



**New South Wales Aboriginal Land Council
Policy No.1 of 2010**

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

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

1 What this policy is about

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

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

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

- (2) In Division 4 of Part 2 of the ALRA, the expressions “deal with land” and “land dealing”, in relation to land said to be “vested” in Aboriginal Land Councils, are defined very broadly. Most dealings with LALC land must be approved by NSWALC (section 40E(1)).
- (3) The exceptions to this rule are:
 - (a) a lease for less than 3 years (including any option to renew the lease), *other than* a social housing management lease,
 - (b) a land dealing prescribed by the regulations (noting that none are presently prescribed) (section 40E(2)), and
 - (c) a land dealing relating to land that is reserved or dedicated under Part 4A of the *National Parks and Wildlife Act 1974* (including a lease negotiated pursuant to s.36A of the ALRA) (section 42A(2)).

This policy is not concerned with land dealings that fall within these exceptions

- (4) A purchase or other acquisition of land by a LALC is not a dealing with land vested in a LALC.
- (5) If NSWALC approves a LALC land dealing, then it is to issue the LALC with:
 - (a) a dealing approval certificate, which is conclusive evidence of the approval and contains the conditions (if any) to which the approval is subject (section 41), and
 - (b) if required, and if all relevant conditions are complied with, a registration approval certificate, which authorises the NSW Registrar-General (and his agency LPI), to register any registrable instrument that gives effect to or forms part of the dealing (sub-sections 41 and 42M).

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

- (6) However, if a LALC land dealing is done without NSWALC's approval, or is done contrary to the conditions of NSWALC's approval (and without the benefit of a dealing approval certificate and, if required, a registration approval certificate), the results will be:
- (a) the dealing will be void (section 42C(1)), and
 - (b) the NSW Registrar-General will not register any registrable instrument that gives effect to or forms part of the dealing (section 42M(2)).

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

1.1.2 How is NSWALC's approval to be sought?

- (7) The ALRA says that to seek NSWALC's approval for a proposed land dealing, a LALC must make an application to NSWALC (section 42F). The application must meet the requirements in section 42F(2) and clause 104 of the ALR Regulation (including being in the form approved by NSWALC).

1.1.3 How must NSWALC process land dealing approval applications?

- (8) If an application is made to NSWALC in the way required by the ALR Regulation, NSWALC must then deal with or process the application according to the requirements of the ALRA and the ALR Regulation. NSWALC:
- (a) must, as soon as practicable after receiving a proper application from a LALC, give the LALC information about such things as how long the approval process is likely to take, whether an expert assessment panel is to be constituted, and how much it will cost (clause 107 of the ALR Regulation),
 - (b) may convene an "expert advisory panel" to assess the whole or part of an application (section 42I and clause 108 to 112 of the ALR Regulation).
- (9) Ultimately, NSWALC must determine whether it will approve the proposed land dealing, and, if so, what conditions (if any) it will impose on the approval (section 42G).

1.1.4 When will NSWALC approve a proposed land dealing?

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

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

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

1.1.6 Can NSWALC impose conditions on an approval?

- (12) If NSWALC determines that it should approve a proposed land dealing, it may do so subject to conditions (section 42G(6)).
- (13) The conditions have to be about things that are to happen before the proposed land dealing is completed (e.g. before the settlement monies on a contract for sale are paid and the transfer document is registered).
- (14) One of the conditions that NSWALC can impose is that the LALC and/or a third party (e.g. a joint venture partner) enter into an “approval agreement”. These approval agreements are about things that may have to be done after the proposed land dealing is completed (e.g. an approval agreement may require the LALC to apply the proceeds of a land sale in a particular way).

1.1.7 How is NSWALC required to make these decisions?

- (15) The requirements of section 42G(1) (set out in (10) above, and requiring that the decision to deal with the land be made by the LALC’s members) do *not* involve NSWALC exercising any discretion: either NSWALC is satisfied that the criteria are in fact met or it is not.
- (16) However, the criterion referred to in section 42G(2) (which is referred to in 1.1.5 above) imposes a broad discretion on NSWALC to refuse a proposed land dealing even though it may satisfy the requirements in section 42G(1).
- (17) Section 42G(3) sets out some things that *may* be taken into account by NSWALC, and in doing so gives an idea of what the purpose of NSWALC’s discretion is, but this is not an exhaustive list.
- (18) Similarly, NSWALC’s discretion to impose conditions on an approval is broad.
- (19) Further, the ALRA leaves other aspects of the operation of the land dealings approval regime open to NSWALC’s consideration or discretion. These include:
- (a) requiring additional information or documents in relation to a land dealing approval application (section 42F(4)),
 - (b) constituting expert advisory panels to assess all or part of an application (section 42I and clause 109 of the ALR Regulation),
 - (c) the calculation of assessment fees (section 42F(5) and clause 106 of the ALR Regulation),
 - (d) stipulating the time for the payment of assessment fees, and
 - (e) requiring security for the payment of assessment fees.

1.1.8 What is the role of NSWALC policy?

- (20) One of the things listed in section 42G(3) that NSWALC may take into account when deciding whether a proposed land dealing should be refused is any applicable policy of NSWALC.
- (21) Written policy is desirable to promote consistency in NSWALC decision making and to provide some greater predictability and certainty to LALC's, and persons dealing with them, about how LALC applications for approval of proposed land dealings will be treated by NSWALC.
- (22) Policies of this kind are made pursuant to section 113 of the ALRA, and in accordance with section 114 of the ALRA.

1.2 This policy

1.2.1 What is the purpose of this policy?

- (1) 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 (including section 42G), NSWALC has made this policy which sets out the process that will be followed and some considerations that NSWALC will take into account.

