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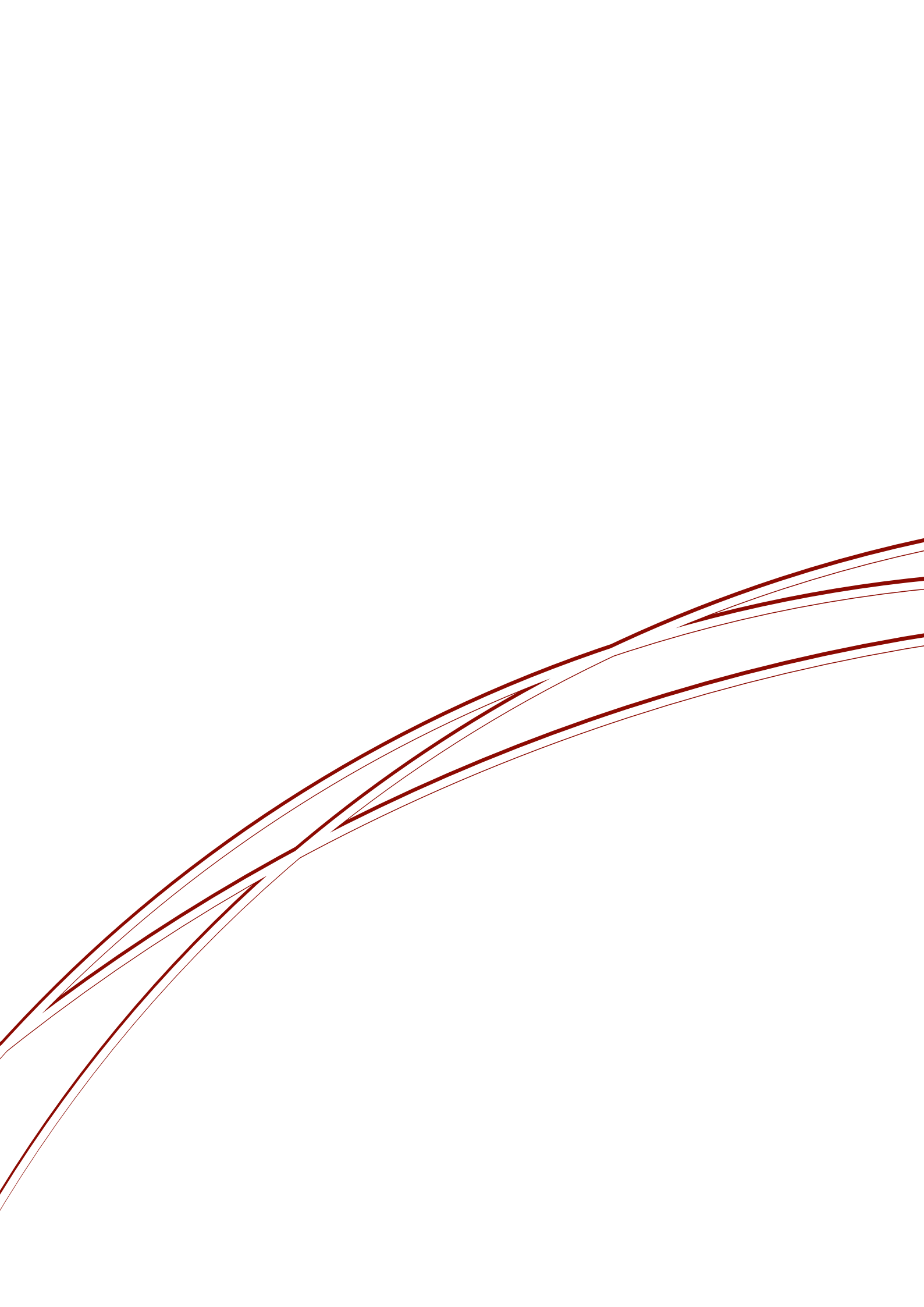
INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES



## GOVERNANCE AND REGULATION IN THE NSW ABORIGINAL LAND COUNCIL NETWORK

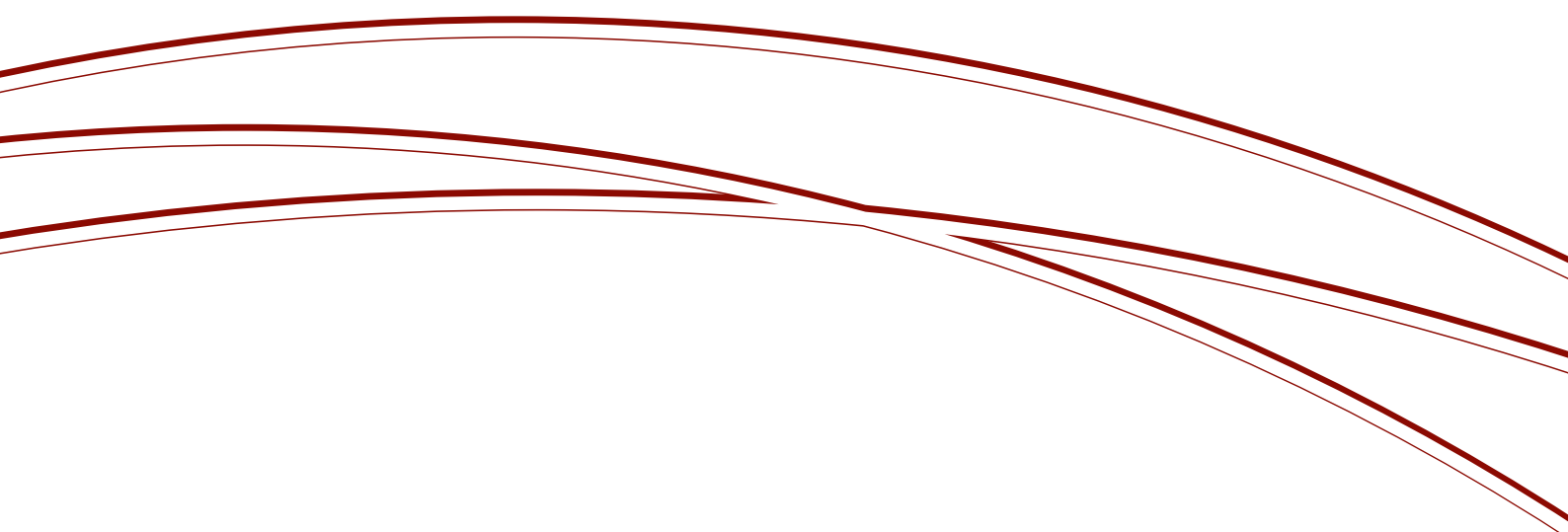
**MAY 2017**





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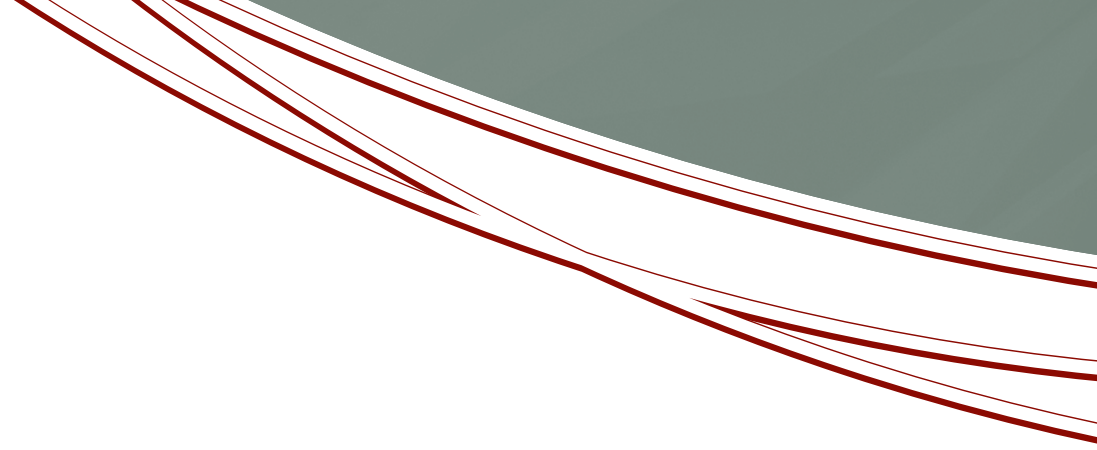
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## GOVERNANCE AND REGULATION IN THE NSW ABORIGINAL LAND COUNCIL NETWORK

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**MAY 2017**

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# Executive summary

The NSW Independent Commission Against Corruption (“the Commission”) has conducted a number of investigations into Local Aboriginal Land Councils (LALCs) in the last five years, three of which have involved public inquiries. Over that same period, the Commission has received more than 180 complaints about alleged corrupt conduct concerning Aboriginal affairs and services. These relate to issues such as the improper use or acquisition of funds or resources by people in positions of trust, unmanaged conflicts of interest, and partiality in the allocation of resources.<sup>1</sup> At the centre of these issues lies a number of governance challenges faced by LALCs in NSW.

This report examines those challenges and the factors contributing to them. It explores and suggests ways in which these challenges might be addressed to strengthen the accountability of LALCs and their leadership to “improve, protect and foster the best interests”<sup>2</sup> of their members. The report also explores ways in which the regulatory role of the Aboriginal land council network may be enhanced.

A number of the suggestions for strengthening arrangements included in this report impact on the governance and regulatory framework established under the *Aboriginal Land Rights Act 1983* (“the ALRA”). At the time of writing, the five-yearly statutory review of the ALRA had not commenced, but some of the issues discussed and suggestions made in this report may inform that review in the future.

<sup>1</sup> Data from Commission annual reports for the financial years from 2011–12 to 2015–16 (see appendix I). During the period from February 2012 to December 2016, the Commission received 152 complaints about the Aboriginal land council network, predominantly in relation to LALCs.

<sup>2</sup> Section 51 of the *Aboriginal Land Rights Act 1983*.

## Report overview

Chapter 1 sets out the research and consultation the Commission undertook in preparing this report. It also provides an introduction to the range of governance mechanisms that are in place to ensure LALC leaders are held accountable. Internally, the conduct of LALC board members is governed by codes of conduct. The LALC Community Land and Business Plan (CLBP) also establishes short- and long-term LALC goals. Externally, LALCs are overseen by a number of regulators, including the NSW Aboriginal Land Council (NSWALC) and the Office of the Registrar, *Aboriginal Land Rights Act 1983* (“the Registrar”<sup>3</sup>).

Chapter 2 examines the factors contributing to the challenges that members face in holding LALCs and their leadership accountable for their decision-making and provides a number of suggestions to address these challenges. Member participation rates at meetings in many LALCs are low, with some LALCs estimating participation rates of between 0 and 24%. Lack of participation affects members’ ability to receive important information about LALC activities and performance and their ability to provide feedback to the LALC leadership. Similarly, CLBPs are not always fulfilling their potential as an avenue for member participation and the monitoring of the decisions of the leadership. The chapter considers how greater member involvement in the development and ownership of internal LALC governance controls can be achieved.

Chapter 3 sets out the factors contributing to the challenges that LALC boards face in promoting good governance. While many board members understand their role in leading and scrutinising LALC activities,

<sup>3</sup> Denotes both the office and title holder in this report. In the case of references to the title holder, attempts have been made in this report to make the distinction clear.

the systemic incentives to do so can be strengthened. Managing conflicts of interest is also a challenge for LALCs and one that needs continuous review and improvement. This chapter considers ways that some LALCs have managed this challenge.

Chapter 3 also outlines ways in which LALC boards can build their capacity not only in governance but also in business activities. According to the ALRA, board members are popularly elected rather than selected under a merit-based appointment process. Their capacity to properly scrutinise and oversee the performance of the chief executive officer (CEO) can be a challenge for some LALCs, just as it is for all community organisations. Attempts have been made by NSWALC to improve the capacity of board members through mandatory governance training. However, there is growing recognition, including by NSWALC, of the limits of once-off training, and the need for further capacity building activities, such as customised supplementary training for LALCs coordinated at the zone-level (see figure 1, page 10).

Chapter 4 considers the way that structure, resources and other factors are limiting the effectiveness of the Registrar and NSWALC in overseeing LALCs and suggests ways to address these concerns. Currently, there is an overlap between regulators such as NSWALC and the Registrar; a situation that could benefit from better coordination and government resourcing. NSWALC also performs dual roles as a facilitator and regulator, and this can give rise to conflicting functions. But this is not unique to NSWALC. When these potentially conflicting functions are given to an organisation, they need to be carefully managed and separated.

A particular area of concern discussed in chapter 4 is the transfer of some financial risks from LALCs to NSWALC when a LALC is placed under administration. Given the limits of NSWALC's regulatory role and finite resources, this can make it particularly cautious in its regulatory behaviour.

Chapter 4 also considers ways in which the efficacy of the functions of the Registrar can be enhanced to ensure that any breaches of the ALRA are appropriately responded to, providing a greater incentive for LALCs to comply with the ALRA.

## Suggestions for improvement

The following suggestions for improvement are made in this report.

1. LALCs should consider motivators for stronger member engagement; for example, by:
  - demonstrating their ability to achieve benefits for members and their community
  - fostering community pride
  - taking steps to ensure all members can participate in the LALC
  - ensuring the LALC is properly run
  - promoting informal and formal opportunities for communication.
2. LALCs should strengthen member ownership of the CLBP by ensuring, for example, that the CLBP:
  - is developed through a truly participatory process
  - is realistic and based on a sound business case
  - contains clearly stated and measurable goals
  - is aligned with a LALC's operations
  - implementation process provides for the regular flow of information to members about its application.
3. LALCs should strengthen member ownership of their governance rules through measures such as:
  - developing their own rules and codes of conduct that have been adopted to meet their circumstances
  - developing their own constitution that supplements existing rules and their code of conduct
  - making their existing rules and codes of conduct more accessible to members.
4. LALCs should adopt local strategies that will enhance their ability to manage conflicts of interest, including:
  - taking steps to ensure board diversity
  - adopting local processes to improve transparency in decision-making
  - using different mechanisms to remind board members to be conscious of conflicts of interest and to manage them
  - delegating certain board decisions to an impartial decision-maker.
5. LALCs should enhance the confidence and capability of board members by:
  - using structured mechanisms, such as the risk-assessment process, to assist in the review of the CEO's performance

- having the CEO present financial and business information in a format that is readily understood
  - customising board training to the requirements of individual LALCs
  - using external providers and volunteers to supplement board members' skills
  - using established LALC information networks as a source of board advice
  - using LALC subcommittees to build specialist knowledge within a board
  - requiring LALCs to demonstrate capacity for economic development activities as a pre-requisite to taking on additional challenges
  - taking steps to ensure board continuity in order to retain corporate knowledge and skills
  - supplementing existing elected boards with skills-based appointments
  - undertaking succession planning to ensure future leadership capacity.
6. NSWALC and the Registrar should take steps to improve the coordination of their regulatory responses, including the establishment of a memorandum of understanding (MOU) for that purpose.
7. NSWALC should ensure there is a separation of its regulatory functions from other functions to ensure its competing goals are properly managed.
8. NSWALC should focus its economic development activities in areas where gaps have been identified in relation to the services and funding provided by other organisations.
9. The policy requirements developed by NSWALC for the transfer of non-land assets by LALCs to corporate entities should include:
- the demonstrated capacity of a LALC board to run both the LALC and its corporate entities
  - the establishment by the LALC of clear conflict of interest management protocols and policies
  - market-testing to demonstrate the value of the proposed arrangements to the LALC
  - the development of a business case by the LALC that includes an assessment of any possible risks arising from the establishment of a corporate entity and a consideration of alternative options to the proposed arrangements.
10. The NSW Government should review the funding available to the Registrar to ensure the Registrar has the capacity to undertake the full range of enforcement options available in relation to misconduct by board members and LALC staff.
11. The NSW Government should amend the ALRA to provide for an incorporation purpose test in relation to the creation of LALC entities that is overseen by NSWALC. The test should ensure that the purpose, cost effectiveness and efficiency of the entity is demonstrated.



# Chapter 1: Introduction

Section 3 of the *Aboriginal Land Rights Act 1983* (“the ALRA”) provides that the purposes of the ALRA are as follows:

- (a) to provide land rights for Aboriginal persons in New South Wales,
- (b) to provide for representative Aboriginal Land Councils in NSW,
- (c) to vest land in those Councils,
- (d) to provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils,
- (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.<sup>4</sup>

The ALRA established a network of Local Aboriginal Land Councils (LALCs) 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”.<sup>5</sup>

The establishment of LALCs under the ALRA resulted in the abolition of the Aboriginal Lands Trust (“the Trust”),<sup>6</sup> which, among other functions, had been the central body that held title to all Aboriginal reserves in NSW on behalf of, and for the benefit of, Aboriginal people. The Trust had also been responsible for houses located on the reserves. After the enactment of the ALRA, the property of the Trust was transferred to the minister for Aboriginal affairs (“the Minister”) pending its eventual transfer to LALCs established over areas that included and encompassed

the lands held by the trust.<sup>7</sup> Aboriginal communities were quick to apply for areas to be constituted as LALCs and, within six years of the ALRA’s enactment, 117 LALCs had been established.<sup>8</sup> There are now 120 LALCs in NSW.

