

Minimising corruption risks in land dealings

Guide for Local Aboriginal Land Councils

This guide discusses the corruption risks that Local Aboriginal Land Councils (“LALCs”) can face when entering land dealings such as joint ventures, and the strategies that they can put in place to minimise these risks. Strategies include getting advice throughout the process and consulting with members, making sure that decisions are made in a transparent way, and keeping accurate records.

The decisions about land dealings are too important to get wrong.

LALCs own and manage large tracts of land. The land can have cultural value for Aboriginal people. It can also provide opportunities for economic development by Aboriginal communities. LALCs may decide to develop or sell portions of this land in certain circumstances.

For example, LALCs may develop their land by entering into joint business ventures to develop housing or other resources. This could be as an investment and/or to provide employment opportunities for the community.

The conditions governing land dealings are set out in Division 4, Part 2, of the *Aboriginal Land Rights Act 1983* (“the ALRA”). In September 2009, the NSW government amended the ALRA to provide clearer and more certain processes for LALCs to follow in their land dealings.¹ Clearly, LALCs need to be familiar with this legislation before entering into land dealings. LALCs also need to ensure that the developers they deal with are familiar with the legislation.

It is vital that LALCs carefully manage and use their land to ensure long-term benefits for their communities.

Past ICAC investigations have revealed corruption risks in planning and development processes. LALCs can be vulnerable to unscrupulous developers who deliberately try to exploit LALCs for their own benefit. They are not alone in this. In 2008, the ICAC’s investigation into Wollongong City Council showed the lengths that determined and corrupt developers will go to improperly influence the development approval process.²

A number of LALCs have recently expressed concern to the ICAC about possible corruption risks in land dealings. The risks

identified include the payment of secret commissions to LALC members and developers deliberately misleading LALC members through the promotion of exploitative land deals.³

LALCs are NSW public authorities for the purposes of the *Independent Commission Against Corruption Act 1988* and can be investigated by the ICAC.

Joint ventures and other land dealings

Dealings in land can involve the mortgage, sale, or exchange of land by a LALC. They can also involve joint venture deals.

Section 40(1) of the ALRA provides a comprehensive definition of land dealings for the purposes of the Act. This includes making a development application in relation to land, the granting of an easement, mortgage or lease over three years, and entering into a biobanking agreement.⁴

A joint venture is a formal, contractual agreement between two or more parties for a common project. Joint ventures include public-private partnerships (“PPPs”). The parties to joint ventures might have different things to contribute to the project. For example, one party might have money and experience in a particular business, and another party might have land in a location convenient to such a business.

Joint venture deals can provide the following benefits to LALCs:

- the sharing of ideas and skills between the parties
- facilitating the development of LALC land to its best potential
- gaining financial input and cash flow from the other party throughout the venture
- gaining the experience and expertise of the other party
- the sharing of business risks
- the opportunity to develop a larger project than a LALC would be able to afford on its own
- creating employment opportunities for LALC and community members

- creating housing or other amenities for the future benefit of a LALC and LALC members
- gaining skills for future business ventures
- a sense of pride and accomplishment.

Land dealings can pose risks for LALCs, including the risk of corrupt conduct, if they are not properly managed. The risks can be the same whether it is a small or large land dealing. Consequently, it is important that LALCs are aware of these risks and put safeguards in place to manage them.

The ICAC provides corruption prevention advice to NSW public sector agencies, including Local Aboriginal Land Councils.

The differences between private and public sectors - how this might affect LALC land dealings

There can be differences between how the public and private sectors do business. There is nothing wrong with this in itself but LALCs need to be aware of these differences when planning a land dealing with a private individual or company.

LALCs exist as public agencies to provide a service to the Aboriginal community in which they operate.⁵ LALCs are required to consider the needs of their entire community in the decisions they make and to be accountable and transparent to their membership and the NSW Aboriginal Land Council (“NSWALC”). LALCs must ensure that all decisions are made in accordance with the requirements of the ALRA and the Aboriginal Land Rights Regulation 2002 (“the Land Rights Regulation”).

Private sector objectives tend to be largely financial and do not place the same emphasis on broader social objectives.

As public agencies, LALCs have strict guidelines about how they are permitted to manage and spend money they receive and their involvement in other financial dealings. One of the reasons LALCs are subject to such regulation is to safeguard the interests of LALC members and other Aboriginal people within the LALC area. Private companies are also subject to various forms of financial regulation. However, they are not under the same obligations as LALCs in regard to how they use their money and other assets.

