

# FACT SHEET



NEW SOUTH WALES  
ABORIGINAL LAND COUNCIL

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## Fact Sheet 8

### Head Lease/Funding Agreement with the Aboriginal Housing Office (AHO)

This fact sheet is intended to be a guide for Local Aboriginal Land Councils (LALC) entering into a Head Lease or Funding Agreement with the Aboriginal Housing Office (AHO) in relation to the *Build and Grow Aboriginal Community Housing Strategy*.

**Important Note:** A Head Lease is a “land dealing” within the definition of the *Aboriginal Land Rights Act 1983 (ALRA)* which requires approval from LALC members and NSWALC **before** the LALC enters into such Head Lease.

A Funding Agreement is not a “land dealing” under the ALRA and does not require members’ or NSWALC approval. However, LALCs must consider whether other dealings that may be connected with or are ancillary to the Funding Agreement are land dealings. Examples of land dealings which may be connected with, or ancillary to, a Funding Agreement are the grant and

registration of a charge over the land or the lodgement of a development application (DA) where the estimated cost of the development is \$500,000 or more. If these types of dealings are contemplated by the Funding Agreement, then LALCs will need to comply with the “land dealing” procedures as set out in this Fact Sheet.

This fact sheet is aimed at helping LALCs to comply with the ALRA and the *Aboriginal Land Rights Regulation 2020 (ALRR)* in relation to advertising land dealing meetings, holding the meeting and passing the appropriate resolutions for land dealings.

Please note that this fact sheet is a guide only and LALCs should seek their own independent advice on any Head Lease/Funding Agreement and compliance with the ALRA and the ALRR in relation to land dealings.

LALCs can obtain more information on the *Build and Grow Aboriginal Community Housing Strategy from the AHO*.

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## What should LALCs consider?

LALCs need to carefully consider the following:

- the LALC owned properties which will be subject to the Head Lease/Funding Agreement;
- the terms and conditions (rights and obligations) of the Head Lease/Funding Agreement;
- what legal interest (if any) the LALC is granting to the AHO; and
- whether a DA is required, and if so, whether the estimated cost of works is \$500,000 or more, to be lodged in relation to any proposed maintenance and repairs to be funded by the AHO.

## Properties/land affected and title searches

LALCs should identify which properties are to be the subject of the Head Lease/Funding Agreement and request a copy of a title search of these properties from the AHO. LALCs should then reconcile the title searches with other records such as rates notices to ensure that the properties are properly identified and described.

LALCs should ensure that the title searches:

- show that the LALC is the owner of the land; and
- do not reveal any affectations on the titles that will prevent the LALC from dealing with the land, e.g.- "*Section 42 Aboriginal Land Rights Act 1983. Approved determination of native title is required.*" A section 42 notation under the ALRA means that a LALC cannot deal with the land unless the land is the subject of an approved determination of native title, ie. a determination has been made by the Federal Court regarding whether native title rights and interests exist in the land.

LALCs may find that some properties they own are actually registered in:

- their former name;
- a mis-spelt name; or
- in a name not constituted under the ALRA.

When LALCs first become aware of this, LALCs should contact the Land and Property Unit of NSWALC (LPU) for assistance in lodging a Change of Name Form, a Request Form or other relevant documents to correct the error. LALCs should also let the AHO know of this as early as possible in its discussions with the AHO.

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## Head Lease and Funding Agreement

LALCs need to fully understand the terms and conditions of the Head Lease/Funding Agreement, including any obligations and rights under the documents. LALCs should obtain a copy of the Head Lease/Funding Agreement from the AHO as early in the proposed transaction as possible and seek independent legal and financial advice on the documents and negotiate amendments to the documents in accordance with their specific needs and their own legal and financial advice.

LALCs need to understand and carefully consider what legal interest, if any, they are granting to the AHO by entering into the Head Lease/Funding Agreement.

## Aboriginal Housing Act 1998

The AHO is a body constituted and governed by the *Aboriginal Housing Act 1998 (AHA)*.

