Aboriginal Lands Act Review

Options paper

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Aboriginal Lands Act 1970 Review

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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 (**the Trusts**) 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 intended to be an audit of the Trusts or to be an investigation into their affairs. It is not within the scope of the review to investigate all the matters which may impact on the delivery of services to Lake Tyers or Framlingham, many of which would involve detailed consideration of government agency coordination and policies in a range of portfolios. Rather it is intended to be 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 Trusts to conduct their affairs. The purpose of this Options Paper is to set out those potential amendments with a view to assisting the members of the Trusts and the communities at Lake Tyers and Framlingham to consider them and to provide feedback on their appropriateness.

This Options Paper is in 3 sections:

1. **Background:** This section sets out the background to the review of the ALA and an overview of the Act and its structure.
2. **Key Issues:** This section sets out the key issues raised with the review through examination of the ALA and consultation with community and options for reform that will better the administration of the ALA.
3. **Options for Change:** This section summarises three broad options for change in light of the key issues:
    a. No change – leaving things as they are
    b. Minor change – those changes set out in the Key Issues section that better the administration of the ALA
    c. Major change – fundamental change to the system

Further consultation in relation to these options will inform a final report which will make recommendations to the Minister.

SECTION ONE

BACKGROUND


Welcome TO LAKE TYERS
LAKE TYERS
ABORIGINAL TRUST
You are now Entering Private Property
Visitors Must Report to the
Administration Office

BACKGROUND TO REVIEW AND ACTION TO DATE

The ALA was passed in 1970 to grant freehold title to Aboriginal residents of the former missions at Framlingham and Lake Tyers through two land-holding Trusts.

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 residents of the former missions on a given day in 1968 were provided with shares and became members of the Trust. Even though members are referred to in the ALA, this Options Paper also refers to the members as "shareholders" as this appears to be a common term used in both communities. Both terms refer to the same group of people.

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.[1]

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

In 2002, an internal review was conducted by two officers of Aboriginal Affairs Victoria (what is now Aboriginal Victoria). 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.[2] 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.

In 2012, the Victorian Government prepared a paper setting out potential further amendments to the ALA, being:

- Providing the Minister with the power to appoint an Administrator to Framlingham Aboriginal Trust, as well as Lake Tyers Aboriginal Trust.
- Including a power for 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.

1 Section 252A, ALRA (NSW).

2 *Review of the Aboriginal Lands Act 1970* (April 2002) (the **2002 Review**), pp 39-41.

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.

In 2017, 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. The Discussion Paper can be accessed here: https://www.vic.gov.au/system/user_files/Documents/av/ALA%20Review%20Discussion%20Paper.PDF.

In 2018, Jason Behrendt and Tim Goodwin were appointed as independent persons to conduct the review of the ALA.

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 – including shareholders and residents – the operation of the ALA, the operation of the Trusts and potential options for reform. The reviewers have also met with people who have contacted them wishing to discuss the review.

On the basis of their own research and those community consultations, the reviewers have drafted this Options Paper to 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.

OVERVIEW OF THE ACT AND ITS STRUCTURE

Many community members may not have read the ALA and are not familiar with its terms. Some of the language used in the ALA is outdated and some parts are not easy to understand. This section of the Options Paper sets out the structure and operation of the ALA to help community members understand more about the current ALA and what might need to change.

Scheme of the Act

Purpose of the ALA

The ALA does not contain any express statement of the objects of the legislation. However, in the Second Reading speech for the Aboriginal Lands Bill, the Minister for Aboriginal Affairs noted that the *"Purpose of the Bill is to enable the remaining Aboriginal settlements in this State at Lake Tyers and Framlingham to become the property of the Aboriginal residents living on them"*.[3] 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 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."* [4]

Establishment of the Trust and the Vesting of Land

The ALA provided for a register to be prepared of persons who were resident on 1 January 1968.[5] To be a "resident" meant you had to have ordinarily lived on the reserve for at least 3 months prior to 1 January 1968. It then provided that those people resident at Framlingham reserve would constitute a body corporate known as the Framlingham Aboriginal Trust and the people resident at Lake Tyers to constitute a body corporate known as the Lake Tyers Aboriginal Trust.[6] Section 9 of the ALA vested the lands comprising the reserves into each of the Trusts.

Powers of the Trust

Each Trust has perpetual succession and is capable of suing and being sued, and *"purchasing, taking, holding, selling, leasing, taking on lease exchanging and disposing of real and personal property, and of doing and suffering all such things as corporations are by law capable of doing and suffering"*.[7] This means that the Trust is like a corporation, but specially created by legislation.

Section 11 of the ALA sets out a range of powers of the Trust which includes:

a. managing, improving and developing the land;

b. carrying on any business on Trust land;

c. purchasing, taking hold, selling, leasing, taking on lease, and exchanging real or personal property;

d. borrowing money, including through mortgaging the land;

3 *Aboriginal Lands Bill,* Second Reading Speech, Minister for Aboriginal Affairs, Hansard, Legislative Assembly, 28 October 1970, p.1419.
4 *Aboriginal Lands Bill,* Second Reading Speech, Minister for Aboriginal Affairs, Hansard, Legislative Assembly, 28 October 1970, p.1420.
5 Section 3, ALA.
6 Section 8, ALA.
7 Section 10, ALA.

e. investing money;

f. distributing dividends; and

g. 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 for the disposal of land (e.g. by sale or lease), but there are restrictions on how that occurs. Land cannot be disposed of, except in accordance with a unanimous resolution of the Trust. A Trust cannot lease land for more than 21 years except in accordance with a resolution which is agreed at a general meeting, for which special notice has been given, and three quarters of the persons being entitled to attend, and do attend, vote upon the resolution.[8] There is no restriction on the entering into shorter-term leases.

Trust Shares

A unique feature of the ALA is the fact that it divided the Trust into shares which were vested in the Aboriginal residents of each reserve at the time the legislation was enacted. Each of the first adult shareholders of each Trust were entitled to 1000 shares. Each child was entitled to 500 shares.

The shares are identified in the ALA as "*personal property*". The ALA anticipates that dividends will be payable on the shares. It also anticipates that shares might be "*acquired*"[9] or "*sold*".[10] Share ownership is intended to be recorded on a "*register of members*" kept by the Trust. The shares are capable of transfer in accordance with the ALA. The ALA limits the transfer of shares to transfer to the Trust, another member, the Crown, and limited family members.[11]

The transfer of shares is only given effect by a recording in the register of members on production by the person gaining the shares of a proper instrument of transfer. There are restrictions on who shares can be transferred to. However there is no requirement that shares be held by an Aboriginal person. The Trust is not able to 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 the Trust.

Members of the Trust

It is only the people who are recorded in the register as the owners of any shares who are members of the Trust. Being a resident on the Trust lands does not give a person an entitlement to be a member of the Trust.

Committee of Management

The ALA says that the affairs of each Trust will be managed by the Committee of Management (**the Management Committee**) who are elected by the members.[12] Membership of the Management Committee is not restricted to people who are members of the Trust. The Trust can appoint a non-shareholding resident or a person with particular occupational qualifications as a member of the Management Committee. That person does not need to be an Aboriginal person.

The office of a member of the committee becomes vacant if the member "*becomes of unsound mind*" or 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.[13]

General Meetings

The ALA provides little guidance on how general meetings should occur. General meetings are required to be called by the Secretary and 14 days' notice is required. The secretary is required to call a general meeting if requested to do so in writing by a quarter of the adult members of the Trust. The ALA requires that the Annual General Meeting

8 Section 11(4), ALA.
9 Section 14(3)(b), ALA.
10 Section 14(4A)-(6), ALA.
11 Section 14(2), ALA.
12 Sections 15 and 16, ALA.
13 Section 15(6), ALA.

(**AGM**) is to be held within 6 months of the end of each financial year.

The ALA provides that a quorum for a general meeting is to be one half of the people entitled to vote at the meeting who are resident on the reserve on the date the meeting is called.

Ministerial Supervision

Under the ALA it is the Minister who has a supervisory function in relation to the Trusts. Currently, it is the Minister for Aboriginal Affairs who is responsible for the Act. If the Minister believes a Trust has failed to comply with the Act, the Minister may give notice to the Trust and require the Management Committee to take action. The Minister also has powers to appoint an administrator or an administration board to the Trust. Each Trust is required to provide the Minister certain financial and other records, including audited financial records, details of the Management Committee and a copy of the unanimous resolution of the Trust for certain land dealings.

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 and it has wide power to make orders regarding the operation of the Trust and ALA.[14]

General Observations

A number of general observations can be made about the ALA.

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 the community.

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 had thought carefully about the system of share ownership. It identified the limited class of people 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. It is also express in identifying that dividends would be payable on the shares. 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*

14 Section 27, ALA.

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 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.

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.[15] 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 to achieve that result, 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 incorporated bodies. The regulatory regime needs to be proportionate to the nature and size of the organisation.

Eighth, both the Lake Tyers and Framlingham Aboriginal communities are very different communities – in geographical size, population and in the make-up of shareholders and residents. In considering options for reform, different options might be needed to meet the unique circumstances of the two communities. **Attachment A** to this Options Paper sets out the current situation at Lake Tyers and Framlingham that has informed this review.

15 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

KEY ISSUES

KEY ISSUES

A number of key issues have emerged in the course of the review. These issues can be summarised in the following six questions:

1. Is the **share system** working or can it be improved?
2 How can **governance** of the Trusts be enhanced?
3. What is the appropriate level of **external regulation** of the Trusts?
4. Are the **dispute resolution** mechanisms in the ALA appropriate?
5. How can greater engagement by **residents** be facilitated?
6. Can the ALA better protect or enable the **sale of Trust land** and provide for **economic development**?

These key issues raise a number of potential reforms that might improve administration of the ALA, which this Options Paper has characterised as 'minor change' in Section 3. However, thinking about these key issues is also relevant to considering the other two options of 'no change' or 'major change'.