1.2.2 What is in this policy?

- (2) This policy has 3 main sections. These are as follows:
 - Section 3 – which describes the NSWALC land dealing approval process from start to finish in 7 stages,
 - Section 4 – which provides guidance at a broad level about considerations that NSWALC will take into account when:
 - (i) considering whether a proposed land dealing is, or is likely to be, contrary to the interests of a LALC's members, or other Aboriginal people in the LALC's area, and
 - (ii) considering what conditions, if any, it should place on any approval of a proposed land dealing,and
 - Section 5 – which provides guidance about various considerations that NSWALC will take into account when formulating conditions that it may place on any approval of a proposed land dealing.

2 Interpretation

2.1 Definitions

- (1) Words and expressions used in this policy have the same meaning as they have in Division 4 of Part 2 of the ALRA.

(2) Further, references to section numbers (e.g. section 42G) are references to sections in the ALRA (except where the section number is followed by the name of another Act).

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

ALRA: means the *Aboriginal Land Rights Act 1983*

ALR Regulation: means the *Aboriginal Land Rights Regulation 2002*

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

LALC: means a Local Aboriginal Land Council

NSWALC: means the New South Wales Aboriginal Land Council

2.2 Interpreting this policy

(1) Importantly, this policy is not law and should not be read as such.

(2) If anything in this policy appears to be in conflict with anything in the ALRA or ALR Regulation (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 ALR Regulation).

(4) LALCs are encouraged to contact NSWALC and seek clarification if there are any matters in the policy that are unclear.

3 The land dealings approval process

3.1 The 7 stages of the land dealings approval process – from application to completion

(1) For the purposes of this policy, making a land dealing approval application, the assessment and approval of that application, and the implementation and enforcement of the approval, are divided into the following stages:

- Stage 1: Applying for approval
- Stage 2: Section 42F(2) compliance check
- Stage 3: Section 42G(1) procedural assessment
- Stage 4: Preliminary assessment
- Stage 5: Substantive assessment
- Stage 6: Determination (including dealing approval certificates)
- Stage 7: Implementing and enforcing approvals (including registration approval certificates and registration prohibition notices)

- (2) NSWALC policy in relation to each of these stages is dealt with in the following sections.
- (3) It is important to recognise that while these are described as discreet and sequential stages in this policy, this is not to say one stage must be completed before activities relevant to another stage may commence.
- (4) If when submitting the application the LALC advises that the application is urgent, then the NSWALC Commercial Unit will endeavour wherever possible to work within the LALC's timeframes.

3.2 Stage 1 – Applying for approval

- (1) In Stage 1, the LALC makes the land dealing approval application to NSWALC.

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

Prescribed information and documents

- (2) The ALRA (section 42F(2)) provides that an application for land dealing approval is:
 - (a) *to be made in accordance with the regulations, and*
 - (b) *to contain the matters prescribed by the regulations, and*
 - (c) *to be accompanied by any application fee, and any documents, prescribed by the regulations.*
- (3) The ALR Regulation (clause 104) set out the requirements for a proper land dealing approval application. It states:
 - (1) *A land dealing approval application is to be made in the form approved by the New South Wales Aboriginal Land Council.*
 - (2) *An application must:*
 - (a) *identify the land affected by the proposed land dealing, and*
 - (b) *specify the manner in which the land is to be dealt with, and*
 - (c) *set out any terms or conditions of the proposed dealing, and*
 - (d) *be accompanied by a copy of the resolution of the Local Aboriginal Land Council approving the dealing, and*
 - (e) *be accompanied by information and other material establishing that the Local Aboriginal Land Council has complied with the requirements of section 42G (5) of the Act, and*
 - (f) *be accompanied by a valuation of the land, and*
 - (g) *be accompanied by the application fee.*
- (4) The LALC resolution approving the dealing that must be provided, is a resolution of the kind described in section 42G(5): the resolution be passed by not less than 80% of the voting members present at a meeting of which 7 clear days notice was given,

stating that, amongst other things, *at the meeting it is proposed to decide whether or not to approve of the land dealing* (clause 103 ALR Regulation).

- (5) The application fee that must be paid is the \$250 application fee prescribed in clause 105(1) of the ALR Regulation. This is a non-refundable fee. No fee, however, is payable for the approval of a development application (clause 105(2)).
- (6) It is recommended the LALC consider obtaining an independent valuation commissioned by the LALC for the land dealing in question from a registered valuer.
- (7) As set out in clause 104(1) of the ALR Regulation, an application for approval must be made using the NSWALC approved form. The approved form will be available on the NSWALC website and from the Commercial Unit.

Additional information and documents

- (8) In addition to the mandatory requirements detailed above:
 - (a) a LALC may include with its application any additional information and documents that it wants NSWALC to consider (section 42F(3)); and
 - (b) NSWALC may require additional information and documents following an initial assessment of the application (section 42F(4)).
- (9) LALCs should be encouraged to provide all relevant additional information and documents that NSWALC is likely to need to properly assess a proposed land dealing when they submit the application. This is in a LALC's interest as it is likely to greatly speed, and reduce the costs of, the assessment and approval process.
- (10) There are a small number of matters in relation to which NSWALC will always require further information and documents. These relate to issues of:
 - (a) transparency and probity, and
 - (b) consistency with the LALC's community, land and business plan.

Information and documentation in relation to these matters is asked for in the approved land dealing approval application form, which is available on the NSWALC website or from the NSWALC Commercial Unit.

- (11) Other than in relation to this small number of matters, there is no standard list of additional information and documents that should always be provided. What is required will depend on the nature and circumstances of the each application. However, guidance about the things that NSWALC is likely to consider that it needs, and hence what should be provided where possible at the outset, is given in this policy. As set out below, staff of NSWALC's Commercial Unit can also assist in relation to this.

3.2.2 NSWALC assistance with making land dealing approval applications

- (12) NSWALC staff will endeavour to provide reasonable assistance and guidance that a LALC may request to make a complying land dealing approval application. NSWALC staff may also provide assistance to a LALC, if requested, by advising on the further information that NSWALC will require in assessing the application.

