

**REPORT TO  
MINISTER FOR ABORIGINAL AFFAIRS  
ON THE  
ABORIGINAL LANDS ACT 1970 (VIC)**

**JASON BEHRENDT AND TIM GOODWIN**

**7 SEPTEMBER 2021**

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**REPORT TO  
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**INTRODUCTION**

The *Aboriginal Lands Act 1970 (Vic)* (**ALA**) is a unique statutory scheme that returned two historically and culturally significant Aboriginal reserves at Framlingham and Lake Tyers to the Aboriginal communities that were resident on them at the date of the legislation. It did so by creating a Trust for each reserve and putting in place a regime for the management and use of the land.

Despite being in operation for nearly 50 years, the ALA has not been the subject of regular review. It is inevitable that over time, issues will arise which Parliament would not have foreseen when it passed the legislation. A review of legislation is an opportunity to identify those issues and to see whether amendments to the ALA can be made which can enable it to better serve the needs of the Aboriginal people it is meant to benefit.

In the case of the ALA, it is also relevant to consider the overall scheme of the ALA and to identify whether it is still the best way to give effect to Aboriginal ownership of the land.

This Review is not an audit of the Trusts or an investigation into their affairs. Nor is it a review of all the matters which may impact on the delivery of services to the Aboriginal Communities in Lake Tyers or Framlingham, many of which would involve detailed consideration of government agency coordination and policies in a range of portfolios. Rather, the Review is a general review of the governing legislation in circumstances where regular reviews have not occurred.

In the course of the current review it is apparent that there are a number of ways in which the ALA could be improved to assist the Lake Tyers and Framlingham Aboriginal Trusts (**the Trusts**) to conduct their affairs. In our opinion there would be general support for a number of these changes although, consistent with the Victorian Government's (**Government**) policy position on Aboriginal self-determination, any proposed changes accepted or further proposed by government, whether in the form of an exposure draft of an Amendment Bill or otherwise, should be the subject of further consultation with the respective Trusts before being implemented.

As will be apparent from the content of this Report, there is a significant difference expressed by the Lake Tyers Aboriginal Trust and the Framlingham Aboriginal Trust as to the short and long term viability of the current scheme. Lake Tyers has expressed a need for a reworking of the Act while acknowledging that it will require a longer and ongoing process to that afforded by the current review, particularly as there is no clear

consensus on what the alternative regime would look like. There is also considerable complexity in the adoption of an alternative arrangement at Lake Tyers given the current state of the share register, and the lack of a clear consensus among shareholders on an alternative or a process of transition.

This Report is in 4 sections:

1. Overview of the ALA: This section provides a general summary of the current scheme of the ALA.
2. Background to the Review and Consultation Process: This section sets out the background to the Review of the ALA and an overview of the ALA and its structure. This section also sets out the process of consultation that has occurred, including its limitations.
3. Key Issues and Recommendations: This section sets out the key issues raised with the Review through examination of the ALA and consultation with community and recommendations for reform that will better the administration of the ALA.
4. Consideration of Broader Reform: This section discusses the consideration of broader reform and options for ongoing review processes.

We commend the report to the Minister for Aboriginal Affairs.

Jason Behrendt

Timothy Goodwin

Reviewers

# **SECTION ONE: OVERVIEW OF THE ABORIGINAL LANDS ACT**

## **THE ABORIGINAL LANDS ACT AND ITS STRUCTURE**

The ALA was a landmark piece of legislation because it was the first time that the Victorian Parliament recognised Aboriginal land rights. Until the ALA was passed, Aboriginal people living on reserves at Framlingham and Lake Tyers had no acknowledged rights of ownership of the land.

The ALA granted freehold title to Aboriginal residents of each reserve. Freehold title is the most complete form of land ownership and is not time-limited. Subject to law, freehold landowners are able to deal with their land (for example, by selling, leasing, licensing and mortgaging it).

The Victorian Government intended that, by returning the land to Aboriginal ownership, it would achieve a significant measure of land justice and would enable communities to become self-sufficient economically and socially. The ALA was an expression of *“the sincere hope that the Government [would] succeed in giving back to the people of Framlingham and Lake Tyers the dignity which was theirs in their original ownership of the continent of Australia”*.<sup>1</sup>

Under the ALA, ownership of the land is structured through two land-holding Trusts (one Trust for Framlingham reserve and another for Lake Tyers reserve). When the legislation was passed, people who lived on the reserves on a given day in 1968 were granted shares and became “members” of their Trust.

Although the ALA refers to “members”, this Report also refers to the members as “shareholders” which seems to be a common term used in both communities. Each term is used here to describe the same group of people (that is, people who hold shares in one of the Trusts).

### **Scheme of the Aboriginal Lands Act**

#### ***Purpose of the Aboriginal Lands Act***

The long title of the ALA says that its purpose is to vest the land in the Trusts, to regulate the Trusts, to make related legislative amendments and “for other purposes”. The long title does not give a sense of the deeper purpose of the ALA.

In the Second Reading speech for the Aboriginal Lands Bill (which became the ALA, once it was passed), the Minister for Aboriginal Affairs noted that *“[t]he purpose of the Bill is to enable the remaining Aboriginal settlements in this State at Lake Tyers and*

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<sup>1</sup> Aboriginal Lands Bill, Second Reading Speech, Minister for Aboriginal Affairs, Hansard, Legislative Assembly, 28 October 1970, p.1421.



Framlingham to become the property of the Aboriginal residents living on them”.<sup>2</sup>  
The Second Reading Speech explained:

*“The strong ties between Aborigines and the land are well known, and despite the removal by time and distance from full-blood settlements, some people at the Lake Tyers and Framlingham reserves still have very strong attachments to these areas of land. Very careful consideration was given to every possible alternative which would allow the residents to take pride in their community. The only reasonable solution which arose out of this consideration was the one which is contained in this Bill – that the Aboriginal people should have ownership of the land on which they and their forebears have lived for generations.”<sup>3</sup>*

The Government intended that the scheme would give residents ownership of land which was recognised as being very important to them.

### ***Establishment of the Trusts and the Vesting of Land***

Under the scheme created by the ALA, each member holds part of their Trust and that Trust owns the land; in that way, the members indirectly own the land.

The ALA required the Government to set up registers of every Aboriginal person who was resident on each reserve on 1 January 1968.<sup>4</sup> To be a “resident”, a person had to have ordinarily lived on the reserve for at least 3 months prior to 1 January 1968 (unless an exception applied).<sup>5</sup> The people resident at Framlingham reserve formed a body corporate known as the Framlingham Aboriginal Trust. The people resident at Lake Tyers formed a body corporate known as the Lake Tyers Aboriginal Trust.<sup>6</sup> Section 9 of the ALA vested the lands comprising the reserves into each of the Trusts.

On 9 June 1971, notices were published in the Government Gazette which identified the 17 people who were entitled to form the Framlingham Aboriginal Trust and the 92 people who were entitled to form the Lake Tyers Aboriginal Trust. These individuals, the first members of each Trust, are listed at **Attachment A** to this Report.

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<sup>2</sup> Aboriginal Lands Bill, Second Reading Speech, Minister for Aboriginal Affairs, Hansard, Legislative Assembly, 28 October 1970, p.1419.

<sup>3</sup> Aboriginal Lands Bill, Second Reading Speech, Minister for Aboriginal Affairs, Hansard, Legislative Assembly, 28 October 1970, p.1420.

<sup>4</sup> Section 3, ALA.

<sup>5</sup> Section 3(1), ALA

<sup>6</sup> Section 8(a), ALA.

## ***Powers of the Trust***

Each Trust is a body corporate (i.e. a corporation) which:

- (a) has perpetual succession (which means that the Trust continues to exist, even if its members die or transfer their shares to another person);
- (b) is capable of suing and being sued;
- (c) can purchase, take, hold, sell, lease, take on lease, exchange and dispose of property;
- (d) can do and suffer "all such other things as corporations are by law capable of doing and suffering".<sup>7</sup>

Section 11 of the ALA sets out a range of powers of each Trust, which include:

- (a) managing, improving and developing the land;
- (b) carrying on any business on Trust land;
- (c) borrowing money, including through mortgaging the land;
- (d) investing money;
- (e) distributing dividends; and
- (f) doing all such things that are incidental to the exercise of any powers.

## ***Restriction on Sale***

Unlike some Aboriginal land rights schemes, the ALA allows each Trust to dispose of land (in particular, by selling or leasing the land), but there are restrictions on how that can be done. A Trust cannot lease land for more than 21 years except in accordance with a resolution which is agreed at a general meeting (special notice must be given of the meeting and at least three quarters of the members who are entitled to attend the meeting must be present and must vote on the resolution).<sup>8</sup> There is no restriction on the Trusts entering into shorter-term leases. Other than entering into leases, the Trust can only dispose of land in accordance with a unanimous resolution of the Trust.<sup>9</sup>

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<sup>7</sup> Section 10, ALA.

<sup>8</sup> Section 11(4), ALA.

<sup>9</sup> Section 11(3), ALA. Under section 2 of the ALA, "***unanimous resolution*** of a Trust means a resolution of which special notice has been given which is agreed to at any general meeting of the Trust by every person who, being entitled to do so, attends the meeting and votes upon the resolution."

## **Trust Shares**

A unique feature of the ALA is the fact that it divided each Trust into shares which were given to the Aboriginal residents of the reserve.<sup>10</sup> The original shareholders were the people listed in **Attachment A**. Each of the first adult shareholders was granted 1000 shares. Each child was granted 500 shares.<sup>11</sup>

The shares are "*personal property*".<sup>12</sup> The ALA anticipates that dividends will be payable on the shares.<sup>13</sup> It also anticipates that shares might be "*acquired*"<sup>14</sup> or "*sold*".<sup>15</sup> Share ownership is to be recorded on a "*register of members*" kept by the Trust.<sup>16</sup>

Members may only sell or transfer their shares in accordance with the ALA. A member can transfer shares to the Trust itself, to another member, to the Crown, and to certain family members.<sup>17</sup> There is no requirement that shares be held by an Aboriginal person.

A transfer of shares only has legal effect if it is recorded in the register of members. To be recorded in the register, the person gaining the shares must show a proper instrument of transfer.

A Trust cannot distribute money amongst its members in the form of dividends except from profits and only then in accordance with an express resolution of the members of that Trust.<sup>18</sup>

## **Members of the Trust**

Only the people who are recorded in the register as owners of shares are members of the Trust.<sup>19</sup> Living on Trust lands does not entitle a person to be a member of the Trust.

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<sup>10</sup> Section 12(1), ALA.

<sup>11</sup> Section 12(2), ALA.

<sup>12</sup> Section 12(3), ALA.

<sup>13</sup> Section 21, ALA.

<sup>14</sup> Section 14(3)(b), ALA.

<sup>15</sup> Section 14(4A)-(6), ALA.

<sup>16</sup> Section 12(6), ALA.

<sup>17</sup> Section 14(2), ALA.

<sup>18</sup> Section 21 (1), ALA.

<sup>19</sup> Section 12(7), ALA.

## **Committee of Management**

Each Trust is managed by a Committee of Management made up of 7 people who are elected by Trust members.<sup>20</sup> Committee members do not have to be members of the Trust.<sup>21</sup> For example, the Trust can appoint a non-shareholding resident or a person with particular occupational qualifications as a member of the Committee of Management. That person does not need to be an Aboriginal person.

The office of a member of the Committee of Management becomes vacant if the member “*becomes of unsound mind*” or is otherwise incapable of acting, becomes bankrupt, resigns, or is removed by a resolution of which special notice is given, passed at a general meeting of the Trust.<sup>22</sup>

There is little guidance in the ALA about how each Committee of Management is to operate, including in relation to how Committee meetings are called. That means that each Committee can determine its own way of operating. The ALA does specify that a quorum of the Committee of Management is 3 members<sup>23</sup> and that decisions must be made by a majority of those attending. Quorum is the minimum number of attendees that must be present to make a meeting valid.

## **General Meetings**

A general meeting is a meeting for all the members of the Trust, which may be held at any time.<sup>24</sup> The ALA provides only limited guidance about how general meetings should occur:

- (a) General meetings are called by the Secretary,<sup>25</sup> who must give members at least 14 days’ written notice.<sup>26</sup>
- (b) The Secretary must call a general meeting if a quarter of the adult members of the Trust ask them to do so (in writing).<sup>27</sup>

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<sup>20</sup> Sections 15 and 16, ALA.

<sup>21</sup> Section 15(4), ALA.

<sup>22</sup> Section 15(6), ALA.

<sup>23</sup> Section 15(11), ALA.

<sup>24</sup> Section 22(7), ALA.

<sup>25</sup> Section 22(2), ALA.

<sup>26</sup> Section 22(4), ALA.

<sup>27</sup> Section 22(3), ALA.

- (c) An Annual General Meeting (**AGM**) must be held within 6 months of the end of each financial year.<sup>28</sup>
- (d) Quorum for a general meeting is one half of the people entitled to vote at the meeting who are resident on the reserve on the date the meeting is called.<sup>29</sup>
- (e) Usually, each member at a general meeting has one vote. However, if there is a request by 5 members who are present at the meeting or by 10% of the total number of members present at the meeting, the number of votes that each individual may cast is determined according to how many shares that person owns (**a poll vote**).<sup>30</sup>

### ***Ministerial Supervision***

Under the ALA, the responsible Minister has a role in supervising the Trusts. Currently, the Minister for Aboriginal Affairs is responsible for the ALA. If the Minister believes that a Trust has failed to comply with the ALA, the Minister may give notice to the Trust and require the Committee of Management to take action.<sup>31</sup> The Minister also has powers to appoint an administrator or an administration board to the Trust.<sup>32</sup> Each Trust must give the Minister certain financial and other records, including audited financial records, details of the Committee of Management and a copy of the unanimous resolution of the Trust for certain land dealings.<sup>33</sup>

### ***Designated places***

The ALA allows the Minister to declare that a place within the Lake Tyers reserve is a “designated place”.<sup>34</sup> That can only be done if the place is not a residence, and the Minister must first consult with Trust members and residents. Designated places can be used by public officials exercising functions or powers under legislation, or by non-government health and community service providers delivering services to residents.<sup>35</sup>

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<sup>28</sup> Section 22(8), ALA.

<sup>29</sup> Section 23(4), ALA.

<sup>30</sup> Section 22(2) and (3), ALA.

<sup>31</sup> Section 23A, ALA.

<sup>32</sup> Section 23B, ALA.

<sup>33</sup> Sections 23S and 23T, ALA.

<sup>34</sup> Section 24A, ALA.

<sup>35</sup> Section 24A(3), ALA.

A number of designated places have been declared at Lake Tyers, including a medical centre, an administration centre, cemeteries, a football ground and a childcare centre.<sup>36</sup>

Under the ALA, roads in the Lake Tyers reserve can be deemed to be public roads.<sup>37</sup>

### ***Powers of the Court***

The ALA also provides that applications can be made to the Supreme Court for shareholders or aggrieved persons to seek relief from the Court (which has wide power to make orders regarding the operation of each Trust).<sup>38</sup>

### **General Observations on Scheme of the Aboriginal Lands Act**

The Options Paper made a number of general observations which have remained relevant in formulating the recommendations contained in this Report.

First, the ALA is important and historic legislation in the long struggle for Aboriginal people to have their rights to land recognised, to take steps to remedy past dispossession, and to provide a mechanism by which the Aboriginal residents on the reserves at the time the ALA was enacted could obtain ownership of the reserve land and collectively pursue economic outcomes for themselves and their communities. As the ALA was passed prior to the Gove Land Rights case,<sup>39</sup> the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the recognition of native title by the common law,<sup>40</sup> the concept of traditional ownership (as Australian law now recognises it) is not present in the ALA.

Second, the share system that confers ownership of land is unique in land rights legislation. It is clear from the Second Reading speech and the debate that followed that Parliament thought carefully about the system of share ownership. It identified the limited class of people (those listed in **Attachment A** to this Report) who would be entitled to hold shares having regard to other measures which had been put in place, including a grants scheme to assist residents to buy land outside the reserve in lieu of shares. The ALA is express in setting up the shares as personal property.<sup>41</sup> It is also

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<sup>36</sup> Minister for Aboriginal Affairs 'Aboriginal Lands Act 1970 - DECLARATION' in Victoria, *Victoria Government Gazette*, No G 7, 15 February 2007, 270.

<sup>37</sup> See ss 24B and 24C, ALA. 'Aboriginal Lands Act 1970 - DECLARATION OF A PUBLIC ROAD AT LAKE TYERS RESERVE' in Victoria, *Victoria Government Gazette*, No G 6, 8 February 2007, 239.

<sup>38</sup> Section 27, ALA.

<sup>39</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>40</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>41</sup> Section 12(3), ALA.

express in contemplating that dividends would be payable on the shares.<sup>42</sup> This has significance in any review of the ALA. Any major change which interfered with shares without compensation would be an interference with property interests, a substantive breach of trust, and further dispossession of Aboriginal people of their land.

Third, while at the time the ALA was enacted the shareholders were all residents of the reserve, that has not remained the case. Some shareholders are still residents on the reserve while others have moved away. Shareholders who have moved away might intend to return and, in any event, not living on the reserve does not diminish the significance that Framlingham or Lake Tyers holds for many of those people. The consequence of people moving away was noted in the Second Reading speech for the *Aboriginal Lands (Amendment) Act 2004 (Vic)* (**the 2004 Amendment Act**):

*“The Act was a landmark law in 1970. It recognised the rights of the indigenous communities at Lake Tyers and Framlingham to own the land, and to control decisions about that land. To these ends, the Act vested the reserve lands in two Trusts, and provided for local occupants to hold personal shares in those Trusts. To manage and make certain decisions about the land, the Act provided for a committee of management for each Trust to be elected by Trust members.*

*This model has remained in place for the last 30 years. However, its effectiveness in practice has diminished over time due to a number of factors. In particular, local participation in decision making at Lake Tyers has declined due to the movement of shareholders out of the area, and the transfer of shares to non-residents. Because participation is linked to shareholding, there has been a decline in residents’ relative capacity to participate in decision making, particularly in general meetings. In addition, the opportunity for Trust members to be involved in the governance of the Lake Tyers Aboriginal Trust has been limited because there has not been a general meeting of the Trust for some years. This is because of difficulties with the legislation. It has also had an impact on the ability of the Trust to meet the governance requirements in the Act.”*

Fourth, despite the broad intentions of the ALA, and perhaps because at the time of the enactment of the ALA all the shareholders were residents, the ALA says very little about the residents of each reserve. The legislation itself is directed towards the shareholders. While the legislation anticipates the Trust has functions to undertake

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<sup>42</sup> See s 21, ALA.

business enterprises and to manage the land, it does not have express service delivery functions. While both Trusts manage housing services to the residents, services in health and education are provided by other organisations. This is relevant because the ALA is primarily land holding legislation and it is unrealistic to expect that either the legislation in its current form, or any other form, will cure all the social and economic challenges that face Aboriginal communities in rural locations. Despite the above, to the extent that external providers of services are reliant on relationships with the Trusts, it also needs to be acknowledged that the governance and the effective operation of the Trusts impact on the residents, some of whom, while not shareholders, may have deep historical and cultural links to the Trust lands. There remains significant social and economic disadvantages at each Trust.

Fifth, although the ALA is directed to conferring private property and economic independence to the residents of the Trust lands at the time of enactment, the land was not transferred to private organisations, unlike in other schemes.<sup>43</sup> As a legislative scheme it remains subject to parliamentary supervision of the affairs of the Trusts and a responsibility on government to ensure that the ALA continues to operate as intended.

Sixth, there are many factors which contribute to the effective functioning of corporations and not all of them are derived from the organisational structure or the legislative context in which they operate. If there are deeply entrenched factional disputes, or a lack of capacity, energy or initiative on the part of those who want it to succeed, then the organisation is likely to face difficulties regardless of the structure which is put in place.

Seventh, there is no guaranteed funding for the Trusts under the ALA. While the Trusts hold substantive assets, some of which generate income, the income currently does not support the employment of extensive staff. In this regard the Trusts are essentially small organisations. The regulatory regime needs to be proportionate to the nature and size of the organisation.

Eighth, the Lake Tyers and Framlingham Aboriginal communities are very different communities – in geographical size, population and in the make-up of shareholders and residents. Accordingly, reform options may need to be unique to each community, depending on the circumstances. **Attachment B** to this Report sets out the current situation at Lake Tyers and Framlingham that has informed this review.

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<sup>43</sup> See for example the *Aboriginal Land (Northcote Land) Act 1989* (Vic); the *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* (Vic) and the *Aboriginal Lands Act 1991* (Vic).



## **SECTION TWO: BACKGROUND TO REVIEW AND CONSULTATION PROCESS**

## BACKGROUND TO REVIEW AND CONSULTATION PROCESS

### Previous Reviews of the Aboriginal Lands Act

The ALA has rarely been reviewed over its near 50-year history. This is unlike the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA (NSW)**), for example, which is reviewed every 5 years to ensure the policy objectives of the legislation remain valid and the operation of the legislation is meeting those objectives.<sup>44</sup>

There have been two formal reviews of the ALA since it was passed in 1970.

In 2002, an internal review was conducted by two officers of Aboriginal Affairs Victoria (what is now First Peoples – State Relations, Department of Premier and Cabinet (**First Peoples State Relations**)). The 2002 Review made a number of recommendations in order to improve the administration of the ALA, including changing the quorum requirements for a general meeting to one half of the resident shareholders at Lake Tyers and Framlingham. The 2002 Review also raised the prospect of more fundamental reform of the share system, by repealing the ALA and transferring the land to general corporate bodies or investing in a share buy-back scheme to decrease the number of shares and shareholders.<sup>45</sup> However, the 2002 Review found that fundamental reform would involve substantial upheaval and considerable cost and that amendments should instead be made to the ALA to update the legislation and improve administration.

The 2002 Review also commented that while the objective of vesting the land in the Trusts was accomplished, the assets, capacity of, and professional assistance provided to the Trusts was insufficient to enable future independence of those communities.

Following the 2002 Review, the ALA was amended in a number of significant respects.

- The quorum requirement was changed in line with the recommendations of the 2002 Review for it to be one-half of all resident shareholders.
- The Minister was provided with the power to appoint an Administrator to Lake Tyers Aboriginal Trust.
- Access rights were granted to Lake Tyers to allow for policing and other service provision to the community.
- Lake Tyers reserve roads were designated public roads to enable road safety and management by the local government authority.

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<sup>44</sup> Section 252A, ALRA (NSW).

<sup>45</sup> *Review of the Aboriginal Lands Act 1970* (April 2002) (the **2002 Review**), pp 39-41.

In 2012, the Victorian Government prepared a paper setting out potential further amendments to the ALA, including the following.

- Providing the Minister with the power to appoint an Administrator to Framlingham Aboriginal Trust, as well as Lake Tyers Aboriginal Trust.
- Allowing the Minister to appoint a Board of Administration with a majority of the Board endorsed by shareholders. This was raised in the context of transitioning the Administration at Lake Tyers back to community control.
- Allowing the Trusts to grant a lease for longer than 21 years.

Changes were made in line with the above options to the ALA in 2013, as well as obliging the Trusts to provide financial reports and a report on the social and economic wellbeing of residents to the Minister.

Relevant to this Review, whatever the merits of these amendments, during consultations some persons expressed lasting resentment towards some of the amendments and the unintended consequences which have followed from them.<sup>46</sup>

### **Current Review of the Aboriginal Lands Act**

In 2017, First Peoples State Relations (formerly Aboriginal Victoria) published a Discussion Paper for a further review of the ALA (**the Discussion Paper**). The Victorian Government stated that it wanted to review the ALA “to improve governance, facilitate economic development and enable greater self-determination for the Framlingham and Lake Tyers Aboriginal communities”. A number of issues were raised for discussion in relation to each of those objectives.

In 2018, Jason Behrendt and Tim Goodwin (**the reviewers**) were appointed as independent persons to conduct the Review of the ALA.

Information in relation to the Review was published on the Engage Victoria Website, maintained by the Department of Premier and Cabinet.<sup>47</sup> That page provided background to the Review, identified the reviewers, and provided access to the Discussion Paper and the ALA, as well as some Fact Sheets about the Review.

### ***Methodology of Review***

The Victorian Government engaged the reviewers to make recommendations with the view of achieving improved governance, facilitate economic development and enable

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<sup>46</sup> For example, the introduction of the residential quorum requirement to address the quorum issues at Lake Tyers has subsequently been used to different effect at Framlingham to deny the establishment of a quorum if a critical number of residential shareholders decide not to attend.

<sup>47</sup> <https://engage.vic.gov.au/ala-review-1970>.

greater self-determination for the Framlingham and Lake Tyers Aboriginal communities.

The methodology of the Review was founded on the principle that the reviewers wanted to make themselves as available as possible for stakeholders to be consulted on potential changes to the ALA.

The relevant stakeholders were:

- primarily shareholders, considering they hold property interests under the ALA;
- residents on Trust land, both shareholders and non-shareholders; and
- Aboriginal community members with historical or traditional links to either or both Trusts.