There are a number of potential changes that are more in the way of technical changes to the ALA, for example, modernising certain terms in the ALA. We have included a table of these potential changes in **Annexure B** for consideration. In the sections below, however, we discuss the more complicated key issues that have been identified.

SHARE SYSTEM

The share system is a unique feature of the ALA. 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 and ownership of land.

Shareholding and transfers of shares

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. It was also assumed that dividends might be paid to the shareholders from the profits obtained from economic activity on the Trusts.

It is only those people who appear on the register as owners of shares who are the members of the Trust.[16] A transfer of shares only takes effect upon alteration of the register of members on production of a proper instrument of transfer.[17] In this way the Management Committee 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.[18]

Section 14(2) sets out to who shares may be transferred. Section 14(3) then sets out that those restrictions do not apply to shares transferred under a will. The ALA 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.[19] 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 accept to buy the shares, they can be sold to "*any person*" at the price fixed by the auditor.

A significant limitation in the shares is that even if they have a value, the holder may not be able to find a buyer, meaning that while they have voting rights, and the potential to receive benefit, the economic benefits which might otherwise attach to owning shares may be difficult to realise.

Over time it would appear that many shares have been transferred to family members rather than being sold. It is possible that some of these have been transferred in exchange for payments outside the scheme for sale anticipated by the Act. 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 remains concern as to whether all transfers have been properly recorded or whether they have occurred in accordance with the ALA. There is no readily accessible dispute resolution mechanism in the ALA by which concerns over the transfer of shares can be raised or resolved.

In relation to the shares in the Lake Tyers trust, there is an issue with there being a number of deceased people who may not have made arrangements for the transfer of shares in a will and it is possible that the executor of a will has not considered the need to take action to deal with the shares.

16 Section 12(7), ALA.
17 Section 13(1), ALA.
18 Section 14(1), ALA.
19 Section 14(4), ALA.

Control by the Management Committee

A transfer is only effected by the alteration of the register.[20] Because the Management Committee is responsible for maintaining the register in practice it effectively controls the transfer of shares. There is no clear statement in the ALA on the extent to which the Management Committee can choose to refuse to allow a transfer of shares and, if so, in what circumstances it can refuse to do so. Accordingly, it may be useful for the role of the Management Committee in approving, rejecting and recording the transfer of shares to be clarified under the ALA.

Some limitations on the Management Committee's role might be:

- where shares are granted either under the terms of a will or by an executor under a will and where the transferee is from a class of persons to who the ALA allows for shares to be transferred. In such an instance it may be inappropriate for the Management Committee to refuse the transfer because no other arrangement could be made for the transfer of the shares;
- that the Management Committee is not to refuse to give effect to a transfer as long as it is to a person who falls within the category of people to who the ALA says shares can be transferred to; or
- to make clear that the Management Committee cannot refuse to give effect to the transfer unless the person is at the time ineligible to be a member for the reasons given in s 15(6) of the ALA, such as being of unsound mind or an undischarged bankrupt.

Clarify Power of the Management Committee in Relation to the Transfer of Shares

Possible Amendment

Amend the ALA to provide that the Management Committee has power to refuse to approve a transfer but that it cannot refuse a transfer if the transfer is made to a class of persons to who shares are capable of transfer under the ALA, unless 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.

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.[21] 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. A document has been prepared by Aboriginal Victoria which currently appears to be used by both Trusts. A copy of that document appears at **Attachment C** to this Options Paper.

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**). This information could also be set out in the ALA. Having the information set out in the ALA avoids criticism being directed to the Management Committee 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.

20 Section 13(1), ALA.
21 Section 13(1), ALA.

Instrument of Transfer

Possible Amendment

Amend the ALA to provide for the existing form for the transfer of shares to 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 of a Management Committee can be by a poll vote, in other instances the transfer of shares can potentially influence the election of the Management Committee. It is also relevant to reckoning the number of people required to constitute a quorum. As a result there is a potential for 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 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.

The ALA could be amended to make it clear that a shareholder can request a copy of the share register and for this to be provided unless there has been no change to the register since the last time it was requested by the individual.

Notice of Transfers

Possible Amendment

Amend the ALA to:

(a) require the body maintaining the share register to give notice of any change to the share register to the other shareholders; and

(b) require that the body maintaining the share register provide a copy of the share register to a shareholder on request unless there has been no alteration to the register since it was last provided.

Class of Potential Transferees

Shares in the Trust are only transferrable in accordance with the ALA.[22] 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:

viii. The husband or wife, or a child or remoter issue, brother, sister or parent of the member;

ix. A brother or sister of a parent of the member; or

x. A child of remoter issue of a parent of the member, or of a brother or sister of a parent of the member.[23]

Community members should consider whether these groups are appropriate or should be broader or narrower.

While shares can be transferred to the Crown, there is no capacity to transfer shares to Aboriginal residents of a reserve unless they are a family member, except arguably under a will. One option is to expand the class of people to who shares may be transferred to include Aboriginal residents of the reserve. This is discussed in more detail below.

22 Section 12(3), ALA.
23 Section 14(2)(d), ALA.

Class of Transferee

Possible Amendment

Section 14(2)(d) be amended to provide that shares may be transferred to an Aboriginal resident of Trust land.

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. The ALA requires that the sale pric e 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"*.

Consideration should be given as to what should occur if this happens under the ALA. If the intention is to allow a sale "*to any person*" at all, but to allow for the Management Committee to refuse to register a transfer if they believe the transferree is inappropriate, then that should be made clear in the ALA by expressly setting out the power of the Management Committee in relation to such transfers. This may be a preferable approach in that it allows for flexibility in the shareholders being able to realise the value of the shares, while having a mechanism to ensure that a sale is only to an appropriate person.

If, on the other hand, it is intended that the sale of shares is only to be made to the class of people identified in s 14(2)(d), then s 14(6) should be amended to make this clear.

Identifying to Who Shares Can Be Sold

Possible Amendment

Consideration should be given to whether the ALA be amended to either:

(a) make clear that shares can only be sold to the class of people identified in s 14(2) of the ALA; or

(b) to make clear that the Management Committee can refuse to register a transfer if the sale is to a person outside the class of people identified in s 14(2) .

It is appropriate that the sale of shares continue to be the subject of some regulation to ensure that shares are not sold for less than their value. This objective would be facilitated if the ALA was 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 Act.

Confirmation that Shares Have Not Been Sold Contrary to the Act

Possible Amendment

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.

Under the ALA, if a person wanted to sell their shares to a family member they would have to get approval from the Management Committee first, so that the Management Committee 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.

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 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 Management Committee. If that amendment was made it would be appropriate 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 order to facilitate this option the ALA could require that the annual audit include a statement of the share value at the end of each financial year.

Allowing for a Waiver of the Requirements for Shares to Be Sold at a Value Set by the Auditor

Possible Amendment

Amend the ALA to allow for the requirement for the sale of shares to be at a value set by the auditor of the Trust (or a person nominated by the Trust) to be waived by the Management Committee, provided 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.

Transfer to Non-Aboriginal People

There is no requirement that ALA shares be held by Aboriginal people. There are now a number of non-Aboriginal people who hold shares in the Trusts. The community should discuss whether this is appropriate. Those non-Aboriginal people who hold shares are primarily spouses of Aboriginal people who have inherited the shares or otherwise had them transferred to them. It may be the view that the transfer to non-Aboriginal people has been minimal and otherwise approved by a Management Committee and therefore no change to the ALA is required in relation to this issue. However, if people continue to pass away without wills, more non-Aboriginal people may inherit shares in the future.

If the view is held that non-Aboriginal people should not hold shares, then one option is to make an amendment to that effect. An alternative option would be that a Trust can permit the transfer of shares to a non-Aboriginal person on the basis that they are held for the benefit of Aboriginal children until such time they turn 18.

It would be appropriate that such an amendment was only prospective and not interfere with the rights of the shareholders who have already acquired interests.

Shares to Only be Held by Aboriginal People

Possible Amendment

Amend the ALA to provide either:

(1) that shares are only to be held by Aboriginal people; or

(2) the Committee may allow for shares to be held by a non-Aboriginal person on the basis that they are held for the benefit of Aboriginal children until such time they turn 21.

Transfer to the Crown

The ALA anticipates that shares can be transferred to the Crown.[24] A number of shares at Lake Tyers are in fact held by the Crown.

In addition to thinking about whether it is acceptable for shares to be transferred to non-Aboriginal people, the community should consider whether it is appropriate for shares to be transferred to the Crown, particularly if there is already the option of transferring shares back to the Trust if they are not wanted.

Deceased Estates and the Transfer of Shares

What the ALA Currently Provides

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 the executor of a will to the persons entitled to the shares under a will or on the intestacy of the deceased member.[25] Intestacy is where a person dies without a will and the law determines how that person's property is to be distributed to their partner, children or other relatives. In some cases an executor of a will or the next of kin may have to apply for a grant of probate or letters of administration from the Supreme Court to distribute the executor's estate.

The best way to ensure that a person's assets are distributed in accordance with their wishes is for them to have a will. However not everyone has a will. 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.[26] If there is no next of kin, the property can belong to the Crown,[27] which then has powers to redistribute it to dependents or appropriate people.[28]

Even if there is a will, the distribution of assets can be complicated if the will has made inadequate provision for dependants and other family members. The resolution of these disputes can be complicated and stressful for families and can result in protracted legal disputes.

The ability to transfer shares under a will or by intestacy appears to allow for a broader class of people to have shares transferred to them. In most instances the beneficiaries of a will are family members but not always. Consideration could be given to whether the ALA should limit the power to transfer shares under a will to a person within the class of people to who shares can be transferred under s 14(2).

Powers of the Management Committee in Giving Effect to a Will

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

It is difficult to see why a Management Committee 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

24 Section 14(2)(c), ALA.
25 Section 14(3), ALA.
26 Section 14(3), ALA. Section 70J-M, 70Z-ZB, 70ZE, 70ZG-ZL, *Administration and Probate Act 1958* (Vic). This is particularly so since the amendments to that Act introduced by the *Administration and Probate and Other Acts Amendment (Succession and Related Matters) Act 2017.*
27 Section 70ZL, *Administration and Probate Act 1958* (Vic).
28 *Financial Management Act 1994* (Vic) s 58(3)(a).

to in s 14(2) 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 Management Committee 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[29] but this is an expensive and cumbersome process.

