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BACKGROUND BRIEFING

Development of a new NSWALC Policy on Assessment and Approval of Local Aboriginal Land Council Land Dealings

Due to recent amendments to the *Aboriginal Land Rights Act 1983* ("ALRA") set to come into force on 31 March 2010, a new draft policy on assessment and approval of LALC Land Dealings has been developed. These amendments stem from a New South Wales Taskforce review into the operation of the ALRA established in 2004 that revealed several areas in need of reform, particularly in relation to the land dealings provisions.

Previously, land dealings policy was made in relation to sections 40B and 40D, which will no longer be in service when the new amendments come into force.

Under section 40B, NSWALC could only refuse to approve a lease or change of use on the grounds that the terms or conditions of the lease were inequitable to the LALC, or the change of use would be detrimental to the interests of other Aboriginal Land Councils.

Under section 40D, LALCs had to obtain NSWALC approval to sell, exchange, mortgage or otherwise dispose of land vested in it. This section gave NSWALC a broad discretion to assess and approve land dealings, but without much guidance.

The amendments that come into force in March 2010 include a new, clearer assessment procedure for land dealings as contained in the new section 42G of the ALRA.

The amendments also create a two certificate approval process in relation to LALC land dealings. Under this new system, LALCs must apply to NSWALC for approval of almost all LALC land dealings (s42F). If NSWALC approves a LALC land dealing, then it is to issue the LALC with a dealing approval certificate and if required, a registration approval certificate (s42K).

Under the new scheme NSWALC will only approve a proposed dealing where the following conditions in section 42G are satisfied:

- A proper application for approval has been made in accordance with the ALRA and the ALR Regulations;
- The LALCs members have passed a resolution in accordance with section 42G(5);
- The proposed land dealing is in accordance with that resolution; and
- NSWALC does not consider that the application should be refused because it 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) & (3)).

This last consideration imposes a broad discretion on NSWALC. In order to give guidance to NSWALC, LALCs and persons dealing with LALCs about how NSWALC will exercise its discretion, NSWALC has developed a Land Dealings Policy.

THE LAND DEALINGS POLICY

The draft Land Dealings Policy:

- Sets out some discretionary considerations in relation to the assessment and approval of LALC Land Dealings that NSWALC will take into account, pursuant to section 42G of the ALRA, including:
 - The transparency and probity of decisions to deal with LALC land;
 - The consistency of the land dealing with the LALC's Community and Business Plan;
 - How the proceeds of the land dealing will be held and used;
 - Any cultural concerns of the land subject of the dealing; and
 - Commerciality of the land dealing.
- These considerations are outlined in more detail in the Policy document, which provides specific examples of what NSWALC will be looking for when assessing and approving land dealings.
- These policies are not law and should not be read as such. The Land Dealings policy aims to provide guidance but does not contain an exhaustive list of all the considerations that may be taken into account in a particular case.
- The ultimate aim is to support LALCs to operate independently and provide persons that deal with LALCs with certainty, while still maintaining high levels of accountability in all LALC land dealings.

STATUTORY REQUIREMENTS

Before a section 113 policy can come into effect, the ALRA requires NSWALC to:

- Refer the s113 policy to each LALC for comment,
- Consider any submissions made by any Local Aboriginal Land Council *within 30 days of the referral of the policy*, and
- Obtain the approval of the Minister to the Policy network on proposed policy changes.

The revised policy will take effect on its publication in the Gazette or on a later day specified in the policy.



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Development of a new NSWALC Policy on Assessment and Approval of Local Aboriginal Land Council Land Dealings

Due to recent amendments to the *Aboriginal Land Rights Act 1983* ("ALRA") set to come into force on 31 March 2010, a new draft policy on assessment and approval of LALC Land Dealings has been developed. These amendments stem from a New South Wales Taskforce review into the operation of the ALRA established in 2004 that revealed several areas in need of reform, particularly in relation to the land dealings provisions.

Previously, land dealings policy was made in relation to sections 40B and 40D, which will no longer be in service when the new amendments come into force.

Under section 40B, NSWALC could only refuse to approve a lease or change of use on the grounds that the terms or conditions of the lease were inequitable to the LALC, or the change of use would be detrimental to the interests of other Aboriginal Land Councils.

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The amendments that come into force in March 2010 include a new, clearer assessment procedure for land dealings as contained in the new section 42G of the ALRA.

The amendments also create a two certificate approval process in relation to LALC land dealings. Under this new system, LALCs must apply to NSWALC for approval of almost all LALC land dealings (s42F). If NSWALC approves a LALC land dealing, then it is to issue the LALC with a dealing approval certificate and if required, a registration approval certificate (s42K).

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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

The New South Wales Parliament passed the *Aboriginal Land Rights Amendment Act 2009* on 16 September 2009 however these amendments will not commence operation until 31 March 2010. The Act will amend the operation of the land dealing provisions in the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)* quite significantly.