Accordingly, the reviewers undertook the following activities throughout the course of the Review:

- Conducted face to face consultations both on Trust land and in surrounding towns where First Peoples State Relations understood stakeholders resided (particularly shareholders). The reviewers took the view that as many shareholders did not live on Trust land, and considering the difficulties of travel for many Aboriginal persons, that consultations would be beneficial in areas other than on Trust land.
- Accepted submissions through the Engage Victoria website and by email.<sup>48</sup>
- Provided their email address and phone number of personal contact and spoke to persons by phone or in person where requested.

The Review proceeded according to the following steps.

- 1 Stage 1 Consultations with stakeholders identified above.
- 2 Development of an Options Paper based on desktop research and the Stage 1 Consultations.
- 3 Stage 2 Consultations with stakeholders, using the Options Papers as a framework for discussion.
- 4 Stage 3, whereby each Trust was funded by First Peoples State Relations to engage an external consultant to work with each Trust to provide a formal submission to the reviewer from each Trust in response to the Options Paper.

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<sup>48</sup> Nine submissions were made through this mechanism.

## ***Stage 1 Consultations***

The reviewers visited Framlingham Aboriginal Trust in June and September 2018 and Lake Tyers Aboriginal Trust in July, August and September 2018 to discuss with community members the operation of the ALA, the operation of the Trusts and potential options for reform. The meetings at Lake Tyers were preceded by members of First Peoples State Relations attending Lake Tyers to door knock to advise members of the proposed meetings. In addition, the reviewers made themselves available at Bairnsdale, Morwell and Warragul. The reviewers have also met with people who have contacted them wishing to discuss the Review. The consultation included some small group discussions as well as some one on one meetings.

## ***Options Paper***

On the basis of their own research and those community consultations, the reviewers drafted an Options Paper that set out potential options for reform of the ALA with the intention of informing a second round of consultations to discuss in greater depth potential options for reform and what the community wants to see happen. The Options Paper was finalised in May 2019 and was published on the Engage Victoria webpage. A copy of the Options Paper, an Executive Summary and supporting Fact Sheets were posted by First Peoples State Relations to every shareholder of the Trusts.

The Options Paper was written taking into account the Stage 1 Consultations, the Discussion Paper and the reviewers' desktop research and preliminary analysis.

The Options Paper provided options to stakeholders to discuss under the following headings:

- **No change:** No amendment of the ALA and maintain the status quo.
- **Minor change:** Improve the administration of the ALA by reference to 6 key issues identified during the course of the Stage 1 Consultations (share system, governance, external regulation, dispute resolution, engagement with residents, and sale of Trust land and other economic activity).
- **Major change:** fundamental reform of the ALA, including by replacing the share system and/or the corporate model of the Trusts.

Based on these options, the Options Paper was designed to provide a framework for discussion in Stage 2 Consultations.

## ***Stage 2 Consultations***

Following the publication of the Options Paper a further process of consultation was undertaken in May and June 2019.

In relation to Lake Tyers, that included meeting with the Committee of Management of the Trust and holding community forums at Lake Tyers, Morwell, Warragul, and Bairnsdale. In relation to Framlingham, community forum where held at Framlingham, Frankston and Geelong. The reviewers also held a forum at Melbourne. These community forums were arranged by First Peoples State Relations. Prior to holding the community consultations at Lake Tyers, every household was provided with information in relation to the proposed meetings.

Again, the reviewers made themselves available to speak to any individuals and groups who wished to speak privately.

### **Stage 3**

Following the Stage 2 Consultations, it became clear to the reviewers and First Peoples State Relations that, generally speaking, engagement had been low at Lake Tyers, the impact of which is discussed below. In addition, during the Stage 2 Consultations, an Administrator was appointed to Framlingham Aboriginal Trust under s 23B of the Act.

In response, First Peoples State Relations supported each Trust to engage an external consultant to work with each Trust to prepare a submission to the Review. In February 2021, the reviewers were provided with submissions from each Trust<sup>49</sup> as well as a number of government agencies<sup>50</sup> and the Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC Submission**).

Following the provision of submissions, the reviewers finalised the drafting of this Final Report. All submissions have been taken into account in finalising the Final Report, including the recommendations contained herein.

## **General Observations on Consultations**

### ***Context and impact on methodology***

The reviewers, with the assistance of First Peoples State Relations, have used best endeavours based on the principle of free, prior and informed consent, to engage with shareholders and residents at both Lake Tyers and Framlingham. This has included using multiple platforms and methods to engage with people. The reviewers have also

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<sup>49</sup> Lake Tyers Aboriginal Trust, Submission to the Victorian Government's Review of the Aboriginal Land Act 1970, 22 January 2021 (**LTAT Submission**); Framlingham Aboriginal Land Trust, Submission to the Victorian Government's Review of the Aboriginal Land Act 1970, January 2020 (**Framlingham ALT Submission**).

<sup>50</sup> Department of Environment, Land, Water and Planning and Department of Justice and Community Safety.

made themselves available through forums at a number of locations in Gippsland and near Framlingham, as well as being available to speak or meet with people individually where requested, for other shareholders or affected community members to participate in the Review.

There were a number of impacts on the Review that affected the operation of the methodology set out above. These impacts were both internal and external to the Trusts.

### ***Low levels of engagement at Lake Tyers***

Despite the efforts of First Peoples State Relations, the level of engagement with individual shareholders at Lake Tyers has been low. In some instances there was no attendance at community meetings held for the Review. Even those held at Lake Tyers Aboriginal Trust were attended by few individuals. This was despite notice being given well in advance with reminders being given the day before or the morning of the meetings.

There may be a number of reasons for the lack of engagement at Lake Tyers.

- It may be systematic of the low level of engagement with the ALA at Lake Tyers which has caused difficulties in the past getting a quorum at general meetings and board meetings.
- Some shareholders or residents may simply be focused on their day-to-day lives which means a review of the ALA is not a priority.
- Demands on the Lake Tyers community for input into a range of other processes may give rise to a level of consultation fatigue.
- It may be that some people may have preferred for these issues to be dealt with by the Committee of Management or people with more knowledge of the ALA and have therefore preferred not to attend or have input.
- Some people may have chosen not to attend due to ongoing and unrelated tensions with other members of the community, based on a perception those others might attend.
- It was difficult to contact some shareholders due to them moving away and their contact details not being updated.

A larger proportion of shareholders and residents were engaged with at Framlingham. This might be a product of the smaller more localised nature of the shareholdings as well as the fact that shareholders at Framlingham appear to be more engaged with the ALA and aware of its content.

### ***Nature of the engagement in consultations***

In relation to the engagement that has occurred, the following general observations can be made.

- 1 There are varying levels of knowledge about the operation of the ALA. Generally speaking, there are low levels of understanding of the provisions of the ALA amongst community members at both Trusts. However, there is a lower level of understanding of the details of the ALA at Lake Tyers than at Framlingham. While there is a general understanding of some aspects of how the Trusts are supposed to function, there is little understanding of the provisions in the ALA that put that scheme into place. While the Options Paper described the structure and provisions of the ALA, to act as an educative tool for the communities, a detailed analysis of the ALA did not occur in the vast majority of the consultations, particularly during Stage 2.
- 2 Not everyone who attended the consultation did so because they had a view on the ALA or how it could be improved. It is clear that some people attended because they believed that it was a forum regarding how they could find out about their family shares, or how they could get information about transferring shares. While the circumstances of these participants was itself informative to the Review, their capacity to engage with the Discussion Paper or the Options Paper was limited.
- 3 Some individuals attended multiple meetings where they expressed similar views on multiple occasions. As is common with public forums, some people were more vocal than others. This is not surprising as some people are more informed, or feel more strongly about the issues being raised.

### ***Historical context – administration and litigation***

For both Framlingham and Lake Tyers communities, the historical context within which people participated in the Review is important to consider.

At Framlingham, a number of shareholders have, in the past 10 or so years, been involved in litigation associated with the operation of Framlingham Aboriginal Trust. This focused input on the specifics of the ALA in a way that did not occur at Lake Tyers, but also meant that certain views were provided through the prism of previous or existing disputes rather than through a consideration of the overall functioning of the ALA.

In relation to Lake Tyers, it should be noted that at the time the Review process was commenced, the Trust had only recently been put back in the control of shareholders, having been placed in administration for 10 years from 2004 to 2014. This is relevant for a number of reasons.



- First, for a period of 10 years, the community was not in control of the Trust and therefore not engaged with the day-to-day issues which may have arisen through the administration of the ALA.
- Second, it became clear to the reviewers that there are residual grievances in relation to the length of the administration, the reasons it was put in place, and the adequacy of the transition out of administration, which may have taken the focus of some individuals away from how the ALA could be improved.

As a result of these matters, there was some general scepticism and lack of trust with the process of a review of legislation, with some people consulted feeling it is part of a broader unspoken agenda of the Victorian Government rather than an opportunity to make a piece of legislation work better for them.

### ***Current context***

As mentioned above, during the course of the Review, the Framlingham Aboriginal Trust was placed into administration. While this may have created the opportunity for shareholders to reflect on the ALA and how it may be improved, it could have also focused the attention of some shareholders towards dealing with the administration rather than the broader issue of legislative reform.

### ***Other challenges during consultations***

During the course of the consultations, some participants raised criticisms of the review process. These criticisms were not universal, but it is appropriate that they be recorded in this Report.

First, at the community meetings at Framlingham and Lake Tyers, some people suggested consultations should only occur on Trust land and as a public forum. However, others at those same consultations made the contrary observation that endorsed allowing people the option to speak privately in recognition that sometimes public forums are dominated by the loudest voices. Ultimately, this was a minority view in the context of the wider Review and the reviewers are comfortable with multiple options and locations being made available due to the diverse locations shareholders reside in and in the interests of speaking to persons as widely as possible.

Second, there was criticism at Lake Tyers and Framlingham about the consultation occurring with non-shareholders. Some shareholders hold a strong view that the Trusts were established for shareholders, the shares are private property, and that there was a fundamental problem of consulting third parties about what should happen to other peoples' property. Related to this was a view that if third parties are able to talk about the government buying back the property of shareholders and redistributing it, then all property should be on the table, including the persons who took up the land package options offered in the 1960's as part of the passage of the Act. In response,

the reviewers have been cognisant of the shares being private property and cognisant of the historical circumstances in which they came to be transferred to particular named individuals.

Third, the process by which the Review has been conducted has evolved. The Discussion Paper was released prior to the reviewers being appointed. A number of individuals at both communities raised the desirability for both the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust being able to meet in relation to the Review. That had not occurred by the end of 2018, and the 2019 bushfires and COVID-19 subsequently intervened to prevent that from occurring.

Fourth, the submissions from both of the Trusts reiterated the difficulty each had in undertaking their own community consultations as a result of COVID-19.<sup>51</sup> Accordingly, the breadth of consultations engaged in by each Trust, that formed the basis for the views expressed in the submissions, was not as extensive as each Trust would have hoped for. For example, the LTAT Submission noted that two of seven positions on the Committee of Management were vacant and a third person did not attend any meetings in the relevant time period. The LTAT Submission therefore stated that it “represents the Committee’s considerations of key matters as have been formally and informally submitted by stakeholders over the period from inception of the review.”<sup>52</sup> At Framlingham, Adam McLean was engaged to consult with resident shareholders, non-resident shareholders and non-shareholding residents, which formed the basis of the Framlingham ALT Submission.<sup>53</sup> However, a number of workshops planned with those groups were cancelled, and so Mr McLean held confidential meetings with stakeholders from each group.

### ***Themes arising from consultations***

The reviewers have considered all the views which have been expressed. In preparing both the Options Paper and this Report, the reviewers have sought to understand the issues raised, determine how they arise within the scheme of the ALA and, where appropriate, consider how the ALA could be amended to address those concerns.

Taking into the fact the matters above – particularly the low level of engagement in consultations, the more general rather than specific nature of the discussion, and the low levels of understanding of the ALA – the reviewers have taken into account certain themes that emerged from the consultations to guide their approach to recommendations for change.

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<sup>51</sup> See LTAT Submission, p 6; Framlingham ALT Submission, p 2.

<sup>52</sup> LTAT Submission, p 5.

<sup>53</sup> Framlingham ALT Submission, p 2.

Those themes are as follows:

- 1 *Greater transparency in the operation of the Trusts:* A constant theme during the course of consultations was a desire of shareholders and residents for there to be greater transparency in the operation of the Trusts, particularly regarding the share system and governance issues for the Committees of Management.
- 2 *Better governance and accountability:* Many community members wanted the Trusts to operate better and according to principles of good governance and that Committees of Management should be accountable for their decisions.
- 3 *Easier and clearer guidance on dealing with and transferring shares:* There were often concerns raised at consultations about the difficulties associated with the process of transferring shares and inheriting shares after family members pass away. Many wanted the process of transferring shares – before or after someone passes away – to be clearer and easier to navigate. Many at Lake Tyers specifically were concerned that shares were still tied up in deceased estates.
- 4 *Promoting economic development:* Outside of the strictures of the ALA, many community members – shareholders, residents and others alike – expressed their aspirations for greater economic development for the Trusts, both on Trust land and beyond. This included desires for agricultural industry, eco-tourism ventures and property investment for community members.
- 5 *Desire to avoid disputes:* Many people at the consultations expressed a desire for disputes amongst community members, particularly shareholders, to end and for there to be clearer dispute resolution mechanisms under the ALA.
- 6 *Less arbitrary regulation:* People had differing views on the position of the Minister and First Peoples State Relations – some wanting no intervention and others wanting greater intervention in the affairs of the Trust. However, at the very least, many participants at consultations wanted the role of government and the Minister to be clearer and expressed interest in the concept of some form of independent regulation.
- 7 *Need for a Holistic Approach:* Both the Trusts supported the Victorian Government's commitment to improve governance, facilitate economic development and enable greater self-determination. Both have also made clear that amending the ALA on its own will not achieve that.<sup>54</sup>

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<sup>54</sup> LTAT Submission, p 5; Framlingham ALT Submission, p 3.

## Overarching Recommendations and Approach to Recommendations

Taking into account all of the above, in regard to the categories of No Change, Minor Change and Major Change, the reviewers have made recommendations that involve **Minor Change** to the ALA in the circumstances of both Trusts. Of course, the recommendations made are not necessarily “minor” in nature, but in fact will provide greater opportunity for better administration of the Trusts.

However, the reviewers have taken a conservative approach to recommending amendments to the ALA in light of the government’s commitment to promoting self-determination as part of the Review. Considering the level and nature of engagement and the context within which the Review has occurred, the reviewers have only recommended change where:

- there was a critical mass of support for a proposal at consultations or in the submissions from the Trusts;
- the recommendation clearly aligns with a theme or themes identified at the consultations; or
- the proposed change is relatively non-controversial (i.e. is clearly needed to fill obvious legislative gap, is a technical fix to a clear problem or is simply a matter of modernisation of the ALA).

Further, the recommendations made have attempted to be adapted and responsive to the unique circumstances of each Trust, in order to avoid the type of unintended consequences that have occurred as a result of some of the previous amendments to the ALA.

Finally, as discussed at various points above, the reviewers have been highly cognisant of the fact that any recommendation that affects the share system, directly or indirectly, affects the private property rights of (mostly) Aboriginal persons. For obvious reasons, that is not a matter to be taken lightly.

It is clear that **No Change** is inappropriate and no person at any consultation or in any submission supported this option.

As explained in Section 4, although a number of persons and submissions called for **Major Change**, including a submission from the Lake Tyers Aboriginal Trust (which we discuss in more detail in Section 4), we consider that further consultation is required before such change to the ALA is considered, let alone implemented, in order to ensure that the principle of self-determination is adhered to. No consensus on Major Change emerged during consultations and, in those circumstances, the reviewers consider and have recommended that ongoing review and consultation occur with shareholders and residents regarding the operation of the ALA.

Further, the recommendations made in this Review, if implemented, will assist by providing a greater opportunity for better administration of the Trusts, putting them in a better position to consider any additional and more fundamental changes to the ALA.

## **SECTION THREE: KEY ISSUES AND RECOMMENDATIONS**

## KEY ISSUES AND RECOMMENDATIONS

In Section 3, the recommendations in the category of **Minor Change** are set out, relevant to a number of key issues that emerged in the course of the Review. These were identified in the Options Paper as:

- (a) Is the **share system** working or can it be improved?
- (b) How can **governance** of the Trusts be enhanced?
- (c) What is the appropriate level of **external regulation** of the Trusts?
- (d) Are the **dispute resolution** mechanisms in the ALA appropriate?
- (e) How can greater engagement by **residents** be facilitated?
- (f) Can the ALA better protect or enable the **sale of Trust land** and provide for **economic development**?

During the course of the Stage 2 Consultations, these issues remained relevant and continued to be the focus of discussion with shareholders, residents and other members of the general Framlingham and Lake Tyers communities.

In addition, this Report discusses two additional issues for potential recommendation, including:

- (g) Should the ALA be **modernised** and how?
- (h) Should there be a process of **ongoing review** built into the ALA?

In light of the fact that the above issues remain relevant and the Options Paper set out a broad framework for potential amendment of the ALA, the reviewers have retained the framework of the Options Paper and built on that discussion in this section of the Report. Accordingly, the Stage 2 Consultations have provided a basis for amendment, abandonment and/or addition to the proposed recommendations in the Options Paper.

## **SHARE SYSTEM**

The share system is a unique feature of the ALA. It is the mechanism by which the ALA conferred ownership of the Trust on the relevant inhabitants. Many shareholders who talked to the Review are very attached to their shares and see them as an important recognition of their family history at Lake Tyers or Framlingham, and as recognition of their connection to ownership of land. They are not just viewed as a property interest or stake in land. They are viewed as ownership of cultural heritage and an important link to land that is culturally and historically important and a means by which that land and culture can be handed down through their family, or what was sometimes referred to as “the bloodlines” of the original shareholding families.

At the same time, the shares and the share system were the subject of substantive discussion and comment. Observations on some of the issues raised with the share system and how they may be improved are set out below. While there were comments from some shareholders that it may be better if the Government bought back the shares and put in place a different system, we do not think this was the view of a majority of shareholders. The LTAT Submission acknowledged significant difficulties with the current scheme of shareholding, but at the same time saw a system of shareholding being retained in an alternative model.<sup>55</sup> The Framlingham ALT Submission noted that while there was support for the continuation of the share system, such support was not universal, and some members of the community supported a buy back or compensation scheme for shares with a view to winding up the share system.<sup>56</sup> This is a matter discussed further in Section 4 of this Report.

### **Shareholding and transfers of shares**

#### ***Scheme of the ALA***

An overview of the ALA was set out in Section 1. The following sets out the specific requirements of the ALA regarding the share system to introduce discussion of potential change to that system.

The system of shareholding in the Trust was the unique mechanism by which Parliament conferred ownership of the Trust on the then residents of the former reserve land. The ALA assumes that dividends might be paid to the shareholders from the profits obtained from economic activity on the Trusts. At a general meeting, shareholders can require that a matter be determined by a poll vote, meaning that a person can vote in accordance with the number of shares they hold.

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<sup>55</sup> LTAT Submission, pp 3-4 and 25.

<sup>56</sup> Framlingham ALT Submission, p 4.



It is only those people who appear on the register as owners of shares who are the members of the Trust.<sup>57</sup> A transfer of shares only takes effect upon alteration of the register of members on production of a proper instrument of transfer.<sup>58</sup> In this way, the Committee of Management maintains control over how, and to whom, shares may be transferred.

Shares can be transferred or they can be sold. A member of the Trust is not permitted to sell or transfer the shares other than in accordance with s 14 of the ALA. The Trust is not allowed to register the transfer of the shares contrary to that section.<sup>59</sup>

Section 14(2) of the ALA sets out who shares may be transferred to. During the course of the Review, it was apparent that some shareholders viewed s 14(2) as providing for the transfer of shares through a “bloodline” of the original families who were present on the reserves at the relevant date. The scope of s 14 is however broader and allows for transfer of shares to the Crown, the Trust, “husbands” and “wives”, and other shareholders, including non-Aboriginal persons.

Section 14(3) of the ALA then sets out that those restrictions do not apply to shares transferred under a will.

The ALA also sets out specific rules for the sale of shares. To sell shares, a shareholder must first offer the shares to the Trust or a person nominated by the Trust.<sup>60</sup> A person cannot sell their shares to anyone and they are not free to choose who they sell their shares to. Nor are they free to decide the price for which shares may be sold. The price is to be set by the auditor. If the shares are not purchased by the Trust, or the person nominated by the Trust does not agree to buy the shares, they can be sold to “*any person*” at the price fixed by the auditor. It is not clear whether this is “any person” from the categories of people listed in s 14(2) of the ALA, or any person at all.

From its inception, the ALA has operated on the basis that shares are private property which could be transferred and sold, and left to the individual shareholders as to whether they exercised that option or otherwise hold on to their shares. An inevitable consequence of such a scheme is that where shares are transferred, they may be distributed unevenly, and over time (particularly a period of 50 years) they may be diluted in some families and consolidated in others.<sup>61</sup> It would appear that in practice

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<sup>57</sup> Section 12(7), ALA.

<sup>58</sup> Section 13(1), ALA.

<sup>59</sup> Section 14(1), ALA.

<sup>60</sup> Section 14(4), ALA.

<sup>61</sup> Bearing in mind that at Framlingham, the 17 original shareholders were only from a limited number of families in the first place.

many shares at both Lake Tyers and Framlingham have been transferred to family members rather than being sold. It is possible, however, that some of these have been transferred in exchange for payments outside the scheme for sale anticipated by the ALA. A number of comments were made to the reviewers that this was the case but it is beyond the scope of the Review to investigate those matters.

### ***Issues Raised in the Review***

The share system was the subject of considerable comment and discussion in the course of the Review. Those matters include the following:

- 1 *Lack of awareness of transfer process:* It is apparent that there is a general lack of understanding on the part of some shareholders of how they can transfer shares. The reviewers spoke to people who wanted to transfer shares to family members but did not know how to go about it. There was also an instance where a person was aware of a family member who had shares and who was not interested in them, but were not aware they could be transferred to other family members.
- 2 *Lack of distribution of shares (including deceased estates) and lack of clarity of powers of the Trust in relation to the transfer of shares:* A substantive issue at Lake Tyers is that a large proportion of shares (possibly as high as 40%) are tied up in deceased estates. The powers of the Trust to remedy this are unclear.
- 3 *Shares transferred contrary to ALA:* Concerns were raised over whether all transfers of shares at both Lake Tyers and Framlingham have occurred in accordance with the ALA.
- 4 *Inaccuracies in the share registers:* Concerns were raised of the accuracy of the share register at Lake Tyers. The original share register was lost and was reconstituted during the administration at Lake Tyers and some shareholders maintain that it was inaccurate.
- 5 *Lack of transparency and supervision:* There is a concern that there is no independent supervision of the share register, or the process by which shares are transferred or recorded. There is no accessible mechanism for dispute resolution when disagreements arise.
- 6 *Shares held by non-Aboriginal people:* A number of shares have been transferred to non-Aboriginal people. The Crown is the holder of a number of shares at Lake Tyers. There was fairly widespread concern about shares being able to be held by non-Aboriginal people.
- 7 *Poll voting:* Concerns were raised by some people during the Review in relation to poll voting with some people maintaining that it discourages participation and places too much power on a number of individuals. The impact of poll votes can

be magnified if there is a low participation rate of shareholders at general meetings.

### **Recommendations in Relation to Share System**

The review has identified that there are more significant issues with the system of share ownership at Lake Tyers than that at Framlingham. The LTAT Submission called for “a new Trust shareholder system that has been developed by the community”.<sup>62</sup> However many features proposed for consideration in that new system did not depart significantly from the existing scheme, but suggested modifications to it. Furthermore, the LTAT Submission was only provided at a very late stage of the review process, and the proposal in it has not been able to be discussed by the reviewers with the broader community of shareholders at Lake Tyers. In the absence of a clear preference for the abolition of the shareholding system by a majority of shareholders and the Trusts, the reviewers have not recommended major changes of that kind. Instead, the reviewers have recommended minor changes to the shareholding system, particularly regarding the transfer of shares and supervision of the share registers.

In the reviewers’ opinion, if in future there is a transition to a different system of share ownership at Lake Tyers, it needs to be approached carefully given the nature of the property interests at stake. Furthermore, any transition from the existing system of share ownership at Lake Tyers to a new one will only be more complicated and lead to further disputes if the current problems with the existing share register are not first rectified. Accordingly, the reviewers have only made recommendations for minor change at this stage, acknowledging that the process for more fundamental reform will require a longer process.

### ***Audit of the Share Register at Lake Tyers***

During the course of the Review a number of concerns were raised about the state of the share register at Lake Tyers and whether it accurately reflected the shareholding. The concerns over the Lake Tyers share register arise in circumstances where the original share register was lost and the share register was reconstituted when the Trust was in administration. The reviewers understand that this was done with the assistance of the public trustee.