One option is to provide that the Management Committee is to maintain control over the transfer of shares pursuant to a will outside the class of people prescribed in the Act. This could be done by expressly providing that the transfer of a share can only occur if it is approved by the Management Committee. However the Management Committee 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). This would retain some flexibility to enable the Management Committee 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.

Role of Management Committee in Relation to Transfers in Accordance with a Will

Possible Amendments

(1) Amend the ALA to provide that the Management Committee is required to approve transfers 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.

(2) 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 <u>provided the person is within the class of person listed in s 14(2) of this Act</u>.

If the above amendment was made there would need to be a complementary 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 classes and it is refused by the Management Committee. 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. In the absence of any children the shares could be transferred to another person, although it would be appropriate that the person is not the executor or a person who was a member of the Management Committee at the time the refusal of the transfer was made to avoid any conflict of interest.

29 Section 27, ALA.

Powers of an Executor in Relation to Transfers

Possible Amendment

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 Management Committee, the executor of the estate is nonetheless empowered to transfer the shares to a person within that class (including the trust and 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 Management Committee at the time the decision to refuse the transfer in accordance with the will was refused.

What Happens if there is no Will

Many Aboriginal people do not have wills.[30] 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.

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.

There is clearly a case for a program for assisting families to transfer shares and encouraging shareholders to ensure that they have a will.

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 people with limited assets is 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 community should consider 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).

Consideration should be given to what that criteria should be. One option would be 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.[31]

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

a. for the shares are to be evenly distributed between the surviving children of the deceased's siblings;

b. in the absence of any such siblings for the shares to be transferred to the Trust.

30 Victorian Law Reform Commission, Succession Laws: Report, 2013, para [5161].

31 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).

Distribution of Shares on Intestacy

Possible Amendment

Amend the ALA to provide that:

(1) In the event that a shareholder dies without a will, the shares are to be distributed by the appropriate person by being evenly distributed to the children of the deceased, and if one of those children are already deceased then:

  (a) that child's share entitlement is to be evenly distributed among that child's children; and

  (b) if the deceased child has no children then evenly distributed among the remaining children of the deceased.

(2) In the event that there are no children or grandchildren, then the shares are to be transferred to the surviving children of the deceased's siblings and in the absence of any such children the shares are to be transferred to the Trust.

Alternative Procedure

A question also arises over whether the ALA should be amended 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. This might help with addressing the large number of shares in the Lake Tyers Trust held in deceased estates.

For example the ALA could be amended to provide that unless a person notifies the Management Committee 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 Management Committee at the request of a family member, provided they 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.

It is appropriate that if such a power was conferred on the Management Committee there are some careful constraints placed on the exercise of power. For example, it may be appropriate 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 Management Committee 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.

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 advantage of such an amendment would be that there could be an easier way for shares to be transferred from deceased estates where the shares are the only real asset, or where the person's assets have otherwise been distributed and an application to obtain letters of administration is complicated. The Management Committee could refrain from exercising the power if it was not satisfied it was appropriate. The downside of such a measure is that the Management Committee would risk involving itself in family disputes about the shares if the power was not exercised cautiously.

Alternative Option in Relation to the transfer of Shares on a Deceased Estate

Possible Amendment

(1) Amend the ALA to allow for a trust to transfer shares held in a deceased estate in the absence of a will or a grant of letters of administration in circumstances where:

  (a) a period of 3 years has elapsed;

  (b) the Management Committee 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 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 persons siblings.

(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.

Maintenance of the Share Register

The ALA provides that each Trust is required to establish a share register. In practice it is the Management Committee who manages it. The Trust can issue a certificate 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.[32]

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 the share transactions had been inadequately administered and that the share register of the Lake Tyers Aboriginal Trust was *"mislaid for some years and membership control was only informally recorded and not updated"*.[33] Aboriginal Victoria 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 altering the register.

The question of whether there should be an independent person responsible for maintaining the share register is in part tied to the question of what role the Minister or their Department should have in the regulation of the ALA. The establishment of an independent person to maintain the register need not remove or diminish the existing responsibility of the Management Committee to authorise share transfers and thereby maintain control over to who shares are transferred. It would however be appropriate to limit the power for any independent person to record the name in the register to only where they are satisfied that:

a. there is a resolution of the Management Committee authorising the transfer; and

b. that the transfer is being made in accordance with the Act.

This would ensure that the Management Committee maintains control over share transfers. It would also provide for an external check 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.

32 Section 12(8), ALA

33 2002 Review, p.26.

A number of options could be considered:

1. It would be open to amend the ALA to require the Minister or the Chief Executive of the Department to maintain the share register.
2. If an independent registrar was provided for then that function could be undertaken by that person.
3. Alternatively, the obligation to maintain the register could be conferred on the Registrar of Incorporated Associations established under the *Association Incorporation Reform Act 2012* (Vic).[34]

Maintenance of Share Register

Possible Amendment

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 share entitlements but would only be authorised to make such a change where they are satisfied that:

(a) there is a resolution of the Management Committee authorising the transfer; and

(b) that the transfer is being made in accordance with the Act.

34 Section 187, *Associations Incorporation Reform Act 2012* (Vic).

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"*[35] *and that it "does not provide for the consequences of non-compliance"*.[36] 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 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 risks for grievances between shareholders and 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 whether it is 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 themselves and to provide basic levels of fairness, transparency and certainty for shareholders or members.

The current review presents an opportunity to consider whether the ALA could provide clearer provisions to guide the operation of the Trusts.

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 Management Committee is to meet at least 6 times per year.[37]

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 Management Committee. 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 Management Committee 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.

Consideration should be given to whether the ALA should provide for at least one general meeting annually in addition to the AGM. The ALRA (NSW) is an example of land rights legislation which requires a certain number of general meetings. It requires that a Local

35 *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [11].
36 *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [12].
37 Section 15(10), ALA.

Aboriginal Land Council must have at least 3 ordinary meetings a year at intervals of not more than 4 calendar months.[38]

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 if provided for. This is a mechanism that is used in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**the ORIC Act**) in relation to certain requirements under that Act.[39]

Frequency of General Meetings

Possible Amendment

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 Act.

Quorum for 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"*.[40] "Reserve" is defined in the ALA to be the *"Framlingham reserve or the Lake Tyers reserve"*,[41] 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.[42] Nor does it have a numerical minimum requirement.[43] Members cannot be compelled to attend meetings, but the failure to have a quorum affects the ability of the organisation to function effectively, impacts on those members 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. 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.

There are a number of options which could be considered to assist with the forming of a quorum for a general meeting of the Trust.

38 Item 1, Part 1, Schedule 3 of the ALRA (NSW).
39 See s 225.5.
40 Section 23(4), ALA.
41 Section 2, ALA.
42 *Clark & Ors v Framlingham Aboriginal Trust & Anor* [2014] VSC 642 per Sifris J at [15].
43 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].

1. If the resident shareholder requirement is to be retained, the ALA could be amended to provide that the quorum of a general meeting will be one-third of the persons entitled to vote at the meeting who are resident on the reserve on the day the meeting was called.
2. If the resident shareholder requirement is to be retained, the ALA could be amended to allow for a quorum to be formed by reference to a percentage of the resident members on any land held by the Trust and not just the former reserve.
3. An alternative approach would be for the ALA to be amended to remove the requirement for half of the resident members to be in attendance and simply provide for a minimum number or percentage of shareholders to be in attendance for a quorum to be formed. For example, the ALRA (NSW) provides that a quorum is 10% of the voting members.[44] A similar approach is adopted by the Model Rules for associations under the *Associations Incorporation Reform Act 2012* (Vic)[45] and the ORIC Act.[46]
4. Regardless of whether the existing system is maintained, or the residential requirement removed, the ALA could be amended to provide that if a quorum is not reached or maintained then:
    a. the secretary can adjourn the meeting to a time to be fixed within 2 to 6 weeks and if the quorum is not then achieved at that time, it may proceed if a specified lesser number of members are present; or
    b. the secretary can adjourn the meeting to a time to be fixed within 2 to 6 weeks, and 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.[47]

Under option (4)(b), the Minister or Registrar can consider the circumstances of the failure to reach a quorum, the nature of the matters on the agenda for the meeting, and whether the reduced quorum is appropriate.

If there are amendments there may need to 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 (e.g. keeping the current quorum requirements for those decisions).

Quorum for General Meetings

Possible Amendment if the Residential Shareholder Requirement is Retained

(a) Amend the ALA to provide that the quorum of a general meeting will be one-third of the persons entitled to vote at the meeting who are resident on the reserve on the day the meeting was called.

(b) Amend the ALA to provide that the quorum of a general meeting is to be formed by reference to a percentage of the resident members on any land held by the Trust and not just the former reserve.

Possible Amendment if the Residential Shareholder Requirement is Removed

(a) Amend the ALA to provide that a quorum will be 10% of the members at Lake Tyers and 25% of the members at Framlingham.

Possible Amendment Allowing for the Waiver of the Quorum Requirement

(a) 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:

44 See cl.3 of Schedule 3 of the ALRA (NSW).

45 See rule 36 of the Model Rules in Schedule 4 of the *Associations Incorporation Reform Regulation 2012*.

46 Section 201.70 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* provides that if a corporation has more than 11 members a quorum is the lesser of 10 members or the greater of 10% of the members with voting rights or 2 members.

47 See by way of analogy ss 25(4) and 25A of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).

i. if the quorum is not achieved at that time, it may proceed if a lesser number of members (to be specified in the Act) are present; or

ii. the Secretary 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.

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. For example the model rules for associations under the *Associations Incorporation Reform Act 2012* (Vic) require that a notice 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"*.[48]

Consideration should be given to whether the ALA should be amended to specify that the notice is to include the time, date and location of the meeting as well as an agenda. Providing an agenda for the meeting gives members comfort in knowing what is to be discussed at the meeting.

