NEW SOUTH WALES
ABORIGINAL LAND COUNCIL

Aboriginal Land Rights Act Amendments Guide

An overview of changes made to the *Aboriginal Land Rights Act 1983* by the *Aboriginal Land Rights Amendment Act 2014*.

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DISCLAIMER

This information has been compiled and provided by the New South Wales Aboriginal Land Council's Legal Services Unit.

It is intended to be a brief overview of the major amendments affecting LALCs and does not include details of every amendment to the Act made by the *Aboriginal Land Rights Amendment Act 2014.*

The information contained in this booklet is information only and does not constitute legal advice.

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INTRODUCTION

This booklet outlines the changes that have been made to the *Aboriginal Land Rights Act 1983* (the ALRA) by the *Aboriginal Land Rights Amendment Act 2014*. Aside from the changes to the appointment of advisors, investigators and administrators (see page 12), these changes came into force on 1 July 2015.

This booklet provides an overview of the changes, with particular focus on the introduction of voluntary Aboriginal Land Agreements, the regulatory reporting obligations of Local Aboriginal Land Councils (specifically relating to budgets, annual reports and financial statements), changes to disciplinary action that can be taken in relation to Officers of Aboriginal Land Councils who engage in misconduct, changes that clarify the functions of Local Aboriginal Land Councils in relation to business enterprises, and the new requirements that apply to LALCs that use an 'entity' to exercise their functions.

The booklet outlines significant changes that have been made to existing sections of the Act and explains new provisions introduced by the amendments.

1. LAND CLAIMS AND ABORIGINAL LAND AGREEMENTS

REFUSAL TO REFER LAND CLAIMS

New Provision: section 36(4A)

(4A) The Registrar may refuse to refer a claim, or part of a claim, to the Crown Lands Minister if the Registrar is satisfied that:

a) the claim, or the part of the claim, relates to lands that are not vested in Her Majesty, or

b) the claim or the part of the claim has been made in contravention of an undertaking given by the claimant in an Aboriginal Land Agreement under section 36AA while such an undertaking remains in force.

What does this mean?

Previously, any Aboriginal land claim lodged with the Registrar had to be referred to the Minister. This amendment means that the Registrar can refuse to refer a claim to the Minister for determination if the Registrar is satisfied that the land is not Crown land (which cannot be granted in any case). The Registrar may also refuse to refer a claim on the basis that the claim relates to land under an Aboriginal Land Agreement where the relevant Land Council has agreed not to lodge future claims over that land (which again cannot be granted in any case).

This provision will only affect the administration of land claims and not the right of Aboriginal Land Councils to claim land. While the Registrar will be able to establish whether the land is Crown land or is subject to an agreement not to lodge claims by conducting simple searches, procedural safeguards will also ensure that any errors can be reviewed and rectified by the Courts (see below).

NOTICE OF REFUSAL TO REFER LAND CLAIMS

New Provisions: sections 36(4B), 36(4C), 36(4D)

Section 36:

(4B) before refusing to refer a claim, or part of a claim, to the Crown Lands Minister the Registrar must:

a) inform the claimant, by notice in writing, of the Registrar's intention to refuse to refer the claim, or the part of the claim, and the reasons for the refusal, and

b) invite the claimant to provide further information supporting the claim, or part of the claim within 28 days of the giving of the notice (or such greater period as may be specified in the notice), and

c) consider any further information provided by the claimant within that period.

(4C) If the Registrar has not referred a claim, or any part of a claim, to the Crown Lands Minister within 60 days after the claim was lodged with the Registrar or by the end of the period within which the claimant has been invited to provide further information supporting the claim, the Registrar is taken to have refused to refer the claim, or the part of the claim, to the Crown Lands Minister.

(4D) an Aboriginal Land Council may appeal to the Court against a refusal to refer the claim, or any part of the claim to the Crown Lands Minister.

What does this mean?

These new subsections operate as a procedural safeguard for Land Councils. The Registrar must provide notice in writing of reasons for refusing to refer a claim. Land councils also have the right to appeal the refusal through section 36(4D). The amendments also provide that where the Registrar has not referred a claim, or part of it, to the Crown Lands Minister within 60 days after the claim was lodged, the Registrar is taken to have refused to refer the claim to the Crown Lands Minister.

ABORIGINAL LAND AGREEMENTS

New Provision: section 36AA

(1) In this section, ***Aboriginal Land Agreement*** means an agreement, in writing, between the Crown Lands Minister and one or more Aboriginal Land Councils (whether or not the agreement also includes other parties) that, in addition to any other matter that may be included in the agreement, makes provision for:

a) the exchange, transfer or lease of land to an Aboriginal Land Council, or

b) an undertaking by an Aboriginal Land Council not to lodge a claim, or to withdraw a claim, in relation to specified land.

(2) An Aboriginal Land Council and the Crown Lands Minister may, at any time by notice in writing, commence negotiation, in good faith and in a manner agreed between the parties, for an Aboriginal Land Agreement whether or not a claim has been made under section 36 by the Council in relation to the land that is subject of the proposed agreement.

(3) The Aboriginal Land Council or the Crown Lands Minister may, with the approval of the other party, invite one or more other Aboriginal Land Councils, or any other person, to join the negotiations and enter into the Aboriginal Land Agreement.

(4) An Aboriginal Land Council, the Crown Lands Minister or any other party may, at any time before the making of an Aboriginal Land Agreement, withdraw from negotiation for the agreement by notice in writing to the other party or parties.

