

The Hon. Sarah Mitchell, MLC
Minister for Aboriginal Affairs
c/- Aboriginal Affairs NSW
Level 3/35 Bridge Street
SYDNEY NSW 2000

18 September 2017

Our Ref: Z17/0225

Dear Minister

Review of the *Aboriginal Land Rights Act 1983*

Please find enclosed the Commission's submission concerning the review of the *Aboriginal Land Rights Act 1983* (the Act).

The Commission's submission talks primarily to the second scope point, as these issues are fundamental to the complaints the Commission receives about Local Aboriginal Land Councils (LALCs), and the corruption prevention training the Commission provides to this sector.

The submission refers to its public inquiries Operations Petrie, Nestor and Greer which involved, respectively, Wagonga LALC, Casino-Boolangle LALC and Gandangara LALC. In addition, the submission refers to the Commission's May 2017 report 'Governance and regulation in the NSW Aboriginal Land Council network'.

Thank you for the opportunity to comment on your review of the Act. Should you have any questions about our submission, please do not hesitate to contact Mr Lewis Rangott, Executive Director, Corruption Prevention on (02) 8281-5822 or lrangott@icac.nsw.gov.au.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

Submission by the Independent Commission Against Corruption on the Review of the Aboriginal Land Rights Act 1983

The scope of the Statutory Review is to:

1. Inquire into and make recommendations as to whether the policy objectives of the NSW *Aboriginal Land Rights Act 1983* (the Act) remain valid, and whether the terms of the Act remain appropriate for securing those objectives, today and into the future.
2. Inquire into and make recommendations as to whether the governance, structural, regulatory and administrative arrangements of the Act support the aspirations of the NSW Aboriginal community.
3. Ensure that recommendations of the review take into account any current and emerging reforms which might impact on the operations of the Act, in particular the Aboriginal Cultural Heritage reforms.

This submission from the Independent Commission Against Corruption (the Commission) talks primarily to the second point of the scope.

Under section 248 of the Act, Aboriginal Land Councils are taken to be public authorities for the purposes on the *Independent Commission Against Corruption Act 1988* (the ICAC Act), the *Ombudsman Act 1974*, and the *Government Information (Public Access) Act 2009*.

While many Local Aboriginal Land Councils (LALCs) are operating successfully, and governance across the network continues to improve, complaints the Commission receives about LALCs indicate persistent governance challenges. Common themes relate to the improper use or acquisition of funds or resources by people in positions of trust, unmanaged conflicts of interests, and partiality in the allocation of resources.

In the past six years, the Commission has conducted a number of investigations into LALCs, three of which involved public inquiries. These were:

- Operation Petrie: *Investigation into the conduct of officers of the Wagonga Local Aboriginal Land Council and others*, September 2012. Findings of corrupt conduct were made against five people.¹
- Operation Nestor: *Investigation into the conduct of a Casino-Boolangle Local Aboriginal Land Council CEO and administrative officer*, February 2017. Findings of serious corrupt conduct were made against two people.²

¹ *Investigation into the conduct of officers of the Wagonga Local Aboriginal Land Council*, September 2012 <http://www.icac.nsw.gov.au/docman/investigations/reports/3965-investigation-into-the-conduct-of-officers-of-the-wagonga-local-aboriginal-land-council-and-others-operation-petrie-sept-2012/file>

² *Investigation into the conduct of a Casino-Boolangle Local Aboriginal Land Council CEO and administrative officer*, February 2017 <http://www.icac.nsw.gov.au/component/investigations/article/5065?Itemid=4196>

- Operation Greer: *Investigation into the conduct of a former chief executive officer and members of the board of Gandangara Local Aboriginal Land Council*, February 2017. Findings of serious corrupt conduct were made against one person.³

Operation Petrie

In brief, Operation Petrie concerned the Commission's investigation into allegations that individuals external to Wagonga LALC (WLALC) made corrupt payments to WLALC officers to induce them to use their positions to facilitate a proposed joint venture, and long-term leases, on land vested in WLALC. The Commission learned about these allegations in 2011, although the conduct itself concerned events that occurred between March 2005 and April 2010.