It can be common and acceptable practice in the private sector for a company to offer gifts and benefits to people they are planning to do business with. This can include paying for expensive meals and other hospitality while negotiating business deals.

These practices are generally not tolerated in the public sector as they can undermine an agency’s obligations to its community to obtain best value for money. Such practices can also create corruption risks, for example, by unduly influencing a public official to favour a particular proposal that may not represent the best option.

Case study - ICAC investigation into Wollongong City Council

In October 2008, the ICAC released the third and final part of its report in relation to its investigation of serious and systemic corruption associated with Wollongong City Council. The ICAC’s investigation involved, amongst other things, an examination of the assessment and determination of development applications by council officers. The ICAC made corrupt conduct findings against various council officers and developers as a result of this examination.

The investigation identified various social interactions between the council officers and developers which often involved the exchange of gifts and benefits. These included:

- lunches paid for by the developers
- a social weekend at one of the developer’s farm
- the receipt of gifts such as alcohol by council officers.

The ICAC found that in some cases close personal relationships between Council officers and developers were undisclosed and unmanaged and resulted in a wilful failure by the Council officers involved to properly perform their official functions.

Conflicts of interest

What is meant by “conflict of interest” here is a conflict between a person’s private interests (such as their own career, financial status and general well-being and that of their family and associates) and the public interest.

Everyone has private interests, and conflicts do occur between these interests and the public interest. What is crucially important is that these conflicts of interest are identified and managed appropriately.

All councillors, board members and LALC staff are expected and obliged to put the public interest first in their work. That means considering and acting in the best interests of

the entire community, not just an individual, family or group. Section 176 of the ALRA specifically requires Councillors, board members and LALC staff to act honestly and not use their office for personal advantage or to the detriment of an Aboriginal Land Council.

In addition, LALCs are required by the ALRA to adopt and comply with a Model Code of Conduct (“the Code”).⁶ The Code states that board members must at all times safeguard the interests of their LALC and its members. Furthermore, board members must not enter into any agreement or undertake any activity that may be in conflict with the interests of the LALC, or that would prejudice the performance of their duties. A breach of the Code can result in serious consequences, including dismissal.

The ALRA also includes a definition of pecuniary (financial) interests and mandates how they should be managed by councillors, staff and board members during Council meetings.

This involves disclosing the nature of the interest and not being present at, or in sight of, the LALC meeting during consideration or discussion of the matter, and during voting on the matter, unless the LALC determines otherwise. Consultants engaged by LALCs are also obligated to declare and manage their pecuniary conflicts of interest.⁷

Non-pecuniary interests are interests that do not amount to pecuniary interests as defined in the ALRA. These commonly arise out of family or personal relationships and involvement in sporting, social and other groups. While the ALRA does not specifically deal with non-pecuniary interests, the Code can be used for guidance on how to manage such interests when they conflict with the public interest. Detailed advice on managing non-pecuniary conflicts can also be found in a number of ICAC publications, including the November 2009 brochure, *Identifying and managing conflicts of interest in the public sector*.

Case study – ICAC investigation into Koopahtoo LALC

The ICAC’s investigation into Koopahtoo LALC (“KLALC”) showed the corruption risks that can arise when a joint venture is not properly planned and managed. It also showed the risks when LALC members are deliberately misled and conflicts of interest are not declared.

In 1997, KLALC entered a joint venture agreement with a company called Sanpine Pty Ltd. The agreement was to undertake a housing development on KLALC land. The land was mortgaged to finance

the development. The major potential beneficiary of the joint venture was Sanpine.

The Chairperson of KLALC accepted a paid position as an Aboriginal Liaison Officer to the joint venture. The Chairperson was a vocal supporter of the joint venture. He did not tell the KLALC membership about his position with the joint venture even though he clearly had a conflict of interest between his public duty to KLALC and his obligations to promote the joint venture, regardless of whether it was in KLALC’s interest. The joint venture mortgage funds eventually ran out and KLALC was put into administration. The matter created a lot of upset and unhappiness in the community and damaged KLALC’s reputation.

The ICAC also made findings of corrupt conduct in relation to a number of KLALC officers and recommended that consideration be given to their prosecution for offences under the *Crimes Act 1900* (NSW).