(5) Without Limiting the matters that may be included in an Aboriginal Land Agreement, such an agreement may make provision for or with respect to the following:

a) financial or other consideration,

b) exchange, transfer or lease of land,

c) conditions or restrictions on the use of any land to which the agreement relates,

d) joint access to and management of land (including a lease of a type referred to in section 36A),

e) undertakings by an Aboriginal Land Council or the Crown Lands Minister with regard to the lease, transfer, management or use of any land,

f) the duration of the agreement,

g) the resolution of disputes arising under the agreement.

(6) The Crown Lands Minister may enter into an Aboriginal Land Agreement whether or not a claim has been made under section 36 in relation to any lands to which the agreement relates.

(7) If a proposed Aboriginal Land Agreement provides for the transfer or lease of lands for which a Minister other than the Crown Lands Minister is responsible, the concurrence of that other Minister is required before the agreement is made.

(8) The provisions of section 36(9)-(13), (15) and (17) apply (with necessary modifications) to the transfer of lands in accordance with an Aboriginal Land Agreement in the same way as those provisions apply to the transfer of lands under that section.

(9) An Aboriginal Land Council or the Crown Lands Minister may, at any time during the negotiation for an Aboriginal Land Agreement, notify the other party, in writing, that the agreement must not make provision with respect to specified lands.

(10) The Crown Lands Minister is, on the making of an Aboriginal Land Agreement, authorized to transfer or lease Crown lands the subject of the agreement in accordance with the agreement.

(11) If an Aboriginal Land Agreement provides for the termination or transfer of an interest in land, other than an interest of the Crown, the transfer or termination may only be effected with the approval of the holder of the interest.

(12) The Registrar is to keep and maintain a register in relation to Aboriginal Land Agreements made under this section.

(13) The register required to be kept under this section is, subject to the regulations, to include such information and to be in such form as is determined by the Registrar.

(14) The provisions of the ***Crown Lands Act 1989*** that provide for the transfer of Crown lands do not apply in respect of the transfer of land carried out in accordance with an Aboriginal Land Agreement.

(15) In this section:
Crown Lands Minister has the same meaning as in section 36.
interest in land includes:

a) a legal or equitable interest in the land, or

b) an easement, right, charge, power or privilege over, or in connection with, the land.

What does this mean?

This section provides a statutory mechanism which allows for negotiation of Aboriginal Land Agreements. Aboriginal Land Agreements will operate as an alternative option to land claims being determined under section 36. These agreements are completely voluntary and provide a broad scope for negotiating beyond whether the land is "claimable Crown land" under section 36.

The Aboriginal Land Council that lodged any relevant claims and the Crown Lands Minister **must** be parties to an Aboriginal Land Agreement, however other parties can also be invited to be part of the negotiations. For example, this could include another part of Government, a Local Government Body or a native title group. Parties are able to withdraw from negotiations at any time by providing written notice to the other parties.

The parties may enter into an Aboriginal Land Agreement whether or not a claim to Crown lands under section 36 has been made in relation to land.

Aboriginal Land Agreements can deal with any matter, including land swaps, joint management of land and compensation. The only thing they **must** include is an agreement about the exchange, transfer or lease of land to an Aboriginal Land Council **or** an undertaking by an Aboriginal Land Council not to lodge a claim, or to withdraw a claim, over specified land.

Should an Aboriginal Land Council undertake not to lodge a claim in the future, any claims over that land can be refused for referral by the Registrar under section 36(4A), or refused by the Crown Lands Minister under section 36(5AA) of the ALRA.

Where land is to be transferred to an Aboriginal Land Council pursuant to an Aboriginal Land Agreement under section 36AA of the ALRA then that land is taken to be "vested" in the Aboriginal Land Council. This means it has the same status as land that is granted as a result of a land claim, including that:

- it is transferred subject to any native title rights and interests that continue to exist (section 36(9) and (9A))[1],
- it is protected from being acquired (other than through a specific Act of Parliament, section 42B) and,
- unlike other freehold, the transfer of the land includes ownership of the mineral resources in the lands other than gold, silver, coal, petroleum or uranium (section 45).

The introduction of Aboriginal Land Agreements also means the LALC and NSWALC functions have been amended to include entering into Aboriginal Land Agreements. This is set out in the amendments to section 52(2)(g) and section 106(2)(f).

Aboriginal Land Agreements provide a flexible new mechanism for Land Rights to deliver outcomes for the Network – however, please be aware that they bring risk as well as opportunity to the Network. It will be critical for Land Councils to have proper advice in any negotiations, particularly if a Land Council is considering agreeing to not lodge claims over certain land in the future.

NSWALC is preparing further information for the Network and will consult with the Network to develop strategies and policies for this new provision.

1 Which brings with it the requirement that there is a determination of native title over the land before it can be dealt (see section 42 of the ALRA)

2. LALC HOUSING

KEY AMENDMENTS IN RELATION TO SOCIAL HOUSING

Previously, the ALRA treated LALC housing as a specific type of community benefit scheme. Section 52B of the ALRA and Clause 45 of Schedule 4 of the ALRA imposed additional approval requirements including that a social housing scheme had to generate sufficient income in order to provide for long term maintenance. Through the repeal of section 52B, the amendments will remove the special approval requirements for LALC housing schemes and instead bring these schemes within the general community benefits scheme approval provisions of section 52A. A social housing scheme will now be known as a Community Benefit Scheme (Residential Accommodation).