Following a period of review, significant amendments were made to the Act in 2006, including that:

- a) LALCs are now required to gain approval from NSWALC before proceeding with land dealings⁴
- b) LALCs are required to develop and implement a Community Land and Business Plan (CLBP), which must be approved by its members, and [at the time] the NSWALC⁵
- c) LALC board members are required to undertake mandatory NSWALC governance training within six months of being elected.⁶

While the amendments to the Act were aimed at strengthening governance in the network, they were costly to implement, and these costs fell to the land council network. During the public inquiry for Operation Petrie, the then CEO of NSWALC, Mr Geoff Scott, was questioned about the tension between compliance costs and capacity building. He replied:

In every series of amendments going back since I've [been] involved in the land council system we have sought the government to conduct a financial impact study on the amendments going forward and been refused on every occasion. The only comment going forward is that it will cost the government nothing. It doesn't, it costs the land council system. That then prevents us from providing benefits and the sort of issues we're talking about now about providing more training, more support to

³ *Investigation into the conduct of a former chief executive officer and board members of the Gandangara Local Aboriginal Land Council*, February 2017.
<http://www.icac.nsw.gov.au/component/investigations/article/5070?Itemid=4196>

⁴ Division 4 of the Act regards Land dealings by Aboriginal Land Councils. There are some exemptions, under s.42E(2), to LALCs requiring NSWALC's approval.

⁵ Subsequent amendments to the Act mean that LALCs are no longer required to get NSWALC's prior approval for their CLBPs, but are still required to provide a member-approved copy to NSWALC.

⁶ Under s.65(5)(a), the NSWALC may exempt a board member wholly or partially if it is satisfied that the board member has previously undergone training under this section or already has sufficient skills to carry out his or her functions as a board member.

*actually get people's skills and provide benefits to members. Most of our resources now are tied up in – or a lot of them in regulation which has to be done.*⁷

It remains the Commission's view that any amendments to the Act should take account of how the associated costs would affect the network. The Operation Petrie report made the following three corruption prevention recommendations to the Minister for Aboriginal Affairs and the government generally and for the purposes of this submission, the Commission reiterates them.

Recommendation 1

That any future amendments to the *Aboriginal Lands Right Act 1983* are sensitive to the resource implications of compliance with the amended legislation for the Aboriginal land rights network.

Recommendation 2

That the Minister for Aboriginal Affairs consults with the NSW Aboriginal Land Council regarding the Aboriginal land rights network's financial and resource capacity to provide support and capability development to LALCs across NSW.

Recommendation 3

That the Minister for Aboriginal Affairs considers a review of the operation of Part 10 of the *Aboriginal Land Rights Act 1983* in meeting the expectations of the land rights network by excluding individuals who have been found to have engaged in corrupt conduct or in serious misconduct for a period of up to five years.⁸

In addition, it is worth noting that the issues in Recommendation 3 are often raised during the Commission's visits to LALCs, and in conversation with the NSWALC. People in the network are very concerned that persons who have had corrupt conduct findings made against them simply move on to a new LALC or, in some situations, regain positions of trust, through employment or as Board members of the LALC at which they acted corruptly.

Operations Nestor and Greer

In brief, the Commission's investigation, Operation Nestor, found that, between June 2010 and September 2012, the former CEO and administrative officer of the Casino Boolangle LALC engaged in corrupt conduct by issuing false invoices, and certifying documentation to enable them to cash cheques drawn on the land council's bank account for their own benefit. The cost of this corrupt conduct was close to \$80,000.