The process for establishing a LALC is fairly straightforward. An application for the constitution of an area as a LALC may be made by any 10 or more adult Aboriginal people, each of whom resides within the area or has an association with the area. Members of LALCs do not have to establish that they are historically from that area. Applications must be made in writing, lodged with the Office of the Registrar of the ALRA (“the Registrar”), be supported with a map or description of the boundaries of the area, and include a proposed name.<sup>9</sup> The Registrar publishes applications in the NSW Government Gazette and also sends them to the NSW Aboriginal Land Council (NSWALC). The ALRA sets out the procedures and time periods in which objections to applications can be made and the measures taken to determine the outcome, which includes conciliation by NSWALC and referral to the NSW Land and Environment Court.<sup>10</sup> Once the boundaries of a LALC have been approved and an announcement is made in the NSW Government Gazette, a LALC can make a claim for Crown land.<sup>11</sup>

In terms of their activities, LALCs are extremely diverse organisations. They include cultural activities, social

<sup>4</sup> Section 3 of the ALRA.

<sup>5</sup> Section 51 of the ALRA.

<sup>6</sup> The Aboriginal Lands Trust was established by the *Aborigines (Amendment) Act 1973*.

<sup>7</sup> Aboriginal Lands Trust, “Administrative history”, NSW State Archives and Records. Accessed on 1 February 2017 at <https://www.records.nsw.gov.au/agency/1896>.

<sup>8</sup> NSW Aboriginal Land Council, *Annual Report 1988–89*, November 1989, p. 13. Accessed on 1 February 2017 at <http://www.alc.org.au/media/24378/NSWALC%20Annual%20Report%201988-1989.pdf>.

<sup>9</sup> Clause 7 of the Aboriginal Land Rights Regulation 2014.

<sup>10</sup> Clause 9 of the Aboriginal Land Rights Regulation 2014. Ten or more adult Aboriginal persons can object to applications for the constitution of an area as a LALC. The steps that objectors must take are similar to those taken by applicants.

<sup>11</sup> Section 36(1) of the ALRA provides for claimable land.



housing (provided as part of a community benefit scheme), projects funded by government grants and business enterprises.<sup>12</sup> According to the most recent data available, apart from assets associated with these activities, the land assets held by LALCs in NSW in 2012 was in excess of \$2 billion.<sup>13</sup>

LALCs also vary in size and income, with 38% having less than 100 voting members and 62% having more than 100 voting members.<sup>14</sup> Some LALCs are completely dependent on the small amount of annual funding they receive from NSWALC, while a small number generate multi-million dollar incomes from their business activities.

## Overview of current LALC governance arrangements

Governance refers to the framework of rules, relationships, systems and processes by which authority is exercised and controlled in organisations.<sup>15</sup> A range of these governance

mechanisms both within and outside NSW LALCs are in place to ensure they exercise their powers accountably.

Within a LALC, codes of conduct and strategic planning processes establish standards of acceptable and expected behaviour and provide information about the activities of the organisation.<sup>16</sup> This information can be used by members of the LALC to scrutinise and assess the performance of the board that has been elected by members to lead decision-making in the LALC. The LALC board is obligated to uphold the governance standards of the organisation and to review the performance of the LALC.<sup>17</sup>

LALC members also approve a Community Land and Business Plan (CLBP), which sets out the short- and long-term and goals and activities of the LALC.<sup>18</sup> The CLBP provides a way for members to participate in the planning of LALC activities and to measure the activities of the LALC against the original plan. In addition to supervising LALC staff, the chief executive officer (CEO) is responsible for managing the day-to-day affairs of the LALC to achieve the goals set out in the CLBP.<sup>19</sup>

Outside a LALC, external regulators are involved in systems to scrutinise the activities of LALC leadership. They use education and sanctions to ensure that there is compliance with the law.

NSWALC is a key external regulator of LALCs. It is a statutory corporation established under the ALRA to facilitate, oversee and coordinate the work of LALCs across the state. NSWALC received its foundation funding from a 7.5% levy of NSW land tax from 1984 to 1998.

<sup>12</sup> Economic activities by LALCs are categorised by Dr Janet Hunt as falling into four categories: cultural heritage management and natural resource/environment management work, tourism and related enterprises, residential and commercial land development, and partnering for social development. See Associate Professor J Hunt, Submission to the *Inquiry into Economic Development in Aboriginal Communities*, Standing Committee on State Development, Legislative Council NSW, October 2015. Accessed on 15 March 2017 at <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/35622/003%20Dr%20Janet%20Hunt.pdf>.

<sup>13</sup> This is the most recent figure available.

<sup>14</sup> NSWALC, *The Sustainability of the NSW Aboriginal Land Rights Network*, June 2012, p. 5.

<sup>15</sup> ASX Corporate Governance Council. Sourced from the Public Service Commission website. Accessed on 31 March 2017 at <https://www.psc.nsw.gov.au/workplace-culture---diversity/workplace-culture/behaving-ethically/behaving-ethically/section-3---ethics-good-practice/3-5-governance/introduction-to-governance/introduction-to-governance>

<sup>16</sup> Model code of conduct for LALCs, Schedule 1, Aboriginal Land Rights Regulation 2014. Accessed on 27 January 2017 at <http://www.legislation.nsw.gov.au/#/view/regulation/2014/553/schl>.

<sup>17</sup> Section 62 of the ALRA provides for the function of LALC boards.

<sup>18</sup> Section 82 of the ALRA.

<sup>19</sup> Section 78A of the ALRA.

These monies are held in trust and fund the work of NSWALC and LALCs. NSWALC has a board of nine councillors representing the nine NSWALC regions (see Figure 1).

A main way in which NSWALC regulates LALCs is via its risk-assessment system, which includes a series of governance and administrative checks, many of which concern the extent to which a LALC is meeting the requirements of the ALRA.<sup>21</sup>

The risk-assessment system was introduced in 2014 to categorise LALC operational risks into low, medium and high risks, with corresponding ratings assigned to each risk rank. The risk-assessment system also applies a multiplicative calculator to assess operational risks

based on the ratings.<sup>22</sup> A LALC's risk assessment is used to determine its eligibility for NSWALC funding and the frequency of its future assessments, funding payments and reporting frequency. The link between the risk assessment and funding serves as a lever to promote compliance with governance standards. However, the risk assessment also functions as an internal audit mechanism that can be used by the CEO and LALC board to assess the health of the LALC's governance.

NSWALC also provides one-off mandatory governance training to LALC board members; although, longer-term board members may undergo this training more than once. In addition, NSWALC assists LALCs to comply with the ALRA by providing guidance on the preparation and

**Figure 1: Map showing the nine NSWALC regions<sup>20</sup>**



<sup>20</sup> This map has been reproduced with the permission of the Office of the Registrar, *Aboriginal Land Rights Act 1983*.

<sup>21</sup> Functions of NSWALC are outlined in s 106 of the ALRA.

<sup>22</sup> NSWALC, *Annual Report 2013–2014*, October 2014, p. 37. Accessed on 15 March 2017 at <http://www.alc.org.au/media/93439/NSWALC%20Annual%20Report%202013-2014.pdf>.



implementation of CLBPs, keeping accounts, and preparing and submitting budgets and financial reports.

Another key external regulator of LALCs is the Registrar, an independent statutory office holder appointed by the Governor of NSW. The Registrar is directly funded by the NSW Government and oversees both LALCs and NSWALC by investigating complaints and breaches of the ALRA and the Aboriginal Land Rights Regulation 2014 (“the Regulation”), by referring disciplinary matters to the NSW Civil and Administrative Tribunal (NCAT) for prosecution and by pursuing disciplinary action against officeholders where necessary.<sup>23</sup>

Aboriginal Affairs NSW administers the ALRA at the direction of, and on behalf of, the Minister. Aboriginal Affairs works with NSWALC and the Registrar to ensure compliance with the Act and reviews the ALRA. The Minister has high-level oversight of LALCs, including over the appointment of investigators and administrators on the recommendation of NSWALC and the Registrar. The Minister also has authority to dissolve or amalgamate a LALC if such action is warranted.<sup>24</sup>

In addition to these external regulators, the LALC board members and CEO are public officials and, therefore, come within the NSW Independent Commission Against Corruption’s (“the Commission”) jurisdiction. NSWALC and LALCs are also public authorities for the purposes of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).<sup>25</sup> The NSW Ombudsman has a role to monitor and assess Aboriginal programs with a view to improving service delivery to Aboriginal communities and helping Aboriginal people resolve complaints.<sup>26</sup> NSWALC and LALCs are also public authorities for the purposes of the *Ombudsman Act 1974*<sup>27</sup> and the *Government Information (Public Access) Act 2009*.<sup>28</sup> As a statutory body, NSWALC is subject to the *Public Finance and Audit Act 1983* and is audited by the Audit Office of NSW.<sup>29</sup> LALC audits must be conducted in accordance with the relevant Australian standards.<sup>30</sup>

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<sup>23</sup> Section 165 of the ALRA lists the statutory functions of the Registrar.

<sup>24</sup> Section 87 and s 91 of the ALRA.

<sup>25</sup> Section 248 of the ALRA.

<sup>26</sup> Part 3B of the *Ombudsman Act 1974*.

<sup>27</sup> Section 248 of the ALRA.

<sup>28</sup> Section 248 of the ALRA. Although LALCs are not agencies for the purposes of s 6 of the *Government Information (Public Access) Act 2009*.

<sup>29</sup> Section 41A of the *Public Finance and Audit Act 1983*.

<sup>30</sup> NSWALC, *Local Aboriginal Land Council Financial Reporting Policy*, June 2015. Accessed on 15 March 2017 at <http://www.alc.org.au/media/99379/150626%20-%20%20nswalc%20alc%20financial%20reporting%20policy%20-%20gazetted.pdf>.

Figure 2 (page 13) summarises the structures and functions involved in the LALC regulatory framework.

## The role of the Commission

One of the functions of the Commission is to examine the laws, practices and procedures of public authorities and public officials, while also educating, advising and assisting public authorities and the community on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration can be promoted.<sup>31</sup>

In preparing this report, the Commission interviewed a variety of stakeholders and subject matter experts, to help develop a clear picture of the current operation of LALCs, and their views on the regulatory challenges and areas for improvement. The extent of the Commission’s consultation is detailed below.

Commission staff visited six LALCs, conducting in-depth group interviews with the leadership, including CEOs, staff and board members to discuss their experiences.

In addition, the Commission distributed an online survey to the leadership of each of the 120 LALCs (see appendix I). The survey was addressed to the CEO or chair of the board of each LALC, and only one survey response from each LALC was accepted by the Commission. Forty-two of the 120 LALCs participated in the survey, representing a 36% response rate.

The Commission met several times with NSWALC and conducted a group interview with all of the NSWALC zone directors to obtain a comprehensive understanding of the operation of LALCs, including their relationship with NSWALC. Additional interviews were held with some zone directors to discuss more specific issues. While the zones have the same mandate under the ALRA, as part of NSWALC, they explore different strategies to strengthen governance within their individual LALCs.<sup>32</sup>

The Commission spoke with the former Registrar.<sup>33</sup> As one of the key regulators of LALCs, the Registrar plays a mediation and compliance role with LALCs.

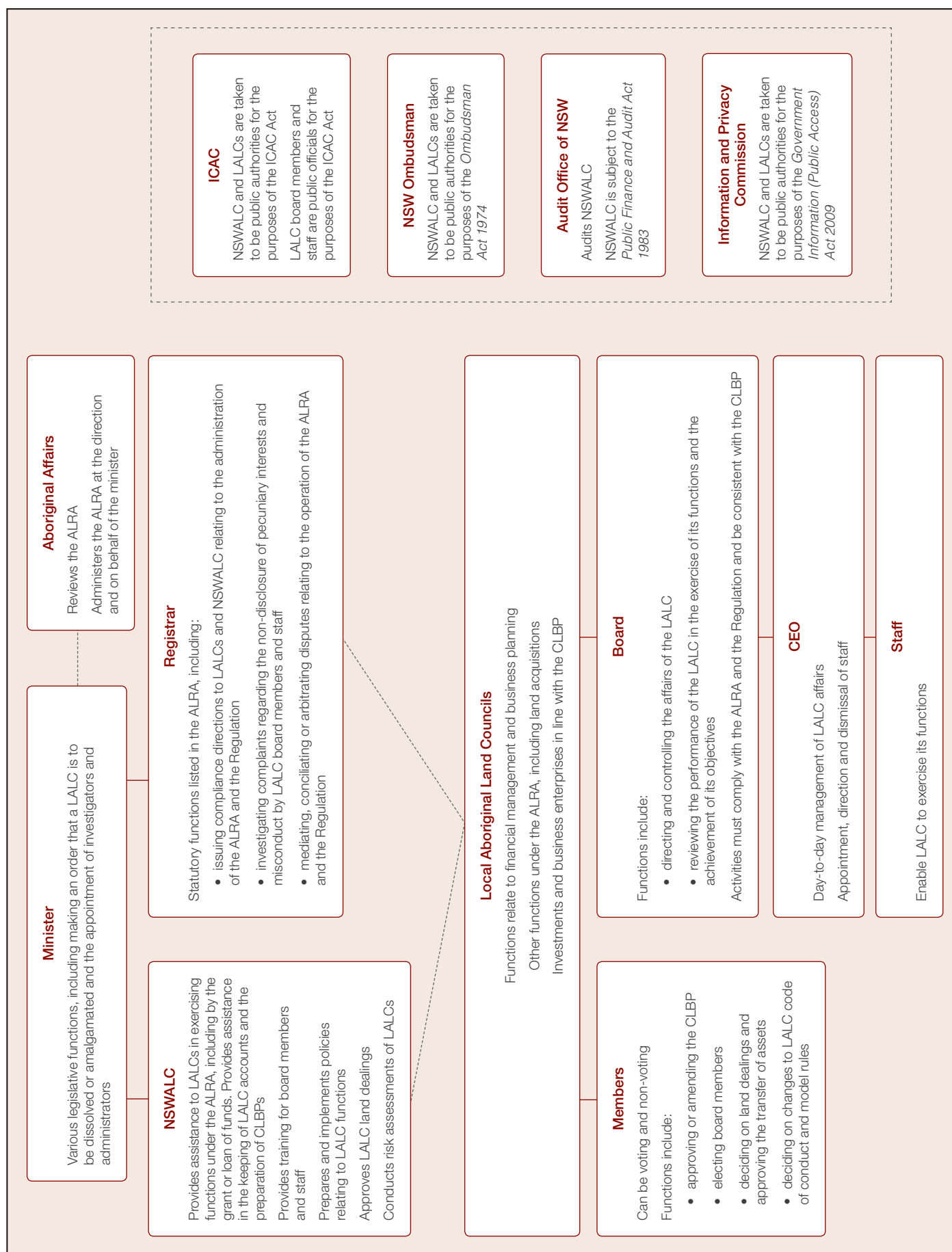
The Commission met with then Minister, the Hon Leslie Williams, and her staff. The Minister has various responsibilities and powers in administering the ALRA.

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<sup>31</sup> NSW Independent Commission Against Corruption (ICAC), *Annual Report 2015–16*, pp. 7 and 46.

<sup>32</sup> The network of LALCs is divided into nine regions called zones. Each zone has between nine and 21 LALCs.

<sup>33</sup> Stephen Wright resigned as Registrar on 31 January 2017, following several years in this position. The new Registrar, Ms Nicole Courtman, commenced in April 2017.

**Figure 2: LALC network governance framework**Adapted from NSWALC, *Mandatory Governance Training for Local Aboriginal Land Council Board Members*, 2015, p. 21.



The Commission met with staff from Aboriginal Affairs to discuss its role in promoting the economic wellbeing of Aboriginal communities. Aboriginal Affairs implements the NSW Government's plan for Aboriginal Affairs known as Opportunity, Choice, Healing, Responsibility and Empowerment (OCHRE).

The Commission met with the Hon Greg Pearce MLC, Chair of the NSW Legislative Council Standing Committee on State Development. The role of the Standing Committee on State Development was to explore economic development issues in LALCs.

