



New South Wales Aboriginal Land Council
Investigation Report

29 August 2003

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1 Executive Summary

On 29 May 2003 I was appointed to investigate the New South Wales Aboriginal Land Council (“NSWALC”) pursuant to Section 216 of the *Aboriginal Land Rights Act 1983* (“the Act”) for a period of three calendar months.

The purpose of the appointment was to investigate all the affairs of the NSWALC. Without limiting the scope of my appointment I was also to specifically investigate a number of identified areas relating to the operation and management of the NSWALC.

The Terms of my Appointment did not specify a period of time to be covered by the investigation and it would not be practicable to investigate all of the affairs of NSWALC since its inception, in the time available. Accordingly, emphasis has been given to issues and decisions relevant to the life of the current Council; that is the period since 11 December 1999.

Initial interviews were conducted with Councillors and management of NSWALC to gain an appreciation of the functions and activities of the organisation as well as the roles of each. All Councillors have been interviewed by the investigation team with the exception of Cllr W Murray.

Interviews were also held with various members of the Aboriginal community who came forward and contacted my office on hearing of the investigation.

During the course of my investigation I have considered many aspects of the New South Wales Land Council, including its efficiency and effectiveness in fulfilling its functions under the the Act.

My key recommendations are provided at section 12 of my report and are complimented, where applicable, by specific recommendations at the end of each section.

It is my overall recommendation, that under section 223 of the Act that the Minister appoint an Administrator to the New South Wales Aboriginal Land Council to administer all of the functions of the New South Wales Aboriginal Land Council:

- The position of Administrator should be filled by an Aboriginal person.
- The term of appointment should be for a period of eighteen months.

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This recommendation should not be construed as a punitive measure against the Councillors as its aim is to provide a period of separation between the Council and the Corporate Body, something the current Council has been unable to achieve, and to provide the Corporate Body an opportunity to re-establish itself. The appointment of a full-time CEO, to commence in early September, provides further opportunity to strengthen the Corporate Body.

The Position of the CEO

My investigations indicated that significant periods have existed in the life of this Council where the CEO role was not permanently filled. The Council has failed to meet its obligations by not appointing an effective CEO with a clear mandate to direct and manage the organisation for substantial periods of time.

Inaction by Council has established a culture whereby the duties and functions of the CEO have been impeded by Councillors contrary to the express provisions of the Act and the employment contracts of the CEO.

The Council Meeting Process

Proposed Resolutions do not include recommendations and or advice from the Managers of the Corporate Body with respect to legal and financial implications. Resolutions are drafted at the table during the meeting process and are sometimes subject to some further condition. This has resulted in poorly drafted Resolutions that lack clarity.

It is clear that the current meeting process is not efficient and it has a detrimental affect on the effectiveness of the decision making process. Council has failed in its governance obligations to ensure adequate policy, as it relates to the elected body, is up to date to facilitate the discharge of their responsibilities in an efficient and effective manner.

Councillor Register of Interests and External Representations

NSWALC does not maintain a register of general disclosures of interests, a gifts register, or a register of Councillor's external representations. The failure to maintain appropriate registers is a significant failing on the corporate governance of NSWALC.

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Councillor Discretionary Grants

Whilst the concept of Councillor discretionary grants appears well founded the “discretionary” nature of these grants is not consistent with transparent decision making required of Councillors. Councillors are exposed to allegations of corruption, nepotism and imprudence in their administration of such funds whether or not, there is any substance to such allegations. There is an obvious difference in understanding between Councillors regarding how best to administer and for what purpose grants can be allocated.

Councillor Travel Allowances

There are a number of matters which suggest a continued disregard for the standards of accountability and probity expected of Councillors in relation to claims by them for travel.

Staff Organisation Structure

In commencing a review of the organisation in early 2003 without having first appointed a permanent CEO, Council has demonstrated a lack of foresight. The absence of certainty and direction this created has had a deleterious effect on staff morale and motivation.

In my view Council’s subsequent decision to defer implementation, pending the appointment of a new CEO is correct. The CEO must be fully engaged and committed to this process and should review and manage the transition. At this stage of the development of a robust and effective organisational structure, it is critical that strong and continuing leadership is given by a CEO with the ungrudging support of the Council.

Financial Management

The current Council has failed to show leadership by not monitoring the progress of strategies identified in the “Business Plan 2002-2007”. Further, the strategic plans have not been taken to the next stage and expressed in financial terms as part of the development of a Long Term Financial Plan for Council.

The 2003/2004 budget has not been prepared within the context of a current management plan and it is not apparent if resources have been allocated efficiently in accordance with stated priorities.

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The Council is in breach of section 157 of the Act in so far as it has been unable to furnish to the Minister sufficient information to facilitate the approval of the 2002/2003 and 2003/2004 budgets.

Complaints Handling

The internal complaint handling process within NSWALC is inadequate. As a consequence, complaints of corrupt conduct, maladministration or fraud have the potential to avoid referral to the appropriate authority. Failure to undertake a proper investigation also exposes the Council to potential criticisms of corruption or favouritism regardless of the true position.

Statutory Investments Fund ("SIF")

More than 90% of funds held in the SIF are with external fund managers. However the internally managed component has been invested in assets that are not publicly listed. NSWALC does not have the internal resources to effectively manage active investments. Whilst only representing 6% of the SIF, the internally managed assets represent 69% of the unrealised losses being carried by NSWALC.

The mortgage fund is a component of the internally managed assets forming part of the SIF. The operations of the mortgage fund have been the subject to adverse comment in a number of the reports to Parliament by the Auditor General and a number of independent reviews.

There is no control file on the overall conduct of the mortgage fund that includes all legal advice relating to the mortgage fund or that provides an overall review of the losses of the fund over the term of its operation. This represents a failure by the Corporate Body to effectively manage its business.

Support to Local Aboriginal Land Councils

The "Business Plan 2002 to 2007" for NSWALC includes as one of its functions "to start a process of building equity among our own people, including the distribution of wealth". It is arguable that this process should commence with a review of NSWALC's approach to LALC funding. At present approx 44% of LALCs are either on conditional or cessation funding. Six of the thirteen RALCs are on cessation of funding. A review of various allocations on a regional basis reveals that funding is not aligned to the number of LALCs in the Region and the total LALC network.

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Over several years, Rates Debts of LALCs have risen steadily. LALCs have been briefly afforded rates exemption but that exemption has now been withdrawn. In respect of some LALCs the deduction for Rates Debt recovery is less than the amount the Rates Debt is increasing. Further NSWALC has failed to take legal action against the offending LALCs as resolved by Council.

Legal Costs

Councillors have no role in seeking external advice in respect of the commercial and business affairs of NSWALC. NSWALC has failed to implement the recommendations of its own internal audit review issued in August 1998 that found that external lawyers were engaged without entering into formal engagement letters or obtaining cost agreements and no policy or procedures existed to provide staff and Councillors guidance in this area.

Feedlot Beef Venture

I have obtained independent legal advice on the power of NSWALC to enter into this venture that is contrary to that provided to Council by its internal advisors. This advice concurs with other external advice obtained by NSWALC that operating an enterprise is outside its functions.

NSWALC is not appropriately structured or resourced to effectively operate an enterprise in a commercial environment. Operation of any commercial venture increases the exposure of the statutory fund to unforeseen claims and losses that do not sit comfortably with the concept of investments responsibly managed under the Trustee Act. Notwithstanding any legal restrictions there are overriding commercial reasons why NSWALC should not operate any enterprise.

Rural Properties

In early 2003 NSWALC appears to have seriously damaged its reputation with a number of suppliers to the rural properties due to non-payment of invoices. This appears to have resulted in many inefficiencies and costly delays. The rural properties have attracted a significant amount of NSWALC's resources, both in money and time, which have been diverted from its core functions.

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Council, in its current plans to transfer the rural properties back to LALC's through a trust arrangement, has not addressed the future viability of the properties, their future funding requirements and the obligation of the LALC's to retain the properties within the Land Council network.

Fleet Management

Issues raised by the Auditor-General remain outstanding, namely concerns relating to the use of fuel cards the failure of the majority of Councillors to record details related to the use of their motor vehicles on motor vehicle running sheets.

Minimart

A substantial period of time elapsed between the proposals by Tamworth LALC to take over the Minimart to when it was transferred to the LALC (from 5 December 2000 until 13 June 2003). During this period of time substantial damage occurred to the property while it was under NSWALC's control.

There is no indication whether the LALCs in the Northern Region agreed to the transfer of the Minimart to the Tamworth LALC as initially proposed. I have been unable to establish whether the requirements of S40(1)(a) of the Act have been complied with by NSWALC. This section requires NSWALC to obtain the approval of the respective LALC.

NIIS Proposal

NSWALC's file in relation to the proposed purchase of the National Insurance Intermediary Services Pty Limited (NIIS) appears to have been created after my appointment. There is no summary of the current position or outstanding issues provided. The file includes no record of the Resolutions of Council. Important documents are missing from this file, including relevant memos from the previous Acting CEO and it is an incomplete record of the nature and conduct of this transaction.

The fact that the business did not currently have offices or employees in New South Wales does not appear to have been a concern to the Council in its deliberations.

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Funeral Benefits Scheme

Despite numerous advices both internally and externally Council has continued to follow its own agenda in the establishment of a Funeral Benefit Scheme. In some instances Council has taken control of issues to the exclusion of the Corporate Body. Council have repeatedly failed to consider the obligations under the General Purchasing Delegation in respect of consultancies and services in relation to the Funeral Benefit Scheme.

Mungindi LALC and the Glanville Property

The files maintained by NSWALC are poorly maintained and incomplete. There is little documentation on files to indicate that NSWALC complied with its own policies and procedures in regard to providing funding to MLALC. Specifically there are no written applications from MLALC and no feasibility assessments for the project.

ICAC Issues

NSWALC has taken an approach to dealings with ICAC that appears both arrogant and incompetent. Its repeated failure to adequately review the implementation of the recommendations exhibits a clear unwillingness of the Councillors to drive through any significant change in the organisation and a abject failure by the Executive to exhibit any leadership in ensuring the organisation has developed appropriate policies and communicates those throughout the Land Council network.

Filing Retention & Structure

Throughout my investigation I found the filing structure of NSWALC to be very poor. Repeatedly it was observed that papers were not secured within the file binders and the documents themselves were often not stapled together. This loose paper has made a logical and efficient review of the current position of such files impossible. There are generally no summary records or action sheets that record the current position of the area and actions being taken in respect of each matter. The lack of a central filing system further highlights NSWALC's failure in its document management system.

2 Introduction

2.1 General

On 29 May 2003 I was appointed to investigate the New South Wales Aboriginal Land Council (“NSWALC”) pursuant to Section 216 of the *Aboriginal Land Rights Act 1983* (“the Act”).

Section 216 (1) provides for the Minister to appoint an investigator, from a list of investigators jointly prepared by the Director-General and NSWALC, to investigate the affairs, or specified affairs, of an Aboriginal Land Council, including its efficiency and effectiveness.

Section 218 provides the investigator with powers to access all records and information related to the affairs being investigated.

2.2 Terms of Appointment

The Deputy Premier, Minister for Education and Training, and Minister for Aboriginal Affairs, The Honourable Dr Andrew Refshauge MP (“the Minister”) approved my appointment as investigator to New South Wales Aboriginal Land Council for a period of three calendar months commencing on the 29th May 2003. The Terms of my Appointment are as set out below in paragraphs 2.3 and 2.4.

2.3 Functions and Duties

The purpose of the appointment is to investigate all the affairs of NSWALC.

The investigator is required to investigate, document, report on and make recommendations in relation to all the affairs of NSWALC as necessary to satisfy the terms of appointment, and shall exercise such powers, duties and functions as are conferred by the Act or any other relevant laws.

The investigator must comply with the reporting requirements set out in clause 6 of the Terms of Appointment and in particular must provide the Minister with a final report by the expiration of his term of appointment.

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2.4 Specific Duties

Without limiting the scope of the investigator's appointment to investigate all the affairs of NSWALC the investigator is to specifically investigate the following areas relating to the operation and management of NSWALC:

- Compliance with its responsibilities and functions under the Act;
- Dealings, decisions and management of the Statutory Investment Fund ("SIF"), which finances the operations of NSWALC and the 121 Local Aboriginal Land Councils ("LALCs");
- The need for any changes to systems, policies and procedures which would improve the operation of the SIF, and the management of NSWALC, including the level of support for LALC's;
- Current financial management processes including its budgetary processes and any need for changes to systems, policies and procedures, including the possible need for the appointment of an administrator; and
- Any outstanding issues arising from the reports of the Independent Commission Against Corruption ("ICAC"), NSW Ombudsman and the Auditor-General as advised by the Minister.

2.5 Reasons for Appointment

In the Ministers Report dated May 2003 and tabled to Parliament under Section 216 of the Act, the Minister stated his concerns as including:

"A number of issues relating to NSWALC's operations have been raised repeatedly by the Audit Office, ICAC, the Ombudsman and the Department of Aboriginal Affairs. I am concerned that many longstanding issues have not been appropriately addressed by NSWALC and that the persistence of these issues may be indicative of deficiencies in NSWALC's operations."

"NSWALC's failure to provide sufficient information in response to these issues has caused me to seriously question whether NSWALC is operating in an efficient and effective manner."

"I have become increasingly concerned that NSWALC is not supporting LALC's to ensure that they operate effectively and efficiently and provide relevant services to meet the needs of members."

And finally:

“As an organisation purporting to be representative of, and working for the benefit of, the Aboriginal people of NSW, I seek to ensure that it is operating in an efficient and effective manner.”

2.6 Past Investigations and Inquiries

There have been a number of earlier independent public enquiries conducted into the affairs of NSWALC.

June 2002 Investigation concerning compliance with various provisions of the Annual Reports (Statutory) Bodies Act 1984 and the Aboriginal Land Rights Act 1983.

2.6.1 ICAC Investigations

April 1998 Report on Investigation into Aboriginal Land Councils in New South Wales – Corruption Prevention and Research Summary.

June 1999 Report on Investigation into Aboriginal Land Councils in New South Wales – Investigation Report.

October 1999 Investigation into Aboriginal Land Councils in New South Wales – Report on investigation into travel allowance and expense claims by the Councillors of the New South Wales Aboriginal Land Council.

2.6.2 NSW Ombudsman

June 2002 Investigation concerning compliance with various provisions of the Annual Reports (Statutory Bodies) Act 1984 and the Aboriginal Land Rights Act 1983

2.6.3 NSW Public Accounts Committee

December 2002 Enquiry into Aboriginal Land Councils Mortgage Fund.

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2.7 Acknowledgements

In completing my investigation it is appropriate to acknowledge the contributions made by the individuals of the investigation team. Mr Deryk Andrew, who performed the key role of supporting me in the direction of the investigation process including, liaising with stakeholders and the drafting of this report and related recommendations. Mr Ian Hollow, Mr Guy Baxendale, Ms Nicolette Martuo, all of whom have performed the detailed investigation of the matters covered in this report and Mr Philip Price, Mr Ian MacPherson, Mr Robert Ryn and Ms Jodie Smart who have assisted in my investigation at various times.

I would also like to express my appreciation to the Chairman, Clr Les Trindall, and Acting CEO, Ms Kerri Wilkinson, the Councillors and Staff of NSWALC who provided my team with access to the information and records requested for the purpose of our investigation and their courteous assistance during the term of my appointment.

2.8 Dictionary

Definitions contained in Section 4 of the Act have been adopted for use in this report. Specifically, the following abbreviations apply:

The Act	<i>means</i> The Aboriginal Land Rights Act 1983
NSWALC	<i>means</i> The New South Wales Aboriginal Land Council
RALC	<i>means</i> A Regional Aboriginal Land Council
LALC	<i>means</i> A Local Aboriginal Land Council
The Council	<i>means</i> the elected body of Councillors
The Executive	<i>means</i> the Chairman, Secretary and Treasurer of the Council
CEO	<i>means</i> the position of Chief Executive Officer and previously the position of Executive Director
Council	<i>means</i> Councillors elected to the governing body.
The Corporate Body	<i>means</i> the CEO and staff of NSWALC organised according to the functions carried out by NSWALC

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The Act	<i>means</i> The Aboriginal Land Rights Act 1983
SIF	<i>means</i> the Statutory Investment Fund comprising of the Capital value of \$485,340,000 referred to in Section 150 of the Act
Executive	<i>means</i> the Offices of Council comprising the Chairman, Secretary and Treasurer.
The Minister	<i>means</i> The Deputy Premier, Minister for Education and Training, and Minister for Aboriginal Affairs, The Honourable Dr Andrew Refshauge MP
Clr	<i>means</i> Councillor
DAA	<i>means</i> the New South Wales Department of Aboriginal Affairs
ASIC	<i>means</i> Australian Securities and Investment Committee
CMXXX/xx	<i>Means</i> Council Meeting Number/ Resolution Number

3 New South Wales Aboriginal Land Council

3.1 Background

The preamble to the Act acknowledges the traditional ownership of land in NSW by Aboriginal people. It states:

- Land in the State of New South Wales was traditionally owned and occupied by Aborigines;
- Land is of spiritual, social, cultural and economic importance to Aborigines;
- It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land;
- It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.

The 2001-2002 Annual Report of NSWALC provides the following:

“The New South Wales Aboriginal Land Rights Act 1983 gives the New South Wales Aboriginal Land Council (NSWALC) the mandate to provide for the development of Land Rights for Aboriginal people in NSW. The Council is committed to the ongoing provision of high quality support and advice to the Local Aboriginal Land Council network and empowerment of Aboriginal communities through:

- Land acquisition either by land claim or purchase
- Establishment of commercial enterprises to create a sustainable economic base for Aboriginal communities
- Maintenance and enhancement of Aboriginal culture, identity and heritage (including the management of traditional sites and cultural materials within NSW).

In addition, NSWALC acts as an advisor to and negotiates with Governments at all levels to ensure the preservation of Aboriginal rights.”

3.2 The Three Tiers of Aboriginal Land Councils

The Act established a three-tiered system of elected Aboriginal Land Councils. Since its original enactment, the Act has been amended on several occasions that have had the effect, amongst other things, to alter the inter-relationship and financial accountabilities of these three tiers of elected representatives. An underlying theme of the Act is to facilitate the autonomy and rights to self determination at the grass roots level.

3.2.1 The First Tier - Local Aboriginal Land Councils (“LALC’s”)

The 2001 – 2002 Annual Report of NSWALC provides the following:

LALC’s are constituted under the Act as separate body corporates. LALC’s are located across New South Wales. The number within each Region varies and ranges from 3 to 16, and the current total is 121. Each LALC elects its own office bearers (chairperson, secretary and treasurer) and also elects two regional representatives to attend meetings at their RALC. Staff and members are encouraged to access advice, information and support from NSWALC.

LALC’s work for their members and the wider Aboriginal community living in their local area. They assist in matters relating to the areas of housing, legal, employment and other day-to-day matters involving Aboriginal people in accordance with functions detailed under the Act.

The Act established the Land Council structure in a way that will help achieve a high degree of participation and involvement by every Aboriginal person in the affairs of their local community.

3.2.2 The Second Tier - Regional Aboriginal Land Councils (“RALC’s”)

The 2001 – 2002 Annual Report of NSWALC provides the following:

RALCs are constituted under the Act as separate body corporates, currently there are 13 RALC’s located across New South Wales. Each Regional Aboriginal Land Council is made up of representatives elected by the various Local Aboriginal Land Councils. RALC’s are designed to play an advisory role in the management of the land Council network and do not have direct authority over any Local Aboriginal Land Council (although a RALC can make recommendations for consideration by a LALC or NSWALC). Importantly, the RALC provides a local support base for LALC’s and their elected Councillor.

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RALC's are empowered with the following functions:

- a) *to provide assistance, when requested, to Local Aboriginal Land Councils within its area in the management, acquisition, use, control and disposal of land,*
- b) *to promote the protection of Aboriginal culture and the heritage of Aboriginal persons in its area,*
- c) *to provide advice and such further assistance as is required from time to time by Local Aboriginal Land Councils within its area,*
- d) *to provide advice and such further assistance as is required from time to time by the New South Wales Aboriginal Land Council,*
- e) *such other functions as are conferred or imposed on it by or under this or any other Act.*

Regional Aboriginal Land Councils and the number of LALC's within each Region is as follows:

Region	Number of LALC's
North West	17
Wiradjuri	16
North Coast	13
Central Coast	12
Far South Coast	10
Western	10
Central	10
Sydney/ Newcastle	8
Northern Tablelands	7
Northern	7
Murray River	5

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Region	Number of LALC's
South Coast	3
Western Metropolitan	3

3.2.3 The Third Tier - New South Wales Aboriginal Land Council

The 2001 – 2002 Annual Report of NSWALC provides the following:

The Council consists of 13 democratically elected members who represent the 13 Aboriginal Land Council regions in New South Wales. The Council is supported in its work by the Corporate Body, located in Parramatta, headed by a Chief Executive Officer who is responsible for all aspects of the day-to-day operation of the Council's affairs.

Most regions have a Branch office to support the Council's work, with a total of 11 Branch Offices supporting 13 Regions. The principal client of NSWALC is the network of 121 Aboriginal Land Councils that collectively manage the range of support services delivered at local level to their communities. These services include housing, legal, employment, training and property acquisition and management."

3.3 NSWALC Objects and Functions

The Objects of NSWALC are:

- to improve, protect and foster the best interests of Aboriginal persons within New South Wales, and
- to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales.

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NSWALC is empowered under the Act to perform the following functions:

Section 106 provides:

- a) *to administer the New South Wales Aboriginal Land Council Account and the Mining Royalties Account established under this Act,*
- b) *to grant funds for the payment of the costs and expenses of Local and Regional Aboriginal Land Councils (whether under funding agreements with Local and Regional Aboriginal Land Councils or otherwise),*
- c) *to acquire land on its own behalf or on behalf of or to be vested in a Local Aboriginal Land Council and to transfer land acquired on behalf of a Local Aboriginal Land Council to such a Council,*
- d) *to negotiate the acquisition by the Council or by one or more Local Aboriginal Land Councils of lands of cultural significance to Aboriginal persons that are listed in Schedule 14 to the NPW Act and the lease of those lands to the Minister administering that Act,*
- e) *to submit proposals to the Director-General of National Parks and Wildlife for the listing in that Schedule of other lands of cultural significance to Aboriginal persons that are reserved or dedicated under the NPW Act,*
- f) *to negotiate the lease by the Council or by one or more Local Aboriginal Land Councils of lands to which section 36A applies to the Minister administering the NPW Act,*
- g) *to determine and approve or disapprove of the terms and conditions of agreements proposed by Local Aboriginal Land Councils to allow mining or mineral exploration on land,*
- h) *to make claims to Crown lands, either on its own behalf or, if requested by a Local Aboriginal Land Council, on behalf of that Council,*
- i) *with the agreement of a Local Aboriginal Land Council, to manage any of the affairs of that Council,*
- j) *to mediate, conciliate and arbitrate disputes relating to the operation of this Act between Aboriginal Land Councils, between those Councils and individuals, or between individual members of those Councils and to refer such disputes to the Registrar or independent mediators, conciliators and arbitrators,*

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- k) to make grants or lend money to, or invest money for or on behalf of, Aboriginal persons,*
- l) with the approval of the Minister, to make grants or lend money to a funeral benefits scheme established for the benefit of Aboriginal persons,*
- m) to hold, dispose of, or otherwise deal with land vested in or acquired by it,*
- n) to assist Local and Regional Aboriginal Land Councils in complying with this Act in respect of the establishment and keeping of accounts and the preparation and submission of budgets and financial reports,*
- o) to assist Local and Regional Aboriginal Land Councils in conducting elections in accordance with this Act for Chairpersons and other officers,*
- p) to advise the Minister on matters relating to Aboriginal land rights,*
- q) to compile and maintain a register of all land held by Local Aboriginal Land Councils,*
- r) to compile and maintain a consolidated roll of all members of Local Aboriginal Land Councils,*
- s) to make prescribed information contained in the land register or consolidated membership roll that relates to a Local Aboriginal Land Council available on request to the members of that Local Aboriginal Land Council,*
- t) to promote the protection of Aboriginal culture and the heritage of Aboriginal people in New South Wales,*
- u) to provide or make available appropriate training for staff, officers and members of Aboriginal Land Councils (including but not limited to training in computer, administration, financial, accounting and ethical practice skills),*

Chapter 3: NSW Aboriginal Land Council

- v) *to exercise the functions conferred or imposed, by the Commonwealth Native Title Act, on a representative Aboriginal/Torres Strait Islander body (within the meaning of that Act) if the Council is determined to be such a body by the relevant Commonwealth Minister under that Act,*
- w) *to ensure that no part of the income or property of the Council is transferred directly or indirectly by way of dividend or bonus or otherwise by way of profit to Councillors or members of staff of the Council (but nothing in this paragraph prevents the payment in good faith of remuneration to any Councillor or member of staff of the Council),*
- x) *to exercise such other functions as are conferred or imposed on it by or under this or any other Act.*

Consistent with these core functions NSWALC identifies the following as its key aims in its 2001 – 2002 Annual Report:

- *Fully support LALC's so they operate effectively and efficiently and provide relevant services to meet the needs of members.*
- *Help LALC's acquire and develop assets to become financially viable and self-sufficient.*
- *Ensure NSWALC is operationally sound and above reproach and that this is acknowledged both internally and externally.*
- *Maximise the return on investment portfolio while minimising the risk through prudent investment and increase the capital base.*
- *Influence Government policy and community attitude to create improvements for Aboriginal peoples.*

3.4 The Elected Body

The Council consists of 13 Councillors, democratically elected by LALC's members to serve four-year terms. The elected body itself elects an Executive.

The life of the current Council commenced on the date of the last election that was 11 December 1999.

Chapter 3: NSW Aboriginal Land Council

Current Councillors of NSWALC are:

I Ardler	South Coast Region
D Brown	Far North Coast Region
D Clark	Murray River Region
O Cruse	South East Coast Region
V Graf	Sydney Newcastle Region
W Griffiths	Northern Region
R Lester	Western Metropolitan Region
J Morgan	Wiradjuri Region
W Murray	Western Region
M Ritchie	Central Coast Region
R Towney	Central Region
L Trindall	North West Region

During the life of the current Council the Executive positions have been held by the following Councillors:

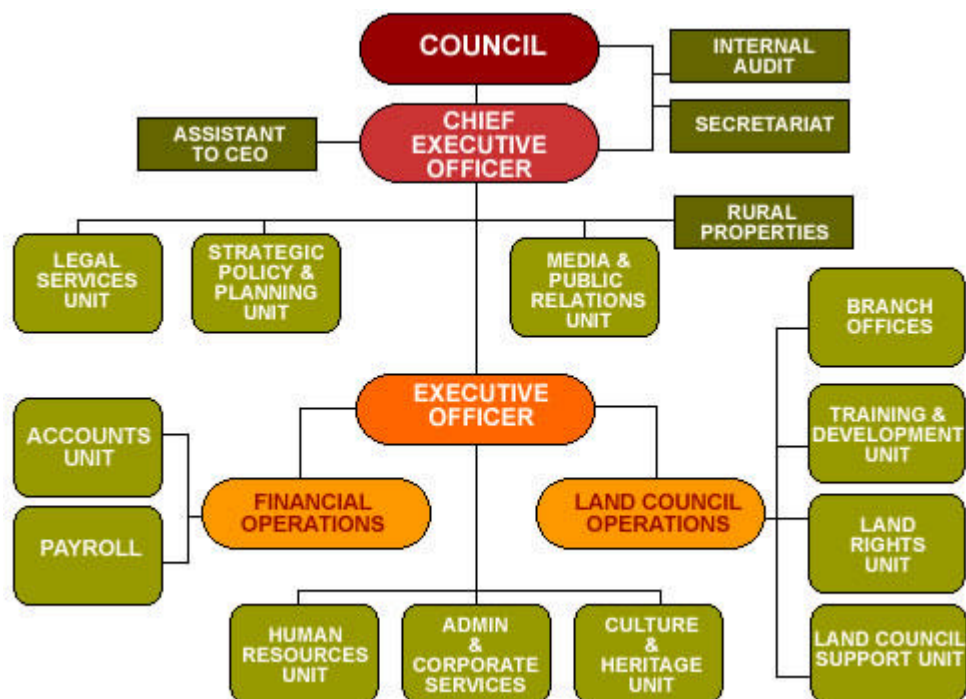
Chairman:	Clr L Trindall	From 10 Sept 2002
	Clr R Towney	23 Dec 1999 to 9 Sept 2002
Secretary:	Clr I Ardler	From 23 Sept 2002
	Clr V Graf	23 Dec 1999 to 23 Sept 2002
Treasurer:	Clr R Lester	From 26 Aug 2002
	Clr I Ardler	9 Oct 2001 to 25 Jul 2002
	Clr R Lester	23 Dec 1999 to 23 Sept 2001

Chapter 3: NSW Aboriginal Land Council

3.5 Organisational Structure

NSWALC is arranged in functional areas relating to the core business of the Council – namely, Land Rights and Investment. There is a range of management and support areas including Executive, Human Resources, Training & Development, Accounts, Purchasing, Fleet Management, Field Liaison and Internal Audit.

A major review of staffing structures was undertaken in September 2001 and the recommendations implemented in the year ending 2002. The current organisational staff structure is as follows:



4 Conduct of the Investigation

4.1 General

The Act provides for the appointment of an Investigator to Aboriginal Land Councils and empowers the investigator with access to all records and information of the Council related to the affairs being investigated.

Section 216 provides:

- 1) *The Minister may appoint an investigator, from a list of investigators jointly prepared by the Director-General and the New South Wales Aboriginal Land Council, to investigate the affairs, or specified affairs, of an Aboriginal Land Council, including its efficiency and effectiveness.*
- 2) *The Minister may appoint an investigator to investigate the affairs of a Local or Regional Aboriginal Land Council only with the approval of the New South Wales Aboriginal Land Council.*
- 3) *The Minister must prepare a report in writing of the Ministers reasons for appointing an investigator to investigate the efficiency and effectiveness of the New South Wales Aboriginal Land Council.*

Section 218 provides:

- 1) *The Chairperson of an Aboriginal Land Council and any other person who has possession or control of any records of the Council must, if required to do so by an investigator who produces evidence of his or her appointment, provide the investigator with:*
 - a) *access to such of the records as relate to the affairs being investigated, and*
 - b) *information that the Chairperson or other person is able to give in relation to those records and affairs, and*
 - c) *authorities or orders on bankers and others that relate to those records or affairs and that the Chairperson or other person is able to provide.*

Chapter 4: Conduct of the Investigation

2) *If a record:*

- a) *is not in writing, or*
- b) *is not written in the English language, or*
- c) *is not decipherable on sight, a requirement to provide access to the record is not complied with unless access is provided to a statement, written in the English language and decipherable on sight, that contains all the information in the record.*

3) *A person must not hinder, obstruct or delay an investigator in the exercise of his or her functions.*

4.2 Period of Investigation

The Terms of my Appointment did not specify a period of time to be covered by the investigation and it would not be practicable to investigate all of the affairs of NSWALC since its inception in the time available. Accordingly, emphasis has been given to issues and decisions relevant to the life of the current Council, that is the period since 11 December 1999. However, where appropriate to complete an understanding of the matter being investigated consideration of events and decisions of the Council arising before this date was also made.

4.3 Investigation Process

The investigation was not limited in the matters to be examined, rather it provided for the broadest possible power to “investigate all the affairs of NSWALC” together with those additional matters specified. Consequently, as the investigator I decide, having regard to the Terms of my Appointment, what issues to examine and to what extent, what records and information to access and which persons might be able to assist in my investigation. My investigation commenced on 29 May 2003 and was conducted for the most part, at the premises of NSWALC located at 33 Argyle Street, Parramatta.

The following procedures were undertaken in carrying out the investigation:

Chapter 4: Conduct of the Investigation

4.3.1 Interviews

Initial interviews were conducted with Councillors and management of NSWALC to gain an appreciation of the functions and activities of the organisation as well as the roles of each. Interviews with Councillors were scheduled to coincide with Council meeting dates. All Councillors have been interviewed by the investigation team with the exception of Cllr Murray who has not attended any of the four meetings of the Council that have been held since my appointment. This is not considered to have been a significant disadvantage to the investigation.

Interviews were also held with various members of the Aboriginal community who came forward and contacted my office on hearing of the investigation.

4.3.2 Observation of Council Meeting

My investigation team attended the 203rd State Council Meeting held in the week 23rd to 27th May 2003 to observe the conduct of the Councils business.

4.3.3 Branch Office Visits

Interviews were conducted with the majority of the Branch Managers through out July 2003. Each Manager was asked thirty-four standard questions relating to the different areas of operation of NSWALC.

The only branch offices not visited were Menindee in the Western Region and Batemans Bay in the Far South Coast Region.

4.3.4 Review of NSWALC Records

During my investigation I experienced difficulties both in accessing key staff and in obtaining complete records on specific areas of inquiry. The effect was to hinder the efficient progress of my investigation however I do not believe it has impacted on the appropriateness or validity of my final recommendations.

Many of NSWALC's key employees were absent during the period of my investigation due to meetings, leave, and ill health. I have estimated a 20% absenteeism rate in this period. Notable absences included the following positions:

Chapter 4: Conduct of the Investigation

Position	Estimated Absenteeism Rate %
Executive Assistant	21%
Manager Internal Audit	34%
Manager Administration	21%
Manager Legal Services Unit	26%
Director Land Council Services	43%
Legal Officer	19%
Senior Accounts Officer	31%
Personnel Officer	27%

Difficulties were encountered in locating key records throughout my investigation as NSWALC has no centralised document management system.

NSWALC employees have indicated that many documents are duplicated because each unit has their own filing system. The separate system of filing includes both paper filing and electronic versions. There is no documented policy regarding filing protocols and staff file and capture electronic data in their own way.

4.3.5 Community Concerns

Interviews were also held with various members of the Aboriginal community who came forward and contacted my office on learning of the investigation.

A number of enquiries and submissions were received from members of the Aboriginal Land Council network. A significant number of the issues raised related to matters which have been the subject of earlier investigations or related to LALC's and were assessed as being outside the scope of the terms of my appointment.

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4.4 Reporting of Recommendations

Normally in conducting a review of an organisation the findings of the review would be discussed and recommendations formulated in consultation with appropriate parties.

The nature of my appointment does not afford me the luxury of this consultative process. No draft report has been prepared for issue to the Minister, DAA or NSWALC for comment.

I have been aware of this limitation in the process of formulating my recommendations and have attempted to clarify the factual position and discuss the nature of recommendations with interested parties where possible.

I do not believe this limitation reduces the relevance of my recommendations for the improvement of the efficiency and effectiveness of this organisation.

5 Corporate Governance

5.1 Definition

Corporate Governance is a term commonly associated with management practices in the private corporate sector. A useful definition contained in Australian Standard: 'AS 8000 - Good Governance Principles', as issued by Standards Australia is as follows:

"The system by which entities are directed and controlled.

Corporate governance addresses the issues arising from the interrelationships between boards of directors, such as interaction with senior management, and relationships with the owners and others interested in the affairs of the entity, including regulators, auditors, creditors, debt financiers and analysts.

There is no one global applicable definition but some useful statements include:

'Corporate Governance is concerned with improving the performance of companies for the benefit of shareholders, stakeholders and economic growth. It focuses on the conduct of and relationships between, the board of directors, managers and the company shareholders.'

Corporate Governance generally refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organisation."

The above definition and statements have been adopted for use throughout this report when making assessments and comment about attitudes to governance within NSWALC.

Good governance requires a clear definition of the roles of the elected body and the corporate body, transparency in decision-making and accountability in the stewardship of the resources of the organisation. The commitment of people at all levels of the organisation is required. This starts with the elected/ governing body, the chief executive officer and senior management in the corporate body. Good governance cannot simply be imposed by legislation and regulation. To be effective it needs to be a value shared by people within the organisation such that it is a foundation of the corporate culture.

5.2 The Concept of Separation of Power

A main objective underlying the doctrine of Separation of Power is to preserve and maintain the liberty of the individual. A cornerstone of this doctrine is to ensure different powers are divided and distributed to create an appropriate system of checks and balances.

The Separation of Powers is a concept that forms a fundamental tenet to our system of government. It is applied to varying degrees in different levels of Government in Australia.

The concept of the Separation of Powers has recently been considered in the Public Inquiry into Warringah Council and reference is made to the Inquiry Report at section 5.1.

Previous investigations into Aboriginal Land Councils have also commented upon the importance of this concept.

ICAC Report “Corruption Prevention and Research Summary” in April 1998 noted the following:

“The separation of policy decision making from implementation of those decisions administratively is an important way to minimise the opportunities for corruption”.

In the context of local government the following concepts of Separation of Power were identified as being fundamental to the efficiency and effectiveness of the governance of the Corporate Body. It is considered that these concepts are equally relevant to NSWALC.

- 1) that the same person should not form part of both the Elected Body and the Corporate Body.

In my opinion the practical effect of this concept is compromised by the provision in Section 107 (1) of the Act that states that the role of Councillor is a full-time position.

- 2) that the Council should not control or interfere with the exercise of functions of the Corporate Body.
- 3) that the Council should not exercise the functions of the Corporate Body and vice versa.

This Separation of Powers was given legislative effect in the 2001 amendments made to the Act.

Chapter 5: Corporate Governance

5.3 The Corporate Body

The Corporate Body comprises of the Chief Executive Officer and the employed staff of the organisation. Its role is to support the Council and implement the policies and strategies the Council has adopted.

The Corporate Body presently has 50 staff located in head office and 30 staff located in the branch network. It is organised according to functions as set out in the organisational structure in section 3.5.

5.4 The Role of the Chief Executive Officer

Reason for Review

The concept of Separation of Powers between the Council and the Corporate Body is fundamental to the efficient and effective operation of NSWALC. The Chief Executive Officer (“CEO”) provides the link between the Council and the Corporate Body.

The terms of my appointment require me to investigate the efficiency and effectiveness of NSWALC. One of the outstanding issues arising from ICAC investigations was the development of best practice corporate governance.

At the time of my appointment the position of CEO was being performed in an acting capacity. Due to the importance of this role, I determined to examine this area.

Overview

In the 60 month period since the appointment of Ms. Norma Ingram to the position of Executive Director in September 1998 the position of CEO has only been held by a permanent appointee for thirty-four months as follows:

Ms Ingram	16 months
Mr Bradford	18 months

A consultant, Mr D Rose, was appointed to act in this role for the six months from December 2002 to May 2003.

Chapter 5: Corporate Governance

During the life of this Council, the role of the CEO has been held in an acting or temporary replacement capacity for substantial periods. In summary, the position of CEO has only been held on a full time basis for nineteen of the forty-five months, representing 42% of that period.

This raises considerable concern about the Council's commitment to good corporate governance and whether it has acted in the interests of NSWALC and its members by having the role of CEO performed in an acting capacity for a significant proportion of the life of the Council.

In my opinion the Council has failed to ensure an effective Separation of Powers existed between the Council and the Corporate Body in that;

- The Council has neglected to fill the vacant CEO role with a permanent appointee for substantial periods of time.
- The Council, when it has filled the CEO role, has failed to permit the appointee to freely perform his or her functions.
- The Council through its Executive have promoted an environment of conflict in its relationship with its CEO with the following results:
 - The costly termination of CEO contracts of employment.
 - Difficulties in recruiting new staff at management level.
 - The negative impact on staff generally and the management function specifically.
 - A negative perception of Council within both the indigenous and wider community.

The position of CEO has (as at the date of this report) been filled. The position has been offered to Mr. William Johnstone and I understand he will commence in this position on 3rd September 2003. Without an appropriate and effective Separation of Powers between the Council and the CEO, the CEO designate will struggle to effectively manage and direct the Corporate Body of NSWALC and to implement the steps that this report recommends and which have been recommended by previous reports on the operations and governance of NSWALC.

Chapter 5: Corporate Governance

Relevant Legislation

The position of CEO was formalised and defined by the Aboriginal Land Rights Amendment Act 2001. The amendments were effective from 25 October 2002.

The Act now provides an obligation on the Council to appoint a CEO immediately if a vacancy arises in the position.

Prior to the amendments referred to above, the positions of either CEO or Executive Director have existed in name but without support of a statutory framework.

The Act now provides the functions for which the CEO is responsible.

Section 139 provides:

- 1) *The CEO is generally responsible for the efficient operation of the New South Wales Aboriginal Land Council's organisation and for ensuring the implementation, without undue delay, of decisions of the Council.*
- 2) *The CEO has the following particular functions:*
 - a) *the day-to-day management of the Council's affairs,*
 - b) *the exercise of such of the functions of the Council as are delegated by the Council to the CEO,*
 - c) *the appointment of staff in accordance with staff organisation structure and resources approved by the Council,*
 - d) *the direction and dismissal of members of staff.*

The duties of the Chairman, Secretary and Treasurer of the Council are also specifically set out in the Model Rules for NSWALC.

Policy & Procedures

The proper functioning of the Council and the CEO relies upon an effective working relationship, a mutual co-operation and a clear definition of the respective roles of the Council, its Executive and the CEO. This requires a clear process for the appointment of the position of CEO, a clear and unambiguous definition of the role and functions of the CEO, and a transparent and equitable process for the termination of the CEO in particular and defined circumstances.

Observations & Comment

Chapter 5: Corporate Governance

My investigations indicated that significant periods have existed in the life of this Council where the CEO role was not permanently filled. For example, the permanent role was vacant for the entire period from 19 January 2000 to 4 June 2001. The Council has failed to meet its obligations by not appointing an effective CEO with a clear mandate to direct and manage the organisation for substantial periods of time. The results of the recruitment process for the CEO suggests the Acting CEO appointed by the Council may not have had the executive experience and skills necessary to perform the functions required of the CEO. In addition the "acting" CEO is restricted in their ability to develop, review and to implement policies and programs due to the caretaker nature of the role that they are performing.

A consequence of not appointing a permanent CEO is that members of the Executive participate to a greater degree in functions of the Corporate Body. The risk for the Council is the perception that they are seen to be exercising or interfering in the exercise of functions of the Corporate Body, a role they are not necessarily skilled, qualified or capable of doing. Their participation provides increased opportunities for acts of corruption to occur and the potential for deterioration in the accountability and transparency of decision making.

The Act and Model Rules contain provisions that separate the positions of Council and the CEO. It may be said however that no statutory provisions or guidelines exist that provide clarity for the interaction of the roles of the Executive, especially the Treasurer, and the CEO. Over the life of this Council, this has resulted in a reduction in the effectiveness of the CEO and the Corporate Body. By not promptly appointing a CEO and interfering in the day-to-day functions of the corporate body, Council has created a situation where they can legitimately be criticised for poor corporate governance and a lack of leadership.

My investigations have indicated that the inaction by Council has established, a culture (by Councillors) whereby the duties and functions of the CEO have been impeded contrary to the express provisions of the Act and the employment contracts of the CEO. In restricting particular functions of the CEO, Councillors have undertaken day-to-day decision-making roles that are arguably beyond their capabilities and experience, and beyond their duties as elected Councillors.

Chapter 5: Corporate Governance

Immediately after the appointment of Mr Bradford to the role of CEO in June 2001 the relationship between the Executive of the Council and CEO was arguably dysfunctional. It is not unreasonable to assume that the issues between the Treasurer and the CEO in the period from June 2001 were a function of the lack of clarity in the roles of the Treasurer and the CEO and a conflict of personalities of the individuals involved.

Examples of inappropriate involvement in the day-to-day activities of the organisation abound. During 25-27 July 2001 for example the Treasurer sent five memos to the CEO requesting information relating to management of the Corporate Body.

26 July 2001; the Treasurer advised in a memo to the CEO..."Please be advised in relation to Councillors travel allowance payments I, as NSWALC Treasurer, am the authorising person and in my absence Mr Shanawany or the Acting Executive Director. Please ensure you observe Council decisions."

This action by the Treasurer is inappropriate. It removed an administrative function from the CEO and compounded the error by the creation of a potential for conflict of interest.

26 July 2001; the Treasurer advised by memo to the CEO..."Please provide me with copies of all directions you have given to staff in the finance, investment and evaluation areas of NSWALC operations. Further, please ensure that you provide to me on all future occasions copies of any directions you issues (sic) to staff in these areas."

My investigations revealed many further examples that illustrate the breakdown of the relationship between the CEO and the Treasurer:

8 August 2001; Clr Lester raised his concerns at a Council meeting on the Employment Contract entered into by the Chairman with the new CEO. Clr Lester's concerns related to the cross over of the financial functions between the CEO and the Treasurer as set out in Schedule A to the contract of employment of the CEO. This problem was not a new problem to the Council. The contract was affirmed by Resolution of the Council although, it is noted Clr Lester voted against this Resolution.

At the same meeting two further Resolutions were proposed and passed with respect to accepting Legal Counsel's advice on the relationship between CEO and functions of the Council and confirming the acting Financial Controller, Mr Talaat Shanawany, be advised that he is directly responsible to the CEO and not the Treasurer. Clr Lester is recorded as voting against these Resolutions.

Chapter 5: Corporate Governance

It is not obvious why the second of these Resolutions should be required as the Financial Controllers position would ordinarily report to the CEO and not directly to Treasurer or any other member of the Council.

21 August 2001; the Council endorsed the CEO's decision to terminate the contract of Boulevard Connections Pty Ltd, this being the consulting company providing the services of the Financial Controller, Mr Shanawany. Clr Lester also voted against this Resolution.

27 August 2001; Clr Lester sent a memorandum to the CEO addressing a number of issues relating to the CEO and Treasurer roles. The relationship between the two was already confrontational, as was the tone of this memorandum. This memorandum included the following quote from the Treasurers Report to the 181st Meeting of the Council "Let me make myself perfectly clear, I have no confidence in the CEO to manage the financial affairs of NSWALC, he is not my nominee until I am confident he can". Later in the memorandum it goes on to advise ".....As the elected Treasurer of NSWALC, I now inform you effective as of midday Monday 27th August 2001, within the Head Office of NSWALC no commitment of expenses or payment of expenditure on behalf of the Council are to be made without my written approval."

Whether this is a correct interpretation of the functions of the Treasurer as set out in the Act or not, it is my view that the Treasurer should have appreciated the need to uphold the division of responsibilities between the Council and the Corporate Body.

30 August 2001; the Chairman issued a memorandum to all Councillors and staff confirming that the day-to-day management of NSWALC was the responsibility of the CEO, be they financial or otherwise.

7 September 2001; the Treasurer sent a memo to the Chairman taking objection to the CEO report tabled at the previous Council meeting, in which he regards the contents..."to be bordering on slander" and..."I advise you that you and the CEO leave me no option but to seek the relief of the Court".

7 September 2001; Council advises the Treasurer of a motion to be put to the next Council meeting to remove him as Treasurer for reasons of failing to follow Council instructions and conduct detrimental to NSWALC.

21 September 2001; the Treasurer was removed from office by a majority vote of the Council. Clr Lester then institutes legal action, as is his right, to restore his position. This action was unsuccessful and costs were awarded against Clr Lester.

Chapter 5: Corporate Governance

On 2 August 2002; Clr Ardler who had been appointed to replace Clr Lester, resigned as the incumbent Treasurer. This action set in motion a series of events that revived the conflict between the functions of the CEO and the previous Treasurer, Clr Lester.

On the 26 August 2002 Clr Lester regained the Treasurer's position. The CEO commenced negotiations to obtain payment of costs from Clr Lester related to the legal proceedings referred to above. It is open to question why these recovery proceedings were not commenced earlier. Had they been, this would have negated any notion of political motivation.

The conflict between the CEO and Treasurer was further escalated by Clr Lester in memos dated 2 and 5 (x2) September, 2002. On September 5 Clr Lester withdrew the CEO's status as nominee for the Treasurer and advised that the Manager of Financial Operations would assume the nominee status of the Treasurer.

As this role is subordinate to the CEO, this directive by the Treasurer was entirely inappropriate.

The potential Funeral Benefit Scheme had become a matter of conflict between the CEO and the Treasurer. In a memorandum dated 2 December the CEO advised the Chairman of his intention to refer a report to ICAC requesting an investigation into the process and conduct of the proposed Scheme.

Mr Bradford was terminated as the CEO of NSWALC by Council Resolution on 4 December 2002.

In the course of my investigation I confirmed with the legal advisers to Mr Bradford that due to his dismissal no referral of the matter alluded to was ever made to ICAC.

It is also significant to note that during the latter period of my investigation the Treasurer again involved himself in the day-to-day administrative operations of NSWALC. This instance related to the Treasurer giving instructions directly to a member of staff in relation to a payroll processing matter. The matter was also raised with that person's supervisor and then finally raised with the acting CEO. The Treasurers last step should have been his first and only point of contact.

Whilst, the level of interference referred to above concerns mainly one Councillor other examples exist. I refer to comments in this report dealing with the Mungindi LALC and the Glanville property development and the NIIS Proposal.

Chapter 5: Corporate Governance

It is considered that the other members of the Council have failed to adequately perform their obligations due to their inaction and failure to adequately resolve these issues.

Other matters

The Council has failed to conclude timely and relevant performance appraisals of the CEO.

No protocol exists for the legal, efficient and cost effective termination of an individual in the role of CEO. Over the life of this Council this resulted in legal disputes with both former CEO's. The legal procedure and settlement of costs has been a significant financial burden to NSWALC. One of the two legal matters is yet to be satisfactorily concluded so the total costs are not quantifiable.

In light of the preceding comments, a general observation is that certain aspects of the governance difficulties within NSWALC are not amenable to change by decree or legislation. These are:

- A culture at Council level that Councillors have a right or even an obligation, to interfere in the day-to-day administration.
- A conditioned response from administrative staff that a Councillor is their boss.
- Demoralised staff and consequent apathy or resistance to embrace change.
- A loss of talented staff capable of implementing change.
- Instances of a clear failure by Councillors to understand the basic concepts of conflict of interest.

Chapter 5: Corporate Governance

Recommendations

An administrator be appointed to administer all the functions of NSWALC.

An Aboriginal person should be appointed to the position of administrator.

The term of the appointment should be eighteen months.

Legislative reform is required to abolish the Executive positions of the Secretary and Treasurer.

Council must provide timely and relevant performance appraisals of the CEO.

A policy for the appointment of the CEO and other senior positions should be established.

A policy for the termination of the CEO position should be established. This must be consistent with the CEO's employment contract. A protocol for formal mediation should be included in the policy.

6 The Council

As stated earlier in this report the separation of roles of the Council and the Corporate Body is a cornerstone to good governance and necessary for organisational efficiency and effectiveness. Numerous previous reports into the activities of NSWALC have referred to a lack of definition in the respective roles and functions of elected Councillors and the Corporate Body. Council's apparent inability to develop an appropriate governance policy and effectively oversee its implementation resulted in the recent changes to the Act to give legislative effect to the separation of roles.