These amendments will primarily affect the New South Wales Aboriginal Land Council (NSWALC), Local Aboriginal Land Councils (LALCs) and people or companies wishing to engage in land dealings or development partnerships with Aboriginal Land Councils (ALCs).

Why is the ALRA changing?

In 2004, the then Minister for Aboriginal Affairs, Dr Andrew Refshauge, called for a review of the ALRA and established a ALRA Review Task Force. This Task Force identified a number of problems with the current ALRA and released two issues papers recommending changes to the ALRA. Some amendments have already been passed by Parliament. The 2009 land dealings amendments represents the implementation of the final phase of recommendations made by the Task Force.

The new amendments is concerned with the land dealings provisions in the ALRA. The Task Force recognised that this part of the ALRA needs to be well constructed in order to

"establish a strong foundation for ALCs to acquire, own and dispose of land in ways that will give Aboriginal people and communities long-term prosperity and independence."¹

The Review highlighted that a number of major development projects had run into serious difficulties because of mistakes made by LALCs or their advisers that were largely due to a lack of clarity in the ALRA. The current provisions of the ALRA leave LALCs vulnerable to making costly and serious mistakes when dealing with land. Some of these mistakes cannot be reversed and this has had detrimental consequences for LALCs and the Aboriginal people they represent. In addition, dealing with LALCs is currently seen as high risk for developers, which greatly reduces the economic value of land rights.

The amendments will change the land dealings provisions of the ALRA to provide a clearer process for LALCs to follow when they apply to the NSWALC for approval to deal with their land. This will provide more certainty for LALCs, and for developers wishing to deal with LALCs, as well as promoting transparency and accountability with regards to land dealings.

¹ NSWALC Review Task Force, *Summary of Issues Paper 1* at 1, August 2005.

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In addition, the proposed provisions contemplate more complex land dealings, such as joint venture agreements to develop residential housing on land, and provide mechanisms for LALCs to carry out those types of land dealings. This means it will be easier for LALCs to enter into partnerships with others to develop or dispose of land while having certainty these dealings are compliant with the ALRA. The risk to developers of dealing with LALCs is greatly reduced; meaning the potential for land rights to provide economic benefits for Aboriginal Land Councils and their business partners is greatly increased.

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

The ALRA 2009 will commence on 31 March 2010. LALCs will still need to seek consent from NSWALC before they deal with their land but the process for making the application will change.

What do the changes mean for LALCs?

The changes are aimed at ensuring LALCs can legally deal with their land in a manner that is consistent with the purpose of the ALRA. LALCs will be required to comply with all the changes stemming from the new application process and pay any applicable fees or levies.

Which land dealings will require approval?

Under the amendments the scope of 'land dealings' has been widened and includes:

- sale of land;
- lease of land;
- mortgage of land;
- easements and covenants over land;
- biobanking agreements;
- subdivision plans; and
- development applications.

All land dealings by LALCs will require NSWALC approval before they can proceed. LALCs will need to comply with the new application process set out in section 42F(2) and clause 104 of the *Aboriginal Land Rights Regulation 2002 (ALRR)* to make a valid application.

What is involved in the new application process?

An application by a LALC for approval of a land dealing must:

- identify the land affected by the proposed land dealing;
- specify the manner in which the land is to be dealt with;
- set out any terms or conditions of the proposed dealing;
- be accompanied by a copy of the resolution of the LALC members approving the dealing;
- be accompanied by information establishing the LALC has complied with the requirements in section 42G(5) and passed a valid resolution approving the dealing (discussed below);
- be accompanied by a valuation of the land prepared by a registered valuer within the preceding 12 months; and

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- be accompanied by the \$250 application fee (unless the proposed dealing is a development application).

What are the requirements for LALC resolutions approving a land dealing?

LALC resolutions approving land dealings must:

- be passed at a meeting of which at least 7 days clear notice was given (in accordance with the ALRR);
- be passed at a meeting specifically called for the purpose of the land dealing (EOM);
- The EOM must achieve quorum (i.e. at least 10% of the voting members attended);
- be passed by not less than 80% of the voting members of the LALC present at the meeting; and
- 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 Aborigines 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.

Conditions of approval

NSWALC can impose certain conditions on a land dealing. These can be conditions that must be satisfied before completion of the land dealing or conditions requiring LALCs or third parties to enter binding agreements with NSWALC as to certain matters. Examples of the types of conditions include:

- a **land dealing approval agreement** – which may be registered on the title of the land and run with the land, binding future owners; or
- a **registration prohibition notice** on the title to land – which stops any dealings with the land that are made without NSWALC consent, even where the land is no longer owned by a LALC.

For more information on conditions of approval see the relevant Fact Sheet.