The Commission met with Danny Lester, Deputy NSW Ombudsman (Aboriginal Programs), and staff. The NSW Ombudsman's office has an Aboriginal Unit responsible for reviewing whole-of-government service delivery.

The Commission met with Anthony Bevan, Registrar of Indigenous Corporations. As an independent statutory office holder, Mr Bevan is responsible for the administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* ("the CATSI Act"). Amendments to the ALRA made in 2014 require LALCs to establish, acquire or operate corporations under the CATSI Act or under the *Corporations Act 2001* ("the Corporations Act") if authorised by NSWALC policy.<sup>34</sup> However, amendments passed by the NSW Parliament in February 2017 restore the ability of LALCs to operate companies under the Corporations Act without the need for NSWALC authorisation.<sup>35</sup>

In addition to those listed above, the Commission met with staff from the following organisations.

#### **Australian Indigenous Governance Institute (AIGI)**

– AIGI has developed an online governance toolkit for Indigenous organisations. It includes information on decision-making, succession planning and identifying and managing conflicts of interest.

#### **Centre for Aboriginal Economic Policy Research at the Australian National University (CAEPR)**

– CAEPR has experience in researching Aboriginal economic development and governance in Australia, including LALCs in NSW.

**Indigenous Business Australia (IBA)** – IBA has worked with a number of LALCs focusing on profitable business opportunities.

**Indigenous Community Volunteers (ICV)** – ICV is a registered charity and non-profit community development organisation. It supports Indigenous communities in

their own initiatives with the aim of bringing long-term improvements to the health, wellbeing and self-sufficiency of the community.

**North West Lands Trust** – in 2014, the NSWALC transferred the titles of land and properties it held to the newly formed North West Lands Trust. The Trust allows 17 LALCs to be shareholders. Member LALCs vote for a board of directors, which is made up of five representatives from LALCs.

**NSW Fair Trading** – Fair Trading has a regulatory role with cooperatives and associations in NSW, including those providing services by, and for, Aboriginal people.

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<sup>34</sup> Section 52(5A) and s 52(5B) of the ALRA.

<sup>35</sup> The amendments commenced in April 2017.

## Chapter 2: How do members hold LALCs accountable?

Members of a LALC need to be able to hold the organisation and its leadership accountable for the outcomes and benefits that the LALC has been established to provide for them. To do this, members need to be actively engaged with the LALC. They need to be involved in the planning and monitoring of CLBPs. They also need to be involved in establishing LALC rules of operation and codes of conduct and be able to ensure that standards of behaviour are enforced.

This chapter explores the challenges LALC members experience with holding their leadership accountable and becoming engaged in the activities of their LALCs, and suggests ways in which those challenges can be addressed.

### Member engagement

When engaged in the activities of their LALC, members have active control over its decisions. They are also able to assess the performance of their LALC's leadership because they have greater visibility over the LALC's operations and key strategic decisions. Additionally, engagement allows members to exercise their decision-making rights in an informed way and have ownership of key decisions.

LALC members need to be provided with appropriate facilities and information to perform their roles properly. In particular, members require:

- ready access to information about what the LALC is doing
- communication from the LALC leadership that is open and honest
- the encouragement and facilitation of their participation in meetings.<sup>36</sup>

<sup>36</sup> This approach is consistent with the governance principles and recommendations by the ASX Corporate Governance Council, *ASX Corporate Governance Principles and Recommendations*, 2014, p. 25. Accessed on 25 January 2017 at <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>.

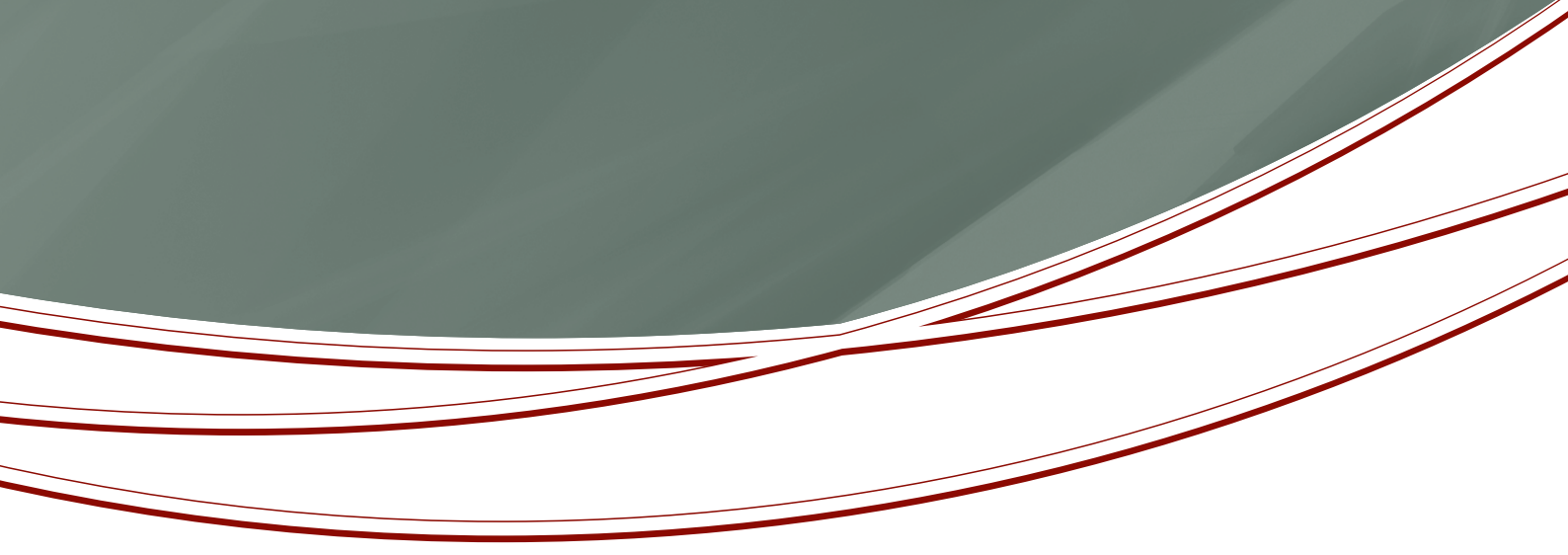
The main way members exercise involvement in their LALC is through their involvement in meetings. These are a key way for members to receive information about LALC operations and performance and through which they can provide feedback. Through participation in meetings, members are engaged in the decision-making of the LALC, primarily through the exercise of their right to be involved in the promotion and passing of resolutions. The ALRA gives LALC members responsibility for making decisions about:

- accepting people qualified for membership of the LALC
- approving amendment of LALC rules and codes of conduct
- approving amendment of the CLBP
- approving the transfer of assets
- approving dealings with land
- receipting LALC annual budget and financial statements
- electing board members
- suspending members from attending and voting at meetings
- approving requests to change the name of the LALC's area, requests to amalgamate or dissolve the LALC, or requests to relocate the LALC to another region.<sup>37</sup>

If members do not attend meetings, their ability to access the necessary information to inform these decisions and participate in making them is impaired.

Under the ALRA, there must be at least three ordinary member meetings (not more than four months apart) and

<sup>37</sup> Section 52G of the ALRA.



one annual general meeting per year.<sup>38</sup> These meetings must be advertised in a local newspaper or other means approved by the LALC. The ALRA requires a quorum of 10% of voters at meetings.

In practice, getting members to attend regular meetings is a particular challenge. While LALCs often have a large number of members, there is usually only a “core” group who attend meetings and, for many LALCs, it can be difficult to get a quorum. According to the majority (65%) of LALCs who responded to the Commission’s survey, 0–24% of members generally attend any members’ meeting, regardless of the topic. A further 24% of LALCs indicated that 25–49% of members attend their regular meetings.

During stakeholder consultation undertaken as part of the research for this report, LALCs informed the Commission that the active participation of members in meetings may be undermined by a number of factors. These include logistical challenges associated with getting to meetings, the effectiveness of their participation in the meeting process when they do attend, and the related problem that some members do not believe they are being communicated the right or sufficient information at meetings (for example, audit management letters and operating budgets).

## Motivators for stronger member engagement

LALCs informed the Commission during stakeholder consultation that membership engagement is driven by a number of motivators, including the delivery of real and long-lasting benefits to members and the community, cultivating community pride, the development of a whole-of-community purpose and perceptions that a LALC is properly run.

<sup>38</sup> Schedule 3, clause 1, of the ALRA.

The Commission’s consultation revealed that membership participation is highest in those LALCs that are able to demonstrate they achieve benefits for members and their community, such as:

- the provision of affordable housing
- sponsorship of sporting teams and other events
- scholarships for Aboriginal people (for example, academic or sporting scholarships)
- employment opportunities
- cultural and heritage protection
- land development opportunities that generate income for current and future LALC members and build skills and experience.

**“...seeing outcomes is when communities will engage and have belonging and ownership [of] outcomes.”**

Comment by LALC survey respondent

Community pride is another motivator that influences member engagement. One LALC described this motivator in its survey response as the desire to be part of something that represents them. Some LALCs told the Commission of ways in which they promote community pride. A strong focus on skill development was seen as a key strategy.

One LALC said it develops the leadership skills of their young members through participation in school holiday programs in partnership with non-Indigenous corporations. The LALC also develops the skills base of its young members through organising participation in sporting events such as a girls’ sports-based development program

and a midnight basketball competition with a life skills educational component. The LALC also offers driving lessons in partnership with a local driving school. Additional skills for members are also developed through the establishment of a working farm that focuses on providing study and employment opportunities for local Aboriginal people. Importantly, the LALC leadership and staff take active steps to make themselves available to members by acting as a first place of contact for all Aboriginal issues and Aboriginal people coming into the area.

Membership engagement is also developed through LALCs offering something for all members, not just a particular demographic or age group. This involves taking steps to ensure that the whole of the community is involved in a LALC; for example, by considering the age of members and possible barriers to their participation in a LALC, such as the time and location of meetings and other planned opportunities for communication.

A number of LALCs have taken active steps to enhance the participation of all sections of the community. These include offering school-based traineeships aimed at connecting young people to the LALC. Another LALC encourages young people to join in by including a social element in meetings, which provides an opportunity to catch up with family and friends.

Some LALCs also advised the Commission that members are attracted to LALCs that are perceived to be run properly. This involves dealing with wrongdoing in a consistent and fair manner that is transparent. The members of one LALC board felt that the strong governance processes led by their CEO contributed to member confidence in the organisation. They referred particularly to the transparent way in which the CEO dealt with theft of cash from the LALC's office a few years ago. They felt that this demonstrated to the membership that the law is, and has to be, followed by the LALC and this contributed to members' trust in the organisation.

## **Fostering member engagement through formal and informal opportunities for communication**

To be engaged in a LALC, members need to be able to access both formal and informal opportunities for communication. Member meetings provide the main formal opportunity for communication between a LALC's leadership and its members and a mechanism for members to be heard on key issues and to make decisions. Several LALCs expressed the view that in well-run meetings the chairperson observes meeting procedures and the rules of debate, meeting agendas are provided, and members are given adequate notice of the time and place.

Some LALCs surveyed by the Commission highlighted that in well-run meetings participants showed respect for each other, and appreciated that a purpose of meetings is to establish two-way communications between both members and the LALC's leadership. One LALC stressed to the Commission the need for positive, respectful communication between the leadership and the membership for any member who has a question or needs support.

Respectful communication should also extend to member interactions at meetings. One person suggested members could participate in developing a code of meeting practice to provide, for example, that people who want to speak have equal and respectful opportunity to do so. Developing such a code would be a way for members to demonstrate their shared commitment to ensuring that disagreements at meetings do not escalate into a level of conflict, damaging the opportunity for meaningful decisions to be made.

The effectiveness of meetings is also enhanced if the right information is clearly communicated to members to assist them to make well thought-out decisions. This works best if information is presented in ways which are objective, readily understood and placed somewhere that is accessible. Some LALCs use newsletters and video presentations to convey information. One LALC has successfully used Google Earth with some add-ons to display land holdings to members in a way that is clear and easily understood.

Some LALCs also stressed the importance of adopting an inclusive and imaginative approach to member communication. Sometimes the use of flyers, face-to-face canvassing, Facebook and emails are not enough to encourage members to come to meetings. Some LALC CEOs told the Commission that they addressed this problem by providing members with incentives to come to important meetings, such as raffles, lucky-door prizes and refreshments.

Informal or ad hoc opportunities for communication also provide an important opportunity for members to be informed of their LALC's activities. Some practical approaches to improving informal opportunities for member engagement include making the LALC office available as a social centre. This encourages members to visit and see if anything is happening and information about forthcoming events and opportunities can be passed on. Other LALCs combine formal and informal opportunities for member participation; for example, by following meetings with a social event.

## Member ownership of the CLBP

Another mechanism through which members are able to hold LALCs accountable is through involvement in the content and monitoring of CLBPs. This involvement gives members a sense of ownership of the CLBP. Strategic plans such as the CLBP are also important to the accountability of organisations because they provide a document that allows members to measure the performance of the LALC and its leadership, and there is potential for the CLBP to be used more fully in LALCs to promote member participation and monitoring of LALC leadership decisions.

Since 2006, it has been mandatory for all LALCs to prepare and implement a CLBP unless the LALC has been granted an exemption by NSWALC.<sup>39</sup> CLBPs are a mechanism by which members can monitor the actions and performance of the LALC. The main purpose of the CLBP is:

*...to describe the aims of the Land Council and to develop strategies by which these can be achieved ... give the Land Council Board and staff a clear understanding of members' expectations and set clear benchmarks to be met over the period of the plan.<sup>40</sup>*

The ALRA requires that the CLBP be approved by a vote at a special meeting of the LALC members.<sup>41</sup> Also, NSWALC may consider consistency with a CLBP when approving a LALC land dealing.<sup>42</sup> A LALC must, within nine months after the holding of an election of board members for the council, approve or amend the CLBP for the council that was in force immediately before the election.<sup>43</sup> CLBPs must reflect a period not exceeding five years.

The CLBP can assist members to hold LALCs to account for activities by providing something concrete against which to measure performance. When well-developed and implemented, the CLBP gives LALCs a framework to plan and monitor what they want to achieve over the following five years and what can realistically be accomplished. Boards, staff and members all have a role in reviewing the progress of the goals in the plan and, if warranted because of changing circumstances or needs, are able to amend the plan at a members' meeting.

<sup>39</sup> Under s 82(5) of the *Aboriginal Land Rights Amendment Act 2006*, NSWALC can exempt a LALC from having a CLBP if it "is satisfied that, having regard to the limited operations of the Local Aboriginal Land Council, compliance is not appropriate".

<sup>40</sup> NSWALC, *Preparing a Community Land and Business Plan – Guide for Local Aboriginal Land Councils*, 2006, p. 3.

<sup>41</sup> Section 84 of the ALRA.

<sup>42</sup> Section 42G(3)(a) of the ALRA.

<sup>43</sup> Section 82(1A) of the ALRA.

Members' involvement in the development and monitoring of the CLBP was seen by LALCs as integral to its successful implementation provided that the CLBP was realistic and reflected the wishes of the whole community.

NSWALC has advised the Commission that some LALCs do not have a current, approved CLBP. Feedback provided to the Commission by LALCs also suggests there are sometimes a number of problems with how the CLBP is developed and implemented, thereby undermining the role of the CLBP as an accountability mechanism.

Some LALCs commented that CLBPs are overly ambitious and consequently more likely to fail. A CLBP may be unrealistic for a number of reasons, including a lack of available skills and resources to assist in its development and implementation. Alternatively, some CLBPs are not ambitious enough. In both scenarios, members are at risk of becoming disillusioned with the CLBP and consequently becoming disengaged from their LALC.

**"I feel that the process around development of the CLBP [Community Land and Business Plan] is lost on much of the community, either through unreal expectations, [or] a lack of understanding of business processes and principles and market economics."**

Comment by LALC survey respondent

LALCs also observed that some CLBPs do not deliver or reflect what the community wants. This may occur, for example, when CLBPs are developed by external consultants who do not fully engage with communities. Where this has occurred in the past, LALCs told the Commission that some CLBPs were not properly implemented or truly owned by the local community.

NSWALC has also identified that poor information flow between LALCs and their members about the purpose of the CLBP and the progress of its implementation is also a problem. To help address this issue, NSWALC has been running workshops for LALCs on the CLBP to clarify the development process and purpose of the plan.

In some cases, the CLBP has not cascaded into goals and actions for the board or into transparent measures of board performance that is fed back to the membership. This can occur when a CLBP lacks clear and measurable outcomes.