Section 108 provides:

- 1) The role of the Councillor is, as a member of the governing body of the Council:
 - a) *to direct and control the affairs of the Council in accordance with this Act, and*
 - b) *to participate in the allocation of the Councils resources for the benefit of Aboriginal people, and*
 - c) *to participate in the creation and review of the Councils policies and objectives, and*
 - d) *to review the performance of the Council in the exercise of its functions and the achievement of its objectives.*

- 2) The role of a Councillor is, as an elected person:
 - a) *to represent the interests and respond to the concerns of Local Aboriginal Land Council members, and*
 - b) *to facilitate communication between the Local Aboriginal Land Council members and the New South Wales Aboriginal Land Council.*

Further amendments made to the Act established the position of the CEO and clearly articulated that responsibility for the day-to-day management of the affairs rested with the CEO.

Chapter 6: The Council

Although it may be reasoned that the changes to the legislation were not enacted until October 2002 this does not diminish the responsibility on the Councillors to show leadership in adopting best practice governance policies and procedures.

6.1 Qualifications of the Elected Body

A number of people from the membership have expressed the view during the investigation that there should be a minimum standard of qualification to be eligible to stand for election to the position of a Councillor of NSWALC. It is reasoned that this will facilitate improving the standard of the elected body.

The Act provides that a person is only disqualified from standing for election if they are not a voting member of a LALC within the Region.

It is my view that it is not appropriate to impose conditions relating to minimum standards of education or qualification on individuals who are considering offering themselves for election. If the membership is of the view that persons do not have the required experience or qualifications to represent them as elected Councillors, then that view should be expressed via the democratic process.

However, it is considered important for the Land Rights system that the ability to participate is as inclusive as possible to all Aboriginal people in New South Wales. One barrier to this is the requirement that the position of Councillor is a full time position. This prevents talented people engaged in other full time occupations from standing for election.

One possible remedy is to consider whether the interests of the membership can adequately be represented by Councillors who are not full time. This analysis is beyond the scope of my appointment and it is open to question whether the elected body would have the impetus to undertake such an assessment that may result in a change to their tenure. I note that the full time nature of the role of Councillor increases the likelihood of a breakdown in the separation of powers, especially if the responsibilities of a Councillor are not sufficient to fully occupy a person in the position.

Part time representation would require a strong capable Corporate Body to provide support and clear recommendations to Council.

In addition consideration may be given to whether Councillors should be restricted to a maximum of two consecutive terms. This would require legislative amendment.

6.2 The Council Meeting Process

Reason for Review

The meeting costs of Council are significant and as part of my investigation, the Council minutes of all available meetings for the life of this Council have been subject to review. My examination of the minutes indicates that meetings are generally held for a period of one week at a time and the number of Councillors recorded as being in attendance and voting on motions varies throughout the meeting process. In interviews with Councillors it was stated that meeting papers are not distributed prior to the meeting date. As a result of this and in order to further my understanding of Council's governance practice, the meeting of the 203rd State Council Meeting held from the 23rd to 27th June was observed by the investigation team.

Overview

The Act empowers the Council amongst other things to direct and control the affairs of NSWALC and participate in the allocation of NSWALC's resources for the benefit of Aboriginal people. The regulations require that meetings of the Council be held at least once every quarter. A review of the meeting schedule indicates that this Council has held a total of 51 meetings over 168 days during its life to date. These meetings comprise ordinary and adjourned meetings as well as any extraordinary and workshop meetings. NSWALC Policies and Procedures Manual (last revised in April 1999) provides the following guidance on meeting procedures:

Section 3 clause 6.5 provides:

Councillors should ensure that their decisions and actions are reasonable, and appropriate to the circumstances, based on a consideration of all the relevant facts and supported by adequate documentation.

Section 3 clause 10, amongst other things, provides Councillors shall:

- Give their whole time and attention to the business at hand...and carry out their work efficiently and effectively; and
- Attend for the entire duration of the meeting; and
- All mobile phones must be switched off during official meetings.

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Observations & Comment

Meetings did not always start at the scheduled time and not all Councillors were in attendance at the scheduled starting time;

Meetings are not open to the membership and/or the public at large;

The CEO or their delegate is not in attendance for the whole meeting process;

Councillors leave and rejoin the meeting to attend to other business including the taking of phone calls;

A written report by the CEO and other Managers is not always provided as part of the Table Papers;

Resolutions that remain outstanding are not tabled to the Council as a matter of course;

Proposed Resolutions do not include recommendations and or advice from the Managers of the Corporate Body with respect to legal and financial implications;

Verbal Reports and advice from Managers are sought on an ad hoc basis. A consequence of this is the meeting process is delayed and lacks continuity as Managers are located and requested to join the meeting;

Councils policy on rescission motions is not well understood and or documented.

Resolutions are drafted at the table during the meeting process and are sometimes subject to some further condition. This has resulted in poorly drafted Resolutions that lack certainty.

The interviews conducted with Councillors indicated an awareness of these issues and their impact on the efficiency of Council's meetings. Comments made to me included:

- Meetings start late, late back from lunch, mobile phones are left on;
- Councillors coming and going is disruptive;
- Papers provided on the morning of meeting, not enough time;
- Sometimes papers are put together on day of meeting, items aren't actioned before the next meeting;

- Papers should be provided two days earlier, on the day is not professional;
- Five day rescission notices are difficult and I have never been happy with them.

It is clear that the current meeting process is not efficient and has a detrimental affect on the effectiveness of the decision making process. What is not clear, is why the Council has failed to address these issues and enforce compliance with its own stated policies and procedures. The Policies and Procedures Manual was last revised in April 1999. Council has failed in its governance obligations to ensure adequate policy, as it relates to the elected body, is up to date to facilitate the discharge of their responsibilities in an efficient and effective manner.

Recommendations

As the leaders of the peak body in the aboriginal land rights system Councillors should comply with their own stated policies with regard to code of conduct during meeting procedures.

The Policies and Procedures Manual should be reviewed and updated and include suitable sanction provisions for breaches of codes of conduct.

Table Papers should be distributed at least one week before meeting dates. These should be provided to Councillors using email. If necessary a hardcopy can continue to be made available for collection at the start of the meeting.

Written reports to Council from the CEO and Managers in the Corporate Body should be included in the Table Papers. Specific comment on all Resolutions that remain un-actioned should be made.

The meeting duration is too long. Council need to workshop this area and implement change with the specific goal of reducing the time commitment to meetings.

Council Meetings should be open to the membership. Meetings should be held regularly in local and regional areas. Where possible meetings should be held in the chambers of the relevant Local Government Council.

Resolutions should be made after a proper consideration of the financial and legal implications. These assessments should be included as part of an assessment and recommendation from management of the Corporate Body.

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Resolutions should not be passed subject to further conditions. Where further information is required or some act is yet to be carried out, Council should defer making a Resolution until all the facts are known to avoid any doubt being raised as to whether conditions have been satisfied.

6.3 Councillor Register of Interests

Reason for Review

This issue was identified during our preliminary planning as a fundamental issue to be reviewed during the course of all the investigation.

Overview

Both Councillors and the Secretariat advised that a register of interests is maintained in respect of Councillors. A cursory review identified that the register comprises a record of actual declarations of a pecuniary interest by Councillors during the conduct of Council meetings.

NSWALC does not maintain a register of general disclosures of interests, a gifts register, or a register of Councillor's external representations.

Relevant Legislation

Section 56B of the Act was in force from the date of election of the new Council until 24 October 2002. It provided for a system of disclosure of pecuniary interests focussing on actual conflicts arising in respect of matters considered by Council. Section 56B(4) of the Act requires that all disclosures made to Council are to be recorded in a book maintained for this purpose. Section 56B(3) provided for a general disclosure of interests by Councillors if it was made to a meeting of Council.

The amendments to the Act came into effect on 25 October 2002. These included a significant change to the code of conduct applicable to Councillors. Section 184 requires Councillors to disclose a pecuniary interest in any matter being considered by Council at one of its meetings. The requirement to maintain a pecuniary interest register has been replaced by a requirement for the nature of the interest to be recorded in the minutes of the meeting. Section 186 provides for a general disclosure of interests by Councillors if it is tabled to a meeting of Council.

Section 113(j) provides the office of a Councillor becomes vacant if the Councillor engages in any paid employment outside the duties of their office, unless they have the consent of Council.

Section 187 requires a disclosure by any consultant engaged by NSWALC who gives advice at any meeting of Council.

A model code of conduct is included in the legislation and remains in force until NSWALC adopts its own code. I understand NSWALC has been working with the Registrar on the new code pursuant to the provisions of Section 177(2) but at the date of this report it has not been adopted. The present model code makes no mention of any responsibilities in respect of the disclosure of interests.

Policy & Procedures

The Policy & Procedures Manual Paragraphs 11.0 to 13.0 covers the existence and disclosure of interests. Clause 13.1 requires the nature of the interest to be disclosed in writing. Clause 13.2 requires the disclosure to be recorded in the minutes and disclosed in a pecuniary interests register.

Investigation Undertaken

Disclosed Pecuniary Interests

Annexure 13.7 contains a summary of the interests disclosed by Councillors during the life of this Council and recorded in the pecuniary interest register.

Adequacy Of Current System Of Disclosure

Under the previous legislation the pecuniary interests register is an appropriate means of satisfying the statutory obligations. A significant number of the entries are deficient in that they do not indicate the following:

- The motion number in respect of which the interest is disclosed.
- The actual nature of the interest that has raised concerns.

The minutes do not always record the announcement of the nature of the interest, which has meant that the nature of any interest will not be clearly available on the public record. In this respect the practice has not followed the Policy & Procedures manual, which has imposed a higher level of disclosure than that required under the Act.

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There are examples of where:

- interests have been disclosed at the meeting and not recorded in the register.
- where interests disclosed in the register have not been disclosed in the minutes.
- where Councillors have remained in meetings after disclosing an interest without the approval of the meeting.

I have not sought legal advice on whether any failure by individual Councillors is sufficient to warrant prosecution under the provisions of Section 56C of the old legislation.

It is clear that the implementation of the existing policy was deficient. These Policy and Procedures have not been updated to reflect the recent legislative amendments. Council must now ensure the minutes record not merely the departure of the Councillor and the existence of an interest, but the nature of that interest.

However the legislative guidelines should only be considered the minimum acceptable disclosure. Best practice would suggest that Councillors make additional voluntary disclosures. Common practice in not for profit organisations and government organisations is for a register of general disclosures to be maintained, both as to possible interests and roles with other organisations.

Disclosure of interests by Clr Clark

A search of the records held at ("ASIC") has revealed that Clr Clark was appointed a Director to NIDA on the 15 November 1999. He remained in this position as at 1 August 2003. This directorship was not clearly disclosed in the register of interests held by the Secretariat. A review of correspondence has revealed that NIDA had requested NSWALC, provide a director to sit on their Board and it appears Clr Clark was NSWALC's appointment. My review of the minutes of Council has failed to identify a formal Resolution approving of the appointment of Clr Clark to this role.

Clr Clark considered he had an interest sufficient to warrant a disclosure of a pecuniary interest on 14 May 2001 when he declared an interest relating to a proposal by NIDA for the Funeral Fund. However there is no record in the minutes that he has made any additional disclosure or absented himself from the Council meeting while motions involving the activities of that company were considered, in particular the Funeral Fund and NIIS.

Even if he was a properly authorised nominee of NSWALC on the board of NIDA in my opinion the appropriate course of action would have been to

declare an interest and then request a Resolution of Council that he remain and vote on the issue. The appointment of a Receiver & Manager to NIDA, and the related financial problems of that company may give rise to concerns as to potential issues of self-interest on behalf of the Councillor in considering proposed financial arrangements between NIDA and NSWALC. This concern could have been allayed if the appropriate procedures had been followed.

The present Chairman has acknowledged he had some reservations with the presence of Clr Clark during discussions of some of these matters but never raised his concerns with the Council at the time.

Disclosure of interests by Clr Lester

During CM 163 Council considered a Resolution approving Clr Towney retaining his position as an ATSI Regional Commissioner. Clr Lester disclosed an interest without specifying the nature of that interest. The minutes then record he remained in the room, but did not participate in discussions. No Resolution providing for him to remain in the room was passed.

CM195/34 considered the recovery of legal costs by NSWALC awarded against Clr Lester. The minutes of that meeting disclose Clr Lester declared a pecuniary interest and left the boardroom. However the pecuniary interests register suggests that the Council agreed Clr Lester could remain in the meeting but not participate in discussions or voting. There is no Resolution of Council approving Clr Lester to remain in the Council Meeting.

CM195/82 concerns a rescission of the earlier motion 34. The minutes record Clr Lester declared an interest and left the room. However immediately prior to the Resolution it is recorded Clr Lester declared an interest and excluded himself from discussion. This appears to be at odds to the earlier statement and suggests he remained present while the matter was discussed. The register has no entry in respect of this Resolution.

CM198/11 directed all files on the Clr Lester legal action to be delivered to Council. The minutes record Clr Lester abstained from voting on this Resolution, however it appears he was present during discussions. There is no Resolution authorising him to remain in the room.

CM199/16 relates to payment of these legal costs. The minutes do not record Clr Lester being absent from the meeting during consideration of the motion. Of interest is that two Councillors are recorded voting against the Resolution, one being Clr Graf. The immediately preceding Resolution resolved that Clr Graf be removed from the meeting for the remainder of the day.

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CM204 on 21 July 2003, Clr Lester advised that as NSWALC no longer had an interest in the Northern Insurance Brokerage he was expressing an interest in that brokerage through Wonnarua Nation Aboriginal Corporation. I am advised this corporation is an incorporated Aboriginal Corporation.

The final entry in the pecuniary interests register was entered after the initial review by my team. Clr Lester completed this entry in respect of the 204th Meeting held on 21 July 2003 on the 5 August 2003. In my opinion the delay in completion of the register is not appropriate and the Secretary must ensure interests are recorded on a timely basis. It is noted that in this case neither the Minutes nor the register disclose the nature of Clr Lester's interest.

Disclosure of interests by Clr Griffiths

CM197/8, Clr Griffiths advised of a pecuniary interest and it was recorded in both the minutes and the pecuniary interests register. However no Resolution of Council was passed authorising him to remain in room and listen to discussions. It appears that he made that determination for himself and did not seek a formal Resolution of the meeting. Further the exact nature of the interest is not disclosed in either record, although it would appear that Tony Griffiths is one of his direct relatives.

Disclosure of interests by Clr Trindall

CM163/26, Clr Trindall advised of a pecuniary interest and obtained consent of NSWALC to continue his business of stock trading and receive an income through the company LRJ Holdings Pty Ltd. Clr Trindall advised that this company has subsequently ceased to operate and has been deregistered. This Resolution is considered to comply with the obligations of Clause 3 of Schedule 5 of the old legislation.

Although I am not aware of any significant issue relating to this disclosure it does evidence the potential conflict between the full time nature of the role of a Councillor and their obligation to apply their entire endeavours to the pursuit of NSWALCs interests and the holding of multiple roles in external organisations.

Disclosure of interests by Consultants

My review of the minutes has not identified any disclosure by external consultants, of any pecuniary interests at the time of giving the advice (since the date the new requirement took effect. I am not aware of any notification provided by NSWALC to its consultants that sets out their obligations in this regard.

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ASIC Search Results Regarding Interests

The following is a summary of the interests of Councillors disclosed by a search of the ASIC register on the 25 June 2003;

Clr Trindall		Nil
Clr Lester		Nil
Clr Ardler	Director	Wreck Bay Enterprises Ltd
Clr Towney		Nil
Clr Murray		Nil
Clr Briggs		Nil
Clr Brown		Nil
Clr Ritchie	Director	Aussiquest Pty Ltd
Clr Graf		Nil
Clr Morgan		Nil
Clr Clark	Director Director	Kullowa Kudjer Ltd NIDA Ltd
Clr Griffiths	Director	Kullowa Kudjer Ltd
Clr Cruse		Nil

Kullowa Kudjer Limited / Federation of LALC's

Kullowa Kudjer Limited (KKL) was incorporated on 5 December 2002. This entry has been established and marketed across the LALC network as a "Federation Of LALC's" established to enable LALC's to pool resources for land development and business projects. The incorporation of this entity has not been initiated or approved by NSWALC.

Two Councillors are registered directors. Another director is Robert Walker who is currently the branch manager of Murray River Branch based in Moama. Mr Walker has advised he is also Treasurer. The company secretary is recorded as Hazel Hudson, a former regional chairman and currently employed in Murray River Branch.

Chapter 6: The Council

Clr Clark referred to the federation of twenty LALC's during discussions of the Feedlot Beef venture at CM199. However there has been no general disclosure by the Councillors of their role in this entity although most, if not all, remaining Councillors are aware of their position. This is in clear breach of their obligations under Clause 11.2 of the Councillors Code of Conduct. I also have concerns regarding the potential for breaches of NSWALC Code of Conduct in the area of Confidentiality and Personal Advantage. There are diverse views among Councillors as to the appropriateness of this venture within the ALC structure. With the limited information available my concerns with this venture are the same as for the creation of Regional Trusts.

More serious concerns should be levelled against the involvement of staff in this enterprise. In discussions with the HR Manager he was unaware of any of the roles in this company held by employees of NSWALC. There has been no disclosure of the roles on the staff files of either employee. Given that the only two staff in that branch are Treasurer and Secretary of the company it is possible that time and resources of NSWALC are being utilised in its establishment and operation. Also there is potential for LALC's and their members to misinterpret the operation of this entity as being an enterprise that is supported or officially sanctioned by NSWALC.

Although it appears this company is a not for profit organisation its commercial nature would raise a significant potential for conflict of interests. Use of any material resources of the branch or significant investment of time by employees would be in clear conflict with the obligations of the two full time employees to their employer. I also have concerns regarding the potential for breaches of NSWALC Code of Conduct & Ethics in the area of Confidentiality and Interaction with Council.

Obligations of Councillors to focus on interests of NSWALC:

Section 107(1) of the Act provides that the role of a Councillor is to be a full time role. As a result it is reasonable to expect that Councillors have an obligation to apply their entire endeavours to the pursuit of NSWALC's interests during their term as an elected representative. The holding of multiple roles in external organisations must detract from their ability to satisfy this obligation. Unlike board members of listed companies or Councillors of Local Government Councils the legislative provision that a NSWALC Councillor is a full time role provides a unique issue that does not appear to have been the subject of serious consideration by the Council.

The Act certainly contemplates that Councillors may adequately fulfil their functions while maintaining income-generating activities from other sources (s113 (j) of the Act). Clause 22.2 of the Code of Conduct provides that secondary employment shall not be in conflict with carrying out NSWALC business. These provisions appear to be in conflict with the tenet of the preceding section. The Council needs to develop a policy on the matter and determine what the obligation should be for Councillors in devoting their total endeavours to the ALC interests.

If the role of a Councillor was a part time role, the seriousness of this issue would reduce significantly.

Best Practice Corporate Governance

Best practice would suggest that a general disclosure of all relevant interests should be made by Councillors upon their election and regularly reviewed during their term of appointment. This register should be available for review by Councillors, NSWALC and the membership. This register should be updated regularly.

The failure to maintain an appropriate register of interests is a significant failing on the corporate governance of NSWALC.

Observations & Comment

NSWALC does not maintain a register of general interests of Councillors, a gifts register, or a register of Councillor's external representations.

This register of interest of the Council is seriously deficient in that it does not include:

- a separate listing for each Councillor of their directorships and board roles,
- a separate listing for each Councillor of their shareholdings and financial interests, and
- a separate listing for each Councillor of any gifts or gratuities received.

The Council should maintain a register of all external representations that Councillors hold on behalf of NSWALC. This register should include details on any remuneration, fees or allowances payable to the Councillors in respect of these positions.

The records of the Secretariat do not clearly identify the manner in which all issues considered by Council are raised for discussion.

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The records of the Secretariat do not clearly identify the particular motions in which Councillors identify an interest and are sometimes unclear on the nature of the interest disclosed and whether the Councillors are absent during consideration of the particular agenda item.

Recommendations

All Tabled Papers are to be included in NSWALC archive records.

The Council adopt appropriate policies and procedures regarding disclosure of interests, including sanctions for Councillors who breach those policies and procedures.

The Council minutes record how all matters have been raised for consideration of Council if they do not appear on the meeting agenda.

In addition to the requirements of the Act the Council minutes should clearly record when Councillors leave the meeting and the number of Councillors that abstain from voting on any motion.

The Council conducts continuing education on pecuniary interests & conflicts of interest.

The Council resolves to maintain a register of interests by way of general disclosure. This register be updated on a regular basis by Councillors. Each Councillor is provided with a summary of their disclosed interests at least annually. This register is to include details of all directorships, executive positions, shareholdings and other financial interests of Councillors.

The Council maintain a list of all external representations, including a reference to the Resolution approving the relevant Councillor accept that position.

The Council establish a register of gifts and gratuities received by Councillors.

The minutes record the nature of the interest when a Councillor makes a disclosure during a meeting.

These policies should be incorporated into the Councillors Code of Conduct or the Model Rules.

NSWALC prepare a standard advice for all its consultants that clearly discloses their obligations in regard to pecuniary interests. This advice is provided to all external consultants and a signed acknowledgment is retained by NSWALC together with the terms of their appointment.

The CEO interview the staff of Murray River Branch to identify what is involved in their role as officers of Kullowa Kudger Limited and determine if there has been any breach of their terms of employment or the Code of Conduct & Ethics.

That the Employee Code of Conduct & Ethics be revised to include a policy on multiple employment and outside interests, be they indigenous or otherwise.

6.4 Councillor External Representations

Reason for Review

This issue was identified during my preliminary planning as a fundamental governance issue to be reviewed during the course of the investigation.

Overview

Both Councillors and the Secretariat advised that no register of external representations was maintained in respect of Councillors holding positions in external organisations. Generally this was not considered a significant issue by Councillors who identified only a limited number of such roles were maintained.

Relevant Legislation

There is no specific power for NSWALC to be represented on boards of external organisations, but this appears to fall within its function under Section 106(t) of the Act “to promote the protection of Aboriginal culture and the heritage of the Aboriginal people in New South Wales.” This function is not listed in Section 146 of the Act as a restricted function that cannot be delegated by Council.

Under the previous legislation the power of delegation was contained in Section 55 (3), whereby Council could delegate to any person prescribed in the Regulations any functions prescribed by the Regulations other than the power to delegate. No provision was made in the regulations for such delegation.

Section 148 of the Act provides the Council must review all its delegations once every year. In my opinion the authorisation of Councillors or staff to represent NSWALC on external boards or organisations constitutes a delegation and is captured by this provision. As this amendment took effect in October 2002 the period for the first annual review has not expired. Any attempt to review the delegations will be delayed as a result of the absence of a register summarising these appointments.

Policy & Procedures

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The Policy and Procedures Manual refers to this process in Clause 7.28. It refers specifically to representations on the following bodies;

- Water Advisory Board
- The Biodiversity Advisory Council
- The State Assessment Panel For Natural Heritage Trust Funding
- The Heritage Council

The manual provides for how representatives are to be identified for state, regional and local appointments, however no mention is made as to the maintenance of a register of these appointments.

Investigation Undertaken

Documents Reviewed

Policy & Procedures Manual

Disclosed External Representative Positions;

The following is a summary of the representative positions disclosed by Councillors during the foundation research interviews conducted with them;

Clr Trindall

Aboriginal Housing Association (AHA)
Local Government Association (LGA)

Clr Ritchie

Aboriginal Housing Office (AHO)

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Representations Identified

During the course of my investigation I have identified the following representative positions held by persons on behalf of NSWALC and not disclosed in discussions with Councillors listed earlier in this Chapter. Some of these roles may have been for limited periods. I have included the listing not as a criticism of Councillors but to identify the number and diversity of the positions held by Councillors to assist in understanding why a listing of the roles and who fills those roles is vital for the effective management of the organisation.

Entity	NSWALC Representative
Local Government & Shires Association Executive	R Towney
NSW Police Aboriginal State Advisory Council (PASAC)	R Lester D Clark L Trindall L Trindall
Game Council Of NSW	D Clark O Cruse
Board Of Far West Children's Health Scheme	V Graf
Indigenous Protected Areas Advisory Group	Unknown
State Assessment Panel For Natural Heritage Trust Funding	Unknown
Aboriginal Housing Development Corporation	M Ritchie
Geographical Names Board	L Trindall
NIDA Ltd	D Clark
Resource & Conservation Assessment	R Towney
NSW Aboriginal Housing Office	M Ritchie
Biological Diversity Advisory Council	Unknown
Heritage Council of NSW	Unknown
NSW Water Advisory Board	Unknown

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The following non-representative positions are held by Councillors for which approval of Council has been sought ;

Entity	Date	Meeting	Approved Persons
Jenolan Caves Trust	24/9/2002	CM197/9	James Morgan Wally Peckham
Wreck Bay Community Council	18/12/2002	CM199/35	Ivan Ardler

I note that Cllr Ardler has advised that he has become aware his position with Wreck Bay Community Council has also required him to accept directorship of Wreck Bay Enterprises Ltd. He was unaware of this role and will seek a Resolution of Council regarding this position.

In discussions with the NSW Police my team has been advised that NSWALC has only attended one of the six or eight meetings held of the PASAC. I have also seen documents referring to absences by representatives of the previous Council to the Biological Diversity Advisory Council and NSW Aboriginal Housing Office. If NSWALC is holding itself out to be the peak indigenous body in NSW, it needs to ensure its Councillors and representatives that are acting as its delegates on these boards are serious about representing Council and attend as many meetings as is possible in the circumstances.

The 2001 Annual Report contained a list of thirteen committees in which staff of the Land rights Unit were involved. There is no record maintained by Council or the CEO as to the authority of staff to represent NSWALC on these committees. No similar disclosure was made in the 2002 Annual Report.

Delegations Manual

On 15 May 2001 Council passed a Resolution confirming the delegation manual was re endorsed as the operative document from NSWALC. This delegation appears appropriate in the circumstances with all Council delegations being to the CEO. It is noted within the manual that the CEO has power to delegate these matters if he so desires.

I am advised that at this time the Acting CEO has not formally delegated any powers. However staff at the branch offices are still relying on the delegations included in the Policy & Procedures Manual as authority for their delegation to sign cheques and incur expenditure. This position should be clarified as soon as possible and an update to the policies & delegations issued by the CEO.

Observations & Comment

Best practice would suggest that a separate register of all external representations and delegations should be maintained. Although not formally required under the Act, Council must accept its responsibility to strive to maintain the highest levels of integrity and governance. As NSWALC purports to be the peak indigenous body it must lead the way in implementing standards that the entire ALC Network can aspire to.

The failure to maintain a register leads to:

- Confusion as to individual responsibilities of Councillors
- Lack of accountability for portfolio responsibilities
- Potential for Council not to be represented on Boards and Organisations it could contribute to.
- Inefficiency in the conduct of the annual review required under the Act.
- Inefficiency in the implementation of the transfer of responsibility when staff or Councillors leave or change portfolios.

This register should be updated regularly. This register should be available for review by Councillors, NSWALC and the membership.

The failure to maintain an appropriate register of representations & delegations is a significant failing on the corporate governance of NSWALC.

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Recommendations

A register should be maintained of all external representations that Councillors hold on behalf of NSWALC.

The Register should record the Resolution authorising the individual to represent Council and include details of any remuneration, fees or allowances payable to the Councillors or staff in respect of these positions.

The Secretariat maintains the register and submit delegations for annual approval.

These policies should be incorporated into the Councillors Code of Conduct or Model Rules.

Immediately upon the appointment of the new CEO the delegations manual be reviewed to contain appropriate delegations are in place.

6.5 Councillor Discretionary Grants

Reason for Review

During interviews with Councillors issues of accountability were raised in respect to the administering of discretionary grants. On this basis, this was considered an emerging issue of sufficient merit to warrant further investigation.

Overview

Councillors are provided with a budget allocation for discretionary purposes to provide grants to various parties for funeral assistance, hardship, medical and sporting pursuits.

A review of the accounting records indicates the following approximate amounts were expended as discretionary grants; 2001 – \$25,000; 2002 - \$376,000 and for the 9 months to June 2003 - \$282,000. The increase in 2002 arose due to allocations to Councillors being based on \$11,000 per region plus \$2,000 per LALC. A corresponding decrease in sporting grants was also noted.

Relevant Legislation

The Act provides in Section 106 that the functions of Council include “making grants or lending money to, for or on behalf of, Aboriginal persons.”

Policy & Procedures

The Policies & Procedures Manual (last revised April 1999) provides guidance on the nature of payments to be covered by grants and the limits imposed. As the policy has not been updated its relevance is limited.

Discussions with the Accounts Unit indicate the current practice is to record details of amounts paid as discretionary grants in a spreadsheet to permit monitoring of the running balance of the payments made by each Councillor.

Previous Reports – Internal & External

The 2002 Management Letter from the Auditor General recommended that procedures were needed to ensure the propriety of grants. As with all payments made by Council, appropriate supporting documentation should be maintained by Councillors to substantiate payments.

The Management response noted that Councillors were allocated an amount per Region to use at their discretion for providing assistance to the Aboriginal communities and that all grants made, are supported by appropriate documentation.

Observations & Comment

Clr Griffiths authorised \$15,500 in discretionary grants in the month of October 2002. A significant portion of amounts granted were described as relating to “rugby league” or “hardship” and related to the AIRLAC Rugby League tour to England. Documentation indicates amounts were paid to support certain players to participate on the tour and that payments were made either directly to AIRLAC or in one case to the mother of player who was selected to play.

A further “hardship” grant was paid to Ms. Chantae Griffiths who is related to Clr Griffiths.

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Clr Trindall on 2nd June 2003 has referred the possible misuse of discretionary funds by Clr Griffiths to ICAC noting the following concerns:

- payments to individuals noted as being for “hardship” when the payment related to participating in the AIRLAC Rugby League tour to England.
- Clr Griffiths participation on the tour to England.
- \$659.50 of the hardship payment (to Clr Griffiths’ daughter of \$2,500) has not been fully acquitted and the documentation submitted for approval by Clr Griffiths did not disclose his relationship to the recipient.
- The expending of a significant proportion of the annual allocation in the first month of its release.

Clr Ritchie authorised a grant of \$2,000 in regard to “an electrical connection” on 11 April 2003. This was paid directly to an individual rather than the third party that completed the work

Clr Cruse authorised five payments of \$150 during 2003 to one individual in connection with “medical related travel”. In one instance, on 16 April 2003 there was no payment voucher or authorisation attached to the remittance advice.

Clr Murray loaned \$2,000 to one individual. Repayments were to be \$55.55 per month although the agreement signed by Mr. O’Donnell did not specify when repayments would commence. The agreement was signed on 26 February 2003 and no repayments have been recorded for the period to 30 June 2003. This loan was funded from Clr Murray’s discretionary grant fund allocation.

Discretionary funds of certain Councillors have been used to provide a loan of \$2,080 to an employee of NSWALC. The purpose of the loan is disclosed as relating to the satisfaction of an obligation to the State Debt Recovery office. This loan was to be repaid at \$100pw. The loan commenced on 25 February 2003 and only one payment of \$100 has been made. Consequently the status of this amount is uncertain and may give rise to a Fringe Benefits Tax issue.

Councillors transfer unused grant funds to each other. On 2 June 2003, Clr Cruse transferred \$300 to Clr Briggs discretionary account.

No budget allocation for discretionary grants was originally included in the 2004 budget. The Manager of Financial Operations has subsequently advised that the discretionary grants will be reinstated in the budget, but at the date of my report, the budget has not been finalised.

As at 7 August 2003, there was \$16,000 in discretionary grants paid. The Manager of Financial Operations, has advised this relates to unspent 2003 allocations expended in the current year.

Observations & Comment

Whilst the concept of Councillor discretionary grants appears well founded the “discretionary” nature of these grants is not consistent with transparent decision making required of Councillors. Councillors are exposed to allegations of corruption, nepotism and imprudence in their administration of such funds whether or not, there is any substance to such allegations.

The practice of transfer of unspent allocations (between Councillors) also lacks transparency and is not consistent with best practice principles of good governance.

There is inadequate guidance and policy governing the use of such funds. There is an obvious difference in understanding between Councillors regarding how best to administer and for what purpose grants can be allocated. This is evidenced by the referral to ICAC made by Cllr Trindall.

It is unknown if people applying for grant assistance are members of LALC's.

Budgets and summaries of grant allocations by each Councillor are not maintained in NSWALC accounting package. This increases the risk of error.

Grant application requests are not currently used. This is despite such forms existing for this purpose.

Only one Branch indicated they administered the granting of funds on behalf of the respective Councillor.

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Recommendations

To avoid allegations of conflict of interest and impropriety, Councillors should not be empowered to exercise their discretion in allocating grant funds.

Discretionary grant funds should be administered at the Branch office level subject to predetermined guidelines outlined in the Policy and Procedures Manual.

The Policies and Procedures Manual should be updated to include:

- The nature of grants to be made, i.e. hardship, education, sporting assistance etc.
- Threshold amounts that can be paid both individually and cumulatively, before additional authority is required.
- Method of payment, the current practice of making payments directly to third parties is satisfactory and needs to be enforced.

6.6 Councillor Travel Allowances

Reason for Review

The addendum to the terms of my appointment as investigator specifically identified the “Matters Involving Councillors” as an outstanding issue from the Report to Parliament of the Auditor General for 2003 to be covered in the course of my investigation.

In the 2003 report to Parliament the Auditor-General raised concerns relating to the Councillors. The key issues raised in relation to travel allowances are as follows:

- Advances for cancelled trips being repaid by payroll deduction instead of by immediate lump sum settlement.
- High level of cancelled trips by one Councillor.
- Delays of over three months in submitting expenditure acquittals.
- Possible conflict in the locations of two Councillors as detailed in Council meeting attendances, travel, and mobile phone and fuel card records.
- Large debts brought forward from the previous year, still outstanding at year-end.
- Inadequate detail of journey on some travel claims.

Overview

Since the current Council's inception in December 1999, the Auditor-General's Reports to Parliament have consistently included unfavourable comments on the actions of a number of Councillors. These actions include the misuse of Council assets (motor vehicles, telephones, fuel cards and travel advances) and the lack of accountability for their time and movements.

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Policy & Procedures

The Policies & Procedures Manual (last revised April 1999) includes the following references:

- “.....Councillors and Staff are required to acquit their outstanding advances for Travel Allowance before any further advances are paid”;
- “ Applicants must repay advances for travelling when trips are cancelled or do not take place.....are expected to repay advanceswithin a reasonable time”;
- “.... payment of Councillors Travel Allowances to be paid the day after being received by Finance and Accounts Branch”.

Previous Reports – Internal & External

The inappropriate handling of travel allowances by Councillors has been raised repeatedly by the Auditor-General, was the issue of a report by ICAC in 1999 and has been reviewed by NSWALC’s internal audit unit.

Observations & Comment

Despite the number of earlier investigations and reports into this area, my examination of travel allowances paid indicated a continued lack of accountability by a number of Councillors in this area.

Examples of this include:

On 11 October 2002, per payment number 1160, Clr Lester received an advance of \$500 for travel in the period 14 to 19 October 2002. This advance has not been acquitted. Clr Lester subsequently received another advance on the 24 October 2002.

On 2 June 2003, per payment number 2433, Clr Griffiths was issued a TA for travel in the period 1 to 7 June 2003. There was no acquittal for this TA before 30 June 2003. Clr Griffiths did however receive two additional TA’s one on 23 June for \$1,000, per payment number 2526, and one on 27 June for \$870, per payment number 2531.

Clr Murray received an advance of \$900 on the 30 May 2003. The trip was subsequently cancelled. This has not been repaid in one lump sum, but rather is being repaid via payroll deductions.

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Council passed the following Resolution to the effect "That effective immediately the NSW Aboriginal Land Council Treasurer is the authorised person to approve Councillors' Travel Allowance documents" (CM195/43), replacing the CEO. This Resolution was proposed by the Treasurer and was noted as being effective immediately. The potential for conflict of interest has been noted earlier in this report.

As recently as 3 June 2003, representations by the Chairperson, Clr Trindall have been made to ICAC in respect of the misuse of travel allowances by Councillors Griffiths and Murray.

During my examination of this area it was noted that Clr Clark is the only one of the thirteen Councillors to submit a motor vehicle running sheet detailing travel and petrol usage. However, this detailed logbook was last submitted in April 2003.

As at 30 June 2003, Councillors owed amounts or had un-acquitted travel advances totalling \$9,300 (2002 - \$16,800). Three Councillors have balances over \$1,000. In 2002, five Councillors had balances over \$1,000.

Councillor	2003 Balances over \$1,000	2002 Balances over \$1,000
W Murray	4,898	4,424
R Lester	2,370	5,497
W Griffiths	1,580	2,719
L Trindall	Nil	1,231
D Brown	Nil	1,025

Given the size of the outstanding amounts, it is possible that these amounts include amounts other than unacquitted travel allowances. It is unacceptable that Councillors do not immediately repay any overpayments made to them.

There are a number of matters that suggest a continued disregard for the standards of accountability and probity expected of Councillors in relation to claims by them for travel. Councillors, as leaders of the Aboriginal community, should be scrupulous about such claims.

Over several years, countless recommendations have been given in order to improve the accountability with respect to travel allowances, yet the same issues continue to be evident.

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Without the maintenance of proper log sheets, unauthorised journeys not on the behalf of the Council cannot be identified.

Recommendations

Detailed motor vehicle running sheets should be maintained by Councillors and submitted promptly to NSWALC each month.

Councillors should immediately repay travel allowances not acquitted.

Standing authorisations should be provided by all Councillors allowing NSWALC to deduct unacquitted and overpaid travel allowances directly from Councillor remuneration once these have been outstanding for more than one month.

The Policies and Procedures Manual needs to be updated.

6.7 Staff Organisation Structure

Reason for Review

The most recent amendments to the Act incorporate a detailed listing of functions of the Council and a requirement that each Council review the staff organisation structure to ensure its ability to carry out those functions. Whilst the election of this Council pre-dates the amendments to the legislation, Council did resolve in December 2002 to engage Hawkless Consulting Pty Limited to undertake a review of NSWALC organisational structure. This review was completed and a report provided to Council in April 2003.

The terms of my appointment included the requirement to investigate the efficiency and effectiveness of NSWALC together with outstanding issues arising from previous ICAC reports. One such issue is the development of systems of best practice corporate governance. The recommendations of the Hawkless review were approved by Council to be implemented at the time of my investigation. The manner of implementation was noted as being of concern by some staff and on this basis was included in the investigation.

Overview

The 'Beyond the Sunset' Policy document established by NSWALC State Councillors previously recognised the need to re-structure operations to meet the needs and requirements of the objectives of NSWALC.

As a consequence a number of reports have been commissioned during the life of the present Council that touch upon structural and governance issues, these include:

- Cal Davis – 'Devolution of Functions from NSWALC Head Office to NSWALC Branch Offices', 2000
- Ferrier & Hodgson – 'Review of Staffing & Structure', September 2001
- Alitek Business Plan
- Hawkless Consulting – 'Organisation Structure Review and Cost Reduction', 13 April 2003

In addition, there have been investigations by ICAC in the period 1994 to 1998 culminating in the paper 'Preventing Corruption in ALC's, numerous responses to complaints investigated by the NSW Ombudsman and annual audits conducted by the NSW Audit Office. Each has highlighted deficiencies in the organisational structures leading to excessive costs, or lapses in effective governance, or both - all having a significant impact on NSWALC's financial position and its performance as steward of aboriginal assets and of aboriginal rights enshrined in the Act.

Failure to implement legislative change

It is clear that historically self-regulation in the areas of governance and the ability of the organisation to deliver the functional outcomes envisaged in the legislation has been ineffective. The 2001 amendments imposed specific remedies, such as the separation of powers by creating a statutory CEO role and obligations such as the requirement for regular organisational review, that go some way to redressing the situation.

However, in regard to effective organisational structure and best practice corporate governance, much of the remedy continues to rely on action by the Council.

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The Hawkless Report was commissioned in January 2003 and (its recommendations) on 19 March 2003 Council resolved that it be implemented. Subsequently, at Council's 203rd meeting held on 23rd to 27th June 2003, Council resolved to delay the implementation of the recommendations of Hawkless Report until after the appointment of a new CEO.

In my view the decision to defer implementation, pending the appointment of a new CEO is in my view correct. The CEO must be fully engaged and committed to this process and should review and manage the transition. At this stage of the development of a robust and effective organisational structure, it is critical that strong and continuing leadership is given by a CEO with the ungrudging support of the Council.

In commencing a review of the organisation without having first appointed a permanent CEO, Council has either demonstrated a lack of foresight or merely reacted to a barrage of criticism aimed at the Council. In any event the absence of certainty and direction in this regard has had a deleterious effect on staff morale and motivation.

Hawkless Report recommendations

My review of the Hawkless Report has identified recommendations in the area of corporate governance that appear deficient and should be revisited:

Future of Internal Audit

Whilst the outsourcing of the internal audit function might save money, in my opinion it would diminish the effectiveness of its value. A consequence of the adoption of this recommendation would be a significant reduction in the number of hours available for this function as a result of the much higher cost per hour of outsourced resources.

This is not considered appropriate at the time of implementation of an efficient management and staffing structure, and an effective system of corporate governance. The effectiveness of this program requires monitoring, evaluation and testing. Rather than diminish the role of the internal audit function, a thorough review of its effectiveness as a key plank of the governance process should be performed.

The present internal audit charter requires the central audit plan to be approved by Council. This should be clarified as being the Audit Committee of the Council.

The Internal audit manager has complained of inadequate resources, (eg failure to replace vacant positions). The cost cutting in this area is counterproductive, as more of the causes of the financial difficulties in which the Council finds itself, would have been identified by an effective Internal Audit function, thereby allowing earlier intervention. Of course, such difficulties could only be rectified where effective management takes action once notified. There is evidence in the audit reports of deficiencies going uncorrected from year to year.

Future of the Legal Service Unit

The Hawkless Report, proposes 'the abolition of the legal services team and replacement with a Corporate Counsel'. The proposal is aimed at reducing legal costs and establishing the position of 'Custodian of Corporate Governance'.

It has been estimated by the current General Counsel that if he had the support of five employed solicitors and an administrative assistant the LSU could not only replace most of the external legal costs but extend the range of legal support currently to the LALC's. This statement was supported with the following arguments;

- In part the need to resort to external legal advice results from the under-resourcing of this unit.
- It is clear from the cost of legal services and the volume of work, that legal matters are a significant part of the Council's operations.
- Much of this legal work is of a specialised nature specific to Aboriginal rights and entitlements as legislated and as a matter of case law.
- The dispersal of this knowledge amongst external legal advisers fails to establish within the organisation a body of knowledge that will be of value to the future operations of the Council.
- This lack of institutional knowledge is a significant management issue and means that the Council will continue to need to engage outside expertise into the future at significant cost.
- NSWALC through the LSU can brief Barristers directly and centralising all legal services will ensure more effective liaison with external lawyers, the Registrar and the Crown Solicitors' Office.

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I have reservations concerning the adoption of the Hawkless model. The role of an internal LSU and its ability to provide ongoing support to NSWALC and the LALC's should not be underestimated. Despite the views of some, I support the argument that there remains a wealth of opportunities for further land claims to be made on behalf of indigenous people. NSWALC have a vital role to play in this process. Further, as the network grows there are clear examples of the growing complexity of the commercial transactions involving NSWALC and the LALC's. The need for legal support can only be expected to remain constant, if not increase. There is also significant merit in the view that active involvement in the internal operations of the network provides General Counsel and the LSU with a better understanding of the operations of the organisation and the network. This ensures that internal advices and instructions to external lawyers are framed appropriately and include issues that may not be readily apparent to an external advisor receiving a brief on a specific issue.

6.8 Financial Management

6.8.1 The Business Plan

Reason for Review

Under my terms of appointment I am to specifically investigate the current financial management processes including NSWALC's budgetary processes and any need for changes to systems, policies and procedures.

Overview

Standards Australia AS 8000—2003 "Good Governance Principles" provides that the object of good corporate governance principles is to:

- Enhance organisational performance.
- Understand and manage risks to minimize the negative aspects and maximise the opportunities.
- Strengthen shareholder and/or community confidence in an entity, particularly in areas that are not formally regulated.
- Enhance the public reputation of an entity through enhanced transparency and accountability.
- Provide a mechanism for benchmarking accountability.

NOTE: Within many entities (especially Government entities and not-for-profits) there are other objectives including social outcomes.

A key aspect of good governance is a properly formulated business plan that articulates the Vision for the organisation together with strategies and actions to assist the organisation achieve its Purpose and Objectives. Such a plan will also assist members in assessing the performance of the Council.

Relevant Legislation

Section 108 of the Act specifies that the duties of a Councillor include, amongst other things:

- to participate in the allocation of the Council's resources for the benefit of Aboriginal people, and
- to participate in the creation and review of the Council's policies and objectives, and
- to review the performance of the Council in the exercise of its functions and the achievement of its objectives.

Policy & Procedures

Corporate Planning is covered in Section 5 of the Policies & Procedures manual (last revised April 1999) that provides that the Council will prepare a corporate plan and a business plan each year.

The stated purpose of the corporate plan is to formalise the objectives of the Council for the year ahead. The stated purpose of the business plan is to set direction for the management of the organisation.

Responsibility for organising the preparation of the corporate plan is placed with the Deputy Director (executive officer). No responsibility is allocated in relation to the business plan. The responsibility of the Councillors in formulating the corporate and business plans is not discussed.

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Previous Reports – Internal & External

References have been made to the following planning documents prepared by NSWALC:

- Beyond the Sunset
- Corporate Plan 1998 to 1999
- Tracks to the Future
- Business Plan 2002 – 2007

Observations & Comment

A review of the above planning documents was undertaken and the following observations made:

Beyond the Sunset

In its document “Beyond the Sunset”, prepared in 1996, NSWALC established “a set of polices which would enshrine principles and standards to guide NSWALC into the future, and beyond the cessation of NSW Government funding in 1998 (known as the Sunset Clause).

The objectives set out by NSWALC were:

- To plan for the continued operation of the Land Council network up to and beyond 1998.
- To ensure LALC’s develop their administration and organisational responsibilities so they will be fully funded.
- To develop and implement home ownership.
- To establish a mortgage fund to support the home ownership objective according to the requirements of the Act and Trustee Act.
- To seek sources of funding to enable financial independence.
- To establish and develop our own financial institutions to enable access to financial resources.
- To assist in the coordination of the provision of social support services with the relevant governments and local Aboriginal organisations.
- To maximise land acquisition.

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- To develop and maximise the use of Aboriginal land for economic purposes.
- To establish an Aboriginal sporting Council network in conjunction with other relevant bodies.
- To protect and preserve Aboriginal Culture and Heritage in NSW.

The means by which NSWALC planned to meet these objectives are enumerated within the document. Whilst the document provides a number of performance targets, there are no statements as to manner in which NSWALC proposes to assess its performance.

Corporate Plan 1998 to 1999

In NSWALC's "Corporate Plan 1998 to 1999", the eleven objectives detailed in the "Beyond the Sunset Clause" are reiterated. The plan provides diagrams of Council Portfolios and the Organisation Structure and the remainder of the document provides an overview of the Aboriginal Land Rights Act 1983.

Tracks to the Future – Directions for the New South Wales Aboriginal Land Council 2000 and beyond

The "Tracks to the Future" document, having been developed over the period of October 1999 to March 2000, represents the first significant strategic planning document of the current Council.

The copy made available to me was incomplete:

#	Title	Included in copy provided?
1	Preamble	Yes
2	Our Story: Who we are	Yes
3	Our Dreaming: NSWALC philosophy	Yes
4	Our Journey: NSWALC vision	Yes
5	Our Way: Values statement	Yes
6	Our Mob: Council portfolios	No

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#	Title	Included in copy provided?
7	Our Sharing: Contributions & benefits of NSWALC	Yes
8	Our Tracks: Goals	Yes
9	Actions Plans	No
10	Appendices	No
11	Pre-survey results	No
12	SWOT Analysis	No
13	Broad skills & knowledge needed for Councillors	No

Upon a request to the Acting CEO, NSWALC was able to locate additional components of the Tracks to the Future document. These were sections 6, 9, 11 and 12

Sections 9 – ‘Action Plans’ and 11 – ‘Pre-survey’ were part of an Interim Management Plan for NSWALC prepared by Head Office and Branch Managers on the 19th and 20th October 1999. There is no indication that these documents actually formed part of the final “Tracks to the Future” document.

The action plan details sixty objectives with strategies, responsibilities, resources required timeframes and expected outcomes. The “Tracks to the Future” document in comparison reduces this to twenty-four goals and notes “that all goals identified in Beyond the Sunset are likely to be on-going”.

The final document does not detail the objectives or performance targets for each goal or the means by which Council proposes to achieve them. No mention is made of the manner in which Council will assess its performance in respect of each goal.

At the 166th Meeting of Council held in April 2000, Council resolved to endorse the release of the draft document of “Tracks to the Future” to the LALC’s for comment.

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At the 171st Meeting of Council held in October 2000, Council ratified the engagement of “Cal Davis Consultancy firm” to assist in the implementation of “Tracks to the Future”. Mr Cal Davis later became a full-time employee of NSWALC and continues to assist LALC’s.

At the 173rd Meeting of Council held in February 2001, Council endorsed “the office bearers to finalise the recommendation and comments which emanated from the Dubbo Conference on 19-20 May 2000”.

It is apparent that the Councillors were unable to ever finalise and fully implement the “Tracks to the Future” document. As detailed below, in the second half of 2001 an external consultant was recommending that it should be an urgent priority of NSWALC to develop a three-year Business Plan.

Business Plan 2002 - 2007

On the 13th of September 2001 Mr Tony Hanrahan of Ferrier Hodgson issued his final report on the review of staffing and structure for NSWALC. A recommendation of this report was for the CEO, as a matter of urgency to develop a three-year Business Plan that:

- Clearly prioritises the objectives in the “Beyond the Sunset” document.
- Outlines a course of action as to how each of the prioritised objectives will be achieved.
- States timelines and performance indicators for each objective.
- Includes review and/or evaluation mechanisms for each prioritised objective.

As the 185th meeting of Council held 26th to 30th of November 2001 it was resolved that NSWALC immediately discuss with the CEO and give approval for the “NSWALC 3 – 5 years Plan for Land Council Network” to be contracted, if necessary, and have it created and presented early in 2002.

In March 2002 Alitek Consulting Pty Limited (“Alitek”) was engaged to assist Councillors and staff in preparing a five-year business plan. Workshops were held during April and May 2002 with the final business plan being issued in June 2002.

