Entering into important agreements for Local Aboriginal Land Councils

Legal information for Local Aboriginal Land Councils

This fact sheet covers:

- common types of agreements LALCs may enter into
- steps you should take before entering into a contract
- the important parts of a contract
- changing or ending a contract
- disputes about contracts

Agreements, also called contracts, are part of everyday operations for organisations, including Local Aboriginal Land Councils (LALCs).

Understanding how agreements work and knowing what to look out for when you are entering into agreements will help protect your LALC from legal and financial risks.

Disclaimer

This fact sheet explains the key risks LALCs should consider when entering into agreements and provides some practical tips to follow to help your LALC minimise these risks.

This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, seek legal advice before deciding what to do.

Please refer to the full disclaimer that applies to this fact sheet.

Common types of agreements LALCs may enter into

Contracts are legally binding agreement. This means that the parties who enter into a contract have created a legal relationship and can seek a legal outcome if something goes wrong.

Contracts can be oral (spoken) or in writing.

Contracts are useful, because each party can be certain about what each other is required to do. This allows both parties to plan ahead, and avoids disagreements down the line about what is required from each party.

However, contracts can also be risky because they lock parties into obligations. You can get yourself into trouble by entering into contracts that you cannot perform.

A contract must meet the following **four requirements** to be considered a contract under law:

1.	There must be an **agreement**, either express or implied. This requires one party to make **an offer**, and that offer to be **accepted** by the other party.
2.	Each party must give something of value to the other, like a payment of money in exchange for goods or services (sometimes called **consideration**).
3.	There must be an **intention** to create legal relations, which means the parties wanted the agreement to be legally binding. This is distinct from early negotiations or discussions that are not binding, and
4.	There must be **certainty** around the key parts of the agreement. This means it must be clear who the parties to the contract are, what the contract is about, and what each party has to do.

If an agreement meets these four requirements, it will be **legally binding** on the parties to the contract and the parties will have rights and obligations under the contract.

'**Rights**' means things that a party is entitled to receive or do because of the contract. '**Obligations**' means things that a party is required to do because of the contract.

Example – rights and obligations

A LALC enters into a contract with Robertson Fire Services to perform quarterly inspections and maintenance of fire alarms at several residential properties owned by the LALC. In exchange, the LALC has agreed to pay a quarterly fee of $1,500.00.

In this contract:

- the LALC's rights are to have their residential property fire systems inspected and maintained, and their obligations are to pay the right amount of money on time
- Robertson Fire Service's rights are to receive the quarterly payment on time, and their obligations are to perform the fire inspection and maintenance to the agreed standard

There can be consequences if the parties don't do what they have said they will do (that is, perform the promises each party has made) under the contract. For instance – in the example above – if Robertson Fire Services do not perform the maintenance as agreed, they may become liable for damages that the LALC suffers as a result.

If any of these elements are absent, there is **not** a legally binding (enforceable) agreement.

Common types of written contracts that a LALC may enter into include leases, employment agreements and residential tenancy agreements.

Note

In some circumstances (even where the above elements exist), a contract or obligation may not be enforceable – for example, if:

- a pre-condition has not been met (for example, a job applicant fails a pre-employment medical
- it's the product of wrongdoing (for example, fraud)
- there has been a failure to comply with a formal requirement imposed by law
- one party lacks the ability to enter into a contract (for instance, because they are a child)
- the person seeking to enforce the contract is not a party to it, or
- the promise or agreement is illegal under law or against public policy

Sub-contracts

A sub-contract is a type of contract that is used where a party to a main contract (sometimes called the 'head' agreement) enters into a separate agreement with a third party to conduct some or all of the work required under the main contract.

Sub-contracts are common in development and construction projects, where a builder will enter into the main contract with a developer to construct a building and will then enter into a series of sub-contracts with various trades-people to perform each of the tasks required to construct the building

Deeds

A deed is a legally binding document.

A deed is different from a contract because it must be in writing, and it does not require each party to exchange something of value.

That means one party can give something away without receiving anything in return, which is not allowed in a contract. An example is where property is given as a gift. In this case, a deed of transfer of ownership would be used.

Agreements that are not legally binding

Some agreements may not be legally binding, even though they are in writing and look like a contract.