Amendments have also been made so that operation of a Community Benefit Scheme (Residential Accommodation) without NSWALC approval will be a trigger for the appointment of an **Administrator** from 1 January 2016 (section 222(1)(h)). Further, any administrator that is appointed for this reason will be empowered to deal with land without members' approval for the purpose of making the operation of the scheme lawful (ie to obtain NSWALC's approval of the scheme or to become a registered Aboriginal housing organization or a registered community housing provider) (section 230(2)(d)).

If the LALC is under administration for six months or more and still fails to get NSWALC approval of its scheme, or become registered, the continued operation of the scheme without approval will be a ground for the Minister to make changes to a LALC area, including amalgamation or dissolution of a LALC (sections 87 and 91).

What does this mean?

Approval for these Schemes will change so that LALCs will only need to meet the general community benefit scheme approval provisions as set out in section 52A of the ALRA. Previously, in order to obtain NSWALC approval for what was referred to as a "social housing scheme", a LALC was required to show that the income from any social housing scheme provided by or on behalf of the LALC was sufficient to provide for long term maintenance of the social housing scheme and to meet all the expenses associated with the operation of the scheme.

NSWALC has developed a new NSWALC policy on Community Benefit Schemes (Residential Accommodation) which will replace the current SHAPE Policy.

If any LALC who is currently providing residential accommodation under an existing community benefit scheme and does not obtain NSWALC approval of that scheme before 1 January 2016 (unless the LALC is a registered Aboriginal housing organization within the meaning of the *Aboriginal Housing Act 1998* (NSW) or a registered community housing provider within the meaning of the *Community Housing Providers National Law* (NSW), the LALC will risk the appointment of an administrator, and subsequent dissolution, as discussed above.

For further information, see the NSWALC Policy on the Approval of LALC Community Benefits Scheme (Residential Accommodation) and the CBS (Residential Accommodation) Guide for LALCs.

3. PLANNING, REPORTING AND COMPLIANCE

The amendments include a significant change to the ALRA reporting framework for LALCs, as they empower NSWALC to make policies that set out the requirements in relation to auditing and financial reporting, the budgets of a LALC and annual reports.

NSWALC has developed a Policy on LALC Budgets, LALC Annual Reports and LALC Financial Reporting. Each Policy has been gazetted by the Minister (following consultation with LALCs). The Policies are available on NSWALC's website or through your Zone Office.

FINANCIAL STATEMENTS:

SECTION	OLD	NEW
Section 153(2)-(3)	**(2)** Each such Council must prepare financial statements for each financial year of the Council in accordance with section 41B(1) of the *Public Finance and Audit Act 1983*. **(2A)** Section 41BA of the Public Finance and Audit Act 1983 applies to financial statements required to be prepared under this section in the same way that it applies to financial reports required to be prepared under that Act. **(3)** The financial statements must be submitted for verification and certification to an auditor appointed by the Local Aboriginal Land Council concerned from a list of auditors kept by the New South Wales Aboriginal Land Council.	**(2)** Each such Council must: **(a)** prepare financial statements for each financial year in accordance with any applicable policy of the New South Wales Aboriginal Land Council, and **(b)** if required to do so by any applicable policy of the New South Wales Aboriginal Land Council, cause the accounts to be submitted for verification and certification. **(2A)** A policy of the New South Wales Aboriginal Land Council may require the accounts of a Local Aboriginal Land Council to be submitted for verification and certification by: **(a)** an auditor, or **(b)** any other person, or class of persons, as may be specified by the policy. **(3)** The financial statements must, if required by any applicable policy of the New South Wales Aboriginal Land Council, be submitted for verification and certification by an auditor appointed by the Local Aboriginal Land Council concerned from a list of auditors kept by the New South Wales Aboriginal Land Council.

The amendments to sections 153(2) and 153(3) of the ALRA mean that LALCs will now be required to prepare financial statements for each financial year in accordance with NSWALC policy, rather than the ***Public Finance and Audit Act 1983***. These subsections also allow NSWALC policy to provide conditions requiring that accounts be submitted for verification and certification, rather than requiring all financial statements to be audited. Where such a NSWALC Policy requires a LALC to have its financial statements audited, the audit must be carried out by an auditor appointed by the LALC from the list of auditors kept by NSWALC.

BUDGETS:

SECTION	OLD	NEW
Section 158	**(1)** Each Local Aboriginal Land Council must, not less than 10 weeks before the commencement of each financial year, prepare and submit for the approval of the New South Wales Aboriginal Land Council a detailed budget relating to its proposed operations during that financial year. **(2)** The New South Wales Aboriginal Land Council may seek information relating to the budget from a Local Aboriginal Land Council at any time. **(3)** The budget prepared and submitted under this section is to include details of a Council's proposed operations, including operations to be funded by persons or bodies other than the New South Wales Aboriginal Land Council, and is to contain any matters prescribed by the regulations.	**(1)** Each Local Aboriginal Land Council must, before the commencement of each financial year, prepare and adopt a detailed budget relating to the Council's proposed operations during that financial year. **(2)** The budget must be prepared in accordance with any applicable policy of the New South Wales Aboriginal Land Council and be submitted to the New South Wales Aboriginal Land Council not less than 10 weeks before the commencement of the financial year to which the budget relates. **(3)** The New South Wales Aboriginal Land Council may require a Local Aboriginal Land Council to resubmit a budget under this section if the New South Wales Aboriginal Land Council is satisfied that the budget does not meet the requirements of this section.