The two certificate process

If a land dealing is approved by NSWALC then NSWALC must give a **dealing approval certificate** to the LALC within 14 days of approval being given. If an instrument relating to a land dealing is a registrable instrument, NSWALC must give a **registration approval certificate** if it is satisfied that:

- the instrument is a registrable instrument forming part of a land dealing approved by NSWALC;
- any conditions imposed by NSWALC on the land dealing have been met;
- any community development levy in respect of the land dealing has been paid.

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NSWALC can refuse to give a dealing approval certificate or registration approval certificate if any assessment fee payable in relation to the application has not been paid. For more information on the two-certificate process see the relevant Fact Sheet.

What else must LALCs be aware of?

LALCs should also be aware that:

- restrictions on land dealings apply with regard to land that is subject to native title rights or land that is reserved or dedicated under the *National Parks and Wildlife Act*;
- land dealings of a certain value will be subject to the community development levy. For more information see the community development levy Fact Sheet;
- NSWALC can require that a land dealing application be assessed by an expert advisory panel before NSWALC will consider and make a determination on the approval. For more information see the expert panel Fact Sheet;
- only the LALC concerned with NSWALC's decision to approve or not approve the land dealing can bring proceedings for judicial review in the Land and Environment Court; and
- **land dealings made in contravention of the requirements of the ALRA are void.**



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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983* (NSW) (ALRA)

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Conditions of approval

NSWALC can impose certain conditions on a land dealing. These can be conditions that must be satisfied before completion of the land dealing or conditions requiring LALCs or third parties to enter binding agreements with NSWALC as to certain matters. Examples of the types of conditions include:

- a **land dealing approval agreement** – which may be registered on the title of the land and run with the land, binding future owners; or
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- the instrument is a registrable instrument forming part of a land dealing approved by NSWALC;
- any conditions imposed by NSWALC on the land dealing have been met;
- any community development levy in respect of the land dealing has been paid.

NSWALC can refuse to give a dealing approval certificate or registration approval certificate if any assessment fee payable in relation to the application has not been paid. For more information on the two-certificate process see the relevant Fact Sheet.

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LALCs should also be aware that:

- restrictions on land dealings apply with regard to land that is subject to native title rights or land that is reserved or dedicated under the *National Parks and Wildlife Act*;
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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

What do the new amendments to the ALRA mean for the NSWALC?

The amendments are aimed at improving the land dealings provisions in the ALRA. As a result, the process for LALCs to obtain NSWALC approval before entering into land dealings has changed dramatically. This means NSWALC will be implementing new processes to comply with the new provisions in the ALRA.

In addition to the new approval process, the amendments are introducing several other changes. Briefly, the major changes NSWALC will implement under the new provisions in the ALRA are as follows:

1. NSWALC will be required to assess every land dealing application made by a LALC under the new requirements in section 42G. The amendments have given NSWALC a larger discretionary role in examining whether a land dealing is, or is likely to be, contrary to the interests of the LALC or other Aboriginal people within the area.
2. A new certification process will also operate in relation to land dealings. LALCs will be required to obtain an initial certificate from NSWALC (*a dealing approval certificate*) approving a land dealing, and a second certificate from NSWALC (*a registration approval certificate*) allowing a registrable instrument to be recorded under the *Real Property Act 1900* or the *Conveyancing Act, 1919*.
3. NSWALC or LALCs will be able to constitute an expert advisory panel to assess a land dealing application and provide an opinion to NSWALC on the land dealing.
4. NSWALC will be able to issue approvals for land dealings subject to conditions. These conditions can take the form of *land dealing approval agreements*, which may be registered on the title of the land and bind future owners, or *registration prohibition notices*, which prevent registration on the title to the land unless the imposed conditions are fulfilled.
5. NSWALC will need to ensure that all land dealings carried out by LALCs are consistent with the community, land and business plan of that LALC and any relevant policies of NSWALC. This means NSWALC will need to review its relevant policies for all land dealings.
6. The amendments introduce a community development levy. This is a levy that LALCs must pay on certain land dealings. NSWALC is requested to set up a fund for these payments and match any payment made by a LALC into the fund. NSWALC will use the fund to make payments to LALCs requiring assistance to buy land or enter into development opportunities.

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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983* (NSW) (ALRA)

This fact sheet provides information for LALCs and other third parties on some of the important changes they should be aware of and when these changes will come into effect.

What do these changes mean for developers?

The purpose behind the amendments is to provide greater clarity about the operation of the ALRA and to provide more certainty for parties wishing to enter into developments, partnerships or Joint Venture Agreements with Local Aboriginal Land Councils (**LALCs**). The changes will increase the confidence of those engaging in land dealings with LALCs because they provide clear and appropriate regulation of the valuable land holdings owned by LALCs. The amendments will also give Aboriginal people the ability to engage in more complex land dealings that will provide greater economic benefits.

Important transitional provisions

All land dealings relating to land vested in a LALC will be subject to the new land dealings approval process (for more information on this process see the fact sheets on section 42G). This means LALCs, or parties that have entered into dealings with LALCs, will need to be aware of the status of those dealings when the amendments come into force.