Some people commented to the Review that they have been left with shareholdings which are illogical and cannot be explained. Others have complained that there were transfers recorded in the original share register which are not reflected in the reconstituted one. Leaving aside whether all share transactions have been properly reflected and recorded in the register, the concerns appear to have some basis in that there are now more shares in the register than what were originally issued.

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<sup>62</sup> LTAT Submission, p.5.

In circumstances where an original register was lost, it is unsurprising that there may be inaccuracies, particularly if there was limited paperwork kept by the Trust in relation to the transactions.

There may be limitations in whether an audit could correct all inaccuracies, but given the comments that have been made to the Review, it warrants a process of further checking and amendment if necessary. This is not least because the integrity of the register is critical to the proper operation of the Trust, and there is likely to be ongoing difficulties if there are unresolved grievances in the accuracy of the share register.<sup>63</sup>

The LTAT Submission supported an audit of the Lake Tyers share register, though suggested it be conducted by an Independent Registrar rather than any person

### **Recommendation 1**

- First Peoples State Relations provide assistance to the Lake Tyers Aboriginal Trust to undertake an audit of the share register at Lake Tyers.

connected to the Trust or a financial auditor.<sup>64</sup> There is great value in this suggestion, although the reviewers are not inclined to be overly prescriptive regarding how any audit should occur.

### ***Improving Awareness of the ALA and Share System***

Unsurprisingly, there does not appear to be a strong awareness of the content of the ALA and how it operates.<sup>65</sup> During the course of the Review, First Peoples State Relations prepared a number of plain English information sheets which proved useful, particularly for those who might have otherwise had difficulty in engaging with the substantive Options Paper. It would be useful if similar materials could be prepared about the ALA generally and placed on the First Peoples State Relations website and provided for dissemination to the Trust. The plain English summaries should merely seek to inform the community about the content of the legislation and the procedures it provides for.

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<sup>63</sup> They are also likely to be exacerbated if at any time in the future there was a decision to substantially alter the landholding structure and compensation was payable on the value of shares held.

<sup>64</sup> LTAT Submission, pp 24-25.

<sup>65</sup> See LTAT Submission, p 11; Framlingham ALT Submission, pp 3-4.

## **Recommendation 2**

- First Peoples State Relations should prepare plain English summaries of the ALA in consultation with the Lake Tyers and Framlingham Aboriginal Trusts.

During the Lake Tyers consultations, the reviewers were approached by a number of individuals who did not know whether they had shares, and did not know how to find out what shares they owned, which highlights a lack of information in relation to shareholding. There similarly appears to be a lack of information about the process for transferring shares. Both these matters could be contributing to low participation in the affairs of the Lake Tyers Aboriginal Trust.

It is clear that the operation of the ALA at Lake Tyers would benefit if the Trust was assisted to implement a program to increase awareness about the process of transferring shares under the ALA, and for the Committee of Management to take steps to give effect to transfers where they are requested. This should also include clear information about how individuals can identify whether they hold shares or not. This program would need to be implemented in conjunction with the program to address the large number of shares which are tied up in deceased estates, which is set out in more detail below.

Although there was a higher level of understanding of the share system at Framlingham, the Framlingham ALT Submission also supported the proposition that shareholders should be supported and informed as to their responsibilities with respect to share transfers.<sup>66</sup>

## **Recommendation 3**

- First Peoples State Relations provide assistance to the Framlingham Aboriginal Trust and Lake Tyers Aboriginal Trust to develop and disseminate materials advising shareholders of:
  - (a) how to clarify the number of shares they own; and
  - (b) how to transfer shares, and to who shares can be transferred.

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<sup>66</sup> Framlingham ALT Submission, p 4.

## ***Control by the Committee of Management***

A transfer of shares is only effected by the alteration of the register to record the transfer.<sup>67</sup> Because the Committee of Management is responsible for maintaining the register, in practice it effectively controls the transfer of shares. There is no clear statement in the ALA whether the Committee of Management can choose to refuse to allow a transfer of shares and, if so, in what circumstances it can refuse to do so.

The Committee of Management having the ability to refuse a transfer (even if it is to a person within the class of people identified in s 14 of the ALA), might be viewed as an important exercise of the right of self-determination in that it allows the Committee of Management to determine the composition of the shareholding group. On the other hand, the current problems at Lake Tyers with the large number of shares held in deceased estates, may be exacerbated if there are additional hurdles to effect a transfer. The LTAT Submission stated that the Committee of Management should not determine the transfer of shares but rather provide authorisation in conjunction with an Independent Registrar.<sup>68</sup>

The Options Paper raised the option of clarifying the role of the Committee of Management in approving, rejecting and recording the transfer of shares. It also suggested that the Committee of Management should not be able to refuse the transfer of shares under the terms of a will or by an executor of a will, or generally, if the transferee is from a class of persons to who the ALA allows for shares to be transferred. This should be subject to an exception where the Committee of Management could refuse the transfer if the person is ineligible to be a member for the reasons in s 15(6) of the ALA.

### **Recommendation 4**

- Amend the ALA to provide that the Committee of Management has power to refuse to approve a transfer but that:
  - (a) the Committee of Management cannot refuse a transfer if the transfer is made under a will, or by the executor of a deceased estate, and the transfer is made to a class of persons to who shares are capable of transfer under the ALA; unless
  - (b) the person to who shares are to be transferred is ineligible under s 15(6) of the ALA to being a member at the time of transfer.

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<sup>67</sup> Section 13(1), ALA.

<sup>68</sup> LTAT Submission, p 26.

### ***Instrument of Transfer***

A transfer of shares only takes effect upon alteration of the register of members on production of a proper instrument of transfer.<sup>69</sup> The ALA does not define what a “*proper instrument of transfer*” is. Nor does it set out what information should be included in support of any instrument of transfer. In practice it appears that the Trusts require the production of some documentation in support of the transfer in the form of a statutory declaration from the person passing the shares (**the transferor**) and the person receiving them (**the transferee**).

A document has been prepared by First Peoples State Relations which currently appears to be used by both Trusts. A copy of that document appears at **Attachment C** to this Report. The Options Paper suggested that this should be a prescribed form in the ALA. Having the information set out in the ALA avoids criticism being directed to the Committee of Management where reasons for the request for documentation might be misunderstood and misinterpreted as getting in the way of the wishes of the transferor or transferee.

Consistent with the observations above on the need for better clarity around the process under which shares are transferred, it would be appropriate for this document to be formalised so that there is a clear and transparent process for the transfer of shares.

#### **Recommendation 5**

- Amend the ALA to provide for the existing form for the transfer of shares at Attachment C be a prescribed document and for the ALA to prescribe the documents which are to be provided in support of the application for transfer.

### ***Notice of Transfer and Access to the Share Register***

It is apparent that shares have been transferred from time to time and, in many instances, the transfer of shares may have had little impact on the operation of the Trust. However, because the election can be by poll vote, in other instances the transfer of shares can potentially influence the election of the Committee of Management. The holding of shares is also relevant to reckoning the number of people required to constitute a quorum. As a result there is potential for a dispute if the transfer of shares does not occur in a transparent way. Given that the transfer of shares does not appear to occur regularly, it does not appear to be an onerous obligation for a Trust

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<sup>69</sup> Section 13(1), ALA.

to give notice to members of any transfer of shares. If, as discussed below, the share register was to be maintained by a Registrar, then the Registrar could give notice of the transfer. In order to increase transparency, it is also appropriate that the Trusts, and the body maintaining the share register, ensures that the register is available for inspection by shareholders upon request.

### **Recommendation 6**

- Amend the ALA to:
  - (a) require the person or body maintaining the share register to give notice of any change to the share register to the other shareholders; and
  - (b) require that the Trusts, and the person or body maintaining the share register, ensure that the register is available for inspection by shareholders upon request.

In drafting this amendment, care will need to be taken to ensure that there is an appropriate mechanism for the communication between the Registrar and the Trusts to ensure that it operates from the most up-to-date version of the share register.

### ***Class of Potential Transferees***

Shares in the Trust are only transferrable in accordance with the ALA.<sup>70</sup> The ALA requires that shares can only be transferred to the Trust, another member, to the Crown, or to certain family members. The family members to whom shares can be transferred are described in s 14(2)(d) as follows:

- (i) *The husband or wife, or a child or remoter issue, brother, sister or parent of the member;*
- (ii) *A brother or sister of a parent of the member; or*
- (iii) *A child of remoter issue of a parent of the member, or of a brother or sister of a parent of the member.*<sup>71</sup>

The Options Paper invited community members to consider whether these groups are appropriate or should be broader or narrower, and in particular, whether they should be able to be transferred to long term residents of the Trusts. There were differing views on this issue. There was some openness to allowing shares to be transferred to

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<sup>70</sup> Section 12(3), ALA.

<sup>71</sup> Section 14(2)(d), ALA.



long term residents.<sup>72</sup> However, on the whole, the position that was expressed more consistently was one which maintained that shares should be passed down to the descendants of the original shareholders (or through “bloodlines”). The Framlingham ALT Submission stated that shares should only be held by “Aboriginal people connected to Framlingham”.<sup>73</sup> The LTAT Submission makes clear the view that shares should only be held by Aboriginal descendants<sup>74</sup>, although suggested there be a category of honorary shareholder for long-term residents<sup>75</sup>.

On this basis we would not recommend amending the ALA to alter the class of person to who shares can be transferred at this stage, other than to require that the transfer is to an Aboriginal person, which is discussed in more detail below. It may be a matter which could be considered in future along with other options for improving resident participation, discussed further below.

### **Sale of Shares**

The ALA puts in place a very specific procedure for the sale of shares. The ALA does not allow for a person to privately sell their shares to another individual without first offering them to the Trust or a person nominated by the Trust. Nor does it allow for them to negotiate a price. Rather, it requires that the sale price for any share is to be fixed at a price determined by the auditor. One of the functions of this requirement is presumably to ensure that an individual does not sell their shares at less than what they are worth.

The ALA is not clear about whether the shares can be sold to anyone, including people outside the class of people listed in s 14(2), in the event that the Trust or the person nominated by the Trust refuses to buy them. On the one hand, the Trust will retain some control over the transfer because it can refuse to register the transfer. On the other hand, s 14(6) of the ALA says that upon the offer to the Trust lapsing, “*the member shall be entitled to transfer the shares or any of them to any person at a price being not less than the price fixed for them by the auditor*”.

The Options Paper invited consideration of whether the ALA should be amended to make clear that the shares can only be sold to the class of people identified in s 14(2) of the ALA, or alternatively, to clarify that the Committee of Management can refuse to register a transfer if the sale is to a person outside the class of people identified in s 14(2).

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<sup>72</sup> See also Framlingham ALT Submission, p 4.

<sup>73</sup> Framlingham ALT Submission, p 4.

<sup>74</sup> LTAT Submission, p 26.

<sup>75</sup> LTAT Submission, pp 27 and 35.

The Review did not receive extensive feedback on this issue. The LTAT Submission stated that shares should not be capable of sale at all, and only acquired by “descendants” of shareholders.<sup>76</sup> In those circumstances, amendment is appropriate to ensure that the provision aligns with the preference to not expand the class of people to who shares can be transferred and to ensure shares remained in family possession. Rather than implement a complete prohibition on the sale of shares outside the class of people identified in s 14(2) of the ALA, it would be preferable at this stage if the ALA was amended to only clarify the powers of the Committee of Management to refuse the sale of shares to a person outside of the class of people identified in s 14(2) of the ALA. This provides greater agency to each of the Trusts in circumstances where the reviewers have not heard a clear consensus on the issue.

### **Recommendation 7**

- Amend the ALA to provide that the Committee of Management can refuse to register a transfer if the sale is to a person outside the class of people identified in s 14(2).

As noted above, concerns have been raised with the Review, that in the past, shares may have been transferred through sale contrary to the ALA. While the extent to which this has occurred is unclear, it is possible to amend the ALA to reduce the likelihood of this occurring in the future.

In particular, the ALA could be amended to require that in requesting a transfer of shares, the Instrument of Transfer is to be accompanied by a statutory declaration from the person selling the shares and the purchaser, confirming that the transfer is not a sale or exchange for any other consideration (e.g. money) contrary to the ALA.<sup>77</sup> While this would not guarantee that the ancillary transactions do not occur, it would at least require the vendor and the purchaser putting their minds to the issue and signing declarations that no consideration has passed contrary to the Act.

### **Recommendation 8**

- Amend the ALA to require that in requesting a transfer of shares, the Instrument of Transfer is to be accompanied by a statutory declaration from the person selling the shares and the purchaser, confirming that the transfer is not a sale or exchange for any other consideration.

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<sup>76</sup> LTAT Submission, p 26.

<sup>77</sup> This was generally supported by the LTAT Submission: see p 26.

### ***Waiver of Restrictions of the Sale of Shares***

Under the ALA, if a person wanted to sell their shares to a family member they would have to get approval from the Committee of Management first, so that the Committee of Management nominates them as the purchaser. It is understandable that some shareholders would want to sell shares to family members rather than them being sold to a person nominated by Trust.

The Options Paper noted that, if there is a need to enable the sale of shares for a lesser value to family members, then consideration should be given to amending the ALA to provide a framework in which that can occur.

The Options Paper also noted that the ALA could be amended to allow for the requirement to sell the shares at a value to be set by the auditor to the Trust (or a person nominated by the Trust) to be waived by the Committee of Management. The Options Paper noted that if that amendment was made, it would also be appropriate to require that the person selling the shares signs a declaration that they are aware of the value of the shares and acknowledge that they are selling them at less than their nominated value.

In the process of the Review this option received little comment. While the reviewers believe it would be a beneficial amendment, it is not critical to the current operation of the ALA to warrant it being made at present, although it may be a matter which the Trusts may want to consider in future.

### ***Transfer to Non-Aboriginal People***

There is no requirement that ALA shares be held by Aboriginal people. Shares can be transferred to spouses regardless of whether they are Aboriginal or not. There are now a number of non-Aboriginal people who hold shares in the Trusts. At one level this may be seen as unsurprising as there is no restriction on who may live on the reserve lands and non-Aboriginal people have married shareholders and have become active members of the community.<sup>78</sup> On the other hand, it is unclear to the extent that the ALA intended that shares be transferred to non-Aboriginal people.

The issue of non-Aboriginal people holding shares received considerable comment and the weight of opinion was that shares should only be held by Aboriginal people. This view was confirmed in both the LTAT Submission and the Framlingham ALT

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<sup>78</sup> It should also be noted that there is no prohibition on non-Aboriginal people being appointed to the Committee of Management even if they do not hold shares. The ALA has always anticipated that non-shareholders could be appointed to the Committees of Management, enabling a broader range of people to bring their expertise to the management of the affairs of the Trusts.

Submission.<sup>79</sup> In relation to the circumstance where a shareholder passes away with young children, there was some comment that these could be held by a non-Aboriginal person until the children turned 18 or 21.<sup>80</sup> A view was also expressed that whether this was appropriate in any given case, was a matter which should be determined by the Committee of Management having regard to who the person is and whether they are known to the local community.

The reviewers understand that there are only a very small number of shares which are currently held by non-Aboriginal people. Consistent with the view emphasised above that shares are personal property, we recommend that any changes should be prospective rather than retrospective.

### **Recommendation 9**

- Amend the ALA to provide that shares are to only be held by Aboriginal persons, subject to an exception that a non-Aboriginal person may hold shares on trust for children until they turn 18 if it is approved by the Committee of Management.

The reviewers have considered the effect of the *Charter of Human Rights and Responsibilities 2006 (Vic) (Charter)* on any limitation of share ownership to Aboriginal persons. Rights under the Charter are not absolute and may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>81</sup> The most relevant Charter rights in these circumstances are: recognition and equality before the law (s 8), protection of families (s 17(1)), cultural rights (s 19) and property rights (s 20).

Our preliminary view regarding the effect on particular rights, of limiting share ownership to Aboriginal persons, is as follows.

- 1 *Recognition and equality before the law:* It is arguable that any proposed amendment is a 'special measure' designed to address disadvantage because of past discrimination against Aboriginal people.<sup>82</sup> The foundation of the ALA is to provide land justice to Aboriginal peoples. On that basis, there would be no incompatibility with the right to recognition and equality before the law.

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<sup>79</sup> LTAT Submission, p 26; Framlingham ALT Submission, p 4.

<sup>80</sup> See also Framlingham ALT Submission, p 4, which provided support for this concept.

<sup>81</sup> Section 7, Charter.

<sup>82</sup> Section 8(4), Charter.

- 2 *Protection of families:* It might be argued that denying a family member ownership of shares because they are not an Aboriginal person would limit the Charter right to protection of families. However, there is a strong counter-argument that such a limitation would be reasonable and demonstrably justified given the importance of securing the rights of Aboriginal people to own the relevant land.
- 3 *Cultural rights:* If implemented, the proposed recommendation would enhance cultural rights by protecting the rights of Aboriginal people to maintain their relationship with the land.
- 4 *Property rights:* The reviewers recommend that the amendments apply prospectively and not retrospectively. This is likely to ensure there would be no 'deprivation of property' and property rights under the Charter would not be limited.

The reviewers note that if an Amendment Bill is presented to Parliament, there must be a statement of compatibility with the Charter prepared,<sup>83</sup> but that Parliament may declare that an Act, or a provision of an Act, has effect despite being incompatible with Charter rights.<sup>84</sup>

Without pre-empting Parliament's decision, the reviewers have formed the preliminary view that a recommendation that shares be only held by Aboriginal persons in the future is compatible with the Charter. If not, then it would be for Parliament to decide whether the policy reasons we have outlined, based on community feedback, outweigh any incompatibility with the Charter.

### ***Increasing the Number of Shares***

A general meeting may increase the number of shares in the Trust at any time so that shareholders receive an increase proportionate to their shareholding. This allows the Trust to increase the amount of shares but ensures that shareholders maintain the same proportion of shares in the Trust that they did before the increase (e.g. a shareholder will still own 5% of the shares before and after an increase).

In view of some of the challenges that have arisen associated with the transfer and sale of shares and the difficulties in the accuracy and maintenance of the share register, Attachment B to the Options Paper suggested that it might be appropriate to delete this power. As the power does not appear to have ever been exercised, there is no pressing need to delete the power. As there has been no significant engagement

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<sup>83</sup> Section 28, Charter.

<sup>84</sup> Section 31(1), Charter.

on the issue, the reviewers do not recommend making the suggested amendment at this stage.

### **Deceased Estates and the Transfer of Shares**

The ALA provides that the shares in the Trust are personal property. When the owner dies the shares form part of the deceased's estate. The ALA anticipates that shares will be transferred by either the executor of a will to the persons entitled to the shares under a will, or according to the intestacy of the deceased member.<sup>85</sup>

However, many Aboriginal people do not have wills. If there is no will, an application to the Court can be made for letters of administration, usually by the next of kin. The *Administration and Probate Act 1958* (Vic) has rules about the distribution of a deceased estate, and often the entirety of the estate will go to the deceased person's partner.<sup>86</sup> If there is no next of kin, the property can belong to the Crown,<sup>87</sup> which then has powers to redistribute it to dependents or appropriate people.<sup>88</sup>

In relation to the shares in the Lake Tyers Aboriginal Trust, a number of deceased people have not or are unlikely to have made arrangements for the transfer of their shares in a will and, even if they had a will, it is possible that the executor has not considered the need to take action to distribute the shares. At Lake Tyers there may be up to 65 deceased estates requiring administration. This represents a substantial proportion (approximately 40%) of the shares which have not been distributed and the rights in relation to those shares are in effect not being exercised.

The review spoke to a number of people who were relatives of shareholders who had passed away who were aware that no steps had been taken to have the shares transferred. The lack of distribution of shares tied up in deceased estates has flow on effects on the operation of the Trust. First, it is unclear how many shares in deceased estates would be transferred to current non-shareholder residents of Lake Tyers if they were distributed to immediate descendants, but at least some of them would. Second, the large volume of undistributed shares potentially skews the voting power of the remaining shareholders where a poll vote is used at a general meeting. Both these matters may contribute to low participation rates at Lake Tyers.

It is a matter that needs to be addressed as a matter of urgency. This is to ensure that those who are intended to benefit from the ALA and participate in the affairs of the

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<sup>85</sup> Section 14(3), ALA.

<sup>86</sup> Sections 70J-M, 70Z-ZB, 70ZE, 70ZG-ZL, *Administration and Probate Act 1958* (Vic). This is particularly so since the amendments to that Act were introduced by the *Administration and Probate and Other Acts Amendment (Succession and Related Matters) Act 2017* (Vic).

<sup>87</sup> Section 70ZL, *Administration and Probate Act 1958* (Vic).

<sup>88</sup> *Financial Management Act 1994* (Vic), s 58(3)(a).

Trust are able to do so. In the event that, in the future, there is a desire to move away from the share system into another structure, it is important that shares have been properly distributed to ensure that such decisions can be properly made while minimising the risk of on-going disputes.

It is clear to the reviewers that the above situation requires dual action, namely:

- 1 Creation of a program to assist the families of those persons in deceased estates have shares properly transferred and
- 2 Clarifying the powers of the Trust in relation to shares in deceased estates.

### ***Program to Assist Families with Shares in Deceased Estates***

It is clear that there has been a lack of understanding among shareholders and their families as to what they should do to pass shares on in the event that a shareholder passes away. It is possible that some families are simply unaware of the shareholding of their relatives. In addition to amending the ALA to clarify the powers of the Trust to transfer shares, First Peoples State Relations should assist the Lake Tyers Aboriginal Trust to approach family members of deceased shareholders and provide information on how those shares can be transferred. Ideally this would occur after the legislative amendments recommended below have been made to ensure that the information is up to date, and to ensure that those families can utilise more efficient procedures to pass those shares on. If it occurred after the recommended legislative amendments, it could be that an Independent Registrar (referred to below) could perform this task.

#### **Recommendation 10**

- First Peoples State Relations (or an Independent Registrar) provide assistance to the Lake Tyers Aboriginal Trust to identify and notify families of deceased shareholders, and to provide information to those families as to how those shares can be transferred and to who shares can be transferred.

### ***Powers of the Committee of Management in Giving Effect to a Will***

The ALA is not clear on the circumstances in which a Committee of Management can decide to not give effect to the intentions set out in a will.

It is difficult to see why a Committee of Management would refuse to give effect to a transfer in accordance with a will other than in circumstances where the transfer is to a person who is not within the class of people to who shares can normally be transferred. The possibility that a will may provide that the shares be transferred to people outside the class of people referred to in s 14(2) of the ALA arises because s 14(3) suggests that restriction does not prevent a transfer of shares “*to the person entitled*” under a will.

The failure of the Committee of Management to allow a transfer in accordance with a will would create a problem that the shares would remain with, and the rights attached to them exercisable by, the executor. The executor would not be reasonably able to transfer them to anyone else contrary to the terms of the will. The executor may be able to ask the Supreme Court to order the transfer<sup>89</sup> but this is an expensive and cumbersome process.

One option is to provide that the Committee of Management is to maintain control over the transfer of shares pursuant to a will outside the class of people prescribed in the ALA. This could be done by expressly providing that the transfer of a share can only occur if it is approved by the Committee of Management. However the Committee of Management would not be able to refuse a transfer if it is to one of the classes of people to who shares can normally be transferred under s 14(2) of the ALA. This would retain some flexibility to enable the Committee of Management to approve transfers while retaining the power to refuse transfers which are inappropriate. It would also prevent unnecessary disputes in relation to transfers which ought to reasonably be approved.

#### **Recommendation 11**

- Amend the ALA to provide that the Committee of Management is required to approve transfer of shares, but is not to refuse a transfer to a person under the will or an intestacy of the deceased person if the transfer is to a person within the class of persons listed in s 14(2) of the ALA.
- Amend s 14(3)(a) of the ALA to provide:
  - (3) Nothing in this section shall be construed as preventing a transfer of shares –
    - (a) by the personal representative of a deceased member to the persons entitled thereto under the will or on the intestacy of the deceased member provided the person is within the class of person listed in s 14(2) of this Act.

If the above amendment was made there would need to be a complimentary amendment to set out what happens to the shares if the transfer is refused. The unique nature of the share system warrants specific provisions to empower an executor to transfer the shares to a person within the class of people identified in s 14(2) in the event that a will provides that the shares are transferred to a person outside those

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<sup>89</sup> Section 27, ALA.



classes and it is refused by the Committee of Management. Consideration should be given to whether in the first instance the alternative should be that the shares are evenly distributed to the children of the deceased person. However, in the absence of any children, the shares could be transferred to another person. It is appropriate that the person is not the executor or a person who was a member of the Committee of Management at the time the refusal of the transfer was made to avoid any conflict of interest. We note that this would, in effect, override the intentions of a deceased person in a will, but consider it necessary in order to provide effect to the desires of the Trusts, that shares remain held by the classes of persons listed in the ALA (i.e. the 'bloodlines'). It appears to us a gap in the legislation to control the capacity to transfer shares to persons outside the class of persons in s 14(2), but not to do so in the circumstances of a will.