While this section continues to stipulate that a LALC must prepare a budget relating to the Council's proposed operations at least 10 weeks before the commencement of the financial year, the budget must now be prepared in accordance with NSWALC policy, rather than the regulations. Additionally, the previous requirement for NSWALC approval of the budget is no longer necessary. LALC budgets must now be prepared and approved by the Board of the LALC and as always will need to be received by the members at the annual general meeting.

LALC approved budgets must still be provided to NSWALC by 21 April each year and NSWALC may direct LALCs to resubmit any budgets that have not been prepared in accordance with the Act and Policy.

ANNUAL REPORTS:

SECTION	OLD	NEW
Section 161(2)	**(1)** The report of the operations of a Local Aboriginal Land Council is to include the particulars set out in Schedule 1 to the Annual Reports (Statutory Bodies) Regulation 2000.	**(1)** The report of the operations of a Local Aboriginal Land Council must be prepared in accordance with any applicable policy of the New South Wales Aboriginal Land Council.

This amendment means that LALCs must prepare their annual reports in accordance with NSWALC policy, rather than Schedule 1 to the *Annual Reports (Statutory Bodies) Regulation 2000*.

COMPLIANCE:

Exemption from GIPA requirements:

New Provision: section 248(2)

SECTION	OLD	NEW
Section 248	Each Aboriginal Land Council is taken to be a public authority for the purposes of the Ombudsman Act 1974, the Independent Commission Against Corruption Act 1988 and the Government Information (Public Access) Act 2009.	**(1)** Each Aboriginal Land Council is taken to be a public authority for the purposes of the Ombudsman Act 1974, the Independent Commission Against Corruption Act 1988 and the Government Information (Public Access) Act 2009. **(2)** Despite subsection (1), a Local Aboriginal Land Council is not taken to be an agency for the purposes of section 6 of the Government Information (Public Access) Act 2009.

Section 248 of the ALRA provides that all Aboriginal Land Councils are public authorities for the purpose of the *Government Information (Public Access) Act 2009* (this is the freedom of information legislation in NSW). The addition of subsection (2) exempts LALCs from the requirement of section 6 of the *Government Information (Public Access) Act 2009* to proactively make certain information publically available. LALCs must still comply with the other provisions of the GIPA, including responding to requests for information made under that Act.

COMMUNITY LAND AND BUSINESS PLANS:

The amendments have a number of effects in relation to Community Land and Business Plans (CLBPs). They are as follows:

NSWALC approval of CLBPs:

SECTION	OLD	NEW
Section 84(6)	**(6)** A community, land and business plan approved by a Local Aboriginal Land Council takes effect when it is approved by the New South Wales Aboriginal Land Council.	**(6)** A community, land and business plan for a Local Aboriginal Land Council takes effect on the day on which it is approved or on such later date as may be specified in the plan.

Section 84 has been amended to provide that approval by the NSWALC of a LALC's CLBPs will no longer be required. A LALC's CLBP is now approved by the LALC's members at a members meeting for which 14 clear days notice has been provided.

Content of CLBPs:

The content requirements of section 83 have been reduced so that LALC CLBPs will only need to include the objectives and strategies of the LALC in relation to land acquisition, management and development; Community Benefit Schemes; Aboriginal culture and heritage; business enterprise and investment; and anything required to be included by NSWALC Policy or the Regulations.

CEO's function in relation to CLBPs:

The addition of sections 139(2)(a1) and 78A(2)(a1) make clear that the functions of the Chief Executive Officer of a LALC, and the functions of the Chief Executive Officer of the NSWALC, include assisting in the preparation and implementation of their respective Council's CLBPs.

LALC approval or amendments to CLBPs:

New Provision: section 82(1A)

(1A) A Local Aboriginal Land Council must, within 9 months after the holding of an election of Board members for the Council, approve or amend the community, land and business plan for the Council that was in force immediately before the election.

The addition of section 82(1A) requires a LALC to approve or amend the CLBP for the Council within 9 months after the election of a new Board. This will require a LALC to comply with the preparation, consultation and approval requirements of sections 82 & 84, but in so doing a LALC may change as little or as much as the membership wish to change in their plan.

A new section 52G(1)(d1) has also been added to the ALRA to provide that approval or amendment of the CLBP is a function which is to be exercised by Council resolution.

New Provision: section 84(5A)

(5A) A Local Aboriginal Land Council must, not more than 14 days after approving or amending a community, land and business plan, provide the New South Wales Aboriginal Land Council with:

(a) a copy of the plan, and

(b) documentation demonstrating that the Council approved the plan in accordance with this Division.

While NSWALC is no longer required to approve a LALC's CLBP, a LALC must provide NSWALC with a copy of the plan along with documentation demonstrating that the plan was lawfully approved by Council. This will require a LALC to provide NSWALC with the following within 14 days of the approval or amendment of the CLBP:

1. the approved CLBP;
2. notice of the meeting at which the members approved the CLBP;
3. attendance records for the meeting at which the members approved the CLBP;
4. Membership roll at the time of the meeting at which the members approved the CLBP.

COMMUNITY BENEFIT SCHEMES:

Amendments to section 108 of the ALRA will remove the requirement for NSWALC to supervise Community Benefit Schemes.