At the commencement of the new provisions LALCs will be in one of three positions:

1. A LALC has been issued with a section 40B approval or 40D certificate (under the old provisions) and has lodged the certificate with the Registrar-General at the time the new provisions come into effect. In this situation a LALC will not be subject to the new provisions of the ALRA; or
2. An ALC has been issued with a section 40B approval or 40D certificate (under the old provisions) and has not yet lodged this certificate with the Registrar-General. In this case the ALC may be issued with a Registration Approval Certificate by NSWALC (under the new provisions) to enable it to register the relevant dealing. Note however that in situations where the old approval has been revoked by NSWALC and there is no evidence that the LALC has entered into legally binding contracts prior to the decision of NSWALC to revoke the approval, NSWALC will not be bound to issue a registration approval certificate.
3. A LALC has not been issued with a section 40B approval or 40D certificate in relation to a land dealing and will therefore be subject to all the new provisions in the ALRA.

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Under amendments to the ALRA, a new system of certification has been introduced for the registration of land dealings made by Local Aboriginal Land Councils (LALCs). The system revolves around the use of two different certificates that the New South Wales Aboriginal Land Council (NSWALC) will issue to the LALC concerned, if the requirements under the ALRA have been complied with.

The two certificate process

The new certification process is aimed at enhancing security and certainty surrounding land dealing transactions and preventing the registration of dealings that have not been approved by NSWALC.

Dealing approval certificates

Dealing approval certificates are certificates in the prescribed form signed by the CEO of NSWALC that certify the approval of the land dealing. For LALCs dealing in land, the certificate is evidence that the dealing has been approved by NSWALC. For NSWALC land dealings, the certificate is evidence that the dealing complies with section 42D of the ALRA.

Dealing approval certificates are issued within 14 days of approval of a land dealing application to the relevant LALC to enable them to enter into the dealing. For example a dealing approval certificate would be issued for an approved contract of sale that is subject to certain conditions. The dealing approval certificate must set out any conditions the approval is subject to. The dealing approval certificate can then be relied on as conclusive evidence of NSWALC's consent to that land dealing.

Registration approval certificates

Registration approval certificates are certificates in the prescribed form, signed by the CEO of NSWALC, issued for a registrable instrument relating to land held by an LALC that certify:

- the registration of the instrument, under the *Real Property Act 1900*, is authorised under the ALRA; or
- the registration of the instrument, under Division 3 of Part 23 of the *Conveyancing Act 1919*, is authorised under the ALRA; or
- the making of a recording in respect of the instrument in the Register or the General Register of Deeds is authorised under the ALRA.

For LALC land dealings the registration approval certificate is evidence that:

- the instrument is a registrable instrument that relates to a land dealing by a LALC that has been approved by NSWALC;
- any conditions placed on the approval by NSWALC have been met; and

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- any community development levy payable in respect of the land dealing has been paid.

For NSWALC dealings the registration approval certificate is evidence the instrument is a registrable instrument relating to a land dealing by NSWALC that complies with Division 4 of the ALRA.

What is the effect of the two certificate system?

Dealing approval certificates

A LALC cannot enter into a valid land dealing without a dealing approval certificate. This is because the dealing approval certificate is conclusive evidence that NSWALC has given approval for the land dealing. Without this certificate, any land dealing entered into will be unenforceable against the LALC and the LALC will not be liable for any damages in respect to the unenforceable agreement.

Registration approval certificates

The amendments specifically state that the Registrar cannot register a registrable instrument in relation to land owned by a LALC unless the registrable instrument is accompanied by a registration approval certificate. Without this certificate any registration or recording on the register has no effect, and does not create or pass any interest in land under the *Real Property Act 1900*. The effect of this amendment is that a new exception to indefeasibility of title is created. For more information on this see the indefeasibility Fact Sheet.

The cumulative effect of the two certificate process is that it will be very difficult for anyone to engage in unauthorised land dealings with regard to LALC land.



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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

Under amendments to the land dealings provisions in the ALRA, a new approval process has been introduced that will apply to Local Aboriginal Land Councils (**LALCs**) wishing to engage in land dealings. In addition, a new system of certification has been introduced for the registration of land dealings made by Local Aboriginal Land Councils (**LALC**). The system revolves around the use of two different certificates that the New South Wales Aboriginal Land Council (**NSWALC**) will issue to the LALC concerned, when it is satisfied the requirements in the ALRA have been met.

The effect of this new system of certification is that land dealings registered with the Registrar that do not comply with the ALRA will have no effect, despite their registration. This creates a new exception to the doctrine of indefeasibility of title.

What is indefeasibility of title?

Indefeasibility of title is a legal concept that applies to land registered under a Torrens Title system. New South Wales uses the Torrens system of registration. Under the *Real Property Act 1900*, any interest in land is required to be registered with the Land Titles Office. The legal recognition of an interest in land stems from that registration of title.