### **Recommendation 12**

- Amend the ALA to provide that, despite anything in any other Act or any obligation of an executor at common law or in equity, in the event that a will provides that shares are to be transferred to persons outside the class of people identified in s 14(2), and such a transfer is refused by the Committee of Management, the executor of the estate is nonetheless empowered to transfer the shares to a person within that class (including the Trust or the Crown) and that no claim can be made against the executor in that circumstance provided that:
  - (a) the transfer is an even distribution of shares to the surviving children of the deceased; or, in the absence of any such children,
  - (b) the transfer is to another person, provided the person is not the executor or a person who was on the Committee of Management at the time the decision to refuse the transfer in accordance with the will was made.

### ***Transfer of Shares on Intestacy***

Many Aboriginal people do not have wills.<sup>90</sup> Many Aboriginal people pass away without the assets which might otherwise justify a person to seek letters of administration. Many families may be unaware of the processes for seeking letters of administration. Over time there have been a number of shareholders who have passed away without wills and their shares have not been transferred because the family has not made arrangements for the distribution of the estate.

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<sup>90</sup> Victorian Law Reform Commission, *Succession Laws: Report*, 2013, para [5161].

If letters of administration are sought, the *Administration and Probate Act 1958 (Vic)* contains specific rules in relation to the distribution of the estate and does not have regard to the specific scheme of the ALA in identifying how the shares should be distributed. Amendments to the *Administration and Probate Act 1958 (Vic)* in 2017 made it more likely that the entire estate of persons with limited assets will be transferred to a spouse or domestic partner. This means that the potential for shares to end up with non-Aboriginal spouses rather than Aboriginal descendants is likely to become more common, unless there is some provision for the transfer of shares in a will.

The Options Paper noted that consideration should be given to whether the ALA should state that in the event that a shareholder dies without a will then the shares are to be distributed in accordance with the criteria in the ALA rather than the *Administration and Probate Act 1958 (Vic)*. It also noted that consideration should be given to what that criteria should be, with one option being to prioritise the transfer of shares to younger generations, so that in the absence of a will the shares are evenly distributed to the children of the deceased and if one of those children is already deceased then that child's share is to be evenly distributed among their children.<sup>91</sup>

In circumstances where the deceased had no children, the options would be:

- (a) for the shares to be evenly distributed between the surviving children of the deceased's siblings; or
- (b) in the absence of any such siblings for the shares to be transferred to the Trust.

The Options Paper also raised the alternative option of amending the ALA to allow for the Trust to effect a transfer of shares where there is no will or no action has been taken to transfer them. The example given was that the ALA could be amended to provide that unless a person notifies the Committee of Management within 3 years of a person being deceased that:

- (a) there is a will, or
- (b) that a person has sought or obtained a grant of probate and letters of administration,

then the shares are able to be transferred by the Committee of Management at the request of a family member, provided they are only transferred evenly to the children

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<sup>91</sup> Such an approach would not be dissimilar to what occurs in relation to the residuary estate of someone who dies intestate: see s 70ZG of the *Administration and Probate Act 1958 (Vic)*.

of the deceased person, or in the absence of any children, they are transferred evenly among the children of the deceased person's siblings.

The Options Paper noted that if this power was conferred on the Committee of Management there needed to be some careful constraints placed on the exercise of power, including that the power only be exercised:

- (a) after a particular period of time, to provide sufficient time for the family to take steps to obtain letters of administration if they want to take that course and for any disputes in relation to the will to surface;
- (b) there is clear documentation to satisfy the Committee of Management that the deceased has died without a will or a will has not been located;
- (c) notice is given to other shareholders before the power can be exercised; and/or
- (d) the shares are only transferred evenly to the children of the deceased person, or in the absence of any children, they are transferred evenly among the children of the deceased person's siblings.

The Options Paper noted that if such a change was to be made then there would need to be a provision which would protect any new owner of the shares against any later claim.

The subsequent consultations did not descend into the details of these two options. The weight of opinion appeared to:

- (a) favour the need for the Trusts to be able to deal with deceased estates to provide families with an easier mechanism to pass shares on; and
- (b) for shares to remain within family groups (i.e. for shares to be passed down to children or grandchildren where possible).

The LTAT Submission stated that in the case of intestacy, shares should go to the Aboriginal next of kin or, if none, that the shares should be transferred to the Crown to be dissolved or provided to honorary shareholders. While there may be benefit to the latter suggestions, the reviewers are confident that an amendment that ensured shares were transferred to members within a family group would be sufficient to ensure those shares stayed within the "bloodlines" of the relevant family.

The LTAT Submission also recommended that a Registrar have functions to provide for the transfer of shares in the case of intestacy. We consider that this can be achieved by providing that an independent person be responsible for the maintenance of the share register (see below).

At the least, these views tend to point against there being rigid criteria which predetermined where shares would go, in favour of the alternative approach raised in the Options Paper. It is important however that such a power be exercised carefully and transparently and in a way which minimises the likelihood of the Trusts being unnecessarily embroiled in family disputes.

### **Recommendation 13**

- Amend the ALA to allow for a Trust to transfer shares held in a deceased estate in the absence of a will or grant of letters of administration in circumstances where:
  - (a) a period of 3 years has elapsed;
  - (b) the Committee of Management is satisfied that there is no will or letters of administration;
  - (c) prior notice of the proposed transfer is given to other shareholders; and
  - (d) the shares are only to be transferred evenly to:
    - (i) the children of the deceased person, and to their children if they are also deceased; and
    - (ii) in the absence of any children, they are transferred evenly among the children of the deceased person's siblings; and
  - (e) the shares may be transferred other than in accordance with (d) if the people referred to in that clause as being entitled to the shares agree in writing.
- Amend the ALA to provide that where the shares are transferred in the absence of a will and letters of administration it removes any claim or right to the shares by any other person.
- Any such amendment should be drafted to make clear that the terms of the ALA take priority over any other legislative and common law rules.

A further issue which arises from the *Administration and Probate Act 1958* (Vic) is that the distribution of the estate in the case of intestacy is determined in accordance with a monetary criteria where, in the first instance, the spouse is entitled to the assets up to a certain monetary entitlement and after that, the residual of the estate could be distributed to other parties.

In Attachment B to the Options Paper it was noted that this could lead to some unintended outcomes in circumstances where the shares cannot be readily sold, and

their value realised, in the same way that shares in an ordinary company can be. This potential issue could be avoided if the value of shares is disregarded in reckoning the value of the estate for the purposes of the *Administration and Probate Act 1958* (Vic). The review received no clear response on this issue and it is unclear whether it could have unintended consequences in any particular matter. In those circumstances the Review does not recommend the change be made at this stage but ought to be a matter that is the subject of on-going consultation.

The Framlingham ALT Submission also suggested that shareholders be supported to draft wills in circumstances where many Aboriginal people do not have wills.<sup>92</sup> The reviewers are generally supportive of this proposal, but do not consider it necessary to make a formal recommendation to that effect. However, the reviewers encourage First Peoples State Relations to work with both Trusts to provide or fund a program to assist shareholders draft wills to ensure the problems (particularly associated with Lake Tyers) with deceased estates do not continue to manifest.

### ***“Personal Representative”***

Attachment B to the Options Paper noted that s 13(2) of the ALA states that the “*personal representative*” of a deceased member can write to the Trust and have his or her name entered on the register of shares. Section 14(3) of the ALA anticipates that the personal representative would transfer the shares. “*Personal representative*” is not defined but in this context is likely to have the same meaning as in the *Administration and Probate Act 1958* (Vic).<sup>93</sup> The Options Paper noted that consideration should be given to amending the ALA to make this clear. There was no substantive comment on this issue during the course of the Review, but the reviewers do not consider it to be controversial.

#### **Recommendation 14**

- Amend the ALA to define “*personal representative*” to have the same meaning as in the *Administration and Probate Act 1958* (Vic).

### **Maintenance of the Share Register**

The ALA provides that each Trust is required to establish a share register. In practice it is the Committee of Management who manages it. The Trust can issue a certificate

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<sup>92</sup> Framlingham ALT Submission, p 4.

<sup>93</sup> “Personal representative” is defined in s 5(1) of the *Administration and Probate Act 1958* (Vic) to mean the “the executor original or by representation or administrator for the time being of a deceased person”.

under seal showing the number of shares owned by a person and that certificate is *prima facie* evidence of title at the date of its issue.<sup>94</sup>

The effectiveness of the scheme is dependent on the members having faith in the reliability of the share register. The maintenance and integrity of the register is critical to the protection of the members' property in the shares. It is also determinative of who is able to attend and vote at general meetings, and can influence whether a quorum is achieved for the purposes of general meetings. A lack of transparency in how the share register is maintained and how shares are transferred can therefore lead to disputes.

The system is however prone to human error and inadequate record keeping. The 2002 Review reported that share transactions had been inadequately administered and that the share register of the Lake Tyers Aboriginal Trust was "*mislaidd for some years and membership control was only informally recorded and not updated*".<sup>95</sup> First Peoples State Relations funded an audit to attempt to rectify this problem. The fact that the Trusts are not guaranteed funding also means that it cannot be assumed that the Trust will always have access to legal advice in maintaining and updating the register. The option of amending the ALA, to provide for independent oversight of the share register was discussed in the Options Paper. During the course of the Review there was general support expressed for this option.

The LTAT Submission highlighted the problems for the Committee of Management in maintaining the share register in the absence of appropriate support. In the past, at Lake Tyers, the share register has failed to be maintained and records have not always been reliable.<sup>96</sup> It appears in those circumstances that the LTAT Submission argued in favour of an independent person or Registrar maintaining the share register, and effecting transfers of shares to minimise risk of mismanagement, as well as protect the Committee of Management itself from being criticised based on perceptions of its maintenance of the share register.

While no clear position was expressed in the course of consultations as to who that person would be, in our view the preferable approach is for the independent person to be an ALA specific registrar. This is discussed in more detail below. We do not think it would be appropriate for the Minister or their Department to undertake this function.

While there are administrative costs associated with providing for independent oversight, in the form of an independent person or Registrar (as discussed in greater

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<sup>94</sup> Section 12(8), ALA.

<sup>95</sup> 2002 Review, p.26.

<sup>96</sup> LTAT Submission, pp 24-26.

detail under the heading “External Regulation” below), the reviewers believe these costs will in part be offset by:

- (a) savings in administrative costs for First Peoples State Relations in having to deal with administration of the ALA, in light of an independent person taking on a number of roles;
- (b) efficiency costs in having an independent person assist the Trusts in performing their functions, particularly in maintaining the share register; and
- (c) savings in cost, time and community division from a decrease in disputes in the community regarding the maintenance of the share register, and the associated costs to the Victorian Government as a result of those disputes.

The establishment of an independent person to maintain the register need not remove or diminish the existing responsibility of the Committee of Management to authorise share transfers and thereby maintain control over to who shares are transferred. It would however be appropriate for any independent person to record a transfer in the share register only where they are satisfied that:

- (a) there is a resolution of the Committee of Management authorising the transfer; and
- (b) the transfer is being made in accordance with the ALA.

This would ensure that the Committee of Management maintains control over share transfers. It would also provide for an external check to ensure that the transfer complies with the ALA.

A complementary power to authorise the independent body or person to request information relevant to the transfer would facilitate the exercise of that function.

### **Recommendation 15**

- Amend the ALA to provide that the share registers are to be maintained by an independent person. The independent person would be responsible for recording transfers of shares but would only be authorised to make such a change where they are satisfied that:
  - (a) there is a resolution of the Committee of Management authorising the transfer; and
  - (b) the transfer is being made in accordance with the ALA.

The amendment is to ensure that the independent person has the appropriate powers to fulfill the functions of maintaining the register, including a power to request

information, require the production of documents, and to provide information to shareholders about their shareholding.



## GOVERNANCE

The ALA provides little direction on how the Trust is to govern itself. It has been noted by the Supreme Court that the ALA provides a “*fairly skeletal regime of regulation*”<sup>97</sup> and that it “*does not provide for the consequences of non-compliance*”.<sup>98</sup> With goodwill and cooperation, this skeletal regime is clearly sufficient to enable the Trusts to function effectively. In recent years, a number of disputes have arisen which may have been avoided, or resolved more efficiently, if the ALA had provided clearer guidance for how certain decisions should be made, or if an alternative dispute resolution to Supreme Court proceedings was contained in the ALA. It is also clear that there have been difficulties in achieving a quorum for general meetings at both Lake Tyers and Framlingham, and it is arguable that the current drafting of the ALA has contributed to that problem.

Unclear procedures and uncertain rules increase the risk for grievances between shareholders and of ongoing disputes which undermine the ability of an organisation to achieve its goals.

All organisations are subject to some level of supervision and minimum governance requirements, regardless of whether it is a private corporation, a public body carrying out statutory functions, or an Aboriginal or non-Aboriginal entity. This oversight and direction should not be viewed as a restriction on the ability of corporations to govern themselves, but are intended to assist organisations to govern and to provide basic levels of fairness, transparency and certainty for shareholders or members.

### Recommendations in relation to Governance

The Review presents an opportunity to consider whether the ALA could provide clearer provisions to guide the operation of the Trusts. The Options Paper raised a number of options to improve the governance of organisations. While some of these were commented upon in the subsequent consultations and in the submissions, many of them were not. However, as described in Section 2, key themes that emerged in the consultations and submissions included a desire for greater transparency in the operation of the Trusts and better governance and accountability for the Trusts.

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<sup>97</sup> *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [11].

<sup>98</sup> *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [12].

## General Meetings

### *Frequency*

The ALA does not contain a minimum requirement for the holding of general meetings. This is in contrast to the requirement in the ALA that the Committee of Management is to meet at least six times per year.<sup>99</sup>

It is clear that at various stages there have been difficulties in holding general meetings. This is in part because of the rules in relation to what constitutes a quorum. However, it is also apparent that apart from the holding of the AGM, there has not been a practice of having general meetings at regular intervals. The effect of this at Framlingham and Lake Tyers, to some extent, may be alleviated by the small number of resident shareholders and a view that many members may not attend more regular general meetings in any event.

However, the function of a general meeting is also to provide an opportunity for the members to ask questions of the Committee of Management. Frequent general meetings demonstrate a willingness for transparency which can prevent unwarranted suspicions about the management of the organisation. It reduces the risk of those not on the Committee of Management feeling disenfranchised from the organisation. This is particularly so in an organisation where the membership of the committee is significantly influenced by the distribution of shares. Having regular general meetings also allows for a flow of information which can assist in avoiding misunderstandings and disputes.

The Options Paper suggests that at least one general meeting per year be required in addition to the AGM.<sup>100</sup> The LTAT Submission rejected this suggestion, stating that AGMs were already an onerous task and that further general meetings may disrupt the business of the Committee of Management.<sup>101</sup> This view appeared to be based on a misunderstanding between a general meeting of shareholders and a Committee of Management meeting, of which there is already a requirement to hold six meetings a year. The Framlingham ALT Submission generally supported regular general meetings.

In the circumstances, the reviewers recommend that at least one general meeting per year be required in addition to the AGM.

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<sup>99</sup> Section 15(10), ALA.

<sup>100</sup> The ALRA (NSW) is an example of land rights legislation which requires a certain number of general meetings. It requires that a Local Aboriginal Land Council must have at least 3 ordinary meetings a year at intervals of not more than 4 calendar months: see Item 1, Part 1, Schedule 3 of the ALRA (NSW).

<sup>101</sup> LTAT Submission, p 20.

It is acknowledged that in some instances it may not be appropriate to have a general meeting, and the ALA should provide a mechanism for an exemption or a waiver to be obtained, either from the Minister or a Registrar.<sup>102</sup> The reviewers consider that this deals with the concerns expressed in the LTAT Submission that holding additional general meetings may be overly onerous.

### **Recommendation 16**

- Amend the ALA to require the holding of at least one general meeting per year in addition to the AGM with an exemption from the requirement being able to be granted in appropriate circumstances from the Minister or a Registrar appointed under the ALA.

### ***Quorum at General Meetings***

When the ALA was enacted it provided that a quorum of a general meeting would be one half of the people entitled to vote at the meeting. There was no distinction between a shareholder and a resident shareholder for the purposes of determining a quorum, although upon enactment all shareholders were resident on the land.

This was varied by the 2004 Amendment Act to provide that for the purposes of establishing a quorum for a general meeting, there needed to be half the number of people who are entitled to vote “*who are residents of the reserve on the day the meeting was called*”.<sup>103</sup> “Reserve” is defined in the ALA to be the “*Framlingham reserve or the Lake Tyers reserve*”,<sup>104</sup> both of which are defined as the specific land described in the schedule to the ALA. The intention behind this change was to make it easier to form a quorum in circumstances where a number of shareholders had moved away from the reserve.

It has been noted that the ALA does not contemplate that the requirement for a quorum can be dispensed with or relaxed.<sup>105</sup> Nor does it have a numerical minimum requirement.<sup>106</sup> Members cannot be compelled to attend meetings, but the failure to have a quorum affects the ability of the organisation to function effectively, undermines the election process of the Committee of Management, impacts on those members

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<sup>102</sup> A similar mechanism is used in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) in relation to certain requirements under that Act: See s 225.5.

<sup>103</sup> Section 23(4), ALA.

<sup>104</sup> Section 2, ALA.

<sup>105</sup> *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [15].

<sup>106</sup> As noted in *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [14] and *Clark-Ugle v Clark* [2016] VSCA 44 per Tate, Ferguson and McLeish JJA at [69].

who take time out to attend the meeting, and can lead to a waste of resources, particularly if a venue has been hired for the meeting to occur.

While there were sound intentions behind amending the ALA so that a quorum was determined by reference to the number of resident members in attendance, the current rule means a quorum may not form if a critical number of the resident members do not attend, even if there are a substantive number of the non-resident members in attendance.

Framlingham owns a number of additional properties in reasonable proximity to the former reserve land and on which members of the Trust are resident. Recently, the Lake Tyers Aboriginal Trust purchased a residential property at Lake Tyers which has the potential to be occupied by a shareholder. As the ALA currently stands, the attendance of these members at a general meeting does not count towards the reckoning of a quorum because it is only those residents on the former reserve land who are counted for that purpose.

Complicating this is the fact that there is no definition as to when a person should be taken to be a “resident” of the reserve for calculation of the quorum. This is a matter which has the potential for further disputes. As discussed below, a definition of “resident” may be required in the ALA to clarify this issue.

The Options Paper put forward a number of options to assist with the forming of a quorum for a general meeting of the Trust. These included simply reducing the number of people required for a quorum, allowing for those resident on any Trust property to be included towards the quorum, or to allow for a lesser number of people to make up a quorum at a subsequent meeting if a quorum is not formed on the first occasion.

During consultations there appeared to be an awareness on the part of some shareholders that there needed to be some greater flexibility in forming a quorum, particularly as a failure to have meetings can lead to the Trust being in breach of the ALA, with the risk that the Minister may appoint an administrator as a result. The LTAT Submission stated that the quorum requirements were overly complex, but also expressed frustration that the options in the Options Paper were complicated and would be difficult for the Trust to manage. Although the LTAT Submission noted it did not have a “good alternative proposal”, it endorsed a reduction of the quorum requirement from one-half to one-third of resident shareholders.

While there is a need for flexibility, under the ALA the Trusts can make significant decisions at general meetings over and above the general operations of the Trust, and there is a need to strike a balance to ensure such decisions are not made with a critically small number of people. Accordingly, while there is some attraction in having an automatic reduction of the quorum, the reviewers consider a better approach would be to allow for the Registrar or the Minister to provide an exemption to the quorum rule to such numbers as they consider appropriate in the circumstances (which may be

one-third, as suggested by the LTAT Submission). In doing so, the Registrar or the Minister can consider the circumstances of the failure to reach a quorum, the views of the relevant Trust regarding what flexible arrangements might be necessary, the nature of the matters on the agenda for the meeting, and whether the reduced quorum is appropriate.

There should be complementary amendments which ensure that decisions about the disposal of land, such as a decision to sell the land or lease the land for over 21 years, can only occur if the quorum is met at the first meeting, or only with a higher quorum (i.e. keeping the current quorum requirements for those decisions).

### **Recommendation 17**

- Amend the ALA to provide that if a quorum is not reached, or not maintained for the time specified for the meeting, the Secretary can adjourn the meeting to a time to be fixed within 2 to 6 weeks, and can seek an exemption from the quorum rule with the number of people to be required to form a quorum to be determined by the Minister or the Registrar.
- The amendment should specify:
  - (a) the time in which the request is to be made, and the time in which the request for a lesser quorum should be approved; and
  - (b) that a general meeting constituted with a lesser quorum is not to make any decision in relation to the leasing or disposal of land.

Section 23(1) requires that attendance by a shareholder at a general meeting must be in person. We note that the COVID-19 pandemic has highlighted the difficulties with achieving this. However, the reviewers did not discuss this issue at any of the consultations, and so any amendment that provides greater flexibility (e.g. virtual attendance by videolink) should be the subject of further consultation.

### ***Notice of General Meetings***

The ALA requires that 14 days notice be provided for general meetings. It does not specify what is required to be in the notice. The Options Paper raised the potential for the ALA to be amended to require that a notice also specify the time, date and location of the meeting and “*indicate the general nature of each item of business to be*

considered at the meeting".<sup>107</sup> Although during the course of consultations there was little detailed comment on this specific proposal, the reviewers do not consider the proposed amendment to be controversial. The LTAT Submission noted that there is

### **Recommendation 18**

- Amend the ALA to require that a notice of a general meeting is to specify the time, date and location of the meeting and indicate the general nature of each item of business to be considered at the meeting.

little guidance in the ALA as to how general meetings should be conducted and therefore the reviewers consider that this amendment should assist in clarifying those matters.

### ***Minutes of General Meetings***

The ALA does not specify any requirement to keep minutes of general meetings. This is unusual and a deficiency in the legislation. Minutes that record the attendance and the decisions made are essential for providing transparency of decision-making as well as providing a proper record that the meeting had a quorum and that decisions were properly made. The Options Paper noted that while it might be that as a matter of practice this is already done<sup>108</sup>, it is appropriate that the ALA make clear that it is required.

Such a requirement is a basic governance requirement. The Model Rules for associations under the *Associations Incorporation Reform Act 2012* (Vic) provide that a committee must ensure that minutes are taken and kept for each general meeting and that the minutes record "*the business considered at the meeting, any resolution on which a vote was taken and the result of the vote*".<sup>109</sup> There should also be a requirement for minutes to be provided to members on request.<sup>110</sup> Although this proposal was not widely discussed at Stage 2 Consultations, there was support for the proposal from the small number of shareholders that did discuss the issue with the reviewers and accords with a desire for greater transparency and better governance.

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<sup>107</sup> Rule 33 of the Model Rules in Schedule 4 of the *Associations Incorporation Reform Regulations 2012* (Vic).

<sup>108</sup> The LTAT Submission noted this was general practice for Lake Tyers: p 22.

<sup>109</sup> Rule 41(1)-(2) of the Model Rules in Schedule 4 of the *Associations Incorporation Reform Regulations 2012*. See also s 220.5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and Clause 6 of the Part 1, Schedule 3 of the ALRA (NSW).

<sup>110</sup> See for example s 220.10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

### **Recommendation 19**

- Amend the ALA to require that:
  - (a) the Trust is to keep minutes of each General Meeting which records the attendance, the business considered at the meeting, any resolution on which a vote was taken and the result of the vote; and
  - (b) the minutes of the General Meeting be made available to members upon request.

### ***Poll Voting***

The ALA provides that decisions at a general meeting are made on the basis of one person, one vote, unless a poll vote is held.

Section 23(2) of the ALA provides that a poll vote is required to be held if it is *“demanded by not less than five persons present, or by any person or persons entitled to exercise not less than one-tenth of the total votes of those present”*. If a poll vote is held *“the number of votes to which each member is entitled shall be determined by the number of shares the member owns.”*<sup>111</sup>

Voting by poll is intended to allow votes to occur by reference to an individual’s stake in the Trust. It may therefore be seen as an important concomitant of the share system. However, over time, individual share holdings may get diluted among some families and consolidated in others, resulting in significant disparities between the shares held by individuals in comparison to how they were originally distributed. This can be exacerbated by a lower participation of shareholders at general meetings, in that if more shareholders attended, the shareholdings of particular individuals would be less significant in a poll vote.

It is unclear how often poll voting occurs. The reviewers understand that the last two annual general meetings at Lake Tyers have opted not to use poll voting. The view was expressed by some at consultations that poll voting was resorted to more often when community disputes exist. Despite this, a number of shareholders expressed frustration at the capacity for decisions to be made by poll vote. Concerns were expressed that many saw the system as undemocratic and a disincentive for attendance as people did not see much point in attending if the outcome was predetermined by the number of shares people held. The LTAT Submission raised concerns that poll voting allowed for nepotism and control of who was on the

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<sup>111</sup> Section 23(3), ALA.