Under the AHA (specifically Part 4), the AHO is able to protect the funding it provides to Aboriginal housing providers, such as LALCs, by registering its interest on the title

to the properties which benefit from the funding.

## Interest granted to the AHO

The Head Lease/Funding Agreement may create an “interest” in land owned by a LALC. The AHA specifies when the AHO is considered to have an interest in LALC land. The key sections of the AHA about the AHO’s interest in land are set out in **Attachment 1** to this Fact Sheet. LALCs should seek their own advice on the meaning of these sections and the impact of these sections on land owned by LALCs.

LALCs should obtain their own independent legal advice as to the type of interest a LALC is proposing to grant to the AHO and obtain written clarification from the AHO as to what the AHO will record on the titles to the LALC land.

The sample Head Lease and Funding Agreement that the AHO has provided to NSWALC states that the AHO proposes to register an interest in LALC land under section 21 of the AHA but LALCs should clarify with the AHO whether it proposes to register any other interest under Part 4 of the AHA such as a charge under section 22 of the AHA.

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## Scope of works - Is a development application (DA) required?

LALCs should request a scope from the AHO of the works to be carried out on the LALC's properties. LALCs should require the AHO, as the service provider, to contact the relevant municipal or shire council to find out which of the works may require a DA.

**Please note** that lodging a DA is a land dealing under the ALRA, and where the cost of the works under the DA is \$500,000 or more, land dealing approval from members and NSWALC will be required. Where the cost of works under the DA is less than \$500,000, the LALC Board may approve the DA.

## Land Dealing - notices and resolutions required

After a LALC fully understands and wishes to proceed with the Head Lease (and potentially the Funding Agreement if there is a land dealing connected with the Funding Agreement) it is required to obtain members' and NSWALC's approval under the ALRA, before entering into the agreement, by holding a land dealing meeting and passing

the relevant resolutions approving the land dealing(s).

The ALRA and the ALRR are specific as to how a LALC must notify its members of a land dealing meeting, how it must hold a land dealing meeting and what type of wording a resolution approving the land dealing must contain.

Under the ALRA, the LALC is required to strictly comply with the relevant clauses and sections of the ALRR and ALRA before NSWALC can consider and determine whether to approve the land dealing.

## Notice of Meeting

For meeting notice requirements, see Fact Sheet number 3. A sample of a meeting notice is attached at **Attachment 2**.

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## Holding the LALC land dealing meeting and passing resolutions

NSWALC suggests that at the meeting;

- (1) the LALC tables the Head Lease or other land dealing instrument and any other relevant documents (such as legal advice on the documents);
- (2) AHO attends the meeting and provides a presentation to the LALC members to ensure that LALC members fully understand the land dealing and is available to answer any questions members may have, or alternatively, a summary of the key terms and conditions of the Head Lease or other land dealing instrument should be presented to members;
- (3) the LALC's legal advisor attends the meeting to explain the documents and answer any legal questions members may have.

LALCs should carefully minute the meeting, including all the documents tabled and the discussions that occurred.

LALCs should not open the meeting until there is a quorum present (at least 10% of the LALC's voting members are in attendance). For further information on calculating quorum, please see Fact Sheet 4. LALCs should not pass a land dealing resolution unless it has a quorum present.

LALCs can only approve a land dealing by passing a resolution. The ALRA sets out what the resolution must contain.

For land dealing resolutions, see Fact Sheet number 4. A sample of a members resolution approving the land dealing is attached at **Attachment 3**.

## Application to NSWALC

After the LALC has held its land dealing meeting and passed the relevant resolution(s) it should apply to NSWALC for approval of the land dealing using the 'Application for Approval for a Dealing with Land' on [NSWALC's website here](#) and provide all relevant information to the LPU of NSWALC, including:

- the Application for Approval of a Dealing with Land properly completed, signed and dated;

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- payment of the application fee (\$250);
- title searches for all relevant properties;
- a copy of the meeting notice;
- evidence of the date the meeting notice was given to members (e.g.- a newspaper clipping of The advertised meeting notice including the date of the newspaper, mail log showing the date the meeting notice was sent out to all members or a declaration from the LALC Chair or CEO stating when the notices were sent out to all members);
- properly signed minutes of the meeting;
- a copy of the resolution(s) passed;
- a copy of the signed and legible attendance sheet;
- a copy of the membership roll current as at the meeting date;
- copy of the Head Lease and any other relevant documents (such as legal advice and other documents tabled or presented at the meeting); and
- a valuation report (for this type of transaction, a Valuer-General's valuation will be acceptable).