Where an agreement is not legally binding, there won't be any legal consequences if either party breaks the agreement. An example of a common type of written agreement that is not legally binding is a Memorandum of Understanding (**MOU**). An MOU is often used where the parties want to set out in writing how they will work together in an informal way.

Caution

If an agreement such as an MOU is not intended to be legally binding, this should be clearly stated in the document. The rest of the document also needs to be drafted carefully to make sure it won't be interpreted as a legally binding agreement. Simply labelling an agreement an MOU may not be enough to make sure it's not legally binding.

Other types of agreements LALCs may enter into

Aboriginal Land Agreements

The *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) allows the NSW Government and LALCs to enter into agreements to resolve land claims, reducing the need for costly and lengthy claim determinations. These agreements are called Aboriginal Land Agreements (**ALA**s).

ALAs can settle multiple land claims at the same time. They can also include financial payments and land swaps that may include transfers of unused Crown land (land in NSW owned and managed by the State Government) that has not yet been claimed.

Without limiting the types of things that can be dealt with in an ALA, an ALA may make provision for or about:

- financial considerations
- exchange, transfer, or lease of land
- conditions or restrictions on the use of any land to which the agreement relates
- joint access to and management of land
- undertakings by an Aboriginal Land Council or the Minister administering the *Crown Lands Management Act 2016* (NSW) about the lease, transfer, management or use of any land
- the duration of the agreement and the resolution of disputes
- the resolution of disputes under the agreement

Indigenous Land Use Agreements

Indigenous Land Use Agreements (**ILUA**s) are voluntary agreements between native title parties and other people or bodies about the use and management of areas of land and waters. While registered, ILUAs bind all native title holders to their terms. ILUAs also operate as a contract between the parties.

There are three types of ILUAs:

- **A body corporate agreement** is used if there is one or more registered native title bodies corporate for the entire agreement area. A body corporate agreement is the only type of ILUA that can be used where there are registered native title bodies corporate in relation to the whole area.
- **Area agreements** can be made if there is no registered native title body corporate for the entire agreement area. Where there are no registered native title bodies corporate or registered native title claimants for all or part of the area, any person who claims to hold native title in relation to that area or the representative Aboriginal or Torres Strait Island body must be a party to the area agreement.
- **Alternative procedure agreements** can be made by a representative Aboriginal or Torres Strait Islander body and any registered native title bodies corporate for the area.

A LALC would fall under the term 'representative Aboriginal or Torres Strait Islander body'.

No matter which form of ILUA is used, the relevant state, territory or Commonwealth government must be a party to the agreement that provides for the extinguishment and surrender of native title.

An ILUA must be registered for it to be enforceable between the parties, and an ILUA is not enforceable against anyone that is not a party to it.

For more information about Indigenous Land Use Agreements, see the National Native Title Tribunal's webpage on these agreements.

Steps you should take before entering into a contract

Remember – contracts are legally binding agreements, so you must always consider the financial and legal consequences of entering into a contract before you sign it.

There are four key steps to take before signing a contract:

Step 1.	Check who you are entering into the contract with. These are called the 'parties' to the contract
Step 2.	Check what approvals are required for both parties to enter into the contract
Step 3.	Check what the contract says and that you and the other party can meet the promises you are making in the contract
Step 4.	Check that the right people are signing the contract

Check who you are entering into the contract with

It's important to understand who you are entering into a contract with, so you can confirm the following critical details:

- you are dealing with the person that you think you are, and
- you are dealing with a person that can do what they are promising to do

The first step to learning more about who you are entering into a contract with is to identify what type of entity the other party is (for example, an individual, a government agency, a company, a trust, a partnership or a sole trader).

You can conduct free searches online to find basic information about the entity, or you may be able to find further information about a company's directors and shareholders through a paid online search called a company extract search (see below for further information).

Tip

If you know the name or the Australian Business Number (**ABN**) of the entity you are entering into a contract with, you can conduct a free search for further details on the Australian Business Register using the ABN Lookup website.

You can also find information on companies and businesses by conducting a free search using Australian Securities and Investment Commission's (**ASIC**) organisation or business name search.