The introduction to the business plan acknowledges that “it builds on a number of previous plans, including “Beyond the Sunset” prepared in 1996 and “Tracks to the Future” prepared in March 2000”.

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Five key objectives are identified for NSWALC:

- Fully support the LALC's so they operate effectively and efficiently, and provide relevant services to meet the needs of members.
- Help the LALC's acquire and develop assets to become financially viable and self-sufficient.
- Ensure NSWALC is operationally sound and above reapproach, and this is seen both internally and externally.
- Maximise the return on the investment portfolio (while minimising risk through prudent investment), and increase the capital base.
- Influence government policy and community attitude, to protect and preserve Aboriginal culture and to create improvements for Aboriginal people.

For each objective the plan provides the following:

- High level Key Performance Indicators (KPIs) to measure the achievement of each objective.
- Strategies to be put in place to achieve the objective.
- Low-level KPIs to measure the achievement of each strategy.
- Detailed action plans for each strategy with allocated responsibilities and deadlines.

Alitek advised Council that "the business plan should be reviewed regularly, say twelve monthly".

Council began the process strongly commencing work on strategies at its August 2002 meeting with further follow up scheduled for the next meeting. During the subsequent two meetings the then Chairman Clr Towney resigned and Clr Graf was removed as Secretary. Shortly, thereafter in December 2002 the Chief Executive Officer, Mr Jeff Bradford, was dismissed.

A review of subsequent Council Meetings, through to the 204th meeting held 21st to 25th of July 2003, indicated that no further action has occurred.

Observations & Comment

NSWALC's Policies & Procedure Manual is outdated and inadequate in respect of corporate planning.

The "Business Plan 2002-2007" completed in June 2002 presents as a much more professional document than its predecessor. The document clearly articulates the long-term goals and objectives for NSWALC. The five key objectives are supported by strategies and action plans together with assigned responsibilities and performance measures.

The current Council has failed to show leadership by not monitoring the progress of strategies identified in the plan. In August 2002 the Council began discussing the implementation of the action plans. However it is evident that from this point the Council's resolve became subordinate to the political processes occurring within the Council at that time. The departure of the CEO who had initiated the process, further contributed to preventing the completion of the work commenced.

The strategic plans have not been taken to the next stage and expressed in financial terms as part of the development of a Long Term Financial Plan for Council. Long Term Plans assist with the prudential management of Council's financial risk and enable the financial effects, of Council decisions, to be considered.

The Council has been ineffective in implementing its Vision as evidenced by its lack of commitment to progress the strategies developed in its "Business Plan 2002 – 2007".

Recommendations

The value of the Five Year Plan needs to be preserved. The CEO should undertake an assessment of the status of the action plans and redetermine responsibilities and target dates where required. The revised business plan should be reported to and approved by the Council.

The stated key objectives, KPI's and actual performance should be reported to the membership each year as a report card on the effectiveness of the Council. Consideration should be given to including this on the website of NSWALC as well as in the Annual Report.

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6.8.2 The Budget Process

Reason for Review

Under my terms of appointment I am to specifically investigate, the current financial management processes including NSWALC's budgetary processes and any need for changes to systems, policies and procedures.

The purpose of my investigation into the budgetary process is not to perform a detailed review of the current budget. This review has already been undertaken by PricewaterhouseCoopers at the request of the Minister. My review has focussed on the efficiency and effectiveness of NSWALC in preparing its annual budgets and in responding to requests for information from the Minister.

Overview

This area covers the budgetary process in relation to the 2003-04 financial year.

Reference has been made to "A best practice guide for reporting local government budgets in Victoria" (the Guide) issued in May 2003 by the Institute of Chartered Accountants in Australia. This Guide has applicability to NSWALC.

The Guide provides that an organisations budget should form part of, and should be driven by, the strategic planning framework. The annual budget needs to be linked to the organisations long-term objectives and with the long term financial plan. The focus of the annual budget becomes the resourcing of service delivery in the short term, but within the context of longer-term financial sustainability.

NSWALC does not have a current strategic plan or a long-term financial plan in which to give contextual reference to its current budgetary process. Whilst a business plan for 2002 – 2007 exists it was never fully actioned by NSWALC and has not been updated at the end of June 2003.

Relevant Legislation

Section 157 provides:

- a) The New South Wales Aboriginal Land Council must, not less than 6 weeks before the commencement of each financial year, prepare and submit for the approval of the Minister a detailed budget relating to its proposed operations during that financial year.
- b) In determining whether or not to approve a budget, the Minister may seek from the Council, and the Council must furnish to the Minister, such information as the Minister requests relating to the budget.

Policy & Procedures

NSWALC's Policies and Procedures manual requires Council, not less than six weeks before the commencement of each financial year, to prepare and submit for the approval of the Minister a detailed budget relating to its proposed operations during that financial year.

This policy is a reiteration of sec. 157 of the Act.

Budgets are prepared by the finance section, headed by the Manager of Financial Operations. The budgets are prepared on a cash basis and not adjusted for accrued assets or liabilities.

Budgets are only prepared for the "Administrative arm" of NSWALC. No budget is prepared for the SIF and as such the budgets do not provide a complete picture of the organisation and are not readily comparable to the annual audited financial results.

The budget is not set within the framework of a current corporate plan. While a five-year business plan was prepared in June 2002, it was never fully implemented.

Discussions with the Manager of Financial Operations and the Finance Manager indicated that the budgets are set through a process of consultation with Unit and Branch Managers. Internal memorandums are forwarded to the Managers requesting their budgets for the coming year. If submissions are not received by the due date, the finance section uses the Division's current year budget as the basis for the forecasts.

Unit and Branch Managers have indicated to my team that no feedback is provided to them on their budget submissions even where these are changed by the finance section. Consequently it is questionable whether Managers have any sense of ownership in this process.

Previous Reports – Internal & External

There are no internal audit reports on NSWALC's budgetary process.

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At the request of the NSW Department of Aboriginal Affairs (DAA), PricewaterhouseCoopers has undertaken a review of the 2003/04 budget that was submitted to the Minister. The results of this review were reported to DAA on 20 June 2003.

Summary of Revisions to the 2003/2004 Budget

A detailed chronology of the revision to the 2003/2004 budget is provided in Annexure 13.1.

The table below summarises the changes to the forecast result of NSWALC's "Administrative Arm" for the 2003/2004 financial year:

Change in forecast	Date Prepared / Submitted	Forecast Surplus / (Deficit)
N/A	16 May 2003	\$126,799
(\$104,189)	19 June 2003	\$22,610
(\$987,583)	27 June 2003	(\$964,973)
\$1,548,643	21 August 2003	\$583,670

This series of revisions highlight the uncertainties facing Council in relation to the current investigation, implementation of the recommendations of the Hawkless Report, delays in appointing a new CEO and forecasting returns on the SIF.

2002/2003 Budget

A detailed review of the events surrounding the approval process in relation to the 2002/2003 budget is provided in Annexure 13.2.

As at 5 August 2003 the 2002/2003 budget is still not approved.

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Issues raised by PricewaterhouseCoopers

On 28 July 2003 the Council received a report from PricewaterhouseCoopers dated 20 June 2003 raising twenty-one issues as a result of their review of the 2003/2004 budget submitted to the Minister. In my opinion ten of the twenty-one responses explanations provided by NSWALC are inadequate.

Details of the issues and NSWALC's responses are provided in Annexure 13.3.

Review of budgets set by the current Council

An analysis was performed of the budgets approved over the life of this Council. The budgets compared were for the years ending 30 September 2001 through to 30 June 2004.

The budgeted surplus / (deficits) for these years are summarised below (Note: actual results for 30 June 2003 are unaudited):

Year	Budgeted Cash Surplus / (Deficit)	Increase (Decrease) in Cash Statement of Cash Flows	Operating Result per Financial Statements
2001	\$1,917,505	(\$4,811,000)	(\$1,925,000)
2002	\$54,949	(\$2,673,000)	(\$14,736,000)
2003	\$5,702	\$376,000	\$13,892,000
2004	\$583,670	NA	NA

As noted above, the budgets are prepared on a cash basis for the "Administrative Arm" of NSWALC and as such the budget amounts are not readily comparable to actual results disclosed in the annual audited financial statements. This same issue arises when reporting on a monthly basis.

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Detailed comparisons across these years were also performed on the following areas of the budget:

- Branch Budgets
- Councillor Budgets
- Administration Budget
- Rural Property Budget

I have identified and noted further issues in addition to those raised by PricewaterhouseCoopers that relate mainly to the underlying assumptions. These are detailed in Annexure 13.4. Of the seven issues raised by my team, unsatisfactory responses were received for four of the items.

The majority of concerns raised by both PricewaterhouseCoopers and myself could have been avoided if NSWALC included adequate commentary including the assumptions underlying the preparation of the 2003/2004 budget.

Monthly reporting of actual v forecasts

Comparisons between actual and budgets are prepared monthly by the Accounts section for each business unit. However as the basis of preparation is not consistent the analysis is of little, if any, value.

Other matters

The Tripartite Housing and Infrastructure Program was a joint initiative between NSWALC, DAA and ATSIC to improve the living conditions at forty-five former Aboriginal Reserves across NSW.

NSWALC's commitment of \$2,250,000 represented 50% of DAA's commitment to the program in the 1997/98 year, being the last year in a three-year programme. Of this amount \$250,000 had been paid and no further amount is included in the budget.

The Treasurer has acknowledged that NSWALC has been requested to pay this amount and advised me that the Minister is aware of its omission from the budget. No documentation to this effect has been provided to me.

Details of the correspondence in relation to the Tripartite Housing and Infrastructure Program are provided at Annexure 13.5.

Observations & Comment

The Council is in breach of section 157 of the Aboriginal Land Rights Act 1983 in so far as it has been unable to furnish to the Minister sufficient information to facilitate the approval of the 2002/2003 and 2003/2004 budgets.

The yearly budgets do not provide a complete picture of NSWALC's operations as they relate only to the "Administrative Arm" of the organisation and are prepared on a cash basis. As a result, the overall budgeted position of Council cannot be compared to the annual audited financial statements and their use as an effective management tool is limited.

The 2003/2004 budget has not been prepared within the context of a current management plan and it is not apparent if resources have been allocated efficiently in accordance with stated priorities.

There is a lack of ownership of the budget process due to inadequate consultation with Unit and Branch Managers and the lack of comparability between budget and actuals.

Council has been unable to finalise its budget for the 2003/04 financial year. Between 16 May 2003 and 21 August 2003 there have been four different versions of the budget with forecast results ranging from a surplus of \$126,799 to a deficit of \$964,973. The current budget discloses a surplus of \$583,670. These variances result from changes in the underlying assumptions. These include:

- The extent to which proposed restructuring of the organisation occurs;
- The appointment date of the new CEO;
- Forecasted returns from the SIF
- Underlying assumptions used in the preparation of the budget are not documented;

No proper analysis has been made of cost drivers relevant to each Branch to provide a meaningful basis to allocate resources. (Eg. the number of LALC's within each Branch.) This deficiency applies equally to the service units of the Corporate Body;

Key Performance Indicators have not been identified as part of the budget;

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A significant liability of NSWALC dating back to 1997/98, relating to the Tripartite Housing and Infrastructure Program, has not been included in the 2003/2004 budget.

Recommendations

A suitable timeline should be developed of the key dates including the Council meeting date for adoption of the budget. The Budget process should commence at least six weeks before the due date (i.e. by 1 April) and all Unit Mangers should be included in the process.

The Budget should be prepared on an accruals basis, include all of the operations of NSWALC. The Budget should document all of the key assumptions.

A Capital Budget should be prepared. This should disclose all planned capital expenditure and the sources of funding for the budget, both internal and external. This will also include planned allocations to LALC's.

A Long Term Financial Plan should be developed. The Plan should be based on the objectives and strategies taken from the five-year business plan and expressed in financial terms. This will assist the Council align the allocation of scarce resources with its longer-term goals.

Budgets should be compared against actuals on at least a quarterly basis and where necessary, variations approved. A template should be established so that details of the original adopted budget are maintained.

The quarterly budget analysis report should be included on Council's website and be available to the membership.

The budgeted cash flows for NSWALC need to be prepared on a monthly basis (not merely by dividing the annual budget by twelve) to highlight the critical cashflow periods for the organisation.

Resolutions of Council with a financial impact should be identified in the budget.

NSWALC support the initiative of the DAA to have an independent financial expert assist in developing new budget templates and processes. NSWALC should be involved in the selection of the independent financial expert.

6.9 Complaints Handling

Reason for Review

The purpose of this section is to examine and summarise the Complaints Review process within NSWALC and to provide our conclusions and recommendations to deal with any shortcomings that may exist.

The review deals with two main areas:

- The internal complaint handling process.
- The management of referrals from investigating authorities.

Internal Complaint Handling Process

The formal Complaints Process was developed as a consequence of ICAC Discussion Paper “Preventing Corruption in Aboriginal Land Councils” and the “Report on Investigation into Aboriginal Land Councils in New South Wales”. Recommendation 12 of that report provided:

NSWALC should establish a Dispute Management System that includes a procedure for dealing with complaints relating to misconduct by members and employees.

The recommendation was supported by the appointment of an Aboriginal Complaints Officer. The officer handles preliminary enquiries, participates in the investigation of complaints from the Aboriginal community and refers serious matters to the Head of Internal Audit to determine whether more formal investigation is required. The Complaints Officer acts as a contact point for the Aboriginal community educating them on the role and functions of NSWALC as well as identifying complaints and issues that may warrant investigation by NSWALC, NSW Police and ICAC.

The current Aboriginal Complaints Officer (ACO) has been in the role for approximately two years. She was appointed to this position with limited regard to her suitability for the role. My investigations suggest that the ACO has not received specific ongoing training opportunities. This is in spite of the contents of the Policies and Procedures Manual which states that the ACO is entitled to receive on the job training in a range of relevant skills including (but not limited to) office procedures, legal interpretation, negotiation and mediation, report writing and complaint management. Clearly NSWALC has not been effective with respect to this guideline. Despite the limited training opportunities for the ACO, I am of the opinion that she has conducted the complaint handling role satisfactorily.

Policy & Procedures

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Procedures for dealing with complaints within the NSW, Regional or Local land councils of NSW have been laid out in Chapter 4 of NSWALC's Policies and Procedures Manual. The Manual deals with Complaints Policy, Forms for recording and reporting complaints, and a Position Description for the role of Manager Complaints Unit/Aboriginal Complaints Officer ("ACO").

The objectives of the Complaints Policy set out in the Policies and Procedures Manual are as follows:

- To process complaints in an expedient manner.
- To utilise the skills and expertise of NSWALC staff in gathering background information for assessing whether formal complaints are
 - a. factual
 - b. vexatious
 - c. malicious
 - d. an attempt to avoid dismissal or disciplinary action, or
 - e. false or misleading.
- To participate as a member of a committee made up of representatives from ICAC, NSW Ombudsman, and the DAA, to meet on a monthly basis to discuss any matter of concern that may effect any organisation pertaining to complaints of a corrupt nature associated with Aboriginal Land Councils.
- To maintain a statistical database for gathering information for inclusion in NSWALC's Annual Report.
- To provide assistance to ICAC and the NSW Ombudsman's Office with their enquiries, through the Executive Director and/or Council as required.
- To act as contact point for the Aboriginal community, educating them on the Roles and Functions of NSWALC.
- To identify complaints and issues that may warrant investigation by the NSW Ombudsman, ICAC, NSW Police and NSWALC.
- To utilise the skills and expertise of Branch Office staff in acquiring information and assistance in investigating matters of concern pertaining to Aboriginal Land Councils within their boundaries.

- To assist with the provision of a mediation service as requested by LALCs or individual members of LALCs.

Section 7 of NSWALC's Internal Reporting Policy imposes on "Nominated Disclosure Officers" a set of responsibilities and reporting procedures with respect to complaints. This Policy identifies the Manager of Internal Audit as the "Disclosure Coordinator". The important role for assessment and reporting is the so-called Principal Officer, a position that can be equated to the current CEO.

It is of serious concern that the Policies and Procedures Manual was last revised in April 1999. Since the last revision, Australian Standards Series AS 8000 has been issued. Of particular relevance are AS 8001-2003 *Fraud and corruption control* & AS 8004-2003 *Whistleblower protection programs for entities*.

Observations & Comment

In fact it appears the Manual is still considered to only be a draft policy and the forms contained in the Manual are not currently used.

The internal complaint handling process within NSWALC is inadequate. As a consequence, complaints of corrupt conduct, maladministration or fraud have the potential to avoid referral to the appropriate authority. Failure to undertake a proper investigation also exposes the Council to potential criticisms of corruption or favouritism regardless of the true position.

Problems exist with the lack of resources allocated to the investigation process; the ongoing education and training of the Complaints Officer; delegation of projects within NSWALC; liaison with investigating authorities such as ICAC and NSW Police; weaknesses in compliance with Protected Disclosures Legislation; and the reporting processes.

Management of Referrals from Investigating Authorities

The management of complaint referrals from investigating authorities is unsatisfactory. The result is that complaints of corrupt conduct, maladministration or fraud fail to be investigated on a timely basis. This can in turn lead to claims of misadministration being levied at Council. Matters referred to NSWALC are dealt with in an inconsistent manner at all stages, from receipt, through the investigation process to the reporting function. Two key reasons for the unsatisfactory management of the referrals received are i) lack of effective written procedures and policies, ii) lack of appropriate resources, and iii) absence of requisite investigative powers.

It is not appropriate that the Policies and Procedures Manual has not been reviewed and if revised to take into account the changes to the Act and to address the experiences of the Council, the CEO and the Complaints

Chapter 6: The Council

Officer during the last three years. The Manual should be an evolving document. As such the aims, objectives, forms and position description would be expected to develop in a process of continuous improvement.

Manager of Internal Audit manages ICA referrals without support from a dedicated team of investigative staff. This ensures that complaints that are referred to NSWALC cannot be investigated effectively, if at all, and are by necessity added to the pre-existing complaints for investigation. In short, insufficient resources exist. No effective system exists to deal with complaints referred to NSWALC by ICAC. The result is that unresolved complaints have not had the resources dedicated to them to ensure a full investigation has occurred and the complaints have accumulated with any report back to the correct authority.

NSWALC has failed to adequately investigate and report on a large number of complaints referred to it by ICAC. The inaction by NSWALC had grown to such an extent that ICAC withdrew fourteen requests for investigation and information. ICAC subsequently asked NSWALC to concentrate on five key complaints and requested they undertake a full and proper investigation and prepare a written report on the outcome.

A further example of failure by NSWALC to investigate a complaint is evidenced by the "Appin Tape". Information of alleged fraud was made available to NSWALC that it failed to pursue. Criticism can be directed at NSWALC for failing to follow up and document the allegation from the tape. The failure to investigate the claims, failure to open a complaint file and failure to prepare a written report of the investigation leave the Council open to allegations ranging from incompetence to corruption.

The involvement of Internal Audit is inappropriate as the internal audit function should not include sole responsibility for complaint investigation. The Internal Audit function is aligned more closely with systems and financial analysis. The proper procedure is that complaints are initially directed to NSWALC where the CEO or the Council can engage an appropriate ACO to investigate, report and ultimately liaise with ICAC, NSW Police, and DPP as required. The CEO should allocate work directly to the ACO.

They may provide a valuable resource to the Complaints Review Unit to complement the investigative work of that Unit. It is questionable however whether Internal Audit has the investigative skills with respect to fraud related matters to have a primary role.

The role of NSWALC, Council and the Executive is not clear from the relevant legislation and procedural guidelines. Comprehensive policies and procedures should exist on the following matters:

- How to investigate a complaint received
- How to refer a matter outside NSWALC
- What to refer outside NSWALC
- A definition of the roles and responsibilities of ICAC, NSW Police and the DPP
- Documentation standards

The participation by the ACO in meetings made up of representatives from ICAC, NSW Ombudsman, and the Department of Aboriginal Affairs (as required in the Policies and Procedures Manual) has not occurred on a regular basis. Further, the DPP has never been part of any liaison group. The Manual proposes meetings on a monthly basis to discuss any matter of concern that may effect any organisation pertaining to complaints of a corrupt nature associated with Aboriginal Land Councils. Given the apparent failure of previous attempts to establish a liaison group, I suggest liaison take place between the ACO and ICAC and NSW Police separately. This may allow a better rapport to be developed between NSWALC and these authorities

Internal Reporting Policy

The DPP Act is not being followed in all circumstances. The aim of the Policy is to provide support for persons who make disclosures of corrupt conduct, maladministration or fraud. The Act aims to facilitate the disclosure whilst protecting the reporter from reprisals. A number of examples exist where the identity of persons making disclosures has not been adequately protected.

Despite the above conclusion, the Policy contains potentially favourable guidance for the investigation and reporting process. The Internal Reporting provisions contain a dated, but valuable flow-chart for decision making. The benefits are identifiable in the flow of information through the complaint receipt, investigation and reporting procedures.

Chapter 6: The Council

Recommendations

The role of ACO should be a senior position within NSWALC. Significant financial resources need to be allocated to the creation of a Complaints Review Unit to ensure that the Unit has staff with appropriate skills to perform their role in fraud detection and dispute resolution/mediation. Training might include a liaison program with NSW Police and the establishment of a template report for referral of complaints to NSW Police. If a template is issued to the LALCs it should increase the likelihood of action being taken to prosecute complaints.

NSWALC's Policies and Procedures Manual needs to be re-written at Section 4 on Complaints Policy. The aim of the re-write should be to properly outline procedures for i) acceptance of complaints, ii) the delegation of projects within NSWALC; iii) liaison with investigating authorities such as ICAC, NSW Police and DPP; iv) protocols for compliance with Protected Disclosures Act; and v) the reporting processes. Guidance should be taken from AS 8001-2003 *Fraud and Corruption Control* & AS 8004-2003 *Whistleblower Protection Programs for Entities* and through liaison with the relevant statutory authorities.

ACO to liaise with ICAC to determine what steps can be adopted to increase cooperation. Develop Protocols on whether ICAC can refer matters directly to LALCs for investigation with a review function delegated to NSWALC for independent assessment and timely reporting.

Training for the ACO and complaint staff should be substantially upgraded and reflect the investigative nature of the work performed by the Complaints Unit. A key member of the Unit should be an individual with a fraud investigation background. Initial training for the Unit staff would ideally include fraud detection and mediation skills.

The Complaints Unit should be increased immediately to at least three people. The team should work on a project by project basis and also have a training responsibility for NSWALC and LALC staff.

The Policies and Procedures Manual must be revised to include a flow chart clarifying the responsibilities of the Council, CEO and ACO with respect to Complaints investigation and reporting. All matters referred to NSWALC should be recorded in a Complaints Register. The Register should be reviewed on a regular basis by the ACO and the CEO and a regular reporting program established between the ACO and the CEO.

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Internal audit should not be engaged to conduct the initial investigation of Complaints received by NSWALC. Internal Audit may however have a role in reviewing systems and financial matters as a resource to the Complaints Review Unit. Internal Audit should provide for this contribution to Complaint Review in preparing its annual internal audit plan.

Conduct regular liaison meetings with representatives from ICAC and the NSW Police to discuss improvements to systems, training and any matter of concern associated with Aboriginal Land Councils.

The NSWALC Internal Reporting Policy should be re-written to ensure individuals are protected and thereby encouraged to report any acts of corrupt conduct, maladministration or fraud.

7 Statutory Investment Fund

Reasons for Review

Under my Terms of Appointment I am to specifically investigate the dealings, decisions and management of the Statutory Investment Fund (SIF) and the need for any changes to systems, policies and procedures that would improve the operation of the SIF.

The Auditor-General in his 2003 report to Parliament also raised the SIF as a key issue. He raised concerns that Section 150 of the Act creates a mandatory requirement to keep the capital value of the SIF at \$485.3 million. As at 28 February 2003 the SIF balance was \$482.2 million but it had risen to \$487.8 million at 1 April 2003.

Council needs to prudently manage its investment policies, recurrent expenditures and operational risks to ensure they do not adversely impact the SIF balance. Section 150 of the Act does not impose any penalty should the SIF drop below the required capital value.

Overview

This Chapter covers the Statutory Investment Fund (SIF). The fund has an externally managed and an internally managed component. It is the main source of income for NSWALC.

NSWALC has a stewardship role over the SIF to maintain this for future generations of indigenous people.

The “background paper – review of the Aboriginal Land Rights Act 1983 (NSW)” produced by NSWALC provides the following commentary on the SIF:

“The NSW Aboriginal Land Rights Act provided for the Land Council system to receive annual funding, from 1983 until the end of 1998, equivalent to 7.5 per cent of the government’s land tax revenue for the previous year. Fifty per cent of this money annually was to be invested, in order to build a financial base for the years beyond 1998.

The guaranteed land tax funding for the Land Council system finished on 31 December 1998 after 15 years. At this time, the NSW Aboriginal Land Council Account (known as the ‘investment fund’) totalled \$492,505,102. The fund will form the core capital base for the Land Council network in the future. The network is funded from the interest generated from investments.

Chapter 7: Statutory Investment Fund

The majority of the fund has been invested in cash and bonds with some limited investment in real property.”

NSWALC’s now defunct Investment Committee (“NIC”), during a meeting held 30 October 1998, specified that NSWALC “required 10% (\$48M) of the fund to make investments themselves, making mistakes, and learning from these mistakes”. This is the internally managed component.

More than 90% of the SIF is externally managed on behalf of NSWALC with advice from Chifley Financial Services. Chifley Financial Services have been providing this advice since their appointment in late 1998. Internally managed assets are controlled by NSWALC and comprise investments in real property, mortgage funds and cash accounts. At 30 June 2003 the internally managed assets represented 6% of the SIF.

Notwithstanding the plethora of negative press received by NSWALC in relation to the SIF, NSWALC has acted responsibly and appropriately in its custodial capacity by appointing external experts to manage the majority of the SIF with the aim of generating returns of 5% plus CPI.

The decision of the NIC, to risk up to 10% of the SIF to make mistakes and learn from them can only be described as arrogant, reckless and a failure of basic stewardship. This decision has been endorsed by the current Council. The investment in mortgage funds, in particular, is a financial quagmire from which NSWALC is still attempting to extricate itself.

It is interesting that despite the unusually high level of attention paid to the SIF there is no prescriptive guidance of how it is measured and what assets comprise the balance. Also there is no provision in the Act or the Regulations that addresses the repayment of funds to the SIF should it drop below the level set in section 150(1), no provision as to when restoration should occur and imposes no penalty for a breach of section 150(1).

Relevant Legislation

Sections 149 and 150 of the Act provide for the establishment of the SIF and for preservation of its capital value.

The Act provides that the capital value of the SIF, as at 31 December 1998, is determined to be \$485,340,000.

Chapter 7: Statutory Investment Fund

Policy & Procedures

The SIF:

Section 18 of the policies and procedures manual (last revised April 1999) covers the area of Investments.

The manual provided for the operation of the NIC, comprising the Treasurer, the Financial Controller, the Business Advisor and the External Advisor. The Investment Committee ceased to operate subsequent to its meeting held 14 September 2001.

The manual specified that ultimate responsibility for all investment decisions lay with Council. Council is to approve all the key aspects of the investment management process prior to implementation.

The Council now makes investment decisions with advice from its Investment Advisor, Chifley's and NSWALC's Manager of Financial Operations ("MFO").

The current investment strategy, based upon advice from NSWALC's external investment advisor and its own requirement to retain control of 10% of the SIF is as follows:

Total	Australian Shares	International Shares	Property	Australian Fixed Interest	International Fixed Interest	Absolute Return	Internally Managed
100%	25%	10%	7.5%	17.5%	20%	10%	10%

Previous Reports – Internal & External

The Council is currently in the process of tendering for the future services of an external fund manager. During the March 2003 meeting of Council a motion was passed for the Internal Audit department to audit the tender process due to perceived bias by a number of the Councillors.

Discussions were held with Mr Soane Wainiqolo, Senior Internal Auditor. Mr Wainiqolo provided to me a finalised copy of Internal Audit's report dated 16 June 2003 into the tendering process for financial advisors.

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Key findings arising from the Internal Audit report are as follows:

1. Internal Audit has recommended that the tender process be redone.
2. Documents and records of Council were found to be not complete and not properly prepared.
3. A tender process was not entered into; rather a negotiation process was attempted.

The key recommendations (from a list of 19) arising from the Internal Audit report are as follows:

1. Policy guidelines on tender processes should be documented in the Policy and Procedures Manual.
2. The appointed investment advisor should be reviewed annually for performance against best practice.
3. Councillors should not become involved in the tendering process unless they have a clear direction from Council.
4. The Council rigorously treat each candidate equally.

When requested for management responses from Internal Audit, the MFO provided no comment or inadequate responses to each of the key issues.

The tendering processes of NSWALC have been covered elsewhere in this report.

7.1 Managed Investments

Appointment of the Investment Advisor and Custodian

In a meeting of the NIC held on 30 October 1998, the then Business Advisor advised that tenders had been called to manage the Council's investments and these were being evaluated. In late 1998 NSWALC arranged for Chifley Financial Services to act on its behalf as investments advisor. At this time all advisory services provided by Macquarie Risk Advisory Services Pty Ltd were terminated. This decision was minuted in the meeting of the NIC on 12 January 1999.

The meeting of the NIC on 8 March 1999 resolved to appoint State Street as Custodian of the SIF. The meeting of the NIC on 17 April 2000 resolved to call for tenders as Custodian of the SIF. The result of this process was a Resolution on 22 May 2000 to appoint AMP/Cogent as Custodian of the SIF and State Street's services were terminated.

According to the MFO, no written contract exists between the Council and Chifley Financial Services. Chifley Financial Services have advised me that

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they have been paid a flat fee per annum of \$100,000 (plus GST since 1 July 2000) for services since appointment. There appears to be no documentation as to how NSWALC negotiated this fee to ensure the most competitive fee was obtained.

Valuation and Measurement Issues

On a monthly basis Cogent provides detailed reports of funds held with various fund managers and all transactions undertaken during the month. These reports are supplemented by performance reports by Chifley Financial Services that provide a narrative on the monthly results.

The MFO advised that since February/March 2003 he has been providing weekly balance reports to the Minister of Aboriginal Affairs. These weekly reports are compromised because actual balances are only available from the Custodian at the end of each month. The MFO estimates the mid-month balances for reporting purposes.

In my opinion the reporting of weekly balances is of little value and places an inappropriate emphasis on short-term valuation shifts rather than focusing on the longer-term investment strategy.

Chifley Financial Services will recommend rebalancing the investments as required, depending on the market. This can be a costly exercise as it involves transferring funds between fund managers and possibly crystallising unrealised losses or incurring exit fees on breaking an investment term.

The MFO advised that such rebalancing has occurred twice since he commenced with the Council in February 2002. My review of the investment balances since 30 September 2002 indicated that no significant rebalancing had taken place up to 30 June 2003.

Current Position of the Invested Funds

At CM202/12, it was resolved to proceed with a re-tendering process and in the meantime to adopt Chifley's advice in their letter dated 26 May 2003, including a 90-day termination clause. This advice was to invest the SIF, with the exception of cash and internally managed assets, in units in the Chifley Investment Fund that operates as a master trust. Cogent Investment Operations Pty Ltd is to be replaced as Custodian by J.P. Morgan and a number of fund managers are to be changed.

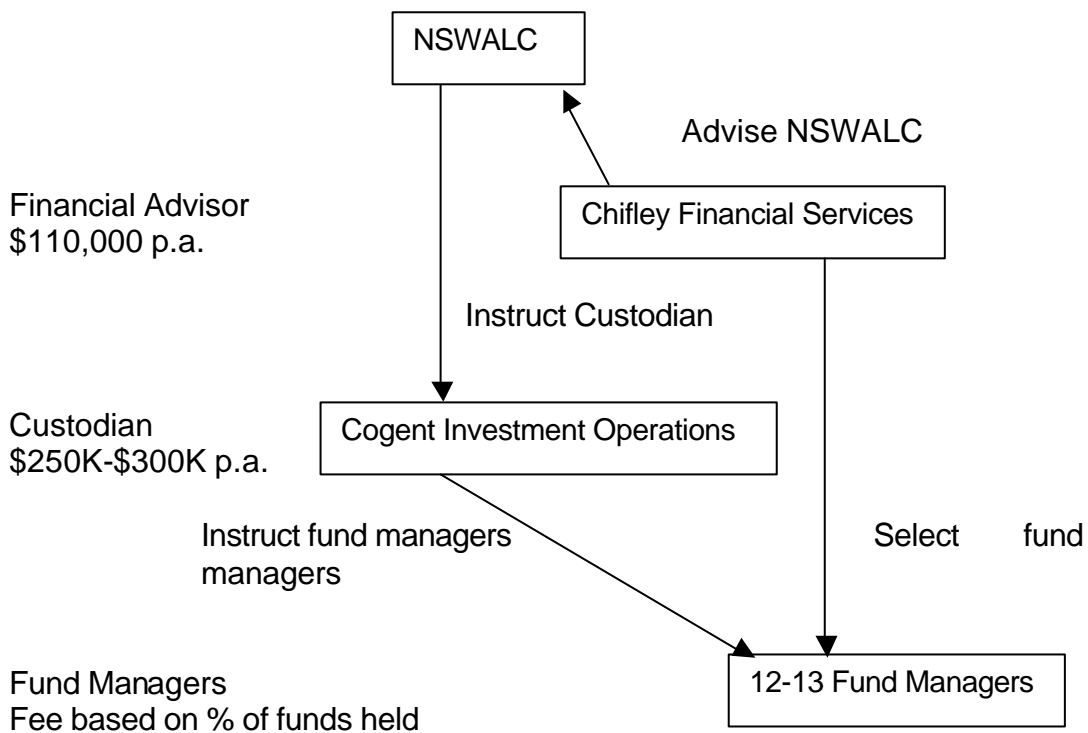
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A letter from Chifley Financial Services to the MFO confirmed that during the period 28 July to 15 August 2003 assets would be transitioned to the new custodian, JP Morgan as a consequence of the Council utilising the Chifley Investment Fund.

I am not in a position to offer a contrary view. Whilst it appears unusual for the Council to change its investment strategy on the advice of its Financial Advisor while this position is the subject of a current tender process, there is nothing to indicate improper conduct by the Council.

Structure of current and proposed investment structure

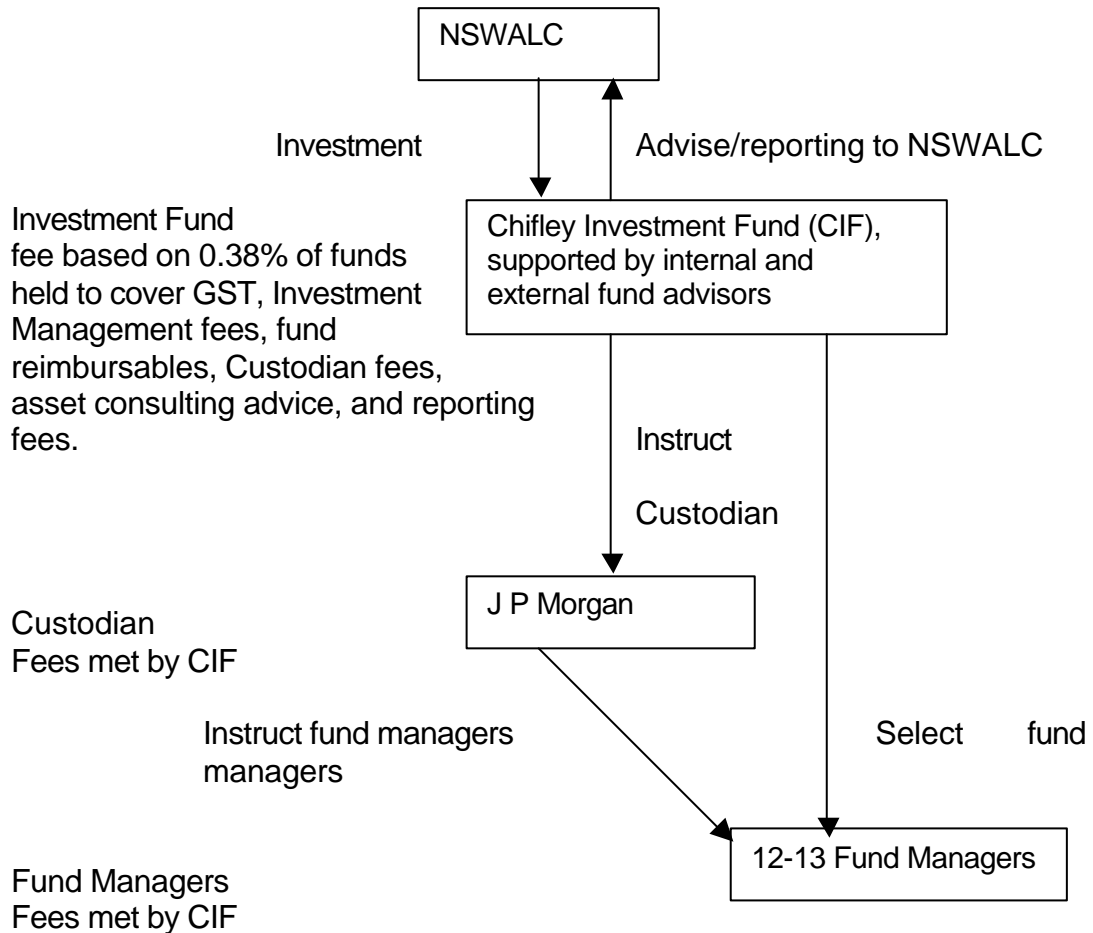
The existing structure under Chifley Financial Services and Cogent Investment Operations is as below:



As at April 2003, management calculated the annual cost of the above structure to be \$2,476,804.

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The new structure to be implemented is as follows:



As at April 2003, management calculated the annually cost of the above structure to be \$1,751,492, being an estimated saving of \$725,312. These calculations were performed on the investment fund's allocations at that time, not on the re-balanced allocations. Actual savings, according to Chifley Financial Services are expected to be in the range of \$300,000 to \$400,000 per year.

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Investment manager, custodian and fund manager charges

Chifley Financial Services has supplied me with details of the fund manager charges (MER) effective 30 June 2003. None of the fund managers charge up-front fees or pay any annual trailing commissions.

According to Chifley Financial Services, a number of managers had relationships with NSWALC prior to their appointment. In some circumstances Chifley Financial Services was unable to influence the price charged to NSWALC as the negotiations had already been concluded. Chifley Financial Services indicated that this was particularly in relation to AMP and Clay Finlay.

Chifley Financial Services claim to have always negotiated with fund managers to reduce the investment costs of NSWALC. Examples were provided to support this claim.

Measurement of the SIF

The unaudited balances held in the SIF as at 30 June 2003 total \$501,917,307, comprising internally managed assets of \$31,451,588 and externally managed assets of \$470,465,719. Full details of components of the SIF as at that date as provided by the Custodian are detailed in Annexure 13.6.

As at 30 June 2003, the Custodian reported that NSWALC's SIF of \$501,917,307 included an unrealised loss of \$27,794,168 or 5% of the balance. \$19,096,421 or 69% of the unrealised loss at 30 June 2003 is attributable to the internally managed assets, including mortgages. As at 30 September 2002 NSWALC's unrealised loss on its portfolio of \$487,624,603 was \$23,930,686 or 5%. The unrealised loss as at 30 September 2002 attributable to the internally managed assets was \$9,030,736 or 38% of the total unrealised loss. This indicates both an improvement in externally managed assets and deterioration in the value of the internally managed assets.

Observations & Comment

The Act does not specify the manner of calculating the SIF or the frequency with which the SIF should be measured and compared to the statutory minimum of \$485.34 million. The Act is drafted in a manner to suggest a single account exists when in reality NSWALC has its investments over an extensive portfolio. In addition it has assets and liabilities that are not reflected in the nominal SIF.

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No consideration is given to the relationship to the Administrative Fund with the SIF. The Administrative Fund is not defined in the Act. This term is used internally by NSWALC to represent the net assets of NSWALC that are not part of the SIF. Currently NSWALC could manipulate its performance by internal transfer of assets between the two funds. For example by delaying payment of creditors NSWALC could generate additional cash internally and invest it to boost the SIF balance.

The working capital balance (Current Assets less Current Liabilities) should be included in the calculation of the SIF balance. This will provide a better indicator of the SIF and facilitate the correct measurement of the balance of the SIF amount. This should not raise any significant difficulties for the management of the organisation.

The weekly measurement and reporting of the SIF is not accurate as actual values are only available from the Custodian at the end of each month. Also a focus on short-term movements in the SIF is inappropriate when there are far more significant financial and performance issues that need attention. The effective utilisation of budgets and other financial management tools will provide a better path to financial health than focusing on short term estimated returns.

Whilst only representing 6% of the SIF, the internally managed assets represent 69% of the unrealised losses being carried by NSWALC.

More than 90% of funds held in the SIF are with external fund managers. However the internally managed component has been invested in assets that are not publicly listed. NSWALC does not have the internal resources to effectively manage active investments. The concept of internally managed investments should relate to management of the investments not the type of investments that are held. The significant majority of the SIF should be in publicly listed investments.

Any land held in the SIF should be revalued to market at least annually for the purpose of measuring the balance in the SIF and determining NSWALC's compliance with section 150 of the Act. Although this is not a requirement under generally accepted accounting standards, given the nature of the investment and the statutory obligations of NSWALC, I believe this is the most prudent approach.

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There should be no monetary penalty for a breach of section 150 of the Act. A more appropriate sanction is to amend section 223 to provide that where the capital value of the Account referred to in section 150 falls below the limit for three consecutive months is a trigger for the Minister to appoint an Administrator. The power to appoint is not intended as a penalty but to provide the Minister with an effective response to preserve the SIF held for future generations where the elected Councillors of the day fail to adequately perform this function.

Current Policies & Procedures do not exist in relation to the operation of the Investment Fund.

The performance of Council's current Investment Managers, Chifley Financial Services, has not been subject to formal annual reviews since inception. Fees paid to a number of fund managers are too high as arrangements had been made by Council prior to the appointment of its current financial advisor, Chifley Financial Services.

Council and staff have not maintained appropriate records to evidence that due process was undertaken in appointing Chifley Financial Services and in negotiating the annual fee paid. NSWALC's tendering process appears to have been circumvented by Councillors and staff. This has created costly inefficiencies due to the need to re-tender for investment advisors.

Recommendations

The SIF should only comprise publicly traded investments, cash equivalents and real property free from encumbrances.

All assets comprising the SIF are to be valued at their market values at the date of measurement. For external reporting requirements this should coincide with NSWALC's year-end reporting date.

The SIF balance is to be measured as the sum of:

- the market value of all assets held as part of the SIF including real estate holdings;
- and the working capital of the administration fund calculated in accordance with generally accepted accounting standards.

A monthly report on the measurement and performance of the SIF must be tabled to each meeting of Council. The legislation should be amended to require NSWALC to report the value of the SIF balance to the Minister on a quarterly basis.

Chapter 7: Statutory Investment Fund

Section 223 of the Act should be amended to provide when the SIF balance is below the statutory limit for three consecutive months it is a trigger for the Minister to have power to appoint an administrator.

Updated Policies and Procedures need to be written in relation to the operation of SIF.

External advisors should be appointed as a result of publicly advertised tenders, that are conducted in a fair and appropriate manner.

The performance of Council's advisors should be formally reviewed on an annual basis and every three years the services should be re-tendered.

7.2 Internally Managed Investments

Details of the internally managed assets as at 30 June 2003, provided in the Custodian's end of month report are as follows:

Investment	% of Internally managed account	Market Value as at 30 June 2003
Direct Property (WDV)	38.0%	11,924,208
1st Nation Credit Union	19.2%	6,026,354
Mortgage Advances	37.7%	11,855,146
Short term investments	12.7%	3,998,947
CBA 11AM account	0.8%	257,441
Dividend due – current	2.7%	862,999
CBA Admin account	-0.1%	(44,306)
Mortgage Advances	0.1%	9,379
Provision for loss on Mortgages	-11.3%	(3,549,999)
Statutory Investment Account	0.2%	75,421
TOTAL	100.0%	\$31,415,588

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The weekly reports prepared by the Manager of Financial Operations indicated a number of assets are treated as “Administrative” rather than “Statutory” and therefore not included in the above balances. These include:

- Outstanding rates debts due from Local Aboriginal Land Councils - \$3,256,450.
- Other loans, including the amounts due from Mungindi LALC in relation to the Cotton Farm venture - \$2,655,010.

Also not included in the above balances are the rural properties transferred from Regional Aboriginal Land Councils with an unaudited balance at 30 June 2003 of \$4,256,309. Whilst it may be arguable that these properties should be included in the SIF, their history of losses would likely prevent them from passing the “prudent person” test. Comments on this under performing asset are included elsewhere in my report.

The balance of accounts payable (being liabilities due arising out of the conduct of NSWALC) of \$3,697,000 is not included as a reduction to the statutory balance, despite the fact the Commonwealth Bank Administrative bank account is included. This can have the effect of causing the reported balance of the SIF to be overstated by withholding creditor payments as any increase to liabilities is not taken into account.

When reporting the balance of internally managed assets the total should be shown inclusive of the working capital of NSWALC’s “Administrative Arm” to ensure outstanding liabilities are factored into the calculation.

7.2.1 Argyle Street Building

Overview

In 1993, NSWALC purchased a 10 storey commercial property at 33 Argyle Street, Parramatta. The property is in close proximity of the Parramatta Railway Station and the Westfield Shopping Centre. NSWALC currently occupies levels 4 and 9, whilst the only external tenant occupies the ground floor. Only two car spaces are leased.

The property is disclosed in NSWALC’s financial statements as a component of the SIF.

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In 2002, a tenant that occupied part of Level 6 terminated their lease with NSWALC and vacated. NSWALC's Administration Manager retained the services of the property managers, Colliers Jardine (N.S.W) Pty Limited ("Colliers") to assist in selecting a contractor to make good and refurbish level 6. However the contract was awarded by the Administration Manager to the lowest tenderer despite the reservations expressed by the property managers regarding the scope of works excluded in their tender. A substantial cost overrun resulted and the matter referred to ICAC. At the date of this report the Internal Audit Department ("Internal Audit") had not completed their investigation of the matter.

Policy & Procedures

NSWALC does not have a policy and procedure in respect of the purchase and ongoing business of owning commercial properties. In respect of maintenance, make good and refurbishment of the property, NSWALC has a purchasing policy that requires all purchases to be by way of a written and correctly authorised purchase order. As a Statutory Body, NSWALC follow guidelines issued by the NSW State Contract Control Board ("SCCB").

Ownership

From the NSW Land Property Information database, I obtained a land title search, which indicates that the property is registered in the name of the New South Wales Aboriginal Land Council. The Certificate of Title number is 12/731869.

Valuation

According to a schedule of properties prepared by the NSW State Valuation Office ("NSW Valuation") at 30 March 2001, the property has a registered value as follows:

Property Description	Valuation 30 March 2001 \$
Land 2,048 m2	11,700,000
10 Storey Building	2,100,000
Total	13,800,000

Historical Gross Rental Comparison and Return on Investment

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According to the schedule of properties provided by NSW Valuation and dated 30 March 2001, the building had a net lettable area of 5,432.8m², and 142 car spaces. Colliers advised me that the building is a grade B building.

From NSWALC's financial statements, I prepared a table below, which compares the gross rental income compared with the written down value ("WDV") of the property at each end of each financial year to arrive at the investment rate of return. Gross rental income charged by NSWALC's business units has been eliminated.

Period	Rent Income \$'000	Property Written down Value \$'000	Actual Return WDV %	Rate based on
30 June 2003 #	96	11,051	<1	
30 Sept 2002 ##	440	11,345	3.8	
30 Sept 2001	189	11,511	1.6	
30 Sept 2000	722	10,812	6.6	
30 Sept 1999	1,532	11,263	13.6	

- 9 Months rental due to a change of balance date. One external tenant remains.

- Two tenants vacated in February/March 2002.

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A review of the property files indicate that previous tenants include the following:

Level No.	Current Tenant	Previous Tenant	Date Vacated
9	NSWALC	NSWALC	N/A
8	Vacant	NSWALC	N/A
7	Vacant	NSWALC	N/A
6	Vacant	IT Company	March 2002
5	Vacant	AMP/Native Title	NTU 2001, AMP Feb 2002
4	NSWALC	AMP	AMP Feb 2002
3A	NSWALC	NSWALC	N/A
3B	NSWALC	NSWALC	N/A
3C	NSWALC	NSWALC	N/A
Ground	HCF Hearing	N/A	N/A

Potential Lease Income And Return On Investment

NSWALC has retained the services of Colliers Leasing Division in Parramatta to assist in leasing the vacant floors. Colliers advised me that the Parramatta CBD is currently experiencing a commercial property vacancy level of approximately 8%. The vacancy level has risen from July 2002, where it was 5.9%. Colliers also advise that there is some evidence that property owners in the Parramatta CBD are offering rent-free holidays and substantial refurbishment allowances in a bid to attract new tenants. Based on my discussion with Colliers, I have prepared a table detailing a range of expected gross annual rental income that NSWALC would expect to receive, if the property was fully let. Due to the fact that the property is considered an investment, I have included expected gross rents in respect of the levels (4 & 9), which NSWALC currently occupies in order to arrive at an accurate reflection of the total investment income that might be achieved in the event that the property could be fully leased.

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Description	Unit	Low/High	Expected Low per Annum \$	Expected High per Annum \$
Lettable Area	5,432 m ²	\$290/\$300	1,575,280	1,629,600
Car Spaces	142 spaces	\$180/\$200	306,720	340,800
Total			1,882,000	1,970,400
Expected Gross Return based on 2001 Valuation			13.6	14.3

Current Property Management

Colliers Jardine (N.S.W) Pty Limited has been the property manager of the building since 1994.

They have continued to manage the property on a month-by-month basis since 1996 when their last agreement with NSWALC finished.

Observations & Comment

The property has been substantially non-income producing since February 2002. The asset is under performing and has a negative impact on the SIF.

The property management of the building has not been publicly tendered to confirm that NSWALC is obtaining the best value for money in regard to these services.

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Recommendations

Given the poor return on the investment in 33 Argyle Street, Parramatta, Council should obtain independent investment advice as to the options available to it, in respect of:

- continued occupation or relocation;
- outright sale;
- sale and lease back;
- any other options

The contract for property management services should be publicly tendered in accordance with guidelines issued by the SCCB. A suitable contract should be entered into with the successful tenderer.

7.2.2 Mortgage Fund

Reason for Review

The addendum to the terms of my appointment as investigator specifically identified the Mortgage Fund as an outstanding issue from the Report of the Auditor General for 2003 that is to be covered in the course of my investigation.

Overview

The mortgage fund is a component of the internally managed assets forming part of the SIF. The operations of the mortgage fund have been the subject to adverse comment in a number of the reports to Parliament by the Auditor General and a number of independent reviews.