Under the Torrens system once an interest in land is registered on the Real Property register, the owner of that interest holds it free from all other interests (except those that are also registered on the register). This is referred to as indefeasibility of title, because the owner of the registered title cannot have their interest defeated by an unregistered interest even if that unregistered interest was created before the owner's interest, subject to a few legal exceptions,

Currently, land dealings that are registered with the Registrar obtain indefeasibility of title as soon as they are registered, even if the land dealing was in breach of the ALRA. This means the person who is the registered title holder will be able to maintain title to the land, and deal with it as they wish, regardless of whether or not the land was obtained in breach of the ALRA. The new provisions, which require NSWALC to issue two certificates (a dealing approval certificate and a registration approval certificate) to an LALC before a land dealing can be registered, will change the effect of this.

The new exception to indefeasibility

The amendments provide that a dealing that is registered without a valid registration approval certificate will have no effect. Generally, once an interest in land is registered, the owner takes it free from any other interest and the title is indefeasible. However, the provision that a dealing registered without a valid registration approval certificate has no effect creates an exception to the general rule. This is what is referred to as the new exception to indefeasibility of title.

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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

Under amendments to the ALRA the New South Wales Aboriginal Land Council (**NSWALC**) or LALCs may constitute an expert advisory panel to assess applications made by Local Aboriginal Land Councils (**LALCs**) for approval of land dealings. These panels are to be constituted in accordance with the *Aboriginal Land Rights Regulation 2002 (ALRR)*.

What is the expert panel?

The expert panel is an advisory panel established by NSWALC to provide expert advice, and make recommendations in order to assist NSWALC in forming a view as to whether a land dealing application should be approved or not. Under clause 108 of the ALRR, NSWALC is to establish a public register of persons who may be appointed to expert panels. LALCs can access the contact details of experts. The panel experts will have expertise in one or more of the following:

- land valuation;
- property development;
- planning;
- business;
- finance;
- corporate governance;
- Aboriginal heritage or culture; or
- any other expertise NSWALC considers relevant.

NSWALC may add or remove people from this register at any time and must forward a copy of the register to the Minister at least once every 12 months.

How is a panel formed?

NSWALC may form an expert panel, consisting of one or more members from the register, to assess a land dealing approval or any other part of the application, if:

- NSWALC is of the opinion it is appropriate to do so and the application procedures have been followed by the LALC and NSWALC; or
- the LALC seeking approval of the land dealing requests an assessment.

The cost of an expert panel will be passed directly onto the LALC.

What does the panel do?

The expert panel must review any material provided to NSWALC by the LALC relating to the land dealing and any other material provided by NSWALC. At the request of NSWALC the panel may:

- consider whether the proposed land dealing is, or is likely to be, contrary to the interests of the members of the LALC concerned or other Aboriginal people in the area;

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- provide a recommendation in order to assist NSWALC in forming a view as to whether the proposed land dealing should be approved; and
- provide a recommendation as to any conditions that may be imposed upon approval.

The panel must provide NSWALC with a written report in the time specified by NSWALC.



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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

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Under new amendments to the land dealing provisions in the ALRA a community development levy is being introduced. The purpose of this levy is to redistribute the wealth from Local Aboriginal Land Councils (LALCs) with more valuable land holdings, to LALCs with less valuable land and less development opportunities.

What is the community development levy?

The community development levy is a payment LALCs are required to pay for any dutiable transaction to which the levy applies, that occurs in relation to a land dealing. Aboriginal Land Councils (ALCs) already enjoy an exemption from stamp duty payments under section 280 of the *Duties Act 1997*. The operation of that exemption will not change.

However, even if stamp duty is exempt under section 280, if the community development levy applies to the transaction, then the levy will still be payable. This is because the levy will apply whether or not the LALC is liable to pay duty under the *Duties Act*.

Which transactions attract the levy?

The community development levy applies to the following dutiable transactions:

- a transfer of land;
- an agreement for the sale or transfer of land;
- a declaration of trust over land;
- a lease of land in respect of which a premium is paid or agreed to be paid;
- any other transaction prescribed by the regulations.

The community development levy will not apply to the following dutiable transactions:

- transactions exempt from duty under the *Duties Act 1997* other than under Section 280;
- transactions under a community benefit scheme providing home ownership for Aboriginal people;
- transactions between LALCs
- transactions where the dutiable value of the land is \$80,000 or less; and
- any other transactions prescribed by the regulations.

How much will the levy cost?

The levy is calculated similar to the way that stamp duty is calculated under the *Duties Act* and is progressive. This means the more expensive the transaction, the higher the levy will be. The levy rate is as follows, for transactions where the dutiable value of land is:

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- more than \$80,000 but not more than \$1million = 100% of the amount of duty;
- more than \$1million = 150% of the amount of duty.

For example:

On a transfer of \$500,000, the levy = \$18,000 (including the transfer instrument).
 On a transfer of \$1million, the levy = \$40,500 (including the transfer instrument).