NSWALC approval required

Recent amendments to the ALRA have changed the land dealing provisions of the Act. The amendments include changes to the NSWALC approval requirements for land dealings. The changes will help ensure that land dealings are in the best interests of the entire community as well as promoting transparency and certainty.⁸

- The new section 42E of the ALRA states that a LALC must not deal with land vested in it except with the approval of NSWALC as set out under section 42G. Importantly, NSWALC may refuse to approve a land dealing if it considers that the dealing is, or is likely to be, contrary to the interests of LALC members or other Aboriginal people in the area.
- The recent amendments to the Act also make it clear that a LALC land dealing that requires approval is void and of no effect unless NSWALC approval is given.
- The amendments also provide that if NSWALC approves a LALC land dealing, the NSWALC CEO must give the LALC a dealing approval certificate for the land dealing. The certificate may be relied upon to support the land dealing it authorises.
- LALCs must also obtain a registration approval certificate from the NSWALC CEO before they can register any dealings on title to land under the *Real Property Act 1900* or under the *Conveyancing Act 1919*.⁹

- The recent amendments to the ALRA also include, if required by NSWALC, provision for the assessment of land dealings by expert advisory panels prior to NSWALC approval. A LALC seeking approval of a land dealing can also request an assessment.¹⁰
- Under the ALRA, NSWALC also has the power to impose conditions on land dealing approvals provided to LALCs.

Strategies for minimising corruption risks in land dealings

It is important that LALCs safeguard their rights, assets and interests when considering and participating in land dealings. Different land dealings present different challenges. Some of the basic strategies for minimising corruption risks in land dealings are set out below.

Assessment of value and risk

- Before LALCs deal with their land they should obtain a title search of that land to verify ownership and check that there are no restrictions recorded on the title that will prevent or possibly delay the LALC from dealing with the land. An example of this is the restrictions in section 40AA of the ALRA relating to native title.
- LALCs should carefully consider their options in relation to potentially valuable land. An initial step is to ascertain the precise value of the asset, in its current form. This can be achieved through obtaining an independent valuation of the land prior to considering any land dealing. An application by a LALC for NSWALC approval of a land dealing must be accompanied by a valuation of the land prepared by a registered valuer within the preceding 12 months.¹¹
- LALCs should do some basic research before deciding what to do with their land. What is the land's zoning? How have other parcels of land in similar locations been developed? A local government council can provide, for a fee, a planning certificate which sets out basic information in relation to a parcel of land.
- LALCS then need to consider their options in relation to a land holding. These could include selling the land and investing the proceeds; holding the land as a passive investment; developing the land as a residential subdivision and selling individual blocks; or using the land for some community purpose. LALCs should consider obtaining expert advice to identify and consider their options.
- Before entering into a joint venture, a LALC should consider a business case for the project. LALCs are

required under section 82 of the ALRA to develop and implement a Community Land and Business Plan.¹² This will help identify how (or if) a proposed land dealing will benefit the LALC community in both the short and long term. LALCs should also consider undertaking specific feasibility studies and business cases for land dealings.¹³

- Formal joint venture agreements should be clear about the project outcomes, the timeframes involved, total costs and financing, the respective contributions of partners, governance and management arrangements, and the risks and proposed gains involved in the project. This includes what the rights and obligations of each party are and what each party is entitled to if the other party breaches the agreement.
- Prior to consideration by LALC membership, a LALC should obtain independent legal, financial and any other advice appropriate to help ensure that the LALC's interests are properly protected.
- LALCs should obtain proof that a proposed joint venture partner has the money, skills and experience that they claim they can bring to the venture. Searches can be conducted on the Australian Securities and Investments Commission website to find out whether a company is registered, and the history of its principal officers.

Competition

- LALCs should consider whether a proposed land dealing is the best deal available. Having open and competitive selection processes, for example an open tender, help ensure value for money. This is often called testing the market. Such processes also make it difficult for private interests to influence the outcome of a deal.

Consultation

- LALC members should be fully consulted before a LALC enters into a land dealing. This will help ensure that they have ownership of the project and provide a level of accountability. Consultation may involve holding information/question and answer sessions before the members are asked to vote on the land dealing.
- Section 42G(5) of the ALRA sets out the mandatory requirements in relation to the passing of a resolution by a LALC approving a land dealing. This includes calling an extraordinary LALC meeting for the purpose of voting on the land dealing.

Transparency

- The proceedings of LALC meetings should be properly recorded in accordance with Schedule 3 of the ALRA. The minutes should be readily available to all members and a copy kept in a secure location. This will ensure that all members are clear on what has been discussed and decided. The ICAC's experience has shown that when records are not properly kept a motivated person can exploit this situation for their own benefit. It can also make it harder for an agency to prove if someone has acted improperly.
- LALC members should be kept regularly informed about all proposals concerning their land and other assets. This is in addition to LALCs' reporting requirements under the ALRA.
- LALCs should provide their members with regular written updates on the progress of land dealings, including the expenditure of funds. This topic may be a standard agenda item at each meeting.
- Joint venture arrangements should be subject to regular audit. Audit reports should cover related party disclosures, including financial transactions involving board members. Audit reports should be available to LALC members.
- Joint venture project plans should have milestones and evaluation points. For example, a LALC could keep a checklist of when tasks are due to be completed. This helps the LALC assess whether the project is on track and on budget.
- Business meetings should be conducted in a business environment and in a professional manner.

