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fact sheet

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

FACT SHEET 1

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.

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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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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