- (13) Feedback on the additional information and documents (if any) that NSWALC may require to make its assessment can be provided by staff of NSWALC's Commercial Unit.
- (14) In relation to complex and significant land dealing proposals, LALCs are encouraged to approach NSWALC at an early stage – in many cases prior to the making of a formal application (which can only be made after the LALC's members have approved the proposal) – to discuss what further material will best assist in making the approval process a swift and smooth one.
- (15) It is important that when NSWALC staff provide such assistance, LALCs understand that while the assistance is given in good faith:
 - (a) sole responsibility for making complete and adequate applications rests with the LALC, and
 - (b) any assistance given by NSWALC staff is not any kind of representation or promise that the application will be approved.

3.3 Stage 2 – Section 42F(2) compliance check

- (1) In Stage 2, NSWALC staff consider and advise the LALC whether the application complies with the requirements of section 42F(2) of the ALRA and clause 104 of the ALR Regulation.
- (2) 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.
- (3) The Stage 2 compliance check does not involve the exercise of any discretion or the consideration of whether the material submitted with the application establishes that the proposal should be approved. It is a mechanical exercise wholly concerned with whether the application is in the form required, and contains the information and documents required, by the ALRA and the ALR Regulation.
- (4) If NSWALC staff consider that the application complies with the requirements of section 42F(2) and clause 104, the LALC will be given written notice that the application has been received, NSWALC is satisfied that it is a proper land dealing approval application, and it will next be the subject of a preliminary assessment and the LALC can expect to receive further notice about the application within 14 days.
- (5) If, upon a compliance check, NSWALC considers that an application does not comply, the LALC will be given written notice of why the application does not comply, and 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 is to be advised that NSWALC does not consider the application to be a proper land dealing approval application and that it will not be considered further. If the LALC then still wishes to have NSWALC's approval for the proposed land dealing it will have to make a fresh application.
- (6) The compliance check will be completed, and the LALC will be advised of the result as soon as practicable after the application has been received by NSWALC.

- (7) If the LALC has advised that there are reasons why the application needs to be processed as a matter of urgency, NSWALC will endeavour to work within the LALC's timeframes wherever possible.

3.4 Stage 3 – Section 42G(1) procedural assessment

- (1) In Stage 3, NSWALC staff will give consideration to whether the land dealing approval application establishes that the proposed dealing complies with section 42G(1) of the ALRA (which are the basic *procedural* requirements that NSWALC must be satisfied of before it will approve any proposed land dealing). The purpose of this initial consideration is to identify, as early as possible, any defects in a proposed land dealing that may mean that there is little point in proceeding to consider the application further.
- (2) If NSWALC staff consider that the proposed land dealing *does* comply with the procedural requirements in section 42G(1), they will proceed with the Stage 4 preliminary assessment.
- (3) If NSWALC staff consider that the proposed dealing does *not* comply with the procedural requirements in section 42G(1), the LALC will be given written notice of this fact, and why it does not comply. Any such notice will be given as soon as practicable after the completion of Stage 3.
- (4) If, after being given such notice, the LALC:
 - (a) disputes the non-compliance with section 42G(1), or
 - (b) does *not*, within 28 days of the notice being given:
 - (i) provide additional information or documents that demonstrate that the proposed dealing does in fact comply, or
 - (ii) withdraw the application in writing,the Council of NSWALC will proceed to determine the land dealing approval application (without consideration of whether the proposed land dealing is, or is likely to be, in the interests of the LALC's members and others).
- (5) If, in determining the application, the Council of NSWALC is *not* satisfied that the proposed land dealing meets the procedural requirements in section 42G(1), it will refuse the application and the LALC will be given written notice of this.
- (6) If, in determining the application, the Council of NSWALC *is* satisfied that the proposed land dealing meets the procedural requirements in section 42G(1), the LALC will be given written notice of this fact, and that NSWALC staff will now proceed with the Stage 4 preliminary assessment.

3.5 Stage 4 – Preliminary assessment of applications, fees, additional information (if required), expert panel (if required) and estimated time for determining applications

- (7) In Stage 4, NSWALC staff will form preliminary views in relation to an application, and they will consider:

- (a) whether additional information or documents are required (pursuant to section 42F(4)),
 - (b) the manner in which it intends to assess the application and whether or not the application, or any part of it, is to be referred to an expert advisory panel (and if so, the details of the panel and the nature and proposed terms of reference for the panel's assessment) (pursuant to section 42I of the ALRA and clause 109 of the ALR Regulation),
 - (c) what the assessment fee for the assessment of the application will be, or how such assessment fee is to be calculated and an estimate of the likely fee (pursuant to section 42F(5) of the ALRA and clause 106 of the ALR Regulation),
 - (d) the time for payment of the assessment fee,
 - (e) whether any security will be required from the LALC to secure the payment of the assessment fee,
 - (f) any application made by the LALC to waive payment of some or the whole of an assessment fee, and
 - (g) the estimated time for determining the application.
- (8) The LALC will then be given the written notice by NSWALC, required by clause 107 of the ALR Regulation, and also notice of NSWALC's consideration of all other matters referred to above (together referred to as the "Stage 4 notice").
- (9) Stage 4 ends when the LALC:
- (a) gives NSWALC the notification referred to in clause 107(2)(b) of the ALR Regulation,
 - (b) provides any security for the payment of an assessment fee that may have been required by NSWALC, and
 - (c) pays any amount by way of assessment fee that may be payable.
- (10) If the LALC either does not give NSWALC the notice referred to in clause 107(2)(b) of the ALR Regulation agreeing to NSWALC's proposed manner of assessment, does not provide any security required or does not pay any assessment fee payable, NSWALC is not required to assess the application (clause 107(2)).
- (11) Further guidance in relation to all of these matters is given below.