Example

It's important to make sure that the name and the ABN of the entity you are contracting with is correctly identified in the contract.

For example, if the entity is a registered company, the name of the party in the contract will usually take the form 'XYZ Pty Ltd ABN xx xxxx xxxx'. If the entity is a sole trader, the name of the party will usually take the form 'John Smith ABN xx xxxx xxxx'.

Once you know what type of entity you are entering into a contract with, make enquiries about the other party's financial position. This might include asking for copies of their recent financial statements to find out whether there is any risk of them 'going broke' and not being able to make payments or perform work that they are promising to do under the contract.

Note – financial due diligence

The level of financial due diligence that will be required will depend on the size of the transaction and the risks involved if the other party breaches the contract.

For larger transactions such as property developments, LALCs may want to inspect the financials of the other party closely. It's common for the other party to ask you to sign a confidentiality agreement before financial details about their organisation are disclosed.

It's recommended that you get independent advice about any financial information provided to you where a large or high-risk transaction is involved.

In addition to finding out about the other party's financial position, also make enquiries about their reputation and whether they are reliable to work with. This might include asking the other party for commercial references, examples of previous similar projects or work completed and information about the relevant experience of key staff and directors or owners.

Tip

Consider asking the other party to provide commercial references (from customers or organisations they have previously provided similar goods or services to). Some small businesses and tradesmen may not want to provide full financial statements for small contracts, so often this is a good way to get further information.

Check what approvals are required for both parties to enter into the contract

Consider whether the contract requires prior approval of the LALC's board or membership or involves a dealing that requires the NSW Aboriginal Land Council's prior approval.

Note – requirements under the ALR Act

Under the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**), LALCs are required to obtain prior approval from the NSW Aboriginal Land Council for some land dealings:

- the ALR Act sets out criteria that must be met to allow a LALC to buy property, which can include the written approval of the NSW Aboriginal Land Council (Section 38)
- the ALR Act requires that a LALC must not deal with land vested in in except with the approval of the NSW Aboriginal Land Council in accordance with the Act (Section 42E)

The ALR Act also contains specific reporting, approval and risk assessment requirements in relation to arrangements such as forming, acquiring, managing or operating a corporation or other body, including community benefits schemes (Section 52C).

It's also important to check with the other party to find out what approval processes they need to go through on their end, and how long those processes might take. Always ask the person you are dealing with whether they have the authority to negotiate and enter into contracts on behalf of their organisation. If the other party is a company, you might ask to see a copy of the resolutions of the board of the company that authorises entry into the contract.

If the person you are dealing with does not have authority to negotiate and enter into contracts on behalf of their organisation, ask for details of the person who does have the relevant authority.

Tip

Find out what approval processes apply when you start to negotiate a contract, so that you can arrange for those approvals in time and avoid delays towards the end of the contracting process.

Check what the contract says and that you and the other party can meet the promises you are making

It's important to read the contract in full so you can make sure you understand the promises each party is making to the other (see below for further information to help you understand all the important parts of a contract).

The main promises made by parties under a contract are called 'obligations'.

Your obligations might include your LALC being required to perform services, provide goods, pay money or report to the other party within a certain time frame. Check your LALC's obligations under the contract to make sure that they accurately reflect your understanding of what you are agreeing to do, and that you are able to fulfil those obligations (ie. that you can do what you are promising to do).

It's important to make sure you are comfortable that you can meet your obligations under a contract because if you breach your obligations (ie. if you don't do what you are promising to do), there may be legal and financial consequences.

Also check the other party's obligations under the contract and consider whether they will be able to meet them (see above for further information on conducting financial due diligence and commercial reference checks on the other party).

Check that the right people are signing the contract

If the right people don't sign a contract, it may not be legally binding. Only certain people can sign a contract on behalf of your LALC, so you should make sure you know who those people are.

Who can sign for a LALC?

A LALC must execute or sign contracts according to its rules. Your LALC might be governed by the model rules, which are set out in Schedule 1 of the *Aboriginal Land Rights Regulation 2020* (**Model Rules**).

However, some LALCs may have had their own rules approved by the Registrar. If that is the case for your LALC, you will have to check your rules to understand who has authority to execute contracts for your LALC because it may not be the same as in the Model Rules.

