



fact sheet

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Land Dealings with the Aboriginal Housing Office (AHO)

This fact sheet is intended to be a guide for LALCs dealing with the Aboriginal Housing Office (**AHO**). Whether LALCs are proposing to enter into a Head Lease or Funding Agreement with the AHO, this is likely to be a land dealing within the definition of the *Aboriginal Land Rights Act 1983 (ALRA)* which requires approval from LALC members and NSWALC **before** a LALC can enter into such Head Lease/Funding Agreement.

This fact sheet is also aimed at helping LALCs comply with the ALRA and the *Aboriginal Land Rights Regulation 2002 (ALRR)* in relation to advertising land dealing meetings, holding the meeting and passing the appropriate resolutions for land dealings.

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

What should LALCs consider?

LALCs need to carefully consider the following:

- The LALC owned properties which will be subject to the Head Lease/Funding Agreement;
- The terms and conditions (rights and obligations) of the Head Lease;
- The terms and conditions (rights and obligations) of the Funding Agreement;
- What legal interest the LALC is granting to the AHO;
- Whether a development application (**DA**) is required to be lodged in relation to any proposed maintenance and repairs to be funded by the AHO?

Properties/land affected

LALCs should identify which properties are to be the subject of the Head Lease/Funding Agreement and request a copy of a title search of these properties from the AHO.

LALCs should ensure that the title searches:

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

Head Lease and Funding Agreement

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

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

Aboriginal Housing Act 1998

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

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

Legal interest granted to the AHO

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

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

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

Scope of works. Is a DA required?

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

Please note that lodging a DA is also a land dealing under the ALRA and will require members’ and NSWALC’s approval.

If a LALC is not able to ascertain the full scope of works to be carried out on its properties and which works will require a DA at the time it advertises a land dealings meeting in relation to entering into the Head Lease and/or the Funding Agreement then the LALC may need to advertise and hold a subsequent land dealings meeting to obtain members’ and NSWALC’s approval in relation to lodging a DA (if required and when the scope of the works is known).

Land Dealing - notices and resolutions required

After a LALC fully understands and wishes to proceed with the Head Lease and the Funding Agreement it is required to obtain members' and NSWALC's approval under the ALRA to sign and enter into the documents by holding a land dealings meeting and passing the relevant resolutions approving the land dealing(s).

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

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

Notice of Meeting

Clause 103 of the ALRR states:

"103 Notice of meetings of LALCs

- (1) *For the purposes of section 42G (5) (a) of the Act, notice of a meeting to approve a land dealing must be given not less than 7 clear days before the meeting.*
- (2) *The notice must:*
 - (a) *clearly identify the land subject to the dealing, and*
 - (b) *state the manner in which the land is to be dealt with, and*
 - (c) *state that at the meeting it is proposed to decide whether or not to approve of the land dealing."*

Attached to this fact sheet as **Attachment 2** is an example of a meeting notice that may assist a LALC to advertise a meeting to consider a land dealing in compliance with clause 103 of the ALRR.

In addition to the sample meeting notice attached and in order to ensure, as far as possible, that LALC notices calling land dealing meetings comply with the ALRR, LALCs or their legal advisors should prepare draft meeting notices and are encouraged to provide the draft meeting notices to the Commercial Unit of NSWALC for further assistance and comments prior to placing the advertisement or sending out the meeting notice to members.

Holding the LALC land dealings meeting and passing resolutions

NSWALC suggests that at the meeting;

- (1) the LALC table the Head Lease, Funding Agreement and any other relevant documents (such as legal advice on the documents);

- (2) AHO attends the meeting and provides a presentation to the LALC members to ensure that LALC members fully understand the land dealings and are available to answer any questions members may have;
- (3) the LALC's legal advisor attend the meeting to explain the documents and answer any legal questions members may have.

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

LALCs should not open the meeting until there is a quorum (at least 10% of the LALC voting members must be present) and a LALC should not pass a land dealings resolution unless it has a quorum present.

The ALRA sets out the minimum requirements for a LALC to approve a land dealing by passing a resolution.