Notice of General Meetings

Possible Amendment

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.

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. While it might be that as a matter of practice this is already done 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 the 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"*.[49] There should also be a requirement for minutes to be provided to members on request.[50]

Minutes of General Meetings

Possible Amendment

Amend the ALA to require that:

(1) 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;

(2) the minutes of the General Meeting be made available to a members upon request.

Committees of Management

Election of the Committee of Management

The ALA provided for staggered elections when the Management Committees were first created in 1970, so that only 2 or 3 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 Act.[51]

48 Rule 33 of the Model Rules in Schedule 4 of the *Associations Incorporation Reform Regulations 2012* (Vic).

49 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).

50 See for example s 220.10 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

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

Justice Robson however exercised the power under s 27 of the ALA to reintroduce staggered terms because it would *"permit the Trust to continue as it should have if the Act had been properly observed in the past"*.[52] 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 [Aboriginal Victoria] for help. In my opinion, [Aboriginal Victoria] 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."*[53]

One advantage of a staggered election system is that it ensures some continuity and retention of corporate knowledge on the Management Committee. However, given that the share structure means that the representation on the Management Committee may be driven by the distribution of share ownership, it is unclear to what extent this is really an issue for the Trusts. During the community consultations, it appeared to the Review that staggered elections were generally supported by shareholders.

The potential remains for the system of staggered representation on the board to fall out of sync. Rather than having to ask the 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 Management Committee, may reinstitute a similar procedure to that set out in s 15(1). Because the procedure in s 15(1) was specific in time for the first Management Committee of the Trust, it might be appropriate to modify the procedure and state that, where staggered elections have failed to be maintained completely, and AGM might be conducted whereby 3 persons are elected for 1 year, 2 persons are elected for 2 years, and 2 persons are elected for 3 years.

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

Maintaining Staggered Terms

Possible Amendment

Amend the ALA to make clear that the Trust can reintroduce a staggered term at an AGM if for whatever reason, if it has failed to be maintained. If staggered terms are reintroduced, 3 persons should be elected for 1 year, 2 persons should be elected for 2 years and 2 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 7 persons. The ALA does not prescribe the procedures for the election of committee members including processes for nomination. Consideration should be given to whether the ALA should prescribe election procedures, including whether:

a. the Trusts should continue to employ the services of the Victorian Electoral Commission to conduct the elections, which appears to have occurred in the past; or

b. a Registrar should conduct the election.[54]

52 *Clark v Framlingham Aboriginal Trust* [2014] VSC 367 per Robson J at [191].
53 *Clark v Framlingham Aboriginal Trust* [2014] VSC 367 per Robson J at [197].
54 Rights who conducts the election in NSW or the Associations Incorporation Reform *Act* 2012 (Vic) whereby the Registrar for that legislation conduct elections for incorporated associations.

Disqualification of Committee Members

Section 15(6) of the ALA provides that the office of a member of the Management Committee 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 Management Committee. For example, under the ORIC 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.[55] They are also removed if they are disqualified from managing Corporations Act corporations.[56] Similar provisions are contained in the land rights legislation in other jurisdictions.[57] Consideration should be given to whether a similar rule should be included in the ALA.

A further issue that arises is how long the person should be disqualified for. For example, under the ALRA (NSW) a person is disqualified for convictions within the last 5 years.[58] Under the ORIC Act there are powers for the Registrar to make an application to a Court to extend the period for up to 15 years.[59]

Disqualification from the Management Committee

Possible Amendment

(1) Amend the ALA to provide that, in addition to the existing prohibitions, a person should be disqualified from sitting on the Management Committee 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.

(2) Amend the ALA to provide that a person is also prohibited from sitting on the management committee 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.

Casual Vacancies

The ALA makes limited provision for the filling of a casual vacancy if an elected member of the Management Committee 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.

Casual Vacancies

Possible Amendment

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 Trust 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. Many of the above reforms are similar to many of those Model Rules.

55 Section 279.5(2), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
56 Section 279.5(5), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
57 See for example s 66 of the ALRA (NSW).
58 Section 66(1)(a) and (b) of the ALRA (NSW).
59 See s 279-10, *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

The advantage of such a mechanism is that it ensures the rules of the organisation are collated in a single accessible location. This adds to the transparency of the processes and assists members to understand how the organisation operates and assists in avoiding disputes. An advantage of placing them in Model Rules however is that they can be the subject of amendment to fit the needs of the particular Trusts. However, this also means that the rules can be weakened, which might not be in the interests of the Trusts.

Under the ALRA (NSW) rules are amended with the approval of a registrar.[60] If a registrar was appointed to the ALA then that mechanism could also be utilised in the ALA.

The Review is interested to hear from community members about whether the rules of the Trust should be included in the ALA itself or in Model Rules that can be amended.

Model Rules

Possible Amendment

Amend the ALA to provide for Model Rules which are a schedule to the Act which are able to be adjusted by the Trust.

Pecuniary Interests

Section 15(5) of the ALA provides that a person is not disqualified from being elected to the Management Committee 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 Management Committee 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 Management Committee, 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 and 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 vote on the matter.[61] While material personal interest is not defined in legislation, under general corporations law it is taken to be either a financial or non-financial benefit that is of some substance or value rather than low value and it must be personal to the particular director.

Consideration should be given to making 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.

Pecuniary Interests

Possible Amendment

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

Exemption from Compliance

A rigid regime for administration can place unintended burdens on the organisations. 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.[62] 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.

Exemption from Compliance

Possible Amendment

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 Act.

60 Section s 52F(3), ALRA (NSW).

61 Section 195 of the Corporations *Act 2001* (Cth).

62 See for example ss 225.1-225.20 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and ss 57, 103 and 108 of the *Associations Incorporation Reform Act 2012* (Vic).

EXTERNAL REGULATION

Role of an Independent Registrar

The ALA currently provides that a Government Minister is responsible for ensuring compliance with the Act. There is also a general power for aggrieved people or shareholders to seek relief from the Supreme Court for breaches of the Act. This latter power, while broad, is potentially expensive and not very accessible for most members. A number of matters discussed above identify a case for there to be an independent registrar to assist with compliance with the ALA.

A number of other land rights regimes provide for a specialised registrar to provide independent supervision of that legislation.[63] Corporations legislation can also make provisions for registrars to have a supervisory or intervention function.[64]

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. In the context of the ALA, the potential role for a Registrar could include the following:

1. to maintain the share register for each Trust;
2. to provide assistance to the Trusts in relation to the holding of meetings and compliance with the ALA;
3. to mediate, conciliate or arbitrate disputes in relation to the operation of the ALA or to refer such disputes to independent mediators, conciliators or arbitrators;
4. to investigate complaints; and
5. to make recommendations to the Minister in relation to the appointment of an administrator or the issuing of compliance directions.

There is an administrative cost in providing for such a position in relation to two organisations.[65] While the ideal may be to have a registrar with specialised functions and expertise in relation to the ALA, an alternative would be to confer those functions on the Registrar under the *Associations Incorporation Reform Act 2012* (Vic).

Independent Registrar

Possible Amendment

Amend the ALA to provide for an Independent Registrar with functions that include maintaining the share register, to provide assistance to the trusts in complying with the Act, to mediate, conciliate or arbitrate disputes, and to investigate complaints.

Reporting to the Minister

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

1. 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 Management Committee and the Auditor regarding those financial reports within 14 days of the AGM.[66]
2. 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.[67]
3. The Trusts must give the Minister a copy of the annual economic and social wellbeing report it prepares.[68]

63 See for example ss 164 - 175, ALRA (NSW) and ss 15 and 16 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth).
64 See for example s 187 of the *Associations Incorporation Reform Act 2012* (Vic) and ss 653.1- 673.5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
65 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).
66 Section 23S(1), ALA.
67 Section 23S(2), ALA
68 Section 23S(3), ALA.

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 Act, otherwise known as a compliance direction.[69] 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.[70]

There is no requirement for the Minister to take into account, or act on, the information in the various reports, other than a general obligation to keep the most recent reports at Aboriginal Victoria.[71]

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. In the first place 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 information that is provided is largely based on census information which is already available to the Minister. The ALA places no obligation on the Minister to do anything with the information that is provided in the reports.

An alternative use of the limited resources of the Trust 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. Such a document would also provide an opportunity for each Trust to report (for the benefit of the members and the Minister) on the challenges facing the Trust including (if relevant) the social challenges impacting on the functioning of the Trusts.

A further alternative would be to require each Trust to prepare a strategic plan every three years. For example, Land Councils under the ALRA (NSW) must prepare and implement a community, land and business plan.[72] The matters that must be contained in a community, land and business plan include the objectives and strategy of the Land Council in relation to:

- the acquisition, management and development of land and other assets;
- the provision and management of community benefits schemes;
- business enterprises and investment; and
- Aboriginal culture and heritage.

A strategic plan that sets out the objectives and strategy of the Trusts in relation to those matters might be of greater benefit to the community than a plan on the social and economic wellbeing of residents.

Social and Economic Wellbeing Report

Possible Amendment

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 provide an Annual Report or three-year Strategic Plan.

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.[73] Private corporations are subject to statutory regulators such as the Australian Securities and Investment Commission and the Office of the Registrar of Aboriginal Corporations.[74] Some land rights schemes have a number of mechanisms for intervention. Under the ALRA

69 Section 23A, ALA.
70 Section 23B, ALA.
71 Section 24AA, ALA.
72 Section 82, ALRA (NSW).
73 See for example s 39 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 29 Aboriginal Lands Trust *Act 2013* (SA), s 13N of the *Anangu Pitjantjatjara Yankunytjatjara Act 1981* (SA).
74 Section 487.5 of the Corporations (Aboriginal and Torres Strait Islander) *Act 2006*.

(NSW) there is a Registrar of Aboriginal Land Rights who has regulatory and investigative powers.[75] The Minister for Aboriginal Affairs can appoint investigators and administrators.[76]

Under the ALA it is the Minister who has this function.[77] 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.