At the meeting of NIC on 12 January 1999 it was recorded that the mortgage fund was established “for the prime benefit of the LALC’s and the Aboriginal Community”. The minutes also record that “Other mortgagors will be introduced by solicitors, but care is to be taken in assessing the credit worthiness of each proposal.”

At the meeting of the NIC held on 8 March 1999 “Objectives, Procedures & Guidelines” for the rules of conduct of NSWALC Mortgage Fund were adopted.

At the meeting of the NIC held on 20 September 1999 seven loans totalling \$7,708,000 were approved. It was immediately resolved that “lending to new commercial mortgage applicants, not already approved, cease forthwith.”

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As at 31 May 2003 shortly after the date of my appointment the position of the loan portfolio was as follows;

Four Performing Loans (LALC's)	639,171
Three Non Performing Loans (External)	12,082,336
	<hr/>
	12,721,507
Provision for Loss on Investments	(3,550,000)
	<hr/>
Total Mortgage Fund	9,171,507
	<hr/>

Relevant Legislation

PWC Legal provided an advice to NSWALC dated 1 February 2001 that succinctly details the relevant legislative provisions applicable at the time the loans were granted;

“The effect of Section 29A of the Act is that the Land Council must not disburse 50% of the funds provided to the Land Council up until 1998. These funds must be invested. As the Land Council has been advised by Council in an advice dated 25 May 1998, the word “invest” requires that the advance be made in the expectation of receiving income from the capital so advanced.

*Different considerations apply to those amounts held in the Land Council's Account over and above the 50% that cannot be disbursed. However, if these funds are to be invested then Regulation 88 applies. Therefore, in our view, it is clear that the Land Council may only invest any monies in the Land Council Account pursuant to Regulation 88 (1), that is, in accordance with the “law for the investment of trust funds”. It is equally clear that the “law for the investment of trust funds” specified in Regulation 88 (1) refers to the Trustee Act, 1925 (NSW) (“Trustee Act”). Indeed the High Court has determined that a provision in the Tasmanian Superannuation Act 1938-1950 in almost identical terms to Regulation 88 was taken to be a reference to the Trustee Act (1898) (Tas): *Fouche v Superannuation Board* (1952) 88 CLR 609 at 629. Appropriate references in the Trustee Act to trustee must therefore be read as referring to the Land Council. “*

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The Trustee Act authorises a trustee to invest in any form of investment including first mortgages over real estate, unless expressly forbidden by the instrument creating the trust. Assuming the Act itself is the instrument creating the “trust” (see the definition of instrument in Section 5 of the Trustee Act), there is no express provision forbidding any form of investment. Sections 14A, 14B & 14C Trustee Act 1925 apply to the investments made by NSWALC.

The Council is empowered to invest and manage NSWALC’s account and to make grants to, lend money to or invest money for or on behalf of aboriginal people. These functions appear in Section 106(1)(a) & (k) of the Act. Previously Section 23(1)(a) & (h).

Council cannot delegate either of these functions. The current provisions are contained in Section 146(a) & (g) of the Act. Although Section 55(3) of the previous Act was expressed differently, the effect remains the same as the regulations applicable at that time did not provide for delegation from Council.

This fact was confirmed in advice received by Clr Lester from the Registrar on 28 October 1998. The advice stated, “No function has been prescribed and no person has been prescribed by the regulations pursuant to this section. Such prescription in the regulations is the only way that an Executive of NSWALC or a member of staff could be invested with the power to exercise a function of NSWALC”.

The model rules contained in the Regulations to the Act provide;

14 Sub-committees

The Council may appoint sub-committees for the purpose of investigating proposals and presenting their findings and suggestions to the Councillors at a meeting.

A sub-committee is to meet as directed by the Council or, in the absence of such direction, as often as it sees fit.

A decision of a sub-committee is not a decision of the Council.

Chapter 7: Statutory Investment Fund

Policy & Procedures

A copy of the policy and procedures for the operation of the mortgage fund as approved by the NIC is Annexed to 13.19 of this report.

Previous Reports - Internal & External

There have been four independent reviews of the operation of the mortgage fund ;

Date	Author	Initiated by
02 Nov 2000	Price Waterhouse Coopers Accountants	NSWALC
28 Mar 2002	ICAC	NSWALC (Rod Towney – Chairman)
Dec 2002	Public Accounts Committee NSW Parliament	Public Accounts Committee NSW Parliament
13 May 2003	Audit Office of NSW	Statutory Audit Obligation

Recommendations extracted from the report of PWC;

This report made the following recommendations;

1. NSWALC obtain legal advice with respect to six issues:
 - The role of Mr Doberer
 - The role of Robertson Finance
 - The advice of Mr Solari
 - The compliance of members of the NIC with respect to their obligations under the Trustee Act
 - The possibility of recovering losses from valuers and mortgage brokers involved in the loans
 - Whether the issuing of mortgage loans was an activity that NSWALC was legally qualified to conduct.
 - Further investigations be conducted in three areas;
 - Interviews with key people

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- Analysis of companies and people involved in the mortgage loans to determine any relationships
 - Enquiries to the Receiver of Stonehaven (one of the borrowers) to determine the application of the funds advanced by NSWALC
 - NSWALC obtain/locate copies of documentation missing from their files or confirm that the documentation did not exist, including specified documents relating to the following loans;
 - Stonehaven Gardens Pty Limited
 - Tintara Nominees Pty Limited
 - Nungaroo LALC
 - Lenson (Goolmangar) Pty Limited
 - All decisions relating to the investment in mortgage loans or waiving of penalty charges be appropriately approved and adequately documented.
2. Further investigate the errors between the Loan Accounts maintained on EXCEL subsidiary ledger and the detailed General Ledger of NSWALC, specifically in respect of the loan to Sonvico Pty Limited.
3. Accounting for Investments In Mortgage Loans;
- Multiple entry of Cheques
Further investigation required determining whether this is a data entry error or an inappropriate payment
 - Recording of Interest & Penalty Charges
Further investigation to identify accounting entries relating to mortgage loan investment and separate from those entires related to other investment activities
 - General Ledger entries not reconciling to Excel Spreadsheets
Further investigation of bank accounts and the general ledger to determine whether an error exists and if so which record is in error
 - Interest Charges not being recorded in General Ledger
Further investigation of bank account and general ledger to determine whether an error exists and if so which record is in error
 - General Ledger not reconciling to Trial Balance

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Recommendations extracted from the management Letter to NSWALC by the Auditor-General's Report 2003 – Repeat Finding

This report made the following recommendations;

- i. NSWALC approve a variation in repayment terms of Albury LALC or ensure compliance with the terms of the contract.
- ii. Penalty interest should be applied to late mortgage payments on non-performing loans. NSWALC to follow up the outstanding payments from Nungaroo LALC.
- iii. Mortgage subsidiary record balances need to be reconciled to the balance recorded in the general ledger. Evidence of regular review should be provided.
- iv. Council needs to reassess the sufficiency of mortgage repayments when interest rates change to ensure the discharge of the loan obligation by the due date.
- v. Mortgage loss write-offs should be applied to the provision where provision for loss on that mortgage has been made previously.
- vi. Management periodically review subsidiary mortgage schedules. Evidence of this review needs to be recorded on the mortgage schedules.

It should be noted that the repeat findings both relate to loans to LALC's. In my opinion these repeat findings are of far lesser concern than a number of the issues detailed later in this chapter.

Recommendations from ICAC & Public Accounts Committee

ICAC made no explicit recommendations as to actions to be taken arising from the investments in the mortgage fund. The Public Accounts Committee of NSW Parliament also made no explicit recommendations but encouraged NSWALC to "continue improving its financial and management practices" and to appoint a suitably qualified Chief Executive Officer as soon as possible.

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Findings extracted from the report of ICAC;

The Commission found no evidence to indicate corrupt conduct occurred. It identified the following four specific issues of concern ;

- i. Despite suggestions from Chifley to engage a professional advisor with expertise in mortgage loan investments, the Committee relied on David Doberer, after he informed them that he possessed the expertise required.
- ii. The Committee pursued investments in mortgage loans despite concerns expressed by Chifley and Macquarie Risk Advisory Services.
- iii. The Committee appeared to conduct cursory or no due diligence or pre-lending reviews on loan mortgagees in determining their ability to meet mortgage loan obligations, contrary to “best practice” lending procedures.
- iv. The administration of the mortgage loan investment scheme appeared to breach provisions of the Aboriginal Land Rights Act and the Trustee Act.

ICAC concluded ;

“In particular it is of concern that the administration of the mortgage loan scheme appeared to fall short of legislative requirements, prudential financial practice, and was established and administered against the advice of the Council’s investment advisers, and in breach of best practice investment principles.”

Findings extracted from the report of the Public Accounts Committee of NSW Parliament ;

The Committee was not able to determine with any precision the extent of losses from the scheme. This was partly because of actions still underway but also partly because of the accounting policies of the Council. NSWALC admitted that when a loan defaulted, they did not continue to accrue interest on the outstanding balance and that legal and other costs may not be accrued on the loan and treated as part of the balance outstanding.

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Copies of three of the tables produced in this report are reprinted in Annexure 13.18. It should be noted that it is unlikely that these summaries correctly reflect the actual results of NSWALC in relation to the mortgage fund. In particular it appears that the total advances made to borrowers has not increased over the last few years despite significant additional costs and expenses being charged to the loans in respect of recovery action.

The Committee concluded that NSWALC had lost at least \$5 million and had the potential to lose more money.

CHRONOLOGY

25 May 1998	NSWALC obtains Counsel advice confirming power to invest in mortgage lending
9 October 1998	Council resolves to establish a mortgage lending fund for LALCs and that NSWALC launch a home ownership programme.
12 January 1999	NSWALC Investment Committee (NIC) establishes mortgage fund
8 March 1999	Council resolves to authorise the NIC to approve and reject mortgage loan applications
8 March 1999	NIC adopts the Objectives, Procedures & Guidelines for the rules of conduct of the Mortgage Fund
11 March 1999	Media release on creation of "First Homes for the First People" Fund
12 March 1999	Council adopts the Objectives, Procedures & Guidelines for the rules of conduct of the Mortgage Fund as per NIC
12 April 1999	First loan approved by the NIC (Sonvico Pty Ltd & Kestral Properties Pty Ltd)
20 September 1999	NIC resolves to cease further commercial lending
7 December 2000	NSWALC obtains preliminary advice from PWC Legal on the Review of the Mortgage Loan Practices
20 June 2001	Council resolves to approve mortgage fund be used for loans to LALC's, LALC members and other aboriginal organisations within NSW

Chapter 7: Statutory Investment Fund

Role of Solari's Solicitors

In advice dated 5 March 1999, Michael Solari of Solari's Solicitors provided NSWALC with the following;

- A statement of objectives and procedures in relation to the Mortgage Fund
- Guidelines for loans to LALC's
- Guidelines for loans to entities other than LALC's

This letter noted that;

"I have also found in my discussions with brokers and developers that there is a real market for:

- *construction finance involving loans that are gradually drawn down as funds are required;*
- *loans for in excess of \$1,000,000.00;*
- *loans for 2 or 3 years with the rate fixed at the beginning for the whole of the term.*

I have amended the rules to allow these types of loans to be considered. The special requirements for construction loans can be discussed later."

The amendment of the rules to provide for an extension of the powers of the fund is surprising given the objectives of the fund to focus on the LALCs and not on changing the investment mix of the SIF by raising its returns on investment by increasing its risk profile. There is no indication that after extending the types of lending the Council was authorised to make, Solari advised Council not to enter into any of that type of lending without first establishing appropriate controls and procedures. One is also led to question whether in determining to widen the scope of loans to cover construction finance Solari considered the obligations of NSWALC under the Trustee Act and whether the risks associated with lending on such transactions was within the scope of prudent investments under that legislation. Further it is noted that in a letter to the solicitors acting for NSWALC on the recovery of the Kestral loan Trevor Engwicht states "this mortgage was recommended by a solicitor (The Law Firm of Solari's)." This loan was one of the first two loan approvals made by the committee one month later.

The NIC and the Council adopted the procedures recommended by Solari. They clearly provide;

- the NIC is to have the power to approve or refuse loan applications. (Clause 8)
- the NIC is to have the power to delegate the power to approve or refuse loan applications. (Clause 10)

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- the NIC is responsible for ensuring all applications are processed according to the guidelines (Clause 11)
- details of all loans processed are to form part of the Executive Director's report to NSWALC
- the financial controller and the Treasurer are responsible for monitoring the fund and reporting to NSWALC on its performance. (Clauses 15 & 18)

Further Schedule 2 relating to loans to entities other than LALC's provides;

- special guidelines and procedures may be adopted by the NIC for loans exceeding \$1,000,000 and for loans seeking construction finance.
- Valuations of the land offered as security must be obtained from a registered valuer nominated by the NIC. Valuations submitted by the applicant can be considered but they will not be in substitution for the independent valuation obtained by NIC.
- No funds will be advanced until the solicitors for NSWALC and the loan manager are satisfied all documentation has been received.

In drafting these guidelines it appears no consideration has been given to the limit on the power of Council under Section 55 of the Act to delegate its powers relating to investments within the SIF.

On 5 December 2000 in the course of a review of the Mortgage Fund PWC advised NSWALC that Mr Solari had refused to be interviewed despite initially indicating that he would cooperate. They indicated they were investigating whether Mr Solari had a legal obligation to provide a written statement due to his role as primary legal counsel to NSWALC during the time in question. This matter was not discussed in their final report.

Given the limitations on my ability to compel people to attend interviews and the fact that NSWALC has reclaimed all its documentation from Mr Solari, in my opinion little purpose would now be served in interviewing Michael Solari in respect of his role in the mortgage fund. I have not attempted to contact him directly during the course of my investigation.

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In discussions with my staff, the internal Legal Counsel of NSWALC has indicated that he believes NSWALC should be pursuing Solari, but people within the organisation still support him. The law firm still advertises in the Murray River Region Magazine and appears to still be providing advice to LALCs. I note that NSWALC also had cause for concern relating to the conduct of Mr Solari in respect of the sale of land on behalf of La Perouse LALC. I have not investigated this matter as it falls outside the terms of my appointment.

In my opinion NSWALC should seek immediate advice on the role of Solari and determine any entitlement it may have to recover against him for any losses as a consequence of advice provided in respect of the mortgage fund.

Actions of NSWALC Councillors & Staff;

It appears Clrs Clark & Griffiths were involved in the discussions with Solari regarding the establishment of the mortgage fund. There are no memos or notes available to me that record the nature or extent of these discussions.

In my discussions with Clr Clark he indicated that the purpose of the mortgage scheme was to enable NSWALC to make loans to LALCs. The wording of Council Resolutions that established the fund and the media releases made at the time the fund was established support this view. These suggest the main purpose envisaged for the mortgage fund was for the "First Homes for the First People Scheme". As mentioned above it appears that the decision to extend the lending criteria of the fund to independent construction developers was made by the solicitor Michael Solari. Certainly there is no evidence to suggest that NSWALC actively opposed the extension of the fund as proposed by Solari.

The home ownership handbook sets out policy and procedures for LALCs entering into home loans. Interestingly this document includes establishment of a Home Ownership Committee. The following extract relates to the recommendations given by NSWALC to the LALCs;

- The Land Council will establish a home ownership Committee.
- The Committee will deal with applications, research of applicants, according to f (4).
- Their decision will not be final.
- The Committee must make written recommendations to the full Council for ratification of their decisions.
- The Committee will consist of the elected executives of Council, plus four other active members.

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There is no record of any Councillors or staff considering the issue of the power of delegation of the approval process from Council to the NIC. This is notwithstanding that NSWALC was advising LALCs that a committee could not approve loans. Further the Treasurer had obtained legal advice from the Registrar in November 1998 advising under the existing regulations to the Act, Council had no power to delegate its functions. Given the effect of the Act, the procedures drafted by Solari and approved by Council should have limited the rate of the Committee to making recommendations in respect of loans for the loans to be approved by the full Council.

Another opportunity for Council to be advised of the making of the loans was pursuant to approval of the common seal of NSWALC being attached to the loans. A review of the loan documents held by NSWALC has revealed no loan documentation has been executed by NSWALC at the time the advances were made. All mortgages were executed by solicitors on behalf of NSWALC. A review of NSWALC loan files and the common seal register indicates some loan agreements were executed after election of the new Council in late 1999. Although this may not be an uncommon practice for a commercial lender it has resulted in another possible internal control being bypassed. The absence of execution indicates that no one within the organisation has taken final responsibility for the decision to enter into the agreements.

The policy and procedures adopted in respect of the mortgage fund by the NIC and Council provided that;

- Details of all processed loans are to form part of the Executive Director's report to NSWALC.
- The financial controller is to inform the Treasurer how the fund is operating from time to time, and the information so provided is to form part of the Treasurer's Report to NSWALC.
- The NIC will place before NSWALC a report on every loan at each NSWALC ordinary meeting.

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My review of the minutes of Council has failed to identify that any of these three procedures were followed during the period covered by meetings 158 to 163, being the 25 May 1999 to the end of December 1999. At the time the mortgage fund was established the Council was embroiled in serious infighting between factions on the Council. The 158th, 159th & 160th meetings were all adjourned at various times for lack of quorums or to seek legal advice on the issues affecting the meetings. At the 158th meeting seven Councillors requisitioned an extraordinary meeting to elect office bearers and Chairman, Ossie Cruse, tabled a desperate plea for unity on the board. It was during this time of extreme dysfunction that the Council should have been controlling the allocation of in excess of \$20 million of funds under its care and control.

Limitations of PWC Review

I have been unable to locate a copy of the letter of instruction that initiated this review. As a result I must rely on the report itself to identify the scope and purpose for which the review was commissioned.

Although it is clear PWC reviewed the Kestral Loan, the report did not refer to it. Although I have been unable to locate a copy of the terms of reference of the review, from the scope outlined in the report consideration of the Kestral Loan and comment on any issues or concerns was within the terms of reference. The absence of any comment on the loan is extremely surprising given it was the single largest loan in the book and comprised in excess of 30% of the loan portfolio at the time and the concerns that had been raised regarding the lending practices of the organisation. It has now transpired that this loan will be the source of the single largest loss suffered in the entire portfolio.

In discussions with Clr Ardler he has advised that although he was secretary at the time the loans were issued no representative of PWC spoke to him. In particular there was no enquiry of him as to the execution of the loan agreements and the attachment of the common seal to them.

There is also no reference in the report regarding the execution of the loan agreements and mortgages. It is possible if Council had been made aware of the fact that in a number of cases there is no documentation signed on behalf of NSWALC in respect of loans made, that Councillors might have been more active in pursuing their enquiry into these matters.

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Although PWC indicated further investigation was required including interviews with Clark, Doberer and Solari the report did not explicitly refer to the fact that these three individuals had all failed to provide assistance and be interviewed regarding the operation of mortgage fund. In the Report to Council tabled by the Treasurer at the 172nd meeting in December 2000, Clr Lester advised the meeting of the lack of cooperation received from Solari and Doberer. No mention is made in his report regarding the decision by Clr Clark not to provide assistance. There is no evidence to suggest the Executive made any attempt to raise the matter with Clr Clark and negotiate his active participation in the review.

Price Waterhouse Coopers Legal Advice

After completion of the review of the mortgage funds by PWC, it appears instructions were given to PWC Legal to provide legal advice on the operation of the fund. These instructions appear to have come from Talaat Shanawany, NSWALC Financial Controller at the time, as the advice received had been directed for his attention. Upon my review of the documents, it was identified that this advice had been received, however there was no record of the letter of instruction and no copy of the advice held by NSWALC. These advices were tabled to the 175th meeting of Council, but did not appear in the Table Papers archived by the Secretariat. Finally, copies were obtained by NSWALC at my request directly from PWC Legal. This event highlights the inadequacy of the records and archive management of the organisation.

In the preliminary advice dated 7 December 2000, PwC Legal summarise their position as follows;

“There is support for the view that NSWALC is able to invest in first mortgages over real estate.... To date we have not identified any other legislative impediment or preconditions which must be satisfied (such as obtaining a licence) in order to carry on this activity although NSWALC may need to comply with certain requirements such as the disclosure provisions of the Consumer Credit Code.”

“There is some evidence that NSWALC has not complied with their obligations made under the Trustee Act in respect of various first mortgage loan investments.”

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The advice indicates the areas of concern relating to the standards required under the Trustee Act relate to the following;

- Failing to obtain independent valuations of the property.
- Approving advances for high risk property developments of a nature being too speculative to be regarded as appropriate investments under the legislation.
- Pursuing mortgage lending against the advice of professional investment advisors.
- Cursory, if any, due diligence being conducted on prospective mortgagors to determine their ability to meet their obligations under the loan agreements.

The advice dated 7 December 2000 remains preliminary advice. A meeting was held between NSWALC and the lawyers on the 4 January 2000 to discuss the advice. Talaat Shanawany, Kerrie Wilkinson and Clr Lester represented NSWALC. Further correspondence was issued to NSWALC dated 10 January 2001 and 1 February 2001. In the latter advice the lawyers were asked to review four issues including ;

“(d) Whether the Land Council may have a cause of action against any individual or organisation in relation to the investment of the Land Council Account funds up until now”

The advice noted that in order to provide the advice on this matter it would be necessary to interview key individuals involved in the investment committee. They note that:

“We understand two key individuals, Mr Doberer and Mr Clark are not available presently although they have indicated that they are willing to meet with us. Consequently, as instructed, we have deferred consideration of this issue until such time as we can complete, as far as possible, our investigation of the facts.”

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In a letter of the 20 February 2001 PWC Legal advise;

“However, as we have discussed with you, Mr Clark has since indicated that he does not wish to now meet with us. Mr Doberer has, we understand, not returned telephone calls made by PricewaterhouseCoopers...As we will be unable, without interviewing all relevant witnesses to determine the facts upon which we can base our analysis and advice, we confirm your instructions that we are to defer taking this step until after ICAC has handed down its report”

At their 175th Meeting on 28 March 2001, Council resolved to wait until ICAC issued its report before determining what action to take regarding the PWC Legal advice.

On 18 April 2001 PWC Legal wrote to NSWALC indicating they had received no further instructions and recommending the remaining issues should be considered shortly to avoid any problems with applicable limitation periods. On 19 June 2001 PWC Legal confirmed NSWALC had indicated they wished the lawyers to consider the final issue and they provided an estimate of costs for the assignment. It appears that the matter has been never pursued.

Actions of NSWALC Councillors & Staff in response to Reports;

In nine months of operation of the mortgage fund loans were entered into that have lost a minimum of \$8 million. This must be considered an extraordinarily poor result from first mortgage lending, which if done effectively is considered a fairly low risk form of investment. This does not take into consideration the understatements of the mortgage balances mentioned later in this section or the opportunity costs of this lost income.

Although they have spent significant resources on the investigation of the mortgage fund few steps have been taken by NSWALC to pursue the recovery options of available to them.

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PwC Report

NSWALC had legal advice on its ability to lend money pre dating the PWC Report. It has sought legal advice on a possible action against the Valuers in the Stonehaven matter, but no action has been commenced. All other legal advice recommended by PWC does not appear to have been sought.

NSWALC had prepared a memorandum on the status of the mortgages in March 2001 that indicated the known relationships of mortgagors with NSWALC, Councillors and staff. It appears the interviews with key players have not been conducted and given the delays, if held now they are unlikely to generate any additional material information. The files disclose no request to the Receivers of the Stonehaven property for information suggested by PWC. This matter may no longer be of any significance if no further recovery action is proposed.

From my investigation it appears the following additional matters remain yet to be adequately resolved;

- Original Loan & Mortgage documents for Nungaroo LALC are still not in the security file.
- There is no policy on how and when penalty interest will be charged or waived and the files do not record the reasons supporting these decisions.

Public Accounts Committee

The Committee was advised that Council receives a report at its meetings on the balances of all loans so they can see the movements over time. A review of the minutes of Council Meetings for 2003 show that a report on the entire mortgage loan portfolio has not been tabled at a Council Meeting during the Calendar year 2003. This does not accord with the evidence provided to the Committee by the Manager of Financial Operations.

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Auditor General

The report by the Auditor General for the year ended 2002 identified the difference between the general ledger and the subsidiary loan ledgers in excess of \$80,000. No clear recommendation was given as to the action to be taken. The response by NSWALC was to amend the subsidiary ledger to balance to the general ledger. In my opinion this action was incorrect as the subsidiary ledgers reflected the correct treatment of GST. The effect of this has been to perpetuate an error in the general ledger and an incorrect BAS return has been lodged with the ATO. Further details are provided in the report of the GST in Chapter 10.

Mortgages Control File 2002/03 includes work papers disclosing that the loan control accounts were reconciled to General Ledger balances for April & May 2003. These were completed on or around 23 May 2003 and 10 June 2003 respectively. The subsidiary ledgers appear to reconcile to the General Ledger for February & March 2003, however there is no clear work paper to evidence a formal reconciliation was undertaken. The subsidiary ledgers do not appear to reconcile to the General Ledger for the first four months of the financial year. It appears that the recommendations regarding the reconciliation by the Auditor General have been actioned immediately after the issuing of the 2002 Management letter dated 13 May 2003 and immediately prior to my appointment. This area had previously been subject to adverse comment in the PWC Report and it appears that NSWALC finally implemented this recommendation as a result of its realisation of the impending action by the Minister, rather than an acknowledgement of its failure to implement appropriate accounting systems.

Disclosures In Annual Accounts relating to Mortgage Fund

In the annual accounts prepared and approved by NSWALC it has stated that loans were issued in breach of the provisions of the Trustee Act.

In my opinion the existing disclosure in the annual report is inadequate to provide a correct view of the investment returns on the Fund. Costs of recovery must be added to the principal debt on all loans and recorded as additional advances. If they are not considered to be recoverable that part of the loan should be fully provisioned as such.

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Australian Accounting Standard AASB 1004 deals with Revenue Recognition and states that interest must be recognised when, and only when, all the following conditions have been satisfied:

- the entity controls a right relating to the consideration payable for the provision or investment of its assets
- it is probable that the economic benefits comprising the consideration will flow to the entity
- the amount of the revenue can be measured reliably

Given that NSWALC is not in the business of money lending, in my opinion it is appropriate that interest should be accrued until at least the time the secured property has been realised. It is clear that interest on the Quinnimont Mortgage should have continued to accrue as the records disclose the sale of the security was more than the outstanding loan at the time of settlement.

In my opinion the current accounting treatment has understated the losses incurred to date and enabled the rate of recovery to be disclosed at a level higher than has in fact been achieved.

Retention of Legal Advice;

NSWALC obtained an advice from Counsel on 25 May 1998 that confirms that NSWALC has the power to invest part of its statutory fund in first mortgage lending. This advice rejected earlier advice obtained from Michelle Sillar Lawyers. Advice was obtained from PWC Legal in late 2000 and early 2001 on the same issue. This later advice makes no reference to the earlier advice of Counsel and it appears a copy of that advice was not provided to the lawyers at the time they were instructed. In a memo dated 7 July 2003 to one of my team, Philip Sutherland, NSWALC's in house legal counsel, has indicated there is an unresolved issue as to whether mortgage lending was a lawful function of NSWALC. Clearly this indicates that he has not been provided a copy of the earlier advices. This failure to record, retain and access the intellectual property of the organisation represents a significant failure by NSWALC. As a practical matter they are wasting resources in time and money in obtaining additional legal advice when matters have already been resolved.

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Role of Cllr Lester in Recovery Proceedings;

In his submission to NSW Public Accounts Committee dated 6 September, 2002 the then CEO Jeff Bradford made the following comment;

“Whilst Councillor Lester was not an Office Bearer during the mortgage debacle, he has, none the less, been an obstacle in my recovery program. Council, for some reason, recently attempted to stop me from proceeding further with my attempts to recover monies involved in the Stonehaven Mortgage. I am of the opinion, as is our legal firm Patrick Woods & Company, that there is more to the Stonehaven matter than meets the eye. However, my main objective is to recover the monies involved.”

In my discussions with Cllr Lester he was unable or unwilling to identify any issues or events that would have justified these comments from the previous CEO. Given the animosity evident between the two individuals at the time leading up to the dismissal of the CEO it is difficult to identify what merit should be accorded to the comments of Mr Bradford.

Loan to Kestral Properties Pty Limited (Kestral) (RE: 23 – 25 Market Street Wollongong)

Overview

On 28 May 1999, NSWALC entered into a loan agreement with Kestral to enable the construction of a 32 unit residential development situated at 23-25 Market Street, Wollongong. Kestral granted NSWALC a mortgage over its property, however, prior to the completion of the property, Kestral experienced financial difficulties and was unable to complete the development. Subsequently Kestral defaulted on the loan and on 21 April 2001 NSWALC, pursuant to the powers contained in their registered mortgage, appointed Receivers & Managers (“Receivers”) over the property. Subsequent to the appointment of Receivers to the Wollongong property, National Australia Bank (“NAB”) pursuant to their debenture security over Kestral’s corporate entity (and registered mortgage over an additional property) appointed their own Receivers and Managers. (“PriceWaterhouse”) The Supreme Court Of NSW subsequently appointed a liquidator to Kestral.

Chronology

From correspondence contained within the file, I have prepared a chronology of events. This chronology is annexed to this report as Annexure 13.8.

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Granting of the Mortgage

I was unable to locate any documentation or correspondence between NSWALC and Kestral prior to the initial loan advance. I understand that Mr. Solari, Solicitor was retained by NSWALC to arrange the security in respect of the loan. It appears from the file that the loan to Kestral was based on a valuation prepared by John Virtue Valuers, supported by a quantity surveyor's report prepared by Hugh. B. Gage. The basis of the maximum amount that NSWALC would lend Kestral was calculated on the following basis:

Security Provided	Valuation \$	Advance %	Maximum Advance \$
Registered mortgage over real property	12,387,000	66.66	8,250,000

As evidenced from correspondence, the Business Advisor to NSWALC referred to the Trustee Act. The relevant section of the Trustee Act relating to the granting of a mortgage is set out below:

Loans and investments by trustees not breaches of trust in certain circumstances

1. If a trustee lends money on the security of property, the trustee is not liable for breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made if it appears to the Court--
 - a) that, in making the loan, the trustee was acting on a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to give such a report and whom the trustee instructed and employed independently of any owner of the property; and
 - b) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and
 - c) that the loan was made in reliance on the report.
2. This section applies to transfers of existing securities as well as to new securities and to investments made before or after the commencement of section 4 of the Trustee and Trustee Companies (Amendment) Act 1995

This loan was made to a commercial enterprise and the security provided by Kestral was a mortgage over the real property only and did not include

Chapter 7: Statutory Investment Fund

any security over the corporate entity of Kestral, such as a debenture. This left the option open for Kestral to grant security over its corporate entity to another borrower. This in fact occurred on 7 April 2000, when Kestral granted National Australian Bank a fixed and floating charge.

Kestral's Financial Position

Towards December 2000, Kestral's director Mr. Bruce Maples contacted Mr. Trevor Engwicht a business advisor of NSWALC. Kestral was under pressure from subcontractors and Mr. Maples requested additional funds from NSWALC to enable the property to be completed. Mr. Engwicht requested John Virtue Valuers to update the valuation. The valuation was supported by several property sales contracts and NSWALC advanced further funds. It later became evident that these 'sales contracts' may have been falsified.

Appointment of Receivers & Managers to the Property

On 14 February 2001, a creditor of Kestral, the Homes Corporation Of Australia Pty Limited petitioned the Supreme Court of New South Wales to wind the company up. Subsequently NAB appointed receivers to Kestral. NSWALC then appointed Receivers to the property on 24 April 2001.

To gain an understanding of the events subsequent to the appointment of Receivers, a member of my Investigation team met with Mr. Peter Hillig of Smith Hancock, the Receivers to discuss the events that led up to the recent decision to auction the partially complete property. I summarise these relevant factors below:

- No work had occurred on the property from mid December 2000 to May 2001;
- there was a CFMEU "black ban" on the property;
- Kestral did not have home builders warranty insurance;
- The CEO, Mr. Jeffrey Bradford maintained a hands on role holding monthly meetings;
- The Receivers presented to Council, two options, sell 'as is' or complete the development;
- Council decided to complete the development;
- Receivers called for expressions of interest to complete the building;
- No interest was received in respect of a fixed price contract;
- Expression of interest to project manage;

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- Bradford introduced Redfern Aboriginal Corporation Constructions Pty Limited (“RAC”) to project manage;
- David Nelson Valuers asserted that the RAC quote was the cheapest; and
- After Mr. Bradford departed NSWALC no further monthly project meetings were conducted.

Decision to complete the property

On 13 November 2001, the Receivers presented their report to Council in respect of the various options available to NSWALC to recover the loan. I have tabled the options presented to Council below:

	Sell “As Is” 13/11/01 \$’000	Complete Worst case 13/11/01 \$’000	Complete Best case 13/11/01 \$’000
Sale Price	7,236	12,900	14,000
Less: Costs to complete est/actual		3,500	3,500
GST	70	450	500
Subcontractors	740	740	740
Selling Costs	220	390	420
Receiver’s Costs	150	400	400
Subtotal Costs	1,180	5,480	5,560
Est Net Funds	6,056	7,420	8,440
Loan Amount	8,251	8,251	8,251
Surplus (Deficit) on disposal of property	(2,195)	(831)	189

NSWALC requested the Receivers to call for expressions of interest to complete the construction on a fixed price contract. The Receivers advised that there was no interest in a fixed price contract, however there was interest in ‘project management’. The Receivers received one offer and

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NSWALC's Chief Executive officer Mr. Jeffery Bradford referred an alternative project management company to the Receivers. This company, Redfern Aboriginal Corporations Pty Limited ("RAC") entered into a contract with NSWALC to project manage the construction through to completion. The CEO held monthly project meetings. Reports were supplied by the Receivers and RAC, together with detailed engineers reports, quantity surveyor' reports and valuations.

As the construction progressed it was confirmed that the developer had failed to obtain homebuilders warranty insurance. NSWALC attempted to purchase cover, however, quotations received were extremely high and one quotation received required a bank guarantee of \$500,000. The insurer insisted there be no expiry on the bank guarantee.

However RAC was unable to complete the construction and a decision was made to sell the property partially completed.

Sale of the Property

In February 2003, NSWALC decided to cease all construction of the property and proceed with the sale of the property by auction. The Receivers and Managers then engaged professionals to provide the following reports:

Professional	Type of Report	Report Date	Valuation Amount \$	Comments
Partridge partners	Engineering Consultants Report	14 Feb & 13 March 2003		Problem with wet areas.
Hanna Newman Associates Pty Limited	Quantity Surveyors	26/02/2003		Increase in cost to complete \$593,608
David Nelson & Partners #	Valuation	28/03/2003	6,500,000	'as is basis'
NSW State Valuer	Valuation	16/04/2003	5,800,000	'as is basis'

The valuation relied upon the revised budget summary of costs to complete provided and prepared by Hanna Newman Associated Pty Limited (Quantity Surveyors).

The following table sets out the calculation of the expected outcome for NSWALC prior to the May 2003 auction:

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	Sell "As Is" 28/03/03 \$'000
Sale Price	6,500
Selling Costs	220
GST incorrectly claimed	116
Subtotal Costs	336
Est Net Funds	6,164
Loan Amount	10,061
Loss to NSWALC #	(3,897)

No interest or penalty interest was charged on the loan from 14 April 2001. If interest had been charged the expected loss on the loan would have been a further \$3m.

On 12 May 2003, Council passed Resolution CM202/34 "That NSWALC authorise the officers to be required to attend the auction and authority is given to officers to execute the contract with the successful bidder winning the bid above the set reserve", Resolution CM202/35 resolved to enter into a contract for sale and authorised Patrick Woods and Company to attend the auction for the purpose of providing legal advice to assist the officers. NSWALC's MFO advised me that the property was sold at auction for \$7,000,000, however, the purchaser failed to settle on 2 July 2003. Based on the information provided by the MFO, the expected proceeds available are tabled below:

Chapter 7: Statutory Investment Fund

	Sold at Auction Awaiting Settlement 02/07/03 \$'000
Sale price	7,000
Selling Costs	220
GST incorrectly claimed	116
Subtotal Costs	336
Est Net Funds	6,328
Loan Amount	10,299
Loss to NSWALC #	3,971

Conclusions - Kestral

There is no evidence on the mortgage file to indicate any credit checks or due diligence was performed prior to granting the loan to Kestral;

NSWALC's security did not include a fixed and floating charge over the corporate entity of Kestral. In effect, NSWALC had no control over the funds that were advanced to Kestral. A charge over the corporate entity may have prevented Kestral from granting a security to NAB over the corporate entity without prior notice to NSWALC;

The apparent failure of the legal advisor to recommend and implement this additional security may constitute negligence for which NSWALC could claim damages.

In spite of the fact that Kestral advised NSWALC that they were experiencing financial difficulties, NSWALC advanced further funds to Kestral, without insisting that a further independent assessment of the financial position of the borrower be completed;

Chapter 7: Statutory Investment Fund

The decision to complete the building was undertaken with professional advice from the Receivers and with additional advice provided by the project managers, an engineer, quantity surveyor and registered valuer. Despite the professional advice, NSWALC incurred additional losses in excess of the 'as is' option to sell in November 2001; and

Continuing difficulties associated with completing the project included:

- poor building construction;
- inability to secure home warranty insurance;
- difficulties in respect to unpaid monies owed to CEFMU members and the resulting payout;
- a two year time delays from the period of default (until the sale of the property; and
- higher than normal legal and professional costs due to the ongoing delays.

The mortgage statement reveals that this account was determined to be non-performing and interest accrual ceased on 11 May 2001. This was the date that the Supreme Court placed Kestral into liquidation.

In his submission to NSW Public Accounts Committee dated 6 September, 2002 the then CEO Jeff Bradford commented that "Council stands an excellent chance of total recovery of all costs associated with the project."

In his evidence before the Public Accounts Committee on 24 October 2002, Jeff Bradford advised that he had a valuation that the building would sell for around \$13.5 million, and there was "still enough fat ... in the building for us to recover our money". Yet at this time the loan was being treated as non-performing and interest accrual had ceased.

Clearly this is an inappropriate accounting treatment. Interest should continue to be charged and all expenses charged to the loan account. As a result it appears the interest income in the General Ledger for the year ended 30 September 2002 may have been understated.

An additional \$1,900,000 has been advanced on the Kestral loan for development and recovery costs incurred by NSWALC after the loan was considered non-performing. The sale has been delayed.

Chapter 7: Statutory Investment Fund

Internal Accounting Practices

The audit process has identified a number of inconsistencies and deficiencies in the manner in which the accounting of the mortgages is managed.

There is no policy for how and when a loan should be classified as non-performing and the accrual of interest cease. Given that NSWALC is not in the business of lending money and is accountable to the LALC membership for the performance of its investments I believe it is appropriate that interest continue to be accrued on all defaulting loans until the underlying property securing the advance is sold. If there is a real likelihood that the monies will not be recovered then provision can be made for the non-recovery of the loan. As NSWALC does not pay income tax this should not impose an onerous obligation on the organisation. If this rule was applied to the two defaulting loans for which secured property has yet to be realised, the following estimated adjustments would be required to increase the outstanding loan balances as at 30 June 2003;

Kestral	\$2,600,000
Travellers	\$230,000

There is no policy for how and when costs of recovery should be charged to a non-performing loan. To date there has been a lack of consistency in the treatment of expenses between different loans. Further there have been a number of errors made in the treatment of GST that will require adjustment in order for the loans to correctly reflect the balance due and payable and for the returns submitted to the ATO to correctly reflect the transactions that have been undertaken. I note that income tax credits estimated at \$116,000 have been incorrectly claimed by NSWALC in respect of the Kestral Loan.

A component of the proceeds of realisation of the Quinnimont property were paid in Contrabart dollars, a form of barter exchange. It appears this has not been reflected in the general ledger and limited steps have been taken to attempt to clarify the value of this asset or how it can be best realised by NSWALC.

Future Lending Practices

At its 188th meeting on 8 March 2002 Council resolved that NSWALC approve the sum of \$8 million for the Commercial Mortgage Program to allow LALC's to access the programme for commercial loans from NSWALC in accordance with the Trustees Act and the Prudent Person Test.

It appears that no further steps have been taken to implement this Resolution.

Chapter 7: Statutory Investment Fund

Observations & Comment

The filing structure of the loan files is very poor. The papers are not secured within the file binders and the documents themselves often are not stapled together. This loose paper has made a logical and efficient review of the current position of the files impossible. There are no summary records or action sheets that record the current position of the loans and actions being taken in respect of each matter.

The control record makes no mention of the status of recovery action against guarantors or third parties and does not record the status of the LALC arrangements.(eg funding from allocation or from the LALC directly in the normal course)

There is no control file on the overall conduct of the mortgage fund that includes all legal advice relating to the mortgage fund or that provides an overall review of the losses of the fund over the term of its operation. NSWALC has been unable to locate the letters of instruction for PWC and PWC Legal. No file containing all correspondence and reports from these firms appears to have been maintained. This represents a failure by the Corporate Body to effectively manage its business.

There appears to have been no attempt by Council to calculate total losses on the total fund or the remaining portfolio. I would have considered this was of interest to the Council and members of LALC's to obtain an overview on the position of the fund and the performance of this part of the SIF. I believe in the circumstances it would be appropriate to prepare such an analysis and for Council to publish the results in its next annual report to improve the transparency of its investment decisions.

The Council has conceded that it has breached the Trustee Act in respect of its involvement in the mortgage fund.

The Council has failed in its obligations to:

- ensure management has implemented recommendations and systems agreed by Council.
- adequately investigate matters raised in independent reports
- effect review of their policies and practices on a timely basis

There has been a failure to appropriately disclose income and expenses on the mortgage loans. Interest on defaulting loans should have been recorded and disclosed in full and then fully provisioned as non-recoverable if circumstances warranted it.

Chapter 7: Statutory Investment Fund

Despite the ongoing issues between the DAA and NSWALC relating to the failure to action the issues raised on the mortgage fund it would appear there has been no internal review of the files to determine;

- the position of each file
- the documentation, if any, that is missing
- the legal advice that has been obtained over the years on these issues.

In my opinion this failure has severely impeded the ability of the organisation to resolve the issues or ensure that it has taken all steps to adequate attempt to recover the monies due to NSWALC.

The GST issues relating to the mortgage fund have been dealt with separately.

I have obtained legal advice on the issue of what the practical effect of a breach of the Trustee Act is on NSWALC, its Councillors and employees. This advice suggests that there is no adverse legal result of a breach of the Trustee Act in relation to the Act. The advice suggests that Councillors and staff would be unlikely to be found to have any legal obligation to refund to NSWALC the monies lost due to their failure to adhere to accepted investments.

As at 31 July 2003, the position of the loan portfolio was as follows;

4 Performing Loans (LALCs)	607,155
3 Non Performing Loans (External)	11,189,468
	<hr/>
	11,796,623
Provision for Loss on Investments	(3,550,000)
	<hr/>
	\$8,246,623

Chapter 7: Statutory Investment Fund

Recommendations

An administrator should be appointed to NSWALC to enable NSWALC to undertake an independent assessment of the recovery action available in respect of losses suffered in the mortgage fund.

A review of all remaining outstanding loans be conducted to ensure all relevant costs and charges have been posted to the accounts correctly and the GST applicable has been recorded correctly.

That NSWALC undertake an analysis of all mortgage loans entered into from 12 January 1999 to the 31 December 1999 to identify the total returns from these investments for each financial year individually and on a cumulative basis. This analysis should separate lending to LALC's from loans to external parties. A table setting out these results is included in all future annual reports until all loans and associated recovery action are finalised.

A review of all known defaulting loans be undertaken to identify those loans for which Solari acted as solicitors for NSWALC on the loans.

That immediate advice is sought from a legal firm with appropriate experience and resources as to the merits and costs of an action against any adviser or consultant for negligent advice in the establishment and operation of the mortgage fund.

That immediate action is taken to obtain copies of all legal documentation relating to the remaining active mortgage loans, specifically the loan to Nungunroo LALC.

All mortgage files be re organised in date order and all documents secured within the file. A control record is established in each file setting out key contracts, dates and terms of the loan. Those key details be recorded in the control sheet.(eg excel worksheet with subsidiary worksheets for each loan.)

A control file is immediately established to hold all legal advice and global reports on the mortgage fund. This is to include a summary of the control records of each loan.

That NSWALC amend its investment policy to restrict its in house assets within the statutory investment fund to cash, interest bearing deposits and listed marketable securities. If the immediate implementation causes default under its statutory obligations this recommendation to be implemented progressively over the next five years.

8 Support to Local Aboriginal Land Councils

8.1 Introduction

Reasons for Review

Clause 5 of the Terms of my Appointment specifies five areas that the Minister directed be covered during the course of this assignment. Clause 5.1.1 covers compliance by NSWALC with its responsibilities and functions under the Act. The framework of the legislation is structured around the support that NSWALC provides to the LALCs and this issue was central to all investigations conducted over the term of this assignment.

In addition the addendum to the terms of my appointment as Investigator specifically identified the Audit Reports of LALCs as an outstanding issue from the Report to Parliament of the Auditor General for 2003 that was to be covered in the course of my investigation. The 2003 report by the Auditor General referred to repeat issues involving;

- Debts of LALCs
- Audit Reports of LALCs

Central to the concerns of the Auditor General is the fact that “The Council is still not utilising any financial or performance appraisal processes to determine whether LALCs are achieving their objectives”.

Overview

As at the date of this report there were 121 LALCs and 13 RALCs. Pursuant to Section 106(1)(b) of the Act, it is a function of NSWALC to grant funds to ALCs for the payment of their costs and expenses (whether under funding agreements or otherwise).

Chapter 8: Support to LALCs

In addition to financial support, NSWALC also has the following functions and responsibilities relating to ALCs:

- manage the affairs of an ALC (with agreement);
- receive the ALC budgets and seek information about those budgets;
- consider whether ALCs should submit a quarterly report on the expenditure of funds provided by NSWALC;
- if directed by the Minister, prepare a quarterly report on the funding of ALCs;
- consider whether to give directions to ALCs on accounting systems, preparation of budgets and certain other matters;
- receive ALC annual reports within prescribed time limits;
- prepare for the Minister a half-yearly report on the funding of ALCs;
- include in the NSWALC's Annual Report the amounts paid to ALCs;
- enter into funding agreements with ALCs;
- cease funding an ALC in certain circumstances; and
- consider whether to make payments to cover an ALC's expenses, before or after the cessation of funding.

The majority of these functions are performed by the Land Council Services Department ("LCS") of NSWALC and by the staff employed at the NSWALC's eleven branches, which are located in eleven of the thirteen regions.

Since the 1990 amendments the role of RALCs has been significantly reduced. As a result the majority of my analysis and review focuses on the LALCs.

Planning an investigation of the functions relating to the LALCs raised a number of practical challenges. Given the significant crossover between statutory functions and activities undertaken, my approach taken to focus on the activities undertaken by NSWALC. The following analysis is structured in that manner and comments will be provided throughout referring the activities back to the statutory framework.

Chapter 8: Support to LALCs

On Friday, 22 August 2003 at 5.04pm, Chalk & Fitzgerald Lawyers sent me an e-mail attaching “some key draft documents as an indication of the direction in which the Council is heading. They advised they were not in settled form and requested they not be quoted” in my report.

Due to the lateness of their arrival, I have not reviewed the documents in any detail; however, they are included in my investigation files that will be delivered to the Minister.

8.2 Funding to LALCs

Overview

The annual grant allocation to assist in the funding of the administration costs of ALCs is the central assistance provided by NSWALC to the ALC network. A commentary on this area is an obvious starting point to an analysis of the support provided to ALCs.

In his 2002 Report to Parliament the Auditor General notes that “the financial management of many LALCs remains a concern and in some cases is getting worse”.

Relevant Legislation

Section 106(1)(b) of the Act states that it is a function of NSWALC to grant funds to ALCs for the payment of their costs and expenses (whether under funding agreements or otherwise).

Policy & Procedures

The NSWALC Policy & Procedures Manual (“Manual”) does not contain a policy in respect of the amount or manner of calculation of grants that NSWALC pays to the RALCs and LALCs.

The total grants disclosed in the financial statements do not include additional financial support provided by NSWALC to RALCs and LALCs. Additional financial support may include the following:

- Debtor Allocations (overpayment of grant allocations);
- Rates Debts (payment of local council rates);
- Short-Term Loans;
- Long-Term Loans; and

Chapter 8: Support to LALCs

➤ Mortgages.

I comment on each type of financial support under the separate section headings below, with the exception of mortgages, which is commented on under the “Mortgage Fund” being Section 7.4.2 of this report.

8.3 Grant Allocations

All LALCs must provide the same minimum level of service and comply with the same statutory obligations.

NSWALC currently applies a standard grant allocation to all LALCs entitled to receive funding. This approach, which is simple and inexpensive to administer, pays regard to neither the differing needs nor the performance of LALCs. As a result, LALCs who have high memberships receive the same amount as those with lower memberships and LALCs with significant assets receive the same as LALCs with little or no assets.

RALCs are allocated grants on a different basis from LALCs. Prior to the 1990 Amendments (“the Amendments”) to the Act, RALCs held assets in their own right and conducted enterprises in a similar manner to a LALC. However, the amendments significantly reduced their function and role. As a result, RALCs are allocated grants by NSWALC for the sole purpose of conducting regional meetings. The grant provides for the costs of two elected members from each LALC in the Region to attend quarterly meetings. The RALC members are paid sitting fees of approximately \$120 per day of attendance.

In respect of the period 1 October 2002 to 30 June 2003 NSWALC budgeted to pay \$82,500 to each LALC. It should be noted that the short financial year of nine months was due to the 2002 Amendments to the Act altering the date of the financial year end and on a full year basis each LALC would have been budgeted to receive \$110,000.

NSWALC’s financial accounts discloses the following grants were allocated to ALCs for the previous four financial years:

	2003# \$'000	2002 \$'000	2001 \$'000	2000 \$'000
RALCs	217	396	446	283
LALCs	8,637	11,712	11,843	10,710
LALCs - Capital	60	87	17	278
Total Grants	8,914	12,195	12,306	11,271

This represents nine months only. An annualised figure would be approximately \$11,872 million.