**Please note** that NSWALC may request further information from a LALC in order to properly assess a land dealing application.

**Please also note** that LALC land dealings must be approved by the Council of NSWALC. The Council of NSWALC meets approximately every 6-8 weeks. Therefore, a LALC land dealing application may take some weeks to receive NSWALC approval. Any LALC land dealing that is not approved by NSWALC is void and unenforceable.

## NSWALC Approval and issue of Dealing Approval Certificate

When the Council of NSWALC approves a land dealing, NSWALC will write to the LALC advising of the approval and providing the LALC with a Dealing Approval Certificate (**DAC**) signed by the NSWALC CEO. The DAC issued to a LALC is evidence that the LALC is permitted, under the ALRA, to deal with the property in the manner and subject to the conditions (if any) set out in the DAC.

When NSWALC approves a LALC entering into a Head Lease with the AHO, it usually approves the land dealing conditional on the Head Lease:

- being on substantially the same terms and conditions as the draft Head Lease that was provided to the LALC members at the meeting

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at which they approved the land dealing; and

- relating to only the properties as notified to and approved by the LALC members.

The DAC issued by the NSWALC CEO will contain the conditions of the approval as approved by the Council of NSWALC and will usually have the following documents attached to it:

- the draft Head Lease; and
- the list of approved properties.

LALCs should ensure they comply with the conditions (if any) stated in the DAC otherwise the land dealing may be void and unenforceable.

## Executing Head Lease

Once a LALC has received NSWALC approval (and the DAC) and before a LALC signs the Head Lease it should check that the Head Lease:

- is in substantially the same terms and conditions as the Head Lease attached to the DAC; and
- relates to only the properties as stated in the DAC or as attached to the DAC and there are no additional properties.

If a LALC is unsure whether any differences between the Head Lease (as attached to the DAC) and the Head Lease (they are about to sign) are substantial, please contact the LPU before signing the Head Lease.

Once a LALC and the AHO have signed the Head Lease the LALC should forward a copy of the signed document to the LPU.

## Registration Approval Certificate

As stated above, by entering into a Head Lease with the AHO, a LALC is granting the AHO an interest in the properties the subject of the Head Lease and the AHO is entitled to register its interest in the properties on the titles to the properties.

Under the ALRA, certain dealings relating to Aboriginal Land Council owned properties cannot be registered at the Land Registry Services, NSW (**LRS**) unless it is accompanied by a Registration Approval Certificate (**RAC**) issued by the NSWALC CEO.

The AHO therefore cannot register the Head Lease without a RAC. If the AHO chooses to register its

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statutory interest instead of the Head Lease, the AHO may not require a RAC.

When requested by the AHO, a LALC should apply to NSWALC for a RAC by using the Application for Registration Approval Certificate which can be found on the [NSWALC website here](#).

LALCs should lodge the Application for a RAC with the LPU together with a copy of the signed Head Lease (in registrable form).

When NSWALC receives an application for a RAC, NSWALC checks:

- the signed Head Lease against the draft document that was approved to ensure that they are substantially the same; and
- the properties in the Head Lease are the same as the properties stated or attached to the DAC.

If the documents are substantially the same and the properties are the same<sup>1</sup> the NSWALC CEO issues a

RAC to the LALC which the LALC should then forward to the AHO so that the AHO can lodge the Head Lease for registration. LALCs can direct that NSWALC forward the RAC direct to the AHO and email the LALC a copy for its records.

If there are any discrepancies, NSWALC will contact the LALC for an explanation as to the discrepancy and NSWALC will, where possible, assist the LALC to correct the discrepancy such that the NSWALC CEO will be able to issue the RAC.