Rule 18 of the Model Rules allows a LALC to execute documents by affixing its common seal if:

- the LALC's board has approved the affixing of the common seal, and
- the seal is attached in the presence of two board members, who also sign as witnesses

Who can sign for the other side?

It is also important to make sure that the person signing for the other side is allowed to sign, especially if they are signing on behalf of a company.

Tip – signing under 'section 127'

A contract might say that a company is signing under 'section 127 of the *Corporations Act 2001* (Cth)'. This is a common method for companies to sign contracts, because it allows the other parties to easily check whether the people that are signing have authority to sign on behalf of the company.

Section 127 allows a company to execute a contract using two signatures. Either two directors, or one director and one company secretary, must sign the document. You can perform an ASIC search of the company to find out who the directors and company secretaries are, to check whether the correct people are signing.

For important contracts like leases or other property contracts, it's common for individuals to provide evidence of their authority to sign on behalf their organisation. Consider whether it is appropriate to ask the person (or people) signing the contract on behalf of the other party to provide evidence of their authority to do so.

Note – other requirements

Some contracts and other legally binding agreements such as deeds may require witnesses to sign as well. Unless stated in the contract or required by law, there are generally no requirements around who can witness a contract, other than ensuring that the witness is:

- 18 years of age or over
- of sound mind and not under the influence of drugs or alcohol at the time
- not a party to the contract and does not have any financial interests in the contract, and
- has known the person they are witnessing sign the contract for at least one year or has taken steps to verify their identity (for example, by sighting their drivers licence or another form of photo identification)

Note – if you are unsure about the signing requirements, seek legal advice

The important parts of a contract

The table below explains some of the common, important parts in a contract. These parts are often referred to as the 'terms' or 'clauses' in a contract.

Clauses in contract	Explanation
Parties	It's important that the contract clearly names and identifies the correct parties to the contract.
Term (ie. duration of a contract)	It should be clear when the contract starts, and whether the start date is conditional on any particular event occurring. The duration of the contract should also be clear (ie. it should be clear when the contract ends). This may be on a particular date specified in the contract, or the contract might end if the services have been performed or the goods have been delivered.
Details of the purpose of the contract	The contract should clearly set out what it is about. Sometimes this part of the contract is labelled 'recitals' or 'background'. For example, a contract may set out the details of the relevant project for which the other party's services are being sought and outline any relevant important dates, tasks or budgets in relation to that project.
Obligations of other party	The contract should specifically state what the other party is required to do, including any: • time frames for completion of any work or payment of any funds • details about any work to be conducted (for example, a contract for property maintenance should specify what properties are to be maintained, the standard of work required, how many people are required to do the work, who will provide any equipment required, and how often the services are required to be performed), and • any reporting required about the progress or completion of work undertaken including how and when the reporting should be provided
Your organisation's obligations	Your organisation's obligations should be set out clearly in the contract and may include: • due dates and amounts of any payments due • details about the kind and standard of any work your organisation is required to do or goods you must supply, and • any reporting your organisation is required to submit to the other party including how and when the reporting should be provided
Funding and fees	The contract should set out any fees or funds to be paid by the parties, dates for payment and any conditions to be satisfied before money is paid (ie. on completion and satisfactory inspection of certain work).
Taxes	Consider whether there are any fees, duties or taxes payable under the contract or as a result of the type of transaction the contract relates to (for example, some transactions may attract stamp duty or GST charges). The contract should set out who is responsible for paying these costs. You may need to get specific advice from a tax agent, accountant or lawyer to ensure you are accounting for all applicable taxes and duties in the contract.