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

- (12) As referred to above, the approved application form requires that the LALC provide some additional information and documents about a small number of matters whenever it makes a land dealing approval application. However, NSWALC's discretion under section 42F(4) to require additional information and documents goes beyond this small range of matters. Further, there is nothing in section 42F(4) which places any time restriction on when, or at what stage, NSWALC may require the further information and documents.

- (13) There is a vast range of information and documents that might be relevant to a complete understanding of a proposed land dealing. At the same time, however, it is important that the land dealing assessment and approval process be conducted as efficiently as possible. It will not generally be necessary, in order to properly discharge its functions under Division 4 of Part 2, for NSWALC to have all of the information and documents available to the LALC in relation to a proposed land dealing.
- (14) With this in mind:
- (a) NSWALC will require additional information or documents (in addition to those required in the application form), where it appears to NSWALC staff assessing a land dealing approval application, that, in the absence of the information or documents being provided:
 - (i) NSWALC may consider that the proposed land dealing is, or is likely to be, contrary to the interests of the LALC's members and others for any reason, or
 - (ii) NSWALC may not be able to properly consider whether or not the proposed land dealing is, or is likely to be, contrary to the interests of the LALC's members and others, or
 - (iii) NSWALC may not be able to properly consider what conditions, if any, ought to be placed on any approval that NSWALC may be minded to give,and
 - (b) NSWALC staff will aim to ensure that additional information and documents are required by NSWALC only once, and as early in the assessment process as possible.
- (15) Further, if NSWALC requires additional information or documents, the information and documents required will be identified with as much precision and particularity as reasonably possible, in order to make provision of the additional information or documents as straightforward as it can be.
- (16) NSWALC staff may discuss the additional information or documents NSWALC requires with the LALC's contact person for the application in order to assist NSWALC in better identifying the additional information or documents that NSWALC will require and/or in order to assist the LALC to better understand what additional information and documents are being required.
- (17) Where the LALC refuses or fails to provide the additional information or documents required by NSWALC, the application will proceed to Stage 5 assessment without the benefit of the additional information or documents.

3.5.2 Referral to an expert advisory panel

- (18) NSWALC will refer all or part of a land dealing approval application to an expert advisory panel if it considers it is appropriate to do so.
- (19) 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.
- (20) 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) the persons who it proposes to appoint to the panel, and
 - (b) the proposed terms of reference for the panel's assessment.

3.5.3 Calculation of the assessment fee

- (21) NSWALC has determined that, for 12 months after the commencement of the *Aboriginal Land Rights (Amendment) Act 2009*, the only assessment fees that will be charged will be the costs of any expert advisory panel. This will allow both NSWALC and LALCs to become familiar with the new legislation, administrative processes and compliance requirements for land dealings.
- (22) The costs of an expert advisory panel are to be reckoned as 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).
- (23) If NSWALC proposes to constitute an expert advisory panel to assess a proposed land dealing (or part of it), NSWALC will also estimate the likely costs of the panel.
- (24) In estimating the likely costs of a panel, NSWALC will seek the views of the panel members about:
- (a) the process to be followed by the panel in conducting the assessment, and
 - (b) how much of their time is likely to be required to complete the assessment and provide a report.
- (25) If NSWALC fixes an amount as the assessment fee, it will give notice to the LALC of the amount of that fee.
- (26) In all other cases, NSWALC will give the LALC notice of:
- (a) the likely assessment fee, and
 - (b) the full details of how all aspects of the actual costs will in fact be determined (including how the members of the panel will calculate their fees), and
 - (c) the major variables that are likely to affect the actual costs.

3.5.4 Time for the payment of the assessment fee

- (27) Generally, NSWALC will require payment upfront of the assessment fee. However, in some instances NSWALC may decide not to require payment of the whole of an assessment fee, or an estimate of an assessment fee, upfront. NSWALC may

determine instead that part only of the assessment fee, or no part of the assessment fee, is to be paid up front with the balance payable at a later time, or on the happening of a later event.

- (28) NSWALC will fix the time, and any other arrangements, for the payment of an assessment fee having regard to:
- (a) the amount of the assessment fee payable, and
 - (b) the LALC's current financial position, and in particular the current extent of its cash reserves, and
 - (c) the nature and structure of the proposed land dealing, and in particular:
 - (i) whether the LALC will be raising finance in connection with the proposed land dealing, and if so, whether the assessment fee might be paid out of such finance, and
 - (ii) what expectation the LALC may reasonably have of receiving proceeds from the land dealing at a future point in time,and
 - (d) NSWALC's own financial position, and
 - (e) the need to ensure equity amongst the LALCs in relation to the giving of subsidies out of the NSWALC Account.

3.5.5 Security for the payment of the assessment fee

- (29) If NSWALC decides that some or all of an assessment fee may be payable at a future point in time, it will also decide whether to require that the LALC provide security for the payment of the assessment fee.
- (30) A security may be required where:
- (a) the assessment fee, or the estimate of the assessment fee, is more than \$20,000,
 - (b) NSWALC considers, having regard to the circumstances of the LALC (including its recent financial history) and/or the risks inherent in the proposed land dealing, that there is a substantial risk that the assessment fee will not otherwise be paid, and
 - (c) NSWALC considers, having regard to the circumstances of the LALC, that it will be reasonably practicable for the LALC to provide a security.

3.5.6 Waiver of the assessment fee

- (31) If a LALC wishes to seek a waiver of the payment of some or all of an assessment fee, it may do so when it makes the land dealing approval application, or at any time up until it gives the notification referred to in clause 107(2)(b) of the ALR Regulation.
- (32) In general terms, and having regard to:
- (a) the other demands on the NSWALC Account, and
 - (b) the need to ensure equity between LALCs,

NSWALC intends that its land dealing assessment process will be a user pays system to the greatest extent that this is reasonably practicable. This is the purpose of all assessment fees.