Some discrepancies<sup>2</sup> can only be rectified by the LALC holding a fresh land dealing meeting.

**The key to fast tracking the land dealing process is to contact the LPU and the AHO for assistance as early in the Head Lease/Funding Agreement process as possible.**

<sup>1</sup> The Head Lease may contain less properties than the list approved by LALC members and NSWALC if for example, the LALC members and NSWALC approved a list containing 15 houses but between the approval and the date of signing the Head Lease one of the 15 houses burnt down then the Head Lease should contain only the 14 relevant houses. NSWALC usually requests an explanation from a LALC should NSWALC find a discrepancy.

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<sup>2</sup> For example, where the LALC has omitted a property or properties from the original members' approval or the property was not properly identified.



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## Attachment 1

*Aboriginal Housing Act 1998 (AHA)*

Section 18 of the AHA states:

***“18 Circumstances in which AHO is considered to have interest in certain land***

*For the purposes of this Part, the Aboriginal Housing Office is taken to have an interest in land of a registered Aboriginal housing organisation in the following circumstances:*

- (a) if the land is transferred to the registered Aboriginal housing organisation by the AHO,*
- (b) if the land is acquired by the registered Aboriginal housing organisation wholly or partly with funding provided by the AHO,*
- (c) if the AHO constructs housing or makes other improvements on the land,*
- (d) if an AHO housing agreement with the registered Aboriginal housing organisation identifies the land as being land in which the AHO has an interest.”*

Section 20 of the AHA states:

***“20 Rights of AHO in relation to land in which it has an interest***

*(1) An AHO housing agreement may include conditions relating to any land of the registered Aboriginal housing organisation in which the AHO has an interest, including conditions that have effect if:*

- (a) the registered Aboriginal housing organisation fails to use the land for the purposes contemplated by the agreement, or*
- (b) the registered Aboriginal housing organisation proposes to sell or otherwise dispose of the land, or*
- (c) the registration of the registered Aboriginal housing organisation is revoked under this Act.*

*(2) For example, the conditions may:*

- (a) confer on the AHO an option or right to reacquire land transferred to the Aboriginal housing organisation, and*
- (b) confer on the AHO an option or right to acquire land purchased by the registered Aboriginal housing organisation with funding provided by the AHO, and*

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(c) require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement if the AHO does not exercise the option or right referred to in paragraph (a) or (b), and

(d) require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement for housing or other improvements made to the land by the AHO.”

Section 21 of the AHA states:

**“21 No dealings in land in which AHO has an interest without consent of AHO**

(1) A registered Aboriginal housing organisation must not transfer or otherwise deal with land in which the Aboriginal Housing Office has an interest unless:

(a) the AHO consents to the transfer or other dealing, or

(b) the transfer or other dealing is authorised, or is of a class that is authorised, by an AHO housing agreement with that registered Aboriginal housing

organisation (**an exempt transaction**) or

(c) an AHO housing agreement with the registered Aboriginal housing organisation provides that this section does not apply to the land concerned.

(2) The Registrar-General must, on application by the AHO, make a recording in the Register kept under the Real Property Act 1900 to signify that the land specified in the application is subject to this section.

(3) The application is to provide details of any exempt transactions.

(4) If a recording under subsection (2) has been made by the Registrar-General, the Registrar-General is not to register under the Real Property Act 1900 a transfer of that land or any other dealing that is otherwise registrable under that Act unless:

(a) the consent of the AHO to the transfer or other dealing has been endorsed on the transfer or other dealing, or

(b) the transfer or other dealing is an exempt transaction (as notified to the Registrar-General by the AHO), or

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*(c) the recording has ceased to have effect (as recorded by the Registrar-General under subsection (5)).*

*(5) The Registrar-General must, on the application of the AHO, make in the Register a recording to signify that a recording made under subsection (2) has ceased to have effect.*

*(6) An application by the AHO under this section is to be made in an approved form under the Real Property Act 1900 and is to be accompanied by such fee, if any, as may be prescribed by the regulations under that Act.*

*(7) If the AHO makes an application under this section, the Registrar-General is not to inquire into whether the AHO has an interest in the land concerned or into the terms of any AHO housing agreement.*

*(8) This section does not affect the operation of any other prohibition or restriction relating to transfers or other dealings in land.”*

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## Attachment 2

### A sample of a land dealing meeting notice

[Please note: this is only a sample and the particulars of the LALC and properties are made up. LALCs should insert their name, details of the meeting date, time and place and relevant properties (after they have been reconciled and properly identified) and ensure that at least 7 clear days' notice is provided to its members.]