When does the levy have to be paid?

The levy will need to be paid before a registration approval certificate is issued by NSWALC and evidence of that payment provided by the LALC to NSWALC. For a contract for sale or lease, the OSR will stamp the original document showing the date and amount of levy paid. The LALC will need to provide a copy of that document to NSWALC prior to NSWALC issuing a Registration Approval Certificate.

The Office of State Revenue is providing a community development levy calculator, which can be accessed at www.osr.nsw.gov.au. For more information on the community development levy see the Fact Sheet explaining what the levy will be used for.



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What will the community development levy be used for?

The community development levy is a levy payable by LALCs on any dutiable transaction to which the levy applies. For more information on how the levy works and the transactions it applies to, see the 'What is the community development levy?' Fact Sheet.

How does the levy work?

Under the amendments NSWALC is required to establish the NSWALC Community Fund. If a transaction attracts the levy, the LALC must pay the levy to the Office of State Revenue who will process the payment and pay the money to the NSWALC Community Fund. NSWALC will then be required to match the amount paid by the LALC and pay that amount into the Fund.

The Minister may waive payment of the whole or part of NSWALC's payment if the Minister is of the opinion that it is appropriate to do so having regard to the financial circumstances of NSWALC.

What will happen to the money collected from the levy?

As the purpose of the community development levy is to help re-distribute wealth among LALCs, the money from the fund is to be used by NSWALC to provide grants to LALCs for:

- community benefit schemes;
- assistance with land acquisition and land management; and
- other purposes authorised under the ALRA.

NSWALC will develop a policy about the new NSWALC Community Fund and the processes around:

1. how and when LALCs can apply to NSWALC for grants in relation to the fund and
2. how NSWALC might set priorities for the consideration of applications.

Once this policy has been prepared it will be provided to LALCs for comment.

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What is the process NSWALC will follow before issuing a registration approval certificate?

Before NSWALC can issue a registration approval certificate (RAC) to allow a LALC land dealing to be registered, it will need to verify that a LALC has:

- (a) met all the conditions of the land dealings as set out in the Dealing Approval Certificate; and
- (b) paid the Community Development Levy.

LALCs will be asked to provide evidence of these things and NSWALC will also need to reconcile that information against the approval. LALCs should be aware that this reconciliation may take some time and should provide this information to NSWALC with sufficient time before settlement so that there are no delays to settlement.



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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Amendments to the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*

Under the ALRA NSWALC has the power to impose conditions on the land dealing approvals it gives LALCs.

How will NSWALC place conditions on the approval of a land dealing application?

Under the amendments, when NSWALC approves an application for a land dealing application it will issue a *dealing approval certificate* within 14 days (for more information on this see the two certificate process Fact Sheet). The dealing may be approved with or without conditions attached.

NSWALC may impose two types of conditions to the dealing, including:

- a condition that must be satisfied before the completion of the land dealing; or
- a condition that requires the LALC, or one or more third parties, to enter an agreement with NSWALC as to matters that will be carried out before or after the land dealing is completed.

Failure of a LALC to comply with any conditions attached to an approval will be a breach of the ALRA. Where conditions are attached, NSWALC may require parties to enter a *Land Dealing Approval Agreement*.

Land Dealing Approval Agreements

A land dealing approval agreement is an agreement that will apply where a NSWALC land dealing approval has conditions imposed as to the use, management and development of the land. The agreements are binding on and enforceable by the parties to them.

If the land falls under the *Real Property Act 1900*, and NSWALC and each person with an interest in the land agrees, then a land dealing approval agreement may also be registered. This provides a record on the Register of the land dealing approval agreement that is attached to the land.

If the land does not fall under the *Real Property Act 1900*, a land dealing approval agreement can still be registered if each person who is a party to the agreement agrees to its registration. A land dealing approval agreement may then be enforced by NSWALC lodging a *Registration Prohibition Notice* with the Registrar-General.

Land dealing approval agreements may also 'run with the land', which means the agreements are binding on (and enforceable by) successors in title (subsequent owners) if they are registered against the title of the land. This means if a third party sells an interest

in land that is subject to a registered land dealing approval agreement, then the purchaser will also be bound by that agreement.

Registration Prohibition Notice

If there is a land dealing approval agreement in relation to land, NSWALC may lodge a notice prohibiting the registration or recording of any dealing affecting an interest or estate in the land under the *Real Property Act 1900*. The notice must be lodged with the Registrar-General and may be withdrawn by NSWALC once written notice is given to the Registrar-General.

A registration prohibition notice may prevent any dealing with the land contrary to the NSWALC approval until the approved conditions, contained in the land dealing agreement, are met. This may provide one effective mechanism for ensuring that conditions attached to NSWALC approval of a land dealing application are enforced.



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Review of NSWALC decisions

What can a LALC do if its application is refused or is subject to conditions?