Chapter 8: Support to LALCs

The table below details the total grants, expenses (cessation of funding), and rates paid by NSWALC to LALCs for the period 1 October 2002 to 30 June 2003:

Region	Grant Received	Expenses & Rates Paid	Total Funding	Total Funding %	No. LALCs	Total LALCs %
Name	\$	\$	\$	%	No.	%
Central Coast	504,160	417,311	921,471	11%	11	9%
Central	386,584	174,711	561,294	6%	10	8%
Far North Coast	872,052	199,358	1,071,410	12%	13	11%
South Coast	702,551	422,487	1,125,037	13%	13	11%
Murray River	325,501	4,213	329,714	4%	5	5%
Northern	503,358	29,162	532,520	6%	7	6%
Northern Tablelands	354,598	98,595	453,194	5%	7	6%
North West	667,701	538,066	1,205,767	14%	17	14%
Sydney/ Newcastle	616,959	566,634	1,183,594	14%	11	9%
Western	175,551	156,601	332,153	4%	10	8%
Wiradjuri	588,579	332,300	920,878	11%	16	13%
Total	5,697,594	2,939,438	8,637,032	100%	120	100%

Stuart Island Tribal Elders LALC is not recorded in the preceding figures. This LALC has been established solely to hold interests on Stuart Island and it receives no general allocation of funds from NSWALC.

Chapter 8: Support to LALCs

From the preceding table above the following statistics can be drawn:

- The highest total grants (\$872,052) were paid to the Far North Coast Region;
- Least amount of grants were paid to the Western Region of \$175,551;
- Highest amount of expenses and rates were paid on behalf of the Sydney/Newcastle Region of \$566,634;
- Least amount of expenses and rates were paid on behalf of the Murray River Region of \$4,213;
- Highest total funding was provided to the North West Region being \$1,205,767;
- Least amount of total funding was provided to the Murray River Region being \$329,714;
- The Sydney/Newcastle Region contains 9% of all LALCs, however the region received 14% of the total funding; and
- The Western Region contains 8% of the ALCs, however the Region only received 4% of the total funding.

Observations & Comment

Many LALCs lack adequate internal controls and are prone to fraud and instances of expenditure exceeding their budget. Where quarterly grant allocations are made to LALCs that have weak internal controls a larger amount of funds is at risk of being lost to fraud, misappropriation or financial mismanagement.

There is an administrative cost in distribution of the grants. The more often they are made the higher the administrative cost to NSWALC and the less money will be available for NSWALC to spend on progressing their functions under the Act. Where possible grants should be maintained at quarterly intervals.

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The objects of NSWALC as prescribed by Section 105 of the Act focus on improving, protecting and fostering the best interests of the Aboriginal persons within NSW and to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within NSW. The “Business Plan 2002 to 2007” for NSWALC includes as one of its functions “to start a process of building equity among our own people, including the distribution of wealth”. It is arguable that this process should commence with a review of NSWALC’s approach to LALC funding.

At present approx 44% of LALCs are either on conditional or cessation funding. Six of the thirteen RALCs are on cessation of funding.

A review of various allocations on a regional basis reveals that funding is not aligned to the number of LALCs in the Region and the total LALC network. The allocation of funds to LALCs is not equitable in that NSWALC does not consider the needs and resources of each individual LALC. Further there is no financial incentive for LALCs to comply with their statutory obligations and display effective financial management.

I believe there are strong arguments in favour of a system of differential grant allocation. Unfortunately given the limited funds available the creation of a Grant Commission founded on the Local Government and Shires model would be unsustainable. However NSWALC should look to the systems and criteria used by the Commission in developing its own grants policy.

Recommendations

NSWALC should develop a system of differential Grants Allocation that takes into account:

- The needs and resources of each LALC;
- A LALC’s financial management and compliance with its statutory obligations.

Grant Allocations should be distributed on a monthly or quarterly basis.

NSWALC should consider paying a monthly grant to LALCs who have demonstrated poor financial control.

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8.4 Debtor Allocations, Rates Debts, Short Term & Long Loans

Overview

LALCs receive a general allocation amount per year if they are on a full funding status, currently set at \$110,000. If the LALCs are on cessation of funding then NSWALC pays expenses in relation to that LALC for 'essential services' to keep them operational. However, payment for 'essential services' may be greater than the allocation they would have received had they been on full funding. Where a LALC receives a grant that exceeds the budgeted annual allocation, NSWALC classifies the excess as a debt due ("Debt Allocation") to NSWALC. Special purpose grants are also made to LALCs for example for the provision of a LALC office or for housing for LALC members.

NSWALC also advances funds to LALCs in the form of payment of outstanding rates to local councils and shires ("Rates Debts"), short-term loans, long-term loans and mortgages.

The table below details the total debts outstanding to NSWALC in respect of LALCs as at 30 June 2003, together with prior year comparatives:

	30/6/03 \$'000	30/9/02 \$'000	30/9/01 \$'000	30/9/00 \$'000
Debtor Allocations	732	325	377	441
Rates Debts	3,256	3,612	3,779	3,673
Short-term Loans	42	91	90	254
Long-term Loans	2,610	2,599	2,188	935
Mortgages	629	732	848	910
Total Loans	7,269	7,359	7,282	6,213

As evidenced in the table above, between 2000 and 2001 there was a significant increase in long-term loans to LALCs. The major contribution to the increase was the granting of a loan to the Mungindi LALC. A review of this loan is contained in Section 9.9 of this report.

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8.4.1 Debtor Allocations

Section 163(4) of the Act provides that NSWALC may, in its discretion, make payments to cover expenses incurred by the LALC or RALC before or after the cessation of funding.

When payments for essential services of LALCs on cessation of funding exceed the annual grant allocation NSWALC refers to the excess as “Debtor Allocations”. The Debtor Allocation becomes a debt due to NSWALC and is progressively deducted from future grant allocations. The Debtor Allocation does not include Rates Debts or other loans provided by NSWALC. No interest is currently being charged to LALCs with a Debtor Allocation.

A review of the files relating to Debtor Allocations revealed the following:

- The supporting schedules differ from the general ledger;
- Work papers for some months are either not completed or are missing from the files;
- There was no evidence that work papers were reviewed;
- Work papers for only two months had been signed off by staff;
- There are no loan agreements in place regarding Debtor Allocations; and
- Goods & Services Tax is being claimed by NSWALC in respect of payments made on behalf of the LALCs, although the tax invoices are in the name of the LALC.

The general ledger system is maintained on a computerised standard accounting package. The Debtor Allocation ledger includes entries for all LALCs. If the general ledger had sub ledger accounts for each LALC the subsidiary EXCEL ledgers would not be required to be maintained. This would simplify the accounting process. Reporting may require the information to be extracted from the accounting system, but maintaining all records on the general ledger would reduce the risk of errors in the translation of information.

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Annexure 13.9 is a table detailing the outstanding balance due to NSWALC by LALCs in respect of Debtor Allocations for the past three financial years. This discloses the cumulative balances were:

20 June 2003	\$732,606
30 September 2002	\$325,948
30 September 2001	\$377,262

Total Debtor Allocations during 2003 were \$436,089. Repayments of prior years' overpayments were only \$29,431 leaving a balance outstanding as at 30 June 2003 of \$732,606. Significant overpayments in 2003 are listed:

Koompahtoo	\$309,142	Investigator/Administrator fees, wages, office expenses and insurance
Moree	\$56,529	Administrator's fees, staff wages, insurance, utilities, telephone and travel expenses.

The Minister has raised concerns that NSWALC is unable to provide a report on Debtor Allocations. In a letter of 25 May 2003 to the Minister, NSWALC advised that the issue of excess payments to LALCs would be referred to the Joint Review Working Group ("JRWG") with a view to agreeing an appropriate reporting format from 1 July 2003. My investigations have confirmed that this information is maintained by NSWALC.

Observations & Comment

There are a number of causes for a LALC to be placed on cessation of funding. While NSWALC has a statutory obligation to pay the outstanding Rates Debts it has discretion whether to make payment of other expenses when a LALC is under cessation of funding. There appears to be no active exercise of this discretion by NSWALC and no consideration of the circumstances surrounding the classification of the LALC as non-satisfactory.

NSWALC does not send any correspondence to the LALCs advising them that their allocation has been exceeded. A monthly statement is sent to the LALCs that discloses the balance of all loans due to NSWALC. In some cases this statement has not separately disclosed the components of the balance outstanding.

In respect of the Koompahtoo LALC the Debtor Allocation resulted from payments made by NSWALC throughout the financial year, however, this was not brought to the attention of the LALC until after 30th June 2003. It is not clear from the loan statement what the debt comprises.

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There is no policy requiring loan agreements to be put in place for unpaid Debtor Allocations or interest to be charged on outstanding balances.

8.4.2 Rates Debts

Overview

Over several years, Rates Debts of LALCs have risen steadily. LALCs have been briefly afforded rates exemption but that exemption has now been withdrawn.

Section 44A(1) of the Act states that NSWALC is liable to pay the rates debt of a LALC where the LALC has not paid the rates for twelve months or more. Pursuant to Section 44A(3), NSWALC has a right to recover the amount paid from the LALC.

NSWALC's policy in respect of LALCs, which fail to pay their rates obligations, is set out in Section 10.15 of NSWALC's Manual. The policy at the time the Manual was last updated was that NSWALC would deduct the Rates Debt from a LALCs grant allocation until the debt was repaid. Section 19.15 of the Manual sets out the procedures for paying Councils their outstanding Rate Debts. This policy has been superseded, although the Manual has yet to be updated.

NSWALC's current policy is to deduct an amount of 30% of the grant allocation for each LALC who owes Rates Debts.

In August 2000, the Treasurer, Clr Lester obtained a legal opinion in respect of the outstanding Rates Debts due by the LALCs, NSWALC's liability to pay 'other charges' and whether NSWALC is able to recover outstanding Rates Debts from the LALCs.

The opinion, dated 26 March 2001, advised as follows:

- In relation to the Local Government Act 1993. NSWALC should accept liability for "rates" charged, but not for "charges of fees";
- NSWALC is able to recover the debt due by a LALC and that NSWALC would be able to pursue its debt successfully through the courts, even if this necessitated the sale of a LALC's land or the LALC's winding up; and
- NSWALC is able to recover the debt from a reduction in its annual administrative allocation to the LALCs.

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Outstanding Rates as at 30 June 2003

The current amount of outstanding Rates Debt due to NSWALC as at 30 June 2003 is \$3,256,447. Annexure 13.10 to this report is a table setting out the Rates Debts outstanding by each LALC for the last five financial years. A summary of the total Rates Debts is as follows:

Date	Amount due to NSWALC
30 June 2003	3,256,447
30 Sept 2002	3,612,835
30 Sept 2001	3,779,650
30 Sept 2000	3,673,862

Council Policy on the Recovery of Rates Debts

I have reviewed the decisions of Council in respect of collection of the Rates Debts. Tabled below is an extract of some relevant Council resolutions from 1995 to date:

Date	Res No.	Resolution Description
10/10/95	CM129/8	"That administration prepares a performance profile on LALCs who consistently refuse to meet their rate obligations".
12/03/98	CM148/28	"LALCS who fail their obligations to pay rates, that their entire allocation will be retained by NSWALC to pay their outstanding rates and this is to be effective immediately".
02/08/00	CM170/35	"That NSWALC deduct from all defaulting LALCs deemed to have residential rates debt outstanding, the amount of 30% from these LALC's 2000/2001 budget and that the defaulting LALCs be informed of Council's decision before NSWALC pass their budget for 2000/01".
24/06/02	CM193/6	"That NSWALC commence legal proceedings against all LALCs that have an outstanding rates debt to NSWALC that exceeds the annual allocation from NSWALC for administrative expenses."

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Date	Res No.	Resolution Description
12/05/03	CM202/45	"That NSWALC file for a statement of claim against all LALCS that have an outstanding rates debt to NSWALC amounts above \$100,000, or where an agreement to repay will result in a Statement of Claim being issued by NSWALC".

In August 2000, Council relaxed the policy of deducting all outstanding Rates Debts from the LALCs grants allocation by reducing the repayment to 30% of the LALCs annual grants allocation. However by 30 September 2001 rates had risen from \$3,673,862 to \$3,779,650. Subsequent to Resolution CM193/6 to commence legal proceedings against LALCs, letters of demand were sent to the following LALCs:

LALC	Outstanding Balance 31 July 2002 (\$)	Outstanding Balance 30 June 2003 (\$)
Coonabarabran	132,474	128,758
Darkinjung	187,551	174,051
Jerringa	158,402	110,340
Kempsey	592,530	703,467
La Perouse	171,225	179,085
Metropolitan	588,021	430,521
Purfleet/Taree	293,598	212,519
Walgett	139,737	106,737
Wilcannia	492,087	382,540
Total	2,755,625	2,428,018

As evidenced in Annexure 13.10, none of the LALCs have made a full payment of their outstanding Rates Debts as demanded. Although some LALCs have managed to repay substantial amounts the Rates Debts of Kempsey LALC has increased substantially.

The recoverability of the total Rates Debts due to NSWALC from 30% of the grants allocation will take many years, even if the LALCs incur no further debt. The table below demonstrates the time period that it is estimated to take each LALC to repay the Rates Debts from 30% of their grant allocation, currently standing at \$110,000.00 per annum.

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LALC	Outstanding 30 June 2003(\$)	Estimated Years To Repay
Armidale	112,391	3.4
Birrigan Gargle	74,954	2.3
Coonabarabran	128,758	3.9
Dareton	44,631	1.4
Darkinjung	174,051	5.3
Jerringa	110,340	3.3
Kempsey	703,467	21.3
La Perouse	179,085	5.4
Merrimans	79,554	2.4
Metropolitan	430,521	13
Moree	331,296	10.0
Purfleet/Taree	212,519	6.4
Toomelah	46,536	1.4
Walgett	106,737	3.2
Wilcannia	382,540	11.6

Confirmation of Rates Debts

In respect of the Birpai LALC, I note that a rates demand letter from the Hastings Council was received by NSWALC on 24 October 2002, indicating that an amount was due in respect of the LALC's non-payment. The amount outstanding was \$29,429.98. As at the date of this report, NSWALC had not paid the outstanding amount as it was attempting to determine whether the rates had in fact been paid. I understand that the LCS unit requested confirmation from the LALCs auditor to verify the present position.

Observations & Comment

In respect of some LALCs the deduction for Rates Debt recovery is less than the amount the Rates Debt is increasing.

NSWALC has failed to take legal action against the offending LALCs as resolved by Council.

NSWALC has failed to verify the outstanding Rates Debts with LALCs and obtain their acknowledgement of the amount of debt outstanding. The non-confirmation may result in confusion as to what is actually owed in respect to Rates Debts.

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Although the imposition of Council rates is an extremely sensitive issue, for those properties receiving appropriate services and supplies the Indigenous Community cannot expect to receive preferential treatment from Local Government. It is the role of the State and Federal Government to provide appropriate recompense for the economic loss and suffering experienced by Indigenous Australians. Repeatedly, Aboriginal people have spoken to me regarding the goal of land ownership and the independence that it brings. However, ownership brings the obligation to pay rates for essential services.

It is extremely disappointing to see evidence of LALCs abusing their legal position for their own advantage to the detriment of the entire ALC network. LALCs must accept that failure to manage their affairs effectively, or in some cases, intentionally avoiding or delaying their obligations, is harmful to the profile of the indigenous community and a financial burden on those LALCs that are seriously attending to their legal obligations.

Although the issue is culturally sensitive, Council cannot compromise its financial position and the services it provides to LALCs by failure to adopt a commercial perspective on this matter. Their obligation to the wider Aboriginal community to ensure their ability to service the ALC network is not inhibited outweighs the rights of a LALC to retain land that it cannot service.

Interest must be charged on the Rates Debts to give LALCs a financial incentive to make early repayment and to provide greater equity across the LALC network. Debt recovery measures must be formulated and put into practice. Review of the Property Register of LALC land assets will enable NSWALC to identify commercial, rural and vacant property held by LALCs. Consideration should be given to seeking orders for writs of execution against such properties to enable the properties to be sold and the Rates Debts of the LALC extinguished.

The provisions of Section 44 of the Act restrict the rights of various statutory authorities to sell the land of LALCs to satisfy debts due by LALCs to these authorities. To balance this, section 44A of the Act enables Local Councils an avenue of recovery against NSWALC. The combined effect of the legislative provisions is inequitable in that they provide Local Government with rights of recovery in respect of rates owed on land owned by LALCs that are more generous than that applicable to other landholders under the provisions of section 713 of the Local Government Act. Legislative amendment is required to bring the two provisions into line. Further, although NSWALC has a statutory obligation to pay outstanding rates and levies it is not provided with the same statutory protection provided to Local Governments to secure recovery of that debt. The legislation requires amendment to afford NSWALC a statutory lien over the land in respect to any council rates that it pays.

Recommendations

NSWALC should charge LALCs interest in respect of Rates Debts to provide a LALC with a financial incentive to make an early repayment.

The Manual should be updated to reflect the current policy of deducting 30% from the LALCs grants allocation.

NSWALC should review the financial performance of LALCs to determine whether additional payments of Rates Debts could be made by the LALC to NSWALC.

NSWALC should maintain a Property Register of all land that identifies the character of that land. Review of the register of LALC land assets will enable NSWALC to identify commercial, rural and vacant property held by LALCs.

NSWALC must formulate a comprehensive Debt Recovery Policy and implement that policy. Consideration should be given to seeking to obtain orders for writs of execution against commercial, rural and vacant properties to enable the properties to be sold and the Rates Debts of the LALC extinguished.

Legislative amendment is required to bring Section 44A of the Act into line with the provisions of Section 713 of the Local Government Act. This will mean NSWALC will not have an obligation to pay outstanding rates due to a council unless that council can satisfy the provisions of Section 713 of the Local Government Act;

Legislative amendment is required to afford NSWALC a statutory lien over the land in respect of any council rates that it pays, so that it is in no worse position than the council that it is replacing as a creditor.

8.4.3 Short-term Loans

Short-term loans by NSWALC decreased from \$89,818 in 2001 to \$41,976 in 2003. Short-term loans may be made to entities other than LALCs and all such advances are unsecured.

The table below details the amount owed to NSWALC by LALCs in respect of short-term loans as at 30 June 2003, together with prior two year balances as comparatives:

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Schedule of Short Term Loans*:

LALC	30 June 2003 \$	30 Sept 2002 \$	30 Sept 2001 \$
Batesman Bay			187
Bogal		1,624	
Baryulgil	5,000		
Coonabarabran		1,886	7,888
Dareton			1,000
Koompahtoo	26,615	26,615	
Lightning Ridge			187
Metropolitan	10,361	10,361	10,361
Mogo			5,273
Ngunnawal			5,279
Pejar			5,363
Wilcannia			139
NARLA		1,671	1,641
NGURRALA		28,000	27,500
NAIRLAA		25,000	25,000
Total	41,976	95,157	89,818

* Figures obtained from the NSWALC's 2000-01, 2001-02 and 2002-03 Debtors Summary Reports.

My review of the files indicates the following:

- With the exception of a two-month period, there is no evidence that the subsidiary ledgers and working papers were reviewed; and
- I note that NSWALC did not receive any repayments in respect to various short-terms loans to Aboriginal sporting associations totalling \$55,000. These loans were extinguished by way of grant in 2002.

Observations & Comment

The majority of short-term loans are owed by LALCs under cessation funding (88%).

There are no policies in place to determine whether a debt is a short-term or long-term debt. Some short-term loans were reclassified as long-term loans without any adequate explanation appearing on the working papers.

Loans were entered into with no deed or acknowledgement. These advances do not have agreed terms as to the period of the loan, repayments and interest charges.

8.4.4 Long Term Loans

Long-term loans to LALCs increased from \$2,188,895 in September 2001 to \$2,610,707 in 2003.

All long-term loans are unsecured. The majority of repayments on these facilities are received from a deduction from the LALC's quarterly grant allocation.

The table below details the amount owed to NSWALC by LALCs in respect of long-term loans as at 30 June 2003, together with prior two years balances as comparatives:

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Schedule of Long-Term Loans**

LALC	30 June 2003 \$	30 Sept 2002 \$	30 Sept 2001 \$
Amaroo	7,340	10,023	13,378
Bega	14,192	34,404	9,640
Bogal	13,373	16,248	
Brungle/Tumut			8,694
Coonabarabran		6,198	5,898
Eden	165,123	186,976	214,514
Gandangara	178,744	214,556	228,149
Goodooga	13,335	39,795	66,292
Gugin Gudduba	29,406	42,614	
Jumbullum	7,037	11,892	21,462
La Perouse	249,383		
Leeton			738
Mungindi	1,807,707	1,684,182	1,204,551
Narromine	35,845	70,311	94,675
Nowra	33,277	171,645	203,779
Red Chief			18,798
Red Chief			14,836
Wagonga	45,454	45,454	
Wilcannia	10,484	64,890	83,575
Total	2,610,700	2,599,188	2,188,979

** Figures obtained from the NSWALC's 2000-01, 2001-02 and 2002-03 Debtors Summary Reports.

My review of the long-term loan files indicated the following:

- The loan to the Mungindi LALC of \$1.8 Million represents 69% of total long-term loans. Refer to section 450 of this report for more details in respect of this long-term loan;
- Loans relating to LALCs that are on cessation of funding total \$560,228, being 21.5% of total long-term loans;
- There is no consistent policy in respect of charging interest on long-term loans and no indication on the debtors statements as to the rate of interest, if one is applied;
- In respect of the loan to the Goodooga LALC, repayments do not agree to the amount stated in the loan agreement;
- There is no policy as to what constitutes a long-term loan;

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- There is no evidence to indicate that reconciliations of long-term loans are performed;
- Staff rarely sign working papers; and
- There is no evidence of any due diligence, business plan review or risk assessment being performed prior to the granting of long-term loans.

I have identified a number of examples where the amount of the long-term loans recorded in the audited financial statements of the LALCs do not equate to the balance recorded in NSWALC's subsidiary ledger. There have also been examples identified where GST is being erroneously claimed by NSWALC on advances made by way of direct payment of expenses.

In respect of the Goodooga LALC loans there is no mention of interest in the loan agreement, however NSWALC is charging interest on this loan.

At the 170th meeting of the Council a loan to the Narromine LALC of \$120,000 was approved for the lease of an enterprise. There was no documentation on the file indicating what the enterprise is or whether any assessment of the feasibility of the project had been carried out. Subsequently it was revealed that a further \$20,000 was loaned to this LALC. Further investigation revealed that the enterprise was licensed premises and that there are questions over whether the LALC membership was fully advised of the loan sought from NSWALC and the nature of the business being purchased.

In mid 2002 Gandangara LALC applied for a loan of \$6.4 million. In an internal memo to the CEO dated 7th November 2002, the General Counsel indicated that he did not believe staff within NSWALC possessed the expertise or experience to carry out a credit risk assessment of the proposal. He recommended that the application be submitted to external advisors for an expert risk appraisal. The loan application was not approved.

In a separate internal memo from the General Counsel to the Executive Director dated 26th September 2002 regarding a loan application by Darkinjung LALC, General Counsel indicated his concerns in respect of the loan documentation and lack of any due diligence review by NSWALC. During the 198th meeting of Council the CEO advised Council that NSWALC had approved the loan. During the meeting there appears to have been some confusion as to what the process was for the approval of the loan. Ultimately no funds were advanced.

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The Sydney/Newcastle RALC has a debt of \$70,506 that has been outstanding since July 2001. The RALC is on full funding, however no repayments have been made since July 2001. As RALCs do not own assets, the repayment of this debt is dependent on NSWALC enforcing deductions from their allocation.

La Perouse LALC

NSWALC made a payment to Mr. Wheelhouse of \$225,720.13. At the adjourned Council meeting of 16-18 December 2002, the following Resolution CM33/199 was passed, "NSWALC authorise the payment of the outstanding debt owed by La Perouse LALC to Mr. Paul Wheelhouse, and the conditions of repayment to NSWALC by La Perouse LALC be incorporated in the Section 23(f) Management Agreement to be negotiated between the Administrator and NSWALC and La Perouse Office Bearers".

On 19 December 2002, NSWALC wrote to the Administrator of La Perouse LALC, Mr. Tony Hanrahan, and advised him that Council had resolved to settle the debt due to Mr. Wheelhouse for the amount of \$225,720.13 and that Council would not approve of the payment without his endorsement as Administrator of La Perouse LALC. Mr. Hanrahan replied the same day, refusing to endorse the payment, stating that apart from Mr. Wheelhouse's debt, La Perouse had other creditors that amounted to some \$400,000.

On 20 December 2002, the Treasurer, Clr Lester instructed the Financial Controller to pay the amount of \$225,720.13 to the trust account of Mr. Wheelhouse's solicitors, Waterford Ryan Solicitors in settlement of the debt.

Observations & Comment

NSWALC has failed to take legal action against LALCs in respect of Rates Debts.

NSWALC has failed to verify the outstanding debts with the LALCs and resolve any disagreements regarding the balances outstanding.

Some LALCs are completely reliant on NSWALC for funding and therefore they have limited capacity to repay any debt due to NSWALC.

Goods & Services Tax ("GST") is being claimed by NSWALC in respect of the direct payment of LALC's expenses. The Australian Taxation Office highlighted this error during an investigation. This error will result in affected loan balances and interest calculations being understated. Further details in respect of GST issues are contained in Chapter 10 of this report.

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In 2002 over half of the total short-term debt was forgiven by NSWALC as a grant.

Calculations of the outstanding debts and interest charges do not appear to be reviewed. The work papers and subsidiary ledgers do not indicate any evidence of a peer review having been performed.

When an Investigator or an Administrator has been appointed to a LALC, significant costs can be incurred on behalf of the LALC. When the LALC subsequently resumes full funding the outstanding debt due to NSWALC can be substantial and result in that LALC experiencing restricted cash flow for a number of years while the debt is repaid.

There are no policies in place as to what constitutes long-term debt. Interest is not being charged on all loans. There is no indication as to why some loans are charged interest and others are not. There does not appear to be any policy in respect of the decision to advance funds nor is there any evidence to indicate that any credit risk assessments are being performed. NSWALC is advancing funds in a broad range of situations including litigation funding and payment of legal costs. Funds have also been advanced for the payment of debts due by LALCs to banks and other financial institutions, although the files did not contain Council resolutions to support approvals of these loans.

There does not appear to be any loan application form that requires a LALC to advise why it requires the advance. If the LALC in question were already in financial difficulties, then NSWALC is not addressing the real reasons why the LALC is experiencing those financial difficulties.

I agree with the assessment of the General Counsel that no one at NSWALC has the expertise to assess the credit risk of an applicant.

Most of the loan repayments are derived from deduction of grants. Upon review of the long-term loan over 20% is owed from LALCs under cessation of funding. Even if the repayments are deducted from a notional grant, NSWALC is still funding the LALC by the direct payment of wages and other expenses that may force the LALC into increasing its debt.

A review of the audited financial statements of LALCs indicates that in some cases the debt disclosed as owed to NSWALC differs from the subsidiary records of NSWALC. There may be several explanations for the discrepancies, including the LALCs may not have recorded the overpayment of the grant allocation as a debt due to NSWALC and rates may have been paid by NSWALC that are not accrued in the LALC accounts. However this review must be undertaken on a regular basis.

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NSWALC must obtain an annual signed acknowledgment of the debt due to ensure its debt is not affected by the provisions of the applicable limitations legislation.

Lack of policy and procedures regarding the loan or grant approval process leaves staff, Councillors and LALCs in a state of confusion as to what is the correct way of doing things.

Recommendations

NSWALC's monthly statement should be amended to include the components of the outstanding balance being:

- Debtor Allocations:
- Rate Debts;
- Short-term Loans; and
- Long-term Loans;

At the end of the financial year, together with the normal monthly statements NSWALC must send a confirmation request to the LALC requesting written confirmation of the amount due to NSWALC. A copy of the statement and confirmation request is to be sent to the LALC's approved auditor and confirmation of the balance included in the auditor's management response to NSWALC.

NSWALC should enter into a funding agreement with LALCs that are unable or unwilling to pay their debt.

NSWALC should assist LALCs where they are experiencing financial difficulties. Strategies need to be developed for those LALCs under cessation of funding.

NSWALC should develop a clear and simple policy on cessation of funding and what payments NSWALC will meet.

This policy should be communicated to all staff and LALCs. This policy should include provisions regarding:

- Calculation of interest;
- Loan Checklists;
- Allowable reasons for loan advances;

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- Loan Application forms;
- Procedure when loans are in default;
- When independent expert opinions on credit risk assessment or loan evaluation is required;
- How loans are classified as short-term and long term;
- How the GST environment affects loan advances

NSWALC should review its loan portfolio and make the necessary adjustments to correct the outstanding balances for GST if incorrectly claimed.

NSWALC should establish a monetary limit for unsecured lending.

Submission based lending applications are only considered by NSWALC when supported by appropriate feasibility studies and business plans.

NSWALC should confirm LALCs have adequate insurance by requesting insurance information with loan applications.

8.5 Funding Categories

Overview

NSWALC prepares an internal management report titled “Recommended Funding Status Report” (“RFSS”). Subsequent to the 2002 Amendments to the Act, NSWALC is now required to provide the Minister with a six-monthly report that details the funding status of the LALCs. The report has been provided in compliance with their obligations under the Act.

The Minister’s letter to the NSWALC dated 8 May 2003 states “It appears that an unduly complicated system (consisting of 11 categories and sub-categories) is employed by NSWALC to determine the funding status of each ALC. Section 163 of the Act clearly defines the provision relating to the cessation and resumption of funding to Land Councils. The NSWALC categories are ambiguous and seem to complicate the funding provisions outlined in the Act. In particular, funding categories 1.3 and 1.4 appear to be in breach of the requirements of section 163 of the Act by providing funding to LALCs in breach of that section”.

Policy & Procedures

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A copy of the current funding status categories is Annexed to 13.17 of this report. NSWALC does have a policy in respect of the funding status of LALCs, however, Council recently passed Resolution CM202/14 “That NSWALC revise the Funding Status Summary in line with the Minister’s recommendations. NSWALC has now engaged the services of Chalk & Fitzgerald Lawyers (“Chalk”) to undertake a review of the funding categories currently adopted by NSWALC.

Observations & Comment

A review of the RFSS report dated 8 August 2003 was performed. The classification system is complex with four full funding categories and six cessation of funding categories. There does not appear to be any practical significance in the ranking allocated to a LALC other than the difference between the full funding categories and the cessation categories.

In respect of category 4.1, on each due date for submission of reports to NSWALC the LCS unit determines whether a LALC has complied with the Act. If there is non-compliance a letter is sent to the NSWALC Branch Manager requesting confirmation of the failure of the LALC to supply the relevant information within the required timeframe.

Proposed Policy

Council’s response in passing Resolution CM202/4 within five days of receiving the recommendation of the Minister highlights the ineffectiveness of Council. If they were in a position to make that decision it should have been made without the Minister’s recommendation. If they were not in a position to make the determination their swift actions suggests political expedience rather than a reasoned consideration of the issues.

I have obtained a ‘first draft policy’ on funding categories that provides for only five funding categories as follows:

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Code	Description	Funding
F 1	Unrestricted funding	6 monthly funding, in lieu of quarterly, reverts to 12 months funding six months after commencement of policy
F 2	Quarterly funding	Quarterly funding
F 3	Monthly funding	Monthly funding only
UF 1	Financial Support for Core Operations	Max amount as if fully funded, however, funds only for one full-time co-ordinator, rent, MV expenses, utilities, insurance, rates, essential repairs, and preservation of assets.
UF 2	Financial Support for Asset Protection Only	Max amount as if fully funded, however, funds only for insurance, rates, essential repairs, and preservation of assets.

Observations & Comment

The current funding policies are unnecessarily complicated and unclear in their operation. I believe a proposal to reduce the funding categories to five is appropriate. In determining the definition of those categories I believe it is important to take into consideration:

- The cash flow requirements of NSWALC;
- The intention of the grant allocation under section 106(b) to provide funding for the payment of the cost and expenses of LALCs;
- The risk management strategy of releasing monies on the basis of satisfactory financial management;
- That there should be a financial incentive to move up the categories that have been identified; and
- Grant allocations should reflect the cost of the additional administrative burden borne by NSWALC in dealing with LALCs categorised below the optimum category.

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Recommendations

NSWALC should reduce the categories of funding and ensure the definition of the new categories is clear and capable of adequate measurement.

Funding allocated to each classification should provide sufficient financial incentive to motivate LALCs to obtain a higher rating.

The Internal Audit department should conduct regular audits of the LCS unit to ensure that policies and procedures are being applied.

Recommended funding categories should be structured as follows:

Type	Amount \$	Frequency
Unrestricted	Full Allocation	Quarterly in Advance
Provisional	Discounted Allocation	Quarterly in Advance
Restricted	Lowest Allocation	Monthly in Advance

8.6 Cessation of Funding

Overview

Pursuant to Section 163(1) of the Act where a LALC has breached certain provisions of the Act, NSWALC is required to cease funding to that LALC. However, NSWALC is able to pay certain expenses of the LALC on its behalf such as salaries, rates, insurance, rent etc.

Many LALCs are on cessation of funding. The most common reasons for this are failing to obtain an unqualified audit of their financial accounts or where an investigator or administrator has been appointed.

Policy & Procedures

NSWALC's Policy and Procedures Manual does not contain a specific policy in respect of cessation of funding to ALCs, however, under the accounting section of the Manual Section 17.1 states 'Allocations will only made to fully funded RALCs/LALCs who comply with Section 34C of the Act'. Section 34C of the Act has been replaced by Section 163 'Cessation of Funding'.

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Current Status

NSWALC's LCS unit monitors the performance of LALCs. It performs reviews of financial accounts and budgets to determine whether in terms of the Act a RALC or LALC receives full funding or whether it should cease to be funded.

I have been provided with a report titled Summary of LALC Recommended Funding ("Funding Report") dated 8 August 2003. A summary of the funding report is tabled below:

Region	Full Funding	Conditional Funding	Cessation	Total
Central Coast	5	2	5	12
Central	5	-	4	9
Far North Coast	11	-	2	13
Far South Coast	8	1	1	10
Murray River	4	-	1	5
Northern	5	-	2	7
Northern Tablelands	2	1	4	7
North West	4	1	12	17
South Coast	-	1	2	3
Sydney/ Newcastle	5	1	2	8
Western Metro	1	-	2	3
Western	1	-	9	10
Wiraduri	0	2	15	17
Total	51	9	61	121

As evidenced above nearly 50% of LALCs are in the category cessation of funding. Half of those LALCs are in the Wirajuri and North West Regions.

The effect on LALCs in respect of cessation of funding varies considerably. For example, a LALC with a high level of external income (other than NSWALC grants) may be able to meet its commitments without NSWALC funding. However, a LALC with little or no external income would be dependent on the allocation and cessation of funding would have a detrimental effect on the LALC's ability to operate.

Payment of LALCs Expenses subject to Cessation of Funding

Section 163(4) of the Act allows NSWALC to make payments to cover expenses incurred by the ALC before or after cessation of funding. The Minister has raised concerns that NSWALC is unable to provide a report detailing those payments. I have seen evidence to suggest NSWALC currently has the ability to produce such a report.

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Observations & Comment

There are several problems with NSWALC continuing to pay LALC's 'essential services' payments, when there is no funding or management agreement in place:

- There is no encouragement or financial incentive for the LALC to remedy their problems and/or enter into a funding agreement;
- Whilst a LALC is on cessation of funding the existing Executive remains in place and may continue to make inappropriate decisions and/or incur liabilities which in the event of non-payment by the LALC, NSWALC may be forced to pay;
- The administrative cost of the LALC is shifted to NSWALC at no cost to the LALC; and
- Cessation of funding does not restrict access to other monies being received by the LALC.
- For example, NSWALC ceased to fund the Tumut Brungle LALC in April 2001. NSWALC continued to make payments in respect of the LALC's 'essential services'. In September 2001, two cheque signatories misappropriated most of the funds from the rental account, the National Heritage grant and compensation received from Transgrid.

Recommendations

NSWALC should assess why LALCs are placed on cessation of funding in order to identify proactive solutions.

NSWALC should compel LALCs to enter into a funding agreement prior to commencing payment of the 'essential services'.

8.7 Funding Agreement

Overview

The Act allows NSWALC to enter into funding agreements with LALCs and allows for a model funding agreement to be prescribed in the regulations. Although the Regulations do not include a model funding agreement, this does not restrict NSWALC from developing a funding agreement that it believes is appropriate.

The Minister has questioned why NSWALC is not making full use of funding agreements and whether it has any draft agreements or policy. At this time only one executed funding agreement has been executed with a LALC. NSWALC has indicated it is redrafting the model agreements, which is expected to be completed shortly.

Observations & Comment

There is currently no policy or procedure on how or why to implement a funding agreement.

NSWALC has only executed one funding agreement in respect of the Warren Macquarie LALC. The funding agreement was signed on 24 June 2003 and funding was to commence on 1 July 2003. According to NSWALC there are three more funding agreements contemplated. The salient points of the above funding agreement are:

The ALC agrees the following terms:

- Accepts and abides by any direction of NSWALC;
- co-operates with NSWALC during the term of the agreement;
- agrees to provide NSWALC with any information upon request;
- implements any management plan or direction of NSWALC in relation to matters referred to in the agreement;
- the ALC agrees it shall not use the grant funds other than in accordance with the annual budget;
- the ALC will obtain written permission of NSWALC prior to the expenditure of grant funds for any purpose not approved in the agreed annual budget;

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- obtain agreement of NSWALC to any contracts or terms of reference for the employment or the engagement of consultants;
- agrees key performance indicators such as property manager, training etc; and
- abides by the NSWALC employment policy.

NSWALC agrees the following terms:

- Has the authority to take whatever steps it considers reasonable or appropriate to ensure that funding under the agreement to the ALC is used in accordance with the terms of the agreement;
- Is authorised to have access to all records of the ALC, including all records to the provision of funding under the agreement;
- NSWALC to provide reasonable assistance when requested in writing, to the ALC in the preparation of the annual financial statements, the annual reports, the bi-annual and quarterly reports (where required) and the membership roll; and
- NSWALC can suspend payment and recommend amalgamation or dissolution of the LALC.

I note that NSWALC's letter to the Minister dated 25 May 2003, states "the reason the use of funding agreements is limited to these three LALCs at the moment, rather than imposing it on all LALCs, is that NSWALC wishes to offer incentives to those LALCs which have demonstrated sound records of compliance".

The Warren Macquarie LALC funding agreement requires NSWALC assist in the completion of the LALCs financial statements and it requires NSWALC to undertake certain duties, which may include interviewing potential staff of the LALC.

I have serious reservations regarding the content of these proposed agreements. NSWALC has limited financial resources and with each legislative amendment its function and obligations have increased without any additional financial assistance. Currently NSWALC has inadequate resources to undertake all its statutory functions and these agreements will further extend NSWALC's limited resources. Care needs to be taken in drafting these agreements to take into account the responsibilities assumed by NSWALC and consideration should be given to implementing the extended roles and responsibilities of NSWALC over an extended period to take into account the organisation's budgetary restraints.

Recommendations

NSWALC should adopt Funding Agreements which are fair to both LALCs and NSWALC.

Where a LALC has breached the Act, NSWALC should send the LALC a written "Notice of Intention to Cease Funding" which puts the LALC on notice that funding will cease. The LALC then has the opportunity to discuss the matter and consider negotiating a funding agreement with NSWALC.

Development of the model funding agreements should take into account the rights and obligations imposed on NSWALC and its ability to undertake those obligations with its limited resources.

8.8 Management Agreements

Overview

The Minister's letter to NSWALC dated 8 May 2003 stated "I am concerned that NSWALC has failed to adequately to utilise the variety of options available in the Act to address problems being experienced by ALCs. These options include management agreements (s106(1)(i))."

In a letter to the Minister dated 25 May 2003, NSWALC stated, "at present there are 12 management agreements operating and a further 26 which are recommended for NSWALC's consideration."

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Relevant Legislation

Section 106(1)(i) provides where a LALC is unable to manage its own affairs the ALC may approach NSWALC to enter into a 'management agreement'.

Observations & Comment

At the date of my investigation, I noted that only three Management Agreements have been entered into between NSWALC and LALCs. I summarise each management agreement below:

Jubullum – made on 18 November 2002 till 30 September 2003

- NSWALC to manage all affairs
- NSWALC to be paid \$1,000 per month
- NSWALC may recover its costs
- NSWALC may recover disbursements

Mungindi – made in 2001 (undated)

- NSWALC to manage rural properties
- No mention of a monthly management fee
- NSWALC may recover its costs
- NSWALC may recover disbursements
- Also deals with granting of loan for cotton farming

Kempsey – made in 2001 (undated)

- NSWALC to manage rental properties
- No mention of a monthly management fee
- NSWALC may recover its costs
- NSWALC may recover disbursements

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Management Agreements Proposed

The following draft management agreements are in various stages of development in respect of the following ten ALCs:

- La Perouse
- Wamba Wamba
- Trangie
- Tamworth
- Wellington
- Cowra
- Nyngan
- Moree
- Toomelah
- Tumut / Brungle

I have reviewed the proposed La Perouse 'draft management agreement' ("Agreement"). The agreement allows NSWALC to manage the affairs of La Perouse LALC. In respect of the agreement, NSWALC is either responsible for or is to assist La Perouse LALC in respect of the following:

- the calling of and holding of meetings;
- management of the administration;
- management of the residential property, including collection of rents, the payment of certain expenses and liaison with Aboriginal Housing Office;
- provision of a draft housing policy to AHO;
- management of the acquisition and disposal of property;
- expenditure on behalf of the LALC; and
- retaining of consultants.

There does not appear to be any agreed timeframe for implementation, however, I understand that a meeting of the La Perouse LALC was scheduled for 25 August 2003.

If executed the La Perouse LALC agreement will require careful monitoring by NSWALC to ensure that the objectives of the agreement are reached, including the repayment of the debt due to NSWALC.

I have serious doubts whether NSWALC has the necessary skills and resources to manage a large LALC with the limited resources available to it.

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Recommendation

- NSWALC should develop a policy in respect of the use of management agreements and the rights and obligations attaching thereto.
- Management agreement should only be implemented when significant issues are involved.

8.9 Training

Overview

Many LALCs have not been receiving the level of training that NSWALC previously provided. ICAC recommended that priority for training be given to LALC staff and members and LALC coordinators who are critical to the effective functioning of LALCs. It became evident in our investigation that LALCs are not receiving the level of training necessary to enable them to function and carry out their statutory duties.

The provision of effective training of NSWALC staff and to those managing the LALCs is essential in order for staff to ensure the ALC network can carry out its statutory function.

Section 106(1)(u) of the Act states “NSWALC is to provide or make available appropriate training for staff, officers and members of Aboriginal Land Councils (including but not limited to training in computer, administration, financial, accounting and ethical practice skills)”.

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Policy & Procedures

NSWALC has a training policy in respect of NSWALC staff, however there is no policy in respect of training for LALCs.

Previously the Training Unit was a separate business unit. However, it has now been merged with the Land Council Services Business Unit. The training manager Mr. Lorenz Herft has been away from the office on sick leave from 28 April 2003 and I have been unable to interview him. From my observations and discussions with NSWALC staff, it appears that there have been little or no structured internal training courses at NSWALC for the last three years.

I reviewed training expenses for the previous four-year period, which included training for staff at head office, branches and ALCs. The table below details the actual expenses for the different types of training against budget:

Year	Staff Training Actual \$	Staff Training Budget \$	Head Office Staff Training \$	Head Office Staff Training Budget \$	LALC Training Actual \$	LALC Training Budget \$
2003 (9 mths)	6,976.58	10,374	1,825	75,000	130,460.58	112,500
2002	3,474.40	11,500	24,134.94	100,000	176,168.93	165,000
2001	22,117.01	45,000	Nil	250,000	191,642.51	100,000
2000	21,340.28	Unknown	Nil	Unknown	149,440.86	Unknown

The actual expenditure was obtained from the NSWALC's accounting records. It appears that for the 2002/2003 financial years training expenses for LALCs ran over budget and training expenses for other staff came in under budget. Overall, the actual expenses were well under the budgeted External Training.

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Ongoing Training

On 8 January 2003, an internal memo from the Acting CEO to the Treasurer stated, "Due to current budget constraints, I have informed Mr. Herft to cease all new training for this financial year".

For the current financial year (2003/2004), the draft and unapproved budget has allocated \$150,000 for LALC training.

Observations & Comment

The budgeted and actual expenditure on training has decreased significantly over the years.

Without adequate training, especially in the areas of bookkeeping and accounting, LALC's will continue to suffer from misappropriation of funds and failure to achieve unqualified audit reports.

Recommendations

- NSWALC should provide bookkeeping, accounting and corporate governance training for LALCs which continue to suffer from misappropriation of funds and the failure to receive unqualified audit reports.
- Attaché training or refresher courses should be provided.
- The training needs assessment should be reviewed to determine the training needs of staff of both NSWALC and LALCs.

8.10 Branches

Overview

NSWALC has inherited ten Branches in New South Wales from the reorganisation imposed by the 1990 amendments. These offices were previously RALC offices. All attempts to restructure the Branches have met with resistance from within the organisation.

The role of the Branches is to provide guidance and assistance to RALCs and LALCs.

Branches assist LALCs and RALCs in the following areas:

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- Compilation of annual budgets;
- Preparation of annual reports;
- Preparation of quarterly reports;
- Maintaining up to date membership records;
- Ensuring meetings, including AGM's are properly conducted; and
- Obtaining a satisfactory audit.

Branch Managers are responsible for assisting LALCs and RALCs in overcoming any administrative or operational problems.

Branch Managers are responsible for reviewing/monitoring RALCs and LALCs and maintaining a profile of each organisation.

Branches are responsible for managing any of the affairs of a LALC with the agreement of that LALC. Management agreements are to be negotiated with each Council if the LALC is in breach of the Act. Any agreement exceeding three months must be ratified by NSWALC.

Branch Managers are responsible for submitting documentation on their imprest account to NSWALC within seven days of the end of each month.

Branch Managers are required to forward management reports to NSWALC on all LALC's in their region. These reports are to be in a standard format and are to be completed every three months. Details of all major changes since the previous quarter are to be included in these reports.

My team visited nine out of the eleven Branch offices. Due to time constraints, the Western Branch (ten LALC's) at Menindee and the Far South Coast Branch (ten LALCs) at Batemans Bay were not visited. There are no Branch Offices for the regions of Western Metropolitan (three LALCs) and South Coast (three LALCs).

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Summary of Interviews with Branch Managers

Interviews were conducted with each of the Branch Managers visited through July 2003. Each manager was asked 34 standard questions relating to the different areas of operation of NSWALC. Each Manager had various concerns, however the main issues raised by the Branches included the following:

- Lack of training – Managers expressed concern over the closure of the training section of NSWALC. “People at grass-root level need to be trained in finance and corporate governance issues”. “Many LALCs are experiencing fraud due to poor internal controls and thus have received qualified audit reports”;
- Lack of support, direction and communication from NSWALC – Managers rarely received timely feedback from Head Office when enquiries were made. Head Office would often take days or weeks to return telephone calls and often there would be no written responses to manager’s letters. They were seeking more direction to and better dissemination of information from NSWALC;
- No forum for Branch Managers meetings – Hold regular meetings of Branch Managers to share experiences and/or hold state-wide conferences to help get the communication going. During our investigation, the Managers of the Branch Offices finally met at Head Office for a two-day conference;
- No formal feedback or appraisals – Branch Managers should receive timely feedback on their performance to ensure the Branch is meeting its objectives. There have not been any formal reviews performed for Branch Managers and Branch Staff. The Branch Managers also felt that there should be formal reviews for each of the Councillors;
- Lack of resources – Branches need more funding in order to perform their duties. Branches do not get a fair share of resources considering the level of work expected (need cars, staff, cash etc) – Councillors get paid too much in comparison;
- Lack of consultation with the budgets – Managers would submit budgets to Head Office and a revised budget would come back with amendments, without feedback or explanations on why the changes were made. NSWALC should consider the opinion of Branch Managers when setting budgets or revising budgeted amounts;.
- Branch funding needs to take account of the number of LALCs they are responsible for;

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- Improved communication required between LALCs, Branches and NSWALC. Councillors should visit LALC's more often and NSWALC should utilise field officers to improve the relationship between LALC's and Branches; and
- NSWALC, through Branches, should have more powers over LALC's – need to act more quickly and decisively to resolve issues before they escalate.

Observations & Comment

The Branch Managers felt that the services provided to LALCs could be improved with the assistance of Head Office. When problems arise with a LALC, Branch Managers felt that immediate assistance and advice from Head Office would be beneficial. Telephone calls, emails and letters need to be returned swiftly to staff at the Branch level.

The Managers felt that even though their budgets had been substantially reduced, they could still manage day-to-day tasks. However, additional funding would assist in providing better service to LALCs, for example, more visits could be made to LALC offices.

Recommendations

A skills audit of the branch staff be undertaken to identify strengths and weaknesses.

Training for branch staff be developed from the results of the skills audit.

The budget allocation for branches needs to be reviewed and brought into line with the number of LALCs the Branch is required to support NSWALC should undertake a review of the current branch structure to determine if it is appropriate for optional service delivery to LALCs and an efficient use of NSWALC's resources.

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8.11 Property Disposal Under Section 40D Of The Act

Reasons for Review

The disposal of land by a LALC was not specifically raised as a matter for investigation in the Terms of my Appointment, although Clause 5.1.1 refers to compliance by NSWALC with its responsibilities and functions under the Act. This matter was raised in discussions and interviews with staff where reference was made to instances where LALCs had disposed of land at less than market value or disposed of land without the required approval of NSWALC. I also received correspondence from a LALC concerned about the delays by NSWALC in providing its approval. On this basis the approval of land sales was considered an appropriate function to examine.

Relevant Legislation

Section 40D of the Act empowers a LALC to sell, exchange, mortgage or otherwise dispose of land vested in it if:

At a meeting of the LALC specifically called for the purpose (being a meeting at which a quorum was present) not less than 80 per cent of the members of the LALC present and voting have determined that the land is not of cultural significance to Aborigines of the area and should be disposed of; and NSWALC has approved of the proposed disposal, and,

in the case of the disposal of land transferred to an Aboriginal Land Council under section 36, both the Crown Lands Minister and the Minister have been notified ...”

Policy & Procedures

The Policy and Procedures Manual (Last revised April 1999) deals with land disposals in Section 19.10.1(b) which provides:

“Where NSWALC is to approve of any disposal of land this discretion is very broad in that it is not fettered in any sense apart from ensuring that the procedure gone through by the LALC complies with the ALRA and that the transaction does not offend the law in any other way, notably the Trustee Act 1925”.

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We obtained a copy of the current “NSWALC Section 40D” guideline document (dated 26 June 2003) which has been prepared and used by the Land Rights Unit for assessing LALC submissions for Section 40D approval. The guideline details six requirements to be included with any application lodged by a LALC:

- Copy of the advertisement calling the Meeting.
- Evidence a quorum was present at the Meeting.
- Copy of Minutes of Meeting.
- Copy of current market valuation as assessed by a registered valuer.
- Copy of Section 40D Certificate
- Copy of letters to the Minister for Crown Lands and the Minister for Aboriginal Affairs, where applicable.