4. ACCOUNTABILITY

APPOINTMENT OF ADMINISTRATORS, INVESTIGATORS AND ADVISORS:

Amendments have been made so that the Registrar, rather than the Minister, will be responsible for appointing administrators (sections 222(1)-(3)), investigators (section 216) and advisors (section 234(1)) to Aboriginal Land Councils. However, these amendments **did not commence** on 1 July 2015. They are expected to commence by 1 January 2016.

When these amendments come into force, the Registrar will be required to appoint from a list of administrators, investigators and advisors prepared by NSWALC in accordance with the regulations, and submitted to the Minister for approval. Prior to the amendments, the list was jointly prepared by NSWALC and the Government.

REGISTRAR'S POWER TO APPLY FOR INJUNCTIONS TO PREVENT CONTRAVENTIONS OF THE ALRA:

A new section 248B has been inserted which provides that the Registrar will have the power to apply to the Land and Environment Court for an injunction to prevent a contravention of the ALRA. An injunction is a court order that requires a person or body to do, or refrain from doing an act ie not breach the ALRA or cease breaching the ALRA. Non compliance with a Court order may be considered "contempt of court" which may result in penalties being imposed or imprisonment.

In granting the application, the court must be satisfied that on the application by the Registrar, a person is engaged, is currently engaging, or is about to engage in conduct that constitutes:

- a contravention of the ALRA or the regulations, or
- attempting to contravene the ALRA or the regulations, or
- aiding, abetting, counseling to procuring a person to contravene the ALRA or the regulations, or
- inducing or attempting to induce a person (whether by threats or promises or otherwise) a person to contravene such a provision, or
- being in any way, either directly or indirectly, knowingly concerned or party to, the contravention by a person of such provision, or
- conspiring with others to contravene a provision.

Section 248B also enables the Court to issue an interim injunction before the proceedings are finalised. This may be required to preserve the current situation in urgent situations.

AUTHORISATION FOR THE REGISTRAR TO APPLY FOR SEARCH WARRANTS:

A new section has been inserted which provides that the Registrar has the authority to:

- seek a warrant to enter and search premises; and
- take possession of documents if he or she has reasonable grounds to believe that in those premises, there is evidence of a contravention of the ALRA or the regulations or that documents required to be provided to an investigator or administrator have not been provided without reasonable excuse.

Application for a search warrant will be subject to Division 4 of Part 5 of the *Law Enforcement (Power and Responsibilities) Act 2002* (NSW) including how warrants may be issued and what information they must contain.

INCREASE OF MAXIMUM PENALTIES FOR OFFENCES UNDER THE ALRA:

The ALRA contains little used criminal offence provisions for certain breaches of the Act. The maximum penalties for these offences have been increased and in some cases a distinction between offences made by an individual and offences made by corporations is made. These amendments mean greater accountability for LALCs and individuals in relation to compliance with the ALRA.

Where an Aboriginal Land Council is required to assist investigators with records that relate to an investigation, the penalty for non-compliance has been raised from a maximum 10 penalty units[2] ($1100) to a maximum of 30 penalty units ($3300) in the case of an individual and a maximum of 60 ($6600) penalty units in the case of a corporation. Additionally, where a person hinders, obstructs or delays an investigator in the exercise of their functions, the maximum penalty has been raised from 10 penalty units ($1100) to 60 penalty units ($6600).

2 Under section 17 of the Crimes (Sentencing Procedure) Act 1999 (NSW), one penalty unit is currently worth $110. This means that a reference to a penalty unit is taken to be an amount of money obtained by multiplying $110 by the number of penalty units.

Where an Aboriginal Land Council is required to assist administrators, the maximum penalty for non-compliance has been raised from 10 penalty units ($1100) to 30 penalty units ($3300) in the case of an individual and 75 penalty units ($8250) in the case of a corporation. Where a person inhibits, obstructs or delays an investigator in the exercise of their functions, the maximum penalty for that offence has been raised from 10 penalty units ($1100) to 60 penalty units ($6600).

IMPLEMENTATION OF STREAMLINED DISCIPLINARY MECHANISMS FOR MISCONDUCT:

There have been a number of amendments to Part 10, which deals with conduct, disclosure and disciplinary matters. These changes are generally aimed at streamlining the disciplinary mechanisms and processes for dealing with misconduct (previously known as "misbehaviour"). They also bring the complaint and disciplinary procedures relating to "pecuniary interests" including the NSW Civil and Administrative Tribunal (NCAT) proceedings (former Division 5 and Subdivision 1 of Division 6 in Part 10) into the general misconduct disciplinary procedures.

MISCONDUCT:

The amendments replace all references to "misbehavior" with 'misconduct", however the meaning remains the same. Misconduct includes:

- a contravention of a provision of the ALRA or the regulation,
- a contravention of an applicable code of conduct,
- an act committed by:
    - a councilor at a meeting of the New South Wales Aboriginal Land Council, or
    - a Board member of a Local Aboriginal Land Council at a meeting of the Board or of the Local Aboriginal Land Council.
- an omission or failure to do something.

INVESTIGATION OF MISCONDUCT:

The new Part 10 provides a streamlined and more flexible process for the Registrar to deal with misconduct. Importantly, the grounds on which the Registrar may initiate disciplinary proceedings now include a complaint made to the Registrar which may be made by an Aboriginal Land Council, a Board of a LALC, a member of an Aboriginal Land Council or any other person (see section 181D). Previously a Land Council could only initiate a disciplinary process if it made a request of the Registrar by resolution.