- (33) NSWALC will only waive an assessment fee if it is satisfied that it is appropriate to do so having regard to factors such as:
- (a) the amount of the assessment fee payable,
 - (b) the LALC's current financial position, and in particular the extent of its cash reserves,
 - (c) any expectation that the LALC may have of receiving proceeds from the land dealing out of which the assessment fee might be paid,
 - (d) NSWALC's own financial position, and
 - (e) the need to ensure equity amongst the LALCs in relation to the giving of subsidies out of the NSWALC Account.

3.5.7 Time for determining the application

- (34) Estimates of time required to determine a land dealing approval application will be calculated on the following bases:
- (a) times stated will run from the time when NSWALC receives from the LALC the notification referred to in clause 107(2)(b) of the ALR Regulation, and
 - (b) it will be assumed that requests for additional information or documents will be complied with within 28 days, or such longer time as may have already been agreed between the LALC and NSWALC.
- (35) When the LALC is notified of the estimate of the time required to determine the land dealing application, it will also be notified of:
- (a) these and any other assumptions upon which the estimate is based,
 - (b) the major variables that are likely to affect the actual time required to determine the application.

3.5.8 Stage 4 notice to the LALC

- (36) Having regard to NSWALC's obligation under clause 107(1) of the ALR Regulation to give the notice referred to in that provision as soon as practicable after receiving a land dealing approval application, NSWALC will ordinarily aim to give the applicant LALC the Stage 4 notice (which includes the notice required by clause 107(1) of the ALR Regulation), as soon as reasonably practicable after the completion of Stage 2.
- (37) Where the LALC has advised of some urgency in relation to determination of a land dealing approval application, NSWALC will endeavour to work where possible within the LALCs timeframes.

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

- (38) After giving the Stage 4 notice referred to above, NSWALC will take no further action in relation to the land dealing approval application unless the LALC:
- (a) Agrees to the manner in which the land dealing is to be assessed and any fees payable as per clause 107(2)(b) of the ALR Regulation,
 - (b) provides any security for the payment of an assessment fee that may have been required in NSWALC's notice, and
 - (c) pays any amount by way of assessment fee that may be payable in accordance with NSWALC's notice,
- (39) If the LALC does not agree with NSWALC's Stage 4 notice and agreement cannot be reached in relation to alternative assessment methods/options NSWALC is not required to determine the application or further assess the application and NSWALC will refuse the application.

3.6 Stage 5 – Substantive assessment

- (1) In Stage 5, 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, Stage 5 will also include assessment by that panel, and consideration of the panel's report by NSWALC staff.
- (3) The purpose of the Stage 5 substantive assessment is for NSWALC staff to decide what recommendation to make to the Council of the 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 others and refused, and
 - (b) the conditions, if any, that should be placed on any approval.
- (4) The Stage 5 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 Stage 4 notice, and
 - (b) the need for the land dealing approval process to operate efficiently in general.
- (5) The Stage 5 assessment will be undertaken having regard to section 42G of the ALRA and each of the matters set out in Sections 4 and 5 of this policy.
- (6) The Stage 5 assessment will be carried out on the basis of:
- (a) all the material provided to NSWALC by the LALC (including any additional information or documents required by NSWALC and provided by the LALC),
 - (b) any report of an expert advisory panel that has been obtained, and
 - (c) any other relevant material available to NSWALC and that has been provided to the LALC that is not in the public domain.
- (7) NSWALC staff will aim to complete Stage 5 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.
- (8) At the end of Stage 5, NSWALC staff will submit the application to the Council of NSWALC with their recommendation.
 - (9) If NSWALC has requested additional information or documents and the LALC has *not* provided this information or documents, the Stage 5 assessment will be carried out, and a recommendation made to the Council, without the benefit of the additional information or documents.
 - (10) The LALC will be given written notice of the completion of the Stage 5 assessment and of the date/s of the Council meeting at which the land dealing approval application is expected to be considered and determined.

3.7 Stage 6 – Determination (including dealing approval certificates)

- (1) In Stage 6, the Council of NSWALC will determine the land dealing approval application and, if it approves the proposed land dealing, a dealing approval certificate will be issued to the LALC.
- (2) 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.
- (3) The determination will be made, having regard to section 42G of the ALRA and each of the matters set out in Sections 4 and 5 of this policy.
- (4) The determination will be made on the basis of:
 - (a) all the material provided to NSWALC by the LALC (including any additional information or documents required by NSWALC and provided by the LALC),
 - (b) any report of an expert advisory panel that has been obtained,
 - (c) any other relevant material available to NSWALC and that has been provided to the LALC, and
 - (d) the recommendation of NSWALC staff in relation to all of that material.
- (5) Unless, on considering the application, the Council of NSWALC considers that it requires additional information and documents in order to determine the application, the Council of NSWALC will generally determine an application at the first scheduled meeting after the completion of the Stage 5 substantive assessment.
- (6) If the Council of NSWALC determines that the proposed land dealing should be approved, NSWALC's Chief Executive Officer will, as required by section 42K(1) of the ALRA, issue a dealing approval certificate within 14 days of the determination being made (provided that any assessment fee that is payable at that time has been paid).

3.8 Stage 7 - Implementing and enforcing approvals (including registration approval certificates and registration prohibition notices)

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

compliance with the approval agreement may be critical to whether or not the land may be further dealt with by the transferee (see sub-sections 42O and 42P of the ALRA).
- (3) If NSWALC approves a proposed land dealing subject to a condition that the LALC enters a land dealing approval agreement with NSWALC, non-compliance with the land dealing approval agreement will be taken to be a breach of the ALRA, with the potential consequences that breaches of the ALRA may have (section 42G(7)). These include a compliance direction under Part 12 of the ALRA and the appointment of an administrator under Part 11 of the ALRA.