In the explanatory material included in the guidelines NSWALC provides the assessment criteria it will apply. In particular reference is made to evidence showing members have made an informed decision. In this regard, information which must be provided to members of the LALC should include:

- Land identification (including area), and
- A current market valuation, identified as being a valuation by a registered valuer not being more than 12 months old.

Reference is made that Section 40D applications must be received at least two weeks prior to the next Council Meeting. This implies that processing by NSWALC can be completed in a relatively short period.

It is also stated that NSWALC is required to ensure the LALC undertakes the proposal in accordance with the approval given by its Members and NSWALC. Presumably this requirement has been included following a report by Internal Audit dated 31 January 2002 that noted the failure by NSWALC to ensure compliance by LALCs with conditions attached to Section 40D approvals.

The current NSWALC Business Plan included a Strategy– “To consider a contribution from the proceeds of sale and mining royalties to help finance head office support for economic development .” (Strategy 2.4.4)

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NSWALC obtained legal opinion in February 2001 which included advice that Council should not impose conditions upon a disposal that can only be satisfied after the disposal occurs (“Conditional Approval”).

Observations and Comment

NSWALC does not keep a register of S40D applications made and approved by the Council. It is therefore not possible to establish in the time available to me the effectiveness of NSWALC in performing this function. The ability to measure the turnaround in the processing of these applications is vital to the ongoing management of NSWALC.

The Section 40D Guidelines document and explanatory notes demonstrates an attempt by NSWALC to take more responsibility in its approval of land disposals. However the process is largely procedural and does not extend to an appropriate consideration of matters available under their discretionary powers. I am aware of instances where NSWALC has not approved proposed land transfers due to concerns regarding:

- Joint Venture arrangements to develop and sell land, where land claims are yet to be acquired.
- Joint Venture agreements inequitable to LALCs, relative to risks assumed and contributions made by the partners to the venture.

NSWALC does not require a LALC to provide details of its present landholdings nor a business plan showing how the funds arising from a sale will be used. The ability to assess the significance of proposed land disposal and the impact this will have on the LALC in the future is therefore limited.

Council is currently considering proposals to approve a transfer of land to a trust or some other entity that are not an Aboriginal Land Council. Consequently any future dealings of the land by that entity may not be subject to the Section 40D requirements of the Act. We have raised this matter in discussions with Clr Trindall who advises that the Trust Deed or other legal instrument will be drafted to ensure the requirements of Section 40D of the Act will be preserved. Without reviewing the terms of the proposed legal instruments it is not known to what extent the rights and obligations provided for in the Act can be protected.

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Although Section 40 of the Act appears to be widely drafted to protect the land owned by the ALC network, recent events and reviews have found significant practical deficiencies in its effectiveness:

- LALCs are freely able to enter into a range of commercial contracts and arrangements that do not in themselves amount to a disposal of a land.
- If such agreements are entered into prior to seeking Section 40D approval then contractual obligations and entitlements can be created that give rise to claims for specific performance or damages for breach of contract.
- In the event of such a claim, although the land itself has been protected, this will be of no practical benefit as the outcome could be to imperil ownership of the land or to attack the financial stability of the LALC. Under the provisions of Section 234 of the Act, this risk is directly transferred to NSWALC and the SIF.

Consideration needs to be given in consultation with NSWALC and the Registrar to legislative amendment to broaden the application of S40D and to quarantine losses within a LALC itself.

The Act does not provide for the proceeds from land disposals by LALCs to be paid into a separate bank account of NSWALC as would be the case for mining royalties and fees received pursuant to Part 3 of the Act. There is also no requirement for any payment to be made to NSWALC by LALCs from these proceeds. The Act does provide in Section 46 for 40% of all mining royalties and fees to be paid to NSWALC. There is an inherent inequity between LALCs depending on the value of their respective landholdings and no direct mechanism for NSWALC to redress this because of the limited resources available to it.

Recommendations

In consultation with NSWALC and the Registrar, the Act should be amended to broaden the scope of Section 40D to apply to a LALC entering into a transaction the effect of which provides for, or contemplates, the disposal of land owned by a LALC.

In consultation with NSWALC and the Registrar the Act should be amended to limit the scope of Section 234(2) of the Act to ensure NSWALC and the SIF does not have to underwrite the net deficiencies of a LALC on dissolution.

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NSWALC should continue to develop its Section 40D policy and educate LALCs in its requirements. LALCs should be required to provide a full list of all land holdings and a statement as to the purpose to which proceeds of the sale of land will be put in support of their application.

NSWALC should maintain a register of Section 40D applications in order to develop appropriate performance measures for processing these applications. The register must be a chronological record of the processing of applications from date of receipt to date of approval.

Legislative reform should be considered to provide for a fixed percentage contribution of all land sale proceeds to be paid to NSWALC. Consideration needs to be given to the appropriate percentage rate of the redistribution and whether those contributions should be transferred to:

- 1) the Statutory Capital Account to be preserved in addition to the capital value referred to in Section 150 of the Act;
- 2) a trust fund to be added to the sum available to the general grant allocation made under Section 106(1)b;
- 3) a trust fund for the purpose of funding special purpose grants to LALCs;
- 4) to consolidated revenue of NSWALC to meet ongoing costs and expenses of the organisation.

In my opinion option (3) would be the most preferable application of these funds and option (4) the least desirable application.

8.12 Register Of LALC Landholdings

Reasons for Review

The Auditor General has raised concerns that NSWALC does not maintain a register of land held by ALCs.

Overview

NSWALC's Land Rights Unit ("LRU") oversees the land dealings of ALCs in terms of the Act. A database of landholdings of ALCs would enable NSWALC to monitor the dealings of land by ALCs.

Relevant Legislation

Section 106(1)(q) of the Act states that a function of NSWALC is to compile and maintain a register of all land held by ALCs.

Policy & Procedures

Section 19.6 of NSWALC's Manual states "NSWALC currently has a detailed record of all land owned by all ALCs". This section of the Manual has not been updated since 1999.

Previous Reports - Internal & External

In November 1997, NSWALC conducted a four-month pilot study under the title of the "Land Needs Strategy (LNS) Project". Funding was obtained through a grant from ATSIC to NSWALC's Native Title Unit. The pilot study established a property register of all land owned by ALCs, however, inquiries of the LRU indicate that the database has not been maintained since 1997.

NSWALC's Internal Audit Report No. IA/2001/261 of 17 August 2000, states "Council passed Resolution No. 76/170 that Council investigate the possibility of the establishment of a database of all NSWALC and ALC dealings".

Investigation Undertaken

My inquiries of the LTU staff indicate that no property register exists, although the LRU have obtained electronic data from Land & Property Information NSW ("LPI") in respect of land registered in the name of ALCs.

Presently, LRU is unable to access information regarding property dealings of the ALCs. A written request had been made to the LPI for information in respect of ALCs dealings in land, although this was initially met by a refusal on the grounds of privacy. NSWALC have advised me that they will be following up the refusal with LPI.

Discussions with the LRU staff indicate that a property register would assist them to immediately verify the accuracy of details provided by ALCs contained within the standard application forms and supporting documentation.

Chapter 8: Support to LALCs

Observations & Comment

NSWALC does not have a property register; therefore NSWALC is not fulfilling one of its functions under the Act.

NSWALC does not currently have a budget for establishing a property register.

A well maintained Property Register would assist NSWALC's efficiency in terms of providing support to LALCs by:

- (1) Enabling the LRU to register and monitor all land claims and Section 40D applications through the LRU; beginning with receipt of the application, processing by the LRU (including requests for further particulars), recommendation to Council, Council approval and subsequent registration by the LPI;
- (2) Providing a shared database of property information that is able to be accessed by NSWALC's other Business Units, such as Land Council Support, Internal Audit and Legal Services;
- (3) Providing a useful management tool to monitor the effectiveness and efficiency of the LRU;
- (4) Enabling the assessment and monitoring of complaints in respect of land dealings of LALCs;
- (5) Enabling the finance department to determine total outstanding rates by LALCs to allow more effective monitoring of forecasts and cash flow monitoring;

A property register may also be a useful tool to enable NSWALC to establish the housing needs of Aboriginal people and make predictions regarding future trends in land disposal and claims.

Recommendations

- NSWALC should establish and maintain a property register;
- The suggested information the property register should include would be the following information:
 - (i) Title Name
 - (ii) Address
 - (iii) Volume Folio
 - (iv) Folio Identifier
 - (v) Land description
 - (vi) Area
 - (vii) Plan No.
 - (viii) Current zoning
 - (ix) Condition of property
 - (x) Current use
 - (xi) Intended future use (e.g. Housing etc.)
 - (xii) Area
 - (xiii) Plan No.
 - (xiv) Cultural significance
 - (xv) Valuation
 - (xvi) Current annual rates payable
- Establish a simple tracking system for all Section 40D applications;
- Maintain the accuracy of the property register by obtaining regular electronic updates from the LPI for cross-checking against the database to ensure accuracy of the information; and
- After the property register has been established, NSWALC should consider marketing it to ALCs as a source of information that may assist ALCs in lobbying both State and Federal Government agencies for additional grants to provide housing for Aboriginal people.
- Require LALCs to submit an updated list of all property holdings with any application for the approval of a land disposal under Section 40D.

Chapter 9: Matters Investigated

9 Matters Investigated

9.1 Legal Costs

Reasons for Review

During my foundation research a number of matters were raised that related to concerns in respect of the instruction of lawyers and payment of legal costs by NSWALC. The following analysis details some of the relevant matters not covered in other Chapters.

Overview

Legal costs have been identified in the Council's financial statements in each of the past four years as follows:

2002 (9 mths)	\$978,000
2001	\$1,936,000
2000	\$2,194,000
1999	\$2,017,000

These amounts do not include:

- i). costs that have been included in other cost centres in the financial statements
- ii). Costs that have been paid by way of grants or loan advances.

An internal audit report in August 1998 reported the legal costs for the six months to 31 March 1998 were in excess of \$810,000 and for the financial year ended 30 September 1997 were \$2,173,000. From these figures it is clear that annually the Council spends significant funds on legal fees, notwithstanding that the reported costs may be understated. Over the term of the current Council a significant proportion of the costs that have been incurred relate to internal dispute Resolution and employment issues rather than the pursuit of the legislated functions of the Council.

Chapter 9: Matters Investigated

Policy & Procedures

NSWALC's Policies and Procedures Manual makes no mention of the Legal Services Unit nor gives any guidance to Councillors as to the distinction between legal services that are of a private nature and those that relate specifically to their role as a Councillor.

There is no process or guidelines for Councillors that individually require legal advice in relation to any matter that touches upon their position, to obtain that advice without authorisation. There is no effective system for the control of instructions provided to external legal advisors and no apparent accountability for the management of these costs. There is also no provision for the centralised indexing and archiving of all legal advices received by NSWALC. As a result there is duplication in advice (and cost) and often a loss of the purchased intellectual property contained in the advices received.

Payment of Legal Costs Councillor Lester

In CM182 Albury 21/9/2001 the incumbent Treasurer, Clr Lester, was removed from office by a majority vote of the Council in what appears to be the result of a factional dispute. The incumbent then resorted to legal action to restore his position. His case was lost and the result was appealed. He again lost on appeal. Substantial costs were incurred in these proceedings and NSWALC was awarded costs against the plaintiff that totalled approximately \$40,000.

At the 195th held on 26 August 2002 Lester regained the Treasurership. The then CEO commenced negotiations to obtain payment of the costs. The issue of recovery of these costs was raised during the Statewide Conference held at Coffs Harbour in July 2002. Despite the forum having no formal legal capacity, the issue of payment of Clr Lester's costs was raised for discussion. Given the nature of the meeting I would have expected the Chairman to explain to the meeting that it was inappropriate to consider the motion. However consideration of the Resolution was not impeded and the meeting passed a Resolution stating that NSWALC should not forego recovery of the legal costs due by Clr Lester.

It is unfortunate that this motion was allowed to be considered as its Resolution conferred an expectation on the LALC membership that Council would act in a particular manner and ensured that whatever determination was subsequently made by Council that the Resolution would be in the political spotlight.

Chapter 9: Matters Investigated

At the meeting held on 30th August CM195/34 Council determined to ignore the recommendation of the Statewide delegates and resolved not to recover those costs against the Treasurer. There are arguable reasons why this debt should and should not be met by NSWALC. The real failure of Council is that no policy was in place in respect of Councillors' legal costs notwithstanding the litigious history of the organisation. Further the minutes do not reflect the background or the reasoning behind the decision.

Council must accept that its minutes are public documents and circulated to the wider Aboriginal Land Council network. Although clearly they do not need to be a transcript of proceedings they need to succinctly capture the substance of the matters discussed to ensure transparency in the decision making process. The lack of business papers supporting the Resolution clouds the position even further.

In my discussions with Clr Lester he advised that he was supported in commencing proceedings by other Councillors, but made the mistake of not having them join the proceedings. There has been no indication of his wider support for the action and he has left himself exposed to criticism that his action in commencing proceedings was personally motivated. If his purpose was to clarify the legal position on the rights of Council and its elected officers he had the option to seek legal advice with or without the assistance of the Registrar. Taking formal proceedings appears to have been aimed at restoring his personal position lost due to a political vote.

As an exercise of the discretion of Council I do not believe the decision of Council to waive the legal costs can be attacked, however the process by which the decision was taken could have been managed much better.

Legal costs in the matter of Buck v Jones

The above case relates to defamation proceedings against Mr Alan Jones, Radio 2UE and Mr Anthony Carter with respect to a radio broadcast in 1997. The broadcast dealt with the Dunghutti Peoples native title claim over land at Crescent Head.

Chapter 9: Matters Investigated

My review has revealed nothing to evidence that the litigation and subsequent settlement was inappropriate or uncommercial. I acknowledge that NSWALC may determine that for commercial or political reasons it wishes to indemnify individuals to institute legal proceedings. Its actions in making that decision must be transparent. It is this lack of transparency that was Council's biggest failing and that leads to criticism and claims of potential fraud and corruption. Council must have policies on when it will provide external funding and ensure such arrangements have strict limits and reporting guidelines to ensure that it is able to effectively manage its exposure. Any funding must be done with the knowledge and advice of LSU.

Conclusions

Legal services is a significant expense borne by NSWALC, however it appears not be managed appropriately in that:

- There is no central authority that determines what services are to be outsourced and what litigation is to be undertaken
- There is no evidence of any risk management
- There is little understanding by Council as to when there is justifiable recourse to external legal support rather than internal resources
- There is little understanding of the increased cost of outsourcing legal advice.
- There is little appreciation of the non-financial benefits of an internal legal resource.

The Legal Services Unit is a vital part of this organisation and is presently under resourced and under utilised.

The use of a properly constituted Legal Services Unit together with the support of the Registrar and the Crown Solicitor's Office should be the first point of reference for providing advice on a non-adversarial basis on any matters relating to internal management issues and the operation and effect of the Act. Councillors should actively seek to use this resource and mediation to settle disputes and only commence formal legal proceedings as a last resort.

Councillors have no role in seeking external advice in respect of the commercial and business affairs of NSWALC. NSWALC has failed to implement the recommendations of its own internal audit review issued in August 1998 that found that external lawyers were engaged without entering into formal engagement letters or obtaining cost agreements and no policy or procedures existed to provide staff and Councillors guidance in this area. (Internal audit report IA/S/98/202).

Chapter 9: Matters Investigated

Recommendations

I recommend that the Legal Services Unit is retained and that the Unit is resourced with a realistic budget to enable it to provide a meaningful contribution to the legal services that NSWALC require. The General Counsel who heads this Unit should report to the CEO and not to the Council.

I recommend that the power to engage legal firms in the furtherance of the objectives of Council and the CEO be restricted to the LSU through the General Counsel.

The General Counsel should consider the establishment of a panel of solicitors to provide specific legal advice for which there are no in-house skills. LSU will be responsible to ensure appropriate letters of engagement are executed and appropriate files are maintained. Details of costs and expertise should be provided and considered at the time of appointment to the panel.

Council must formulate a policy on;

- when a Councillor can seek independent legal advice
- the procedure for claiming costs of that advice and the limits of the indemnity from NSWALC
- if, and when, Council will seek copies of independent legal advice obtained by Councillors paid for by NSWALC for the benefit of future Councils.

Council must formulate a policy on when it will provide funding for legal costs to external parties. It must ensure such arrangements have strict limits and transparent reporting guidelines to ensure that it is able to effectively manage its exposure. Any funding must be done with the knowledge and advice of LSU.

It should be a matter of standard procedure in all matters in which NSWALC engages in litigation, that costs awarded in favour of the Council should be pursued subject to normal commercial considerations regarding likelihood of recovery. This policy should be communicated throughout the organisation.

Council should consider alternative forms of dispute Resolution at every opportunity.

9.2 Feedlot Beef Venture

Reasons for Review

The addendum to the terms of my appointment as investigator specifically identified the Feedlot Beef Project as an outstanding issue from the Report to Parliament of the Auditor General for 2003 that was to be covered in the course of my investigation. The 2003 report by the Auditor General referred to the acquisition of 270 head of cattle for a test market venture of supplying feedlot beef to the Japanese market. This was stated as being done by the CEO without the authority of Council or a signed agreement being in place.

Overview

The Feedlot Beef venture relates to a test market feedlot programme for the production of marbled beef for export into the Japanese market. The initial project planned for 270 head to be purchased over a year. It was proposed that 45 head would be purchased every second month for the period August 2002 to July 2003. Estimated outgoings for this period totalled approximately \$280,000. The project was budgeted to first generate sales revenue in May 2003 and thereafter be cashflow positive.

Participants included:

- Regmont Pty Limited (a subsidiary of Manno Corporation):
Contributes rural properties, management skills, market share, staff training, animal genetics and capital;
- Manno Corporation Limited
Purchases feedlot conditional steers from NSWALC and will also establish the market in Japan for the “Feedlot Beef” product;
- NSWALC
Responsible for the purchase, breeding and feeding of the steers and all costs to the time of slaughter.

Relevant Legislation

Section 106 of the Act does not provide NSWALC with a specific power to carry on an enterprise. NSWALC has previously obtained legal advice indicating they have no power to enter into an enterprise in relation to its proposal to operate a Funeral Fund.

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Investigation Undertaken

A chronology of events is provided in the Annexure 13.11.

In April/May of 2002 the then CEO learned of a business opportunity that he considered being of some potential for NSWALC and the LALC network. After some consideration of the proposal it appears the CEO considered it had merit and on 18 June 2002 Regmont made the initial purchase of cattle on behalf of NSWALC.

In August 2002 “The Feedlot Beef Story” Business Plan was completed. At its meeting on 9 September 2002; Council resolved to “allow further development of this feedlot...and involvement of our CEO.....”; (CM195/51).

In a memorandum dated 27 November 2002 Clr Trindall documents his visits to the rural properties and indicates he first became aware of cattle in the feedlot on 21 November 2002. Clr Trindall also noted that the CEO advised him that NSWALC Legal Counsel was having difficulties registering the logo. He records his concerns as including:

- There was no Council Resolution to purchase 126 steers (@ approx \$800ph and 4 bulls costing \$23,000;
- There was no registered logo;
- There were no contracts or agreements with Manno Group or Riverina Farms;
- Unauthorised payment may be identified by the Auditor General

In a memorandum to Clr Trindall on 2 December 2002 the CEO stated; “...in line with Council’s decision to pursue further development of the Feedlot Beef Program market testing lots comprising 45 head of steers and heifers are being processed at Regmonts Feedlot”. I understand this to be a reference to the earlier Resolution of Council CM195/51.

At its meeting on 5 December 2002; while noting that the purchase of some stock on behalf of NSWALC was unauthorised, Council resolved to allow further development and approves the purchases to date. (CM199/35) On 13 January 2003 NSWALC General Counsel provided advice confirming the lawfulness of the Feedlot Beef venture in the context of the requirements of the Act. I note that this advice was sought well after commencement of Feedlot activities commenced although prior to first kill scheduled for May 2003.

Conclusions

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It is likely that NSWALC's financial commitment to the test venture occurred without a clear direction from the elected body. The documentation indicates that the then CEO J Bradford entered into preliminary discussions with the proposed parties and authorised the initial purchase of 137 Heifers at a cost of \$122,378. The voucher was approved for payment by the Executive Officer. The initial purchase of 45 shorthorn steers at a cost of \$33,987 for the feedlot was invoiced on 9 August 2002 although a purchase order No1985 was not completed until 31 October. This purchase order together with the payment voucher was signed off by the then CEO Jeff Bradford.

Although individual purchases of Steers occurred in lots of 45 head at an estimated cost of approximately \$33,000 per purchase the proposal was to purchase 6 lots totalling 270 head at an estimated total cost of \$203,000. The financial delegations manual dated 30 April 2002 (noted as approved at Council Meeting held on 18-19/9/02) includes a schedule of financial thresholds for particular types of expenditure, both capital and revenue in nature. A general limit of \$50,000 exists to cover all other types of expenditure not specified. All delegations are subject to the approved budget for each year.

There was no specific allocation of in the 2002 budget to cover expenditure of this nature. It appears that the CEO has acted outside the level of his delegated authority by entering into the above transactions although his actions are subsequently ratified by the Council.

The earliest Resolution by the Council is CM199/35 on 5/12/02 ratifying the purchase of "some stock" whilst not specifying the value involved. Subsequently, Council also reaffirmed its position as being "committed" to developing the Outback Beef project, subject to legal advice. It is significant to note that at the time of committing to the project, Council had not undertaken any appropriate due diligence of the proposal or of the parties involved although it had earlier received reports and a presentation relating to the project at Councils meeting 195 held on 29 August 2002.

Whilst Council did qualify its commitment as being subject to legal advice it is not apparent how the amounts invested to date were considered and rationalised. The legal advice obtained from NSWALC's in house Legal Counsel confirmed the lawfulness of the "Trial Project" pursuant to the Act, it was also further suggested that if the project was to proceed past the trial period then approval of the Minister should be sought.

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NSWALC's financial advisers, Chifley Financial Services Limited, were commissioned to provide an assessment of the venture. Their report dated 23 June 2003 raised the following issues as major considerations for Council to resolve "before any investment or acceptance of a proposal to increase exposure to this asset":

- Investment Structure;
- Source of ALC Funding;
- Capital Requirements;
- Strategic Details; and
- Contractual Arrangements

At the time of our investigation the project is still in the trial period and has not been progressed. In fact the scale of the trial was reduced such that no further purchases of steers were made after February 2003, reducing the planned program from 270 head to 189 head being the number purchased to date.

I have obtained independent legal advice on the power of NSWALC to enter into this venture that is contrary to that provided to Council by its internal advisors. This advice concurs with other external advice obtained by NSWALC that operating an enterprise is outside its functions.

NSWALC is not appropriately structured or resourced to effectively operate an enterprise in a commercial environment. Operation of any commercial venture increases the exposure of the statutory fund to unforeseen claims and losses that do not sit comfortably with the concept of investments responsibly managed under the Trustee Act. Notwithstanding any legal restrictions there are overriding commercial reasons why NSWALC should not operate any enterprise.

In discussions with the Clr Trindall I am advised that the project may not be progressing past the trial stage.

Chapter 9: Matters Investigated

Recommendations

Council needs to formulate a clear policy on the submission of investment and other proposals to the elected body for consideration. There should be established principles and guidelines to be followed which govern the types of investments which NSWALC will be involved with, minimum information requirements to be included in proposals, how proposals are presented and vetted, criteria for assessing proposals and the due diligence process to be adopted before any financial resources are committed.

Investments and other significant allocations of funds should be in accordance with the goals and principles set out in the business plan of NSWALC. There must be a process to ensure any such projects fall within the strategic programs of the organisation.

The certification procedures for authorising purchase orders and payment vouchers need to be strengthened to ensure commitments are only entered into and paid in accordance with budgeted funds.

Prior to progressing the “Feedlot Beef” project past the Trial period further legal advice should be obtained.

Chapter 9: Matters Investigated

9.3 Rural Properties

Reasons for review

The addendum to the terms of my appointment as investigator specifically identified the Rural Properties as an outstanding issue from the Report to Parliament of the Auditor General for 2003 that was to be covered in the course of my investigation.

In his 2003 report to Parliament the Auditor-General raised concerns relating to the rural properties. The key issues raised are as follows:

1. Rural properties have lost about \$9 million over a 12-year period.
2. Internal controls in the Rural Property section are weak.
3. A consultant was appointed in 2002 to examine the farm management practices, stock and records of all five farms owned by NSWALC. The consultant's report referred to the following:
 - a. Background of heavy losses on various farm ventures over a period of 11 years.
 - b. Current farm managers lack the necessary skills to achieve the full potential of the properties, despite being dedicated to the task.
 - c. Lack of communication between NSWALC branch offices and the farms.
 - d. Lack of consistent policies across the five properties.
4. The consultant recommended retaining the properties for a minimum period of two years to determine whether profitability can be achieved.
5. It was recommended that a farming expert be appointed to work in conjunction with the current farm managers to enable the introduction of a strategic plan, a budget, a cropping strategy and a livestock program for each farm.
6. In January 2003 Council entered into a formal contract with Riverina FARM to provide expert farm management services.

Chapter 9: Matters Investigated

Overview

This review covers the rural properties owned and operated by NSWALC.

NSWALC owns the following rural properties:

Property *	Managed by Riverina FARM **	Commercial **	Area (Hectares) *	Year acquired*	Revenue base *	Manager *
Barooga Karrai (in Euabalong)	Yes	Yes	9,890	1992	Mixed farming – livestock and cereal grains	David Trindall
Calooma / Nulty Springs (near Bourke)	Yes	No	47,697	1989	Wool, cattle & Damara sheep	David Trindall
Winbar (near Louth)	No	No	24,397	1989	Cattle	David Trindall
Appin (near Menindee)	Yes	No	31,704	1990	Merino wool & livestock trading, irrigation farming of lucerne crops.	Norman O'Donnell
Kaituna & Uno (near Coonamble)	Yes	Yes	5,184	1990	Cereals and livestock agistment	George Greenaway

* Information from NSWALC website

** Information from discussions with Riverina F.A.R.M Pty Ltd

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As indicated earlier the filing system is inadequate and NSWALC does not have a complete record of documents in relation to the Rural Properties that it manages. The lack of a centralised filing system only adds to the difficulties of efficiently and effectively managing these assets.

Relevant Legislation

Extracted from the Act:

Section 106 provides:
(cf former section 23)

The functions of the New South Wales Aboriginal Land Council are as follows:

- a) to acquire land on its own behalf or on behalf of or to be vested in Local Aboriginal Land Council and to transfer land acquired on behalf of a Local Aboriginal Land Council to such a Council,
- b) to hold, dispose of, or otherwise deal with land vested in or acquired by it,
- c) to exercise such other functions as are conferred or imposed on it by or under this or any other Act.

“Review of the Aboriginal Land Rights Act 1983 (NSW) Background Paper” issued by the NSW Department of Aboriginal Affairs at page 18 provides the following:

“A major aspect of the changes in 1990 was the reduction of the roles and operating capacity of Regional Aboriginal Land Councils (RALC’s), via the removal of many of their functions and the transfer of their assets to the New South Wales Aboriginal Land Council (NSWALC). RALC’s could no longer claim, purchase or hold title to land.”

As a result of the 1990 amendments, the rural properties held at RALC level were transferred to NSWALC.

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Policy & Procedures

Section 24 of the policies and procedures manual covers the area of Rural Properties. The section has not been updated since April 1999 and is out of date.

The former CEO, Jeff Bradford undertook a restructure of the Rural Properties Section, in conjunction with the external farming expert, Riverina FARM. This restructure resulted in a Farm Management Plan in May 2002 that removed any responsibility for the rural properties from the branch managers. In the absence of current documentation, the rural properties have been functioning without any formal policies or procedures since May 2002.

Previous Reports – Internal & External

At a meeting of NSWALC on 1 May 1997 it was resolved that a full investigation be conducted into the activities of the Rural Properties Section. On 7 November 1997 the Audit Committee appointed Anthony Thomas Rees as special investigator. A preliminary report was issued on 11 February 1998 and the final report on 18 August 1998. It appears that no follow up to this report was undertaken

I am not aware of any further internal audit reviews of the rural properties after this date. In July 2001 the CEO commenced the process of engaging external rural property experts to formally review the rural properties owned and operated by NSWALC.

Investigation Undertaken

Significant time was spent to obtain an understanding of the rural property operations. NSWALC files and reports were reviewed. Discussions were held with Mr Richard Reid of Riverina FARM, the current external rural property managers. Two team members visited the rural properties of Kaituno & Uno in conjunction with the branch visit at Coonable.

Prior to the engagement of Mr Jeff Bradford as CEO in June 2001, Branch Managers managed the rural properties at a regional level. In ascertaining the current status of the rural properties and the reasons for their continued poor performance I have limited my review to the period following Jeff Bradford's appointment and the initial engagement of Riverina FARM Pty Ltd to evaluate the properties.

A review of the CEO's files on the rural properties together with the information supplied by Riverina Farms has produced a chronology of

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events that appears as Annexure 13.12. This chronology aims to summarise key documents and is not an exhaustive list of all the correspondence in the files reviewed.

The executive assistant was in the process of updating these files at the time of my review and as such it is possible that the missing documents will be located and filed at a later time.

Overview of farms

Reference was made to documents from the files of both NSWALC and Riverina FARM to document the improvement or decline of each rural property being externally managed from January 2002 to date. Full details of this review are provided at Annexure 13.13.

Significant Council Resolutions

During the 202nd meeting held between 12th and 16th May 2003 a delegation from the North West Region requested NSWALC to transfer back to the region the four properties that the sixteen LALC's in the North West region originally bought. The delegation noted that the LALC's in the region paid approximately \$2.1 million over the period 1984 until 1989 to purchase the properties. The delegation advised the meeting that precedence was set in 1998 when "Auley" was handed back to Balranald LLAC.

It was suggested by the delegation that the land not be transferred to an individual LALC but to a Trust comprising all the LALC's in the region. NSWALC was also requested to provide funding to meet a twelve months' budget and an incentive. The delegation also requested that NSWALC grant the machinery on the properties to the LALC's.

The Council later resolved the following: (CM202/50)

"NSWALC approve for Kaituna, Uno, Calooma and Nulty Springs to be transferred into a trust to be set up to include all the LALC's in the North West region as a divestment from NSWALC to the LALC's in the North West Region as recommended by the North West RALC and that the current assets located on the properties be granted to the Trust."

The board papers accompanying the minutes of the 202nd meeting of Council contain no paperwork to support the Resolution.

Section 3 clause 6.5 of NSWALC Policies and Procedures Manual (last revised in April 1999) provides the following guidance on meeting procedures:

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“Councillors should ensure that their decisions and actions are reasonable, and appropriate to the circumstances, based on a consideration of all the relevant facts and supported by adequate documentation.”

Subsequent discussions with Clr Trindall indicated that it is Council’s intention to transfer the remaining regional properties situated in the Western and Wiradjuri regions in a similar manner. He further advised that the documentation to establish the trust was currently being prepared by an external legal advisor, Mr Steven Goddard.

It is questionable whether this significant decision of Council has been made on the basis of an objective analysis of its benefits and costs, as required by its own policies & procedures manual, or rather on emotive grounds to correct a perceived wrong suffered by the Region as a result of the 1990 amendments to the Act. Clr Trindall admits the repatriation of this land is his personal crusade, however this leads to the possibility that actions will be taken without adequate care and consideration that may ultimately lead to the goal not being achieved.

It is my recommendation that the transfer of the rural properties does not proceed at this time. The establishment of the trust gives rise to significant legal issues that need to be resolved to protect the interests of LALC’s and their members. Also the operations require effective management and business plans and budgets. NSWALC has not requested or been provided with evidence that these exist. If the LALC’s are going to be presented with these assets NSWALC must be satisfied of what its ongoing financial support is going to be and that the LALC’s have the necessary controls and plans in place to successfully manage the transition and the ongoing operations.

Actual results for the nine-month period 1 October 2002 to 30 June 2003

The manager of financial operations has provided me with draft, unaudited financial results for the financial period ended 30 June 2003. The four farms reviewed generated a loss for the nine-months of \$676,956 as set out in the table provided at Annexure 13.14.

Total losses by the rural properties over the thirteen-year period are now close to \$10 million.

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Observations & Comment

General

1. The rural properties have operated without any current written policies and procedures for over a year.
2. Despite a history of losses, the current Council, elected in December 1999, have undertaken no independent review of the rural properties. The last review instigated by Council was in 1997 for which I have been unable to identify any follow up or remedial actions taken as a result of the matters identified.
3. Early in his appointment as CEO, Mr Jeff Bradford commenced the process of undertaking an independent review of the rural properties. This review process led to the restructuring of the rural properties section and the appointment of Riverina FARM Pty Ltd as independent farming experts reporting directly to the CEO.
4. The lack of a central filing system has meant NSWALC does not have a complete record of all documents in relation to the rural properties.
5. It took NSWALC a period of eight months, to approve and execute the consultancy agreement with Riverina FARM. Riverina FARM had been acting in its capacity as consultant to NSWALC throughout this period.
6. It is evident that NSWALC, with the assistance of Riverina FARM, were able to effectively leverage off the strengths of each of its properties during the difficult drought conditions prevailing during the 2002/03 year.
7. Since June 2002 written correspondence between NSWALC and Riverina FARM appears to be predominantly “one-way”. I have sighted very few examples of NSWALC acknowledging the monthly reports of Riverina FARM or providing written responses to direct queries or requests for approval on certain matters.
8. Riverina FARM has advised that they never received a reply to their correspondence to Mr Danny Rose during his period as Acting CEO (December 2002 to May 2003). This statement was confirmed with the current Acting CEO.

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9. In early 2003 NSWALC appears to have seriously damaged its reputation with a number of suppliers to the rural properties due to non-payment of invoices. This and a seemingly over-bureaucratic approach to approving the smallest expenditure appear to have resulted in many inefficiencies and costly delays.
10. The legality of NSWALC operating a business has been questioned. Notwithstanding this, the rural properties have attracted a significant amount of NSWALC's resources, both in money and time, which have been diverted from its core functions.
11. Council, in its current plans to transfer the rural properties back to LALC's through a trust arrangement, has not addressed the future viability of the properties, their future funding requirements and the obligation of the LALC's to retain the properties within the Land Council network.
12. I have obtained independent legal advice on the power of NSWALC to operate enterprises. This advice concurs with other external advice obtained by NSWALC that none of the functions of NSWALC directly give it the power to undertake a business enterprise on its own behalf. The power to undertake a business enterprise mostly arise, as being necessary for or incidental to, the performance of one of its functions. I believe it is appropriate for NSWALC to attempt to resolve its powers in this regard. Discussions should be held with the Registrar as to the appropriate course of action and may involve the Registrar seeking further legal opinion.

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Kaituna & Uno

1. Poor farm management decisions; late spraying and weed infestations, and poor rainfall resulted in the realisation of only 20% of the 2001 crop.
2. By December 2001 the structure of farm reporting to NSWALC through the Branch Manager had ceased to be effective.
3. The 2002 cropping programme, completed in June/July 2002, was undertaken in accordance with advice from the external farming advisor, Riverina FARM.
4. By September 2002 it had become apparent that drought conditions had caused the failure of the 2002 cropping program.
5. The 2003 cropping program was commenced without the use of fertiliser, against the advice of Riverina FARM. The lack of fertiliser will limit the ability of NSWALC to attain a maximum yield.
6. External contractors were not used for pre-sowing spraying of weeds, against the advice of Riverina FARM. This is despite inadequacy of the farm's own equipment. In July 2003, Riverina FARM was advising of continued weed growth invading the crop.
7. In June 2003, 128 cattle were relocated to Kaituna Uno from Barooga Karrai due to a lack of feed.
8. Draft management accounts of NSWALC for the 9-month period to 30 June 2003 reflect a loss of \$186,803 (including depreciation charge of \$110,010). This result reflects the failure of the 2002 cropping program.

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Barooga Karrai

1. Examples of poor farm management were evident in late-2001. The 2001 crop of wheat was suffering from an infestation of black oats and wire grass due to no pre-spraying being carried out. The property had been without water due to damaged water pipes. These pipes had not been repaired due to a lack of timely funding.
2. By December 2001 the structure of farm reporting to NSWALC through the Branch Manager had ceased to be effective.
3. The property suffered in the first half of 2002 from the inadequacies of its farm manager, Kevin Thurston, who was dismissed in July 2002.
4. During Mr Thurston's employment the property had been allowed to deteriorate. The homestead presented poorly, the additional accommodation block was in a very untidy state, the workshop was in disarray, the machinery shed was damaged by left over fertiliser, equipment was left in the elements due to the inefficient use of the hay shed, cropping equipment had not been maintained, chemical containers had not been disposed of correctly, 119 sheep had died due in part to a deficiency in diet with the remaining sheep suffering from a severe lice infection and internal fencing was in urgent need of repair.
5. It is a poor reflection on the internal controls of NSWALC that these matters required the appointment of an external farm advisor before they were discovered and addressed. This highlights the fact that NSWALC is not appropriately structured or resourced to effectively operate an enterprise in a commercial environment.
6. In October 2002 it had become apparent, as with Kaituna & Uno, that drought conditions had caused the failure of the 2002 cropping program. The 2002 crop was used for livestock feed and all sheep held at Appin were transferred to Barooga Karrai.
7. In January 2003 it was decided to rid the property of the majority of its livestock due to the lack of any sustainable fodder.
8. From February 2003 through to early July 2003, Riverina FARM sought approval or otherwise to proceed with the 2003 cropping program with approval finally being given in July.
9. Draft management accounts of NSWALC for the 9-month period to 30 June 2003 reflect a loss of \$374,782 (including depreciation charge of \$61,849). This result reflects the failure of the 2002 cropping program.

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Appin Station

1. In November 2001 the property had approximately 6,000 sheep and 100 acres of land under irrigation, of which 40 acres was used for Lucerne. No cattle were on the property at that time.
2. During the November 2001 inspection of the property, boundary fencing was considered poor and internal fencing in urgent need of replacement. Fencing remains an issue at Appin Station.
3. In August 2002 approximately 4,500 sheep had been shorn and were being fed on the Lucerne bales. Despite having cut thousands of bales of Lucerne (650 bales each cut) the property had no accurate count of the number of Lucerne bales cut, used as feed or sold to other properties. No income has been recorded by NSWALC for the sale of Lucerne to external parties during the 2002/03 year.
4. Allegations regarding private sales of Lucerne and fraud were made in late 2002 / early 2003. These allegations have not been raised specifically to me during this investigation. There is no record of NSWALC taking any action to investigate this complaint.
5. Riverina FARM had advised NSWALC as early as August 2002 for the need to erect a hay shed with a storage capacity of 50,000 Lucerne bales. To date, this recommendation has not been actioned.
6. By September 2002 the property was continuing to struggle with the drought described by locals as the worst in living memory.
7. In November 2002 approximately 2,500 sheep were mustered and transported to Barooga Karrai, The estimated loss suffered by NSWALC due to the drought was 2,500 sheep.
8. In July 2003 the property was recovering from the drought and recommendations were being made to re-stock the property.
9. Draft management accounts of NSWALC for the 9-month period to 30 June 2003 reflect a loss of \$164,064 (including depreciation charge of \$50,915). This result reflects the severe drought, the transfer of the surviving sheep to Barooga Karrai in late 2002 and the minimal amount of money (\$7,623) expended on maintenance during the period.

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Calooma / Nulty Springs

1. In late-2001 the property maintained 2,500 Damara meat sheep, 2,000 Merino ewes and 40 unmustered cattle. The property does not have a cropping program.
2. In August 2002 it was decided that the property would be used solely for feeding of stock on the Mulga trees during the drought.
3. An initial muster was conducted in January 2003 to transfer the sheep to Barooga Karrai with a complete muster planned for August 2003.
4. By July 2003, following drought breaking rains over the past few months, the property was recovering well with livestock currently held at Barooga Karrai to be returned to Calooma.
5. Draft management accounts of NSWALC for the 9-month period to 30 June 2003 reflect a profit of \$48,693 (including depreciation charge of \$24,218).

Recommendations

1. At this time NSWALC should not divest its rural properties to a trust on behalf of LALC's within a particular region.
2. A review of the repatriation of rural properties should be conducted to establish the appropriate method of returning them to the control of the LALC's in the respective regions. Consideration should be given to the LALC's holding the land as tenants in common and a separate management company being formed for the purpose of operating the farm pursuant to an occupation or share farming agreement.
3. NSWALC should immediately cease to be actively involved in the day-to-day operations and management of the rural properties. Management of the rural property section should be delegated to the external farm manager.
4. The external farm manager should be authorised to make day-to-day decisions and approve expenditure in line with a Council approved strategic plan and budget.
5. An imprest system should be established to ensure the external farm manager has access to cash flow as required.

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6. Suppliers should be paid promptly by the external farm manager rather than NSWALC.
7. The external farm manager should continue to provide monthly reports to the CEO of NSWALC.
8. The performance of the external farm manager should be formally reviewed by the Council on an annual basis.
9. Advice should be obtained on the power of NSWALC to operate the farming enterprise.

9.4 Fleet Management

Reason for Review

The addendum to the terms of my appointment as investigator specifically identified “Matters Involving Councillors” as an outstanding issue from the Report to Parliament of the Auditor-General for 2003 that is to be covered in the course of my investigation.

The Auditor-General raised concerns in respect to the following matters:

- One Councillor exceeded his motor vehicle budget by \$11,000 or 66.8%.
- Misuse of fuel cards and mobile phones.
- The majority of Councillors do not record details related to the use of their motor vehicles on motor vehicle running sheets, raising the following concerns:
 - Unauthorised journeys or journeys not on behalf of the Council cannot be identified.
 - An unidentified FBT liability for private journeys undertaken by Councillors may exist.

Overview

This review covers the area of fleet management, the other areas of Councillors expenditure are reviewed in Chapter 6.

Policy & Procedures

The Policies and Procedures manual refers to NSWALC’s “Fleet Management Procedures Manual”. The Fleet Management Procedures Manual is dated 1 March 1995 and has not been updated since that time.

The manual requires the following:

- Completion of a Motor Vehicle Running Sheet for each trip.
- When using petrol cards the driver should complete the appropriate details on the Motor Vehicle Running Sheet.

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The manual contains no requirement to maintain the current spreadsheets and files maintained by the Fleet Supervisor. Procedures to check for anomalies are not detailed in the manual. Current and adequately documented policies and procedures do not exist in the area of Fleet Management. The absence of documented policies and procedures means that when the Fleet Supervisor is absent there are difficulties in maintaining adequate control in this area. The Fleet Supervisor is aware of this issue, however lack of staff resources has prevented the documenting of the updated policies and procedures.

A draft "Driver Agreement" has been developed by the Fleet Supervisor in May 2003 enumerating the responsibilities of employees' allocated vehicles however this document has not been approved by the Acting CEO or Council.

The Fleet Supervisor maintains hard copy files for each vehicle, however most summaries and information regarding vehicles are maintained on Excel spreadsheets. These files are not linked and do not provide high level summaries of vehicle costs and usage. The Fleet Supervisor is recommending the introduction of dedicated fleet management software – Figtree Systems (FigFLEET). The approximate cost of the software is \$50,000 and the implementation has been delayed due to budgetary constraints. The 2003/2004 budget has made provision for this new system.

Previous Reports – Internal & External

The last internal audit review into NSWALC's fleet management section was reported on 5 December 2001. The thirteen (13) recommendations provided by internal audit were discussed with the Fleet Supervisor. Of the matters raised the following items remain issues to the effective functioning of the fleet management section:

Recommendation 7 – Insurance cover on motor vehicles. No confirmation of insurance being provided to the Fleet Supervisor by the broker or underwriter.

Recommendation 9 – Accident reports. Continuing issue of Councillors failing to provide accident reports.

Current vehicle changeovers

At the Council meeting held between 3rd~6th June 2003 an action sheet with an attached Resolution directing administration to trade-in the Councillors' vehicles was adopted. This changeover is being done together with a normal rollover of all Council vehicles.

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Branches normally have two vehicles; however this is now being reduced to one vehicle per branch. The general fleet for head office is being reduced from six to four vehicles. Discussions with the Head of Internal Audit indicated that no tender is required for the purchase of cars as all are acquired under government contract, i.e. the price is the same regardless of the dealer.

The Fleet Supervisor advised that public service policy is for changeover to occur after 9 months or 15,000 km. The current policy of Council is to changeover vehicles every two years or 40,000 km. Discussions with the Fleet Supervisor, together with a review of the March 2003 FBT fleet listing indicated that the majority of cars had reached 40,000km at that time. Vehicle changeover for both Councillors and branches appears to be in accordance with Council's policy of vehicle replacement after 2 years or 40,000 km. The delay in planned changeover was attributed to budgetary restraints.

At prior changeovers, restriction on the choice of make and model of Councillor cars was based on a price ceiling of approximately \$28,000. This meant that Councillors' cars varied between 6-cylinder and 8-cylinder sedans of different makes and in some instances 4WD vehicles were purchased. The policy in place for the current changeover is that all Councillors will be provided with either a Holden Berlina or Ford Fairmont and all branches with either a Holden Acclaim or Ford Falcon. The only exceptions being for Clrs Trindall, Murray and Ritchie who are allocated 4WD vehicles due to the state of the roads in their local areas.

Council does not have preferred suppliers but has in the past used Hawkesbury Holden and Thomson Ford for a large number of its vehicle purchases. The fleet supervisor advises that this is due to the following reasons:

- Availability of stock
- Close proximity and overnight services (Thomson Ford)
- Delivery of cars to NSWALC, on-site servicing and \$272 discount off government price (Hawkesbury Holden)

Vehicle Running Sheets

Vehicle running sheets are not being maintained as required by NSWALC. Running sheets/vehicle logbooks are required to be forwarded to the fleet supervisor by Councillors and branch officers each month. According to the Fleet Supervisor only Clrs Clark and Ardler provide running sheets to NSWALC.

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When this issue was raised with the Treasurer he acknowledged his own failure and the failure of the Executive to enforce the policies of Council. Discussions with branch managers also indicate a lax approach to this policy.

Fuel Costs

Councillors are provided with fuel cards. The Fleet Supervisor reviews monthly invoices for fuel usage and where charges appear anomalous they are referred to the CEO for follow up.

On the 2nd of June 2003 the Chairman referred a number of matters involving Clrs Griffiths and Murray to ICAC. Several of the items raised had been reported to NSWALC by the Auditor General following his audit for the year ended 30 September 2002. Instances of “extraordinary amounts of fuel” being purchased and excessive levels of tyre usage by Clr Murray were detailed.

A further possible example of excessive fuel use by Clr Murray has been identified. A copy of the May 2003 BP Plus invoice for Clr Murray shows the following transactions over 4 days – 30 April to 3 May 2003:

Date	Location	Receipt Number	Litres Purchased
30 April 2003	Wilcannia	003329	100.00
30 April 2003	Wilcannia	003330	94.53
2 May 2003	Wilcannia	003346	125.11
3 May 2003	Wilcannia	003351	100.00
			<hr/>
			419.64
			<hr/>

At an assumed average fuel consumption of 20-litres/100 km (based on average fuel consumption figures quoted by NRMA) Clr Murray travelled approximately 2,098 kilometres over the 4 days and each time filled his vehicle in Wilcannia. On 30 April it appears Clr Murray completed a roundtrip journey of approximately 500 kilometres before refilling his tank and during this journey no one else in Wilcannia filled their tanks (i.e. consecutive receipt numbers). The Fleet Supervisor has referred this invoice to the CEO for Resolution with Clr Murray.

In such instances where anomalies are identified the CEO will direct the Fleet Supervisor to obtain copies of the receipts and to check who has

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signed them. The Fleet Supervisor is currently in the process of investigating this matter.

Due to the failure of Councillors to remit running sheets it is difficult to ascertain whether or not travel undertaken is bona fide. This increases the time spent resolving such matters by both the Fleet Supervisor and the CEO. At this time the processes are neither efficient nor effective.

Telephone Costs

NSWALC is on a group business plan with its supplier. Councillors, Head Office Managers, Branch Managers and authorised staff are issued mobile phones on this plan.

All head office staff make a 10% contribution to their monthly mobile phone bills. Some Councillors and some branch staff make the 10% contribution. Clearly it is inappropriate to have an inconsistent treatment on the remuneration packages of different staff on similar levels. Councillors should also be treated in a consistent manner.

The telephone supplier provides monthly invoices in both hard and electronic versions. The former IT manager claimed NSWALC's IT system could not run the electronic billing system (EBS) reports. It appears that the current IT manager accepted this position without question. Inquiries made arising from my investigation indicated that the current version of the EBS software is version 7.6 and that Council has version 6.3. Arrangements have now been made by NSWALC to obtain the latest EBS software. The IT manager believes he has the last five months bills on CD ROMs but that the previous bills provided on floppy disks have been destroyed. Clearly Council has not been making the most efficient and effective use of the technology available to it to analyse the monthly mobile phone accounts.

Conclusions

Issues raised by the Auditor-General remain outstanding, namely:

- Concerns relating to the use of fuel cards.
- Majority of Councillors do not record details related to the use of their motor vehicles on motor vehicle running sheets.

Vehicle, changeover for both Councillors and branches appears to be in line with Councils policy of vehicle replacement after two years or 40,000 km.

Current and adequately documented policies and procedures do not exist in the area of Fleet Management.

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Vehicle running sheets are not being maintained as required by NSWALC policy.

Due to the failure of Councillors to remit running sheets it is difficult to ascertain whether or not travel is bona fide.

In analysing the monthly mobile phone accounts, Council is not making the most efficient and effective use of the technology available.

Recommendations

Policies and procedures in relation to fleet management need to be updated. The draft "Driver Agreement" developed by the Fleet Supervisor in May 2003 needs to be finalised and incorporated into the policies and procedures.

We support the recommendation of the Fleet Supervisor regarding the introduction of a specialised fleet management software.

Procedures need to be enforced to ensure Councillors and branch managers submit vehicle running sheets on a monthly basis e.g. withhold travel advances, cancel fuel cards etc. The Chairman must take responsibility to ensure Councillors comply with the Codes of conduct adopted by Council.

9.5 Mortuary Business

Reason for review

The addendum to the terms of my appointment as Investigator specifically identified the Funeral Benefits Scheme as an outstanding issue from the Report to Parliament of the Auditor General for 2003 that is to be covered in the course of my investigation. The Report to Parliament provides a commentary on the actions being taken to establish a Funeral Fund and included the commentary that “the payments also included a grant of \$94,000 to Glen Innes LALC to purchase a mortuary”

This issue was also identified during my discussions with the Councillors and staff of NSWALC. Given that the complaints related to the mismanagement of Council assets and there was an issue whether the nature of the transaction was within the statutory functions of NSWALC under the Act it was determined to be an emerging issue of sufficient merit to warrant investigation under my terms of appointment.