Non-completion of work	The contract should include a term which determines what will happen if the one party does not complete the work or a stage of the work, and sets out in what circumstances a party is able to withhold payments for non-completion of work.
Performance Management	The contract should include your organisation's rights to manage the other party's performance under the contract (for example, by giving you a right to complete inspections or receive progress reports for work undertaken).
Dispute resolution	This section of a contract will set out the process to follow if a dispute arises between the parties, including whether the parties must undertake alternative methods of dispute resolution (such as mediation) before taking legal action such as commencing legal proceedings in a court. See below for further information on dispute resolution.
Termination (ie. ending a contract)	This section or a contract will set out the rights of each party to terminate (end) the contract, any notice required to be provided to the other party and any obligations which survive termination of the contract. See below for further information on ending contracts.
Varying a contract	This section of a contract should set out how the parties can change or vary the contract. See below for further information on varying contracts.
Notice	The notice section will set out the notice periods, how notice must be provided (ie. in writing, by fax or email) and who notice must be provided to (ie. the CEO).
Confidentiality	Some contracts involve the parties sharing confidential information with each other. For this reason, you should agree on how each party (and their employees, volunteers and contractors) may deal with any confidential information and make sure the confidentiality section in the contract sets out this information correctly.
Intellectual property	Where a contract involves the creation of intellectual property (such as publications, training materials, logos, designs or artwork), the contract should include a section which sets out who owns the intellectual property created under the contract. It should also set out whether each party has a right to use the other party's intellectual property and if so, on what basis and for how long. For more information, see our intellectual property webpage.
Liability and indemnities	An indemnity is a promise to compensate another party for loss or damage that they suffer either directly or indirectly as a result of a circumstance. A party is liable if they are responsible for any loss or damage caused as result of a breach of the contract or due to a party's negligence. The contract should set out: • who is responsible for any loss or damage to either party, or any third (outside) parties, caused by any activity undertaken in the course of the contract • whether one party agrees to (wholly or partly) indemnify the other party for any loss or damage suffered either directly or indirectly as a result of the contract, and • any limitation on the amount or type of loss or damage a party is responsible for (commonly known as a 'limitation of liability' clause) Liability and indemnity clauses can be complex and can assign financial and legal risks to your organisation. Seek legal advice to make sure these clauses are drafted correctly and are in the best interests of your organisation.
Insurance	The contract should set out whether any insurance (for example, workers

	compensation insurance, public liability insurance, professional indemnity insurance etc.) is required and which party is required to take out and pay for the insurance. You may wish to ask for evidence that the other party has the required insurance (for example, a letter from their insurer or a 'certificate of currency').
Warranties	The contract may set out 'warranties' made by the parties. Warranties are essentially promises or assurances from one party to another under a contract. If a warranty made by a party is untrue at the time of entering into the contract (or later becomes untrue), then that party may be in breach of the contract.
Any employee obligations	If the contract involves hiring employees, the contract should specify who is responsible for the employment of the employees, and who pays the employees' legal entitlements (such as taxes, superannuation and workers compensation insurance).
Sub-contracting	If either party proposes (or is required) to use sub-contractors to complete the agreed work, the contract should specify any requirements that separate sub-contracts are to include (for example, if you want the other party to only use certain sub-contractors, this should be specified in the contract).
General provisions	Contracts often include some general provisions to assist with the operation and interpretation of the contract, including: • the laws and jurisdiction that apply to the contract (in most cases this should be your state in Australia) • whether the contract is the 'entire contract' or whether any other documents set out additional terms which form part of the contract • whether the parties can assign (give to someone else) or sub-contract their obligations • who bears the costs of any fees, taxes or duties payable under the contract or the project, and • which obligations, if any, will continue after termination of the contract

When can you change or end a contract?

Changing a contract

A contract may allow for it to be changed or varied after it has been entered into (this is sometimes called a 'contract variation').

The contract may specify how it can be varied. If it does, it's important that these procedures are followed, otherwise the contract variation may not be legally binding.

If the contract doesn't state whether it can be varied, generally you will need all parties to agree to the proposed changes. It is best practice for contract variations to be in writing and signed by each party so that there is a 'paper trail' that evidences the variation in case there is a disagreement in the future.

Caution

Be aware that it is possible to change a contract through your conduct (ie. by doing or saying something).

For example, if you continuously give the other party an extension to perform their work or pay money, you may be indicating that any future requests for an extension will be granted, despite what the contract says.

This risk can be addressed by including a provision in the contract which says that it can only be amended by agreement in writing between the parties.

A formal agreement known as a 'deed of variation' may be required to make changes to important contracts, or a new contract may be required where the changes are extensive, or it would be too complicated to make changes to the original contract.