Section 42G(5) of the ALRA states:

“(5) Requirements for approval resolutions

A Local Aboriginal Land Council resolution approving a land dealing must:

- (a) be passed at a meeting of which prior notice was given, in accordance with the regulations, and at which a quorum was present, and*
- (b) be passed by not less than 80 per cent of the voting members of the Council present at the meeting, and*
- (c) contain the following matters:*
 - (i) the identity of the land,*
 - (ii) a statement that the impact of the land dealing on the cultural and heritage significance of the land to 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.”*

Attached to this fact sheet as **Attachment 3** is a sample of a resolution that may assist a LALC to pass a land dealing resolution in compliance with section 42G(5) of the ALRA.

In addition to the sample land dealings resolution attached and in order to ensure, as far as possible, that the LALC resolutions approving the land dealing comply with the ALRA, LALCs or their legal advisors should prepare draft land dealing resolutions and are encouraged to provide the draft resolutions to the Commercial Unit of NSWALC for further assistance and comments prior to the LALC holding the land dealings meeting.

Application to NSWALC

After the LALC has held its land dealing meeting and passed the relevant resolution(s) it should apply to NSWALC for approval of the land dealing using the “Application for Approval for a Dealing with Land” on NSWALC’s website (link: <http://www.alc.org.au/land->

[councils/lalc-land-dealings.aspx](#)) and provide all relevant information to the Commercial Unit of NSWALC, including:

- the “Application for Approval of a Dealing with Land” properly completed, signed and dated;
- payment of the application fee;
- a copy of a title search for all relevant properties;
- a copy of the meeting notice;
- properly signed minutes of the meeting;
- a copy of the resolution(s) passed;
- a copy of the signed attendance sheet;
- a copy of the membership roll current as at the meeting date;
- copy of the Head Lease, Funding Agreement and any other relevant documents (such as legal advice and other documents tabled or presented at the meeting); and
- a copy of the letters to the Crown Lands Minister and the Minister for Aboriginal Affairs notifying them of the proposed land dealing (as required under section 42E(3) of the ALRA if the land in question was obtained under a successful land claim).

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

Please also note that LALC land dealings must be approved by the Council of NSWALC. The Council of NSWALC meets approximately every 4-6 weeks. Therefore a LALC land dealing application may take some weeks to receive NSWALC approval. Any LALC land dealing that is not approved by NSWALC is void and unenforceable.

Attachment 1

Aboriginal Housing Act 1998 (AHA)

Section 18 of the AHA states:

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

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

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

Section 20 of the AHA states:

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

- (1) *An AHO housing agreement may include conditions relating to any land of the registered Aboriginal housing organisation in which the AHO has an interest, including conditions that have effect if:*
 - (a) *the registered Aboriginal housing organisation fails to use the land for the purposes contemplated by the agreement, or*
 - (b) *the registered Aboriginal housing organisation proposes to sell or otherwise dispose of the land, or*
 - (c) *the registration of the registered Aboriginal housing organisation is revoked under this Act.*
- (2) *For example, the conditions may:*
 - (a) *confer on the AHO an option or right to reacquire land transferred to the Aboriginal housing organisation, and*
 - (b) *confer on the AHO an option or right to acquire land purchased by the registered Aboriginal housing organisation with funding provided by the AHO, and*
 - (c) *require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement if the AHO does not exercise the option or right referred to in paragraph (a) or (b), and*
 - (d) *require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement for housing or other improvements made to the land by the AHO.”*

Section 21 of the AHA states:

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

- (1) *A registered Aboriginal housing organisation must not transfer or otherwise deal with land in which the Aboriginal Housing Office has an interest unless:
 - (a) *the AHO consents to the transfer or other dealing, or*
 - (b) *the transfer or other dealing is authorised, or is of a class that is authorised, by an AHO housing agreement with that registered Aboriginal housing organisation (an exempt transaction), or*
 - (c) *an AHO housing agreement with the registered Aboriginal housing organisation provides that this section does not apply to the land concerned.**
- (2) *The Registrar-General must, on application by the AHO, make a recording in the Register kept under the Real Property Act 1900 to signify that the land specified in the application is subject to this section.*
- (3) *The application is to provide details of any exempt transactions.*
- (4) *If a recording under subsection (2) has been made by the Registrar-General, the Registrar-General is not to register under the Real Property Act 1900 a transfer of that land or any other dealing that is otherwise registrable under that Act unless:
 - (a) *the consent of the AHO to the transfer or other dealing has been endorsed on the transfer or other dealing, or*
 - (b) *the transfer or other dealing is an exempt transaction (as notified to the Registrar-General by the AHO), or*
 - (c) *the recording has ceased to have effect (as recorded by the Registrar-General under subsection (5)).**
- (5) *The Registrar-General must, on the application of the AHO, make in the Register a recording to signify that a recording made under subsection (2) has ceased to have effect.*
- (6) *An application by the AHO under this section is to be made in an approved form under the Real Property Act 1900 and is to be accompanied by such fee, if any, as may be prescribed by the regulations under that Act.*
- (7) *If the AHO makes an application under this section, the Registrar-General is not to inquire into whether the AHO has an interest in the land concerned or into the terms of any AHO housing agreement.*
- (8) *This section does not affect the operation of any other prohibition or restriction relating to transfers or other dealings in land.”*