⁷ *Investigation into the conduct of officers of the Wagonga Local Aboriginal Land Council*, September 2012 op cit p. 47

⁸ *Ibid* p. 48

Operation Greer involved the corrupt transfer of LALC funds totalling \$5,370,000 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 of the Aboriginal Land Rights Act. The Commission found that the former CEO of Gandangara LALC engaged in serious corrupt conduct by improperly favouring the corporate entity in respect of the transfers.⁹

The Commission's research on LALC governance

The reports on Operations Nestor and Greer did not contain corruption prevention recommendations, as the systemic issues identified in these investigations were discussed in the Commission's May 2017 report *Governance and Regulation in the NSW Aboriginal Land Council network* (a copy of which is enclosed with this submission). As with Operation Petrie, both investigations demonstrated the need for better resourcing across the network, ongoing opportunities for training, and greater clarity in the regulatory regime governing LALCs.

In its 2017 report, the Commission examined the factors contributing to the challenges members face in holding LALCs and their leadership accountable and provided a number of suggestions to address these challenges. Member participation rates at meetings in many LALCs are low, and 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.

LALCs advised the Commission that the active participation of members in meetings can be undermined by a number of factors, including whether they have the opportunity to participate effectively when they do attend a meeting.

LALCs further advised 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.

Membership engagement is also developed through LALCs offering something for all members, not just a particular demographic or age group. In addition, some LALCs advised the Commission that members are attracted to LALCs that are perceived to be run properly. This involves dealing with wrong-doing in a consistent and fair manner that is transparent.

One of the functions of a LALC, under section 52G(1) of the Act, gives voting members of a

⁹*Investigation into the conduct of a former chief executive officer and members of the board of the Gandangara Local Aboriginal Land Council*, February 2017.

LALC the authority to suspend a member from attending or voting at meetings of the Council.

This is also dealt with under section 57:

(1) A Local Aboriginal Land Council may suspend a member of the Council (other than a Board member) from attending meetings of the Council for a specified time (not exceeding 3 years) if the Council decides that the conduct of the member:

(a) constitutes a serious breach of the Code of Conduct for members of the Local Aboriginal Land Council, or

(b) is otherwise detrimental to the best interests of the Council.¹⁰

The Commission understands that there may be a general reluctance by LALC members to invoke the above sanctions under the Act. Members may be hesitant to pursue this sanction because it would inevitably have an impact in the wider community. More to the point, while some LALCs do have a code of conduct for members, this is not prescribed under the Act or the Aboriginal Land Rights Regulation 2014 (the Regulation).

Currently, the model code of conduct in Schedule 3 of the Regulation only applies to Board members of a LALC – not members, staff or consultants. LALCs can also prepare their own code of conduct, which must be submitted to and approved by the Registrar. While some LALCs have prepared their own code of conduct, the Commission understands that there remains a heavy reliance on the model code. A LALC can, if it chooses, also make compliance with the code part of its contractual arrangements with the CEO or other staff.

While LALCs can develop their own codes of conduct for staff and members, the Commission believes that the model code/s under the Act and Regulation should extend to persons other than Board members. Accordingly, the Commission suggests:

Recommendation 4

That the NSW government consider amending the Act and/or Regulation to make the current model code of conduct, or a revised version, applicable to the CEOs and staff of LALCs, including contracted staff such as consultants.

Further, the Commission's legal advice is that voting members of LALCs are public officials for the purposes of the ICAC Act. Accordingly, the Commission suggests:

Recommendation 5

That the NSW Government consider amending the Act and/or Regulation to include a model code of conduct for members. The code should clarify what constitutes

¹⁰ *ibid* s.57

acceptable and unacceptable conduct by members, and provide substantial and consistent guidelines to LALCs to determine the grounds upon which members can be suspended.

The effectiveness of the regulatory framework

The Commission makes three points and two recommendations under this heading.

1. Enforcement of compliance with the requirements of the Act 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 consequently there is not always a holistic and consistent regulatory response taken to addressing non-compliance with the Act.

In practical terms, NSWALC has greater ready access to information about non-compliance with the Act 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. Given that 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.