Committee of Management, putting off younger persons from standing for election or being involved in the Trust.<sup>112</sup> These concerns were sometimes raised in conjunction with concerns over the integrity of the share register, discussed above.

These concerns became more apparent in the second round of consultation. It was not a matter that had been addressed in detail in the Options Paper. There would, however, be a number of options to reduce the impact of poll voting.

The first would be to remove the option altogether, thus requiring all decisions being made on a one person, one vote basis. The consequences of this would be that a major shareholder would have no greater say than a person who only held a handful of shares. The LTAT Submission was in favour of this change, and felt that “one person one vote” should be introduced into the ALA.<sup>113</sup> An alternative would be to keep the capacity to have a poll vote but to increase the thresholds required for a poll vote to be called. For example, rather than allowing a small number of individuals to call for a poll vote, an alternative could be to only allowing a poll vote if a majority of shareholders present request a poll vote.

As this option was not set out in the Options Paper, the reviewers are concerned that there has not been sufficient opportunity for shareholders to comment on it, and cannot recommend its implementation at this stage. Further, the Framlingham ALT Submission stated that, although it was discussed, no general view existed regarding poll voting.<sup>114</sup> Given the strong preference in the LTAT Submission, it might however be a matter which ought to be given further consideration in future.

## **Committee of Management**

### ***Election of the Committee of Management***

The ALA provided for staggered elections when the Committees of Management were first created in 1970, so that only two or three persons were up for election at each AGM. In *Clark v Framlingham Aboriginal Trust* [2014] VSC 367, Justice Robson noted that the ALA makes no provision for reintroducing staggered terms once they have been lost through non-observance of the ALA.<sup>115</sup> Justice Robson however exercised the power under s 27 of the ALA to reintroduce staggered terms because it would

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<sup>112</sup> LTAT Submission, pp 19-20.

<sup>113</sup> LTAT Submission, pp 18, 24, 26.

<sup>114</sup> Framlingham ALT Submission, p 5.

<sup>115</sup> *Clark v Framlingham Aboriginal Trust* [2014] VSC 367 per Robson J at [130]. It would also cease to operate following a period of administration.



“permit the Trust to continue as it should have if the Act had been properly observed in the past”.<sup>116</sup> In doing so His Honour noted:

*“... the election regime of the Trust is imprecise, problematic and unwieldy. Once the staggered election system is confused and starts to get out of order, there is no provision in the Act to revive it. The Trust has failed to get it right, it has had to seek legal advice and ask [First Peoples State Relations] for help. In my opinion, [First Peoples State Relations] also got it wrong. This does not bode well for the election regime. Also as mentioned, the Act assumes that it will be faithfully followed. As this case demonstrates, that assumption is misconceived.”<sup>117</sup>*

One advantage of a staggered election system is that it ensures some continuity and retention of corporate knowledge on the Committee of Management. During the community consultations, it appeared to the Review that staggered elections were generally supported. This view was also shared in the LTAT Submission.<sup>118</sup>

The Committee of Management should have responsibility to ensure staggered terms are maintained. However, the potential remains for the system of staggered representation on the board to fall out of sync. Rather than having to ask the Supreme Court to make orders under s 27 of the ALA, as happened at Framlingham, if for whatever reason staggered elections are not maintained, the Trust should have the power to reintroduce staggered terms at an AGM.

This would mean that the Trust, in electing persons on to the Committee of Management, may reinstitute a similar procedure to that set out in s 15(1) of the ALA. Because the procedure in s 15(1) was specific in time for the first Committee of Management of the Trust, it might be appropriate to modify the procedure and state that, where staggered elections have failed to be maintained completely, an AGM might be conducted whereby three persons are elected for 1 year, two persons are elected for 2 years, and two persons are elected for 3 years, which generally aligns with how the first election of the Committee of Management occurred when the ALA first came into force pursuant to s 15(1).

In order to ensure that the new procedure is not abused and staggered elections are not maintained by a Committee of Management, and in order for members of the committee to seek to be elected to longer terms, it might be appropriate to ensure that

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<sup>116</sup> *Clark v Framlingham Aboriginal Trust* [2014] VSC 367 per Robson J at [191].

<sup>117</sup> *Clark v Framlingham Aboriginal Trust* [2014] VSC 367 per Robson J at [197].

<sup>118</sup> LTAT Submission, p 23.

the Trust seeks the approval of the Minister or Registrar for the reintroduction of staggered terms.<sup>119</sup>

### **Recommendation 20**

- Amend the ALA to make clear that the Trust can reintroduce a staggered term at an AGM if, for whatever reason, it has failed to be maintained. If staggered terms are reintroduced, three persons should be elected for 1 year, two persons should be elected for 2 years and two persons should be elected for 3 years. The Minister or Registrar should approve the reintroduction of staggered terms.

The ALA provides that the affairs of the Trust are to be managed by a “*committee of management*” comprising seven persons. The ALA does not prescribe the procedures for the election of committee members including processes for nomination. **Recommendation 23** below identifies that each Trust has Model Rules. If that recommendation is adopted it would be appropriate for the Model Rules to set out election procedures.

### ***Disqualification of Committee Members***

Section 15(6) of the ALA provides that the office of a member of the Committee of Management of a Trust becomes vacant if the member becomes of unsound mind or otherwise incapable of acting, becomes bankrupt, resigns or is removed from office by a resolution of which special notice is given at a general meeting of the Trust. This is a surprisingly narrow range of circumstances to remove a member of the Committee of Management. For example, under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) a person is disqualified if they have been or are convicted of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months.<sup>120</sup> They are also removed if they are disqualified from managing Corporations Act corporations.<sup>121</sup> Similar provisions are contained in the land rights legislation in other jurisdictions.<sup>122</sup>

The Options Paper suggested that consideration should be given to whether a similar rule should be included in the ALA. The Options Paper also noted that a further issue that arises is how long the person should be disqualified for. It noted that under the

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<sup>119</sup> The LTAT Submission supported such a power being given to a Registrar or First Peoples State Relations: p 23.

<sup>120</sup> Section 279.5(2), CATSI Act.

<sup>121</sup> Section 279.5(5), CATSI Act.

<sup>122</sup> See for example s 66 of the ALRA (NSW).

ALRA (NSW), a person is disqualified for convictions within the last 5 years,<sup>123</sup> and that under the CATSI Act there are powers for the Registrar to make an application to a Court to extend the period of disqualification for up to 15 years.<sup>124</sup>

While there may be a case for special provisions having regard to the unique nature of the ALA, it is difficult to see why the rules disqualifying a person from sitting on the Committee of Management should be any different to other land rights legislation or corporations serving the Indigenous community.

### **Recommendation 21**

- Amend the ALA to provide that, in addition to the existing prohibitions, a person should be disqualified from sitting on the Committee of Management if they are convicted of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months. The period of disqualification should be either 5 years after the conviction, or 5 years after the person serves a term of imprisonment, whichever is later.
- Amend the ALA to provide that a person is also prohibited from sitting on the Committee of Management at a particular time if the person is, at that time, disqualified from managing Corporations Act corporations under Part 2D.6 of the Corporations Act.

### ***Committee of Management Governing Rules***

The ALA is non-prescriptive about how the Committee of Management is to conduct its business. In small organisations with little guarantee of funding there is a level at which this is appropriate. On the other hand, the lack of clear procedures can lead to conflict and may create a disincentive for people to be involved in the Committee of Management.

At present, the ALA provides that the Committee of Management is to be comprised of seven people.<sup>125</sup> However, it also allows for a quorum to be made of three people. There is no provision as to who is to call general meetings, how they are to be called, who can attend (other than the committee members) and what kind of notice is to be given. The ALA provides that decisions are to be made by majority vote, meaning that if only three people attend, important decisions can be made by two people. Furthermore, the lack of direction in the ALA gives rise to risks that proper notice of a

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<sup>123</sup> Section 66(1)(b), ALRA (NSW).

<sup>124</sup> Section 275.10(2), CATSI Act.

<sup>125</sup> Section 23, ALA.

Committee of Management meeting is not given to all directors, or that there might be competing meetings of separate groups of directors.

While this issue was not the subject of detailed consultations, it was raised with the reviewers during Stage 2 by various stakeholders. We consider that this obvious gap in the ALA has a real potential to cause confusion and exacerbate concerns with governance. Further, this recommendation accords with a desire for better governance of the Trusts. Accordingly, in line with the approach the reviewers outlined in Section 2, we recommend amendment to the ALA to increase the quorum requirement for the Committee of Management. If there are any specific difficulties with this requirement, as we recommend below in **Recommendation 27**, the Trust could seek exemption from compliance from the Minister or Registrar.

### **Recommendation 22**

- Amend the ALA to provide that a quorum for Committee of Management is four committee members rather than three.

Attachment B to the Options Paper also noted that there is no specific requirement for the Committee of Management to keep minutes of its meetings and recommended that the ALA be amended to make this requirement clear. The reviewers consider this amendment is uncontroversial.

### **Recommendation 23**

- Amend the ALA to make clear that the Committee of Management is to keep minutes of its meetings.

## **Casual Vacancies**

The ALA makes limited provision for the filling of a casual vacancy if an elected member of the Committee of Management resigns or is incapable of fulfilling their functions because of illness or disqualification. Section 15(2) provides that casual vacancies can be filled from time to time at a general meeting, but does not specify when that should occur. The ALA should be amended to make clear that a casual vacancy is required to be filled at the next general meeting of the Trust. That would

ensure that a casual vacancy does not remain beyond each financial year. The LTAT Submission was strongly supportive of this potential amendment.<sup>126</sup>

### **Recommendation 24**

- Amend s 15(2) of the ALA to provide that a casual vacancy is to be filled at the next general meeting after the casual vacancy arises.

### **Model Rules**

The Trusts have no Constitution and are not required to have a Constitution. The rules of each of the Trusts are limited to the minimal matters set out in the ALA or are left to the Trusts to determine. As set out above, there are a number of governance requirements that could or should be included in the ALA in the interests of good governance and transparency.

The *Associations Incorporation Reform Act 2012* (Vic) provides for Model Rules for state incorporated associations that can be modified to fit the particular requirements of an association.<sup>127</sup> The advantage of having a clear rule book is that it ensures the rules of the organisation are collated in a single accessible location. For this reason, the rule book could also set out some of the requirements which are otherwise set out in the legislation. In practice, the rule book may not alter the way the Trusts have been operating, but having an accessible rule book will add to the transparency of the Committee of Management processes and assist members to understand how the organisation operates and thereby avoid disputes.

The ALA should be amended to provide clear rules for how the Committee of Management operates. Both the LTAT Submission and the Framlingham ALT Submission supported such an approach.<sup>128</sup> In order to retain some flexibility in how the Trusts operate, there should be some capacity for the rules to be amended with the approval of the Registrar. In relation to the Committee of Management, the Model Rules should at least address:

- (a) the process for appointing the chair and the secretary, and the term of the chair and secretary;
- (b) the role and function of the chair and the secretary;

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<sup>126</sup> LTAT Submission, p 23.

<sup>127</sup> Section 49, *Associations Incorporation Reform Act 2012* (Vic).

<sup>128</sup> Framlingham ALT Submission, p 5; LTAT Submission, p 23.

- (c) where the Trust employs a chief executive officer (**CEO**), the role of the CEO;
- (d) a Code of Conduct for members of the Committee of Management;<sup>129</sup>
- (e) any requirements for members of the Committee of Management to undergo governance training;<sup>130</sup> and
- (f) the process for giving of notice of meetings of the Committee of Management.

The reviewers note that the LTAT Submission raised a number of concerns with the pressure of the role of CEO and the constant turnover in that position at Lake Tyers. The LTAT Submission made a proposal that the CEO report to the Independent Registrar for consideration. The reviewers consider that this is best dealt with outside of the ALA, particularly as the role of CEO is not mentioned in the ALA itself.

Under the ALRA (NSW), rules are amended with the approval of a registrar.<sup>131</sup> If a Registrar was appointed to the ALA, then that mechanism could also be utilised in the ALA.

### **Recommendation 25**

- Amend the ALA to provide for Model Rules as a schedule to the ALA, which are able to be modified by the Trust.
- The Model Rules should at least set out rules that are consistent with the ALA in relation to:
  - (a) the process for giving of notice of meetings of the Committee of Management;
  - (b) the process for appointing the chair and the secretary, and the term of the chair and secretary;
  - (c) the role and function of the chair and the secretary;
  - (d) a Code of Conduct for members of the Committee of Management;
  - (e) any requirements for members of the Committee of Management to undergo governance training;

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<sup>129</sup> The LTAT Submission was strongly supportive of this suggestion: p 23.

<sup>130</sup> Both the LTAT Submission (p 24) and Framlingham ALT Submission (p 4) were supportive of members receiving governance training.

<sup>131</sup> Sections 52F and 117, ALRA (NSW).

- (f) where the Trust employs a chief executive officer (CEO), the role of the CEO;
- (g) the process for nominating persons for election;
- (h) the process of voting at general meetings, including the calling and holding a poll vote;
- (i) the requirements to keep minutes of resolutions at general meetings and Committee of Management meetings;
- (j) the processes for transferring shares and amending the share register;
- (k) the process at both general meetings and meetings of the Committee of Management for dealing with pecuniary interests;
- (l) the filling of casual vacancies; and
- (m) an internal process that provides for the resolution of disputes internal to the operation of the Trust.

- The Model Rules should be prepared in consultation with the Trusts.

### **Pecuniary Interests**

Section 15(5) of the ALA provides that a person is not disqualified from being elected to the Committee of Management by reason of the fact that they are an employee or have an interest in a contract made by the Trust. However, if a member of a Committee of Management has such an interest, they shall not vote or take part in any discussion on “*any matter affecting any contract in which he or she may be interested (other than a contract of service)*”.

While this places some restrictions on the conduct of a person who has a pecuniary or financial interest in relation to decisions made by the Committee of Management, it is arguably too limited because members may vote on matters in which they have a more general material personal interest at a general meeting, for example crucial decisions about the sale or leasing of land or decisions from which they might receive a benefit, financial or otherwise.

The *Corporations Act 2001* (Cth) states that a director of a public company who declares a material personal interest may not be present when the matter is discussed or voted on the matter.<sup>132</sup> While material personal interest is not defined in legislation, under general corporations law it is taken to be either a financial or non-financial

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<sup>132</sup> Section 195 of the *Corporations Act 2001* (Cth).

benefit that is of some substance or value rather than low value and it must be personal to the particular director.

The Options Paper raised the potential for the ALA to be amended to make clear that a person shall not vote or take part in any discussion on any matter in which they have a material personal interest outside their interest as a shareholder.

While there was not detailed discussion of this issue in consultations, the reviewers consider that this recommendation clearly aligns with community desire for greater transparency and also promotes consistency with other models of good governance and accountability. The LTAT Submission endorsed such a recommendation.<sup>133</sup>

### **Recommendation 26**

- Amend the ALA that a person shall not vote or take part in any discussion on any matter at a general meeting or a meeting of the Committee of Management in which they have a material personal interest.

### **Exemption from Compliance**

The Options Paper noted that a regime for administration can place unintended burdens on the organisations, particularly where they are small and have limited resources. The Options Paper noted that there ought to be a mechanism for the governance requirements of the ALA to be waived in certain circumstances. It is not unusual for such a mechanism to be provided for in land rights or other legislation.<sup>134</sup> It affords supervised flexibility to the management of the organisation and can assist in avoiding a breach of the ALA in circumstances beyond the control of the organisation. In the context of the ALA, the Minister or Registrar (if created) could be the person to exercise the power to waive.

The reviewers received some positive feedback on this option during consultations. It appears that some shareholders are alive to the need to the undesirability of being in breach of the ALA, but sometimes circumstances arise where there is non-compliance through no fault of the Trust. Examples may be where there is a failure to hold an AGM in time for lack of a quorum, or where financial statements have not been prepared in time because of an inability to hold an AGM. Where these

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<sup>133</sup> LTAT Submission, p 24.

<sup>134</sup> See for example ss 225.1-225.20 of the CATSI Act and ss 57, 103 and 108 of the *Associations Incorporation Reform Act 2012* (Vic).



circumstances arise it is preferable for there to be a capacity to remedy the situation without the Trusts continuing to operate in breach of the ALA.

**Recommendation 27**

- Amend the ALA to allow the Minister or a Registrar to provide a Trust with an exemption from compliance, or an extension of time to comply with requirements of the ALA.

## EXTERNAL REGULATION

### Recommendations in relation to External Regulation

#### Role of an Independent Registrar

The Options Paper noted that the ALA currently provides that a Government Minister is responsible for ensuring compliance with the ALA. There is also a general power for aggrieved people or shareholders to seek relief from the Supreme Court for breaches of the ALA. This latter power, while broad, is potentially expensive and not very accessible for most members.

As noted in the Options Paper, a number of other land rights regimes provide for a specialised registrar to provide independent supervision of that legislation.<sup>135</sup> Corporations legislation can also make provisions for registrars to have a supervisory or intervention function.<sup>136</sup> The advantage of having an independent person with this function is to allow for supervision and intervention in the affairs of corporate bodies, independent of government.

There are a number of recommendations in the report which are premised on their being a registrar. These include having an independent person to maintain the register for the Trusts (Recommendations 5 and 15) and providing for exemptions and extensions of time (Recommendation 26). In addition to these functions, the role of the Registrar could also be to:

- (a) assist in providing general information to shareholders and others in relation to the scheme of the ALA;
- (b) provide assistance to the Trusts in relation to the holding of meetings and compliance with the ALA;
- (c) mediate, conciliate or arbitrate disputes in relation to the operation of the ALA or to refer such disputes to independent mediators, conciliators or arbitrators;
- (d) investigate complaints; and
- (e) to make recommendations to the Minister in relation to the appointment of an administrator or the issuing of compliance directions.

As noted above, there was general support for the appointment of an independent person to manage and supervise the share system. There also appeared to be general

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<sup>135</sup> See for example ss 164 - 175, ALRA (NSW) and ss 15 and 16 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).

<sup>136</sup> See for example s 187 of the *Associations Incorporation Reform Act 2012* (Vic) and ss 653.1-673.5 of the CATSI Act.

support for there being a better mechanism for resolving disputes than having to commence proceedings in the Supreme Court, and for there being a person independent of Government to help with the supervision of the ALA.

Both the LTAT Submission and the Framlingham ALT Submission was supportive of the introduction of an Independent Registrar. The Framlingham ALT Submission noted there was general, though not unanimous, support for an Independent Registrar with the types of functions proposed above.<sup>137</sup> The LTAT Submission was strongly in favour of the suggestion, and felt it was particularly important that the Registrar have functions to maintain and secure the share register, oversee share transfers and to mediate disputes.<sup>138</sup>

The preferable course would be to have a registrar who is specific to the ALA. This would be all the more appropriate if the Registrar was to have mediation and assistance functions where a level of cultural awareness and sensitivity may be required. An alternative would be to confer those functions on the Registrar under the *Associations Incorporation Reform Act 2012* (Vic). However, this option did not appear to be well supported by shareholders.

It is accepted that there is an administrative cost in providing for such a position in relation to two organisations.<sup>139</sup> However, as stated above in relation to maintenance of the share register, there are a number of offsetting saving, including reducing the administrative burden on First Peoples State Relations in fielding enquiries and responding to complaints. It will also assist in ensuring that on-going consideration of broader reform or transition to any alternative regime will be able to proceed on a more secure footing.

### **Recommendation 28**

- Amend the ALA to provide for an Independent Registrar with powers and functions that include maintaining the share register, to provide assistance to the Trusts in complying with the ALA, to mediate, conciliate or arbitrate disputes, and to investigate complaints, in addition to other functions recommended in this Final Report.

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<sup>137</sup> Framlingham ALT Submission, p 4.

<sup>138</sup> LTAT Submission, pp 25-26 and 29-30.

<sup>139</sup> The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) is an example of land rights legislation providing for a registrar for a single organisation. There are 116 local Aboriginal land councils incorporated under the ALRA (NSW).

## Reporting to the Minister

The ALA requires each Trust to give the Minister certain records.

- (a) The Trusts must give the Minister a copy of the audited balance-sheet and profit and loss account prepared by the Trusts, and the reports by the Committee of Management and the Auditor regarding those financial reports, within 14 days of the AGM.<sup>140</sup>
- (b) The Trusts must give the Minister a copy of the interim financial reports that are prepared every 6 months within 28 days after the period that the report relates to.<sup>141</sup>
- (c) The Trusts must give the Minister a copy of the annual economic and social wellbeing report it prepares.<sup>142</sup>

A failure to prepare or provide these reports to the Minister may constitute a failure to comply with a provision of the ALA, allowing the Minister to issue a notice to a Trust to comply with the ALA, otherwise known as a compliance direction.<sup>143</sup> If a Trust fails to comply with the direction within a reasonable period, this may constitute reasonable grounds for the Minister to issue a show cause notice to the Trust to argue why an Administrator should not be appointed.<sup>144</sup>

The requirement for each Trust to report to the Minister on the economic and social wellbeing of residents of the Trust would appear to be of limited utility and is resented by shareholders.<sup>145</sup> It is seen as a requirement which has been imposed without consultation, and without regard to capacity of the Trusts to provide the information in any way that is useful. The Trusts have no power to make enquiries of the residents of the Trusts and the residents are under no obligation to provide the information. The ALA places no obligation on the Minister to do anything with the information that is provided in the reports.

The Options Paper suggested that an alternative use of the limited resources of the Trusts would be to dispense with this requirement and instead require the Trust to provide an Annual Report which, in addition to the financial reports which are already required to be produced, includes a statement of the Trust's strategic direction and its operations for the financial year. The Options Paper also noted that a further

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<sup>140</sup> Section 23S(1), ALA.

<sup>141</sup> Section 23S(2), ALA.

<sup>142</sup> Section 23S(3), ALA.

<sup>143</sup> Section 23A, ALA.

<sup>144</sup> Section 23B, ALA.

<sup>145</sup> See also LTAT Submission, pp 13 and 29-30.

alternative would be to require each Trust to prepare a strategic plan every three years that sets out the objectives and strategy of the Trusts.

The proposal to abolish the requirement of an economic and social wellbeing report was supported by those who engaged with the Review and considered the issue. The LTAT Submission in particular was heavily critical of the requirement, calling the report “fairly useless” and a “waste of time”.<sup>146</sup> The proposal for a three year strategic plan received some support in the consultations. The LTAT Submission was supportive of reporting against a strategic plan and noted that they have currently in place a 10 year strategic plan from 2020.<sup>147</sup> The Framlingham ALT Submission indicated support for medium and long term strategic planning.<sup>148</sup>

In our view, a strategic plan is not overly onerous, takes into account the capacity of the Trusts and is a forward looking document that allows for development of the type of social and economic development that many in the consultations desired for the future of the Trusts. A strategic plan also is a transparent framework for shareholders, residents and other community members to hold accountable the Trust and Committee of Management in order to promote better governance. While the reviewers initially raised the suggestion of having a three year strategic plan, in light of the Lake Tyers Aboriginal Trust having a 10 year strategic plan, we think it appropriate to set a three year strategic plan as the minimum time period required.

### **Recommendation 29**

- Delete s 18E of the ALA requiring the Trusts to prepare a report into the economic and social wellbeing of the community of residents.
- Amend the ALA to require the Trusts to prepare a three-year or longer Strategic Plan and for that document to be included in the documents required to be provided to the Minister under s 23S of the ALA.

At present there is no requirement for the Minister to be provided with a copy of the share register for each Trust. In the past, the Minister’s Department has appeared to receive copies of the Share Registers. This appears to have been proven useful in identifying whether those communicating to the Minister are shareholders. It has also served to ensure that a copy of the registers are kept in an independent location.

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<sup>146</sup> LTAT Submission, p 30.

<sup>147</sup> LTAT Submission, p 30.

<sup>148</sup> Framlingham ALT Submission, p 3.

It would be preferable for this be formalised by requiring that a copy of the share register be provided to the Minister along with the financial records.

### **Recommendation 30**

- Section 23S of the ALA be amended to require that a copy of the Share Register as at the date of the AGM be included in the documents to be provided to the Minister.

### **Grounds for Ministerial intervention**

All corporations, whether public or private, are subject to some form of external supervision. Some statutory corporations established under Aboriginal land rights legislation are subject to Ministerial direction.<sup>149</sup>

Under the ALA, it is the Minister who has this function.<sup>150</sup> This may create a perception of Government interference when the power is exercised. However, having the power exercised by a Minister can also be important to ensure the government takes responsibility for making sure the ALA continues to operate for the benefit of Aboriginal people, and is responsive when particular issues arise in the communities that relate to the operation of the ALA. During the course of the consultations, complaints were made about the role of the Government under the ALA. The LTAT Submission expressed frustration at the lack of clarity regarding the expectations of the Minister relating to compliance with the ALA and the threshold at which an Administrator might be appointed.<sup>151</sup> These complaints often related to issues that the appointment of a Registrar, as an independent person, would be designed to alleviate.