Attachment 2

A sample of a land dealings meeting notice

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

“ABC LALC invites its members to attend an extraordinary meeting.

Date: Friday 4 February 2011

Time: 2.30pm

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

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

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

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

NOTE:

1. In order to hold a meeting on Friday 4 February 2011, a LALC must ensure that the newspaper containing the advertisement is circulated in the LALC area and is published no later than **27 January 2011** (to comply with the 7 clear days' notice required under clause 103 of the ALRR).
2. If members have previously, at a properly convened LALC meeting, approved the LALC notifying members of future meetings by post then the LALC can mail the meeting notice to its members by post no later than **20 January 2011** (for a meeting to be held on 4 February 2011). This is because the notice is taken to have been received by the members on the 4th business day after posting (see section 76(1)(b) of the *Interpretation Act 1987*).

The calculation of the dates are:

- 20 January 2011 - Land dealings meeting notice posted;
- 21 January 2011 - 1st business day after posting;
- 24 January 2011 - 2nd business day after posting (as 22 and 23 is the weekend);
- 25 January 2011 - 3rd business day after posting; and
- 27 January 2011 - 4th business day after posting (as 26 January 2011 is a public holiday).

Where a LALC notifies its members of a land dealing meeting by post, the LALC must provide to NSWALC evidence that:

- the previous meeting was properly advertised, convened and the resolution approving notice by post to members was properly passed; and
- evidence that the notice of the land dealing meeting was sent to all voting members on its membership roll on a date that would give its members 7 clear days' notice (e.g receipt from Australia Post showing the postage paid for the letters or a declaration by the Chairperson to that effect).

Attachment 3

A sample of a resolution by ABC LALC approving a land dealing

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

“Meeting of ABC LALC held on Friday 4 February 2011 commencing 2.30pm

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

- a) The terms and conditions of the Head Lease and/or the Funding Agreement (**AHO Agreement**) (tabled at this meeting) and the impact of entering into these documents with the Aboriginal Housing Office (**AHO**) including the granting to the AHO of a legal interest in all the land shown below (**Land**):
 - iv. 12 Smith Street, Narooma (Lot 135 of Section 2 in DP 25739);
 - v. 98 Seville Road, Maynard (Lot 42 in DP 57321); and
 - vi. Cnr McCauley Avenue and Meetis Street, Haven Head (Lot 1712 in DP 111352).

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

- b) Part 4 of the *Aboriginal Housing Act 1998*;
- c) The impact of the Head Lease/Funding Agreement and the proposed grant of legal interest to the AHO, on the cultural and heritage significance of the Land to Aborigines;
- d) that by allowing the AHO to have a legal interest in the Land that, if the ALALC:
 - fails to use the Land for the purposes contemplated by the AHO Agreement;
 - proposes to sell or otherwise dispose of the Land, or
 - is deregistered under the *Aboriginal Housing Act 1998*;a condition may be that the ALALC is required to repay to the AHO money (the amount to be determined as specified in the AHO Agreement);
- e) by granting the legal interest in the Land to the AHO, the AHO has the right to register a recording against the title to all the Land and that if this occurs the LALC must not transfer or otherwise deal with the Land unless it has obtained the prior consent of the AHO,

ALALC approves entering into the AHO Agreement and granting the AHO a legal interest in the Land under section **[LALCs to check and insert the relevant section(s)]** of the *Aboriginal Housing Act 1998*.

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

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

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

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

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

Motion carried/not carried.”