3.8.1 Registration approval certificate

- (4) 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 from NSWALC. Before a registration approval certificate is issued, however, NSWALC's Chief Executive Officer will require proof of compliance with all relevant conditions of the approval (see section 42K(2) of the ALRA).
- (5) 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 NSWALC's files.
- (6) A LALC seeking a registration approval certificate should apply to NSWALC (using the form available on the NSWALC website or from the NSWALC Commercial Unit, and providing all information and documents requested in that form).
- (7) If, at the time that this application is made and considered, one or more conditions of approval are still to be fulfilled, NSWALC's Chief Executive Officer 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 registration approval certificate.
- (8) LALCs should note that the community development levy must be paid *before* NSWALC can issue a registration approval certificate.

- (9) NSWALC's Chief Executive Officer will consider the application for a registration approval certificate and provide a written response to the LALC as soon as practicable after receiving the application.
- (10) A registration approval certificate, where it is to be issued, will generally be given at a point in time immediately prior to registration being required (e.g. at settlement in the case of a sale and transfer of land).

3.8.2 Registration prohibition notices

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

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

- (12) Proving compliance with a land dealing approval agreement in these circumstances, will be the registered proprietor's responsibility.
- (13) A registered proprietor seeking NSWALC's consent to deal with the land, or the removal of the registration prohibition notice, should apply to NSWALC (using the form available on the NSWALC website or from the NSWALC Commercial Unit, and providing all information and documents requested in that form).
- (14) NSWALC's Chief Executive Officer will consider the application and provide a written response to the applicant within 14 days of receiving the application.

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

4.1 Matters NSWALC may consider

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

- (b) Consistency with LALC community, land and business plan,
- (c) Holding and using proceeds,
- (d) Cultural concerns, and
- (e) Commerciality.

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

4.2 Transparency and probity

- (4) 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.
- (5) In all cases, the disclosure requirements in Part 10 of the ALRA must be strictly complied with wherever they apply. There will also be circumstances where disclosure beyond what is required by Part 10 is important.

4.2.1 Transfers and other dealings in favour of LALC's members and others

- (6) One instance where it is particularly important that transparency and probity in decision making beyond the requirements of Part 10 should be evident, is where a LALC proposes to transfer land, or to give some other interest (e.g. a lease), to a LALC member and others.
- (7) In such cases it will be important that:
 - (a) the members voting on the matter be aware that the proposed land dealing that they are voting on is in favour of the LALC member and others,
 - (b) if the LALC member is present at the relevant meeting or meetings, he or she:
 - (i) discloses his or her interest in the proposed land dealing,
 - (ii) does not remain present at, or within sight of, the meeting at any time during which the matter is being considered or discussed, or is being voted on.
- (8) It is also important to appreciate that a proposal to transfer or lease (or otherwise deal with) LALC land in favour of a LALC's members and others may be a community benefits scheme for the purposes of section 52A (and perhaps section 52B) of the ALRA. In this case, the proposal will have to be also approved as a community benefits scheme and this will require an examination by NSWALC of the fairness, equity and transparency of the scheme.

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

- (9) 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.

4.2.3 Transparent selection of proposals

- (10) The need for transparency in decision making to be clearly evident is also particularly important in relation to major land dealing proposals involving land which is significant in terms of its size, value or strategic importance, particularly in situations where the LALC will take on a large part of the risk of the proposal, or other more profitable options might have been available to the LALC.
- (11) In these circumstances, it may be important for NSWALC to explore more closely the relationship between the LALC and its officers and staff on the one hand, and the other party or parties to the proposal.
- (12) 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.

4.2.4 Additional information and documents

- (13) In relation to all proposed land dealings, NSWALC will require some additional information and documents to satisfy potential concerns about transparency and probity. For this reason, the land dealing approval application form asks several questions in response to which information and in some cases documentation is required.
- (14) In some cases, such as those described in paragraph (10) above, NSWALC will require further additional information and documentation.

4.2.5 Exercise of NSWALC's discretion

- (15) 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.
- (16) NSWALC may impose conditions on an approval of a proposed land dealing that aim to ensure that the dealing is done transparently.
- (17) If a proposal anticipates that LALC land be transferred or leased to a LALC's members and others (or otherwise dealt with in favour of a LALC's members and others) according to a community benefits scheme, NSWALC is likely to impose a condition on any approval aimed at ensuring that the land is dealt with only in accordance with that scheme.

4.3 Consistency with LALC community, land and business plan

- (1) Community, land and business plans, are intended to encourage better land use decision making by requiring LALCs to establish a strategic framework within which decisions can be made in the short to medium term. Consistency of a proposed land dealing with a Community, land and business plan is one of the matters

specifically listed in section 42G(3) of the ALRA which NSWALC may consider when deciding whether to approval a land dealing application (see section 42G(3)(a)).

- (2) Community, land and business planning is intended to encourage LALCs to:
 - (a) think carefully about the best range of uses for their land portfolios as a whole,
 - (b) formulate sensible objectives, and
 - (c) develop strategies for the use of the land in a manner that supports the achievement of those objectives.
- (3) If significant land use decisions:
 - (a) are made in an *ad hoc* fashion,
 - (b) are made in reaction to external interest or pressure,
 - (c) do not form part of an overall strategic plan for use or development of the LALC's lands as a whole, or
 - (d) are made without adequate consideration of what the LALC's broader objectives may be and how the proposed use may support or compromise those objectives,