The ALA provides a power for the Minister to appoint an administrator if the Minister considers that there may be relevant grounds. The relevant grounds are:

- (a) where the Trust has failed to comply with a compliance direction without reasonable explanation;
- (b) where members of the Trust have acted in their own interests rather than that of the Trust; or

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<sup>149</sup> See for example s 39 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 29 of the *Aboriginal Lands Trust Act 2013* (SA) and s 13N of the *Anangu Pitjantjatjara Yankunytjatjara Act 1981* (SA).

<sup>150</sup> The Court also has power to provide relief for breaches of the ALA: s 27(2).

<sup>151</sup> LTAT Submission, p 30-31.

- (c) where the appointment of an administrator is required in the interest of the members of the Trust or the residents of the reserve.<sup>152</sup>

Before deciding whether to appoint an administrator, the Minister may give notice to the Trust and call on it to show cause why an administrator should not be appointed and the grounds on which the Minister relies.<sup>153</sup> The Minister may also inform the residents and ask for submissions from the residents on those grounds.<sup>154</sup> After considering any submissions the Minister may appoint an administrator.<sup>155</sup>

The Options Paper noted that there is currently no requirement for the Minister to inform and consult shareholders other than through the Committee of Management. The Options Paper noted that as the shareholders own the undertaking of the Trust, it might be appropriate to amend the ALA to allow the Minister to inform and consult shareholders, as well as residents. This is not least because one of the grounds on which the Minister may appoint an administrator is that it is “*required in the interests of the members of the trust or the residents of the reserve*”.<sup>156</sup>

During the course of the Review, we did not receive any strong feedback on this issue, although the LTAT Submission agreed with a draft recommendation to this effect in the context of clarifying the reasons why an Administrator might be, and is, appointed. If in the future there was an option for the Minister to give notice to shareholders, consideration would need to be given to a process which allows for the Minister to obtain the addresses of shareholders so that notice can be provided to them. Presumably, the Minister maintains a list of addresses for residents so that the existing option of notifying residents under s 23B(5) of the ALA can be complied with. However, in light of the minor level of engagement with this issue, the reviewers have determined not to make a recommendation in favour of such an amendment at this stage.

### ***Power of Investigation***

While the Minister can issue a compliance direction and can appoint an administrator, there is no express power for the Minister to undertake an investigation into complaints in relation to the affairs of the Trust. The requirement for an annual audit means that certain aspects of the Trusts will be the subject of supervision. Other statutory schemes have express powers of investigation which complement mandatory reporting requirements. For example, the ALRA (NSW) allows the Minister to appoint an investigator to “*investigate the affairs, or specified affairs, of an Aboriginal Land*

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<sup>152</sup> Section 23B(1), ALA.

<sup>153</sup> Section 23B(2), ALA.

<sup>154</sup> Section 23B(5), ALA.

<sup>155</sup> See sub-ss 23B(2)-(6), ALA.

<sup>156</sup> Section 23B(1)(c), ALA.

*Council, including its efficiency and effectiveness*".<sup>157</sup> Under the CATSI Act the Registrar may cause an authorised officer to examine the books<sup>158</sup> of an Aboriginal corporation with a view to reporting on whether there has been a breach of the CATSI Act, a breach of any law in relation to the management of the corporation, irregularity in relation to the examinable affairs of the corporation, or circumstances which may constitute a basis for appointing an administrator.<sup>159</sup> Such provisions are usually complemented by requirements for those with authority in the organisation to assist the investigations.

The Options Paper noted that consideration should be given to whether a similar power should be conferred on the Minister or another person under the ALA. The advantage of such a power is that it can ensure the means by which decisions about appointing an administrator are made in a more informed manner. It can also assist with the more efficient use of compliance directions. The LTAT Submission was in favour of such an amendment.<sup>160</sup> The reviewers consider that this recommendation aligns with community desire for greater transparency in the operation of the Trusts and will lead to better governance and accountability.

### **Recommendation 31**

- Amend the ALA to provide the Minister or Registrar with the power to undertake an investigation of a Trust with a view to reporting on whether there has been a breach of the ALA or any law in relation to the management of the Trust or circumstances which may constitute a basis for appointing an administrator.

## **Administration**

The reviewers note that the LTAT Submission raised concerns that there are two governance structures under the ALA – where the Committee of Management runs the affairs of the Trust during self-management or when, during an Administration, an advisory committee is formed of former members of the Committee of Management

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<sup>157</sup> Section 216, ALRA (NSW).

<sup>158</sup> "Books" includes a register, any other record or information, financial reports and records or a document.

<sup>159</sup> Section 453.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

<sup>160</sup> LTAT Submission, p 31.



and residents.<sup>161</sup> The LTAT Submission stated that there should be no difference in structure. As this issue was not raised during the course of the Review and only in the LTAT Submission towards the end of the process, the reviewers are not in a position to make any recommendations regarding the submission of the Lake Tyers Aboriginal Trust. However, the reviewers consider it worthwhile for First Peoples State Relations to continue to consult with Lake Tyers regarding whether any amendments are required and supported by the community.

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<sup>161</sup> LTAT Submission, p 18.

## DISPUTE RESOLUTION

The Options Paper noted that the ALA does not contain a separate scheme for dispute resolution, other than having to seek relief in the Supreme Court.<sup>162</sup> Otherwise, if disputes arise, parties are left to resolve their own disputes. Parties might retain an independent mediator or conciliator themselves, but the ALA does not provide for this option.

Often disputes arise through misunderstandings over events and procedures. Going to Court is often an expensive and disproportionate mechanism where miscommunication or minor differences may be the source of a grievance. Courts are largely inaccessible to many people due to costs and complexity of procedure which means that disputes can fester and escalate. Having an alternative dispute resolution mechanism can alleviate this problem.

Other land rights schemes contain provisions to assist in the resolution of disputes. Under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) the Minister establishes a panel of conciliators for the purposes of resolving disputes on the lands. An Anangu who is aggrieved by a decision of the Executive Board may apply for conciliation in relation to the decision. The Minister refers disputes to a member of the panel unless of the view that it is frivolous or vexatious or otherwise lacks merit. The conciliator can give directions to resolve the dispute. Applications can then be made to the District Court to enforce any direction that is not complied with.<sup>163</sup>

Under the ALRA (NSW) there is provision for the New South Wales Aboriginal Land Council or the Registrar of Aboriginal Land Rights to mediate, conciliate or arbitrate disputes in certain circumstances, with the registrar also having a power to refer disputes to the Court.<sup>164</sup>

The CATSI Act requires that a corporation constitution “*must provide for the resolution of disputes internal to the operation of the Corporation*”.<sup>165</sup> One of the functions of the Registrar is to assist with the resolution of disputes.<sup>166</sup>

The Options Paper noted that if an independent registrar is created for the ALA, that registrar might be given the power to mediate or conciliate disputes. It also suggested that the ALA might be amended to allow for a member to ask the Trust or the Minister to appoint a mediator or conciliator, nominated by the Trust or Minister or an

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<sup>162</sup> Section 27, ALA.

<sup>163</sup> Sections 35-37, *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

<sup>164</sup> Sections 239 - 241, ALRA 1983 (NSW).

<sup>165</sup> Section 66-1, CATSI Act.

<sup>166</sup> Section 658-1, CATSI Act.

independent mediation centre (such as the Dispute Settlement Centre of Victoria)<sup>167</sup> prior to seeking Court intervention.

Where the issue of dispute resolution was raised in the course of consultations, it was generally accepted that having internal disputes resolved by the Courts was a cumbersome and expensive process, and that it was desirable for there to be a more accessible option. The LTAT Submission provided strong feedback that disputes are extremely disruptive to the business of the Trust and that the expectation in the ALA that disputes would be resolved by the Supreme Court was “inappropriate and ineffective”.<sup>168</sup> It is not clear to the reviewers that those with complaints and grievances about the operation of the Trusts were aware of alternative dispute resolution mechanisms which might exist.

There may sometimes be a need for urgent relief from the Courts in relation to some disputes. However, it is appropriate to amend the ALA to provide alternatives and provide better clarity to shareholders as to what options may be available.

**Recommendation 25** above, recommends that there be Model Rules prepared which provides for the resolution of disputes internal to the organisation. It would be useful if the Model Rules also sets out a preference to seeking to resolve disputes through the Dispute Settlement Centre of Victoria where appropriate. It is important however, that the Trusts retain discretion as to when this is appropriate.

**Recommendation 28** above has recommended the appointment of an independent registrar whose functions are to include the mediation, conciliation and arbitration of disputes.

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<sup>167</sup> It is noted that the Dispute Settlement Centre of Victoria has a dedicated Aboriginal and Torres Strait Islander team: [www.disputes.vic.gov.au/about-us/aboriginal-and-torres-strait-islander-team](http://www.disputes.vic.gov.au/about-us/aboriginal-and-torres-strait-islander-team).

<sup>168</sup> LTAT Submission, pp 21 and 31-32.

## FACILITATING ENGAGEMENT WITH RESIDENTS

As noted above, and in the Options Paper, the underlying purpose of the ALA was to confer ownership of the former Framlingham reserve and Lake Tyers reserve on the Aboriginal people resident on the land at a particular date through a system of private shareholding. At the time of the passage of the ALA, it may have been assumed that shareholders would continue to be residents and *vice versa* as shares were passed down through families.

Over time, a number of shareholders may have moved away, either to find employment or due to other circumstances.<sup>169</sup> While the descendants of some of the original shareholders may have had shares passed to them, other shares may have not yet passed from the original owners to younger generations of their family. As a result, a substantial number of shareholders do not live on the former reserves and a number of residents do not own shares. This is particularly the case at Lake Tyers where approximately three-quarters of shareholders live away from Lake Tyers and only a third of residents are shareholders. However, it must also be noted that the extent to which this is the case at Lake Tyers may be impacted by the large number of shares which remain in deceased estates and have not been distributed. The reviewers are aware that there are at least some non-shareholding residents at Lake Tyers who may be entitled to shares which remain in a deceased estate.<sup>170</sup>

The Options Paper noted that to the extent that people living at Framlingham and Lake Tyers continue to see themselves as a community with common interests and aspirations, there is an issue of whether the ALA should say more about the engagement by the Trusts with the non-shareholding residents. At the same time, it needs to be acknowledged that not all of the business of the Trusts will be relevant to people who happen to be a resident. The business of the Trusts may potentially be broader than what occurs on the former reserve land and may not relate to the former reserve land at all. For example, Framlingham Aboriginal Trust has property interests unrelated to the former reserve land or lands used for residential purposes. If the Trusts were to establish related entities as economic enterprises there may be no connection between those enterprises and the issues affecting those residents at Lake Tyers and Framlingham.

At present, non-shareholding residents have no entitlement to exercise similar rights held by members of the Trust. They are not entitled to vote at the AGM of the Trust or

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<sup>169</sup> That is not to say that those people may not have an ongoing and strong connection to the former reserve, or even an intention to return to the former reserve. Indeed at present there would not appear to be sufficient housing to accommodate all shareholders if they wanted to return.

<sup>170</sup> It is also the case that the shares in deceased estates could be distributed to family members who do not live on Trust land.

vote for the Committee of Management. Further, they do not have the right to vote on whether to issue a long-term lease of the land or to sell the land. Despite this, a non-shareholding resident (and indeed any other person) is able to be elected to the Committee of Management by the members. Non-shareholding residents have been elected to the Committees of Management of Framlingham and Lake Tyers in the past, demonstrating a willingness on the part of shareholders to involve residents in the management of the Trust. It would appear that residents are, from time to time, able to attend general meetings even if they are not members and have no voting rights in relation to them. There is nothing in the ALA which prevents this occurring.

The ALA does however provide for a formal role for residents (including non-shareholding residents) in limited circumstances in the process of appointing an administrator and where a Trust is in administration. As set out above, prior to appointing an administrator, the Minister may inform the residents and consider any submissions from them.<sup>171</sup> An administrator can be appointed if it is in the interests of the residents.<sup>172</sup> If an administration board is appointed, the Minister is required to consult with the residents of the relevant Trust prior to the appointment.<sup>173</sup> If a Trust is under Administration, the Administrator must set up an advisory committee made up of former members of the Committee of Management as well as residents.<sup>174</sup>

### **Consideration of Options**

The Options Paper identified a number of options available within the existing framework of the ALA which might be adopted to help facilitate the engagement between the Trusts and the residents. These were:

- (a) to allow for shares to be transferred to residents;
- (b) to require the establishment of a residents advisory committee; or
- (c) to allow for the implementation of a system of associate membership.

The option of expanding the class of people to who shares may be transferred, to include residents, was discussed above. While there was some support for this option in the consultations, on the whole, the stronger preference at Lake Tyers was to keep the shares within the families, or 'bloodlines', of those to who the shares were originally issued. The point was made that the ALA allows for residents to be appointed to the Committees of Management regardless of whether they are a shareholder and this has occurred on a number of occasions.

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<sup>171</sup> Section 23B(5), ALA.

<sup>172</sup> Section 23B(1)(c), ALA.

<sup>173</sup> Section 23M, ALA.

<sup>174</sup> Section 23G, ALA.

In the course of the consultations there was a general recognition that the Trusts have a sense of community that included the residents and that there was an understandable interest on the part of non-shareholding residents in decisions which may impact on them. There was an openness to the possibility of the Trusts being empowered to create a separate class of shares to be provided to long term residents while they remained on the Trust which enabled them to vote at a general meeting. This would provide a voice to residents at the AGM while maintaining the integrity of the current share holdings. Ensuring the Trust remained in control of how that occurred appeared to be a strong concern in relation to that option. It would certainly not be appropriate to impose such an obligation on the Trusts. The Options Paper noted in relation to this option, that one of the downsides of such a process was that it would require the maintenance of a separate membership register and might cause complexity and disputes at meetings. In our view, such a change would be significant to the ALA which ought to be approached carefully.

The Framlingham ALT Submission noted various issues raised by resident non-shareholders at Framlingham:

- (a) Some long-term non-shareholder residents did not feel fully part of the Framlingham community because they did not hold shares and are not able to participate fully in decisions relating to the land at Framlingham.
- (b) Improved engagement between residents and the Trust would be a positive step towards improving transparency and a sense of community.
- (c) Despite the above, it was noted that non-shareholding residents are able to be elected to the Committee of Management.<sup>175</sup>

The LTAT Submission noted that resident engagement was an issue for the Trust, but that it required internal stability and increased engagement and communication from the Trust, such as through a newsletter, rather than a specific amendment to the ALA (subject to the submission that the ALA required major change, as discussed in Section 4 below).<sup>176</sup> The LTAT Submission specifically rejected that shares should be allowed to be transferred to residents under the ALA.<sup>177</sup>

In the circumstances, the reviewers do not consider it appropriate to recommend changes to the ALA regarding any of the options canvassed in the Options Paper regarding resident engagement. There was no clear consensus from the communities or the Trusts regarding whether amendment was appropriate and, if so, what amendments should be made.

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<sup>175</sup> Framlingham ALT Submission, p 5.

<sup>176</sup> LTAT Submission, p 34.

<sup>177</sup> LTAT Submission, p 34.

It should be noted that it would be possible to implement an involvement of shareholders and residents in a separate corporate entity which would not require an amendment to the ALA. In particular, it would be open to the residents and shareholders to establish a corporation to run the affairs on the former reserve and for the Trust to lease the former reserve land to that entity. This, in part, is how health services are run on the Trusts. The advantage of such a mechanism would be that the residential areas and the former reserve land could be run through a general corporation, whether it be a cooperative, an association or a corporate entity without the need to alter the underlying ownership of the share system. Ultimately, the adoption of such an approach, and what it may look like, is up to the shareholders of the Trust. We understand that such an approach has been considered in the past at Framlingham and either not implemented, or not implemented appropriately. We note this potential to highlight that there are substantive options for implementing a structure for the management of the reserve lands that can include residents, which is not premised on substantive amendments to the ALA.

### **Definition of Resident**

One matter however, that does require clarification is the definition of “*resident*”. There is currently no definition of “resident” beyond the definition that was used to determine residency at the time of the passage of the ALA (which required a person to be ordinarily resident on the former reserve for three months to receive shares<sup>178</sup>). However, this definition is no longer relevant as it only applied to establish residency at the time of the establishment of the Trusts.

The Options Paper noted that the ALA could be amended to include a general definition of “*resident*” in s 2. For consistency, this definition should be the same one used at the time of the passage of the ALA, namely that persons ordinarily resident on the former reserve for a period of three months or more. This would also clarify the meaning of “*resident*” in relation to the calculation of the quorum for a general meeting.

### **Recommendation 32**

- Amend s 2 of the ALA to include a definition of “resident” as a person who has been ordinarily resident on the former reserve for a period of three months or more.

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<sup>178</sup> Section 3(2), ALA.

## RESTRICTIONS ON SALE OF TRUST LAND

### Restrictions of Sale of Former Reserve Land

The Options Paper noted that the ALA is different to some land rights schemes in that it anticipates that land held by the Trust can be sold or permanently disposed of. Some land rights schemes do not allow for this to occur and instead provides that the land cannot be sold,<sup>179</sup> although those same schemes also allow for the long term leasing of land.<sup>180</sup> The ALRA (NSW) allows for the transfer, purchase or sale of land, but it contains a number of protections which are intended to assist in safeguarding against inappropriate sales, including that any “*land dealing*” by a local Aboriginal land council has to be approved by the New South Wales Aboriginal Land Council (**NSWALC**). That approval can be refused if NSWALC is not satisfied the dealing complies with the ALRA (NSW) or is in the interests of the members of the land council.<sup>181</sup>

The ALA has its own scheme for making decisions about the sale and disposal of land. Section 11(3) of the ALA provides that “*Subject to subsection (4), a Trust shall not sell, give in exchange or otherwise dispose of any land to any person, except in accordance with a unanimous resolution of the Trust.*”

The requirement for a “*unanimous resolution of the Trust*” is a limited protection as it only applies to those who show up to the meeting if a quorum is reached. Given the lack of attendance at meetings by members, this protection is substantially lessened.

Despite the power to sell land it has rarely been used by the Trusts. Lake Tyers has not sold any land. Part of the former Framlingham reserve has however been transferred to a group of former shareholders in exchange for the relinquishment of their shares. The possibility of repeating such an outcome at Framlingham in future cannot be excluded.

While this may be appropriate for Framlingham, discussions on this issue with shareholders at Lake Tyers revealed a strong view that there ought to be greater protection from alienation for the former reserve land. This was reflected in the LTAT Submission.<sup>182</sup> To ensure such a restriction is effective, it should be complemented by amendments which makes any agreement to sell, transfer, or use the land as a security be deemed to be void and unenforceable at law and that no damages or remedy can be obtained against the Trust in relation to such an agreement.<sup>183</sup> It would

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<sup>179</sup> See for example s 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>180</sup> See for example s 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>181</sup> See Div 2, Part 2, ALRA (NSW).

<sup>182</sup> LTAT Submission, p 17.

<sup>183</sup> A similar provision is contained in ss 42E(4)-(5) of the ALRA (NSW).



also be appropriate to empower the Minister to lodge a caveat over the former reserve land to ensure that it is not transferred contrary to the ALA.

Consistent with this restriction, it would also be appropriate to place a restriction on the long term leasing of the land. At present s 11 of the ALA would allow for a 99 year lease to be created over the entirety of the former reserve land as long as it was agreed to at a general meeting. A lease for that term is unlikely to be perceived as being any different to a sale. It is not appropriate that this be a complete prohibition as it is possible that there is a benefit in entering into a long term lease over part of the land. A compromise position would be that there should not be a lease for longer 40 years without the consent of the Minister, which consent can be withheld if the Minister does not believe it is in the interests of the shareholders. The reviewers consider that this recommendation is in line with the desire at Lake Tyers that Trust land not be alienated.

### **Recommendation 33**

- Amend the ALA to provide that:
  - (a) the former reserve land at Lake Tyers is not able to be sold, or transferred or used as a security;
  - (b) the former reserve land at Lake Tyers is not able to lease the former reserve land for a period of longer than 40 years without the consent of the Minister which can be withheld if the Minister does not consider the lease to be in the interests of the shareholders;
  - (c) that any agreement to sell, transfer or use the former reserve land at Lake Tyers as a security is to be deemed to be void and unenforceable and that no damages or remedy can be obtained against the Trust in relation to such an agreement; and
  - (d) the Minister is entitled to lodge a caveat over the land to ensure that the former reserve land at Lake Tyers is not transferred contrary to the ALA.

For Framlingham, though there have been historical decisions to dispose of part of the former reserve land to former shareholders, using land as a security for a loan, or other venture, generally places the ownership of the land at risk. It is arguable that using land as a security falls within the concept of “*otherwise dispose of*” prohibited in s 11(3) of the ALA. The Framlingham ALT Submission noted general support for restrictions to the sale of Trust land, except for property purchased for investment purposes.<sup>184</sup> To avoid any doubt, it may be considered preferable if s 11(3) made clear that a decision to mortgage or use land as a security has to be made in the same way as a decision to sell the land, therefore requiring a unanimous resolution of the shareholders who attend a general meeting.

#### **Recommendation 34**

- Amend section 11(3) of the ALA to provide that Framlingham Aboriginal Trust shall not sell, mortgage, use as a security, give in exchange or otherwise dispose of any former reserve land to any person, except in accordance with a unanimous resolution of the Trust.

#### **Purchased Land**

The restriction on land dealings apply not only to the former Trust land, but any land held by the Trust. While the restrictions in the ALA for dealing with the former reserve land is appropriate, the observation has been made to the Review that they are not appropriate for purchased land.<sup>185</sup> Both Framlingham and Lake Tyers own land which has been purchased since the Trust was established. If they are to operate commercially, they should be able to buy and sell land in a commercial way.

#### **Recommendation 35**

- Amend the ALA to provide that the resolution to sell land other than the former reserve land by Lake Tyers Aboriginal Trust or Framlingham Aboriginal Trust needs only to be approved by 80% of the members present and eligible to vote.

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<sup>184</sup> Framlingham ALT Submission, p 5.

<sup>185</sup> See also Framlingham ALT Submission, p 5.

## **FACILITATING ECONOMIC ACTIVITY**

When the ALA was enacted, there was an intention that the Trusts would engage in economic activity for the benefit of the members of the Trust. It is clear that both the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust have in the past sought to establish economic enterprises to create income streams and employment opportunities for the long term sustainability of the community. Framlingham has developed some income streams including from its wind farm.

During the course of the Review it was clear that aspiration remains. The view was expressed that although dividends had not been paid in recent years, shareholders needed a long term view and there was potential for that to occur in the future, although LTAT have made clear that the potential for financial gain from shares was not a community aspiration, and the function of shares as a mechanism for recognising ownership was far more important.<sup>186</sup> In relation to Lake Tyers there were a number of comments in relation to the economic potential of the land in terms of cultural tourism and other ventures.

There was also frustration expressed at Lake Tyers at the current lack of progress. This in part was attributed to a lack of capacity on the part of successive Committees of Management following the 10 year administration. It was also attributed by others to the administration itself, which was seen as having destroyed the self-governing capacity of the community, and failed to put in place any economic strategy or develop income streams. The complaint was also raised that there has been some Government support and funding for general infrastructure but no funding to pursue economic development. The current funding was seen as inflexible and did not allow the community to pursue economic development proposals.

The Options Paper noted that improving the opportunities for the Trusts in relation to economic activities may well be best facilitated by specific funding initiatives directed at establishing and supporting economic activity rather than just maintaining infrastructure.

At the same time, the Review provides an opportunity to examine the ALA and explore whether amendments could be made to the ALA to improve the ability of the Trusts to pursue those objectives.

### **Powers of Trust**

The powers of the Trust are set out in s 11 of the ALA. In pursuing economic development, it may be beneficial for a Trust to also have the power to establish a separate corporate entity to protect the assets of the Trust. It is arguable that the

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<sup>186</sup> LTAT Submission, p 12.

powers granted to the Trust by s 11 of the ALA are not sufficient to allow the Trust to establish a related corporate entity, though s 10 of the ALA provides the Trusts with the power to do all things a corporation may do.

The reviewers recommend that the ALA expressly state that a Trust is able to establish a related corporate entity and the functions of the Trust should be amended accordingly. An example of such a function is s 52(5A) of the ALRA (NSW), which provides that a Land Council:

*"may establish, acquire, operate or manage the following:*

- (a) an Aboriginal and Torres Strait Islander corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 of the Commonwealth,*
- (b) a company within the meaning of the Corporations Act 2001 of the Commonwealth."<sup>187</sup>*

If such entities are established by the Trusts, the ALA should be amended to require that the operation of the other entity is reported on in the same manner as the operations of the Trust itself.<sup>188</sup> Consideration may also need to be given to ensuring that there are restrictions on transferring assets to a related entity to ensure that the existing assets remain within the statutory scheme that regulates the Trusts.