If the Trusts preferred a regulator other than the Minister, then a number of options could be considered:

1. The role of the Minister could be partly replaced or complemented by an Act specific independent registrar, as set out above.[78] The creation of such an office would require the Government to properly resource the office to carry out those functions for it to be effective.

2. *An alternative would be to confer specific powers on an existing registrar with similar functions such as the Registrar of Incorporated Associations established under the Association Incorporation Reform Act 2012 (Vic).*[79]

Appointment of Administrator

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

c. where the appointment of an administrator is required in the interest of the members of the Trust or the residents of the reserve.[80]

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.[81] The Minister may also inform the residents and ask for submissions from the residents on those grounds.[82] After considering any submissions the Minister may appoint an administrator.[83]

There is currently no requirement for the Minister to inform and consult shareholders. Considering shareholders own the undertaking of the Trust, it might be appropriate to amend the ALA to allow the

75 See s 165(f), 181F-G, ALRA (NSW).
76 Section 216 and 222, ALRA (NSW).
77 The Court also has power to provide relief for breaches of the ALA: s 27(2).
78 An example of this type of arrangement can be seen in s 222(d) of the *Aboriginal Land Rights Act 1983* (NSW) where the Minister can appoint an administrator based on the report of an investigator or by the State Land Council that the funds or other property of the Council have not been properly applied or managed.
79 Section 187, *Associations Incorporation Reform Act 2012* (Vic).
80 Section 23B(1), ALA.
81 Section 23B(2), ALA.
82 Section 23B(5), ALA.
83 See sub-ss 23B(2)-(6), ALA.

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"*.[84]

Notice of Appointment of Administrator

Possible Amendment

Amend s 23B(5) to provide that notice of an intention to appointment of an administrator may also be provided to the members of the Trust as well as residents.

Circumstances in Which an Administrator Can Be Appointed

The circumstances in which the ALA provides that an administrator may be appointed are reasonably wide. The ability for the Minister to appoint an administrator if the Minister considers that it is required *"in the interests of the members of a Trust or the residents of a reserve"* is particularly broad. It is generally consistent with what is provided for under other schemes. However, while similar mechanisms are found in other schemes, some of those schemes are more prescriptive.

Under the ALRA (NSW) the reasons that a Minister may appoint an administrator include if there are not sufficient members to form a quorum, if the Land Council does not provide satisfactory financial statements, keep accounts or prepare a budget, if the Minister is of the opinion the Land Council has ceased for 6 months to substantially exercise its functions, or because of a failure to comply with a compliance direction.[85]

The grounds for appointing an administrator to a corporation under the ORIC Act include:

- a failure to comply with the Act or internal governance rules without proper explanation;
- where the officers have acted in their own interests without proper explanation;
- where the affairs of the corporation are being conducted in a way that is oppressive, or unfairly prejudicial to, or unfairly discriminatory against members of the corporation, or contrary to the corporation;
- where internal disputes are interfering with the proper conduct of the corporations affairs; or
- where the majority of the directors have requested an administrator.

Under that Act the appointment of an administrator can also be made where it is in the interests of the corporation, in the interests of the corporation's creditors, or in the public interest.[86]

In relation to Lake Tyers Trust and Framlingham Trust, there does not appear to be a lack of power on the part of the Minister to appoint an administrator. What appears to be a more constructive mechanism to assist in the governance of the Trusts, is to include the type of guidance which is otherwise usually provided for in legislation governing incorporated bodies, which is discussed above in the section titled 'Governance'. If there were breaches of those requirements, then a compliance notice could be issued requiring the breach to be remedied. The existing power to appoint an administrator for non-compliance with the breach notice would then be sufficient.

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 Council, including its efficiency and effectiveness"*.[87]

84 Section 23B(1)(c), ALA.
85 Section 222, ALRA (NSW).
86 Section 487.5(1), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
87 Section 216, ALRA (NSW).

Under the ORIC Act the Registrar may cause an authorised officer to examine the books[88] of an Aboriginal corporation with a view to reporting on whether there has been a breach of the 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.[89] Such provisions are usually complemented by requirements of those with authority in the organisation to assist the investigations.

Consideration could 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.

Investigations

Possible Amendment

Amend the ALA to provide the Minister or other suitable person to undertake an investigation of a Trust.

88 "Books" includes a register, any other record or information, financial reports and records or a document.
89 Section 453.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

DISPUTE RESOLUTION

The ALA does not contain a separate scheme for dispute resolution. 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. If disputes cannot be resolved then the only remedy under the ALA is to seek relief in the Supreme Court.[90]

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 Pitjantjatara 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.[91]

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.[92]

The ORIC Act requires that a corporation constitution *"must provide for the resolution of disputes internal to the operation of the Corporation"*.[93] One of the functions of the Registrar is to assist with the resolution of disputes.[94]

If an independent registrar is created for the ALA, that registrar might be given the power to mediate or conciliate disputes. Further, 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 independent mediation centre (such as the Dispute Settlement Centre of Victoria, which has been set up by the Victorian Government to provide free dispute resolution services) to mediate or conciliate a dispute prior to seeking Court intervention. Such an amendment could make it mandatory that those steps occur prior to commencing action in the Supreme Court.

90 Section 27, *Aboriginal Lands Act 1970* (Vic).
91 Section s 35-37, APY Land Rights *Act 1981* (SA).
92 Sections 239 - 241, ALRA 1983 (NSW).
93 Section 66-1 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
94 Section 658-1 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

FACILITATING ENGAGEMENT WITH RESIDENTS

As noted above the underlying purpose of the ALA was to confer ownership of the former Framlingham reserve and the 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.[95] While the descendants of some of the original shareholders may have had shares passed to them, others 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 about three-quarters of shareholders live away from Lake Tyers and only a third of residents are shareholders.

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. Framlingham for example 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 resident 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 vote for the Management Committee. 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 Management Committee by the members. Non-shareholding residents have been elected to the Management Committees 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.[96] An administrator can be appointed if it is in the interests of the residents.[97] If an administration board is appointed, the Minister is required to consult with the residents of the relevant Trust prior to the appointment.[98] If a Trust is under Administration, the Administrator must set up an advisory committee made up of former

95 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.

96 Section 23B(5), ALA.

97 Section 23B(1)(c), ALA.

98 Section 23M, ALA.

members of the Management Committee as well as residents.[99]

There are 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.

Allow for Shares to be Transferred to Residents

An option to increase the involvement of residents in the running of the Trust is to amend the ALA to allow for the transfer of shares to a broader class of people, including transferring shares to Aboriginal people who are resident on the Trust land. To the extent that the Crown holds shares it may be appropriate to allow for those shares to be transferred to existing residents rather than remaining with the Crown.

However, while this may potentially increase the level of share ownership by residents in the short term, it would first require an individual shareholder to transfer some of their shares in the first place. There is of course no guarantee that a shareholder would want to do so. It also needs to be acknowledged that it does not remove the possibility that those residents to who shares are transferred may themselves move off the former reserve or transfer their shares to family members who are not residents (and have never been residents) on the former reserve.

Resident Advisory Committee

Another potential option is to amend the ALA to require the Management Committee to establish an advisory committee of non-shareholding residents (the **residents advisory committee**) to assist the Management Committee in exercising its functions insofar as they relate to matters which affect the reserves. This could be similar to the advisory committee established under administration,[100] but only be made up of non-shareholding residents. Such a mechanism would allow a forum for residents to raise matters that affect the residents with the Management Committee for it to consider.

It should be noted that there is nothing in the ALA which would prevent such an advisory committee being established at present, but the reference in the ALA to requiring such a committee assures its existence. It should also be noted that this option would not mean that the Management Committee was bound to follow the advice of the residents advisory committee. If such a requirement was to be put into the ALA, thought would need to be given as to how the residents advisory committee is established. One option would be for the residents advisory committee to be established simply by appointment by the Management Committee. This would be the simplest approach, but this might not create a truly representative group of advisory committee members. An alternative approach would be for there to be an election process by residents. The risk with such an approach is that in the absence of clear guidelines, this may lead to disputes associated with how the election process was conducted, who had the right to vote as a resident and how many persons should be on the advisory committee.

Associate Membership

An alternative approach is to amend the ALA to provide for associate membership of the Trust and allow for non-shareholding residents to be associate members. It is not unusual for organisations to have associate members with limited rights. For example the model rules in the Associations Incorporation Reform Act 2012 (Vic) provides for associate members who do not vote "but may have other rights as determined by the Committee or by resolution at a general meeting".[101] Such a mechanism would provide a formal mechanism for recognising the existing residents, with the rights attached to associate membership being determined by the shareholders. It might provide a mechanism for a broader range of residents to provide input than what may be provided by an advisory committee. The disadvantage of such an approach is that it would require the maintenance of a separate membership register and might cause complexity and disputes at meetings.

99 Section 23G, ALA.
100 Section 23G, ALA.
101 Section 14 of Schedule 4 of the *Associations Incorporation Reform Regulations 2012* (Vic).

Position of residents

Possible Amendments

Amend the ALA to provide for any of the following options regarding the role of residents in the operation of the Trust:

- Allowing for shares to be transferred to existing residents of the trust.
- Establishing a resident's advisory committee to the Management Committee.
- Allowing for residents to become an associate member of the Trust with the rights attributed to the associate members to be determined by a general meeting of the trust.

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 3 months to receive shares[102]). However, this definition is no longer relevant as it only applied to establish residency at the time of the establishment of the Trusts.

The ALA could be amended to include a general definition of *"resident"* in s 2. This definition could 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 3 months or more. This would also clarify the meaning of *"resident"* in relation to the calculation of the quorum for a general meeting.

Definition of Resident

Possible Amendment

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.