## Strengthening member ownership of the CLBP

It is important that LALCs develop CLBPs that engage members and provide measurable outcomes. A main way of strengthening member ownership of CLBPs is by ensuring that they are developed through a truly participatory process. This means making sure that consultation is wide-ranging. The CLBP should then reflect the views of those involved in the consultation process.

According to the LALCs that responded to the Commission's survey, the most common way of engaging communities to participate in the CLBP was community consultation workshops – 73% of LALCs that responded to the survey did this. Thirteen per cent of LALCs said they run surveys among members to gauge their views on the future of the LALC, whether or not they participate in the meetings and discussions. One LALC indicated that they recently reviewed and signed off on their CLBP using a process that involved three to four consultation meetings with the broader community, which extended to Aboriginal people who were not members of the LALC as well as non-Aboriginal community members.

The LALC also held two members' meetings to finalise and agree on the CLBP. Only around 25 members participated directly in meetings about the CLBP, but many more provided feedback through a survey run by the LALC leadership. Another LALC developed its CLBP by surveying the whole community on how the LALC can help the wider Aboriginal community. The LALC also conducted workshops with members that involved reading out proposals and the CEO consciously reinforcing to the community that it was their plan and not that of the CEO.

A truly participatory process to develop a CLBP involves recognising upfront that adequate time will be needed to undertake consultation. Some LALCs advised the Commission that developing a successful CLBP took at least six months; this is not an unreasonable time given the considerable amount of consultation required to develop a CLBP and the important role it plays in shaping the future of the LALC.

Another important way of ensuring that a CLBP is realistic and based on a sound business case is ensuring the plan is well researched. One LALC has an Economic Development Unit, consisting of board members and staff, which assesses options for economic development enterprises and presents proposals to members at meetings. Members and the leadership make suggestions to the unit, and the unit reviews the merit of the suggestions with the help of experts such as NSWALC economic development staff (who are engaged as advisers as opposed to substantive decision-makers). The unit then develops realistic and well-researched plans that can be presented to members for approval.

The inclusion of clearly stated and measurable goals in the CLBP will also help promote its role as an accountability tool. If there is uncertainty around what a CLBP is attempting to deliver or there are problems with measuring delivery because of a poorly drafted plan, members will become disengaged. This view is reflected in one of the Indigenous Investment Principles developed by Indigenous Business Australia, that for asset and investment performance to be measured and reported to the community it must be based on clearly defined standards and expectations.<sup>44</sup>

The role of the CLBP as an accountability mechanism is enhanced if it is aligned with a LALC's operations. A difficult governance issue arises when a CLBP outlines strategies that are not reflected in a LALC's operations. In order for members to understand whether or not their CLBP is aligned with their LALC's operations, there needs to be transparency around how a CLBP is implemented or otherwise translated in the operational running of the LALC. One LALC informed the Commission that it connects everything it does to the CLBP. The CLBP cascades down into an operational plan for each staff member within the LALC.

A number of LALCs fully integrate the CLBP into the operations of their LALC. For example, one LALC told the Commission that its board regularly considers the LALC's progress on achieving the goals set out in the CLBP and uses a template form provided by NSWALC to ensure this is done comprehensively. The board then informs members of the progress at meetings.

**“[The] CLBP should be ongoing, to be updated as required, not every four years.”**

Comment by LALC survey respondent

The role of the CLBP as an accountability mechanism is also enhanced when there is regular flow of information to members about the implementation of the CLBP. One LALC observed that it needs to constantly communicate to members what it is doing and explain how its activities will benefit the community and how these activities relate to the CLBP.<sup>45</sup> Some LALCs have adopted specific approaches

<sup>44</sup> Indigenous Business Australia, *Indigenous Investment Principles*, 2015, p. 27. Accessed on 13 April 2017 at [http://www.iba.gov.au/wp-content/uploads/IB7158\\_IPP-brochure\\_FA4.pdf](http://www.iba.gov.au/wp-content/uploads/IB7158_IPP-brochure_FA4.pdf).

<sup>45</sup> The Office of the Registrar of Indigenous Corporations recognises that the ongoing process of monitoring the performance of a corporation against its objectives and business strategy is imperative for good corporate governance. See Office of the Registrar of Indigenous Corporations, *Analysing key characteristics in Indigenous corporate failure – research paper*, March 2010, p. 71. Accessed on 17 March 2017 at [http://www.oric.gov.au/sites/default/files/documents/06\\_2013/Analysing-key-characteristics-in-Indigenous-corporate%20failure\\_v-2-2.pdf](http://www.oric.gov.au/sites/default/files/documents/06_2013/Analysing-key-characteristics-in-Indigenous-corporate%20failure_v-2-2.pdf).

to guarantee the regular flow of information about the implementation of the CLBP to their membership. These include maintaining constant communication about the progress of the CLBP through frequent member meetings (nine per year), newsletters (every quarter), the annual report, and personal interactions.

## The effectiveness of LALC governance rules

Members can hold the LALC leadership to account through the establishment of rules and codes of conduct that set standards of behaviour for board members and staff. Documents such as codes of conduct have the potential to set clear standards of behaviour for the LALC leadership, helping to make them answerable for their conduct.

Under the ALRA, LALCs are required to adopt rules of operation. The ALRA prescribes model rules for LALCs, which are set out in schedule 1 of the Regulation. These rules relate to matters such as calling meetings, voting, taking minutes, financial management and the duties of the CEO and chairperson. The model rules also include procedures for the suspension of members (other than board members) from LALC meetings for a period of time.<sup>46</sup> LALCs can develop their own rules, which are required to be submitted and approved by the Registrar.

Under the ALRA, LALCs are also required to adopt codes of conduct. The ALRA prescribes a LALC model code of conduct, which is set out in schedule 3 of the Regulation. A LALC can also prepare its own codes of conduct that must be submitted to, and approved by, the Registrar. Disciplinary proceedings against board members and staff can be initiated by complaints or allegations made to the Registrar by a member.<sup>47</sup> Grounds for disciplinary action include one or more incidents of misconduct, which can involve a contravention of an applicable code of conduct.<sup>48</sup> The ALRA also provides that a LALC code of conduct may declare that a breach of a specified provision allows a LALC to remove a board member by majority vote.<sup>49</sup>

The effectiveness of LALC rules and codes of conduct as an accountability mechanism may be undermined in a number of ways. The current model rules and model code of conduct are somewhat limited in their scope. For example, the model code of conduct establishes general standards of behaviour for board members<sup>50</sup> and does

not include LALC staff such as the CEO.<sup>51</sup> Comparable organisations to LALCs, such as corporate native title bodies,<sup>52</sup> incorporated associations under the *Associations Incorporation Act 2009* and Aboriginal and Torres Strait Islander corporations established under the CATSI Act cover a slightly broader range of matters for office holders in their prescribed standards. Furthermore, there is no example of a code of conduct, approved by the Registrar, that has contained a dismissal provision.

Many LALCs told the Commission that they did not have a sense of ownership of their governance standards. They have adopted the prescribed rules and codes of conduct rather than developing standards that meet their needs. As a result, the rules and codes of conduct may not be seen as relevant or useful to members. In his 2016 testimony during the Commission's Operation Greer public inquiry, the then Registrar, Stephen Wright, stated that very few LALCs have actually developed and submitted their own list of rules or codes of conduct for approval. Mr Wright indicated that there is "much scope for further conversations about crafting rules to suit individual needs" and that "one would hope" that this would improve the conduct of LALC officers.<sup>53</sup> Part of the benefit of developing their own standards, as emphasised by Mr Wright in his evidence, is undertaking the process of considering the issues covered by a code of conduct and applying it to the local situation.

Some LALC members also lack information about how to access and use a LALC's code of conduct. As a result, members do not have visibility of the code and so its usefulness as an accountability tool is thereby limited.

There may be a general unwillingness by LALC members to invoke the sanctions available to them under the ALRA to suspend other members from attending or voting at meetings of the LALC.<sup>54</sup> Section 57 of the ALRA provides that members (other than board members) can be suspended from attending LALC meetings if a LALC decides that the conduct of the member is detrimental to the best interests of the LALC or constitutes a serious breach of the LALC's code of conduct for members.<sup>55</sup> Members may be hesitant to pursue this sanction because

<sup>46</sup> See also s 57 of the ALRA.

<sup>47</sup> Section 181D of the ALRA.

<sup>48</sup> Section 181B and s 181A of the ALRA.

<sup>49</sup> Section 177 of the ALRA.

<sup>50</sup> The model code of conduct applies to "officers". Section 4 of the ALRA defines an officer as a board member of the LALC.

<sup>51</sup> Contractual arrangements between the CEO (or other staff) and the LALC, however, could impose compliance with the model code of conduct.

<sup>52</sup> Under the *Native Title Act 1983* (Commonwealth), native title bodies corporate are established for each native title determination.

<sup>53</sup> ICAC, Operation Greer transcript, May 2016, p. 970T. Accessed on 16 March 2017 at <http://www.icac.nsw.gov.au/docman/transcripts/greer/4814-24-05-2016-operation-greer-transcript-pp-00959-00994-from-2-10pm-to-3-59pm/file>.

<sup>54</sup> See s 52G and s 57 of the ALRA.

<sup>55</sup> Section 57 of the ALRA. Note that the model code of conduct does not include provisions relating to members.

it would almost inevitably have an impact on relationships in the wider community.

While this is a contentious issue, failing to take action against members that are persistently disruptive has an adverse and often long-term impact. Current members can become disheartened and feel that it is too difficult to effect positive change in a disruptive environment. Potential members may be discouraged from joining if they see the LALC as dysfunctional, even though it may only be the actions of a few members that damage a LALC's reputation and viability as a leader in the community. A disruptive atmosphere may also result in staff and board members leaving, which can have a direct impact on a LALC's ability to keep a consistent and clear focus on being accountable and transparent in decision-making, record-keeping and communication.

## Strengthening the effectiveness of LALC governance rules

Members should consider strengthening their ownership of governance rules by developing and submitting to the Registrar for approval their own rules and codes of conduct that have been adapted to meet their circumstances. Alternatively, LALCs should consider developing their own governance rules via a constitution that supplements the model rules and model code of conduct.

The Indigenous Governance Toolkit promotes self-developed governance rules as a way of building cultural legitimacy into governance.<sup>56</sup> The toolkit recommends "road-testing" rules with members and providing enough flexibility in the rules to allow them to be refined over time.

In other jurisdictions, entities similar to LALCs are afforded considerable freedom in developing their governance rules. In NSW, while the *Associations Incorporation Act 2009* sets out a bare minimum of governance rules, associations are given considerable freedom in developing their own rules, requiring a wide range of issues to be covered in the constitution, as agreed upon by members. These issues include procedures for the functions and processes of management committees, procedures for the resolution of disputes between members and procedures for the inspection of books and documents by members.<sup>57</sup>

The legitimacy of governance rules will also be improved if they are sufficiently detailed to hold the LALC leadership

to account. Ideally, governance rules should set out their objectives, expected standards of behaviour for boards and staff, and how they will be accountable to members. The few LALCs that have developed their own codes of conduct have tended to produce documents that are similar to the model code of conduct but with more detail.

In order to be effective, governance rules must also be accessible to all LALC members. One LALC indicated that it has a one-page version of its code of conduct taped to the wall next to the table where the board meets to remind everyone of the expectation that their conduct at the meeting is of a high standard. This short-form version also has information about where to find additional detail about the rules.

## Conclusion – suggestions for improvement

There is potential to strengthen members' ability to hold the leadership of LALCs accountable.

LALCs should consider motivators for stronger member engagement; for example, by:

- demonstrating their ability to achieve benefits for members and their community
- fostering community pride
- taking steps to ensure all members can participate in the LALC
- ensuring the LALC is properly run
- promoting informal and formal opportunities for communication.

LALCs should strengthen member ownership of the CLBP by ensuring, for example, that the CLBP:

- is developed through a truly participatory process
- is realistic and based on a sound business case
- contains clearly stated and measurable goals
- is aligned with a LALC's operations
- implementation process provides for the regular flow of information to members about its application.

LALCs should strengthen member ownership of their governance rules through measures such as:

- developing their own rules and codes of conduct that have been adopted to meet their circumstances

<sup>56</sup> Australian Indigenous Governance Institute, Indigenous Governance Toolkit, s 6.2.1. Accessed on 16 March 2017 at <http://toolkit.aigi.com.au/toolkit/6-2-where-does-culture-fit-in-your-governance-rules>.

<sup>57</sup> NSW Fair Trading, "About the constitution". Accessed on 8 February 2017 at [http://www.fairtrading.nsw.gov.au/ftw/Cooperatives\\_and\\_associations/Incorporating\\_an\\_association/About\\_the\\_constitution.page](http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Incorporating_an_association/About_the_constitution.page).

- developing their own constitution that supplements existing rules and their code of conduct
- making their existing rules and codes of conduct more accessible to members.

## Chapter 3: The role of boards in promoting good governance in LALCs

This chapter examines the challenge that exists for some LALC boards in performing their role impartially and holding the CEO to account. Where there are opportunities for improvement, examples are given of ways that LALCs are successfully addressing these challenges.

Under the ALRA, the main function of the board is to “direct and control the affairs” of the LALC.<sup>58</sup> Boards are responsible for reviewing the performance of LALC functions and the achievement of their objectives. They appoint and supervise the CEO, who is responsible for the daily administration of the LALC.<sup>59</sup> For good governance, board members need to have a clear understanding of their role in leading and scrutinising the activities of the LALC and overseeing the performance of the CEO.

LALC boards operate in a similar way to the boards of publicly listed companies and incorporated associations. For example, in the same way boards of corporations oversee the strategic direction and operations of an organisation (as opposed to being focused on operational detail), the matters LALC boards consider at their meetings are usually confined to matters of strategic significance.<sup>60</sup>

<sup>58</sup> Section 62(1)(a) of the ALRA.

<sup>59</sup> Section 78A of the ALRA.

<sup>60</sup> For example, the Australian Institute of Company Directors describes the key functions of a board as determining the vision and purpose of the organisation, setting the strategic organisational objectives, working with management to develop a set of plans that align with the organisation’s vision, purpose and strategic objectives, supporting management in its implementation of the plans, and monitoring and evaluating the degree of success against these plans and objectives. Australian Institute of Company Directors, *Good Governance Principles and Guidance for Not-For-Profit Organisations*, 2013, p. 23. Accessed on 8 February 2017 at <http://www.companydirectors.com.au/~media/cd2/resources/director-resources/nfp/pdf/nfp-principles-and-guidance-131015.ashx>.

### The enforcement of existing duties

LALC board members have a number of clearly articulated statutory duties. Board members have a duty to:

- act honestly and exercise a reasonable degree of care and diligence in carrying out their functions under the ALRA or any other Act
- act for a proper purpose in carrying out their functions under the ALRA or any other Act
- not use their office or position for personal advantage
- not use their office or position to the detriment of a LALC.<sup>61</sup>

Although the ALRA places duties on board members, the duties cannot be enforced by any civil action.<sup>62</sup> The only recourse available under the ALRA when a board member breaches their duties is that their conduct may constitute misconduct and may be grounds for disciplinary proceedings under the ALRA.

The Registrar is responsible for dealing with complaints or allegations where there are grounds for taking disciplinary action against a board member. The Registrar may take disciplinary action against a board member including counselling or reprimanding board members, suspending the board member (for not more than six months) and recommending that the LALC take other action against the board member.<sup>63</sup> The Registrar may also refer allegations of misconduct for the consideration of the NSW Civil and Administrative Tribunal (NCAT).<sup>64</sup>

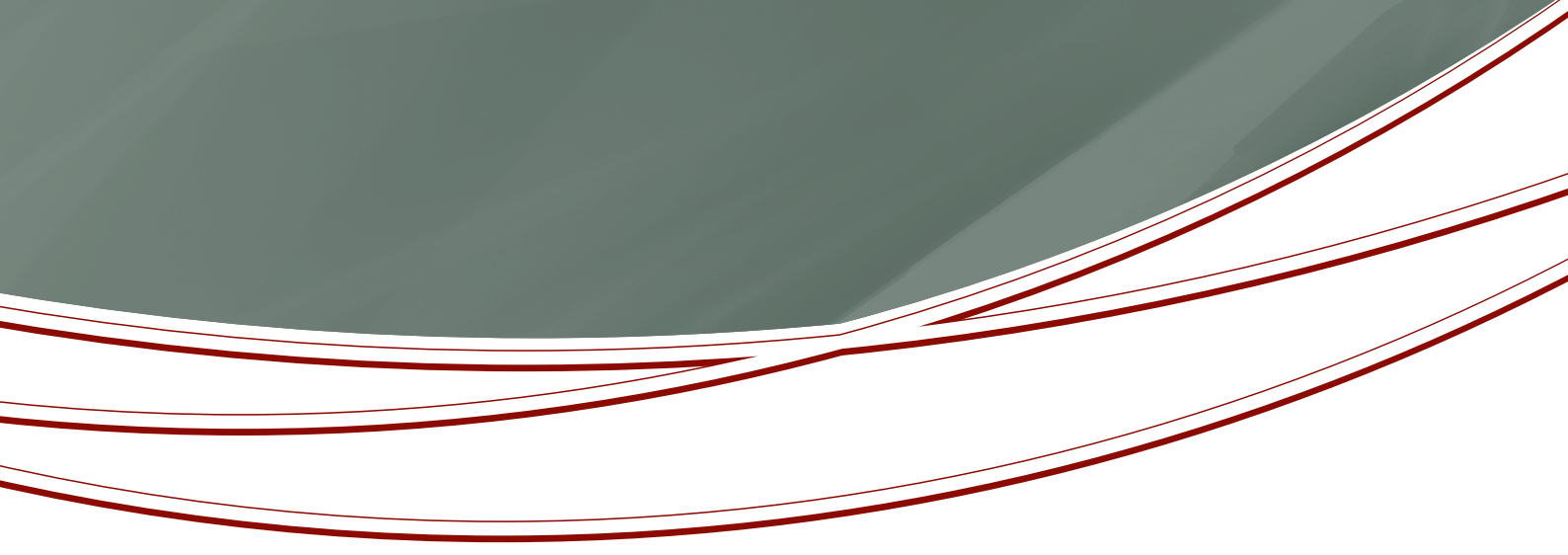
<sup>61</sup> Section 176(1) of the ALRA.