The reviewers note that the LTAT Submission rejected this potential amendment, which is associated with the submission that the Trust should be transformed into a corporation regulated by ORIC (an **ORIC corporation**) (discussed further in Section 4 below).<sup>189</sup> However, even if the Trust became an ORIC corporation, it would have power to establish, acquire, operate or manage another ORIC corporation, and so the reviewers do not consider this a barrier to the recommendation.

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<sup>187</sup> Section 52(5A), ALRA (NSW).

<sup>188</sup> See by way of analogy s 52C, ALRA (NSW).

<sup>189</sup> LTAT Submission, p 33.

### **Recommendation 36**

- Amend the ALA to provide that a Trust may establish, acquire, operate or manage a related entity being either:
  - (a) an Aboriginal and Torres Strait Islander corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth),
  - (b) a company within the meaning of the *Corporations Act 2001* (Cth).
- Amend the ALA to provide that a Trust must include in the accounts and records of the Trust the financial records of the related entity and details of the operations of the related entity.

As presently drafted, s 11(b) of the ALA says that a Trust can “*carry on any business on any land held by the Trust*”. It would be preferable if the ALA instead clarified that a Trust can “*carry on any business, including on any land held by the Trust*” in order to be clear that the locations at which business may be conducted are not limited.

### **Recommendation 37**

- Amend section 11(b) of the ALA to clarify that a Trust “*carry on any business, including on any land held by the Trust*”.

## **Financing the Trusts**

The Options Paper noted that the ALA does not contain any express provision for the financing of the Trusts. This is in contrast to the approach in the ALRA (NSW) where it was acknowledged that “[*]and rights in a highly developed State like New South Wales cannot work if resources are not available for open market purchases*”.<sup>190</sup> The ALRA (NSW) provided for the establishment of a statutory fund which was financed by 7.5% of land tax over a period of 15 years.<sup>191</sup> That fund was intended to “*guarantee*

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<sup>190</sup> Second Reading Speech, Aboriginal Land Rights Bill (NSW), Hansard, Assembly, 24 March 1983, p.5090.

<sup>191</sup> Section 35, ALRA (NSW) (as enacted).

*a source of adequate funding over the long term.*"<sup>192</sup> The statutory fund continues to fund business ventures, land purchases and the resourcing of 116 local Aboriginal land councils.

Under the ALA, the resourcing of the Trusts is dependent on separate applications for funding by the Trusts. It is open to a Trust to seek funding from other sources. The review understands that currently Lake Tyers receives a level of administrative funding from First Peoples State Relations. No such funding is received by Framlingham. Both Lake Tyers and Framlingham receive some infrastructure funding from First Peoples State Relations. This funding is not discretionary but is for specific infrastructure projects. In the past both Trusts appear to have been supported by various levels of Commonwealth funding. Framlingham has managed to finance the purchase of a number of additional properties through the Aboriginal and Torres Strait Islander Commission. These have enabled Framlingham to develop some independent income streams.

The absence of independent funding sources limits the ability of the Trusts to pursue economic opportunities, particularly where they are concurrently dealing with the complexities of managing communities with complex social and historical circumstances.

The Options Paper noted that consideration should be given to whether it is appropriate or necessary to provide for additional funding to allow the Trusts to be proactive in pursuing economic development and separate income streams in addition to current funding which is directed to administration and maintaining infrastructure. There is a desire for economic development both on Trust land and for the benefit of the Trusts. It is unlikely that this will occur effectively in the short term without the injection of some resources to enable that to occur.

### **Recommendation 38**

- In addition to core funding for administration, the Victorian Government should give consideration to providing some targeted funding for investments in the form of property or other investment to create income streams to finance the Trusts.

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<sup>192</sup> Second Reading Speech, Aboriginal Land Rights Bill (NSW), Hansard, Assembly, 24 March 1983, p.5090.

## **Mining**

A number of other land rights schemes provide special measures in the form of requiring either some negotiation or consent to mine on Aboriginal land,<sup>193</sup> or provide for the ownership of certain minerals on Aboriginal land.<sup>194</sup> The Options Paper noted that the ALA does not provide for any such mechanism. However, under s 31 of the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth) there are special provisions requiring permission of the relevant land holding bodies before mining can occur on the land.<sup>195</sup> A similar mechanism is in the *Aboriginal Land (Northcote Land) Act 1989* (Vic).<sup>196</sup> For consistency, Lake Tyers and Framlingham Aboriginal Trusts should have the same veto power.

### **Recommendation 39**

- Amend the ALA to make the requirements in relation to mining consistent with s 31 of the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth).

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<sup>193</sup> See for example ss 40-48J of the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth); ss 29-30 of the *Native Title Act 1993* (Cth), s 53 of the *Aboriginal Land Trust Act 2013* (SA); ss 20-24 of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), s 45, ALRA (NSW).

<sup>194</sup> See for example s 45(2), ALRA (NSW).

<sup>195</sup> Section 31 *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth).

<sup>196</sup> See s 5 *Aboriginal Land (Northcote Land) Act 1989* (Vic).

## MODERNISATION OF THE ABORIGINAL LANDS ACT

Attachment B to the Options Paper contained recommendations for modernising the ALA, which the reviewers considered ought to be non-controversial. During the course of the further consultations no further comment was received in relation to these, although the Framlingham ALT Submission generally supported modernisation of the ALA.<sup>197</sup> The reviewers believe most of the suggested changes remain appropriate to correct obvious gaps and are non-controversial, as set out below.

### Objects of the Aboriginal Lands Act

The ALA does not have any clearly stated objects. It is not essential that legislation has stated objects. It was noted that the objects of the ALA would need to reflect its unique structure and inherent purpose, which are otherwise set out in the Long Title to the ALA. The Options Paper suggested the following form of the wording.

*The objects of this Act are as follows—*

- (a) to provide for the lands constituting the former Framlingham reserve and the Lake Tyers reserve to be vested in bodies corporate (the Trusts) consisting of the persons residing on those lands at the date of enactment;*
- (b) to divide the Trusts into shares to be held by the persons residing on those lands at the date of enactment and to provide a scheme for the transfer of the shares;*
- (c) enabling the Trusts to acquire, hold and deal with Trust land in accordance with this Act for the continuing benefit of the members of the Trusts;*
- (d) enabling the Trusts to establish businesses for the benefit of its members;*
- (e) ensuring that Trust lands are not alienated except in accordance with this Act;*
- (f) establishing mechanisms for the efficient and effective administration of the Trust.*

The Options Paper noted a desire to hear from the community about what objects could be included in the ALA that meet their aspirations for the Trusts. No further comments were received in relation to this issue. As there was no clear feedback on

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<sup>197</sup> Framlingham ALT Submission, p 2.



this issue and there is no imperative for the inclusion, we would not recommend an amendment to include this at this stage. However, this could be a fruitful area of discussion with the Framlingham and Lake Tyers communities in any further consultations once an Exposure Draft or Bill is prepared for discussion with the communities.

### **Specific Terms**

The Options Paper identified that certain terms used in the ALA could be updated to reflect modern plain English. The reviewers remain of the view that these terms should be updated for the reasons give below.

#### **"Aborigine"**

The ALA uses the term "*Aborigine*" which is defined as a person who is descended from an aboriginal native of Australia. Some other legislation dealing with Aboriginal people, refers to "*Aboriginal persons*", although even then the term "Aborigine" is used as part of the definition of the term.<sup>198</sup> It would seem appropriate to make the language of the ALA consistent with more recent legislation dealing with Indigenous people. The *Aboriginal Heritage Act 2006* (Vic) defines an Aboriginal person as "*a person belonging to the indigenous peoples of Australia*". This definition is also used in the *Traditional Owner Settlement Act 2010* (Vic). Other legislation uses the criteria of descent, self-identification and group recognition as part of the definition of who is an Aboriginal person.<sup>199</sup>

#### **"Husband or Wife"**

The ALA uses the term "husband or wife" to refer to one of the classes of people to whom shares may be transferred.<sup>200</sup> That term is not consistent with the contemporary approach to marriages and relationships. The term "*spouse or domestic partner*" should be substituted and defined as having the same meaning as in the *Equal Opportunity Act 2010* (Vic), where "*spouse*" is defined as "*a person to whom the person is married*" and "*domestic partner*" is defined as:

“(a) *a person who is in a registered domestic relationship with the person; or*

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<sup>198</sup> See for example the definition of "Aboriginal person" in s 3 of the *Children, Youth and Families Act 2005* (Vic).

<sup>199</sup> See for example the definition of "Aboriginal person" in s 4 of the *Adoption Act 1984* (Vic) and s 3 of the *Children, Youth and Families Act 2005* (Vic).

<sup>200</sup> Section 14(2)(i), ALA.

- (b) *a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender).*<sup>201</sup>

### **“Infants”**

When the ALA was enacted it was anticipated that shares could be held by infants. The ALA makes special provision for the voting rights for members who hold shares. It is possible that shares could still be transferred to minors and the restrictions on their voting rights remain relevant.<sup>202</sup> Instead of referring to “*infants*” it would be more appropriate for the ALA to refer to “*a minor*” which should be defined in s 2 as “*a person under the age of 18*”.<sup>203</sup> Because the concept of an “*infant*” was relevant to the issuing of the original shares, such a change could only be taken to be prospective and not to affect any existing interests.

#### **Recommendation 40**

- Amend the ALA to:
  - (a) replace the term “*Aborigine*” with “*Aboriginal person*”;
  - (b) replace the phrase “*husband and wife*” with “*spouse and domestic partner*”;
  - (c) replace the term “*infants*” with “*a person under the age of 18*”.

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<sup>201</sup> Section 4 of the *Equal Opportunity Act 2010* (Vic).

<sup>202</sup> See ss 13(4), 22(3), 22(4), 23(5)(a), ALA.

<sup>203</sup> A person must be at least 15 years of age to be a member of a corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

## **ONGOING REVIEW AND CONSULTATION**

As noted above, the ALA has rarely been reviewed over its near 50-year history. The absence of regular reviews means that the ALA has not been able to evolve incrementally and issues (such as the issues with deceased estates), which could have been managed at an early stage have been allowed to grow more problematic and difficult to solve over time.

This Review follows a 10 year administration at Lake Tyers and has been conducted during an administration at Framlingham. This has added to some community scepticism as to the motivation of the Review and might have contributed to a lack of engagement. This is understandable if peoples' experience with previous review processes have been negative. During consultations, some people complained that previous reviews of the ALA had occurred without consultation and some of the amendments had unintended consequences as a result.

The process of this review and its limitations are set out above. It is important that in acting on this review First Peoples State Relations continue to engage with the Trusts to identify how the ALA can be improved. An option for First Peoples State Relations to discuss with Trusts is an inbuilt mechanism for periodic review of the ALA, similar to s 252A of the ALRA (NSW). A mechanism providing for regular periodic review would appear to have the support of both the Trusts.<sup>204</sup>

Further, as suggested by the Victorian Government in previous communications to community members, another round of consultations should be engaged in with an exposure draft prepared for comment.

### **Recommendation 41**

- A copy of this Report should be provided to the Trusts for comment prior to any draft legislation being prepared.
- Prior to a Bill being tabled in Parliament, an Exposure Draft should be prepared and provided to the Trusts for comment.

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<sup>204</sup> LTAT Submission, p 7; Framlingham ALT Submission, p 2.

### **Recommendation 42**

- First Peoples State Relations should continue to engage with the Trusts and work with them to further identify areas of reform which assist with the operation of the ALA, including about whether a periodic legislative review mechanism is appropriate to insert into the ALA.

**SECTION FOUR: CONSIDERATION OF  
MAJOR CHANGE TO THE ABORIGINAL  
LANDS ACT**

An important question raised by the Discussion Paper was whether major change to the ALA is required and desired by the Framlingham and Lake Tyers Aboriginal communities. As the Options Paper highlights, the issue of major change involves two important and related questions for the communities to consider:

- (a) Is the share system appropriate or should an alternative system of land ownership be introduced?
- (b) Should an alternative corporate governance model be used for the Trusts?

At every stage of the Review it was made clear that neither the Victorian Government nor the reviewers had a preconceived view of what changes, if any, should be made to the ALA. Both the Discussion Paper and the Options Paper invited consideration of whether an entire reworking of the scheme for land rights under the ALA should be made. It also set out the types of matters which would need to be considered should such approach be adopted.

### **Consultations**

Whether major change is required, in the form of replacing either the share system or the corporate governance model for the Trusts, was discussed at a number of consultations between community members and the reviewers. Reviewers expressly asked persons at consultation for both Framlingham and Lake Tyers whether the share system should be replaced or whether the corporate governance model of the Trusts needed to change.

To the extent that any views were expressed, they were extremely diverse. A high level summary of those views expressed during the consultations is as follows:

- (a) A substantial number of persons consulted did not express a view on whether the share system or corporate governance model should be replaced. This is understandable in light of the fact that many persons who attended the consultations were unaware of how the share system or corporate governance model operated. In that context, it was difficult for persons to engage as to questions of major change when there was low understanding of the ALA scheme as it currently exists.
- (b) A majority of shareholders viewed their shares as an acknowledgment of their traditional and/or historical connection to land and their ancestors' history on the reserves. The general response of those involved was that the shares are a fundamental part of their land rights and a tangible part of their cultural heritage that can be passed on through their generations. Some shareholders stated that the shares acknowledged those persons who remained on the reserve when it was about to be closed and who fought for its return to Aboriginal ownership.

- (c) Many people who attended consultations expressed frustration with the share system and the operation of the Trusts. However, those frustrations were often focused on issues associated with poor governance or a lack of transparency in the operation of the Trusts or the maintenance of the share register, rather than a fundamental desire to replace the share system.
- (d) A majority of shareholders consulted for Framlingham and Lake Tyers expressed the strong view that the share system should be retained but improved through amendment of the ALA.
- (e) Some people had a strong view that disputes over shares were major problems, more often at Framlingham rather than Lake Tyers, and that persons with greater numbers of shares wielded greater power in the Trusts. However, those persons did not necessarily express the view that the share system needed to be replaced but rather that it needed to be more equitable or that shares should not concentrate in certain persons or families. At Lake Tyers, a number of people without shares, including residents, questioned whether they were entitled to shares that had not been passed down.
- (f) A minority of people at consultations for Framlingham expressed the view that the share system should be replaced.<sup>205</sup> However, most of those persons were unsure what system should replace it, although some who expressed the view mentioned a membership model similar to a prescribed body corporate under the *Native Title Act 1993* (Cth). Most of the people who expressed this view acknowledged that shareholders would need to be compensated for the fair value of their shares. The Framlingham ALT Submission stated that some of those consulted through a buy-back or compensation scheme for shares, although this did not have broad support.<sup>206</sup> Only a couple of those persons (at most) were shareholders.
- (g) A minority of shareholders at consultations for Lake Tyers were open to discussing major change but considered that this was a long term view and, in the short term, focus should be on minor change to the ALA.
- (h) There was very little discussion about the corporate governance model of the Trusts. Some people at consultations had familiarity with ORIC and the cooperative model outlined in the Options Paper, but no person expressed a firm view to the reviewers that the corporate governance model of the Trusts should be replaced, let alone what model should be substituted. However, a number of persons who discussed the corporate governance model had a strong aversion to ORIC.

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<sup>205</sup> This view was confirmed in the Framlingham ALT Submission: p 4.

<sup>206</sup> LTAT Submission, p 4.

## Submissions

The Framlingham ALT Submission proceeded on the basis that amendments were required to the ALA in the nature of minor change and that regular reviews should be introduced into the ALA to enable considering changes as they arise rather than all at once.<sup>207</sup>

The LTAT Submission put a much stronger position than had earlier been expressed to the reviewers. It stated that:

*“The Trust sees that major change is essential. It believes that rescinding the Act and replacing it with a new Act, or suitable alternative formal instrument, would uphold and leave the recognition the ALA has for our original shareholders and more importantly, the recognition of the need to continue to pass back to Aboriginal people Aboriginal ownership of country.”<sup>208</sup>*

The general principles which were suggested to underpin that change were described as follows:

*“The Trust will consider options for this, which might include development of new self-determination legislation or an alternative formal self-determination instrument that:*

- *Protects country – land and waters – into perpetuity.*
- *Supports, empowers and frees the Trust to self-determine its future, supports the Trust community to flourish socially and economically.*
- *Sets mutual obligations between the Trust and the government, and joint governance to oversee that these mutual obligations continue to be met.*
- *Enables a transition arrangement and process for the LTAT community to choose and establish a new, appropriate governance structure, first option to be considered is to become an incorporated Aboriginal corporation under the Federal Government’s Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act), administered by the Office of the Registrar of Indigenous Corporations (ORIC)*

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<sup>207</sup> Framlingham ALT Submission, p 2.

<sup>208</sup> LTAT Submission, p 6.



- *Sets a new Trust shareholder system that has been developed by the community.*
- *Establishes an Independent Registrar to maintain and oversee the Trust share register and the integrity of a refined LTAT share system*
- *Eliminates non-compliant workplace practices and embeds safe employment conditions and practices for Trust staff, especially for the Chief Executive Officer.*
- *Provides for structures to honour country and culture and underpin community cohesion.*<sup>209</sup>

The LTAT Submission also stated:

*“The Trust agrees that it would like to be formally constituted as per the ORIC model, or as a company limited by guarantee: to not have personal liability as it sits in relation to the corporation of the Trust.”*<sup>210</sup>

Nonetheless, the LTAT Submission commented on the options in the Options Paper for minor change in order to inform any new framework and potential legislation that would replace the ALA.<sup>211</sup> Accordingly, in response to the two key questions posed at the start of this Section of the Final Report, the LTAT Submission essentially stated that the share system should be replaced and a new corporate governance model for the Trust be introduced, namely through the Trust becoming a corporation under the CATSI Act.

However, at the same time, the LTAT Submission expressed a desire to keep a system of share holding, but in a revised form.<sup>212</sup> The LTAT Submission set out a diagram of an “Agreed Shareholder System” that looked very similar to that provided for already in the ALA, but kept the shares more strictly within ‘bloodlines’.<sup>213</sup> The diagram indicated the following:

- Shareholders must be descended from original shareholders.
- A spouse of a descendant shareholder must be a non-shareholder resident of over 5 years to own shares, but upon separation or death, the shares

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<sup>209</sup> LTAT Submission, p 5.

<sup>210</sup> LTAT Submission, p 18.

<sup>211</sup> LTAT Submission, p 12.

<sup>212</sup> LTAT Submission, pp 25-27.

<sup>213</sup> LTAT Submission, p 35.

must go back to their living spouse or their children together or otherwise to the Trust.

- (c) A shareholder may only transfer or leave their shares in their Will to Aboriginal children, siblings, blood relations or other descendants of the original shareholders, not their spouses or non-Aboriginal people.
- (d) If there is no Will, shares must be divided amongst children (held on trust if under 18 years old) or to the next of kin who is a descendant relation.
- (e) Any shares returned to the Trust can be provided to an Honorary Shareholder who has been a resident for 5 years on the Trust or provided community work to the Trust. Such persons must not be bankrupt or have a criminal record in the past 10 years and be a fit and proper person.

It also noted that although there was a desirability “*to become an Indigenous Corporation, LTAT would no longer sit under [First Peoples State Relations] which is critical to its operation at present and has been an historically important relationship from the beginning*”.<sup>214</sup> Finally, the submission noted that:

*“Although the Committee could advocate to create separate entities, they also feel that the Act is important in that this one document representing the Trust has stood, albeit poorly, and is historically and personally important, as are shares – just not in the form of the outdated ALA.”*<sup>215</sup>

In essence, the LTAT suggested an outcome whereby there was a more typical corporate structure, through a corporation incorporated under the CATSI Act or other corporations legislation. This model was seen as having benefits in providing a more regular corporate structure which could better access tax benefits of not for profit organisations.<sup>216</sup> However, it is unclear whether the LTAT Submission advocated for an ORIC corporation to act as a trustee corporation while the Trust continues to operate under the ALA as a form of unit trust, similar to a Prescribed Body Corporate under the *Native Title Act 1993* (Cth).

The reviewers also received a submission from the Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**). GLaWAC submitted that major change was required.<sup>217</sup> GLaWAC noted it represented the traditional owners of the land at Lake

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<sup>214</sup> LTAT Submission, p 28.

<sup>215</sup> LTAT Submission, p 12. This comment was despite the LTAT Submission referring to “*rescinding the ALA*” (p 3).

<sup>216</sup> LTAT Submission, p 15.

<sup>217</sup> GLaWAC Submission, p 1.

Tyers and submitted that the ALA should formalise a legislative connection to the traditional owner corporation.<sup>218</sup>

The LTAT Submission acknowledged that the ALA was not based on concepts of traditional ownership and that some shareholders are not traditional owners of the land held by the Lake Tyers Aboriginal Trust, and were sensitive to that state of affairs.<sup>219</sup> However, the LTAT Submission also was “*clear in its position that the Trust and its shareholders maintain their separate position from [GLaWAC] although some Committee Members and shareholders are also Traditional Owners and associated with GLaWAC*”.<sup>220</sup>

### **Consideration of major change**

In considering whether to recommend any major change to the ALA, the reviewers have been conscious of a number of factors.

**First**, the reviewers are conscious of the Victorian Government’s stated aims that the Review should improve and increase governance, economic development and self-determination for the communities at Framlingham and Lake Tyers. Accordingly, any changes to the ALA itself should proceed upon the principles of self-determination.

**Second**, there has been a low level of engagement with the Review from shareholders, residents and other community members at Lake Tyers. Further education is required for members of both Trust communities to understand the more complicated aspects of the ALA, particularly at Lake Tyers. Both submissions from the Trust identified further education as an important step.

**Third**, prior to receiving the detailed submission from LTAT in February 2020, no clear view was expressed regarding major change to the ALA during the course of the consultations at either Lake Tyers or Framlingham other than by certain individuals, without broader support. As discussed above, the views expressed were diverse and sometimes at odds. The timing of the receipt of the LTAT Submission did not allow for more detailed analysis and discussion of the precise nature of the proposed alternative model.

**Fourth**, a majority of shareholders consulted with, at both Framlingham and Lake Tyers, expressed a desire to retain and yet improve the share system. Even the LTAT Submission essentially recommended a modified version of the share system already in place. In that circumstance, it is arguable that it is unnecessary for the ALA to be repealed and replaced to effect such change.

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<sup>218</sup> GLaWAC Submission, p 1-2.

<sup>219</sup> LTAT Submission, pp 12-13.

<sup>220</sup> LTAT Submission, p 5.

**Fifth**, the shares are private property conferred on particular families or persons who were present on the reserves when the ALA was passed. This situation should not be disturbed, so to avoid dispossessing Aboriginal people further of their land.

## **Conclusion**

In light of the views expressed at the consultations and the factors to consider as set out above, the reviewers are not in a position to recommend major change to the ALA, in either replacing the share system with an alternative system of land ownership or introducing an alternative governance model for the Trusts. Accordingly, we have recommended incremental change in the form of minor changes to the ALA that will assist in improving governance, facilitating economic development and enabling greater self-determination.

The consultations did not establish that a majority of community members were in favour of major change, let alone what that major change should be.

Significantly, a majority of shareholders consulted wanted to retain the share system. This is important in the context of the shares being private property and the land being freehold title. Interfering with a person's private property rights, particularly when those rights have been created in order to provide land justice to Aboriginal persons, is a serious undertaking. In that context, and to ensure any change remained true to the principle of self-determination, a critical mass or significant majority of shareholders would need to support major change to the ALA that tampered with their property rights.

The reviewers have taken into account and considered extensively the LTAT Submission. While the LTAT Submission made a strong representation in relation to major change, the details of any alternative model is embryonic and remains quite similar to the structure of the ALA, at least in regard to the share system. Considering that a number of persons in the Lake Tyers consultations expressed a view that they did not want the Trust to be an ORIC corporation, and the LTAT Submission put the opposite view, it is appropriate that further discussion occur at Lake Tyers regarding an appropriate corporate governance model for the Trust. It is noted that some of the recommendations made by the reviewers, including those in relation to the share register being managed by a Registrar, are consistent with the position put in the LTAT Submission in relation to what an alternative scheme may look like.

The reviewers do not think it is appropriate at this stage to recommend that GLaWAC have a formal relationship with the Trust through amendment of the ALA, in light of the position put in the LTAT Submission. Such a view was also expressed by a number of Lake Tyers community members during the consultations. However, the reviewers note that there are no barriers to the Trust and GLaWAC entering into agreements with each other that might codify a relationship outside of the ALA itself, for example, in relation to caring for country.

This is not to say that major change could not be an option in the future. The LTAT Submission provides a basis for an alternative model to be explored further at Lake Tyers. If, after further consultation with the Trusts, and following the improvements that the reviewers hope come out of the recommendations in this Report, there is greater appetite for major change, further consultations might endorse that path. The importance of regular review of the ALA will further assist in that process.