102 Section 3(2), ALA.

RESTRICTIONS ON SALE OF TRUST LAND

Scheme of the Act

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 provide that the land cannot be sold,[103] although those same schemes also allow for the long term leasing of land.[104] 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 Act or is in the interests of the members of the land council.[105]

All of these schemes are seeking to balance the need to protect land which is of significance to Aboriginal people against the *"the predators of free enterprise."*[106], while also allowing Aboriginal communities to pursue economic activity. In doing so they are trying to balance the need for statutory restrictions with the right to self-determination.

The ALA has its own scheme for making decisions about the sale and disposal of land. s 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. To the extent that the shareholders at Framlingham want to retain the option for such an outcome over the whole or part of the trust property, consideration could be given to what amendments might be made to ALA that could faciltate that action.

While this may be appropriate for Framlingham, the Lake Tyers community may want greater protection against the sale of the former reserve land. One option would be to amend the ALA to provide that the former reserve land at Lake Tyers is not able to be sold. An alternative or additional protection would be to require that any sale of the land, or the lease of the land for a term longer than 20 years, must be approved by the Minister. The downside of such an option is that the reintroduction of a level of Ministerial supervision may be seen as paternalistic.

An alternative mechanism which could be adopted to provide added protection for the land at Lake Tyers is to provide t hat a certain percentage of the shareholders (say 25%) are required to be in attendance at any meeting to sell land, and that such a decision is required to be unanimous.

103 See for example s 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
104 See for example s 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
105 See Div 2, Part 2, ALRA (NSW).
106 *New South Wales Aboriginal Land Council v Worimi Local Aboriginal Land Council* (1994) 84 LGERA 188 per Bannon J at 198. See also *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* (2005) 12 BPR 23,381; [2005] NSWSC 892 per Young CJ in Eq at [107].

Restriction on Sale of Land

Possible Amendment

Amend the ALA to provide for any of the following options in addition to the existing requirement of the ALA for the sale and disposal of land at Lake Tyers:

(a) that the former reserve land at Lake Tyers not be able to sold or transferred;

(b) that the former reserve land at Lake Tyers not be able to be leased for a term of longer than 20 years without Ministerial approval; and

(c) that any meeting to decide to sell or transfer land must be made at a general meeting of the Trust attended by at least 25% of the members of the trust. The resolution to sell land would need to be unanimous amongst those members who attend.

Using Land as a Security

Related to this is the fact that the ALA provides that the Trust can mortgage or use land as a security. Using land as a security for a loan or other venture 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). 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.

Using the Land as a Security

Possible Amendment

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

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 not within the scope of this Options Paper to review the historic successes and failures of the Trusts in pursuing this objective. It is clear that both the Framlingham Trust and the Lake Tyers 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. It is also clear that aspiration remains. A number of business enterprises have already occurred at the Trusts, including the two health services.

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 current review also provides an opportunity to look at the ALA and see whether amendments could be made to the ALA to improve the ability of the trust 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. Consideration should be given to whether the ALA should expressly state that a Trust is able to establish a related corporate entity, and if so 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."* [107]

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.[108] 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.

Establishing Businesses

Possible Amendments

(1) 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* of the Commonwealth,

  (b) a company within the meaning of the *Corporations Act 2001* of the Commonwealth.

(2) 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.

107 Section 52(5A), ALRA (NSW).
108 See by way of analogy s 52C, ALRA (NSW).

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 may be preferable if the ALA instead stated 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.

Financing the Trusts

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 *"Land rights in a highly developed State like New South Wales cannot work if resources are not available for open market purchases"* [109] 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.[110] That fund was intended to *"guarantee a source of adequate funding over the long term."* [111] 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 to 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 Aboriginal Victoria. No such funding is received by Framlingham. Both Lake Tyers and Framlingham receive some infrastructure funding from Aboriginal Victoria. This funding is not discretionary but is for specific infrastructure projects. In the past both trusts appear to have been supported by some 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.

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.

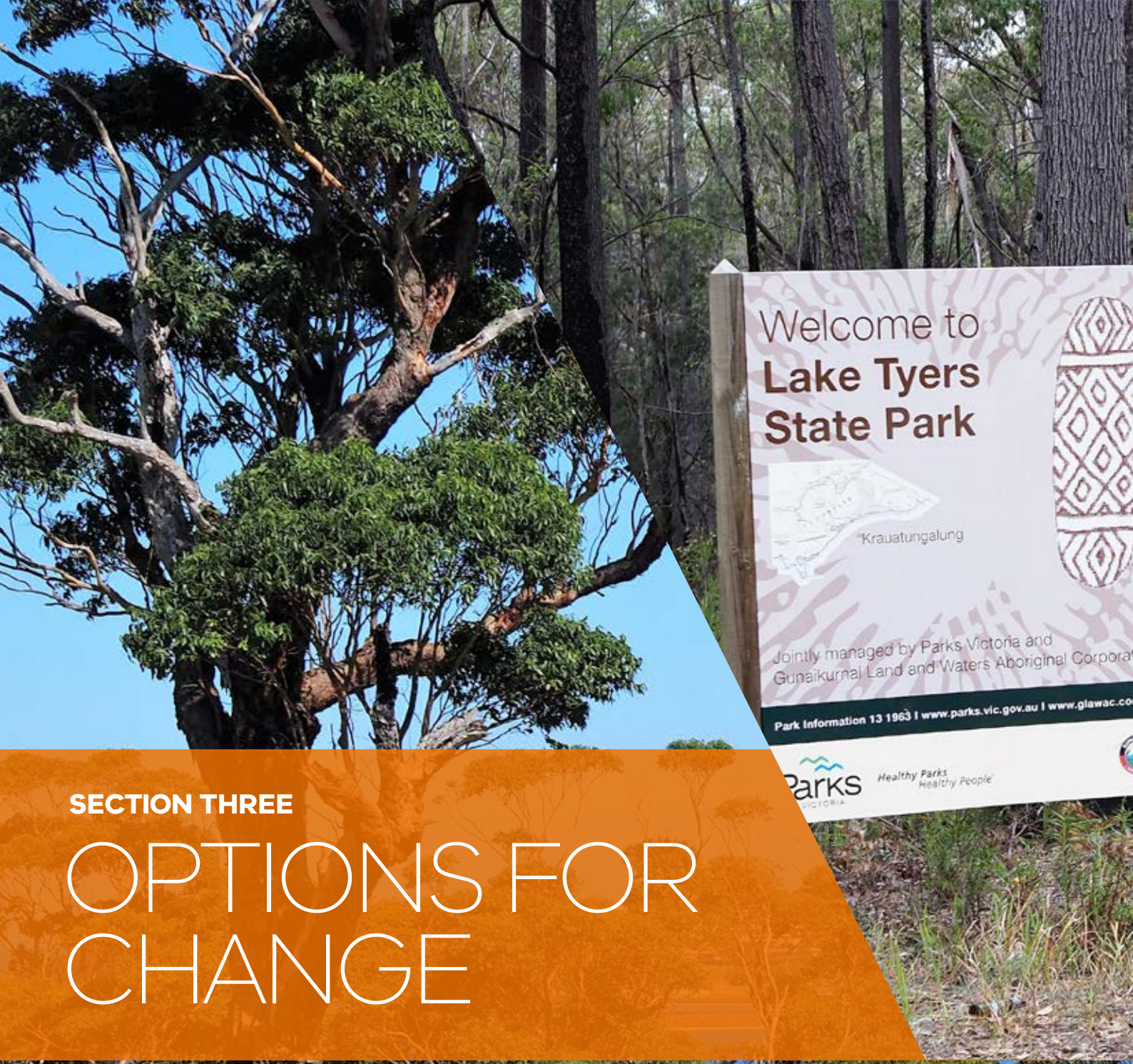
The communities could also consider whether an appropriate option is for a one-off settlement amount to be provided to each community to be invested in a management fund whereby the Trust lives off the interest or investment from the settlement amount in perpetuity. This is the case under the *Traditional Owner Settlement Act 2010* (Vic) for traditional owners. It is also similar to how NSW Aboriginal Land Councils operate after the NSW Government set aside 7.5% of land tax on non-residential land for 15 years, from 1984 to 1998, for Land Councils to fund themselves and invest in land and community projects.

Finance

Possible Recommendations

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

109 Second Reading Speech, *Aboriginal Land Rights Bill* (NSW), Hansard, Assembly, 24 March 1983, p.5090.
110 Section 35, ALRA (NSW) (as enacted).
111 Second Reading Speech, *Aboriginal Land Rights Bill* (NSW), Hansard, Assembly, 24 March 1983, p.5090.



SECTION THREE

OPTIONS FOR CHANGE

NO CHANGE

Despite the identification of key issues in Section 2, members of the Lake Tyers or Framlingham Aboriginal communities, including shareholders and residents, might prefer not to change the ALA at all because they consider that the system is working or that the changes needed are policy, funding or community changes rather than legal changes.

We are interested to hear from any persons who believe that no change should occur to the ALA.

MINOR CHANGE

In Section 2, we have identified a number of key issues and potential changes to the ALA that may assist in the administration of the ALA and ensure there is greater clarity and transparency in the share system and the governance of the Trusts. We have characterised these potential changes as "minor change" as it would not replace the share system or the Trusts or change the fundamental basis of the ALA.

We are interested to hear from persons about whether they consider that some changes to the ALA should be made and what changes they should be, particularly whether people agree with some of the options set out in Section 2 of this Options Paper.

MAJOR CHANGE

An important question raised by the Discussion Paper is whether fundamental change to the ALA is required and wanted by the Framlingham and Lake Tyers Aboriginal communities. There are two important and related questions for the communities to consider:

1. Is the share system appropriate or should an alternative system of land ownership be introduced?
2. Should an alternative corporate governance model be used for the Trusts?

This section attempts to introduce this subject to community members to discuss in the next round of consultations. Fundamental change to the share system is a longer-term project that must be community-led. The first step is a community conversation about whether fundamental change is desired. For example, while there were strong views in support of the maintaining of shares, views were also expressed of a preference for the shares to be purchased back by the Government and a different scheme put in place. Some people had a variety of opinions about whether an alternative corporate governance model should be used for the Trusts but many had not considered what different scheme might be put into place of shares in depth.