it is likely that the result will not be in the best interests of the LALC's members and others.
- (4) Dealings that result from land use decisions made in this way may be contrary to LALC's members and others' interests because, for example:
 - (a) land that would have been useful for meeting community needs and objectives other than cash (e.g. community facilities or employment and business opportunities) may be alienated,
 - (b) the LALC fails to take advantage of a strategic commercial advantage that it may have obtained from planning for and dealing with its land portfolio as a whole (e.g. where lands without development potential, or in which there are cultural values making it unsuitable for development, are managed to offset environmental impacts on other lands for which development consent is obtained), or
 - (c) the LALC has not obtained advice about the highest and best commercial use of its lands.
- (5) It is unrealistic to expect that all land dealings that a LALC may propose during the life of a community, land and business plan will be specifically anticipated in the plan. However, the more significant a land dealing proposal may be in terms of:
 - (a) the area of the land affected by the proposal,
 - (b) what proportion of the LALC's total lands this area is,
 - (c) the strategic importance of the land to the LALC in other respects,
 - (d) the complexity of the proposal,
 - (e) any investment of LALC resources required to undertake the proposal, and
 - (f) the extent to which the future use of the land will be affected by the proposal,

the more important it will generally be that the decision to deal with the land forms part of, or is at least clearly consistent with the objects and strategies in, the LALC's approved community, land and business plan.

- (6) Key considerations for NSWALC in relation to proposed significant 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) If these considerations are not easily answered by reference to the community, land and business plan itself, or indeed if the LALC does not have an approved plan, NSWALC may require additional information and/or documents from the LALC, to enable it to be satisfied that the proposed land dealing forms part of a broader plan for the use of the LALC's land and the achievement of its objectives.
- (8) In some cases where a proposed significant land dealing is not clearly contemplated by the LALC's community, land and business plan, NSWALC may consider it necessary for the LALC to amend its plan to ensure that the members have considered the proposal in the context of a broader strategy.

4.4 Holding and using proceeds

- (1) If a LALC disposes of land, or gives a lease or some other interest in the land, in order to produce an 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) If a LALC disposes of land in return for an injection of cash, or an income stream, and:
 - (a) there are no clearly identified uses for the proceeds (or the identified uses are not authorised under the ALRA), or
 - (b) there is an inadequate management regime or inadequate legal structures in place to manage the cash for the purposes intended,
 this may result in significant losses for the LALC.
- (3) The more significant a land dealing proposal may be in terms of:
 - (a) the area of the land affected by the proposal,
 - (a) what proportion of the LALC's total lands this area is,
 - (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.
- (4) Further, the risks will 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 163 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.
 - (5) Key considerations for NSWALC in relation to proposed significant land dealings will be:
 - (a) Will the LALC receive the proceeds as a lump sum payment or series of payments, or will a long term income stream be produced (as large injections of cash will generally create greater management challenges)?
 - (b) Have clearly identified uses for the proceeds been identified, and:
 - (i) are these uses authorised under the ALRA, and
 - (ii) do they form part of the LALC's objectives as set out in its community, land and business plan?
 - (c) Does the LALC have a recent history of financial and/or management issues?
and
 - (d) Having regard to the above, are there adequate managerial systems and legal structures in place to ensure that the proceeds are used as intended (e.g. formalised procedures or purpose trusts)?
 - (6) For these reasons, in relation to significant land dealing proposals, NSWALC will generally require additional information and documents relating to:
 - (a) how the proceeds are to be held, including:
 - (i) by whom, and
 - (ii) subject to what protections or restrictions,
 and
 - (b) how the proceeds will be applied, including what managerial and/or legal framework will determine this.
 - (7) If the proceeds are to be applied in whole or in part to community benefits schemes of the LALC, then it will be necessary for those schemes to be approved pursuant to section 52A of the ALRA.
 - (8) If it is proposed that the proceeds be held on trust by or for the LALC or its members and others, approval may also be required pursuant to section 52C of the ALRA.

- (9) The conditions that NSWALC imposes on any approval of a LALC land dealing involving significant proceeds may include a condition that the LALC enter a land dealing approval agreement with NSWALC aimed at ensuring that the proceeds are held and used in the manner proposed by the LALC and approved by NSWALC.

4.5 Cultural concerns

- (1) Land is of cultural and heritage importance to Aboriginal people for many reasons. Some lands, or places and objects on the lands, may be of particular cultural or heritage significance.
- (2) Whether the LALC had proper regard to the cultural and heritage significance of the relevant land to Aborigines is one of the matters specifically listed in section 42G(3) of the ALRA as a matter that NSWALC may consider in deciding whether to approve a land dealing application (see section 42G(3)(e)).
- (3) LALCs, and NSWALC, have statutory functions to take action to protect the culture and heritage of Aboriginal persons (section 52(4)(a) and section 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) In relation to some LALC land, where the land may be held subject to native title rights and interests, section 42 of the ALRA may also be relevant in this regard.
- (6) To the extent that the Aboriginal cultural and heritage significance of land is not protected under other regimes, NSWALC recognises that the LALC's members and others of the LALC are generally the people best placed to ensure that proper consideration is given to the protection of that significance.
- (7) 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 (sub-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 (sub-sections 82(2)(b) & (6)).
- (8) However, where credible information is known to, or received by NSWALC, raising concerns that:
 - (a) the LALC's members did not have proper regard to the impact of the proposed dealing on the cultural and heritage significance of the land when it determined to deal with the land, or
 - (b) the likely impact of the proposed land dealing on the cultural and heritage significance of the land is such that it should not be approved,

NSWALC may require additional information, and may consider that the matter should be considered by an expert advisory panel (constituted pursuant to section 42I of the ALRA), so that it may satisfy itself in relation to these concerns before it approves the proposed land dealing.

- (9) 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 generally impose conditions on its approval that aim to ensure that those conditions are satisfied.