<sup>62</sup> Section 176(2) of the ALRA.

<sup>63</sup> Section 181F of the ALRA.

<sup>64</sup> Section 181K of the ALRA.





NCAT is authorised to carry out a number of actions in relation to misconduct, including counselling, reprimanding, suspending (for a period not exceeding two years) and disqualifying board members (for up to five years). NCAT may also order a board member to pay a penalty of up to \$11,000 or to reimburse a LALC for any loss it has incurred.<sup>65</sup> The Registrar may also refer a complaint to NSWALC or the board of a LALC with a recommendation as to how to resolve the matter by alternative dispute resolution or otherwise.<sup>66</sup>

The Commission has been informed by LALCs that the disciplinary provisions of the ALRA are rarely ever used and, to date, there has not been a referral of a disciplinary matter by the Registrar to NCAT.<sup>67</sup> Several stakeholders remarked to the Commission that the lack of any such action for misconduct sends a message that there are no significant personal consequences for this kind of behaviour. This means that, if board members believe there are no consequences and certainly no personal consequences for the breach of their duties, they may not be sufficiently motivated to carry out duties faithfully.

The lack of personal accountability for board members is inconsistent with how the law treats board members in other organisations. For example, LALC board members are treated differently from the board members of other Indigenous entities even though similar duties of directors and senior corporation officers are prescribed under the CATSI Act.<sup>68</sup> A breach of the CATSI Act may expose a board member to a range of penalties including imprisonment. For instance, a breach of the duty to act

in good faith and in the best interests of the corporation can lead to a civil penalty or criminal liability (up to 2,000 penalty units or five years imprisonment) if the breach is reckless or intentionally dishonest.<sup>69</sup>

If the duties of LALC board members under the ALRA are enforced, board members are likely to be more motivated to exercise them with due care and diligence and act for a proper purpose when undertaking their roles. While the imposition of sanctions on board members should be seen as a last resort in promoting good governance standards, it is important that there are real consequences for the failure of board members to undertake their duties properly.

**“...successful prosecutions ... send a strong message to [Aboriginal] corporations that breaking the law will not go unnoticed [and there is] no better way to encourage and support the majority of directors and officers of corporations who do the right thing than to go after those that don't.”**

Registrar of Indigenous Corporations<sup>70</sup>

<sup>65</sup> Section 211A of the ALRA.

<sup>66</sup> Section 181L of the ALRA.

<sup>67</sup> The Commission's conversations with NSWALC and the Registrar indicate that the latter has not taken a complaint about a LALC board member or a LALC staff member to NCAT.

<sup>68</sup> See Divisions 265, 268 and 531 of the CATSI Act.

<sup>69</sup> Section 265.5 and s 265.25 of the CATSI Act.

<sup>70</sup> Office of the Registrar of Indigenous Corporations, *Yearbook 2014–15*, October 2015, p. 6. Accessed on 17 March 2017 at [http://www.oric.gov.au/sites/default/files/documents/11\\_2015/15\\_0060\\_Yearbook\\_v3-2\\_Complete.pdf](http://www.oric.gov.au/sites/default/files/documents/11_2015/15_0060_Yearbook_v3-2_Complete.pdf).

## Managing conflicts of interest

All LALC board members and staff are expected and obliged to act in the best interests of the entire community, not just an individual, family or group. Conflicts of interest will be evident where, for example, a LALC board member votes to allocate housing to a close family member. The appearance of conflicts of interest also needs to be well managed to ensure members have confidence in the way in which LALCs are being governed.

Conflicts of interest are almost inevitable in LALCs as members of the community share familial and other relationships.

**“There may be cultural pressure to do so, but showing favouritism to one family, prioritising your own financial gain, or not declaring a conflict of interest gives out the wrong message to younger people that it is acceptable to act unethically.”**

Indigenous Governance Toolkit<sup>71</sup>

Some of the LALCs with which the Commission spoke said that they have strong procedures to manage conflicts of interest. In some other LALCs, the issue has the potential to be managed better.

The Commission commonly receives complaints about favouritism in the allocation of resources and in recruitment. This can sometimes occur in LALCs, where one family dominates or there is dispute over the allocation of finite resources. However, there are fewer complaints about conflicts of interest in relation to issues that affect members equally, such as culture, services and flood-prevention.

**“If you’re growing the pie, it’s fine – if you’re cutting it up, then it’s a fight.”**

Comment by LALC survey respondent

It is important to maintain comprehensive policies and procedures in relation to conflicts of interest; however, while LALCs are required to have policies and procedures only in relation to pecuniary interests, NSWALC’s analyses of risk-assessment results have identified that some LALCs do not even do that.

<sup>71</sup> Op cit, Indigenous Governance Toolkit, s 5.1.6.

Even where policies and procedures do exist in small communities, it may be difficult for some boards to comply with them. One LALC with which the Commission spoke indicated that, typically, board members with a pecuniary conflict of interest will leave the room when a matter they have an interest in is discussed in order to promote frank discussion between the remaining board members. However, the ALRA is not strict about the requirement to leave the room and still allows a LALC to determine that a member with the conflict of interest can remain in the room while that matter is discussed.<sup>72</sup> This often occurs where there would not be a quorum for the meeting if the individual were to leave the room.

## Local strategies to manage conflicts of interest

Board diversity is one way that LALCs are able to manage conflicts of interest. For example, one LALC noted its board operates effectively for the benefit of the community because the board is relatively diverse, and one family has never had a majority. The LALC explained that, when the board structure was introduced across the network, their LALC board was established as a 10-person body. This limited the centralisation of power and expanded the range of people involved in decision-making.

**“A diverse board spreads the credibility across the community.”**

Comment by LALC board member

In order to prevent the domination of a LALC by one family, one LALC told the Commission that it mandates diversity by securing spots on the board for each family in the LALC to ensure they are all represented. A similar practice is often used in other types of organisations, such as statutory boards where legislation can prescribe board positions for representatives of different stakeholders.

In some communities, where the LALC boards are conscious of the potential for conflicts of interest and how their actions may be viewed by members, there are various

<sup>72</sup> Section 184(2) of the ALRA states:

*Unless the Aboriginal Land Council determines otherwise, the officer or member of staff [who has a pecuniary conflict of interest in a matter to be considered] must not be present at, or in sight of, the meeting of the Aboriginal Land Council:*

*(a) at any time during which the matter is being considered or discussed by the Council, or*

*(b) at any time during which the Council is voting on any question in relation to the matter.*

local processes to improve transparency and promote impartial decision-making. These may also be incorporated into local conflict of interest policies or constitutions. One LALC, which has several board members and staff from the same family, ensures its processes are documented and transparent in order to demonstrate probity via “a paper trail showing that [they are] doing the right thing”. Several LALCs told the Commission that, when there are contentious decisions and the need for transparency in both the process and decisions made, they electronically record board meetings.

Other LALCs use different mechanisms to remind them to be conscious of conflicts of interest and to manage them. For example, one LALC said that it has a strong and well-informed CEO who is able to explain and uphold the legal requirements of the ALRA to board members and staff. Also, board members who have requests from their families are confident to refer matters to a non-conflicted and appropriate, impartial staff member for advice. At another LALC, the legal counsel attends every board meeting to ensure that information provided and options discussed for managing conflicts of interest are legal and realistic.

Some LALCs have dealt with the issue of conflicts of interest by removing affected LALC staff and board members from a decision and delegating it to someone who is more likely to be perceived to be impartial. This kind of strategy has been used in recruitment decisions by one LALC that coordinated with a neighbouring LALC to have it receive and review applications for a job that it was advertising, due to an expectation that the families of board members and staff were likely to apply.

## Board members holding the CEO accountable

### Review of CEO performance

Boards have a key role in challenging management and holding them to account. Board review of a CEO's performance is a common practice in all types of organisations. In this way, the CEO is held accountable for performance against stated goals and the board is seen to be holding the CEO accountable on behalf of its members.

There is scope for more LALCs to regularly review CEO performance. Responses to the Commission's survey indicate that 28% of LALCs reviewed their CEO's performance every year and 35% of respondents noted that they reviewed the performance of their CEO once or twice during the last three years.

LALC boards are less able to perform their role in holding the CEO accountable if they lack confidence and information to question the CEO in a constructive way.

Fundamental to the circumstances identified during the Commission's 2016 public inquiry into alleged fraudulent conduct at the Casino Boolangle LALC (CBLALC) was the trust that board members placed in the former CEO. The Commission found that the former CEO and a former administrative officer engaged in serious corrupt conduct by dishonestly exercising their functions to obtain money from the CBLALC to which they knew they were not entitled. Although, on the evidence before the Commission, it was not possible to determine the exact amount that the former CEO and former administrative officer obtained from the CBLALC, a CBLALC audit letter noted that in the 12-month period from 1 July 2011 to 30 June 2012, a number of cheques totalling over \$77,000 had been drawn and cashed without supporting documentation.<sup>73</sup>

During the relevant period, from 2010 to 2012 approximately, two board members' signatures were needed as authorisation for cheques issued by the LALC. The CEO or administrative officer would usually approach board members with the cheque book to get their signatures. Board members typically did not question the CEO in regard to financial matters, and so accepted her explanations as to why the cheques needed to be issued, even though it was apparent invoices had not been provided to substantiate the payments.

Also, because all board members at CBLALC were signatories of the cheque accounts, the accountability for authorising cheque payments was fractured and undermined any chance of consistency in the use of the authority to approve payments. It was common for the CEO to approach board members at their homes or while they were shopping and this limited their ability to properly assess the validity or appropriateness of the payments and to exercise their authority in an informed way. As one board member stated:

*I do not know why [the then CEO] asked me to sign the back of the cheque but I trusted her and did it. On some cheques were the words “Pay cash”; this had already been written on the [cheque] and I did not question this at all. We as elders within the community put a lot of faith into [the then CEO] and accepted what she told us.”<sup>74</sup>*

The Commission notes that CBLALC has since modified its procedures to address the risks that were identified during this investigation. For example, CBLALC eliminated the use of cheques and instead makes payments via electronic funds transfers. There are now only two authorised payment

<sup>73</sup> ICAC, *Investigation into the conduct of a Casino Boolangle Local Aboriginal Land Council CEO and administrative officer*, February 2017, p. 6.

<sup>74</sup> ICAC, *Operation Nestor*, statement of Nora Caldwell, paragraph 8, ICAC exhibit N1, volume 2, p. 45. Accessed on 17 March 2017 at [http://www.icac.nsw.gov.au/images/Nestor%20Public%20Website/Exhibit%20N1%20-%20STATEMENT%20VOL%202\\_Redacted.pdf](http://www.icac.nsw.gov.au/images/Nestor%20Public%20Website/Exhibit%20N1%20-%20STATEMENT%20VOL%202_Redacted.pdf).

approval signatories, providing a far greater level of scrutiny and accountability than what was provided under the former CEO's tenure, when all board members were signatories. The two signatories meet at a designated time at the CBLALC office to sign payment vouchers which are then attached to invoices and given to the bookkeeper.

Boards generally need access to timely, independent and relevant information to effectively scrutinise the activities of the CEO and the operations of the organisation.<sup>75</sup> For LALCs, the risk-assessment process and financial reports are a crucial source of information about the health of their governance systems.

During the Operation Greer public inquiry into the alleged corrupt conduct of a former CEO and board members of the Gandangara LALC, the Commission heard evidence that the CEO would frequently only give board members copies of the agenda and papers just prior to commencement of the meetings. This made it difficult for board members to properly consider matters before making a decision. One board member stated that, while board members were given an agenda and papers at the meeting, their folder did "not necessarily" contain all the documents to be tabled at the meeting. They essentially had about 15 minutes to review what they could before board meetings.<sup>76</sup> Another board member indicated that, depending on the issues, sometimes there was time before the meeting to read the papers, but that for other issues "another couple of hours would have helped".<sup>77</sup>

## Board capability

Unlike local councils, where candidates for election are required to nominate for office in advance, members interested in becoming a board member of a LALC are not required, under the ALRA and the Regulation, to give prior notice of their intention to do so. They can, if they wish, be nominated for the first time by another member at the annual general meeting (AGM) at which elections are held. While there are justifiable historic reasons for such flexibility, this kind of process does not provide an opportunity for potential candidates to establish or put forward the skills that they would bring to the role. It is also possible in these circumstances for a candidate to accept a

nomination without thinking through the level and extent of the responsibility and commitment required for the role, particularly as successive amendments to the ALRA, including those concerning economic development, have increased the complexity of the matters that board members must consider and the decisions they need to make.

Board member skills are important for effective governance. Responses to the Commission's survey showed that it is common for LALC board members to have experience on boards and community consultative councils of other organisations and some have the cultural and historical experience that comes with being a community elder. However, this experience alone is unlikely to be sufficient to effectively carry out their role to hold the CEO accountable because it also requires specialist skills such as interpreting financial and other operational information, strategic planning and governance skills.

One way of improving board member skills is through training; for example, a good induction training program and additional and ongoing governance training. Board members are required to complete NSWALC mandatory governance training, which involves two days of formal education undertaken within six months of a board member's election (unless they are exempted by NSWALC from this requirement).<sup>78</sup> However, the Commission's survey found that, for 45% of respondents, the NSWALC training was the only governance training that their board members had received.

In general, LALCs interviewed by the Commission felt that the governance training provided by NSWALC is helpful to ensuring that they understand what is required of them in terms of the content of their obligations and their application; however, there are limits as to how well it can prepare board members for their role. During Operation Greer, the Registrar told the Commission that:

*...one of the comments made by one of the Board members, which struck a chord with me, was that he said that he thought two days' training was wholly inadequate, and that he thought the training was a little too patronising, if I could paraphrase what he said. But it just struck me that, whatever that training is within the first six months of election, as we all know, unless those things are reinforced they quickly fall away. But it struck me, I mean, if you do a company directors' course in New South Wales, it takes you the best part of six weeks and then you sit an exam.<sup>79</sup>*

There are a number of issues that make it difficult for NSWALC to develop training that is pitched at an

<sup>75</sup> For example, the ASX requires that "a listed entity should have formal and rigorous processes that independently verify and safeguard the integrity of its corporate reporting". Op cit, *Corporate Governance Principles and Recommendations*, p. 21.

<sup>76</sup> ICAC, Operation Greer transcript, May 2016, pp. 113T–115T. Accessed on 17 March 2017 at <http://www.icac.nsw.gov.au/documents/transcripts/greer/4791-10-05-2016-operation-greer-transcript-pp-00105-00143-from-2-05pm-to-3-57pm/file>.

<sup>77</sup> ICAC, Operation Greer transcript, May 2016, p. 299T. Accessed on 17 March 2017 at <http://www.icac.nsw.gov.au/docman/transcripts/greer/4796-12-05-2016-operation-greer-transcript-pp-00270-00305-from-2-17pm-to-4-03pm/file>.

<sup>78</sup> Section 65 of the ALRA.