The purchase of the Mortuary Business is independent to the issues involving the Funeral Benefits Scheme.

Overview

In June 2002, NSWALC purchased an existing Funeral Business in Glen Innes, NSW. The amount expended on the purchase was \$94,393.06. In NSWALC’s statement of financial performance for the year ending 30 September 2002 the purchase price of the mortuary has been classified as a “funeral grant”.

Relevant Legislation

Section 106(1)(c) of the Act provides NSWALC with the function to acquire land on its own behalf or on behalf of or to be vested in a LALC and to transfer land acquired on behalf on a LALC to such a Council. As previously discussed unlike a LALC, the legislation does not confer on NSWALC the function of purchasing or operating an enterprise.

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Investigation Undertaken

Chronology

On 9 October 2000, during the 171st NSWALC Council meeting Council received a delegation of Messrs. Bob Kelly and Eric Toomey of United Monument and Masonry Service (UMMS). They sought financial assistance from NSWALC to purchase an existing mortuary in Glen Innes. There is no record of any papers tabled at this meeting in respect of this business proposal.

On 26 November 2001, at the 185th Council meeting, Council received a further delegation of Messrs. Bob Kelly and Eric Toomey of UMMS. The minutes of Council record the following:

“An existing Funeral Parlour was for sale in Glen Innes for \$100,000, that included the license, vehicles, plant and equipment;

- the owner had given a first option to buy;
- Running costs would be about \$60,000 making a total of \$160,000;
- A business plan was submitted to Council”

Council noted that ‘this issue is about two individuals who want a business’ It was suggested that the Council could issue a one off long term loan to these individuals for this specific purpose; and NSWALC would need a period of time to assess the feasibility and would discuss the matter further at their December meeting.

On 20 December 2001, pursuant to CM186/32, NSWALC Resolved to purchase the mortuary at Lot 11 Grafton Street, Glenn Innes for \$100,000 plus operational expenses of \$75,100. The funds were to be allocated from the budgeted funeral grant funds.

On 2 April 2002 the CEO wrote to the Chairperson, Mr. Towney to advise, “no feasibility study was undertaken nor business plan in place in relation to the proposed operation”. The CEO recommended that if the business was to be transferred to the Glen Innes LALC then that transfer should take place on completion of the purchase contract.

On 10 May 2002 contracts were exchanged.

On 22 May 2002, Woolf advised that the vendor had provided a warranty that the property complied with all Local Government Act and Public Health Act Regulations regarding a mortuary. He suggested that a specialist consultant familiar with mortuaries inspect the site prior to completion of the purchase.

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On 3 June 2002 Clr Briggs wrote to the CEO advising that he had met with Mr. Michael Arandale on 22 May 2002 regarding the sale of the funeral business to NSWALC and had been informed of the untimely death of Mr. Toomey. This letter attached correspondence from Mr. Arandale to Clr Briggs, that refers to the meeting between Briggs and Arandale on 22 May 2002 and refers to arrangements for the hand over and continuation of the business. It also raised a request to consider the subdivision of the block and the transfer of the “back portion of the block” in exchange for additional work to be carried out on the verandah and garages of the property.

On 26 June 2002, the CEO instructed the Northern Tablelands Branch Manager Mr. Robert Maynard to:

- Prepare an inventory of the property;
- Fax a copy of the list to NSWALC;
- Contact the solicitor; and
- Take possession and secure the property on completion.

On 28 June 2002 the business was settled for the sum of \$105,000 in accordance with the Resolution carried at the 186th NSWALC Meeting.

On 1 July 2002, Mr. Maynard wrote to the Executive Officer of NSWALC, Ms Kerri Wilkinson and advised that in his opinion the furniture, plant and equipment was over valued. Mr. Maynard also noted that the condition of the inventory was poor and some items were missing. Mr. Maynard stated that he was not a valuer, however he estimated the total value of the business should be between \$60,000 to \$75,000. He also noted that a proper valuation of the land, buildings and equipment should have been prepared.

On 29 August 2002 Mr. Kelly of Arlington Funeral Services wrote to the CEO and requested a meeting to discuss the leasing of the mortuary to him and Ms Stephanie Irving. On 12 December 2002, Clr Briggs wrote to seven (7) Northern Tablelands LALCs and advised, “the funeral business in Glen Innes is a potential opportunity for the LALCs to own and drive a business venture that is already set up if we wanted to”.

As at 21 August 2003 the business has not been transferred to Glen Innes LALC and remains unoperational.

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Arising from the visit by the investigation team to the Northern Tablelands branch office on 8 July 2003, Mrs. Leanne Kelly co-coordinator of Glen Innes LALC advised me that;

- The business is currently owned by NSWALC;
- The business has not operated since it's purchase;
- Mr. Bob Kelly is willing and able to operate the business; and
- Total expenses required to restart (capital) and operate the business are \$115,300.
- Funding will be required to be provided by NSWALC.

She also provided a copy of a letter dated 24 July 2003 addressed to the Acting CEO of NSWALC advising that the mortuary is in a state of disrepair, despite Glen Innes LALC sending numerous requests to NSWALC asking that the business be re-established.

Conclusions

NSWALC resolved to make a grant in respect of the acquisition of the business, although it is not clear who the recipient of the grant was to be (Kelly/ Toomey of UMMS or the LALC).

- no formal due diligence procedures were performed
- neither Council nor administration considered the limitation on the power of NSWALC to operate the business once it was purchased. No legal advice was requested on this issue
- no consideration appears to have been given to the restrictions on NSWALC under section 40C of the Act that the LALC must approve any disposal of land. The transaction was implemented as a purchase by NSWALC but with some intention to grant the business to the LALC. This has never been implemented.

There does not appear to be any correlation between the disclosure of running costs of \$60,000 referred to in the minutes of Council and the cashflow projections tabled to the meeting.

No budgets or business plans have been prepared by NSWALC.

The business has not operated since its purchase.

The business requires additional funds to become operational and this has not been included in the NSWALC budget for 2003/2004.

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The accounting treatment of classifying capital assets as a 'funeral grant' is incorrect. Assets should be capitalised until such time it is transferred as a grant. To date no action has been taken to correct the accounting treatment of the purchase in accordance with the Auditor General's Management Letter.

Recommendations

NSWALC needs to obtain legal advice to clarify its ability to own and operate a business either directly or via a management agreement with a LALC.

If NSWALC has the power to operate enterprises consideration should be given to legislative reform to ensure that power is removed. Operation of a business has wide ranging commercial risks, including product liability that may remain for many years. Any such exposure is an unnecessary risk to the statutory investment fund held on behalf of both current and future generations.

The statutory framework of Aboriginal Land Councils is not suited to the management of commercial operations. Decisions must be made by members at properly convened meetings. Extreme care should be taken before any businesses are purchased by these entities and careful consideration given to the exposure of their asset base to any claims arising from that business.

NSWALC should ensure that a properly completed business plan is prepared prior to the purchase of a business, preferably by a qualified individual;

NSWALC should ensure that due diligence is carried out prior to the purchase of a business;

The accounting treatment of the asset should be corrected to reflect the fixed asset purchased.

NSWALC must have a policy for submission based funding proposals by LALCs including suitable assessment criteria.

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9.6 Minimart

Reason for review

During my foundation research, issues were raised concerning management of a Minimart Complex in Tamworth (“the Minimart”) by NSWALC. Given the complaints related to the mismanagement of Council assets it was determined to be an emerging issue of sufficient merit to warrant investigation.

Overview

The Minimart property was transferred to NSWALC from the RALC as a result of the legislative reforms that occurred in 1990. The Northern branch of NSWALC was responsible for the management of the property and has been collecting rents from the tenants. In recent years the complex has been largely vacant and has sustained substantial damage that has not been repaired.

The Minimart was recently transferred to Tamworth LALC, although the LALC is currently in Administration.

Observations & Comment

Land Title search

A search of the Land Property Information database on 23 June 2003 indicates that Tamworth LALC owns the following properties:

Lot 501 DP 1012997; and
Lot 502 DP 1012997. .

Transfer of Property to Tamworth LALC

At the 172nd Council meeting on 5 December 2000, Council passed the following Resolutions:

“That the Northern Branch office arrange for the disposal of the vacant lot 502/1012997. NSWALC to recoup \$20,000.00 from the sale. The remainder of the proceeds to be split between the LALCs within the region” and

At the Council meeting on 6 July 2001, Council passed the following Resolution:

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“That the property known as Tamworth Minimart and flats be transferred to Tamworth LALC provided:

- That Tamworth LALC achieve a satisfactory audit;
- A property manager is engaged to manage the Minimart and Flats;
- That the other LALCs within the Northern region agree to the disposal of the Minimart to Tamworth LALC; and
- That Tamworth LALC consent to the disposal of the vacant block of land and the proceeds are split between the other six other LALCs in the region”.

At the Council meeting on 14 February 2003, Council passed the following Resolution: “that NSW Aboriginal Land Council approve the transfer of Lots 501 and 502, DP 1012997 (being the Mini Mart and adjacent vacant block), to the Tamworth Local Aboriginal Land Council”.

At the Council meeting on 16 May 2003, Council passed the following Resolution: “that NSWALC resolves to enter into a Management Funding Agreement with the Tamworth LALC through the Northern Region Branch office”.

The Act does not provide for a Management Funding Agreement. This Resolution is another example of the poor terminology and lack of clarity in a number of Resolutions passed by the current Council. At the date of this report, neither a Management Agreement or Funding Agreement is in place between NSWALC and Tamworth LALC.

Observations & Comment

A substantial period of time elapsed between the proposal by Tamworth LALC to take over the Minimart until it was transferred to the Tamworth LALC (from 5 December 2000 until 13 June 2003);

During this period of time substantial damage occurred to the property while it was under NSWALC’s control;

There is no indication whether the LALCs in the Northern Region agreed to the transfer of the Minimart to the Tamworth LALC as initially proposed, and

Either a Management Agreement or Funding Agreement should have been executed prior to the transfer of assets.

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We have been unable to establish whether the requirements of S40(1)(a) of the Act have been complied with by NSWALC. This section requires NSWALC to obtain the approval of the respective LALC.

Recommendations

NSWALC should ensure that section 40C(1)(a) of the Act is complied with prior to transferring property and evidence of this tabled to the Council Meeting at which the Resolution was made.

No business or asset should be transferred to a LALC subject to Investigation, Administration or cessation of funding;

No business or asset should be transferred to a LALC without an adequate business plan and financial plan for its operation; and

NSWALC should establish a suitable policy to cover submission based funding requests from LALCs.

9.7 NIIS Proposal

Reason for Review

This issue was identified during discussions with General Counsel and Councillors. Given the size of the proposed transaction it was determined to be an emerging issue of sufficient merit to warrant investigation under my terms of appointment.

Overview

National Insurance Intermediary Services Pty Limited (NIIS) was incorporated on 28 May 2001 and is a wholly owned subsidiary of the National Indigenous Development Alliance Limited (NIDA). It commenced operations as registered insurance brokers in October 2001.

Receivers & Managers were appointed to NIDA on 5 August 2002 by ATSIC under a registered fixed and floating charge. It appears ATSIC were owed between \$2.5 million and \$3 million.

The brokerages comprised three offices, one in Brisbane, Townsville and Perth. Total staff comprised six directors, 13 full-time staff and one part-time staff, of which only one was aboriginal.

At the commencement of the investigation NSWALC was still considering this investment. Negotiations concluded in the June 2003, with the Council withdrawing its expression of interest. Receivers & Managers remain in control of NIDA at the 1 August 2003.

A chronology of relevant events is annexed to this report as Annexure 13.15.

Consideration of Business/Investment Opportunity;

Clr Clark attended a meeting on 30 January 2003 with Clr Lester in Brisbane apparently on behalf of NSWALC. No minutes of this meeting are contained in the files maintained by NSWALC. Clr Clark has advised this meeting was to meet the Board of NIDA to discuss business opportunities. He understood the accountant and solicitor at that meeting were representing the interests of NIDA. Clr Lester has advised that at the time of the meeting he believed the solicitor was an employee of NIIS.

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Council considered this transaction at the 200th meeting on 10 February 2003 and subsequently at the 202nd meeting on 12 May 2003. The Council records disclose no business papers were tabled at those meetings in respect of this proposed transaction. At the earlier meeting a Resolution was passed to make an offer to purchase the brokerage business for an amount between \$2 - \$3 million. At the later meeting a Resolution provided NSWALC was to lodge an expression of interest to purchase the brokerage for the sum of \$2.3 million, subject to relevant due diligence.

The following extract from the formal expression of interests submitted to the Receivers of NIDA by Hogan Besley Boyd Solicitors (HBB) on February 14th 2003, sets out the nature of the proposed transaction;

“NSWALC proposes that the sum of \$2,100,000.00 be paid to the Receivers and Managers of NIDA in consideration for the following: -

- Assignment of any interest which is currently held by ATSIC under the terms of the Loan Agreement dated October 10, 2001 and with respect to Loan Account No. 110009 (including any additional loans, grants or other accommodation, including accrual of unpaid interest, provided by ATSIC in favour of NIIS at any time).
- Assignment of any right and interest which ATSIC may have under the provisions of the Deed of Charge granted by NIIS on October 10, 2001, registered by the Australian Securities & Investments Commission as Charge No. 833430.
- Transfer of all issued shares in NIIS to Newco for a consideration equivalent to their original subscription value of \$1.00 each.
- A suitable form of release by ATSIC in favour of NSWALC and NIIS with relation to any shortfall between the amount of \$2,100,000.00 in comparison with the total amount which may be owing to ATSIC by NIIS as at the date of assignment and transfer of the other assets referred to above.
- Contemporaneously with settlement of these arrangements, NSWALC will require the Board of Directors of Newco and NIIS to be reconstituted in an appropriate manner.”

This expression of interest also states that it is anticipated that NIIS will not generate significant profits in the immediate future and that NSWALC will provide additional working capital to NIIS to allow it to function more effectively

CM202/43 does not clearly disclose the details of the proposed transaction for which it is purportedly giving approval. Although the terms of the offer

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made on behalf of NSWALC represented a lending arrangement, the Council Resolution is framed as a purchase of a business. Discussions and memorandums between NSWALC employees and advisors in Sydney are all framed in terms of the transaction being the purchase of a business. No consideration appears to have been given as to the lack of power for NSWALC to operate a business. There has been no adequate explanation as to the way the motion was framed in the manner it was. Clr Lester maintains that Council was aware the transaction was a loan agreement and not the purchase of a business.

In addition no consideration appears to have been given by Council to the budget variances required to fund the purchase, the additional funding referred to in the letter of offer, or the potential impact on the earnings of NSWALC from this investment being non income generating for the foreseeable future. One would expect that the Council would have required the CEO to consider and report on these matters prior to committing to pursue this opportunity.

Clr Lester has indicated this apparent failure is explained by the intention that the loan form part of the SIF. As a result no budget amendment is necessary as it would merely be a reweighing of the “in house” investments managed by NSWALC. This recollection of the position may be supported by the fact the Chairman had requested Chifley Financial Services to comment on the proposal. I have been unable to locate a copy of the request for comments and only have the response provided by Chifley’s. This suggests NSWALC may have sought an opinion on the “prudent person test” to the proposed investment. However it should be highlighted that the advice relates to a purchase of a business and not a loan to a business.

The assessment by the Treasurer is an oversimplification of the position. Irrespective of the nature of the transaction and the manner of funding, appropriate due diligence and consideration of the financial impact is required.

If in fact it was proposed to be an investment of the SIF then the following matters needed to be considered;

- Did the investment fall within the existing investment strategy of the SIF
- Were funds available within the 10% “in house” management limits of the SIF
- The likely rate of return on the total proposed investment

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- The current returns being earned on the range of investments within the SIF
- The security and guarantees being offered to support the loan
- The underlying viability of the business and the risks associated with it

All of these matters would have required the Corporate Body to review and report back to Council prior to the matter being considered. There is no indication of such information being sought by the Council.

Although no correspondence has been identified, it would appear NSWALC received notification that its expression of interest dated 15 May 2003 was accepted and a request made for NSWALC to proceed with its due diligence

There are no records available to indicate why the due diligence review did not proceed or the reasons justifying the decision by the Acting CEO to terminate negotiations.

Payments Made

My investigations have not identified any payments made in respect of this proposed transaction including to HBB, NIDA, NIIS, or the Receivers & Managers in respect of this proposed transaction. HBB raised an invoice for work undertaken and it appears it was disputed and never paid.

Disclosure of interests by Clr Clark

A search of the ASIC records of NIDA revealed that Clr Clark was appointed as a director of NIDA on the 15 November 1999. He remained in this position as at the 1 August 2003. A review of correspondence has revealed that NIDA had requested NSWALC to provide a director to sit on its Board and Clr Clark was NSWALC appointee to the Board.

The minutes of the 200th Meeting 10th February 2003 disclosed Clr Clark moved Resolution 38 approving a bid of \$2-\$3million for NIIS & voted on the motion without disclosing any pecuniary interest.

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The minutes of the 202nd Meeting on 12th May 2003 are deficient and provide insufficient information to enable an appropriate review of the approval of the bid of \$2.3 million for NIIS. CM202/42 discloses eleven Councillors voted in its favour. The minutes for that day record Clrs Murray & Graf were absent due to health. The minutes do not record any Councillors leaving the meeting however only seven voted on CM202/43, with no abstentions recorded. As a result I am unable to determine whether Clr Clark was present and voting for this Resolution. There is no record in the minutes that Clr Clark disclosed his interest in NIDA, or absented himself from the Council Meeting while the motions were considered.

Although he was a nominee of NSWALC on the board of NIDA, in my opinion the appropriate course of action would have been to declare an interest and then request a Resolution of Council that he remain and vote on the issue. The appointment of a Receiver & Manager to NIDA and its related financial problems may give rise to concerns as to potential issues of self interest on behalf of the Councillor in ensuring NIDA settles its creditors. This concern could have been allayed if the appropriate procedures had been followed.

Adequacy of NSWALC Files on this issue

The CEO file provided to the Investigator comprised six documents as follows;

- 13/6/2003 Facsimile from NSWALC to Deloitte Touche Tomatsu
- 10/6/2003 Letter from Deloitte Touche Tomatsu to NSWALC
- 22/5/2003 Facsimile from Deloitte Touche Tomatsu to NSWALC
- 22/5/2003 Letter from Chifley's Financial Services to NSWALC
- 21/5/2003 Memo from NSWALC General Counsel to Acting CEO
- 11/4/2002 Letter from Newman Cameron Aust to NSWALC

This file is seriously deficient in that it does not include;

- instructions to the Council's solicitor,
- minutes of meetings held relating to the offer,
- a separate copy of the expression of interests dated 14 February 2003, or

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- any materials supporting the Resolution of Council to pursue the opportunity.
- copies of correspondence from the Receivers accepting the expression of interest and authorising due diligence to commence.

Legal Advice on Transaction

Both Clr Clark and Clr Lester maintained at the initial meeting in Brisbane they did not instruct HBB to attend. One may assume that they would then draw the conclusion that HBB were acting for one of the other parties at that meeting. It is unclear when the position changed and verbal instruction of HBB commenced, however by 14 February 2003 it must have been clear to Clrs Clark and Lester that they were instructing HBB.

Despite providing a number of letters to NSWALC relating to the expression of interest HBB have advised me in writing that they did not receive specific instructions from NSWALC. This is in clear conflict with the statement in the expression of interest lodged with the Receivers that confirms that they have been instructed by NSWALC and with HBB rendering an account to NSWALC for work undertaken.

It should be noted that all three letters in my possession from HBB to NSWALC were copied to;

- Mr Fraser Power (For distribution to the directors of NIIS)
- Mr Frank Newman (Newman Cameron Australia)
- Ms Anne Turner (Cordner Taylor Chartered Accountants)

Brian Francis Newman was appointed as a director of NIIS on 2nd April 2003. Newman Cameron Australia was one of the three brokerages that comprised the business of NIIS. Ms Turner appears to have been a professional adviser to NIIS.

I have been unable to determine why copies of this correspondence were directed to these three individuals, however it appears that HBB may have been also acting for NIDA or NIIS in respect of this transaction.

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On 11 March 2003 HBB invoiced NSWALC \$6,688.00 in respect of advice provided in respect of this transaction. The invoice covered work undertaken during the period 1 November 2002 to 10 March 2002, including liaising with the Receivers and receiving and reviewing draft agreements prepared by Freehills. When the Acting CEO raised the issue with Clr Lester he advised that he had not authorised the work that had been conducted. I understand that this account was never paid by NSWALC.

HBB have declined to provide me with any further information without an undertaking that I will meet their costs in doing so. In the circumstances I do not consider the issue warrants me incurring additional costs.

Although no loss has arisen, there are serious concerns in respect of conflict of interest and confidentiality in relation to this transaction. From the documentation it is clear the solicitors were purportedly acting for NSWALC in preparing and submitting the expression of interest. Further Clrs Lester and Clark have instructed those lawyers without ensuring;

- the appointment had been considered on merits
- the instructions were committed to writing
- due consideration had been given to the potential conflicts of interest that the lawyers may have had, and
- the Acting CEO, LSU or the Corporate Body was aware and actively involved in the process.

Role of Clr Lester

At this time it is not apparent why Clr Lester has taken such an active role in the progress of this issue. It appears Clr Lester has provided the only “independent” representation of NSWALC in the negotiations. It appears he has done this without the knowledge or assistance of the Acting CEO or the Corporate Body.

Further as Treasurer he has instructed an offer of in excess of \$2 million to be made on behalf of NSWALC without;

- any independent assessment of the value of the business
- any consideration of whether the transaction is within the legislative functions of NSWALC
- adequate consideration of the limited prospects of the business generating profits in the immediate future and the extent of the

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additional working capital requirements of the business that it was anticipated NSWALC would have to fund

- seeking the advice of the Corporate Body as to the impact the purchase will have on the budget of NSWALC
- seeking the advice of the Corporate Body as to the impact a \$2 million investment would have had on the SIF and its returns

Correspondence from Frazer Mayes Accountants suggests Clr Lester identified and instructed that firm to undertake the due diligence on the transaction. The subsequent memos between the Acting CEO to Clr Lester dated 27 March 2003 suggest that this firm was in fact recommended by HBB and developed the proposed terms of reference in liaison with Clr Lester, HBB and the accountant for NIDA.

In my opinion these oversights and omissions represent a significant failure by an individual holding the Executive position of Treasurer to meet the standards of performance expected of that role.

At the 204 meeting on 21 July 2003, Clr Lester advised that as NSWALC no longer had an interest in the brokerages he was expressing an interest in the Northern Insurance Brokerage through Wonnarua Nation Aboriginal Corporation.

Conclusions

NSWALC file appears to have been created after our appointment. There is no summary of the current position or outstanding issues provided. The file includes no record of the Resolutions of Council. Important documents are missing from this file, including relevant memos from the previous Acting CEO and it is an incomplete record of the nature and conduct of this transaction.

The records of the Secretariat do not identify which Councillor raised the issue or what documentation was considered before Council proposed to invest in excess of \$2 million. There does not appear to have been any consideration to the lack of power upon NSWALC to operate businesses in its own right, an issue that had clearly been considered by the current Council in regard to dealing with the issues of the funeral fund.

The fact that the business did not currently have offices or employees in New South Wales does not appear to have been a concern to the Council in its deliberations.

The records of the Secretariat are inappropriate and poorly maintained. Papers are merely archived in envelopes for individual Councillors. They

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are not adequately secured in a file and responses to correspondence are not attached to original letters.

It appears Council has followed its own agenda in the pursuit of this opportunity. It appears that Clrs Clark and Lester have driven this process, with limited input from the Corporate Body. Information in correspondence provided to them and minutes of meetings that they attended have not been furnished to the CEO or NSWALC administration.

There is insufficient information available to determine the reasons why the transaction was considered by NSWALC or why it was to be structured in the manner proposed. There appears to have been no consideration of how this opportunity fits within the long term strategy of NSWALC.

The formal Council Resolutions have been drafted in a manner that does not adequately reflect the nature of the transaction being proposed.

There is no adequate explanation of how the lawyers were appointed, for whom they were acting and how they were instructed in preparing and submitting an offer for the business.

Recommendations

That an overview of the files of NSWALC is undertaken and relevant documentation is consolidated into common files.

The Secretariat ensure all memos and correspondence of Councillors is also filed in a central location. An appropriate filing system is established and maintained for correspondence and minutes of meetings attended by Councillors.

Legal advice should be obtained for all proposals to determine whether NSWALC has the power to enter into the proposed transaction.

All Tabled Papers should be included in the archive records of Council.

The Council should adopt an appropriate Code of Conduct indicating sanction for Councillors that breach the rules regarding disclosure of pecuniary interests.

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The Council should conduct continuing education on pecuniary interests & conflict of interest. The Executive needs to ensure the pecuniary interest register is updated on a regular basis by Councillors, and each Councillor should be provided with a summary of their disclosed interests at least annually.

Instructions to lawyers must be obtained through the LSU.

9.8 Funeral Benefits Scheme

Reason for Review

The addendum to the terms of my appointment as investigator specifically identified the Funeral Benefits Scheme as an outstanding issue from the Report to Parliament of the Auditor General for 2003 that is to be covered in the course of my investigation.

The Report to Parliament provides a commentary on the actions being taken to establish a Funeral Fund but raised no issues of concern. There is no reference to the Funeral Fund in the Management letter from the Auditor General for the year ended 30 September 2002. The progress of the establishment of the scheme has been the subject of adverse comments in my foundation research and was identified as an emerging issue requiring further investigation.

Overview

NSWALC has considered establishing a Funeral Fund since the early 1990s. NSWALC has explored various options to establish a fund. Initially the operation was restricted by the limitations on NSWALC operating an enterprise and problems in having the Fund registered by the Department of Fair Trading. An attempt to create a fund through financial assistance to a LALC was ultimately subject to legal proceedings and closed. The focus of our investigation will be on the term of the present Council, being the period from 23rd December 1999 to date. I have not considered the terms or operation of any proposed fund but merely reviewed the process by which NSWALC has considered its options and effected the decisions it has made.

I note the purchase of the Mortuary Business in Glen Innes is a separate issue from the Funeral Fund.

At the date of my appointment the Funeral Fund was not operational. As at 30 June 2003 funds totalling \$209,645.79 remains in a separate bank account on behalf of members of the terminated fund.

At the conclusion of my appointment Council was proceeding to issue instructions to undertake an actuarial review of the PrefSure Proposal prior to recommendation to the Minister. I consider considerable analysis remains to be undertaken prior to the adoption of any proposal by NSWALC.

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Relevant Legislation

As a result of the amendments to the Act Section 106(1)(i) was introduced. This provision provides NSWALC with the explicit function to make grants or lend money to a funeral benefits scheme established for the benefit of Aboriginal persons. This power is subject to the approval of the Minister.

Previous Reports - Internal & External

There have been four independent reviews of the operation of the mortgage fund commissioned by NSWALC ;

Date	Author	Subject
19 April 2001	Phillips Fox Actuaries	Actuarial Review of NIDA Proposal For Funeral Fund
10 May 2001	Phillips Fox Actuaries	Actuarial Review of Funeral Fund Options
11 May 2001	Phillips Fox Lawyers	Legal advice on NIDA Proposal & Other Options
10 March 2003	KPMG	Actuarial Study Brief – Mortality Study

Phillips Fox Actuarial Review of NIDA Proposal;

This report concluded that the NIDA Proposal was unattractive and that NSWALC would be better off setting up a self funded (i.e. uninsured) plan. The report noted that they could advise on the options available for doing this if instructed.

Phillips Fox Actuarial Review of Funeral Fund Options;

This report assessed the costs and benefits of four options;

- Maintaining the current system of grants
- Increasing level of grants
- Accepting the NIDA Proposal
- Establishing a separate Funeral Fund

The report made no definitive conclusion although it noted that there was still uncertainty concerning the nature of the NIDA proposal and stated that establishing a fund is likely to be the soundest long term solution.

Phillips Fox Legal Advice on NIDA Proposal & Other Options;

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This report;

- assessed the NIDA proposal from a legal perspective
- commented on the power of NSWALC to establish a funeral fund under the existing legislation
- advised on whether NSWALC could make grants to LALCs that were then applied by the LALC to pay Funeral Fund Premiums of its members

The report concluded that they could not recommend the NIDA proposal, due to various shortcomings and the substantial risk of it being legally challenged. Further they advised that a Funeral Fund should not be established at this time and that NSWALC should seek amendment to the legislation to explicitly give them the power to establish a funeral fund.

KPMG Actuarial Study Brief

This project was restricted to providing a mortality study of indigenous people in NSW. They advised, “Due to various deficiencies in the death and population data for the indigenous population, we have concluded that KPMG Actuaries would have considerable difficulty in obtaining suitable, sufficient and complete data for a mortality study.” They completed their study relying on various ABS Studies and making additional assumptions and noted, “it is important to be aware of the variation in mortality rates that could exist.”

It is interesting to note that it appears NSWALC did not provide the actuaries with statistics from the actual grants made by NSWALC over the last ten years that they have been providing Funeral Grants, to assist with the assessment. They also did not provide them with a copy of the Mortality Report prepared by NSP Buck Actuaries at the request of NIDA.

Chronology

There can be no argument that NSWALC has not been efficient and effective in its consideration and implementation of a Funeral Benefits Scheme for indigenous people. There has been a significant investment of time and money stretching back to 1990, including an appeal to the High Court of Australia. In my opinion today a significant amount of work remains to be done by NSWALC before the Scheme comes into operation. During the term of this Council there have been at least four proposals considered, being NIDA, Guy Carpenter, PrefSure and Holdfast. In addition

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suggestions have been made that the entire scheme should be retained in house and NSWALC self insure the payments.

A table setting out some of the relevant events in the development of the FBS in chronological order appears as Annexure 13.15.

Contract with NIDA

There appears to have been no contractual document entered into by NSWALC and NIDA prior to 4 June 2002. Despite there having been significant resources in time and effort invested in the project there is no indication NIDA would receive any payment other than its commissions on the premiums paid once the Fund was established. It appears that immediately following Council's Resolution to accept the NIDA proposal it raised an invoice for the costs incurred over the preceding two years. This invoice is dated 9 May 2002 for \$167,500 plus GST, totalling \$184,250, and covers a twenty one month period from July 2000, to April 2002. This invoice was not attached to the cheque requisition form of NSWALC.

The Council Resolution approving payment to NIDA, being CM191/42 on the 3 May 2002, is worded as follows;

“That NSWALC accepts the terms and conditions developed by NSWALC and NIDA, including an up front payment of \$104,000 to NIDA to kick start the funeral fund as from the 16 May 2002”.

On 23 May 2002 NSWALC was in the process of instructing Phillips Fox to prepare a Deed of Release in favour of NIDA that provided for payment of \$104,000. I have been unable to locate the letter of instruction to the lawyers, however the files contained a number of emails between NSWALC and that firm. This Deed was approved by NSWALC and sent to NIDA on 24 May 2002. A cheque for \$114,400, being \$104,000 plus GST of \$10,400, was included with that letter despite no agreement having being signed. The MFO of NSWALC had indicated to the then CEO in a memo dated 23 May 2002 that NSWALC would require a tax invoice for this amount and the cheque should be released once NIDA had signed the agreement. It appears this advice was ignored. Clearly the MFO did not have the invoice at the date of the memo, however the invoice from NIDA is dated 20 May 2003 and date stamped received by NSWALC on the 22 May 2003.

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NIDA did not accept the deed of release as proposed. In a fax from NIDA to Clr Clark dated 3 June 2002 it is apparent that NIDA understood that the payment of \$104,000 was to be for an “interim management contract ... to start to develop NSWALC Funeral Benefit Management Systems...” and that they believed approval of State Councillors for payment of the invoice for \$167,000 was still being sought. Rod Williams from NIDA then sought clarification of the position from Clr Clark. Subsequently the CEO and Secretary executed an alternative deed on behalf of NSWALC. This deed disregarded the draft deed prepared by the solicitors for NSWALC. There is no indication on the files that this deed was submitted to the solicitors to review and there is no adequate explanation available from the file to determine why this deed was executed. The invoice attached to the payment voucher is the later invoice and not the original invoice to which the release related. I have no record of a credit note issuing in respect of the subsequent invoice for \$104,000.

The initial proposal recommended by NIDA provided for NSWALC to pay three years premiums up front at a significant cash outlay. It appears NSWALC was advised that this was an underwriting requirement of Citicorp. Subsequently both the MFO and a representative of Chifley’s discussed the matter with Citicorp who advised that no such underwriting requirement existed. It appears this apparent misrepresentation has been the foundation of the mistrust and reticence of the Corporate Body to progress any proposal supported by GCC and Mason.

Guy Carpenter & Co

Guy Carpenter & Co (GCC) was a subsidiary of the Marsh Group of companies. They are insurance brokers who were acting for NIDA in March 2002. It appears that after the collapse of NIDA, Guy Carpenter retained Andrew Mason as a consultant in an attempt to keep developing the Funeral Fund Proposal.

It appears that around August 2002 GCC submitted a marketing proposal to provide assistance to NSWALC in developing a “Self Insured Funeral Program” as approved by Council. GCC quoted \$55,000 plus GST to undertake this assignment. This proposal was accepted in early September 2002 and the sum of \$60,500 paid on the 5 September 2002.

I have received a personal memo prepared by the MFO dated 5 September 2002 relating to the process of approval of this payment. He maintains this cheque was authorised by him at the direct instruction of the then CEO Mr Bradford, who refused to delay the payment until his concerns were resolved.

In a memo dated 21 October 2002 General Counsel wrote to the CEO advising that the document submitted by GCC was a “broking proposal”

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and that they were not providing a model or structure for the Funeral Benefits Scheme. This is contrary to the terms of their assignment.

On 29 October 2002 GCC wrote to NSWALC expressing their concerns as to the delays in implementation of the Fund and acknowledging their existing role involved;

- the development of procedures and documentation
- development of a risk management strategy
- development of a marketing strategy
- to brief legal and actuarial advisors on the establishment of the trust.

They confirmed that they would not be responsible for setting up the trust or for determining the initial pricing and that they were to simply develop operational management systems. I have been unable to locate any report or final product arising from this project. No one in the organisation has been able to confirm that any report was in fact received.

It appears NSWALC should approach GCC to determine what work was in fact undertaken and seek a refund of the monies paid if the assignment was not completed.

Role of Clr Clark

A search of the records of NIDA held at ASIC has revealed that Clr Clark was appointed as a director of NIDA on the 15 November 1999. He remained in this position as at the 1 August 2003.

Clr Clark considered he had an interest sufficient to warrant a disclosure of a pecuniary interest on 14 May 2001 when he declared an interest relating to a proposal by NIDA for the Funeral Fund. However he spoke at 188th Meeting on 7 March 2002 regarding the Funeral Fund and the premium funding and he voted on a funding proposal that approved a \$5.7 million loan to pay a premium to NIDA without disclosing an interest. He also spoke at the 191st Meeting on 3 May 2002 regarding the Funeral Fund and NIDA and voted on a proposal that approved a \$104,000 payment to NIDA without disclosing an interest. Receivers & Managers were appointed to NIDA on the 5 August 2002.

On the 3 June 2003 a director of NIDA issued a facsimile to Clr Clarke discussing the apparent confusion in respect of the monies payable to NIDA and asking him to “please advise me on how I should approach NSWALC on this matter. I would like to get your interpretation before I make direct contact with Kerri.” I have no information that would enable me

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to determine what further negotiations and discussions were conducted prior to settlement of this matter.

This matter is also discussed in the chapter of register of interests in Chapter 5.

On the 24 February 2003 Clr Lester authorised Mason to proceed and instruct KPMG to prepare an actuarial study. This decision was taken without the knowledge or consent of the Acting CEO, Danny Rose.

Role of Mr Andrew Mason

Despite the concerns of two CEOs and General Counsel, NSWALC continues to utilise the services of Mr Andrew Mason (“Mason”).

Mason was originally the National Business Development Manager employed by NIDA. His personal profile in the materials produced by that company suggest he has a background in the insurance industry. As a result of this role he was contracted by GCC to act as a liaison between GCC and NSWALC to assist with the development of the funeral program. No information is currently available as to the terms of his retainer with GCC. It is not clear from NSWALC files when this arrangement ceased.

The arrangement between NSWALC and Mason is dated 19 December 2002. There is no record of any review of his qualifications or experience prior to execution of this agreement. There appears to have been no consideration of whether this consultant has professional indemnity insurance. It appears he was appointed merely because of his long record in acting for external parties in negotiating with NSWALC and not as a result of any genuine attempt to review the merit of the appointment. This lack of transparency has left Councillors open to criticism.

The contract was prepared by General Counsel, who raised concerns as to the content with the Acting CEO as he was not instructed on the terms by NSWALC but by Mason himself. This approach only adds to the concerns regarding transparency and due process in this arrangement. I note that on the same date Patrick Woods & Co Solicitors on behalf of NSWALC received instructions to prepare a similar agreement, however these instructions were withdrawn later the same day. This highlights the problems faced by an organisation if there is no centralised control of briefing external lawyers.

On 4 March 2003 NSWALC received an additional invoice from Cloudscape Pty Ltd on behalf of Mason. Both the MFO and the Acting CEO raised concerns regarding the work undertaken and the expiry of the contract entered into in December the previous year. The invoice is signed by the Treasurer and marked “Supported”.

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Mr Mason issued a memo to the Secretary setting out the proposals from actuaries. It appears Mason was instructed to prepare the brief and to provide a recommendation on the actuaries that should be employed on the assignment. As he was not under contract at the time there must be concern as to his ability to make that selection based upon the best interests of NSWALC. In selecting KPMG, Mason has not explicitly considered the disclosed conflict of interest and its potential impact. He also appears to have given significant weighting to the short time frame in which KPMG can deliver its analysis although it is not clear why that deadline is so critical.

Mason is no longer under contract to NSWALC although he retains a continuing role with NSWALC in a voluntary capacity reporting directly to the Treasurer. There is no contract or terms of reference for the advice that he is providing and no agreement regarding the confidentiality of information NSWALC made available to him. This is clearly an inappropriate relationship.

There is no record that Mason has clearly indicated what remuneration or commissions he will be entitled to if the PrefSure proposal is accepted. PrefSure have advised me that they have “an informal relationship” with Mason but have not provided any additional information on any financial reward that may arise from the successful adoption of their program.

The Act has since October 2002 provided that consultants must disclose any pecuniary interest if advice is given on any matter at any meeting of the Council. My review has failed to identify any disclosure of a pecuniary interest by an external consultant since the date the amendments became effective. In presenting the analysis of the PrefSure proposal to Council on the 14 February 2003 there is no record of any disclosure by Mason of a pecuniary interest.

In my opinion Mason should not be utilised as a resource unless;

- he is subject to a clear contract for service or
- he has disclosed the party that he is acting for, what his role is and what the financial arrangements of that relationship are.

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Role of Clr Lester

At the 175th Meeting of Council a sub committee was established to progress the establishment of the Funeral Fund. Clr Lester was elected to this committee and has subsequently taken an active role in the progress of this issue. It appears that Mason has been reporting to Clr Lester directly largely to the exclusion of the Corporate Body.

At a meeting on 19 August 2003 Clr Lester and Clr Trindall were having continuing dialogue with Mason and were in the process of instructing PWC Actuaries to provide advice on the PrefSure proposal. This is a further example of where Clr Lester has failed to appreciate the separation of power between the Councillor and Corporate Body. Given this behaviour continued to occur during the period of my investigation when all Councillors were intimately aware of the attention being focussed on their conduct I have serious concerns as to the ability of the current Executive to lead the Council and the organisation through the structural changes required to implement effective governance practices.

Adequacy of NSWALC Files

The inadequacy of the filing system has been identified in earlier Chapters. The records relating to the Funeral Fund are no exception. There were significant materials missing from the records of the CEO and LSU including but not limited to;

- letters of instructions to external consultants and advisors
- costs agreement with Phillips Fox
- responses to correspondence
- reports from NIDA
- submissions made on behalf of Council
- all legal advice relating to the Scheme

The files are unindexed and not in date order. There are no control schedules or work papers that enable a quick assessment of the current status of the project. The efficient and effective management of a complex project such as this one involving a number of people and issues requires effective project management. The files reflect that this has been absent.

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Absence of Any Tender Process

From my review of the files on the Scheme it does not appear that at any time during the currency of the current Council has NSWALC set out a clear brief of what it actually wants in a Funeral Benefits Scheme and then advertised for expressions of interest to establish the Scheme within its own parameters. All four firms who have contributed during the last four years have been selected with little or no objective review of the merit of their appointment. In the draft Ministerial Briefing prepared in February 2003 NSWALC states, "Throughout the three year development of this program, over eight APRA licensed life insurers were approached to see whether they could provide the unique, broad form insurance facilities sought by NSWALC". Evidence of this process is not currently available from the files of NSWALC.

I have been unable to locate any engagement letters issued by NSWALC to NIDA, GCC, PrefSure or Holdfast that explicitly states the terms of the instructions as to what is to be provided. This leaves the entire process open to criticism. It should be clear to NSWALC that if the process is not transparent then the necessary Ministerial approval is going to be significantly more difficult to obtain.

Despite the previous concerns and delays experienced in this project over a long period the organisation is not learning from its mistakes and developing systems, policies and procedures to ensure it does not make the same mistakes again. Internal legal advice has been provided that the scheme should be put out to tender. This advice has been ignored and continues to be ignored.

Accounting Treatment of Related Expenditure

A review of the general ledger for grants for funeral funds revealed consultancy expenses have been posted to this account.

In my view this treatment is incorrect and inappropriate as it overstates the grant allocation and misstates the consulting fees incurred. These consultancy fees are required to be separately disclosed in the annual accounts if over the \$30,000 threshold. The fact that the purchase of the Mortuary Business came from monies allocated to the funeral grants budget does not equate to the purchase being recorded as a grant rather than an asset in the general ledger.

At this time the subsidiary control register of the monies retained on trust do not equate to the general ledger. It appears no attempt has been made to resolve the issue. Further it appears that interest earned on the bank account of the fund is not apportioned to the existing members and the contributions of "ex members" are not set off against the grant made on

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their death. This results in the same balance in the trust fund despite funeral grants being made.

Current proposal - PrefSure Life Limited

The current proposal being considered is from PrefSure Life Limited.

The original proposal provided for a total premium payment to PrefSure of \$3,588,000 in year one and \$2,511,600 in year two. Taking into account members contributions and a profit share rebate back to NSWALC PrefSure was budgeting for the net cost to NSWALC at the end of year one being \$378,100 and in year two a surplus of \$73,352 would be generated and available for repayment to NSWALC.

The current proposal appears to require payment of \$1,140,000 being \$285,000 per quarter.

Conclusions

It is not in dispute that NSWALC has the power to establish a funeral fund and that such a fund would be an immense benefit to the indigenous population. However there has been a significant waste of resources, in both time and money, in the development of the scheme.

The CEO files appear to have been created after my appointment. It is broken into annual divisions but documents are not filed in date order and some papers are under the incorrect divider. There is no summary of the current position or outstanding issues provided. No record of Resolutions of Council is included in the file. The two LSU files are in slightly better order and include an index of documents, but it has not been kept up to date. There is no summary of the current position or outstanding issues provided. No record of Resolutions of Council is included in the file.

There was no control file on the overall conduct of the Funeral Benefits Scheme that included all relevant materials relating to the funeral fund or that provides an overall review of the present position of the Scheme. There were relevant documents not included in either set of files and it appears some relevant documents are missing from both files.

Despite numerous advices both internally and externally Council has continued to follow its own agenda in the establishment of a Funeral Benefit Scheme. In some instances Council has taken control of issues to the exclusion of the Corporate Body.

The Funeral Fund Committee has met on numerous occasions and made recommendations to Council, but no minutes of these meetings have been prepared and no records of the reports and information considered at those

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meetings in formulating recommendations have been retained by the Secretariat.

Council has adopted Resolutions without due consideration of the financial impact of their decisions.

NSWALC has not sought clear statements from its consultants on the nature of the financial relationships between them and the insurance companies or insurance brokers proposing the arrangements.

Council have repeatedly failed to consider the obligations under the General Purchasing Delegation in respect of consultancies and services in relation to the Funeral Benefit Scheme. In particular in respect of the contracts with NIDA, Mason and GCC written bids should have been obtained from a minimum of three consultants. In respect of the current proposal to use PrefSure it appears this contract should have been submitted to the Department of Commerce to operate a public invitation for tenders.

No letters from Cloudscape appear on letterhead or are signed by Mason. The correspondence appears as either print outs of electronic documents or memorandums. There appears to have been no consideration of whether this consultant has professional indemnity insurance.

This lack of transparency has generated a great deal of criticism and mistrust as to the financial relationship between the service providers and Council. I have not identified any evidence to support suggestions of any wrong doing. Given that no fund has been established there appears to have been no deliverable achieved that would trigger any commission or payment.

Recommendations

Any further action on the Funeral Benefits Scheme should be deferred until a new CEO has been appointed.

NSWALC should review the figures appearing in Mason's analysis and identify the costs of total funeral grants made over the last five years exclusive of any consultancy fees.

NSWALC should determine what funds it is prepared to commit to obtaining professional advice on the establishment of a scheme and how this commitment is incorporated into the current budget.

NSWALC should determine what funds it is prepared to commit to establish a scheme and how this commitment is incorporated into the current budget.

NSWALC should put this contract out to full public tender.

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NSWALC should select by appropriate means a team of lawyers and actuaries to advise them on the establishment of a scheme. This should include establishing the appropriate terms of a tender and to assist in reviewing the submissions and selecting a candidate. The terms of reference for the tender should include an assessment of both an internally managed scheme and an externally managed scheme.

With the assistance of its selected advisors NSWALC should tender for expressions of interest in operating a scheme, compare the responses and determine which system to pursue.

The responsibility for development of the Scheme should be delegated to the CEO and Councillors should immediately cease to have a day-to-day role in the progress of this matter.

CEO should review the files to determine what action, if any, is required to claim back any monies paid where services may not have been rendered.

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9.9 Mungindi LALC and the Glanville Property

Reason for Review

The Auditor General in his Report to Parliament for 2003 referred to the increase in long term loans to Mungindi LALC (MLALC). He stated “in January 2002, the Council secured the previously unsecured loan.” Reference is also made to additional advances of \$393,000 such that the capped limit of the principal of \$1.6 million had been reached. Given the size of the loan and the currency of the transaction it was determined to be an issue of sufficient merit to warrant investigation under my terms of appointment.

Overview

MLALC approached NSWALC for a loan of \$350,000 to develop the Glanville property. Council approved this loan on 30 May 2000 (CM168/11). The Resolution required a feasibility study to be done and that the cost of obtaining that study would be borne by NSWALC.

A management agreement dated October 2000 was prepared and was executed on behalf of MLALC by the Chairperson and Secretary of the LALC. The execution was not witnessed and the agreement is not executed by NSWALC. There is no indication that this document was tabled to Council for approval or execution.

A second management agreement dated 2001 also exists that has been signed and initialled by various persons although it is not clear in what capacity they have signed. The agreement does not appear to have been executed or sealed by NSWALC.

A chronology of the relevant Resolutions of Council is contained in Annexure 13.16.

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Relevant Legislation

Section 106 provides:

Functions of the Council
(cf former section 23)

1. *The functions of the New South Wales Aboriginal Land Council are as follows:*
 - a) *with the agreement of a Local Aboriginal Land Council, to manage any of the affairs of that Council,*
 - b) *to make grants or lend money to, or invest money for or on behalf of, Aboriginal persons,*

Relevant Former Legislation

The Aboriginal Land Rights Regulation 1996 set out the model rules applicable to LALC's.

Rule 26 provides:

26(5) the Treasurer or, in the absence of the Treasurer, the Chairperson must present to the Council all bills and accounts to be approved for payment and full details of all approvals must be entered in the minutes of the meeting.

26(6) A bill or account must not be paid by or on behalf of the Council unless approved for payment in accordance with sub rule (5)

Policy & Procedures

Policies and Procedures relevant to LALC's are set out in chapter 20 of the Policies and Procedures Manual. As previously reported this was last revised in April 1999.

The following policies set out in section 20.2 are relevant:

- "That all requests from LALCs for NSWALC to assist them, must be in writing. NSWALC must then advise requests in writing to the Regions." (14/2/90 CM63/14);
- "That submissions for funds to acquire properties or businesses not be addressed unless a valuation certificate and a copy of feasibility studies are attached" (13/5/92 CM87);

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- That any funding submissions received after 30/6 of each year be deferred for consideration until the commencement of the new financial year to allow Council to perform its statutory duties” (30/6/92 CM88)

Previous Reports - Internal & External

Mr Terry Millott of the Land Rights Unit prepared a report on the review and assessment of the Glanville property development that was submitted to the 177th meeting of Council held on 14-18 May 2001.

Hassall & Associates Pty Ltd prepared a report on the “Assessment of Irrigation Development at Glanville Mungindi”. This report is undated but appears to have been completed in July 2001. This report estimated costs to complete the development at \$1,448,240 and projected residual income, after the sharefarmers entitlement, and before interest and running costs to be \$184,812. Based on these estimates the period required for NSWALC to recover the principal cost of the development was calculated to be 7.8 years. With the increase in costs and interest being charged on the facility I envisage that the repayment period will be well in excess of fifteen years.

The report clearly indicates there was money wasted correcting the deficiencies in the initial development. The report indicated that a benchmark cost to develop a Greenfield irrigation site was \$3,000 per hectare. The cost of the Glanville development was in the order of \$3,738 per hectare. The additional costs are attributed to the limitations of the design and the costs to bring the original stage one development up to an adequate standard.

“The initial development (Stage 1) appeared to have lacked the necessary planning, foresight and expertise. There could have been steps and expertise employed in the planning stage of the development to prevent additional costs, particularly the striking of sand during the building of Dam 1, which then lead to the redevelopment , Stage 2.”

Sims Lockwood was also commissioned to prepare a report on the Glanville Project. This report was dated 26 August 2002 and tabled to Council at its 195th meeting held on 26 August 2002. The executive summary of this report and its recommendation are extracted and attached as an Annexure 13.21.

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Investigation Undertaken

No significant investigation of the viability of the project was undertaken. My investigation comprised a:

- Review of the existing reports prepared by LRU and external service providers;
- Review of Council Resolutions relating to Glanville property development and any relevant Council business papers;
- Review of the documentation supporting payments made in respect of the development;
- Discussion with the sharefarmer MJR Farming on the current status of the development and the proposals for future works;

Loan Approval Process

The Treasurer, Clr Lester, is recorded in the minutes of Council meeting 168 as suggesting "...that Mungindi LALC need to look at different options to have the property up and running and to submit a proposal to NSWALC." A short break in the meeting then occurred. After the meeting recommenced Resolution CM168/11 was passed endorsing in principle a loan of \$350,000 to MLALC. No Councillors are recorded as voting against this motion and it is not clear how the earlier advice of Clr Lester suggesting a proposal needs to be submitted was dealt with;

Council did not action its own Resolution CM168/11 that required a feasibility study to be carried out before loans were advanced.