DISCIPLINARY ACTION:

The new section 181E allows the Registrar to investigate misconduct or to authorize an investigation of the misconduct (as was the case with the old provision). However, it also makes clear that the Registrar has discretion to decide whether or not an investigation should take place, and the power to terminate an investigation that has already commenced. The Registrar may decide that an investigation should not take place, or should stop, if satisfied of one or more of the following:

- the complaint or the allegation initiating the disciplinary proceedings was not made in good faith,
- the alleged misconduct is trivial or does not warrant investigation,
- the alleged misconduct has been investigated by another authority or is the subject of other proceedings under the ALRA or any other Act,
- the alleged misconduct should be referred to another authority for investigation or it is not appropriate that the Registrar investigate the alleged misconduct,
- the alleged misconduct should not be the subject of disciplinary action under this Division or that no further action is warranted,
- the alleged misconduct occurred more than 2 years before the complaint or allegation was made and the Registrar is not satisfied as to the reasons for the delay in making the complaint or allegation,
- there are insufficient particulars provided in connection with the alleged misconduct to allow the Registrar to investigate the alleged misconduct,
- the person making the complaint or allegation has not responded to a request for further information with the time specified by the Registrar.

The Registrar is required to prepare a statement of reasons as to why he or she has decided to conduct or not conduct an investigation or provide reasons for the termination of an investigation.

If a decision is made to terminate an investigation, the Registrar must, as soon as practicable, notify the Councillor or member of staff concerned, and where there was a complaint or allegation made, notify the Board member of the Aboriginal Land Council or person who made the complaint.

REGISTRAR MAY TAKE DISCIPLINARY ACTION:

The circumstances in which the Registrar may take disciplinary action have changed slightly. The Registrar may now take disciplinary action if the matter has been investigated in accordance with the ALRA, or there is a report by the Independent Commission Against Corruption or the Ombudsman and the Registrar is satisfied based on that report that disciplinary action should be taken (section 181F). Previously the Registrar could only take action if the report stated that grounds exist to warrant taking action, however now a recommendation in such a report that disciplinary action be taken must be referred to the NCAT.

Previously, disciplinary action was limited to suspension for Councillors or Board members and counseling, reprimanding, or dismissal (or recommending the Council take disciplinary action) for a member of staff. Now the Registrar may take the following action:

- counsel or reprimand the officer or member of staff,
- recommend that the Aboriginal Land Council dismiss the member of staff,
- recommend that the Aboriginal Land Council take other action against the officer or member of staff,
- in the case of an officer, suspend the officer.

Note that 'officer' includes Councillors and Board members.

The amendments also increase the maximum time period for which the Registrar can suspend a Councillor or board member to six months, as opposed to the previous maximum suspension of three months.

APPEAL OF THE REGISTRAR'S DECISION:

The merging of section 181H and 181J provides Councillors, Board members and members of staff with the same rights of the appeal with respect to any decision by the Registrar to take action.

An appeal of the Registrar's decision is to be made to the NCAT, and the NCAT may:

- confirm the Registrar's decision; or
- quash the decision; or
- amend the decision consistently with the powers of the Registrar.

REFERRALS TO NCAT:

The Registrar must refer a matter to NCAT instead of pursuing disciplinary action if the Independent Commission Against Corruption has made a report recommending that consideration be given to the taking of disciplinary action, or if the Ombudsman has made a report stating that it is satisfied that grounds exist to warrant disciplinary action, or if the Registrar is of the opinion that the matter should be referred to the tribunal (section 181K).

If the matter is referred to the NCAT then the Registrar must prepare a statement of reasons for the referral.

NCAT:

Section 211 has been removed, which previously set out the process for the NCAT dealing with pecuniary interest matters. These matters will now be dealt with as a misconduct matter (section 211A). Where a Councillor, Board member or member of staff is found to have behaved in a way that warrants disciplinary action, section 211A authorises the NCAT to carry out a number of actions in relation to the misconduct, including:

- counseling the Councillor, Board member or member of staff,
- reprimanding the Councillor, Board member or member of staff,
- suspending the Councillor or Board member,
- disqualifying the Councillor or Board member or member of staff from holding office for up to five years,
- recommending certain disciplinary action or dismissal of a member of staff.

Importantly, new provisions have been introduced that allow the NCAT to order a Councillor or Board Member to pay a penalty of up to $11,000 or to reimburse an Aboriginal Land Council for any loss incurred by the Council.

5. GOVERNANCE

INACTIVE MEMBERS:

New Provision: section 57A Inactive members

(1) The chief executive officer of a Local Aboriginal Land Council may, by notice in writing to a member of the Council (other than a Board member of the Council), declare the member to be an inactive member if, and only if, the member has been absent from 6 consecutive meetings of the Council (or such other number of meetings as may be prescribed by the regulations).

(2) Before declaring a member of a Local Aboriginal Land Council to be an inactive member, the chief executive officer of the Council must:

a. inform the member, in writing, of the following:

i. that the member will be declared to be an inactive member if the member does not attend the requisite number of meetings of the Council,

ii. that the chief executive officer intends to declare the member to be an inactive member after the next meeting of the Council,

iii. the date, time and location of the meeting of the Council after which the chief executive officer intends to make the declaration (being a meeting not less than 20 days after the date the notice is given, or such other period as may be prescribed by the regulations),

iv. the process to be followed by the member to prevent the declaration being made or to cease being an inactive member, and

b. at the meeting of the Council after which the chief executive officer intends to declare a member inactive, inform the members in attendance at the meeting of the chief executive officer's intention.