As noted above, the creation of the Trusts and the system of share ownership in the ALA is a unique statutory scheme. Other land rights schemes have created trusts but some of those have appointed boards,[112] or provide for the establishment of corporations as Trustee organisations.[113] Other schemes use statutory corporations as the land holding structure.[114] The enactment of the ALA predated the enactment of the *Aboriginal Councils and Associations Act 1976* (Cth) and its successor the ORIC Act, legislation designed to provide a means of incorporation more appropriate to Aboriginal people. Today many Aboriginal people have experience with corporate structures such that the concerns over the appropriateness of formal governance structures which may have informed the structure of the Trusts is no longer justified.

The Review understands that the current Victorian Government is open to all potential changes to the ALA.

The 2002 Review considered options for amending and repealing the ALA and noted:

> *"It would be considered inappropriate to repeal the Act or make major changes without taking into account land ownership through Trust shares, and the property rights created through the legislation. If land ownership rights*

112 See for example s 7 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
113 See for example Part 20 of the *Aboriginal Land Act 1991* (Qld).
114 See for example the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA (NSW)**).

by shareholders were withdrawn by repeal of the legislation, then the existing shareholders would rightfully be due for some monetary gain or other recompense." [115]

Changes to the Share System

Some of the reasons as to why fundamental change to the share system might be desirable include:

1. Although the ALA envisaged the payment of dividends, it is not clear that any dividends have ever been paid, limiting the economic benefit realised from the shares.[116] This also means that many people do not understand the economic value of shares.
2. The scheme is complicated and has proven difficult to maintain, particularly at Lake Tyers. The fact that there are a large number of shares held in deceased estates at Lake Tyers highlights the unwieldy nature of the ownership mechanism.
3. The fact that a large number of shareholders do not appear to reside at Lake Tyers or participate in the governance or management of the Trust may demonstrate that the shareholding system is no longer the best mechanism for managing the former reserve land.
4. The share system has, at times, led to disputes in the community and the election process for the Management Committee, where a person's vote can be calculated by how many shares they have, this can be stressful and tense.

However, we note that many people that talked to the review said how important the shares were to them as recognition of their connection to the former reserve land. In thinking about whether to change or remove the share system, it is important for community members to think about how ownership of the land would be held by the community. This leads to a consideration of the corporate governance structure most appropriate for an alternative scheme.

Identifying Alternative Corporate Governance Structures

If the Trusts wanted to move away from the share-owning system, they would need to consider what would be the most appropriate structure for an alternative scheme. Some of the matters that would need to be considered by the community members in relation to an alternative scheme are identified in the Diagram in Attachment D. The options set out below are intended to assist in the further discussion and consideration of the issue in the event that the members of the Trusts wanted to further consider what other arrangements would be possible. The review also understands that people at Lake Tyers and Framlingham might have different views about what is best for each individual Trust.

There might be a number of different reasons for members to want to shift to an alternative corporate governance structure:

a. the members believed that the ownership of land, and the governance of the corporation, should be changed from a share-based system; or
b. the members believed that having the lands owned and managed by them under a different corporate structure (such as a statutory corporation or a private corporation) would be preferable to the existing statutory scheme; or
c. the members believed that the lands should be owned and managed by a broader group of people other than the existing shareholders, provided there was adequate compensation for existing shareholders for the value of their shares.

What would be the most appropriate alternative model would largely depend on which of these reasons was the motivation for the change.

115 Draft Review of the *Aboriginal Lands Act 1970*, April 2002, para [12.2], p.39.

116 This is not intended to suggest that there has not been an economic benefit from the base value of the shares or other benefits from residing on trust land or being involved in the management of the land. Nor is it intended to ignore the historical and cultural significance of owning shares which is discussed above.

Option 1: Establishment of a Statutory Corporation under the ALA

One option would be to amend the ALA to transform the Trust, run by the Management Committee, to a statutory corporation run by a Board. This statutory corporation would hold the land on trust for members of the organisation, with each member having equal voting and membership rights in the organisation.

This option would have the benefit of allowing the land to be held and managed under existing legislation while removing the shareholding system. Aboriginal land councils incorporated under the ALRA (NSW) are an example of land rights legislation using statutory corporations as the land holding entity. Wreck Bay Community Aboriginal Council is another example.[117] Within this option, there is a wide variety of corporate structures which could be adopted. The legislation can be as detailed or general in relation to how the organisation is governed (which might include the types of recommendations set out in Section 2) and land is managed as considered appropriate.

The advantages of a statutory corporation include that:

1. It allows for a flexible scheme for incorporation which is particular to the communities at Lake Tyers and Framlingham. If subject to regular review, it can allow for adjustments to meet the needs of the communities as they change.
2. It can provide for a more certain structure in relation to the rules of the corporation.
3. If land is held on trust, then a statutory scheme can more readily provide mechanisms governing the administration of the organisation, rather than leaving enforcement to the general law.
4. Establishing a statutory corporation under Victorian legislation may be seen as encouraging a closer relationship to government as opposed to moving the responsibility to either Commonwealth supervision under the Office of the Registrar of Indigenous Corporations (**ORIC**) or the Australian Securities and Investments Commission (**ASIC**) under the *Corporations Act 2001* (Cth). This can be beneficial as long as the relationship with the Government remains positive.
5. It may be seen as a more convenient mechanism particularly where there is an intention to impose other legislative measures, such as restrictions on dealing with land, or if there is a desire to regulate third parties in dealing with the corporation.
6. Statutory schemes can create options for coordination with other agencies with regulation and anti-corruption functions.[118]

The disadvantage of such an approach is that it may be seen as not sufficiently encouraging the independence of the Aboriginal community. Being created by statute, statutory corporations are subject to legislative change which can be driven by matters other than the interests or aspirations of the Aboriginal community. Additional supervision by other agencies may not be perceived as a benefit. While a statutory set of rules can provide for a more certain structure, the lack of flexibility can also be seen as limiting.

117 See s 4 of the *Aboriginal Land Rights (Jervis Bay Territory) Act 1984* (Cth).

118 For example, Aboriginal land councils in New South Wales are public authorities for the purposes of the *Ombudsman Act 1974* (NSW) and the *Independent Commission Against Corruption Act 1988* (NSW) and are subject to those Acts. As noted from the options above, it would be open to confer regulatory powers on the Registrar under the *Associations Incorporation Reform Act 2012* (Vic) if there was a preference for not having Ministerial supervision.

Option 2: Corporate Body established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)

An alternative to a statutory corporation is to create a corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**an ORIC Corporation**) to be the land holding body. This was one of the options considered by the 2002 Review having regard to the circumstances of Lake Tyers and the difficulty in trying to obtain a quorum because of the large number of shareholders who are no longer residents on former reserve land.

The advantage of an ORIC Corporation include that:

1. The legislation was enacted with the specific purpose of enabling Aboriginal people to incorporate.
2. The regulator under the ORIC Act is the Registrar of Indigenous Corporations. The Registrar and ORIC have experience in dealing with Indigenous people and their particular needs in running corporations.
3. Many people who are currently shareholders of Lake Tyers and Framlingham are already members of ORIC Corporations and might be familiar with the provisions of the legislation. Under the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth) the Framlingham Forest is vested in Kirrae Whurrong Aboriginal Corporation, which is incorporated under the ORIC Act. Many of the members of the Lake Tyers and Framlingham Trust would also be native title holders as a result of the native title determinations under Gunai Kurnai Native Title Claim[119] or the Gunditjmara native title claim.[120] As part of those determinations, native title holders established corporations under the ORIC Act which either act as agent for native title holders or hold the native title rights and interests in trust. The communities at Lake Tyers and Framlingham will therefore be familiar with and will engage with the ORIC regime in the future. There may be a perceived benefit in not having to deal with a multiple legislative regimes.
4. ORIC has functions which are broader than regulation. For example, they include *"to conduct public education programs on the operation of the Act and on the governance of Aboriginal and Torres Strait Islander corporations"*, to assist with dispute resolution both internal to a corporation or between a corporation and others, and to assist with the internal operation of the corporation.[121] The regime therefore provides the potential for support which is not available under other schemes.

While there are benefits in an ORIC structure, there can also be disadvantages. The Rulebook for ORIC Corporations can be changed, which can significantly alter the nature of ORIC Corporations and how they operate. While ORIC has statutory functions to assist corporations with good governance, it is not necessarily resourced to carry out those functions as much as many corporations need. ORIC may be able to assist with compliance with the organisational rules, but may be less effective in ensuring compliance with trust obligations that the corporation might have to the members, for example, regarding the holding of the former reserve land.

If an ORIC structure was the preferred structure, there might be existing ORIC organisations which are suitable to take on the function of the Trust. Further, it is important to consider that to be an ORIC Corporation requires that at least 50% of members of the corporation are Aboriginal.

119 *Mullett on behalf of the Gunai/Kurnai People v State of Victoria* [2010] FCA 1144 (22 October 2010). The Court determined that the native title rights and interests be held in trust by the Gunai/Kurnai Land and Waters Aboriginal Corporation (GLaWAC).

120 The Eastern Maar people were recognised as native title holders with the Gunditjmara people over land and waters to the west or Warnambul in *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932. The Court determined that the Eastern Maar Aboriginal Corporation be the agent for the Eastern Maar people in relation to their native title rights and interests.

121 Section 658.1(1) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Option 3: Corporate Body established under *Corporations Act 2001* (Cth)

An alternative to an ORIC Corporation is to have a corporation established under the *Corporations Act 2001* (Cth). Corporations established under this legislation are regulated by ASIC. This option may be considered appropriate if there was a preference for moving away from Indigenous specific legislation to more mainstream means of incorporation.

There are however a number of disadvantages associated with taking such an approach. ASIC would not be in a position to provide the same level of targeted, Indigenous specific, support which ORIC is mandated to provide. Further, given that many shareholders are already involved with ORIC Corporations, having to become familiar and engage with a new scheme under the *Corporations Act 2001* (Cth) may add unnecessary complexity.