**“Abc LALC invites its members to attend an extraordinary meeting.**

Date: Friday 18 September 2020

Time: 2.30pm

Place: Abc LALC Office, 49 Muriel Road, Mt Dial

At the meeting members will decide to approve or not approve entering into a Head Lease (a copy is available at the office before the meeting and will be tabled at the meeting) and granting the Aboriginal Housing Office a legal interest in the following properties:

- (i) 12 Smith Street, Narooma (Lot 135 of Section 2 in DP 25739);
- (ii) 98 Seville Road, Maynard (Lot 42 in DP 57321); and
- (iii) Cnr McCauley Avenue and Meetis Street, Opus Head (Lot 1712 in DP 111352).”

**[Please note: LALCs must ensure that all the relevant properties are correctly listed by Lot, Section and DP and by postal address (if possible)]**

#### **NOTE:**

For calculating when to give members notice, refer to Fact Sheet number 3.





## Attachment 3

### A sample of a resolution by Abc LALC approving a land dealing

Please note: this is only a sample and the particulars of the LALC, properties and interest granted to the AHO are made up. LALCs should therefore insert their name, details of the meeting date, time, relevant properties and interest being granted to the AHO.]

#### “Meeting of Abc LALC held on Friday 16 October 2015 commencing 2.30pm

The members of Abc Local Aboriginal Land Council (**ALALC**) having considered the following:

(a) the terms and conditions of the Head Lease (**AHO Agreement**) (tabled at this meeting) and the impact of entering into this document with the Aboriginal Housing Office (**AHO**) including the granting to the AHO of a legal interest in all the land shown below (**Land**):

- i. 12 Smith Street, Narooma (Lot 135 of Section 2 in DP 25739);
- ii. 98 Seville Road, Maynard (Lot 42 in DP 57321); and
- iii. Cnr McCauley Avenue and Meetis Street, Opus Head (Lot 1712 in DP 111352).

[LALCs must ensure that all the relevant properties are correctly listed by Lot, Section and DP and by postal address (if possible)]

(b) Part 4 of the *Aboriginal Housing Act 1998*;

(c) the impact of the AHO Document and the proposed grant of legal interest to the AHO, on the cultural and heritage significance of the Land to Aboriginal persons;

(d) that by allowing the AHO to have a legal interest in the Land that, if the ALALC:

- fails to use the Land for the purposes contemplated by the AHO Agreement;
- proposes to sell or otherwise dispose of the Land, or
- is deregistered under the *Aboriginal Housing Act 1998*;

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a condition may be that the ALALC is required to repay to the AHO money (the amount to be determined as specified in the AHO Agreement);

(e) by granting the legal interest in the Land to the AHO, the AHO has the right to register a recording against the title to all the Land and that if this occurs the LALC must not transfer or otherwise deal with the Land unless it has obtained the prior consent of the AHO and

(f) the impact of the land dealings on the cultural and heritage significance of the land on Aboriginal people,

ALALC entering into the AHO Agreement and granting the AHO a legal interest in the Land under section Part 4 of the *Aboriginal Housing Act 1998*.

Moved by: [LALC to insert the name of the person who moved the motion]

Seconded by: [LALC to insert the name of the person who seconded the motion]

Numbers for: [LALC to insert the number of voting members who voted for the motion]

Numbers against: [LALC to insert the number of voting members who voted against the motion]

Numbers abstained: [LALC to insert the number of voting members who abstained from voting]

Motion carried/not carried."

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