<sup>79</sup> Op cit, Operation Greer transcript, p. 973T. Accessed on 17 March 2017 at <http://www.icac.nsw.gov.au/docman/transcripts/greer/4814-24-05-2016-operation-greer-transcript-pp-00959-00994-from-2-10pm-to-3-59pm/file>.



appropriate level and sufficiently comprehensive. Training is based on a one-size-fits-all model despite the fact there are 120 LALCs in NSW, managing widely varied asset bases and differing significantly in their size and the complexity of their operations. In addition, the voluntary nature of positions means that the time to train and develop skills is limited, as board members have to work and fulfil other obligations in addition to carrying out board duties.

**“It is unrealistic to expect CBLALC Board members to attend training in addition to the compulsory NSWALC governance training. Most Board members are either elderly or working and find it difficult to attend additional activities. The Board role is considered voluntary as Board members only receive \$750 per year.”**

Comment by the current CEO of the CBLALC during Operation Nestor<sup>80</sup>

## Possible ways to improve board confidence and capability

### Using formal mechanisms to assist in the review of CEO performance

The regular review of a CEO's performance can provide a structured way for a board to meet its obligation to hold a CEO accountable. One LALC told the Commission that their CEO recently had an annual assessment completed by the board chairperson using the criteria in the position description. Another LALC reviews its CEO's performance based on an NSWALC template. The zone director assists in this process.

The NSWALC risk-assessment process provides a formal mechanism that can assist in the review of a CEO's performance. The risk assessment serves as a snapshot of the health of the LALC's governance for board members and provides feedback on a CEO's performance. The risk-assessment checks matter, such as the accuracy of board and member meeting minutes, the presentation of CEO reports to the board (including the CEO's financial report)

and whether risk-assessment results have been tabled at board meetings.

LALCs supportive of the risk-assessment process told the Commission that it provides transparency to LALC governance processes. One LALC stated that the risk-assessment process provided a structured format that assisted boards by clearly showing the procedures being used at the LALC.

According to NSWALC, the risk-assessment process has identified issues related to poor CEO performance, including some CEOs not obtaining proper authorisation from boards in relation to administrative actions such as executing payment of LALC liabilities and CEOs not presenting required reports to boards.

### Creating confidence

Board confidence is improved when board members feel that they can ask questions until they understand all the necessary information required to make decisions and that they can take the necessary time to do that. At one LALC, board members are presented at meetings with financial reports and bank statements that include summaries that have been arranged by the office manager with the assistance of the accountant. Because the information is presented in a readily understood and organised way, board members indicated they were comfortable reading financial reports and asking the CEO questions about bank statements. At another LALC, where financial reports are more complex, the CEO takes the time to ensure that board members understand them. This may involve working with them through a document explaining the details and answering any questions. The CEO told the Commission that the board felt comfortable taking time to make decisions and not passing over issues that they did not understand.

### Customised board training

As the mandatory NSWALC governance training itself is not adequate for all LALCs, each LALC needs to assess and develop its own individual training requirements that are tailored to meet their particular circumstances. This will depend on the level of existing skill of the board members and the complexity of their business activities. Assessment of training needs could be part of the NSWALC risk assessment.

LALCs told the Commission that they would benefit from further specialised training in the areas of administration, finance (including understanding internal and external financial reports), economic development (including business development and planning), governance, culture, conflict resolution and how to properly assess training and development needs. One zone has been trialling

<sup>80</sup> ICAC, Operation Nestor, statement of Paula Coghill, paragraph 29, ICAC exhibit NI, volume 2, p. 60. Accessed on 17 March 2017 at [http://www.icac.nsw.gov.au/images/Nestor%20Public%20Website/Exhibit%20NI%20-%20STATEMENT%20VOL%202\\_Redacted.pdf](http://www.icac.nsw.gov.au/images/Nestor%20Public%20Website/Exhibit%20NI%20-%20STATEMENT%20VOL%202_Redacted.pdf).

the provision of supplementary governance and finance training customised to individual LALCs. This allows for the training to be tailored to suit the LALCs' particular CLBP aspirations, policies and procedures.

During Operation Greer, the then Registrar submitted that NSWALC's board training be reviewed to provide opportunities for members of the LALC network to develop the financial governance skills required to function effectively as a board member, and to require all incoming board members to demonstrate financial and governance capacity.

**“Training in organisational transparency, governance and compliance would greatly benefit the future of this organisation.”**

Comment by LALC survey respondent

The Commission is aware that some zones develop detailed “how-to” governance guides that are used as the basis of zone training for LALCs. One zone director has worked with registered training organisations to map this training to the competencies needed for a Certificate III in Business Administration and a Certificate IV in Business Governance. This builds an external assessment process into the training and creates an incentive for board members to complete the training.

## Supplementing skills through the use of external providers

In order to help enhance their decision-making and strategic planning, several LALCs have engaged the assistance of paid experts. The cost of such experts may be prohibitive for some LALCs, but they can also help increase income or prevent losses from economic activities. For example, one LALC told the Commission that it engaged expert advice in relation to a significant land dealing. In that case, a lawyer with extensive experience in joint ventures helped in the early stages of the LALC's residential development and also attended two meetings with members to help the board members explain the details of the development.

Another LALC told the Commission it has used an expert to help inform them of effective business practices; for example, in relation to the development of budgets. Its lawyer attends every board meeting to ensure that information presented to the board by the CEO and other staff is sufficient for the required purpose, meets legal requirements and could be realistically implemented.

When hiring experts, board members need to understand the nature of the expertise they require and the purpose of

hiring an expert. It is also important that, prior to engaging an expert, steps are undertaken to ensure the expert is appropriately qualified to assist the LALC. This involves undertaking due diligence enquires prior to an engagement. A LALC board should also give some consideration as to how the performance of an expert will be assessed.

In February 2017, NSWALC announced that it had entered into an arrangement with Justice Connect to fund a lawyer for a two-year pilot project who would provide legal support and training for the network of 120 LALCs. Areas of law that LALCs can expect assistance with include property, employment, work health and safety, and environment. In entering into the arrangement, NSWALC also anticipated that access to this legal advice would assist LALCs to further build their economic self-reliance as well as allow LALCs to spend more time and resources on community matters.<sup>81</sup>

The Commission also notes that NSWALC is able to assist LALCs with identifying suitable experts. In accordance with the Regulation, NSWALC has established a register of members for expert advisory panels to assist LALCs with the preparation and assessment of land dealings.<sup>82</sup> The purpose of the register is to source suitably qualified organisations across a broad range of disciplines and regional areas with expertise in matters such as land valuation, property development, planning, business, finance and governance.

## Supplementing skills by using volunteers

Volunteers can be used by LALC boards to support their work and supplement their skills base. The CEO of one LALC told the Commission that volunteers can be an “expert sounding board” on matters related to finance, town planning and the law.

Volunteers are engaged informally by LALCs through their local networks. Volunteers are also engaged through formal organisations that provide volunteers to Indigenous agencies, including LALCs, to assist with specific projects.

Indigenous Community Volunteers (ICV) helps connect highly skilled volunteers (Indigenous and non-Indigenous) with LALC boards that need them for short-term public benefit projects.<sup>83</sup> Wellington LALC worked with an ICV volunteer to develop their CLBP.<sup>84</sup> Dubbo LALC has also

<sup>81</sup> NSW ALC, media release, 20 February 2017. Accessed on 3 March 2017 at <http://www.alc.org.au/newsroom/network-messages/pro-bono-legal-help-for-local-aboriginal-land-councils.aspx>.

<sup>82</sup> Clause 106 of the Regulation.

<sup>83</sup> For more information, see the ICV website at [www.icv.com.au](http://www.icv.com.au).

<sup>84</sup> ICV. Accessed on 17 March 2017 at <http://www.icv.com.au/stories/building-skills-and-capacity-long-term-success-country-nsw/>.



developed an ongoing relationship with ICV, working with several volunteers since 2008, including on a project to develop plans for a cultural centre.<sup>85</sup>

The Rural and Regional Enterprise Program (RARE), which is run by the University of Sydney Business School, provides course credits for business students who assist LALCs, including the board, with the early (mostly planning) stages of business development. Students work with communities to deliver business plans, complete feasibility studies and undertake any other relevant research and business analysis.<sup>86</sup> A student provided assistance to Orange LALC's nursery enterprise by helping the LALC identify sustainable sources of income and creating a business plan.<sup>87</sup>

Jawun, a not-for-profit, supports Aboriginal organisations, including LALCs, through volunteers and secondments from the corporate and public sectors.<sup>88</sup> It operates in nine regions across Australia helping urban, regional and remote Indigenous communities. Under its model, Indigenous partners establish their own priorities. One LALC drew on a Jawun secondee's substantial experience in microfinance and development, to review the sustainability of its funeral fund and consider other ways of providing microfinance to the local Aboriginal community.<sup>89</sup>

## Using established LALC information networks as a source of board advice

Board members can use the existing LALC network to learn from more experienced community members. Informal information-sharing is taking place within the LALC network, whereby successful LALC board members are being contacted on an ad hoc basis by other LALC board members for advice on various governance and administrative issues. Zone staff may also play a role in putting LALC boards in contact with each other.

The Commission's survey indicates that 18% of LALCs had received mentoring support. NSWALC could consider facilitating a formal mentoring program to provide detailed insights that are not necessarily available through more generalised sharing of information across the network. This would involve a certain level of commitment and openness from potential mentors and mentees but will provide a more structured and assessable approach than the current

informal approach, which, according to one zone director, "can fall over too easily because of a lack of time, a lack of will, a clash of personalities".

## Using LALC subcommittees to build specialist knowledge

Board subcommittees are one way for board members to develop specialist knowledge and build their capacity, and the importance of subcommittees has been recognised as a good governance practice by other organisations.<sup>90</sup> Issue-based subcommittees can deal with areas such as finance, education and housing. Subcommittees typically review policies and reports, consider them and return them to the board with recommendations for the LALC board to consider. Subcommittees can also assist board members in paying more detailed attention to particular issues. One LALC viewed subcommittees (or "portfolios") as a way for its board members to truly consider the details of a proposal and to develop their understanding of issues. Individual LALC members are invited to participate in subcommittees if they have specific knowledge.

## Demonstrated capacity for economic development activities

During Operation Greer, the Registrar submitted to the Commission that LALC boards could be required to demonstrate their capacity to manage a LALC, including their ability to hold a CEO accountable, as a pre-requisite to taking on additional challenges through economic development activities that potentially put significant LALC assets at risk.<sup>91</sup>

A requirement for board members to demonstrate financial and governance skills before undertaking complex economic development activities would provide an incentive for them to strengthen their capacity in these areas. One way to implement this suggestion is for NSWALC (and other providers of funding) to require LALC boards to demonstrate their basic governance and financial capacity, through risk-assessment results and scrutiny of financial accounts and compliance with legislated board-meeting requirements, before allowing them access to funding and assistance for economic development.

Some CEOs have advised the Commission that the most effective way for LALC board members to develop financial and governance capacity is via an incremental

<sup>85</sup> Ibid.

<sup>86</sup> The University of Sydney Business School. Accessed on 17 March 2017 at <http://sydney.edu.au/business/study/opportunities/RARE>.

<sup>87</sup> Ibid.

<sup>88</sup> For more information, see Jawun website at <http://jawun.org.au/what-we-do/the-jawun-model/>. Accessed on 17 March 2017.

<sup>89</sup> Ibid.

<sup>90</sup> For example, the Australian Institute of Company Directors notes that it can, at times, "make sense for the detailed work of boards to be considered by board committees". Op cit, *Good Governance Principles and Guidance for Not-For-Profit Organisations*, p. 36.

<sup>91</sup> Operation Greer – submissions in reply – Registrar, *Aboriginal Land Rights Act 1983*, 2016, paragraph 38.

approach consistent with the “Nation-Building Approach” considered as part of the Harvard Project on American Indian Economic Development, in which indigenous people develop their governance capabilities and institutions before moving into economic development.

## Retaining corporate knowledge and skills through board continuity

If there is a complete change-over of board members at election time, the effective governance of the LALC can be diminished through the loss of corporate knowledge and skills. LALCs told the Commission during interviews that, if insufficient current board members are re-elected, then knowledge about the LALC’s operations as well as skills that were developed over a period of time, can be lost, jeopardising the continuity of any transition.

One LALC told the Commission that continuity of board members contributed to successful governance due to the stability that it brings. Another LALC believed that, because its board members had remained on the board for a number of terms, their knowledge of the ALRA was extensive.

The 2014 amendments to the ALRA increased the term of LALC board members from two years to four years.<sup>92</sup> In addition to encouraging long-term decision-making, the four-year term for board members extends continuity and makes investing in board member skills development more worthwhile.

One additional way for ensuring board knowledge and skills are retained is to stagger board elections so that not all board members’ positions are vacated at every election. The Australian Institute for Company Directors argues that staggering board elections is a helpful way of ensuring “continuity of appropriate knowledge, skills and experience on the board, as well as continuity on organisation and board-specific issues”.<sup>93</sup>

## Mix of elected representatives and skill-based appointments

Another measure to increase the capacity of LALC boards is to supplement existing elected boards with skills-based appointments. Local Land Services, a statewide NSW Government organisation working in partnership with farmers, landholders and regional communities to advise on best management farming practices, has adopted this type of approach. Local Land Services boards consist of three ratepayer-elected representatives and four government appointments.

The Commission acknowledges that the implementation of staggered board elections and the introduction of some skills-based board appointments would require amendment of the ALRA.

## Encouraging board succession planning

Succession planning deliberately builds the experience of younger or less-experienced people so that they can take over once longstanding board members have moved on. Several interviewees, both from LALCs and from NSWALC, told the Commission that one of the reasons for poor leadership capacity in many LALCs is a lack of succession planning for board positions. Interviewees noted that many LALCs have boards with members who are ageing and retiring, and that their replacements may lack the necessary experience. This lack of experience means that, at best, it takes them substantial time to get up to speed, delaying decisions. At worst, it can lead to poor decisions, bad governance and even collapse.

Several LALCs told the Commission during interviews that they put great emphasis on succession planning, with several having expressly appointed one or more young staff members to roles that will provide them with opportunities to learn how to lead the LALC in the future. Several noted that they allow trainees to observe meetings and decision-making that takes place among the board. In one LALC, board members pointed out that they encourage young people to attend board meetings as observers. Another LALC has a Junior Leadership Program for Aboriginal students in high school (years 10–12) and provides coaching and experience in public speaking as well as lessons in land rights and Aboriginal history. One LALC told the Commission it is considering establishing a “Junior LALC”, which involves local youth in decision-making and management.

## Conclusion – suggestions for improvement

This chapter makes a number of suggestions for strengthening the capacity of LALC boards to promote good governance.

LALCs should adopt local strategies that will enhance their ability to manage conflicts of interest, including:

- taking steps to ensure board diversity
- adopting local processes to improve transparency in decision-making
- using different mechanisms to remind board members to be conscious of conflicts of interest and to manage them

<sup>92</sup> Section 63 of the ALRA.

<sup>93</sup> Op cit, *Good Governance Principles and Guidance for Not-for-Profit Organisations*, pp. 19–20.

- delegating certain board decisions to an impartial decision-maker.

LALCs should enhance the confidence and capability of board members by:

- using structured mechanisms, such as the risk-assessment process, to assist in the review of the CEO's performance
- having the CEO present financial and business information in a format that is readily understood
- customising board training to the requirements of individual LALCs
- using external providers and volunteers to supplement board members' skills
- using established LALC information networks as a source of board advice
- using LALC subcommittees to build specialist knowledge within a board
- requiring LALCs to demonstrate capacity for economic development activities as a pre-requisite to taking on additional challenges
- taking steps to ensure board continuity in order to retain corporate knowledge and skills
- supplementing existing elected boards with skills-based appointments
- undertaking succession planning to ensure future leadership capacity.

## Chapter 4: The effectiveness of the regulatory framework

While the preceding chapters were predominantly directed at LALC boards and LALC members, this chapter is directed at the external regulators of LALCs. It examines the effectiveness of the regulatory framework of the LALC network and provides suggestions for improvement.

### Regulatory principles

There are a number of features that can be identified in better practice approaches to regulation. Each of these is explained below.

#### Risk-based

Under this model, the most resources are allocated to the areas of greatest risk. Risk-based regulation recognises that not all contraventions can be detected and addressed. A regulator, therefore, needs to determine its priorities and allocate its inspection and enforcement resources to have the greatest impact. All NSW Government regulators are committed to implementing risk-based regulation in accordance with set guidelines.<sup>94</sup>

Risk-based regulators may also employ an active program of supervision; for example, the Australian Prudential Regulation Authority (APRA) “aims to ensure that risk-taking by regulated entities is conducted within reasonable bounds and that risks are clearly identified and well-managed”.<sup>95</sup> It undertakes a “baseline” or minimum-level of supervisory activity to identify the key risks affecting regulated industries and entities. This, in turn, helps

APRA determine its “risk-based priorities”. Supervisors at APRA pursue additional risk-based supervisory activities, as appropriate. APRA does not pursue a “zero failure objective” but aims to maintain a low incidence of failure in regulated entities by identifying potential threats early and introducing corrective action or achieving an orderly exit.