Be aware that signing a new contract does not automatically mean that the old one is no longer legally binding. The new contract should specify that the parties have agreed that the terms in the old contract no longer apply. The new contract should also deal with any outstanding issues from the old contract (for example, what happens to any outstanding payments due under the old contract).

Sometimes people might try to vary the contract after expiry by inserting a new expiration date to try to keep it on foot. However, once a contract has expired, it can't then be varied. In these circumstances, a new contract is required.

Ending a contract

Contracts can be brought to an end, (or 'terminated') in a number of ways. These may include:

- where a set date (called a termination date) has passed, or where the amount of time the contract will go on for has passed
- where both parties have finished fulfilling their obligations under the contract
- where both parties agree that the contract should be terminated, or
- where one party chooses to terminate the contract early because the other party has failed to meet their obligations under the contract (this is known as termination for breach of contract)

A contract should always set out when and how it can be terminated. You may decide that there are other circumstances in which you should be able to terminate the contract. For example, both parties may agree that it is appropriate for either party to terminate the contract by giving reasonable notice, or to terminate for reasons of convenience. This information should be included in the contract.

A right to termination arises if the other party has breached the contract and:

- the contract itself provides for a right of termination for the breach in question, or
- the breach is sufficiently serious to justify termination

When seeking to terminate a contract due to a breach by the other party, it is important to consider how serious the breach is. Generally, only serious breaches result in the other party having the right to terminate the contract early.

Some contracts may require you to give the other party a notice if you think they have breached the contract, and give the other party time to fix the breach. Check whether your contract does that and, if so, how long you or the other party has to fix any breaches before the contract can be terminated. Consider whether the party is in a position to fix the breach.

Note – in most cases, termination of a contract does not absolve the parties from liability for any breach that occurred before termination.

Caution

Terminating (or telling the other party that you intend to terminate) the contract early when you have no right to do so can have serious consequences, including your LALC being legally required to compensate the other party for loss they suffer as a result of your actions.

Always read the termination clause in the contract and seek legal advice if necessary before deciding whether to terminate a contract early.

Contracts may set out the parties' obligations that continue to apply after the contract comes to an end. Examples of obligations that may survive termination include obligations that relate to the use of intellectual property and confidential information, the payment of any outstanding amounts and what happens if there is any unfinished work.

What should you do if there is a dispute about a contract?

Most contracts will set out the process that parties should follow if a dispute about the contract arises. This is often called a 'dispute resolution clause'.

Dispute resolution clauses may vary from contract to contract, and they can be quite specific in terms of the process and time frames that need to be followed by the parties to try to resolve the dispute. Dispute resolution clauses sometimes require the parties to meet and try to resolve the dispute (including by going through mediation or arbitration) before taking legal action or terminating the contract.

Make sure you are happy with process and time frames set out in the dispute resolution clause before you enter into a contract. You may decide that you need longer time frames or more steps to try to resolve the dispute before taking legal action or going to court.

If a dispute about a contract arises, make sure you:

- keep records (in writing) about the dispute and any discussions you have with the other party
- check what the contract says about dispute resolution and each party's rights to terminate the contract
- follow the dispute resolution process set out in the contract, and
- seek legal advice if required

More information

See our legal resources for LALCs webpage to find resources specifically targeted to LALCs.

Our website also has resources for not-for-profit community organisations on a range of related topics which may be useful to your LALC:

- Important agreements – This section includes resources on contracts, government funding agreements, IT agreements and leases.
- Who runs the organisation – This section covers governance and includes information on inducting new board members, governance standards for registered charities, financial difficulties and more.
- Managing risk and insurance –This section covers insurance, background checks, negligence, work healthy and safety, criminal conduct and more.
- Holding events – This section provides information on organising and holding events, including issues related to food handling, alcohol service, and sport and adventure activities.
- Managing people – This section covers the relationships your organisation will have with clients, employees, members and volunteers, including recruitment, resignations and disputes.

Justice Connect's LALC Service provides free legal information, training and advice to LALCs. To find out more visit our website or contact the LALC Service.

Relevant legislation:

- The *Aboriginal Land Rights Act 1983* (NSW) is the key piece of legislation that regulates LALCs.
- The *Aboriginal Land Rights Regulation 2020* (NSW) is another supporting piece of legislation that also regulates LALCs.