4.6 Commerciality

- (1) It is important that LALC land be dealt with according to sound commercial principles. If it is not, it will generally not be in the best interests of the LALC's members and others.
- (2) This is not to disregard the fact that a LALC may have very good reasons for wishing to deal with land for little or no financial return. For example, pursuant to a community benefits scheme, a LALC may propose to lease land for a "peppercorn" to facilitate the provision of a service (e.g. a pre-school) to a LALC's members and others that would otherwise not be available to them. Even in such a case, however, there are commercial aspects to the proposed arrangement (such as insurances and the management of risk generally) that need to be considered by the LALC to protect the interests of the LALC's members and others.
- (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,
 - (d) having regard to the nature of the proposed land dealing and the risks inherent in it, the capacity and capability of the persons involved in conducting the proposal (which, in addition to the LALC, may include its advisors or other consultants, a joint venture partner and/or a person taking an interest in the land),
 - (e) the sufficiency of the proposed terms, by which risks inherent in the proposal are allocated and are to be managed, and
 - (f) importantly, the risks or opportunity costs 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 concerned.

- (4) The more significant a proposed land dealing is in terms of:
- (a) the area of the land affected by the proposal,
 - (b) what proportion of the LALC's total lands this area is,
 - (c) the strategic importance of the land to the LALC in other respects,
 - (d) the complexity of the proposal,
 - (e) any investment of LALC resources required to undertake the proposal, and

- (f) the extent to which the future use of the land will be affected by the proposal, the more closely NSWALC will wish to satisfy itself as to the commerciality of the proposal, and the more likely it is that it may wish to refer the proposal, or part of it, to an expert advisory panel.

4.6.1 Where LALCs obtain their own competent and independent advice

- (5) This is not to say that NSWALC will in these circumstances wish to second guess the LALC's own advice and consideration of a proposal about what the best use of land may be.
- (6) Importantly, 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.
- (7) It would, however, be sensible for LALCs wishing to rely on their own advice for approval purposes, to have discussed their intentions, and NSWALC's likely requirements in relation to the advice, at an early stage. This may require that the LALC approach NSWALC in relation to the matter prior to any formal land dealing approval application being made. NSWALC will not regard such approaches as inappropriate. It may be necessary in this case, however, for NSWALC to point out limits to the extent to which the advice of its staff can be taken to be binding on the determination that must ultimately be made by NSWALC itself.

4.6.2 Additional information and documents that NSWALC may require

- (8) NSWALC may require additional information and documents to enable it to assess the commerciality of a proposal. Whether, and if so what, additional information and documents will be required to assess commerciality, will depend on the proposal concerned.
- (9) By way of illustration only, where a significant 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 identity, qualifications and relevant experience of key personnel responsible for the proposal's successful completion,
 - (c) an independent valuation, commissioned by the LALC for the land dealing in question from a registered valuer, not more than 12 months old,
 - (d) disclosing the advice that the LALC has received in relation to the commerciality of the proposal,
 - (e) demonstrating the relevant expertise and independence of the people who provided the advice,

- (f) 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, and
 - (g) otherwise demonstrating that the proposal is in the interests of the LALC's members and others from a commercial perspective.
- (10) By contrast, 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 may require less information or documentation than for more complex transactions.

4.6.3 Conditions to protect commercial interests

- (11) If NSWALC approves a proposed land dealing, it may impose conditions aimed at ensuring that the dealing is not done in a manner, or on terms, contrary to the commercial interests of the LALC's members and others. For example, where the proposal is approved on the basis of representations by the LALC about terms under which the dealing will be done, the conditions will aim to ensure that the dealing is in fact carried out on those terms.

5 Further considerations in relation to imposing conditions on approvals

5.1 When will NSWALC impose conditions on an approval?

- (1) NSWALC will impose conditions on an approval of a proposed LALC land dealing if it considers that this is desirable to ensure that the proposed dealing is done in accordance with the interests of the LALC's members and others.
- (2) The purpose of approval conditions is not solely, or primarily, to act as a restriction on the LALCs ability to deal with its land. It is also, importantly, a means by which the interests of the LALC and the LALC's members and others are protected at all stages through a land dealing.
- (3) 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.
- (4) Where NSWALC approves a proposed land dealing on the basis of representations made to it by the LALC about, for example, the key terms on which the proposal will be transacted, NSWALC will impose conditions that aim to ensure the integrity of its approval, by requiring that the proposal is in fact conducted on the basis of those key terms.
- (5) Alternatively, independently of any representations made to it, NSWALC may reach its own view that it may only be satisfied that a proposed land dealing is not likely to be contrary to the interests of the LALC's members and others if certain conditions are observed.

5.2 What sorts of conditions might be imposed?

- (1) The ALRA imposes some restrictions on the conditions that may be imposed by NSWALC on a land dealing approval. Specifically, section 42G(6) will not allow NSWALC to impose conditions that can only be satisfied after the completion of a land dealing.
- (2) An example of such a condition might be one which requires the proceeds of a land sale to be held and applied according to the terms of a particular charitable trust. The holding and application of those proceeds would occur after the land had been sold and transferred and so such a condition would be unlawful.
- (3) On the other hand, section 42G(6) does allow 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. In the example given above, NSWALC could impose a condition that required the LALC to enter a land dealing approval agreement that said that the proceeds of the sale are to be held and applied according to the terms of the charitable trust. Some further considerations in relation land dealing approval agreements are set out below.
- (4) Beyond the restrictions in section 42G(6), NSWALC is conscious that approval conditions, if badly crafted, may have a significant impact on the workability of a land dealing proposal and ultimately may affect the validity of any interest in the land that the dealing is intended to pass.
- (5) NSWALC will give special consideration, when imposing conditions, to ensuring that the conditions:
 - (a) effectively protect the interests of the LALC and a LALC's members and others in the manner intended,
 - (b) do not unduly interfere with the conduct of the approved proposal,
 - (c) do not render unworkable any aspect of the approved proposal, and
 - (d) do not raise unintended doubts about the validity of the interests of any participant in the approved proposal.

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

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

- (4) 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. It may be necessary in such cases, however, for NSWALC to point out limits to the extent to which the guidance of its staff can be taken to be binding on the determination that must ultimately be made by NSWALC itself.