(3) If the chief executive officer of a Local Aboriginal Land Council declares a member of the Council to be an inactive member under subsection (1), the chief executive officer must make an entry in the Council's membership roll accordingly.

(4) A member of a Local Aboriginal Land Council ceases to be an inactive member of the Council if the member:

a. attends a meeting of the Council, or

b. at any time after being informed of the chief executive officer's intention to declare a member to be inactive requests, in writing to the Registrar, that the member not be declared to be an inactive member.

(5) If a member of a Local Aboriginal Land Council makes a request under subsection (4) (b), the Registrar must notify the chief executive officer of the relevant Council of the member's request and may issue a compliance direction to the chief executive officer in relation to the maintenance of the Council's membership roll.

(6) A member of a Local Aboriginal Land Council, during any period that the member is declared to be an inactive member under this section, is not to be counted as a voting member of the Council for the purposes of determining the quorum required for a meeting of the Council.

What does this mean?

This new section confers authority on CEOs to declare a LALC member that has not attended 6 consecutive meetings as being "inactive". Inactive members will not be included when calculating the quorum for a LALC, but if they attend a meeting they may be counted towards reaching the quorum at a meeting.

An inactive voting member's voting rights are not affected by them being declared as inactive. If they attend a meeting they are able to vote, but will be ineligible to nominate, be nominated or vote in a Board election as they will not have satisfied the requirement to attend two meetings in the previous twelve months.

Although the CEO is vested with this power, there are a number of important mechanisms to provide to check on this power. These mechanisms are:

- that the CEO must notify any member in writing that the member will be declared inactive if they do not attend six consecutive meetings and that the CEO intends to declare the member to be inactive after the next meeting,
- that any member that has been notified of the intention to declare them as being inactive, may notify the CEO or the Registrar of their intention to remain an active voting member,
- that the CEO is to provide notice to other members at a meeting about the proposed declaration of particular members as being inactive,
- if a member is declared to be inactive, they can become an active member by attending a meeting of Council or by notifying the Registrar that they do not wish to be an inactive member.

INCREASING TERM OF OFFICE FOR LALC BOARDS:

Amendments to section 63 of the ALRA provide that the election of Board members will be changed from every second annual meeting of a LALC to every fourth annual meeting of a LALC. This has the effect of increasing the term of office for LALC Boards from two years to four years.

The current Board term will expire at the next annual meeting due in September 2015, and the Board elected at that meeting will sit for the new 4 year term.

The ability of Boards to serve longer terms encourages long term decision making which can be beneficial to the operation of Aboriginal Land Councils.

CODE OF CONDUCT FOR LALC MEMBERS:

Amendments to section 177 of the ALRA provide that LALCs prepare two different sets of code of conducts—one for officers and members of staff of the Council and a separate code of conduct to be observed by all members of the Council. This recognizes that there is a standard of conduct expected of LALC members, not just Board members and staff. There previously was only a code of conduct that applies to Board members and members of staff of a LALC.

As for the pre-existing code of conduct for Board and staff members, the code of conduct for LALC members will be a model code of conduct in the *Aboriginal Land Rights Regulations 2014*. This will be the default code of conduct for LALCs that have not had a code of conduct approved by the Registrar.

The model code of conduct for LALC members has not been drafted at this time.

SUSPENSION FOR BREACH OF CODE:

Currently under section 57(1) of the ALRA a member can be suspended if the Council decides that member's conduct is detrimental to the best interests of the LALC. Section 57(1) has been amended to clarify that a serious breach of the code of conduct will justify the suspension of the LALC member.

EMPLOYMENT:

Amendments to section 78B of the ALRA provides that, with the consent of the Board of a Council, a person may be employed as the Chief Executive Officer of a LALC if that person would have otherwise been excluded because of the person's involvement in a corporation that receives a benefit from the LALC or because the person is also the CEO of another LALC.

The addition of section 79(1A) allows the Registrar to allow a LALC to employ a person where they would otherwise be disqualified from being employed due to having been convicted of a certain offence, where the Registrar has considered:

1 the time that has passed since the offence;

2 the triviality of the offence; and

3 the nature of the proposed employment.

6. Related Entities and Business Enterprises

ABILITY TO FORM, ACQUIRE, OPERATE AND MANAGE BUSINESS ENTERPRISES:

SECTION	OLD	NEW
Section 52(5)(c)	**(5)** A Local Aboriginal Land Council has the following functions in relation to financial management and business planning: **(c)** to facilitate business enterprises, in accordance with this Act and the regulaations and consistently with its community, land and business plan.	**(5)** A Local Aboriginal Land Council has the following functions in relation to financial management and business planning: **(c)** to facilitate business enterprises (including by establishing, acquiring, operating or managing business enterprises), in accordance with this Act and the regulations and consistently with its community, land and business plan.

What does this mean?

The amendment to this section clarifies that a LALC's function "to facilitate business enterprises" can be carried out by "establishing, acquiring, operating, or managing business enterprises" in accordance with the ALRA.