## ATTACHMENT A

Original Shareholders at Framlingham (Gaz. 9 June 1971 p.2042)

1. Austin, Arthur Herbert	10. Clarke, Ian Norman
2. Berg, Henrietta	11. Clarke, Leonard John Gary
3. Clarke, Albert	12. Clarke, Mary Maude
4. Clarke, Alice Maude	13. Clarke, Norris Connolly
5. Clarke, David Herbert	14. Clarke, Percy
6. Clarke, Fay	15. Clarke, Violet Jennifer
7. Clarke, Geoffrey Wayne	16. McKinnon, Alexander
8. Clarke, Henry	17. Rose, James Wallace Leslie
9. Clarke, Herbert Edgar	

Original Shareholders at Lake Tyers (Gaz. 9 June 1971 p.2043)

1. Bryant, Leonard John	47. Fenton, Phillip Edward
2. Bryant, Leonard Joseph	48. Fenton, Sandra Marjorie
3. Bryant, Lucille Francis	49. Harrison, Ada May
4. Bryant, William	50. Harrison, Alice
5. Bull, Agnes Julia	51. Harrison, Allan
6. Bull, Connelly Richard	52. Harrison, Faye Agnes
7. Bull, David Worrick	53. Harrison, Kathleen Amelia
8. Bull, Denise	54. Harrison, Mirrell Laura
9. Bull, Elvie Constance	55. Harrison, Olga Alma
10. Bull Francis	56. Harrison, Shirley Ann
11. Bull, Owen Cedric	57. Johnson, Frederick William
12. Bull, Rita Maureen	58. Johnson, Phyllis Joan
13. Bull, Rodney Clint	59. Marks, Allan
14. Bull, Wallace Murray	60. Marks, Brian Ronald.
15. Carter, Alfred Charles Ronald (Snr)	61. Marks, Gordon
16. Carter, Alfred Charles Ronald (Jnr)	62. Marks, Gwenneth Rowen
17. Carter, Alfred James	63. Marks, Kevin
18. Carter, Campbell Edward Lionel	64. Marks, Lillian
19. Carter, Gwen Rowena	65. Marks, Lola
20. Carter, Iris Anne	66. Marks, Rosemary
21. Carter, Karen Thelma	67. Marks, Thomas
22. Carter, Marion Elizabeth	68. Mobourne, Craig Anthony
23. Carter, Maxine Phyllis	69. Mobourne, Claude Lindsay (Snr)
24. Carter, Pamela	70. Mobourne, Claude Lindsay (Jnr)
25. Carter, Phyllis Francis	71. Mobourne, Daniel Lawson

26. Carter, Phyllis Francis	72. Mobourne Darren Terence
27. Carter, Rowena Ann	73. Mobourne, Donna Marree
28. Carter, Thelma	74. Mobourne, Gail Iris
29. Carter, Wilfred James	75. Mobourne, Gladys Pauline
30. Carmichael, Edward Cornelius	76. Mobourne, Ivy May
31. Edwards, Alfred James	77. Mobourne, Lorna Dorothy
32. Edwards, Cornelius William	78. Mobourne, Janette Ann
33. Edwards, Julie Constance	79. Mobourne, Majorie Dawn
34. Edwards, Leon Warren Cedric	80. Mobourne, Russell Edward John
35. Edwards, Madge Elizabeth	81. Moffatt, Rupert Foster
36. Edwards, Maureen Theresa	82. Mullett, Arthur Benjamin Alexander
37. Edwards, Michael Charles	83. O'Rourke Ella May
38. Edwards, Noelene Sharon	84. O'Rourke Ronald Alfred James
39. Edwards, Ronald William James	85. Pepper, Alison Fay
40. Fenton, Clement Frederick	86. Pepper, Dulcie Daisy Kathleen
41. Fenton, Conway	87. Pepper, Elizabeth Ann
42. Fenton, Gary Patrick	88. Pepper, Hugh
43. Fenton, Geoffrey Terrence,	89. Pepper, Watson
44. Fenton, Hilda Julia	90. Tregonning, Hilda
45. Fenton, Lloyd Martin	91. Wandin, Joseph Frederick James (Snr)
46. Fenton, Melvyn	92. Wandin, Joseph Frederick James (Jnr)

## **ATTACHMENT B**

### **Lake Tyers and Framlingham – Current Situation**

#### **Lake Tyers**

Lake Tyers Aboriginal Trust currently has approximately 160 to 170 shareholders. Only about 40 to 50 shareholders currently live on the old reserve. Many shareholders live in communities around Gippsland, including Bairnsdale, Morwell and Warragul. However, a number of shareholders live interstate.

Lake Tyers Aboriginal Trust also has listed on its share register a significant number of deceased persons whose shares have not been allocated to whoever has inherited those shares.

The review understands that there are approximately 120 to 130 residents at Lake Tyers and 30% of these residents are under 16 years old. There are approximately 45 residences on the former reserve land.

The land held by the Lake Tyers Aboriginal Trust is approximately 4000 ac in size and no portion has been sold under the ALA by the Trust. No land outside the reserve has been purchased by the Lake Tyers Aboriginal Trust. The land has not been valued since 2007.

The Trust receives funding from the Victorian Government for its operations and to provide Municipal and Emergency Services. The Trust also operates as a housing provider to residents and collects rent and is responsible as landlord for the maintenance of the properties on Trust land.

From 2004 to 2015, the Lake Tyers Aboriginal Trust was under Administration and a 10 year Lake Tyers Community Renewal Project was undertaken with the aim of reducing the levels of disadvantage experienced by the Lake Tyers Aboriginal community. The Renewal Project focused on:

- increasing pride and participation in the community;
- improving governance, enhancing housing and the physical environment;
- lifting employment, learning and economic activity;
- improving personal safety and reducing crime;
- promoting health and wellbeing; and
- increasing access to government services and improving government responsiveness.

In 2015, Lake Tyers Aboriginal Trust returned to community control with the election of a new Committee of Management in October that year.



## **Framlingham**

Framlingham Aboriginal Trust currently has approximately 20 to 25 shareholders. Of those approximately half were resident on the reserve as at 30 June 2018. Accordingly, Framlingham is a much smaller community than Lake Tyers and has a larger percentage of shareholders who live on the former reserve land. Of those shareholders who do not live at Framlingham, many continue to live in Victoria.

As at December 2017, a total of 71 people were resident on the former reserve land. Nearly half of those residents were under the age of 18 years. There are approximately 17 residences located on Trust land.

The former reserve land currently held by the Framlingham Aboriginal Trust is approximately 694ac in size. In 2002 there was a subdivision of the former reserve land and a portion of the land was sold to a former shareholder in return for his shares. The land has not been valued since 2012.

Unlike Lake Tyers Aboriginal Trust, in addition to the former reserve land the Framlingham Aboriginal Trust owns a number of additional properties:

- (a) 29 O'Briens Lane Koroit, Vic 3280
- (b) 2 Reginald Grove Warrnambool, Vic 3280
- (c) 'Campbells' – Blacks Lane Framlingham, Vic, 3265
- (d) 'Deen Maar' – Princess Highway Yambuk, Vic, 3285; and
- (e) 60 Bellman's Road, Bushfield, Vic, 3285.

Some of those properties are residential premises with tenants.

Framlingham receives the bulk of its income from Municipal and Emergency Services funding from the Victorian Government, and grants from the Commonwealth government under Indigenous Protected Area and Advancement of Rights to Sea and Land agreements. Framlingham also receives income from the leasing of land to a windfarm located on its Deen Maar property. The Trust also operates as a housing provider to residents and collects rent and is responsible as landlord for the maintenance of the properties on Trust land.

**ATTACHMENT C**

**Current Standard Transfer Application Form**

**FRAMLINGHAM ABORIGINAL TRUST**  
**(Aboriginal Lands Act 1970)**

**INSTRUMENT OF TRANSFER OF SHARES**

I \_\_\_\_\_

(Full Name of **Transferor** in block letters)

Also known as \_\_\_\_\_  
(if you have been known by any other names since you were born, please specify them here (Surname/Given Name))

Current address \_\_\_\_\_

Date of Birth \_\_\_\_/\_\_\_\_/\_\_\_\_

the registered holder and undersigned Transferor for the consideration hereinafter appearing, do hereby transfer to:

Mr.  
Mrs. }  
Miss } (Full Name of **Transferee** in block letters)

Current Address

Date of Birth \_\_\_\_/\_\_\_\_/\_\_\_\_

**NUMBER OF SHARES BEING TRANSFERRED**

(hereinafter called the Transferee) the \_\_\_\_\_  
(Insert number of shares in words)

( )  
(in figures)

shares as specified herein, all numbers inclusive, standing in my name in the books of the FRAMLINGHAM ABORIGINAL TRUST, subject to the several conditions on which I held the same at the time of the signing hereof and I the Transferee do hereby agree to accept the said shares subject to the same conditions.

**If the shares have been sold in accordance with Section 14 of the Act, the consideration for this transfer is:**

\$ \_\_\_\_\_

In words \_\_\_\_\_

\_\_\_\_\_ Date of purchase by Transferee (if applicable)  
\_\_\_\_/\_\_\_\_/\_\_\_\_

No. of Shares	Progressive Numbers	
	From	To

**Relationship to Transferor:**

- Husband or Wife     Child     Brother/Sister     Parent  
 Brother or Sister of Parent     Child of Parent of Parent     Brother or Sister of Parent     Any other natural blood relationship (please specify) \_\_\_\_\_

OR

- The Trust     Trust Member     The Crown (specify State or Commonwealth) \_\_\_\_\_

**Relationship and Identification:**

(In order to verify the relationship between the Transferor and Transferee, please provide one or more of the following documents)

- Certified copy Birth certificate     Certified copy of Marriage certificate     Certified copy of Change of Name certificate  
 Statutory Declaration (by Transferor, Transferee and at least one other relative)  
 Any other certified documents that proves the relationship between Transferor and Transferee (please specify) \_\_\_\_\_

**Please provide one of the following forms of identification:**

(Certified copies must be provided)

- Drivers licence     Passport     Proof of Age card  
 Pension card     Other (please specify) \_\_\_\_\_

SIGNED by the Transferor this  
 / / (Date)

NAME \_\_\_\_\_  
 \_\_\_\_\_  
 (Signature of Transferor)

SIGNED by the Transferee this  
 / / (Date)

NAME \_\_\_\_\_  
 \_\_\_\_\_  
 (Signature of Transferee)

<b>OFFICE USE ONLY</b>		COMMON SEAL
All documentary evidence provided	YES / NO	
Date accepted by Trust Administration		
Date approved by Committee of Management		

## ATTACHMENT D

### Summary of Recommendations

Number	Issue	Recommendation
<b>Share System</b>		
1	Audit of Share Register at Lake Tyers	First Peoples State Relations provide assistance to the Lake Tyers Aboriginal Trust to undertake an audit of the share register at Lake Tyers.
2	Improving Awareness of the ALA	First Peoples State Relations should prepare plain English summaries of the ALA in consultation with the Lake Tyers and Framlingham Trusts.
3	Materials Advising Shareholders of Information about their Shares	First Peoples State Relations provide assistance to the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust to developed and disseminate materials advising shareholders of: <ol style="list-style-type: none"> <li>a. how to clarify the number of shares they own; and</li> <li>b. how to transfer shares, and to who shares can be transferred.</li> </ol>
4	Clarify Power of the Committee of Management in Relation to the Transfer of Shares	Amend the ALA to provide that the Committee of Management has power to refuse to approve a transfer but that: <ol style="list-style-type: none"> <li>(a) the Committee of Management cannot refuse a transfer if the transfer is made under a will, or by the executor of a deceased estate, and the transfer is made to a class of persons to who shares are capable of transfer under the ALA; unless</li> <li>(b) the person to who shares are to be transferred is ineligible under s 15(6) of the ALA to being a member at the time of transfer.</li> </ol>
5	Instrument of Transfer	Amend the ALA to provide for the existing form for the transfer of shares at Attachment C be a prescribed document and for the ALA to prescribe the documents which are to be provided in support of the application for transfer.
6	Notice of Transfers	Amend the ALA to: <ol style="list-style-type: none"> <li>a. require the person or body maintaining the share register to give notice of any change to the share register to the other shareholders; and</li> <li>b. require that the Trusts, and the person or body maintaining the share register, ensure that the register is available for inspection by shareholders upon request.</li> </ol>
7	Class of Transferee	Amend the ALA to provide that the Committee of Management can refuse to register a transfer if the sale is to a person outside the class of people identified in s 14(2).
8	Confirmation that Shares Have Not Been Sold Contrary to the Act	Amend the ALA to require that in requesting a transfer of shares, the Instrument of Transfer is to be accompanied by a statutory declaration from the person selling the shares and the purchaser, confirming that the transfer is not a sale or exchange for any other consideration.
9	Shares to Only be Held by Aboriginal People	Amend the ALA to provide that shares are to only be held by Aboriginal persons, subject to an exception that a non-Aboriginal person may hold shares on trust for children until they turn 18 if it is approved by the Committee of Management.
10	Assistance to Identify and Notify Families of Deceased Shareholders	First Peoples State Relations (or an Independent Registrar) provide assistance to the Lake Tyers Aboriginal Trust to identify and notify families of deceased shareholders, and to provide information to those families as to how those shares can be transferred and to who shares can be transferred.

Number	Issue	Recommendation
11	Role of Committee of Management in Relation to Transfers in Accordance with a Will	<p>(1) Amend the ALA to provide that the Committee of Management is required to approve transfer of shares, but is not to refuse a transfer to a person under the will or an intestacy of the deceased person if the transfer is to a person within the class of persons listed in s 14(2) of the ALA.</p> <p>(2) Amend s 14(3)(a) of the ALA to provide:</p> <p>(3) Nothing in this section shall be construed as preventing a transfer of shares –</p> <p>(a) by the personal representative of a deceased member to the persons entitled thereto under the will or on the intestacy of the deceased member <u>provided the person is within the class of person listed in s 14(2) of this Act.</u></p>
12	Powers of an Executor in Relation to Transfers	<p>Amend the ALA to provide that, despite anything in any other Act or any obligation of an executor at common law or in equity, in the event that a will provides that shares are to be transferred to persons outside the class of people identified in s 14(2), and such a transfer is refused by the Committee of Management, the executor of the estate is nonetheless empowered to transfer the shares to a person within that class (including the Trust or the Crown) and that no claim can be made against the executor in that circumstance provided that:</p> <p>(a) the transfer is an even distribution of shares to the surviving children of the deceased; or, in the absence of any such children,</p> <p>(b) the transfer is to another person, provided the person is not the executor or a person who was on the Committee of Management at the time the decision to refuse the transfer in accordance with the will was made.</p>
13	Distribution of Shares on Intestacy	<p>(1) Amend the ALA to allow for a Trust to transfer shares held in a deceased estate in the absence of a will or grant of letters of administration in circumstances where:</p> <p>a. a period of 3 years has elapsed;</p> <p>b. the Committee of Management is satisfied that there is no will or letters of administration;</p> <p>c. prior notice of the proposed transfer is given to other shareholders; and</p> <p>d. the shares are only to be transferred evenly to:</p> <p>i. the children of the deceased person, and to their children if they are also deceased; and</p> <p>ii. in the absence of any children, they are transferred evenly among the children of the deceased person's siblings; and</p> <p>e. the shares may be transferred other than in accordance with (d) if the people referred to in that clause as being entitled to the shares agree in writing.</p> <p>(2) Amend the ALA to provide that where the shares are transferred in the absence of a will and letters of administration it removes any claim or right to the shares by any other person.</p> <p>(3) Any such amendment should be drafted to make clear that the terms of the ALA take priority over any other legislative and common law rules.</p>

Number	Issue	Recommendation
14	Definition of “personal representative”	Amend the ALA to define “ <i>personal representative</i> ” to have the same meaning as in the <i>Administration and Probate Act 1958</i> (Vic).
15	Maintenance of Share Register	Amend the ALA to provide that the share registers are to be maintained by an independent person. The independent person would be responsible for recording transfers of shares but would only be authorised to make such a change where they are satisfied that: <ul style="list-style-type: none"> <li>(1) there is a resolution of the Committee of Management authorising the transfer; and</li> <li>(2) the transfer is being made in accordance with the ALA.</li> </ul>
<b>Governance</b>		
16	Frequency of General Meetings	Amend the ALA to require the holding of at least one general meeting per year in addition to the AGM with an exemption from the requirement being able to be granted in appropriate circumstances from the Minister or a Registrar appointed under the ALA.
17	Quorum for General Meetings	<ul style="list-style-type: none"> <li>(1) Amend the ALA to provide that if a quorum is not reached, or not maintained for the time specified for the meeting, the Secretary can adjourn the meeting to a time to be fixed within 2 to 6 weeks, and can seek an exemption from the quorum rule with the number of people to be required to form a quorum to be determined by the Minister or the Registrar.</li> <li>(2) The amendment should specify: <ul style="list-style-type: none"> <li>a. the time in which the request is to be made, and the time in which the request for a lesser quorum should be approved; and</li> <li>b. that a general meeting constituted with a lesser quorum is not to make any decision in relation to the leasing or disposal of land.</li> </ul> </li> </ul>
18	Notice of General Meetings	Amend the ALA to require that a notice of a general meeting is to specify the time, date and location of the meeting and indicate the general nature of each item of business to be considered at the meeting.
19	Minutes of General Meetings	Amend the ALA to require that: <ul style="list-style-type: none"> <li>(a) the Trust is to keep minutes of each General Meeting which records the attendance, the business considered at the meeting, any resolution on which a vote was taken and the result of the vote; and</li> <li>(b) the minutes of the General Meeting be made available to members upon request.</li> </ul>
20	Election of Committee of Management	Amend the ALA to make clear that the Trust can reintroduce a staggered term at an AGM if, for whatever reason, it has failed to be maintained. If staggered terms are reintroduced, three persons should be elected for 1 year, two persons should be elected for 2 years and two persons should be elected for 3 years. The Minister or Registrar should approve the reintroduction of staggered terms.
21	Disqualification from the Committee of Management Members	<ul style="list-style-type: none"> <li>(1) Amend the ALA to provide that, in addition to the existing prohibitions, a person should be disqualified from sitting on the Committee of Management if they are convicted of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months. The period of disqualification should be either 5 years after the conviction, or 5 years after the person serves a term of imprisonment, whichever is later.</li> </ul>

Number	Issue	Recommendation
		(2) Amend the ALA to provide that a person is also prohibited from sitting on the Committee of Management at a particular time if the person is, at that time, disqualified from managing Corporations Act corporations under Part 2D.6 of the Corporations Act.
22	Quorum for Committee of Management	Amend the ALA to provide that a quorum for Committee of Management is four committee members rather than three.
23	Minutes of Committee of Management Meetings	Amend the ALA to make clear that the Committee of Management is to keep minutes of its meetings.
24	Casual Vacancies	Amend s 15(2) of the ALA to provide that a casual vacancy is to be filled at the next general meeting after the casual vacancy arises.
25	Model Rules	<p>(1) Amend the ALA to provide for Model Rules as a schedule to the ALA, which are able to be modified by the Trust.</p> <p>(2) The Model Rules should at least set out rules that are consistent with the ALA in relation to:</p> <ul style="list-style-type: none"> <li>(a) the process for giving of notice of meetings of the Committee of Management;</li> <li>(b) the process for appointing the chair and the secretary, and the term of the chair and secretary;</li> <li>(c) the role and function of the chair and the secretary;</li> <li>(d) a Code of Conduct for members of the Committee of Management;</li> <li>(e) any requirements for members of the Committee of Management to undergo governance training;</li> <li>(f) where the Trust employs a chief executive officer (CEO), the role of the CEO;</li> <li>(g) the process for nominating persons for election;</li> <li>(h) the process of voting at general meetings, including the calling and holding a poll vote;</li> <li>(i) the requirements to keep minutes of resolutions at general meetings and Committee of Management meetings;</li> <li>(j) the processes for transferring shares and amending the share register;</li> <li>(k) the process at both general meetings and meetings of the Committee of Management for dealing with pecuniary interests;</li> <li>(l) the filling of casual vacancies; and</li> <li>(m) an internal process that provides for the resolution of disputes internal to the operation of the Trust.</li> </ul> <p>(3) The Model Rules should be prepared in consultation with the Trusts.</p>
26	Pecuniary Interests	Amend the ALA that a person shall not vote or take part in any discussion on any matter at a general meeting or a meeting of the Committee of Management in which they have a material personal interest.
27	Exemption from Compliance	Amend the ALA to allow the Minister or a Registrar to provide a Trust with an exemption from compliance, or an extension of time to comply with requirements of the ALA.



Number	Issue	Recommendation
<b>External Regulation</b>		
28	Independent Registrar	Amend the ALA to provide for an Independent Registrar with powers and functions that include maintaining the share register, to provide assistance to the Trusts in complying with the ALA, to mediate, conciliate or arbitrate disputes, and to investigate complaints, in addition to other functions recommended in this Final Report.
29	Reporting to the Minister	(1) Delete s 18E of the ALA requiring the Trusts to prepare a report into the economic and social wellbeing of the community of residents. (2) Amend the ALA to require the Trusts to prepare a three-year or longer Strategic Plan and for that document to be included in the documents required to be provided to the Minister under s 23S of the ALA.
30	Copy of the Share Register to be Provided to Minister	Section 23S of the ALA be amended to require that a copy of the Share Register as at the date of the AGM be included in the documents to be provided to the Minister.
31	Investigations	Amend the ALA to provide the Minister or Registrar with the power to undertake an investigation of a Trust with a view to reporting on whether there has been a breach of the ALA or any law in relation to the management of the Trust or circumstances which may constitute a basis for appointing an administrator.
<b>Facilitating Engagement with Residents</b>		
32	Definition of Resident	Amend s 2 of the ALA to include a definition of "resident" as a person who has been ordinarily resident on the former reserve for a period of 3 months or more.
<b>Restrictions on Sale of Trust Land</b>		
33	Restriction on Sale of Land	Amend the ALA to provide that: <ul style="list-style-type: none"> <li>a. the former reserve land at Lake Tyers is not able to be sold, or transferred or used as a security;</li> <li>b. the former reserve land at Lake Tyers is not able to lease the former reserve land for a period of longer than 40 years without the consent of the Minister which can be withheld if the Minister does not consider the lease to be in the interests of the shareholders;</li> <li>c. that any agreement to sell, transfer or use the former reserve land at Lake Tyers as a security is to be deemed to be void and unenforceable and that no damages or remedy can be obtained against the Trust in relation to such an agreement; and</li> <li>d. the Minister is entitled to lodge a caveat over the land to ensure that the former reserve land at Lake Tyers is not transferred contrary to the ALA</li> </ul>
34	Using the Land as a Security	Amend section 11(3) of the ALA to provide that Framlingham Aboriginal Trust shall not sell, mortgage, use as a security, give in exchange or otherwise dispose of any former reserve land to any person, except in accordance with a unanimous resolution of the Trust.
35	Selling Land Other than Former Reserve Land	Amend the ALA to provide that the resolution to sell land other than the former reserve land by Lake Tyers Aboriginal Trust or Framlingham Aboriginal Trust needs only to be approved by 80% of the members present and eligible to vote.

Number	Issue	Recommendation
<b>Facilitating Economic Activity</b>		
36	Powers of Trust	<p>(1) Amend the ALA to provide that a Trust may establish, acquire, operate or manage a related entity being either:</p> <p>a. an Aboriginal and Torres Strait Islander corporation within the meaning of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth),</p> <p>b. a company within the meaning of the <i>Corporations Act 2001</i> (Cth).</p> <p>(2) Amend the ALA to provide that a Trust must include in the accounts and records of the Trust the financial records of the related entity and details of the operations of the related entity.</p>
37	Power of Trust to Carry on Business on Trust Land	Amend section 11(b) of the ALA to clarify that a Trust “ <i>carry on any business, including on any land held by the Trust</i> ”.
38	Finance	In addition to core funding for administration, the Victorian Government should give consideration to providing some targeted funding for investments in the form of property or other investment to create income streams to finance the Trusts.
39	Mining	Amend the ALA to make the requirements in relation to mining consistent with s31 of the <i>Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987</i> (Cth).
<b>Modernisation of Act</b>		
40	Modernisation of Act	<p>Amend the ALA to:</p> <p>a. replace the term “<i>Aborigine</i>” with “<i>Aboriginal person</i>”</p> <p>b. replace the phrase “<i>husband and wife</i>” with “<i>spouse and domestic partner</i>”;</p> <p>c. replace the term “<i>infants</i>” with “<i>a person under the age of 18</i>”.</p>
<b>Ongoing Review and Consultation</b>		
41	Report and Bill to be Provided to the Trusts	<p>(1) A copy of this Report should be provided to the Trusts for comment prior to any draft legislation being prepared.</p> <p>(2) Prior to a Bill being tabled in Parliament, an Exposure Draft should be prepared and provided to the Trusts for comment.</p>
42	Continuing Engagement with Trust	First Peoples State Relations should continue to engage with the Trusts and work with them to further identify areas of the reform which assist with the operation of the ALA, including about whether a periodic legislative review mechanism is appropriate to insert into the ALA.