If a LALC's application for approval of a land dealing is refused by NSWALC, or has certain conditions imposed on it by NSWALC, the LALC can request written reasons from NSWALC as to its decision. NSWALC must provide those written reasons within 28 days of the LALC's request.

If a LALC is unsatisfied with the reasons supplied by NSWALC, it can commence proceedings for **judicial review** of NSWALC's decision in the Land and Environment Court. However, before commencing proceedings for judicial review, a LALC must refer their dispute to the Registrar to undergo a dispute resolution process.

Conciliation/mediation

Before commencing proceedings for judicial review, a LALC **must** have the dispute with NSWALC referred to the Registrar for mandatory conciliation/mediation. This is aimed at reducing costly and unnecessary litigation between the parties. The referral does not require the Registrar to resolve the dispute before court proceedings can commence but the referral may provide a non-litigious option for the LALC and NSWALC to discuss the dispute without going to court. After the referral is made, a LALC is then be able to commence proceedings for judicial review of NSWALC's decision in the Land and Environment Court if it so wishes.

Judicial review

If a dispute is referred to the Land and Environment Court it will be subject to judicial review. Judicial review means the court will examine the decision made by NSWALC and decide whether or not NSWALC made an error of law when making its decision. This will **not** involve a review of the merits upon which the decision was made by NSWALC.

Only the LALC that has made the land dealing application to NSWALC may commence proceedings for judicial review of that decision in the Land and Environment Court. No other party will be able to bring a proceeding against NSWALC for its decision to refuse to grant approval or place a condition on the ALRA.



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Some LALCs may find that a feasibility study is required in order to properly consider dealing with their land or developing their land. NSWALC may also require a feasibility study before it can consider a land dealing application by a LALC.

What is a Feasibility Study?

A feasibility study identifies problems and opportunities, determines goals, defines successful outcomes and weighs up all the costs and benefits related to a business or project plan. It also includes limitations and recommendations, so that decision makers are well placed in deciding whether or not to proceed with the business, project or venture. A feasibility study is undertaken in the early stages before a business plan is developed or any formal steps are taken. It is an essential first step before any money or time is spent on more detailed plans.

What is a Business Plan?

Business plans are more in depth and detailed documents that build on feasibility studies and include specific timelines, marketing and operational plans and a detailed financial strategy.

Why is a feasibility study and business plan important?

Feasibility studies and business plans are important for LALCs considering complex land dealings or land development and identify risks and key success factors for achieving the plan. They support the decision making process, by giving a LALC a cost/benefit analysis of the actual business or project viability. This helps to ensure that a LALC is fully informed of the risks and benefits associated with the project or venture. It also helps to protect from the wastage of investment and resources on dealings that are not viable or will provide only nominal profit or benefit.

Feasibility studies and business cases are also important for the approval by NSWALC of land dealing applications. They provide strong evidence that the particular dealing is in the best interests of a LALC and that the risks associated with property development have been fully considered and those risks can be appropriately managed. It may also demonstrate the LALC has been through consultative processes with its members.

Assumptions and sensitivities:

It is important that the assumptions underlying any feasibility / business case are as accurate as possible. For example, market conditions, sale rates, interest rates and many other variables can fluctuate significantly and these fluctuations need to be understood and considered as part of the plan.

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Allowance for contingency:

Often multiple feasibility models are developed so that changing conditions can be analysed. For example, a residential subdivision development may be feasible when interest rates are 7% per annum, but may become unfeasible if interest rates rise to 9%. A prudent LALC should ask that feasibility studies and business cases consider the volatility of finance, construction costs and real estate markets (plus many other things) and that allowances are made for these factors. It is common for feasibility modelling to include a "contingency" allowance for this reason.

Market analysis, project timing and cashflow:

A real estate market's capacity to absorb new land may also vary and feasibility studies often include demographic and market analysis information so that likely demand and sales rates can be predicted. If there is little or no demand for a product, it may take years to sell the product and recoup the project costs. Project timing and month by month cash flow analysis is essential for any complex land dealing activity or real estate development project.

How does a LALC obtain a feasibility study?

Feasibility studies and business case planning for property development is a specialist area. The most important thing when a LALC is engaging an advisor is to ensure that they are appropriately qualified and experienced in relation to the type of development anticipated. A LALC should ask for details of a consultant's qualifications and experience and specifically, details of similar type projects that they have completed in the past.



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One of the most common and frequent land dealings approvals sought by LALCs from NSWALC is an approval for the sale of LALC land.

Methods of sale of land

There are various methods of sale when choosing to sell a property and choosing the right method of sale can help to achieve the best possible price. It is best to obtain the advice of a real estate agent about the best method of sale for a LALC's property and what they think will achieve the best price. When a LALC decides on an agent it will be asked to sign an Agency Agreement which will contain an estimate of the fees, charges and expenses the LALC can expect to pay when the property is sold. Before a LALC signs any Agreement with an agent it should read it carefully and make sure it understands it and any terms and conditions of the Agreement..