ABORIGINAL AND TORRES STRAIT ISLANDER CORPORATIONS:

New Provision: sections 52(5A) and 52(5B)

(5A) **Corporations:**

A Local Aboriginal Land Council may establish, acquire, operate or manage an Aboriginal and Torres Strait Islander corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth.

(5B) A Local Aboriginal Land Council may not establish or acquire a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth unless authorised to do so by any applicable policy of the New South Wales Aboriginal Land Council or, if there is no such policy, by the regulations.

What does this mean?

A LALC who chooses to establish, acquire, operate or manage a corporation to exercise its functions under the *ALRA* may only use an Aboriginal and Torres Strait Islander corporation, within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). A LALC may only establish or acquire a corporation within the meaning of the *Corporations Act 2001* (Cth) if it is authorised to do so by NSWALC Policy, or by the regulations if there is no applicable NSWALC policy.

NSWALC is currently developing this Policy and will soon consult with LALCs about this Policy. LALCs that currently own or operate corporations under the Corporations Act 2001, will be required to transition those operations to CATSI Act corporations within 12 months unless the NSWALC Policy authorises the use of Corporations Act corporations in the circumstances.

LALC RESPONSIBILITIES IN RELATION TO ENTITIES

New provision: Section 52C Local Aboriginal Land Councils' responsibilities in relation to certain arrangements and transfers

(1) In this section:
enter into includes participate in
entity means any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated).

(2) This section applies to an arrangement entered into by a Local Aboriginal Land Council:

a) For the purpose of exercising any of the Council's functions under this Act (including providing a community benefits scheme) and

b) That includes the formation, acquisition, operation or management of an entity.

(3) **Local Aboriginal Land Councils to report on certain arrangements**
A Local Aboriginal land Council must include, in the accounts and records of the Council under this Act and the regulations, details of any operations that are carried out under an arrangement to which this section applies (including any activities or operations carried out by the entity formed, acquired, operated or managed and any financial matters relating to any such entity).

(4) Before entering into an arrangement to which this section applies, a Local Aboriginal Land Council must take reasonable steps to ensure that the Local Aboriginal Land Council will not be prevented from complying with the Council's reporting obligations in relation to operations carried out under such an arrangement (including any financial matters relating to the entity formed, acquired, operated or managed under the arrangement)

(5) **Risk assessment and approval for transfer of certain assets**
Before transferring assets (other than land) in connection with an arrangement to which this section applies, a Local Aboriginal Land Council must, if required to do so by any applicable policy of the New South Wales Aboriginal Land Council (or, if there is no such policy, by the regulations):

a) Conduct a risk assessment with respect to the proposed transfer in accordance with any applicable policy of the New South Wales Aboriginal Land Council or any such regulation, and

b) Obtain the approval of the members of the Local Aboriginal Land Council to the transfer.

(6) **Requirements for approval resolutions**
Any Local Aboriginal Land Council resolution that approves the Council's proposed transfer of an asset (other than land) under this section must:

a) contain a statement identifying the purpose of the action and any conditions to which the approval is subject, and

b) be made at a meeting of the Council:

i. in respect of which notice was given, in accordance with the regulations, not less than 14 days before the day on which the meeting is held, and

ii. at which a quorum is present, and

c) be passed by not less than 80% of the votes cast.

(7) **Approval of termination of certain arrangements**
A Local Aboriginal Land Council must not terminate an arrangement to which this section applies, or dispose of an interest in an entity formed, acquired, operated or managed under such an arrangement, otherwise than in accordance with the approval of the Board of the Council.

What does this mean?

This section introduces some transparency measures that apply to a LALC that enters into an arrangement that includes the use of an 'entity' for the purpose of exercising its functions. An arrangement includes the formation, acquisition, operation or management of an entity. The definition of 'entity' is very broad, and includes any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated). For example, this provision would apply to a LALC that uses a trust to deliver a community benefits scheme or a LALC that sets up a corporation to run a business enterprise.

The section stipulates that a LALC must:

- report on the operations of an entity in its accounts and records; and
- take steps to ensure it can comply with its reporting obligations before entering into an arrangement that includes an entity; and
- where it intends to transfer any asset (other than land) in connection with an arrangement that includes an entity, conduct a risk assessment and obtain member approval before such transfer, but only if required to do so by any applicable NSWALC policy (or if there is no such policy, the regulations).

This section also specifies how member's approval is to be obtained, and provides for termination of any such 'arrangement' only with approval of the Board of the LALC.

LALC INVESTMENTS:

SECTION	OLD	NEW
Section 152(4)	**(4)** Money to the credit of the account may be invested in any manner authorised by the regulations.	**(4)** Money to the credit of the account may be invested: **(a)** In any manner authorised by the regulations, and **(b)** Subject to any applicable policy of the New South Wales Aboriginal Land Council - in any manner in which the New South Wales Aboriginal Land Council Account may be invested.

What does this mean?

The effect of the amendment is to allow LALCs to invest in the same types of investments as the NSWALC Account. Currently, a LALC may only invest in the types of instruments prescribed by the Regulations. The amendment means that there is now the potential for a LALC to make investments in the same way that the NSWALC Account may be invested. However, this may only occur in accordance with a policy of NSWALC which is yet to be developed. This Policy will be a 'section 113 Policy' which must be the subject of consultations with the Network and approval by the Minister. NSWALC will develop this Policy and consult with the Network in due course.

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