#### Outcome-focused

Outcome-focused regulation involves concentrating on outcomes rather than processes. A focus on outcomes emphasises what is to be achieved and the impact of regulation. For example, APRA requires its supervisors to have plans that are appropriate to the regulated entity’s risk profile and desired supervisory outcomes.

#### Principles-based

Principles-based regulation “recognises the complexity and diversity that exists among regulated entities and seeks to avoid a one-size-fits-all approach”.<sup>96</sup> Regulated entities are able to use a variety of techniques to comply with governance principles rather than with a prescribed approach. This approach is used by regulators such as APRA and the Australian Securities and Investments Commission.

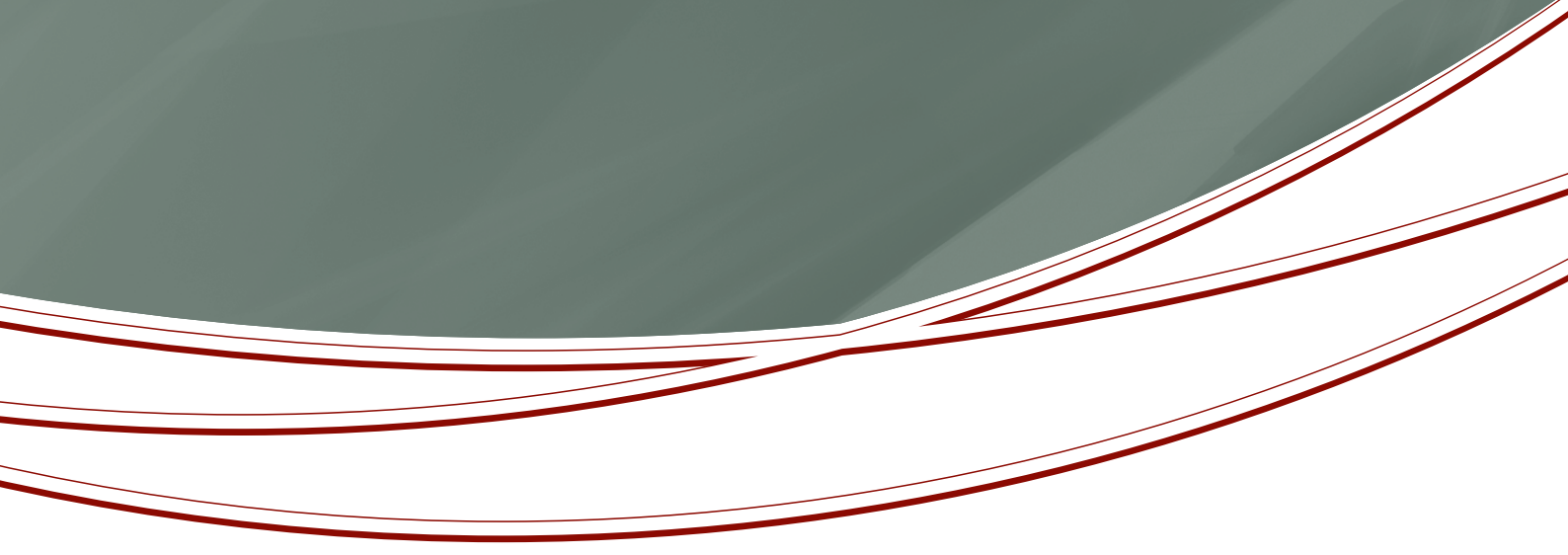
#### Responsive

Responsive regulation recognises that methods are applied according to an assessment of the reasons for non-compliance; for example, a lack of willingness, lack of ability or a combination of the two. The most severe sanctions, such as imprisonment, are used infrequently and reserved for people that demonstrate an unwillingness to comply despite having the ability to do so. More persuasive methods of promoting compliance, such as training and low-level

<sup>94</sup> NSW Department of Finance, Services and Innovation, *Guidance for regulators to implement outcomes and risk-based regulation*, October 2016. Accessed on 17 March 2017 at [https://www.finance.nsw.gov.au/sites/default/files/guidance\\_regulators\\_outcomes\\_regulation.pdf](https://www.finance.nsw.gov.au/sites/default/files/guidance_regulators_outcomes_regulation.pdf).

<sup>95</sup> Australian Prudential Regulation Authority, *The APRA Supervision Blueprint*, May 2015, p. 6. Accessed on 3 March 2017 at <http://www.apra.gov.au/AboutAPRA/Documents/APRA-Supervision-Blueprint-FINAL.pdf>.

<sup>96</sup> *Ibid*, p. 7.



monitoring, are used frequently where it is apparent that non-compliance is due to lack of capability and that people will respond to instruction and respectful dialogue.

Responsive regulation is linked to risk-based regulation because regulatory resources are focused on people at risk of non-compliance. Examples of regulators who use a responsive approach include NSW Liquor and Gaming, which has a matrix of breaches identifying a breach type and scale that is assigned a risk-rating and a recommended enforcement response. All NSW Government regulators are committed to implementing responsive regulation in accordance with set guidelines.<sup>97</sup>

## Regulators working together

Where there are multiple regulators with jurisdiction over the same matters, the role of regulators needs to be clearly understood and coordinated. This is necessary to minimise undesirable consequences such as excessive bureaucracy and complexity of regulation. For example, the NSW Office of the Legal Services Commissioner deals with complaints about solicitors under the *Legal Profession Uniform Law Application Act 2014*. The Legal Services Commissioner receives all complaints and decides whether to investigate the complaint, mediate the complaint, refer it to the Law Society Council for investigation or resolution, or dismiss the complaint. While there are two bodies that may investigate the complaints, the process is clearly coordinated by the Office of the Legal Services Commissioner. Without this coordination, regulatory approaches and outcomes may be chaotic and inconsistent.

## Independence of regulatory functions

If regulatory functions are not separated from operational functions, there is a risk that competing goals may not be

well managed and there is a risk of actual or perceived conflict of roles. Some organisations have both regulatory and operational functions. For example, while the NSW Law Society has a co-regulatory role with the Legal Services Commissioner in investigating complaints against solicitors and maintaining professional standards, at the same time, it is also the peak body for solicitors undertaking operational functions such as professional development, training and advocacy. If these functions are not adequately separated, then there is a risk that the pursuit of one or more of them may have undue influence on the effectiveness of others and, for example, people may perceive that complaints are not being dealt with impartially and fairly.

Where a regulator is required to take on both operational and regulatory functions, it is also important that the regulator does not, in practical terms, take on the risks of a regulated entity otherwise the regulated entity may not be held responsible for its actions or be encouraged to manage its affairs appropriately. For example, while NSW Fair Trading regulates incorporated associations, it does not absorb their debts and it does not provide loans to these entities or invest in their businesses. If it did any of these things, it may be hesitant to exercise its regulatory functions because of the risk the consequences of that exercise has for the agency itself.

## How these principles apply to the regulation of LALCs

### Coordination of regulators

Enforcement of compliance with the requirements of the ALRA is divided between the Registrar and NSWALC. Although there is some overlap in the matters each of them monitor, they also have a different focus and, therefore, there is not always a holistic and consistent

<sup>97</sup> Op cit, *Guidance for regulators to implement outcomes and risk-based regulation*.



regulatory response taken to addressing non-compliance with the ALRA.

NSWALC's regulatory focus is on the oversight and regulation of land dealings and conducting risk assessments of LALCs.<sup>98</sup> Its leverage is to withhold approval for land dealings and LALC funding. NSWALC can also recommend to the Minister, the appointment of an administrator.<sup>99</sup> On the other hand, the Registrar is focused on contraventions of the ALRA and investigating complaints about misconduct and the non-disclosure of pecuniary interests by board members and LALC staff. The Registrar's main leverage is in conducting investigations and taking corresponding enforcement actions.<sup>100</sup>

As a regulator, the Registrar has broader scope than NSWALC, including referring staff and board members of a LALC to NCAT for misconduct<sup>101</sup> or issuing compliance directions.<sup>102</sup> However, NSWALC and the Registrar overlap in relation to matters of compliance covered by NSWALC's risk assessments and which are direct requirements of the ALRA. For example, the overlap is evident with regard to having a current member-approved CLBP and holding the required number of member meetings.

In practical terms, NSWALC has greater on-the-ground information about non-compliance with the ALRA and potential misconduct by LALC staff and board members because it has larger staff numbers than the Office of the Registrar. NSWALC's zone office structure also provides a mechanism for access to on-the-ground information about LALC operations. As zone offices conduct regular checks on LALC governance and administrative arrangements via the risk-assessment system, NSWALC is likely to have a greater awareness of LALC compliance and governance challenges than the Registrar.

While NSWALC has the ability to detect contraventions of the ALRA, it has limited tools to enforce compliance. It may refer serious matters to the Registrar but does not have any certainty about when or how the Registrar will respond to those matters.

Although there is some coordination between the Registrar and NSWALC on LALC governance issues, there is potential for more work in this area. NSWALC told the Commission that it holds quarterly meetings with the Registrar. These often involve reviewing the issues that require their attention and splitting the work associated with them. The two organisations also try to coordinate

responses to possible requests and issues to prevent LALCs "shopping" for a regulator that will give them the answer they want. NSWALC also has discussions with the Registrar if an issue arises that affects both organisations. The relationship between the Registrar and NSWALC is also influenced by the fact the Registrar has functions that are applicable to NSWALC, including the issuing of compliance directions to NSWALC.<sup>103</sup>

One option to promote better coordination and consistency of approach in regulation is through the development of an MOU between the Registrar and NSWALC, which would cover matters such as:

- a definition of their respective roles and how they would work together on matters where there is joint legislative responsibility
- a protocol for referrals to each other, including communication protocols and timeframes for responses
- sharing of high-level information on governance issues that can help tailor training.

Progress to improve the coordination of regulatory functions between the Registrar and NSWALC also needs to be supported with appropriate resources to perform those regulatory responsibilities under the ALRA.

The current funding of the Office of the Registrar limits the use of the enforcement tools at the Registrar's disposal under the ALRA. The former Registrar gave evidence during the Commission's Operation Greer public inquiry that his office receives funding of \$900,000 per year for operating expenses and five staff members.<sup>104</sup>

## Independence of functions

As NSWALC has dual roles as facilitator and regulator under the ALRA, there is potential for conflict between those roles. This requires careful management, since it can lead to conflicting objectives and confuse or compromise the achievement of those different objectives, particularly at a zone-level, where limited resourcing can reduce the separation of different activities.

NSWALC is responsible for overseeing LALCs, promoting compliance with the ALRA as well as generally promoting Aboriginal culture and heritage. NSWALC also advises the Minister on matters relating to Aboriginal land rights and takes actions to protect the culture and heritage of

<sup>98</sup> See s 106 of the ALRA regarding the full functions of NSWALC.

<sup>99</sup> Section 222 of the ALRA.

<sup>100</sup> See s 165 of the ALRA regarding the full functions of the Registrar.

<sup>101</sup> Section 181K of the ALRA.

<sup>102</sup> Section 235 of the ALRA.

<sup>103</sup> Section 165(f) of the ALRA.

<sup>104</sup> ICAC, Operation Greer transcript, May 2016, p. 966T. Accessed on 17 March 2017 at <http://www.icac.nsw.gov.au/docman/transcripts/greer/4814-24-05-2016-operation-greer-transcript-pp-00959-00994-from-2-10pm-to-3-59pm/file>.

Aboriginal people in NSW. It is a regulator; in the sense that it requires accountability from LALCs for the annual funding it provides, but it is also the peak body for the land council network. NSWALC's role as a facilitator is also apparent from its economic development activities, which include facilitation of LALC businesses through providing various grants and loans.

The separation of roles within NSWALC, including at the zone-level, can be a challenge due to resourcing levels. The Commission is aware, however, that during the 2015–16 period, NSWALC undertook a review of its zone offices. As a result of the review, the Northern Zone updated its staffing structure resulting in an internal segregation between governance and compliance matters.<sup>105</sup> Although resourcing levels may not allow for separation of all staff dealing with different functions within NSWALC, it should consider ways to ensure the separation of regulatory functions from other functions in order to properly manage competing goals.

Regulators do not generally bear the risks of a regulated entity. However, there are a number of ways that NSWALC may bear the risk of a LALC's failure. For example, NSWALC is responsible for the payment of LALC administrators.

When a LALC is put into administration, the cost is initially covered by NSWALC; although, it may recover the amount it paid from the LALC for which the administrator has been appointed.<sup>106</sup> If it is not possible to recoup the funds, NSWALC bears the loss. Given that LALCs are often under administration because they have unsatisfactory audit reports, in this way NSWALC may end up bearing the financial risk for poor decisions made by individual LALCs. If there is a likelihood of this occurring in a regulatory system, the regulator may become cautious in its behaviour as regulator and hesitant in fully applying its regulatory powers. NSWALC has expressed the problem in these terms:

*The financial cost of Investigators and Administrators is prohibitive. Such interventions are a financial and administrative drain on the entire land rights network.*<sup>107</sup>

There is a perception from some stakeholders with which the Commission spoke that NSWALC is risk-averse as a regulator because of its exposure to LALC financial risks and the real conflict of roles that presents. NSWALC's acceptance of this type of risk may also disincentivise some LALCs from taking appropriate responsibility or encourage them to underestimate their risks.

## Approaches to regulation

In the context of the ALRA, both the Registrar and NSWALC have elements of a responsive approach to their compliance and enforcement regimes. The NSWALC risk-assessment program is both risk-based and responsive. In theory, the Registrar already has a range of responses under the ALRA to address non-compliance; however, in practice, there is no example of the use of responses at the high-end of that scale.

At the low-end of the scale, under the existing provisions of the ALRA, the Minister, acting on a recommendation of NSWALC or the Registrar, can appoint an adviser to the board of a LALC "if the Minister is of the opinion that the Council is in danger of failing"<sup>108</sup>. Recent amendments to the ALRA improve the existing mechanism for appointing advisers to LALCs.<sup>109</sup> The amendments authorise NSWALC to appoint an adviser to guide and assist a LALC board when NSWALC has issued a LALC with a Performance Improvement Order. Performance Improvement Orders are a new mechanism to help improve the capacity of LALCs and provide a structured early intervention tool to deal with governance challenges before they require the appointment of an administrator or defunding.

Part of the challenge for regulators is managing the level of risk across very different LALCs. Not only are they different in their asset bases and the complexity of their community benefit schemes and programs, they are also quite different in how willing and able they are to operate within the regulatory framework. The principle of responsive regulation is designed to deal with the escalating risk of unwilling or unable entities by also escalating the control and oversight. Conversely, responsive regulation provides those who are willing and able to manage their risk appropriately with the benefit of less regulatory intervention. The system works by creating an incentive gradient across the actions available to the regulator.

**"[The risk assessment system] can make land councils more accountable with governance but for officers with one staff member it becomes a fair bit of work complying...."**

Comment by LALC survey respondent

<sup>105</sup> Ibid, pp. 30–31.

<sup>106</sup> Section 222(5) of the ALRA.

<sup>107</sup> NSWALC, *Annual Report 2014–2015*, October 2015, p. 62. Accessed on 15 March 2017 at <http://www.alc.org.au/media/100237/nswalc%20annual%20report%202014-2015.pdf>.

<sup>108</sup> Section 234(1) of the ALRA.

<sup>109</sup> Section 234D of the ALRA. The amendments commenced in April 2017.

A limitation of the LALC regulatory system is that the size of the incentive gradient is smaller than in other regulatory environments, reducing the motivation for LALCs to adopt a willing and capable approach to governance.

Although the risk-assessment system is responsive in that there are differences in the regulatory treatment of LALCs assessed as low-, medium- and high-risk, there are not vast differences between them. Low-risk LALCs are assessed once a year, report every six months and are funded quarterly. Medium-risk LALCs are assessed twice a year, report quarterly and are funded quarterly. High-risk LALCs are assessed three times a year, report bimonthly and are funded bimonthly.

In the case of NSWALC, additional options to respond to medium- to low-risk non-compliance would enhance their effectiveness. At the medium- to low-risk level, the kind of interventions available are risk-based but limited in gradation. For example, there is a gap in action that NSWALC can take between restricting funding via the risk-assessment system and the recommendation to appoint an administrator.