Clarity

- LALCs should have policies and procedures in place concerning conflicts of interest, gifts and benefits, procurement, record-keeping, etc. This will help board members and other officials to be aware of their obligations.
- LALCs should inform potential partners about LALC policies as above. A statement of business ethics or

a summary document of LALC policies is a good way of letting a joint venture partner know what conduct is expected.

- LALCs and joint venture partners should agree on a management plan prior to formally entering into the venture. For example, will the joint venture engage a project manager, what will be the milestones and expenditures?
- Before signing contracts LALCs should decide whether there will be a need for an ongoing relationship between venture partners, or a settlement for future costs – for example, for the maintenance of housing stock. If so, this should be included in the contract.

Case study – Knowing the value of your asset

A developer contacted the Chairperson of a coastal LALC and offered \$8 million for a section of LALC land. The Chairperson thought this would be a good deal for the LALC and convinced the LALC members to accept this offer.

The LALC contacted the NSWALC as required under the then section 40D of the ALRA to inform it about the proposed sale and gain approval. NSWALC became aware that the LALC had taken the developer's valuation at his word and had not sought an independent valuation. When the LALC did arrange an independent valuation, the land was valued at \$15 million, almost twice the amount offered by the developer.

Summary

- Consult with NSWALC and obtain NSWALC approval before entering into a land dealing and continue to consult with NSWALC throughout each phase of the land dealing.
- Check with local councils and relevant state departments about the permitted use of the land.
- Identify and manage conflicts of interest, gifts and benefits, and other risks.
- Tell the joint venture partner about how LALCs do business.

- Get independent legal, financial and other advice throughout the process.
- Make transparent and accountable decisions.
- Keep secure records.
- Keep LALC members informed throughout each phase of the land dealing.

Endnotes

- 1 These amendments to the Act are expected to commence in March 2010.
- 2 *Report on an investigation into corruption allegations affecting Wollongong City Council*, Independent Commission Against Corruption, Sydney, October 2008.
- 3 These views were expressed by LALCs in response to an ICAC organisational survey "Profiling the NSW Public Sector 2007: Functions, risks and corruption prevention strategies", Independent Commission Against Corruption, Sydney, May 2007.
- 4 Agreements between the Minister for Climate Change and the Environment and landowners which create biobanking sites for areas of recognised biodiversity and allow for the creation and trading of biodiversity credits. For more information on biobanking and LALCs, refer to "What you need to know about biobanking", NSW Aboriginal Land Council, at www.alc.org.au.
- 5 Section 51 of the ALRA provides that the objectives of each LALC are to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council.
- 6 See Schedule 5, Aboriginal Land Rights Regulation 2002.
7. See sections 187 and 188 of the ALRA.
- 8 For further information see *Fact sheet: Land dealings 1 – Why is the ALRA changing*, NSWALC, Sydney, December 2009.
- 9 For further information see *Fact sheet: Land dealings 5 – Two certificate process* and *Fact sheet: Land dealings 6 – Infeasibility of title*, NSWALC, Sydney, December, 2009.
- 10 For further information see: *Fact sheet: Land dealings 7 – Expert panel*, NSWALC, Sydney, December, 2009.
- 11 For further information see *Fact sheet: Land dealings 15 – Valuation of LALC land*, NSWALC, Sydney, December 2009.
- 12 However, NSWALC may exempt a LALC wholly or partly from the requirement to prepare a plan if NSWALC is satisfied that, having regard to the limited operations of the LALC, compliance is not appropriate.
- 13 For further information see *Fact sheet: Land dealings 13 – Feasibility study and business plan*, NSWALC, Sydney,

Corruption prevention advice

ICAC corruption prevention officers provide corruption prevention advice on request to LALCs and other NSW public officials and public sector organisations, and may in some cases be able to provide advice to private citizens about corruption prevention practices that should be followed by public sector organisations. The advice is based on information provided and does not constitute a ruling or legal advice.

For corruption prevention advice:

Telephone the ICAC between 9 am and 5 pm on 02 8281 5999 (or toll free on 1800 463 909 for callers outside Sydney).



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