One of the main considerations for LALCs to bear in mind when choosing a method of sale are:

- Timeframe in which the LALC intends to achieve a sale
- The type of property to be sold
- The area and environment in which the property is located
- The state of the market for the particular type of property
- The professional skills, experience and resources of the Agent
- The LALC's marketing preferences and personal circumstances
- Other competing properties on the market

Below is some information on some of the different methods of sale and when it may be best to use one method of sale over another.

Sale by Private Treaty

Private sale (also known as Private Treaty) is often the preferred method where fixed prices are easily established and for selling are not a major factor. Private sale is often suited to properties where there is already an established market value such as in a block of flats, where there have been several recent sales to give a guide to value of the property.

Sale by Auction

Auction involves potential buyers bidding against each other at the day of the auction. In a competitive atmosphere and market, auctions can often achieve a better price. Whenever there is a doubt as to the ultimate price, vendors often choose auction because of the results achieved. Auctions also provide the most transparent method of sale.

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Sale by Tender

Sale by tender is generally not well suited to residential real estate sales but is utilised mainly for non-residential or highly specialised properties. It does allow potential buyers access to complex information before tendering and often attracts bids on widely differing terms and conditions.



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Recent amendments made to the ALRA stem from a review of the land dealing provisions of the ALRA. Under the new approval system for land dealings, any application for a land dealing approval must include a valuation of the land, prepared by a registered valuer within the preceding 12 months (see clause 104 of the Regulations).

The application form prescribed by NSWALC requires that the valuation be a current market valuation commissioned by the LALC, for the LALC and be consistent with the transaction that is being proposed by the LALC.

Valuation of LALC land assists with the decision making processes LALC members are asked to make.

The requirement of LALCs to obtain a current market value of their land as part of the NSWALC land dealing approval process is intended to make sure that the decisions that LALCs make regarding land dealings, are supported by a thorough analysis of land value.

As a general principle NSWALC would not normally give approval to sale of land for less than a current market valuation, unless the sale provides other benefits to the LALC.

What is the purpose of Valuation?

There are many purposes for obtaining a valuation, including:

- To assist a LALC to consider whether to sell, lease or develop land.
- To provide a LALC with information to set a minimum sale price for an auction
- To provide advice to a LALC considering whether to purchase land.
- To provide information to a LALC for negotiations in relation to sales or leases.
- For a LALC to decide what level of compensation is reasonable for the granting of an easement or for government acquisitions such as sale of land to the RTA for road widening.
- To determine land value as part of a feasibility study for future development of the land.
- To provide to a bank or other lending institution in support of a mortgage.

Methods of Valuation

There are a number of methods used by valuers to determine current market value of land. A valuer will routinely adopt more than one method of valuation in order to "check" the results obtained. Those methods include:

- Direct comparison – where sales of comparable properties are used to determine value.
- Cost (or summation) method – where the value is calculated on the basis of the value of the land plus the depreciated value of any improvements on the land. This method of valuation is more reliable for newer structures. It can also be used for insurance purposes to calculate the replacement cost of improvements.

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- Hypothetical Development – where costs of a hypothetical development are used to establish land value before and after any proposed development.
- Discounted cashflow development – where the value is based on the present value of cashflows for the investment. This method is most often used for commercial and investment properties.

What do valuers take into consideration when preparing a valuation?

A valuer determines the value of property based on a range of variables, including market conditions at a given time, and may take into consideration:

- The highest and best use for the land – being the use of the property that will produce the highest value for the land.
- The types of interest, such as freehold or leasehold.
- The location of the property.
- Improvements on the land such as buildings, fences etc and their condition.
- Any registered interests in the land such as leases, caveats etc.
- Planning restrictions such as Local Council Zoning.
- Regional Plans for the area and possible future rezoning potential
- Any development consents relating to the land.

Why is a Real Estate Agents market opinion or Valuer-Generals Valuation not enough to satisfy the requirements of the ALRA?

Only a real estate valuer that is registered with the Office of Fair Trading can provide a genuine “valuation”.

Real Estate Agents Market Opinions: Market opinions of land value made by licensed real estate agents are estimates of value only.

Real estate agents do not hold the same qualifications as property valuer.

Valuer-Generals Valuations: these valuations are completed for rating and taxing purposes only. The valuations are based on land value only and do not include any value of improvements to the land. Most land in NSW valued by the Valuer-Generals Department is done on a mass valuation basis where properties are placed in groups and valued collectively, on an infrequent basis. These valuations are not considered to be reflective of current market value and as such are not considered to be appropriate for the purposes of the ALRA and specifically clause 104 of the Regulations.

Instructing Valuers

NSWALC encourages LALCs to contact the Commercial Unit of NSWALC to discuss the type of valuation they may need for a land dealing and for any land dealing approval application.