There is no documented policy to cover specific purpose funding to LALC's incorporating eligibility and assessment criteria. Consequently, submissions are not made in accordance with any accepted framework and are dealt with on an ad hoc basis. The decision making process of Council fails to display the required level of transparency especially in the allocation of the scarce financial resources of NSWALC.

Such objectives were previously contemplated in NSWALC's "Beyond the Sunset" document where it was stated:

Objective 2.3 provides:

Submission based funding – available to fully functioning LALCs for special projects of land acquisition, development and business enterprises;

Objective 9.5 provides:

Encourage LALCs to make submissions to NSWALC for funds for land development projects;

However it appears that very little has been done since that time to articulate the action plans required to implement these objectives.

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Observations & Comment

The files maintained by NSWALC are poorly maintained and incomplete. There is little documentation on files to indicate that NSWALC complied with its own policies and procedures in regard to providing funding to MLALC. Specifically there are no written applications from MLALC and no feasibility assessments for the project.

Subsequent internal and external investigation reports refer to a lack of proper management and control in the development of the Glanville property. Considerable amounts of expenditure were committed to this development without the existence of appropriate documentation. The following comments are relevant:

“Documents examined during the course of the investigation show that payments have been approved and made without the proper existing internal controls being followed by some Councillors and staff. This is of particular concern when Councillors would (or should) not only have been aware of the Resolution detailed ... but perhaps more importantly been aware of the necessary controls required for the approval of expenditure. In fact documentation discovered during the course of the investigation reveals that some payments appear to have been made without the knowledge of Council as a whole and after direct contact by the service providers with various Councillors.”¹ and

“It is also of considerable concern that payments of substantial sums have been made without adequate supporting documentation.”¹

It is significant to note the role of Councillors in directing payments to be made without the appropriate documentation and usual checks and balances. On 4 December 2000 Council passed the following Resolution; (CM172/51)

“NSWALC advance an amount in line with the submitted budget to Mungindi LALC to resolve the farm difficulties associated with water holding capabilities that was not foreseen in the original contribution to Mungindi LALC and to allow them to become self reliant by cotton farming, at the Treasurer's discretion and as set out in the budget tabled at this meeting”²

¹ Sims Lockwood Report on the Investigation of the Glanville Project August 2002 page 10

² Council Meeting 172 Resolution 51

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The use of the phrase “*at the Treasurer’s discretion*” is unfortunate however I am of the view that this is not meant to empower the Treasurer with a discretion to overlook usual accounting internal controls and documentation requirements.

There is no correspondence on file to confirm the prior agreement by MLALC to increase the scope of this development and the additional borrowings that would be required to complete the works proposed. It is also apparent that suitable Management and Loan Agreements had not been properly executed prior to funds being expended on behalf of or loaned to MLALC.

NSWALC has registered a Caveat No 7908953A over the properties disclosing its interest as “Mortgagee pursuant to Loan Agreement dated 3 May 2001”. It is not apparent that the requirements of S40D of the Act have been complied with. This section requires a meeting of MLALC to be held specifically to approve entering into a mortgage and for NSWALC to also approve the proposed mortgage.

During discussions with the sharefarmer I was advised that he had indicated to NSWALC that an additional amount of approximately \$400,000 is required to complete the development of the project. Clr Trindall has confirmed he is aware of the proposal but at this time Council have not considered the matter further.

Recommendations

Council should review and update its policies and procedures manual regarding loans to LALCs. Suitable guidelines and criteria setting out the basis and process for funding submissions to be made to Council should be established.

Requests for financial assistance should only be considered and assessed based on satisfactory due diligence being undertaken.

Management Agreements should be reviewed to confirm compliance with the requirements of the Act.

Management Agreements and Loan Agreements should be executed prior to the release of any special purpose funding.

10 Tax Issues

10.1 General

Reason for Review

The impact of taxation on the day-to-day operations of NSWALC is complex and involves a broad spectrum of taxes relating to income, goods and services, and employees, including significant reporting obligations. The relevant tax statutes impose significant obligations on the Council and the Executive, who are in turn reliant on the experience and skills of staff involved in the reporting process.

The terms of my appointment require me to investigate outstanding issues raised by the NSW Auditor-General who referred to the Fringe Benefits Tax liability of NSWALC in his 2003 Report.

NSWALC has not recorded a liability for Fringe Benefits Tax in its financial report for the years ended 30 September 2002 and 30 June 2003. At the time of my appointment the status of NSWALC for tax purposes has not been confirmed by the Australian Tax Office ("ATO"). Due to the importance of this status to the tax obligations on the organisation, I determined to examine this area in some detail.

Overview

NSWALC has claimed refunds of imputation credits received from investments. These refunds are quite substantial and the ability to claim such credits is based upon NSWALC being Income Tax Exempt, the status of which needs to be endorsed by the ATO.

The Council has received \$1,045,475 in refunds from the 2002 financial year and \$1,059,343 from the 2001 financial year. The Council has completed the 2003 application for refunds of imputation credits and intends to claim \$1,560,703.

Charities that have been endorsed as Income Tax Exempt Charities can apply for refunds of imputation credits.

NSWALC has been endorsed as an Income Tax Exempt Charity being a charitable fund established by will before 1 July 1997.

Observations & Comment

The calculations for the refunds appear to be correct. The requirement to be able to apply for refunds of imputation credits is that the entity needs to be endorsed by the ATO as either an Income Tax Exempt Charity or a Deductible Gift Recipient.

While the Council has been endorsed as an Income Tax Exempt Charity, that endorsement was based upon the incorrect selection of exempt status. According to documents from the ATO, the exempt status is based upon the Council being a charitable fund established by a will. It appears as though the original application was completed incorrectly.

Recommendations

Clarification of the income tax exempt status of the Council should be made with the ATO. The ATO Non-Profit Centre has informed me that the best course of action would be to send a letter to the Centre explaining that the current notice of exempt status has some incorrect information on it regarding the classification of NSWALC as a fund established by a will.

In addition, the ATO advises that charities with an income tax exempt status should be reviewing this status each year. A proposal should be tabled at a Council meeting each year showing reasons why the Council should still be exempt. Standard questionnaires are available from the ATO to assist in this process.

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10.2 Fringe Benefits Tax (“FBT”)

The Auditor-General's report over a number of years has indicated that the Council has not recorded a liability for FBT. The Council believes that, in view of the changes to the Act, advice provided by Queens Council (QC) in 1996 and a Council review of decisions taken by the ATO in other jurisdictions, it will ultimately be exempted from the requirement to pay FBT. Even if NSWALC is found to be exempt from FBT, the employee's reportable fringe benefits still need to be recorded on that employee's PAYG Summary each year. As such, a review of the Council's FBT calculations of reportable fringe benefits and reasons for exemption have been made.

Overview

NSWALC believes that it is a Public Benevolent Institution (“PBI”) and thus exempt from paying fringe benefits tax. A review of the process of why the Council believes that NSWALC is a PBI has been reviewed as well as any calculations made in relation to Reportable Fringe Benefits and any potential FBT.

PBIs that are employers may be liable for FBT. PBIs are entitled to an exemption from FBT, subject to capping thresholds of \$30,000 grossed up value of benefits to each employee. The capping regime began from 1st April 2001.

A PBI is a non-profit institution organised for the direct relief of poverty, sickness, suffering distress, misfortune, disability or helplessness. The characteristics of a PBI:

- it is set up for needs that require benevolent relief,
- its dominant purpose is providing benevolent relief,
- it relieves those needs by directly providing services to the people suffering from them,
- it is carried on for public benefit,
- it is non-profit,
- it is an institution.

The Metropolitan Local Aboriginal Land Council received PBI status from the ATO in November 2000.

The objects of NSWALC were amended last year. The new objects now form part of the Act. The former objects stated:

“The objects of the Council are as follows:

- *to improve, protect and foster the best interests of the Council’s members and all Aboriginal people within NSW.*
- *to acquire land in any way authorised under the Act.”*

The new objects state that:

- *“The objects of the New South Wales Aboriginal Land Council are as follows:*
- *to improve, protect and foster the best interests of Aboriginal persons within New South Wales, and*
- *to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales.”*

The independent audit reports since 1998 have indicated that there is uncertainty regarding the Council’s liability in respect of fringe benefits tax.

Observations & Comment

The Council received notice from the ATO in March 1995 that they were not exempt from FBT. On advice from a QC that they were a PBI, the Council continued on the basis that they were exempt from FBT. The QC advice did not discuss reasons why the Council should disregard the decision by the ATO.

At the present time it does not appear that the ATO have issued NSWALC a FBT assessment for outstanding FBT returns.

The ATO were also waiting until a few cases were finalised so they could issue a public ruling on PBIs. The final ruling regarding PBIs was issued in June 2003.

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Possible arguments for PBI status:

- Indigenous organisations have been mentioned in the ATO ruling TR 2003/5 as being possible PBIs.
- An ATO private ruling stated that particular LALC was a PBI.
- The Council has received endorsement from the ATO as an Income Tax Exempt Charity.
- The *Northern Land Council v Commissioner of Taxes (NT) 2002 ATC 5117* case held that a LALC was a PBI for payroll tax purposes.
- The current objects of the Council demonstrate that the purpose of the Council is for benevolent reasons.
- Advice from a Queens Council in 1996 indicated that the Council was a PBI.

Possible arguments against PBI status:

- Initial advice from the ATO was that the Council was not a PBI
- The private ruling was for a LALC which has different responsibilities than NSWALC.
- The Income Tax Exempt Charity Status was endorsed by the ATO under the incorrect provisions.
- The Northern Land Council case referred to LALCs.
- The independent audit report has indicated that there is inherent uncertainty regarding the Council's position in respect of FBT.
- The current objects were amended only in October of last year.
- The government wishes to make amendment to the law so that all tax-exempt concessions will need to be endorsed by the ATO.

Recommendations

Submission to the ATO should be made as soon as possible. The ATO's initial decision was that the Council was not a PBI. The QC's advice did not discuss the consequences of disregarding an ATO decision. The amount of FBT payable may be quite substantial if the ATO stands by their original decision. There may also be high penalties involved due to the Council disregarding the decision by the ATO. The amount of potential liability should also be calculated to determine the extent of the liability if the ATO determines that the Council is not exempt from FBT.

If the ATO does indicate that NSWALC is not exempt from FBT, returns for prior years will need to be completed. Salary packages and policy would also need to be amended to take into account the FBT that NSWALC would now be liable for.

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10.3 Goods & Services Tax (“GST”)

The Council obtained a private ruling from the ATO regarding GST and grants to LALCs. Initially the ATO said on 29 June 2000 that GST would not apply. This decision was reversed on 11 September 2001. The ATO also reviewed a BAS in September 2001 and found that the Council was claiming input tax credits when they were not entitled to do so. This practice is still continuing.

Overview

The ATO issued a final report in June 2003 regarding a review that was done in September 2001. This review uncovered the fact that the Council was incorrectly claiming input tax credits on expenses that were paid on behalf of the LALCs. The Council also claimed input tax credits on invoices regarding funeral grants where the invoice was not made out to NSWALC.

The Policy and Procedures Manual has not been updated since the introduction of the GST.

A GST Awareness program was provided in April 2000. In this program Shane James from the ATO advised that where NSWALC paid expenses on behalf of the LALCs, the LALCs would claim the input tax credits where appropriate. This advice was not taken up by NSWALC.

Six GST monthly accounts were examined on an exception basis. Approximately 48 Monthly accounts have been completed to June 2003. Of the GST accounts reviewed there has been a possible excess claim of credits of approximately \$78,400, not including CTP insurance, accruals or input tax credits claimed on LALC expenses. This is an average of \$13,075 per month. If this is representative since the introduction of the GST, NSWALC could have a potential liability of in excess of \$625,000 that may need to be paid back to the ATO. The average claim on funeral grants per month was approximately \$6,300.

Conclusions

The issue regarding the claiming of credits on funeral expenses seems to have been resolved. There did not appear to be any claiming of input tax credits on funeral grants in the June 2003 BAS. The problem is that prior Business Activity Statements ("BAS") have not been adjusted.

The regional branch meeting on 12th August 2003 does indicate that a process regarding direct payment of expenses for LALCs is being developed that abides by the GST law. A formal process has not yet been documented. At present the Council has been claiming input tax credits on expenses paid on behalf of the LALCs. The Council has also been paying for expenses such as wages and rates where no GST has been claimed. The ATO have stated that the payment of expenses on behalf of a LALC is treated as a grant that is a taxable supply. The ATO state there are effectively two different transactions. One transaction is the grant of money in which the LALC must issue the Council a tax invoice for the Council to claim any credits. The grant will be a taxable supply even if the payment is for wages that is not subject to GST. The other transaction is the payment of the expense in which the LALC may claim input tax credits if it is entitled to do so. (i.e. GST will not be claimed on rates or wages). It should be noted that some invoices from the LALCs were not in the correct format.

Some new staff members may not be familiar with GST and the applicable codes to use (GST free, GST inclusive, GST exclusive).

Input tax credits have been claimed in relation to financial supplies (i.e. investments). Financial supplies are input taxed supplies. An entity should not claim input tax credits in relation to input taxed supplies. However, if the input tax credits that relate to the financial acquisitions (expenses paid in relation to making of financial supplies) are under \$50,000, the whole amount of the credits may be claimed. If the credits are over \$50,000 a reduced credit may be allowed.

The investment and management expenses shown in the last Annual Report show those expenses are over \$500,000. This may indicate that the input tax credits in relation to those expenses are over \$50,000 and therefore the Council may not be able to claim the full input tax credits on those expenses.

When there has been an over claiming of input tax credits a credit adjustment is usually made. This credit is added onto the income side of the business activity statement. The other side of the journal adjustment is made to increase the expense. The BAS may therefore create the impression of income that is greater than income actually received.

If the credit adjustment relates to an expense the credit should reduce the input tax credits claimed not to increase GST paid. The ATO uses the BAS

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information to check other information sent to the ATO. Given that the Council is Income Tax Exempt the risk that the ATO would be concerned about this minor technicality is low.

The ATO does appear to be assisting the Council regarding GST by having workshops and field staff available to visit the Council. However, it did take some time before a final letter was sent to the Council (June 2003) regarding errors found in the September 2001 BAS.

The GST claimed on the BAS comes directly from the Attaché GST account. There are some adjustments regarding branch expenses that may not be sent to the head office on time. Calculations of other fields in the BAS are compiled from a spreadsheet that uses several different supplier reports. The calculation of acquisitions with No GST or GST-free receipts appears to be calculated working backwards from what the GST balances say. This procedure may not calculate the correct level of supplies or those supplies that were not subject to GST. However, this information is used by the ATO for statistical purposes only and how the GST is captured is the main concern.

Some grants such as funeral grants would not be subject to GST as the recipients would not be required to be registered and there is no supply involved. Other grants such as to the LALCs would be subject to GST. There is no policy in place that shows what items are subject to GST and what items are not. A review of Council Meeting minutes also shows that when grants are given in most cases there is no mention of whether or not GST is applicable. In one particular case (NAIRLA sporting grant) there appears to be an over claim of close to \$20,000. In relation to funeral grants a review of some GST Accounts shows a possible over claim of an average of approximately \$6,000 per month. This practice continued until June 2003.

It was found that input tax credits were being claimed in relation to expenses associated with the mortgage loans. Payments associated with the mortgages are loan movements and any payments should be treated as an advance of the total amount and not as an expense that has GST attributable to it. This practice has now been stopped for some loans (Travellers) but continues for other loans (Kestral). In relation to the Kestral loan it appears that at least \$115,000 has been over claimed in input tax credits. There is no policy in place for the employees to check the correct treatment of GST regarding mortgages and other transactions. In 2002 it appears as though the employees completing the loan spreadsheets were treating GST differently than the employees entering the data in Attaché. This inconsistency may be caused by the lack of documented procedures.

Some monthly GST accounts also showed that GST was being claimed in relation to CTP Insurance. Input tax credits on CTP insurance were not allowed to be claimed until 1st July 2003.

From the above conclusions and investigations it can be seen that NSWALC could have a potential liability of at least \$625,000 because of over claiming of input tax credits.

Recommendations

Appropriately trained and experienced staff need to be placed in the appropriate reporting roles to ensure that tax records are properly maintained and obligations reported in accordance with statutory requirements.

Input tax credits should not be claimed in relation to direct payments for LALC expenses. This should be an advance on the usual grant at which time NSWALC can claim the credits. The LALC can claim the input tax credits itself if the invoice is issued it regardless of who actually pays the expense. This process should be adequately documented and be made available to all branches. All branches should also arrange for the 2-day ATO Workshops to be conducted in their region. This will assist LALCs in the change to the new process.

When claiming input tax credits, invoices should be checked to see whether they comply with rules regarding a tax invoice. If the invoice is incorrect the supplier should be notified. An invoice not in the correct form authorised by the ATO may jeopardise the claiming of input tax credits in relation to that invoice. The move to recipient created tax invoices ("RCTI") may solve this problem. However, finance staff has indicated that further staff would need to be employed and the RCTI puts more responsibility on NSWALC instead of the LALCs.

The Policy and Procedures Manual should be updated to include the changes that have occurred to the operations of NSWALC due to the introduction of the GST. This may assist new staff in their orientation to the procedures of NSWALC. The Manual should also indicate that when the invoice has been made out to another entity other than NSWALC then input tax credits may not be claimed. It should be noted in the Manual as to the correct accounting treatment for the payment of expenses in relation to collection of mortgages. These are treated as an advance and no GST should be claimed.

The policy should also review the treatment of grants including a list of what grants that have GST attached. Council needs to take internal guidance on this issue from the appropriately responsible staff. When Councillors are making Resolutions regarding the payment of grants the implications for GST purposes need to be discussed.

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There may be an issue regarding the claiming of credits in relation to investment and management fees or other expenses incurred in relation to financial supplies (investments/mortgages). This area should be reviewed regularly given the high amount of investment expenses.

A reconstruction will need to be made to all the BAS since 1st July 2000. The ATO have already found the error relating to the claiming of credits in relation to direct expenses paid on behalf of LALCs and payments made in relation to funeral grants. Other errors may include the following:

- claiming credits on sporting grants where no entitlement to claim exists
- claiming credits on advances on mortgages
- claiming credits on CTP Insurance
- claiming credits regarding financial supplies

The ATO have advised that the errors in relation to these matters will need to be corrected by 31st August 2003. These errors demonstrate NSWALC's inability to determine when input tax credits may be claimed as input tax credits appear to have been claimed incorrectly in other situations such as with mortgages and sporting grants. Further guidance from the ATO and financial advisors should be sought as to the correct treatment of various transactions. Once the correct treatment has been obtained the policy and procedures manual should be updated and staff should be trained regarding any changes to current practice.

11 Other Matters

11.1 ICAC Issues

Reason for Review

The addendum to the terms of my appointment as investigator specifically identified seven recommendations from ICAC investigation report dated April 1998 titled “Enquiry into Aboriginal Land Councils in New South Wales” as an outstanding issue that is to be covered in the course of my investigation.

Overview

In April 1998 ICAC released its first report on the Enquiry into Aboriginal Land Councils In New South Wales. This report made twenty-six recommendations on how to improve the Aboriginal Land Council system in NSW.

In delivering his report Commissioner O’Keefe made the following comments:

“The implementation of recommendations is the critical phase in determining the long term success of the project. It is crucial that there is follow up to ensure that people involved in Aboriginal land councils know that corrupt conduct is unacceptable and that it will be addressed.”

“Only time will tell how effective ICAC’s investigations and this Report will be in bringing about much needed, much wanted, change for the better in Aboriginal land councils in New South Wales.”

Previous Reports - Internal & External

In October 1999 ICAC released an Implementation Progress Report detailing its assessment of the adequacy of the actions that had been taken by NSWALC to implement its recommendations. In the Foreword to the report the Commissioner notes “ICAC’s recommendations were adopted by the Government, the DAA, and the Office of the Registrar and initially in part, but later fully, by NSWALC.” I have not sought to review the process by which NSWALC considered the recommendations however in my opinion the delays in implementation by NSWALC partly reflects an underlying perception that some of the recommendations are inappropriate and should not, or could not, be implemented by NSWALC. Further details are provided in the following analysis.

Chapter 12: Summary of Key Recommendations

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The Commissioner also notes that:

“Self –interest, maintaining entrenched positions and power bases are antithetical to success – indeed, they underlie the very culture which the recommendations made in April 1998 seek to change.

Unless the leaders of the Aboriginal people give appropriate leadership, unless they demonstrate that they prefer the good of Aboriginal people generally to their own personal interests, unless their conduct is such that it can be used as an exemplar for others, it is likely that the process of change for the better (if it occurs at all) will be slow. In the meantime, the sense of frustration previously demonstrated by Aboriginal people will be maintained and cynicism and despondency are likely to replace the enthusiasm with which Aboriginal people have greeted ICAC’s endeavours on their behalf”.

In his analysis of the extent to which NSWALC has implemented the proposals the Commissioner states;

“NSWALC has not satisfactorily addressed the majority of questions asked by ICAC in relation to the progress made towards implementation of the recommendations. From the material provided by NSWALC it would appear that the current management of the organisation, including the Council, is unable or unwilling to meet basic reporting requirements.

Policies produced by NSWALC in the Policies and Procedures Manual as evidence that it has addressed particular recommendations, are ineffective in that practical guidelines for operation of the policies have not been provided”.

In November 2000 ICAC approached NSWALC to provide a further report on the implementation of the recommendations made. A reply was provided to ICAC in February 2001. This response was published on ICAC Website.

In June 2003 ICAC approached NSWALC for a further report on the implementation of the twelve recommendations that ICAC considered are the responsibility of NSWALC. A draft response was provided to me on 22 August 2003. A copy of this report is annexed as Annexure 13.20.

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Investigation Undertaken

Rather than focus on the twelve recommendations as an end in itself, the approach of my investigation has been to undertake a review of the organisation and any emerging issues that have arisen. This has ensured the focus of the investigation has been on current issues rather than those that were raised over five years ago. Upon completion of the substantive investigation, my team turned its attention to the recommendations made by ICAC and reviewed the implementation of those recommendations, whether the recommendations remain relevant and whether any failure to implement the recommendations has had any significant impact on the organisation. This review is limited by the scope of my terms of reference that restricts my report to the activities of NSWALC itself and not the individual LALCs or other external organisations.

The result has been that a significant number of the problems identified by ICAC remain unresolved and there is little evidence of any improvement in the organisational culture and attitudes within the Land Council network. I will deal with each issue separately using the recommendation numbering from ICAC Report for ease of reference.

11.1.1 Publicise Records of LALC Meetings

This recommendation was not specifically referred to in the Terms of Reference of the Investigator.

Recommendation 9: Develop Councillors' Code of Conduct and Review Pecuniary and Conflict of Interest Provisions.

This recommendation was not specifically referred to in the Terms of Reference of the investigator. Currently the Council is actively developing a code of conduct in conjunction with the Registrar. At this time a copy of the proposed rules is not available.

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11.1.2 Annualise expenses of Councillors

This recommendation was specifically referred to in the Terms of Reference of the investigator.

Councillor expenses and remuneration are currently reported in the annual report in total. ICAC recommendation to disclose payments to Councillors individually has not been adopted and details of any irregularities are not disclosed in the accounts. Voluntary disclosure has now been replaced by a statutory obligation under Section 161(3) of the Act.

The disclosure of individual remuneration of Councillors is a significant additional disclosure that would not be required under generally accepted accounting standards. Current disclosure rules for listed companies have recently been extended to cover disclosure of the individual salary packages of the top five remunerated individuals within the organisation. I believe that if NSWALC had wanted to display leadership in its governance procedures it should have accepted the opportunity to voluntarily comply with this recommendation rather than wait for a legislative amendment.

Interestingly no mention has been made of disclosing the outstanding debts and loans to Councillors. I recommend that debts and loans to Councillors should also be separately disclosed in the annual accounts. The Chairman's Report should also comment on:

- the manner in which these debts have arisen
- the steps being taken to extinguish the liabilities, and
- the compliance of individual Councillors to agreed repayment arrangements.

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A more difficult issue is the recommendation by ICAC that any irregularities in Councillor allowances should be disclosed. This issue has not been considered in the draft responses currently proposed by NSWALC in respect of this recommendation. The annual report is a public document and such a disclosure may well raise concerns regarding issues of due process, natural justice and claims of political manoeuvring. Although I recognise the need for transparency I believe that this part of the recommendation may not achieve the practical result it is intended to. Implementation and enforcement of appropriate governance and internal controls should be sufficient action to satisfy the concerns of ICAC. I note that the Chairman of NSWALC has referred matters to ICAC since the date of my appointment. I believe it is inappropriate for this matter to be canvassed in an annual report prior to ICAC investigation being completed. In my opinion publication of the existence of an ICAC referral against an unnamed Councillor would also bring inappropriate and destabilising pressures to bear on the organisation as a whole.

In my opinion there is little practical utility in having the Audit Office conduct a regular review of Councillor expenses. This is a function of internal audit. An effective system of internal audit is a cornerstone of any corporate governance structure and I believe this should be developed for the long-term benefit of the organisation rather than investing additional resources in the external audit function.

Councillors have entered into a number of questionable transactions in relation to their allowances and grants during the current term of Council. If an effective code of conduct had been in place NSWALC would have been in a better position to deal with these breaches.

11.1.3 Establish a Dispute Management System

This recommendation was not specifically referred to in the Terms of Reference of the investigator.

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11.1.4 Codify the Position & Function of LALC Co-coordinators

This recommendation was specifically referred to in the Terms of Reference of the investigator.

The implementation progress report comments that ICAC is disappointed that NSWALC has not demonstrated commitment to the implementation of this recommendation. I believe there are arguable reasons for not following this recommendation. If NSWALC did not wish to implement them it had a responsibility to adequately explain the position to ICAC and investigate other means of satisfying the underlying concerns of ICAC. NSWALC has failed to do either. I note the draft response to ICAC goes part of the way to clarifying this position.

The recommendation provides that funding provided by NSWALC for coordinator positions should be contingent upon proper compliance by the LALCs with certain minimum employment standards. Unfortunately NSWALC only provides direct funding for these positions in very limited circumstances. With the additional regulatory provisions being incorporated into standard Funding Agreements I perceive that it is going to be increasingly difficult to get any fully funded LALC or LALCS that have adequate internal funding to voluntarily agree to the execution of a Funding Agreement. This is because LALCs are passionate about their right to self-determination and independence provided under the Act. Given the implementation of controls via funding agreements will be a long term process, an interim measure must be to communicate the benefits of voluntary adoption of this policy, to ensure branch offices clearly understand and communicate support for the voluntary adoption of the policy by LALCs and to have auditors report on the uptake of the policy by LALCs in the annual management letters.

The failure to implement this recommendation affects the local Council network more than NSWALC itself. However the failure to adequately explain to ICAC the significant issues involved reflects very poorly on the senior management and the executive of NSWALC.

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11.1.5 Limit scope for office bearers and staff holding dual positions

This recommendation was not specifically referred to in the Terms of Reference of the investigator.

11.1.6 Adopt best practice corporate governance

This recommendation was specifically referred to in the Terms of Reference of the investigator.

In my opinion no significant progress has been made in respect of this recommendation in the five years since the initial report by ICAC. However a number of the issues of concern have been determined by the amendments to the Act. The draft responses currently proposed by NSWALC in respect of this recommendation indicate that the Registrar will now be responsible for developing the codes of conduct for RALCs and LALCs. Further NSWALC has received a grant to develop a model LALC business plan.

Clearly there are significant shortcomings in the corporate governance of NSWALC. The nature and impact of those shortcomings are identified throughout this report. The draft response is inadequate as it fails to mention any actions planned by NSWALC to respond to its own significant governance issues. A clear action plan and implementation timetable is needed to provide some support for proposition that the Council is committed to change.

11.1.7 Improve branch office support to LALCs

This recommendation was specifically referred to in the Terms of Reference of the investigator.

In my opinion no significant progress has been made in respect of this recommendation in the five years since the initial report by ICAC. The draft responses currently proposed by NSWALC in respect of this recommendation fails to acknowledge the delay in responding to a significant issue, central to the existence of NSWALC. In the interviews with Councillors nearly all mentioned the need for NSWALC to focus on the

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support of LALCs as its core function and to apply its resources accordingly. However this rhetoric is not reflected in practice.

My team have interviewed all but two branch managers of NSWALC and there have been consistent statements on the lack of support of the branch network by NSWALC. Delays and failure of responses, lack of resources, lack of training and actions and comments of Councillors contrary to NSWALC policies or direction are common themes.

There appears to be little recognition that the existing branch structure has been inherited from the legislative amendments in 1990 whereby RALC assets were transferred to NSWALC. Since that date there appears to have been little or no review of the manner the branch offices operate and what branch structure would deliver optimal support to the LALC network.

The draft responses currently proposed by NSWALC in respect of this recommendation is again inadequate. It should be noted that the Alitek report was dated June 2002. My report to the Minister relates to a historical review of operations with a focus on the efficiency and effectiveness of NSWALC. It should not be used as the basis for a business plan and will not substitute for Councillors developing an action plan to move the organisation forward.

The Hawkless report was initially commissioned to review the organisational structure for the purpose of reducing costs. The study expanded as the assignment progressed to develop a proposed structure that not only reduced costs but also improved;

- Council's support for LALCs
- Council's ability to implement the Amendment Act, ICAC recommendations and NSWALC Business Plan.

Hawkless recommended the decentralisation of NSWALC operations by the creation of three zone offices in addition to head office. All branch offices were to be retained but the accounting staff moved into the zone centres. However no consideration was given to whether the location and coverage of each existing branch office was appropriate. A commentary on this proposal is outside the scope of this report

There remains significant work required in this area that will have to be initiated once the plan for the network has been resolved.

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NSWALC provides no indication or undertaking to ICAC as to when these policies will be prepared or implemented. Resolution of this issue and implementation of an appropriate plan has the potential to make a significant positive impact on the organisation and the ALC network. Implementation of a poorly considered plan that does not have the active support of the Councillors will have the potential to cause irreparable damage to the reputation of the organisation within its staff and the wider network.

11.1.8 Allocate resources through strategic planning

This recommendation was not specifically referred to in the Terms of Reference of the investigator.

11.1.9 Audit Office to supervise LALC Audits

This recommendation was not specifically referred to in the Terms of Reference of the investigator.

Given that no definition is prescribed in the regulations NSWALC must take a leading role in determining an effective criteria to determine what constitutes a “satisfactory” audit and communicate the fact to LALCs and supervisory authorities. I am satisfied that there needs to be some degree of discretion retained by NSWALC, however the exercise of this discretion must be transparent and well communicated.

The significant issue that has been identified in my review is the professional performance of the existing auditors. I have reviewed the auditor checklist and believe it will not ensure the compliance of the accounts to generally accepted accounting standards. Unfortunately this is a sad reflection on my profession. I recommend that arrangements be made with the CPA and Institute of Chartered Accountants for a selected number of the audited accounts be submitted each year to an appropriately qualified professional to ensure they comply with the standards. These bodies ran a similar program previously for publicly listed companies whereby CPE points were allocated to members for conducting reviews. The approach should be based on a 3-5 year program aimed at improving the quality of their members on the basis of my findings that a significant number of the previous audits were deficient and did not comply with standards. This should be able to be achieved at no costs to NSWALC and will avoid the need for additional costs in getting an external consultant to undertake the assignment.

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11.1.10 Clarify accountability relationships between NSWALC & LALCs

This recommendation was specifically referred to in the Terms of Reference of the investigator.

The ability for NSWALC to provide differential grants to LALCs was always in the Act. Funding under section 106(1) b is totally discretionary and is not subject to a funding agreement pursuant to Section 162. In the past NSWALC has chosen not to exercise this right. However a number of the issues of concern have been determined by the amendments to the Act.

In preparing the draft responses currently proposed, NSWALC has again failed to take the opportunity to issue to ICAC a summary of its understanding of its role with LALCs. By adopting this approach it perpetuates the expectation gap between the supervisory bodies and itself. In this respect NSWALC remains its own enemy, by failing to clearly state its position and role and yet maintaining it is the pre-eminent body with an expansive vision it cannot complain if agencies accept that concept in their dealings with them.

When NSWALC has clearly established its own scope this matter must be clearly communicated to ICAC, the Ombudsman and the DAA.

11.1.11 Training for Land Council staff and members

This recommendation was specifically referred to in the Terms of Reference of the investigator.

There can be no denying that of the twelve recommendations, this is the area that NSWALC has made the greatest advances in. Unfortunately the draft responses currently proposed only refer to results of 2001/02 and not the latest financial year.

The training for Councillors and preparation of induction courses has not progressed.

Details from Guy as I don't know any significant impact on the organisation

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Conclusions

NSWALC has taken an approach to dealings with ICAC that is either arrogant or incompetent. The original acceptance of all recommendations suggests political expediency to take the heat out of the matter while not accepting the full tenet of the proposals. Its repeated failure to adequately review the implementation of the recommendations exhibits a clear unwillingness of the Councillors to drive through any significant change in the organisation and a abject failure by the executive to exhibit any leadership in ensuring the organisation has developed appropriate policies and communicates those throughout the Land Council network.

Consideration of replies appear to have been driven by a grudging acceptance of the legal obligation that the matters must be responded rather than viewing the recommendations as an opportunity to make a meaningful improvement to the structure and operations of the system. The suggestion that there have been competing priorities necessitating a delay in implementation lacks any real merit given that five years have elapsed since the recommendations were made. In fact apart from the legislative changes there is little evidence of any other changes being made to the policies and system of NSWALC. The fact that the current review, response and proposed implementation have been prepared during the term of my appointment only reinforces the argument that the Council and senior management have not devoted adequate time or resources to the issue until forced to.

In fact there are issues raised in ICAC Report that NSWALC has still not considered and have been overlooked in the preparation of the draft response. This highlights my concerns that NSWALC is not looking at general improvements to its corporate governance to progress to best practice but rather is merely responding to issues or concerns raised by external agencies. The management and Council does not seem to have realised if they undertook a well reasoned system of self evaluation of their policies and began to adopt and implement them, those outside agencies would be able to appreciate that actions were being taken and they would not be so critical of the organisation and lack of progress. At some time NSWALC must stop fighting spot fires and develop and implement an overall plan for the fire management of the organisation.

Unfortunately it is clear the all the work ICAC has done has resulted in little change in the culture of this organisation. All effective changes have been legislative and not organisational. Real commitment to progress and the identification of progress hurdles with the provision of timelines to ICAC must be a minimum commitment. The successful completion of the targets on a timely basis will be necessary to win the respect of the supervisory

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bodies and begin the process of restoring NSWALC to the position of strength it should enjoy.

Recommendations

NSWALC should offer the facility for LALCs to publish web pages within NSWALC website to enable them to publish their minutes and other information for members. If LALCs maintain their own website then there should be a direct link from NSWALC website.

Councillors' debts and loans should also be separately disclosed in the annual report.

All special purpose grants should require audit reviews to be conducted of their acquittal.

11.2 Ombudsman Issues

Reason for Review

On 14 May 2001 the NSW Ombudsman ("Ombudsman") commenced an investigation into NSWALC's failure to submit its Annual Reports ("AR"). The Ombudsman subsequently broadened the scope of the investigation to include NSWALC's support to the Land Council network. The Ombudsman's final report was released on 28 June 2002. NSWALC agreed to report to the Ombudsman on a quarterly basis in respect of the outstanding issues arising from the investigation.

Overview

Annual reports in prior years have been submitted by NSWALC to the Minister later than required under the Annual Reports (Statutory Bodies) Act 1984.

A consultant is currently assisting NSWALC in the preparation of its 2003 AR to ensure that it meets its statutory obligations for annual reporting.

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Relevant Legislation

Section 161 of the Annual Reports (Statutory Bodies) Act 1984 states that:

- a) A statutory body shall, not later than 4 months after the end of the financial year of the statutory body, submit its annual report in relation to that financial year to the appropriate Minister.
- b) A statutory body shall, at the time it submits its annual report to the appropriate Minister, where the appropriate Minister is not the Treasurer, submit a copy of its annual report to the Treasurer.

Extracts from the Aboriginal Land Rights Act 1983:

- a) Each Local and Regional Aboriginal Land Council must in each year, as soon as practicable after 30 June, but on or before 1 November, forward to the New South Wales Aboriginal Land Council a report of its operations for the 12 months ending on 30 June in that year.
- b) The report of the operations of a Local and Regional Aboriginal Land Council is to include the particulars set out in Schedule 1 to the *Annual Reports (Statutory Bodies) Regulation 2000*.
- c) In addition to any other requirement under any other Act relating to the annual report of the New South Wales Aboriginal Land Council, the annual report is to include the following particulars for the financial year to which the report relates:
 - the total remuneration (including travelling expenses) paid to each councillor by the New South Wales Aboriginal Land Council,
 - the total funds granted to each Local and Regional Aboriginal Land Council by the New South Wales Aboriginal Land Council.

Section 181 of the Act states “the Pecuniary Interest Tribunal must, within 2 months after the end of each year, provide a report to the Minister concerning proceedings that have been conducted before it during that year”.

Policy & Procedures

There were no relevant policies & procedures noted in the Manual.

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Previous Reports – Internal & External

The Ombudsman's investigation was into the failure of NSWALC to submit AR's for a number of years

Investigation Undertaken

Submission of annual reports to appropriate Minister

The most recent correspondence from the Ombudsman is dated 10 February 2003. In the Ombudsman's letter to NSWALC dated 10 February 2003, the Ombudsman's office noted that they were pleased with the progress made by NSWALC in the development of policies for the production of timely annual reports.

I have reviewed the correspondence between the Ombudsman's office and NSWALC in relation to the investigation concerning compliance with various provisions of the Annual Reports (Statutory Bodies) Act 1984 and the Aboriginal Land Rights Act 1983. The Acting CEO of NSWALC, in her letter dated 29 May 2003, noted that the organisation had engaged a consultant to compile the 2003 Annual Report, which will be available for Ministerial consideration at same time as draft (unaudited) financial statements, i.e. within 6 weeks of end of financial reporting period (30 June 2003).

Land Council issues

The table below details the outstanding issues in respect of the Ombudsman's investigation together with my comments in respect of whether NSWALC has addressed the issues:

NSWALC Claim Progress has been made	Investigator's Comments
Finalise the audit of outstanding Annual Reports ("AR") from Land Councils at least for the years 1999 and 2000.	Not completed NSWALC does not consider that the follow up of AR's for the 1999 and 2000 years is a high priority.
Undertake follow up action to assist Land Councils with outstanding AR's to prepare and forward their reports.	Not completed. 22 AR's of Land Councils have not been received in respect of 2002.

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NSWALC Claim Progress has been made	Investigator's Comments
Prepare and implement a policy, which outlines the role of NSWALC in relation to monitoring the preparation and forwarding of AR's for all ALCs in NSW, including adequate receipting, date stamping and recording mechanisms.	However, in respect of the AR's of Land Councils for 2002, only 98 AR's have been received.
Develop and implement procedures for the receipting of AR's at a central point. The procedures should highlight the need for compliance by local Land Councils, provide for one central point for the receipt of documents, include date stamping and adequate recording in an appropriate format (e.g. using a basic database), and follow up on outstanding documents.	Not Implemented. There is no written policy in respect of receipting of Land Councils AR's. The LCS unit maintains an excel spreadsheet detailing the date the AR's are received.
Similar to the previous two recommendations policies and procedures should be designed, adopted and implemented to monitor the holding of Annual Meetings ("AGM") of Land Councils. The policy should address issues such as the need to follow a specific agenda, and for the details of the meeting to be provided to NSWALC within the required timeframe. Again, the information provided by Land Councils is to be adequately receipted, date stamped, monitored and followed up where outstanding.	Not Implemented. There is no written policy in respect of receipting of Land Councils AGM advices. The LCS unit maintains an excel spreadsheet detailing the date the AGM's were held.

Conclusions

Without disregarding the past inefficiencies and inadequacies of NSWALC in meeting its obligations under the Annual Reports (Statutory Bodies) Act 1984 to ensure the timely submission of its annual reports, it would appear that NSWALC has in place appropriate mechanisms to enable it to meet its obligations in the current year. The NSW Ombudsman's Office and the NSW Department of Aboriginal Affairs are monitoring this situation.

In respect of Land Council issues, NSWALC does not have policies in place that deal with the problems Land Councils face in not being able to consistently obtain AR's. NSWALC is currently developing policy in respect of the issues facing Land Councils and the need to enter into funding

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agreements with LALCS who fail in their obligations to meet the reporting requirements of the Act.

Recommendations

To ensure that the ongoing reputation of NSWALC is maintained, the organisation must ensure that the commitments it has made to the Ombudsman's Office are met. At this crucial time, the Acting CEO and CEO designate should continue to monitor the progress of NSWALC's annual reporting for the year ended 30 June 2003; and

NSWALC must ensure that the receipt and monitoring of Land Councils Annual Financial Reports is given high priority to ensure that all Land Councils are in compliance with the Act in order that as many Land Councils as possible receive funding.

11.3 Outstanding issues

At the date of my report there were a number of matters that remain outstanding and were not able to be included in my report.

Given that the matters were at various stages of investigation, further information may be available in my working papers.

Mortgage Fund (Kestral)	Sale of Wollongong Property
Rural Properties	Section 40C Disposal of Trust
Wallung Trust	Section 40C Disposal of Trust
Murdi Paaki Housing	Role in Lease of LALC Housing
Membership Rolls	Review of Process in Creation of New Rolls
Administrators	Appointment & Release of Reports
HR Issues	Various Issues
Australian Taxation Office	PBI Tax Status
Insurance	Coverage & Certificate of Currency
Policies & Procedures	Review of Proposed Policies & Procedures

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Appointment of an Administrator

It is my overall recommendation, based on my findings, that under Section 223 of the Act that the Minister appoint an Administrator to the New South Wales Aboriginal Land Council to administer all of the functions of the New South Wales Aboriginal Land Council.

- The position of the Administrator should be filled by an Aboriginal person.
- The term of appointment should be eighteen months.

I am conscious of the fact that the effect of the appointment of an Administrator to administer all the functions of the New South Wales Aboriginal Land Council will be the removal of the duly elected Councillors. Consequently the Administrator will also be required to represent the interests and respond to the concerns of Local Aboriginal Land Council members. In view of this I believe it is appropriate that this role is performed by an Aboriginal person.

Policies & Procedures Manual

In nearly all areas of the investigation I have recommended that NSWALC update its Policies & Procedures manual. A number of failures by the organisation and its Councillors can be attributable to a lack of current policies & procedures.

The Position of the CEO

A remedy to the governance difficulties apparent at NSWALC would be the appointment of an Administrator to enable the new CEO, without the interference of Council, time to establish a strong culture of professional management with integrity.

I believe legislative reform is also required to abolish the Executive positions of the Secretary and the Treasurer. In my view, these positions are antiquated roles that are largely irrelevant in today's business environment.

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The Council Meeting Process

Written reports to Council from the CEO and Managers in the Corporate Body should be included in the Table Papers. Specific comment on all Resolutions which remain unactioned should be made. Council Meetings should be open to the membership and these should be regularly held as well as holding meetings in local and regional areas.

Councillor Register of Interests and External Representations

The Council should maintain a register of all external representations that Councillors hold on behalf of NSWALC. This register should include details on any remuneration, fees or allowances payable to the Councillors in respect of these positions.

Councillor Discretionary Grants

To avoid allegations of conflict of interest and impropriety, Councillors should not be empowered to exercise their discretion in allocating grant funds. Discretionary grant funds should be administered at the Branch office level subject to predetermined guidelines outlined in the Policy and Procedures Manual.

Councillor Travel Allowances

Standing authorisations should be provided by all Councillors allowing NSWALC to deduct unacquitted and overpaid travel allowances directly from Councillor remuneration once these have been outstanding for more than one month.

Financial Management

The value of the "Business Plan 2002 – 2007" needs to be preserved. The CEO should undertake an assessment of the status of the action plans and determine responsibilities and target dates where required.

The stated key objectives, KPI's and actual performance should be reported to the membership each year as a report card on the effectiveness of the Council.

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A Long Term Financial Plan should be developed. The Plan should be based on the objectives and strategies taken from the five-year business plan and expressed in financial terms. This will assist the Council to align the allocation of scarce resources with its longer-term goals.

Budgets should be prepared on an accrual basis, include all of the operations of NSWALC and document all of the key assumptions. The budgeted cash flows for NSWALC need to be prepared on a monthly basis to highlight the critical cashflow periods for the organisation.

Resolutions of the Council with a financial impact should specify where in the budget the expenditure is allocated.

The initiative of the DAA to have an independent financial expert assist NSWALC in developing new budget templates and processes is supported. To ensure ownership of the process NSWALC should be involved in the selection of the independent financial expert.

Complaints Handling

The role of the Aboriginal Complaints Officer (“ACO”) should be a senior position within NSWALC. Significant financial resources need to be allocated to the creation of a Complaints Review Unit to ensure that the Unit has staff with appropriate skills to perform their role in fraud detection and dispute resolution/mediation. Training for the ACO and complaint staff should be substantially upgraded and reflect the investigative nature of the work performed by the Complaints Unit.

Statutory Investments Fund

The Statutory Investment Fund (“SIF”) should only comprise publicly traded investments, cash equivalents and real property free from encumbrances.

The SIF should be measured as the sum of the market value of all assets held as part of the SIF including real estate holdings and the working capital of the administration fund calculated in accordance with generally accepted accounting standards.

External advisors should be appointed as a result of publicly advertised tenders, which are conducted in a fair and appropriate manner. Their performance should be formally reviewed on an annual basis and every three years the services should be re-tendered.

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In respect of the mortgage fund NSWALC needs to undertake an independent assessment of the recovery action available to it to recover the losses suffered in respect of the mortgage fund.

NSWALC should amend its investment policy to restrict its in house assets within the statutory investment fund to cash, interest bearing deposits and listed marketable securities. If the immediate implementation causes defaults under its statutory obligations this recommendation is to be implemented progressively over the next five years.

Support to Local Aboriginal Land Councils

NSWALC should develop a system of differential Grant Allocations that takes into account the needs and resources of each LALC and a LALC's financial management and compliance with its statutory obligations.

NSWALC should charge LALCs interest in respect of Rates Debts to provide a LALC with a financial incentive to make an early repayment. NSWALC should formulate a comprehensive Debt Recovery Policy and implement that policy.

Legislative amendment is required to bring Section 44A of the Act into line with the provisions of Section 713 of the Local Government Act. This will mean NSWALC will not have an obligation to pay outstanding rates due to a council unless that council can satisfy the provisions of Section 713 of the Local Government Act;

Legislative amendment is required to afford NSWALC a statutory lien over the land in respect to any council rates that it pays, so that it is on equal terms within the council that it is replacing as a creditor.

Legal Costs

Council must formulate a policy on when a Councillor can seek independent legal advice, the procedure for claiming costs of that advice and the limits of the indemnity from NSWALC and if, and when, Council will seek copies of independent legal advice obtained by Councillors paid for by NSWALC for the benefit of future Councils.

Council must formulate a policy on when it will provide funding for legal costs to external parties. It must ensure such arrangements have strict limits and transparent reporting guidelines to ensure that it is able to

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effectively manage its exposure. Any funding must be done with the knowledge and advice of LSU.

It should be a matter of standard procedure in all matters in which NSWALC engages in litigation, that costs awarded in favour of the Council should be pursued subject to normal commercial considerations regarding likelihood of recovery. This policy should be communicated throughout the organisation.

Feedlot Beef Venture

Investments and other significant allocations of funds should be in accordance with the goals and principles set out in the business plan of NSWALC. There must be a process to ensure any such projects fall within the strategic programs of the organisation.

The certification procedures for authorising purchase orders and payment vouchers need to be strengthened to ensure commitments are only entered into and paid in accordance with budgeted funds.

Rural Properties

At this time NSWALC should not divest its rural properties to a trust on behalf of LALC's within a particular region.

A review of the repatriation of rural properties should be conducted to establish the appropriate method of returning them to the control of the LALC's in the respective regions. Consideration should be given to the LALC's holding the land as tenants in common and a separate management company being formed for the purpose of operating the farm pursuant to an occupation or share farming agreement.

NSWALC should immediately cease to be actively involved in the day-to-day operations and management of the rural properties. Management of the rural property section should be delegated to the external Farm Manager.

Fleet Management

Policies and procedures in relation to fleet management need to be updated. The draft "Driver Agreement" developed by the Fleet Supervisor in May 2003 needs to be finalised and incorporated into the policies and procedures.

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We support the recommendation of the Fleet Supervisor regarding the introduction of specialised fleet management software.

Procedures need to be enforced to ensure Councillors and branch managers submit vehicle running sheets on a monthly basis. The Chairman must take responsibility to ensure Councillors comply with the Codes of Conduct adopted by Council.

Mortuary Business

NSWALC must have a policy for submission based funding proposals by LALCs including suitable assessment criteria.

NSWALC should ensure that a properly completed business plan is prepared prior to the purchase of a business, preferably by a qualified individual;

NSWALC should ensure that due diligence is carried out prior to the purchase of a business;

Subsequent to the purchase, NSWALC should have transferred the business to the LALC as soon as possible to ensure that any goodwill or business opportunity is not lost or eroded; and

The accounting treatment of the Mortuary Business should be corrected to reflect the fixed asset purchased.

Minimart

NSWALC should ensure that section 40C(1)(a) of the Act is complied with prior to transferring property and evidence of this tabled to the Council Meeting at which the Resolution was made. No business or asset should be transferred to a LALC subject to investigation, administration or cessation of funding.

NIS Proposal

The Council adopt an appropriate Code of Conduct including appropriate sanctions for Councillors that breach the rules.

Chapter 12: Summary of Key Recommendations

The Council should conduct continuing education on pecuniary interests & conflict of interest. The Executive ensures the pecuniary interest register is updated on a regular basis by Councillors, and each Councillor is provided with a summary of their disclosed interests at least annually.

Funeral Benefits Scheme

Any further action on the Funeral Benefits Scheme is deferred until a new CEO has been appointed.

The responsibility for development of the Scheme should be delegated to the CEO and Councillors should immediately cease to have a day-to-day role in the progress of this matter.

CEO should review the files to determine what action, if any, is required to claim back any monies paid where services may not have been rendered.

Mungindi LALC and the Glanville Property

Management Agreements should be reviewed to confirm compliance with the requirements of the Act and executed prior to the release of any special purpose funding.