However, while NSWALC has the ability to detect contraventions of the Act, 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.

The Registrar has broader scope as a regulator than NSWALC, including referring staff and board members of a LALC to the NSW Civil and Administrative Tribunal for misconduct¹¹ or issuing compliance directions.¹² The Registrar focuses on contraventions of the Act, 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.¹³

While the Registrar has this broader scope as a regulator, existing funding levels limit the use of the enforcement tools at the Registrar's disposal under the Act. The former Registrar gave evidence during the Operation Greer public inquiry that his office received funding of

¹¹ s 181K of the Act.

¹² s 235 of the Act.

¹³ See s 165 of the Act regarding the full functions of the Registrar.

\$900,000 per year for operating expenses and five staff members, which he described as “inadequate” for the tasks he was required to perform.^{14 15}

One option to promote better co-ordination and consistency of approach in regulation is through the development of a memorandum of understanding between the Registrar and NSWALC covering matters such as:

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

In the Commission’s view, improving the co-ordination of regulatory functions between the Registrar and NSWALC also needs to be supported by appropriate resources for the Office of the Registrar.

Recommendation 6

The NSW Government consider reviewing the funding available to the Office of the Registrar of the Aboriginal Land Rights Act 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.

2. Under the Act NSWALC has dual roles: as facilitator and regulator.

As the peak body, NSWALC is a facilitator for the LALC network. Its activities include promoting Aboriginal culture and heritage, advising the Minister for Aboriginal Affairs on Aboriginal land rights matters, and providing grants and loans to LALCs to facilitate business and community enterprises.

In addition to its regulatory role in LALC land dealings and the transfer of non-land assets, NSWALC also requires LALCs to be accountable for their annual funding, and to meet standards of governance under the risk assessment system. NSWALC can impose a heightened regulatory regime, and withdraw funding, when there are failures in accountability and governance.

¹⁴NSW ICAC, Operation Greer - Public Inquiry . p. 966T 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>.

¹⁵ The Commission has confirmed with the Office of the Registrar of the Aboriginal Land Rights Act that the funding levels cited by the former Registrar are substantially the same.

NSWALC's dual roles can, however, lead to conflicting objectives, and confuse or compromise the achievement of these different objectives. This can particularly be the case at a zone level, where staff engage in both facilitation and regulatory activities with LALCs.

These competing roles, both at the peak and zone level, need to be carefully managed. The tension between these competing roles can lead to resentment and fractured relationships locally, and can sometimes have a negative impact in the wider network.

The Commission's *Governance and Regulation in the NSW Aboriginal Land Council network* report also dealt with the responsibility that NSWALC bears for managing the risk of LALC failure. For example, when an administrator is appointed to a LALC the cost is initially covered by NSWALC. While the Act allows NSWALC to recover these monies¹⁶, it ultimately bears a financial loss if the LALC is unable to meet the costs.

Given that LALCs are often placed under administration because of financial dysfunction, NSWALC essentially assumes a financial risk for poor decisions made by individual LALCs. This could make NSWALC cautious in its regulatory actions, and undermine, or detract from, its achievements as a facilitator.

In addition, knowing that NSWALC could bear these costs of administration may reduce a LALC's willingness to take timely and appropriate responsibility for its own activities.

While the Commission is not making a recommendation about the above discussion, it does invite the Minister and government to consider whether NSWALC's dual roles could undermine its ability to fulfil its functions under the Act.

3. A further consideration in the regulatory environment is that some LALCs are creating significant corporations as vehicles for economic development activities, and may be doing so without adequate experience in managing such enterprises. This area of LALC activity can represent a significant risk, particularly given the potential for non-land assets to be transferred out of a LALC and away from the control of members.

Recommendation 7

That the NSW Government consider amending the Act to provide for an incorporation purpose test in relation to the creation of LALC entities. The test should ensure that the purpose, cost, effectiveness and efficiency of the entity is demonstrated.

¹⁶ s 222(5) of the Act.