At the other end of the response scale, there is the full range of disciplinary provisions of the ALRA. However, the most severe sanctions under the ALRA are not used to respond to significant and entrenched non-compliance, and stakeholders have told the Commission that the incentive for some LALCs to improve compliance is diminished. One LALC told the Commission that, when members observe someone in a leadership position misuse their power, get caught and not face any substantial consequences, they learn that there is very little risk to acting in that way. A number of stakeholders told the Commission they believe that, if a member or leader were to break the rules, they should face serious consequences, even criminal sanctions.

Limited resources impact on the Registrar's ability to use the full range of disciplinary provisions of the ALRA. The funding of a regulator has a direct relationship to the potential of the regulator's impact. As the former Registrar explained to the Commission:

*Currently I could afford to do it [that is, issue a compliance direction] perhaps once per annum without receiving notice of going over budget. More resources would make that more amenable ... I find litigation is always a last resort.<sup>110</sup>*

<sup>110</sup> ICAC, Operation Greer transcript, May 2016, p. 969T. Accessed on 17 March 2017 at <http://www.icac.nsw.gov.au/docman/transcripts/greer/4814-24-05-2016-operation-greer-transcript-pp-00959-00994-from-2-10pm-to-3-59pm/file>.

## Outcomes-focused regulation

NSWALC zone offices also need to be adequately resourced. As discussed, the zones offices provide timely advice and information to LALC leadership, where necessary, acting as the main contact between LALCs and NSWALC's head office. The zone offices play an important role in decentralising regulatory activities and understanding the specific needs of the LALCs they regulate. The zones offices generally provide two primary services to the LALCs in their regions:

- oversight and compliance review of LALC operations, including the risk-assessment program
- support and capacity development for LALC leadership, including running mandatory governance training for board members as well as ongoing CEO training.

However, this ability to undertake an active program of supervision focusing on outcomes also depends on the level of resources at zone-level. During the 2015–16 financial year, the Northern Zone comprised nine positions, the Western Zone comprised six positions, the Far Western Zone comprised two positions, the Eastern Zone comprised four positions, and the Southern Zone comprised nine positions.<sup>111</sup> Limited resourcing at zone-level may lead a particular zone to focus more on checking compliance and less on capability development, which can be time-consuming. It is understood that NSWALC may be considering devolving more resources to zone-level. This would help promote the ability to carry out capability development and outcomes-focused regulation in the first instance.

## NSWALC's role as a broker for LALC economic development

Economic development is a complex activity that involves risk and requires specialist advice. NSWALC's Economic Development Policy, which is in the early stages of implementation, includes a range of initiatives to facilitate economic activity by LALCs over a five-year period. The policy has identified three strategic priorities: facilitation of LALC business enterprises, facilitating Aboriginal employment in NSW, and continuing to grow and manage the NSWALC statutory account.<sup>112</sup> Some of these activities are occurring in the context of a broader range of

<sup>111</sup> NSWALC, *Annual Report 2015–2016*, 30 October 2016. Accessed on 3 March 2017 at <http://www.alc.org.au/media/121107/nswalc%20annual%20report%202015-2016.pdf>.

<sup>112</sup> *Ibid*, p. 25.

Indigenous economic development initiatives that appear to have substantial resource support and expertise.

The Commission notes that a number of existing specialist organisations provide funding for Aboriginal economic development, including:

- Indigenous Business Australia, which is a commonwealth statutory authority providing commercial support, concessional loans to eligible businesses, and undertaking joint ventures with Indigenous businesses. It also provides advice and assistance throughout the business life cycle.
- Indigenous Land Corporation, which is a corporate commonwealth entity assisting Indigenous people to acquire land and providing grants to Indigenous corporations to achieve economic, environmental, social or cultural benefits. It can also assist with the management and development of land.
- Supply Nation, which is a non-profit organisation providing a link between Indigenous businesses and corporations and governments wishing to purchase goods and services from Indigenous businesses.

Given the number of existing organisations providing assistance, it may be more beneficial for NSWALC to consider focusing its efforts in areas where gaps have been identified to avoid duplicating the work of existing specialist organisations and to avoid NSWALC taking on unnecessary risks. For example, NSWALC has already identified that funding for business development is a market gap that it should fill, as no other program successfully provides tailored business development for LALC ideas.<sup>113</sup> In addition, NSWALC already performs the role of a broker for LALCs wishing to undertake economic development, helping them to develop partnerships with industry experts, financiers, the private sector, government, non-government agencies and individuals to help advise, connect, facilitate and fund LALC initiatives.

Some LALCs are creating complex company arrangements as vehicles for economic development activities. This is an area of LALC activity that can represent significant risk, particularly given the potential for significant non-land assets to be transferred out of a LALC and away from the control of members. The Commission's Operation Greer investigation involved the transfer of LALC funds totalling \$5,370,000 on 14 occasions to another corporate entity. The transfers were authorised by the former CEO. The majority of the transfers did not comply with board and member resolutions. Three of the transfers also

contravened a compliance direction issued by the former Registrar. The Commission found that the former CEO had engaged in serious corrupt conduct by improperly favouring the corporate entity in respect of the transfers.<sup>114</sup>

The former Registrar submitted to the Commission in Operation Greer that the stated purpose of any corporate entity established by a LALC should be bona fide and provide a cost effective and efficient way to achieve the stated purpose. He also suggested that it may be desirable for NSWALC to oversee an incorporation purpose test to ensure that the purpose, cost effectiveness and efficiency of the entity are demonstrated.<sup>115</sup> The Commission believes there is merit in adopting this submission.

## NSWALC's role in the transfer of non-land assets

The ALRA requires that, before transferring assets other than land, a LALC must, if required to do so by an applicable policy of NSWALC, conduct a risk assessment in accordance with the policy.<sup>116</sup> It is noted that NSWALC has yet to release its policy of relating to the transfer of non-land assets. The Commission believes that the development of a risk-management framework should be considered a priority given the risks involved in the transfer of non-land assets as demonstrated in Operation Greer. During Operation Greer, the former Registrar submitted to the Commission that the NSWALC risk-assessment policy (or the regulations) should expressly require that the following be addressed for the transfer of non-land assets:

- the demonstrated capacity of a LALC board to run both the LALC and its corporate entities (indicators may include consistent low-risk results in the risk assessment)<sup>117</sup>
- the establishment by the LALC of clear conflict of interest management protocols and policies
- market-testing to demonstrate the value of the proposed arrangements to the LALC.

In addition, the policy requirements for such transactions should include:

- a clear definition of outcomes sought by the LALC from the proposed economic development activity, generally, and the establishment of any corporate entities

<sup>114</sup> ICAC, *Investigation into the conduct of a former chief executive officer and members of the board of the Gandangara Local Aboriginal Land Council*, February 2017.

<sup>115</sup> Op cit, submissions in reply, Registrar, paragraphs 33 and 36.

<sup>116</sup> Section 52C(5) of the ALRA.

<sup>117</sup> This issue was discussed in chapter 3.

<sup>113</sup> Ibid, p. 26.



- a definition of possible sources of risks from the establishment of any corporate entities, the transfer of LALC assets to this entity and the likelihood of occurrence
- an assessment of alternative options, which could achieve the same objectives
- a definition of what is an acceptable risk and how the LALC is going to manage this in relation to the different options
- an assessment of options in terms of criteria such as acceptability of risk and ability to manage risk
- the constitution of any corporate entity providing that no additional sub-entity or arrangement or association be created without the explicit consent of LALC members
- an agreed timeframe for assessment of whether the economic activity or corporate entity is achieving stated objectives and when to implement the agreed risk-management strategies
- a defined, expected rate of return, including non-financial considerations such as cultural or environmental matters
- information and reporting systems that would enable adequate monitoring and management of risk levels
- how and when information will be reported to members
- what role, if any, NSWALC will have in monitoring the risk-management framework in the LALC and the accreditation of experts who can assist LALCs with risk assessment and management.

**“...once corporate entities are established by a LALC, the controls over the establishment of sub-entities are no longer there (unless in the Constitutions), and important controls over investment and disposal of assets is lost.”**

Former Registrar of the ALRA<sup>118</sup>

## Conclusion – suggestions for improvement

There is scope to strengthen the effectiveness of both the Registrar and NSWALC in overseeing LALCs. The regulatory overlap between the Registrar and NSWALC requires better coordination and consistency. While the Registrar and NSWALC do communicate on important issues, there is room for improvement. The development of an MOU between NSWALC and the Office of the Registrar would help improve coordination between the two bodies.

NSWALC also performs dual roles as a facilitator and regulator, which may lead to function conflicts. Although some attempts have been made to separate these roles, NSWALC should consider further options in this regard to ensure its competing goals are properly managed.

NSWALC's role as a regulator could be enhanced by focusing on market gaps such as providing tailored business development for LALC ideas.

The framework within which economic development is undertaken by LALCs would also be improved by the development of a NSWALC policy relating to the transfer of non-land assets, something that currently represents an area of considerable risk to LALCs.

The policy requirements developed by NSWALC for the transfer of non-land assets by LALCs to corporate entities should include:

- the demonstrated capacity of a LALC board to run both the LALC and its corporate entities
- the establishment by the LALC of clear conflict of interest management protocols and policies
- market-testing to demonstrate the value of the proposed arrangements to the LALC
- the development of a business case by the LALC that includes an assessment of any possible risks arising from the establishment of a corporate entity and a consideration of alternative options to the proposed arrangements.

The NSW Government should review the funding available to the Registrar to ensure the Registrar has the capacity to undertake the full range of enforcement options available in relation to misconduct by board members and LALC staff.

The NSW Government should amend the ALRA to provide for an incorporation purpose test in relation to the creation of LALC entities that is overseen by

<sup>118</sup> Op cit, submissions in reply, Registrar, paragraph 40



NSWALC. The test should ensure that the purpose, cost, effectiveness and efficiency of the entity is demonstrated.



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## Appendix: The Commission's survey of LALC leaders

### 1. Welcome

The Independent Commission Against Corruption (ICAC) Corruption Prevention Division is currently researching how Local Aboriginal Land Councils work. This will help identify practices that may help the Land Council Network continue to work effectively for communities into the future.

The survey has 18 questions, and should take no more than 10 minutes to complete. It may be completed by either the CEO or Chairperson of the LALC Board, but may only be completed once.

If you'd prefer to answer these questions over the telephone, please feel free to call Ofir Thaler at ICAC on (02) 8281 5739.

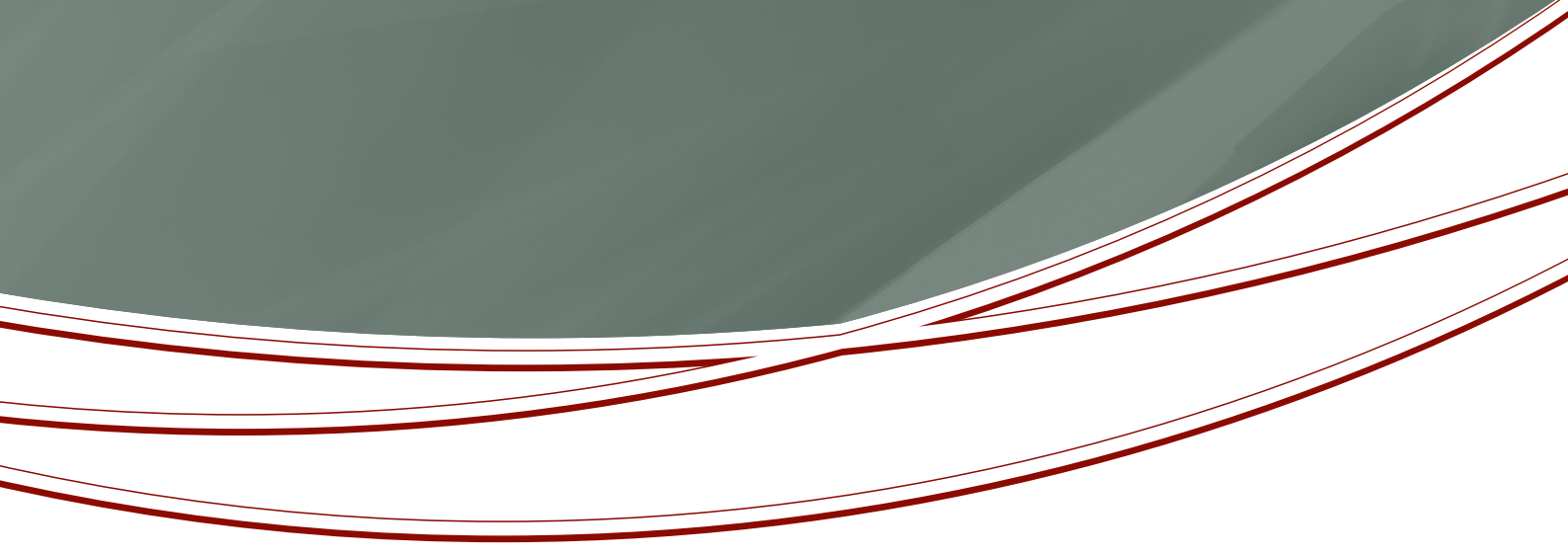
PLEASE NOTE: This survey is not part of an investigation of your, or any, Land Council. It is part of a research project that we hope will help improve the conditions for LALCs.

To begin, click the "Next" button below.

### 2. LALC activities

1. Which of the following services/activities does your LALC provide to members and the community? [Tick all that apply]

- ☐ Cultural activities and programs
- ☐ Training and education
- ☐ Community benefit and social housing schemes
- ☐ Partnerships with local, state or federal government
- ☐ Partnership with private businesses
- ☐ Business enterprises (income for the LALC)
- ☐ Other



2. Given the recent law changes enabling more LALC-related businesses, does your LALC intend to establish (or have you already established) a business or enterprise within the next five years? [Tick one]

- ☐ Yes – Already established (or completed)
- ☐ Yes – In planning
- ☐ Yes – Considering for the future
- ☐ No
- ☐ Don't know/Not sure

3. If Yes, what kind of business or enterprise? (please tell us in general terms)

### 3. Regulation and compliance

4. Overall, do you think the current level of regulatory requirements on LALCs is too much, too little or just right? [Tick one]

- ☐ Too much
- ☐ Too little
- ☐ Just right
- ☐ Don't know/Not sure

5. Are there any regulatory requirements of the LALC that you feel are unnecessary? If so, please outline below.

6. Do you think that the Risk Assessment System implemented by NSWALC is helpful for your LALC? [Tick one]

- ☐ Yes
- ☐ No
- ☐ Don't know/Not sure

7. Why? / Why not?

8. What do you do to help engage your community/members in developing your LALC's Community Land and Business Plan?

#### 4. Monitoring LALC performance

9. How many times in the last three years have you formally reviewed the performance of the CEO?

- ☐ 0
- ☐ 1
- ☐ 2
- ☐ 3
- ☐ More than 3
- ☐ Don't know/Not sure

10. How many times in the last three years have you formally reviewed the performance of the LALC?

- ☐ 0
- ☐ 1
- ☐ 2
- ☐ 3
- ☐ More than 3
- ☐ Don't know/Not sure

## 5. Member participation in activities

11. How many members (both voting and non-voting) does your LALC have? [Tick one]

- ☐ 1 – 50
- ☐ 51 – 100
- ☐ 101 – 150
- ☐ 151 – 200
- ☐ 201 – 500
- ☐ More than 500
- ☐ Don't know/Not sure

12. On average, what proportion of members attend any special meetings (e.g. to vote in new board, to approve an economic development enterprise)? [Tick one]

- ☐ Almost all (75%–100%)
- ☐ Most (50%–74%)
- ☐ Some (25%–49%)
- ☐ Few (0%–24%)
- ☐ Don't know/Not sure

13. On average, what proportion of members attend a regular meeting? [Tick one]

- ☐ Almost all (75%–100%)
- ☐ Most (50%–74%)
- ☐ Some (25%–49%)
- ☐ Few (0%–24%)
- ☐ Don't know/Not sure

14. What proportion of members were involved in the development of your LALC's most recent Community Land and Business Plan? [Tick one]

- ☐ Almost all (75%–100%)
- ☐ Most (50%–74%)
- ☐ Some (25%–49%)
- ☐ Few (0%–24%)
- ☐ Don't know/Not sure



## 6. Experience and training

15. What kind of experience do members of your board have in other community organisations or management?

16. What training have the board members, Chair and CEO of your LALC received to help them effectively manage the LALC? [Tick all that apply]

- ☐ NSW Aboriginal Land Council mandatory governance training
- ☐ Office of the Regulator of Indigenous Corporations training
- ☐ Tertiary training in governance
- ☐ Other

17. Have board members participated in any other types of learning opportunities? [Tick all that apply]

- ☐ Yes, Local/regional networks
- ☐ Yes, Mentoring
- ☐ Yes, from current or previous employment
- ☐ Other

18. Can you think of any additional training that could be helpful?





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