Option 4: Cooperative established under the Cooperatives National Law

A further alternative structure would be the establishment of a cooperative under the Cooperatives National Law. [122] There are a number of cooperatives that operate in the vicinity of the Trusts[123] and some shareholders of the Trusts would be familiar with the governance structure they operate under.

The Cooperatives National Law is administered in Victoria by Consumer Affairs Victoria and the Cooperatives Registrar can take action on breaches of the legislation. Proceedings for breach of the Cooperative National Law can be brought in Magistrates' Court.[124] Decisions of the Registrar are able to be reviewed in the Victorian Civil and Administrative Tribunal. [125]

One advantage of the cooperative structure is that it has the benefit of a general regulatory scheme with established mechanisms for grievances which some members of the community already operate under for other purposes. Each member of the cooperative has one vote, regardless of whether the cooperative also has a share structure.

However, if the intention is to move away from the share system, then any cooperative would have to be a non-distributing cooperative and would not be able to distribute its profits to the members. Non-distributing cooperatives are often not-for-profit community organisations which provide services. The rules around membership of cooperatives may make it an inappropriate model unless the purpose of the cooperative is to provide services. This is because there are requirements for members to be active members. This is unlikely to make it an appropriate model if it is intended that non-residents will retain an interest in the land.

Alternative Structures – Additional Considerations

Regardless of which of the structures above were to be adopted, there would need to be a range of other decisions about the nature of the organisation that was established. Those matters include considering the following questions.

What is the purpose of the new structure?

A preliminary question which would need to be addressed is whether any new entity is intended to be primarily a land holding entity or to be more involved in the provision of services to the residents of the communities. This is relevant to identifying the objects of any new structure or who should be members of the corporation.

A related question would be whether it is intended that the new entity could distribute benefits to its members or whether it is to be a not-for-profit organisation established for charitable purposes. This will have implications for the tax status of the new entity.

122 This is set out in the Appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW).
123 For example the Gunditjmara Aboriginal Cooperative and the Gippsland & East Gippsland Aboriginal Coopertative.
124 *Cooperative National Law Application Act 2013,* s 11.
125 *Cooperative National Law Application Act 2013*, s 11.

A further question which needs to be considered is whether it is desirable for any corporation to have additional statutory powers to regulate the use of the former reserve land or other land it holds. For example, in recognising that there may be third parties using land, the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth) confers limited by-law making powers on Kirrae-Whurrong Aboriginal Corporation and Kerrup-Jmara Elders Aboriginal Corporation in relation to the land transferred under that Act.[126] It may be considered appropriate for similar powers to be conferred on any corporation in relation to the former reserve land to help regulate peoples' use of the land (e.g. if tourists come to visit the land or fish in the rivers or inlets).

Who would be a member of a new corporate structure?

Regardless of which model was adopted, consideration would need to be given to who would be members of the corporation. There are clearly a number of options in this regard comprising any, any mix of, or all of, the following:

a. **Existing Shareholders:** Membership could include existing shareholders. An issue would arise in relation to Lake Tyers whether this could repeat the problem of having a large number of members who do not reside on the Trust lands. This may be ameliorated by the fact that if people had to apply for membership, it would necessarily limit membership to those prior shareholders who wished to be members.

b. **Residents from time to time:** When enacted the ALA intended that the beneficiaries of the Trust will be the people resident on the reserve at a specific date. One option would be to provide that it is the residents of any land held by the trusts from time to time who are entitled to be members. Consideration would need to be given to whether membership would cease if a resident moved off the former reserve and if it made a difference if they only moved to a nearby town.

c. **People with an historical association with Lake Tyers or Framlingham:** It would be open to broaden membership to those people who had an historical association with Lake Tyers or Framlingham. This would perhaps include people who in the past had resided on the land but had moved to nearby towns.[127] It might also include people who have family members buried on the former reserve.

d. **People with a traditional connection or association with Framlingham or Lake Tyers:** A further alternative would be to allow for people to be a member if they have a traditional connection or association with Framlingham or Lake Tyers. This may include people who are native title holders for land and waters in the region or could be defined to include other criteria.

e. **Non-Aboriginal People:** A number of non-Aboriginal people are shareholders of the existing Trusts. Consideration would need to be given to whether the membership of any new entity would be limited to Aboriginal people.

Each of these options would require some definition, either in the rules of the corporation or any governing legislation. A further consideration is whether membership for people in some of these categories should be available as of right, or whether the board of the organisation approves membership where they consider that the relevant criteria is met.

How would the land be held?

Another question that needs to be considered in identifying the best form of any alternative structure is how any land is to be held by any new corporate entity. On the one hand

126 See ss 15 and 23 of the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act* 1987 (Cth).

127 For example Rule 3.1 of the Rulebook of the Kirrae-Whurrong Aboriginal Corporation which has functions under the provides that membership of organization is open to *"an Aboriginal or Torres Strait Islander person who has resided on the Framlingham Reserve for a continuous period of at least 12 months a[sic] any time in their life"* or *"whose eligibility to become a member is approved by the Kirrae Whirrong Committee of Elders as described in the Land Act"*. The ALRA (NSW) is an example of a statutory corporation whose membership is open to Aboriginal people who reside in a particular area or is an Aboriginal person *"who has a sufficient association with the area"* and is accepted as being such by the voting members of the Land Council: see s 54(2A), ALRA (NSW).

the property could be held by a corporation to do as it pleases in accordance with its constitution. Alternatively, it could be held on trust for the benefit of members with the new entity as a corporate trustee. The latter may be more appropriate for the former reserve land if it is intended that the land be kept in perpetuity for future generations. Having the land held in a trust may provide a greater level of security for the land assets. It would also allow for payments to beneficiaries of the trust while allowing the new entity to maintain a charitable status for tax purposes. Where land other than the former reserve land is held, it may be appropriate only the former reserve land to be held in trust or alternatively for the trust to hold all land but allow for greater flexibility in relation to the use and potential alienation of the non-former reserve land.

A related question (which is already discussed above) is whether the former reserve land should be inalienable. This may be relevant to the terms of any trust, and to identifying whether the extent to which any new scheme needs to be complemented by legislation.

For example, in the Northern Territory, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), land is inalienable (can't be sold) and held by Land Trusts. Unlike the ALA, they are directed in the exercise of their functions by a Land Council (e.g. the Northern and Central Land Councils). Land Trusts, as owners of the land, can only grant interests in that land, like a long-term 99 year lease, if directed to by the Land Council with the consent of traditional owners. The Minister for Indigenous Affairs must also consent if a proposed lease is longer than 40 years.

A different situation exists in Queensland. Under the *Aboriginal Land Act 1991* (Qld), there is now the ability to convert town areas held by Aboriginal communities to ordinary freehold land, which can be mortgaged, sold or gifted or used for commercial purposes with little limitation.

The options would therefore include:

a. **All land** being held in trust for members by the corporation, created by deed or by statute;

b. **Only former reserve land** being held in trust, created by deed or by statute;

c. **The land held in trust and/or other land** held by the corporation being the subject of special protection on alienation and land dealings in legislation (similar to what is currently in the ALA).

Would there be a need for governing legislation?

The answers to the above questions feed into a further consideration of whether any alternative scheme needs to be supported by a revised ALA or whether the ALA should be repealed in its entirety. Many organisations hold land without any special legislation. If land was held on trust, a trust deed could be established to govern how the land is to be held. However, if it is intended for there to be restrictions on the alienation of land, it may be beneficial for legislation to exist to ensure those restrictions are clear and legally binding. *The Aboriginal Land Act 1991* (Qld) is an example of land rights legislation which provides for the appointment of a corporation as trustee while at the same time providing some statutory controls on how the corporation exercises its powers as trustee.

How should existing shareholders be compensated?

If the shares were to be removed consideration will need to be given to compensating shareholders.

Shareholders would need to consider whether the shares should be valued under the process set out under the ALA, where the auditor sets the prices, or whether there is additional value to the shares (for example, in terms of non-economic value based on historical connection to the land). That would require negotiation with the Victorian Government.

The 2002 Review noted that negative aspects of fundamental change and repeal of the share system were that providing funding for a share buy-back or dissolution of the share system and transferring land to a corporation owned by some of the same members could be seen as a *"double vesting"*. Furthermore, it does not accommodate the position of those non-residents who may want to retain their interest in the former reserve lands.

ATTACHMENTS

ATTACHMENT A

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 Management Committee 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 694 acres 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 B

Key Issue	Section of ALA	Challenges	Potential reform
Share System			
Increase in number of shares	Section 12(4)	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, it might be appropriate to delete this power.	Delete s 12(4) of the ALA which provides that the Trust at a general meeting may increase the number of shares in the Trust by proportionally increasing the number of shares owned by each shareholder.
Personal representatives	Sections 13(2) and 14(2)	Section 13(2) 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) 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).[128] Consideration should be given to amending the ALA to make this clear.	Amend the ALA to define *"personal representative"* to have the same meaning as in the *Administration and Probate Act 1958* (Vic).

128 *"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"*.

Key Issue	Section of ALA	Challenges	Potential reform
Deceased estates – calculating value of shares	Not applicable	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. This could lead to some unfair outcomes in circumstances where the shares cannot be 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).[129]	Amend the ALA to provide that for the purposes of calculating the value of a "partners statutory legacy" for the purposes of the *Administration and Probate Act 1958* (Vic) the value of any shares is to be disregarded.
Governance			
Minutes of Management Committee Meetings	Not applicable	A number of statutory schemes require that a board keep minutes of its meetings and that minutes be available for inspection by members.[130]	Amend the ALA to make clear that the Management Committee is to keep minutes of its meetings.
Restrictions on Sale of Trust Land			
Purchased land	Section 11(3)	The restriction on land dealings apply not only to the former Trust land, but any land held by the Trust. The Trusts can, and have, purchased other land on the open market. In relation to purchased land the restriction has the potential to inhibit the Trust from achieving economic outcomes through the sale of land. An issue arises as to whether a more flexible approach should be provided in relation to the sale or disposal of land which has been purchased.	One option would be to provide that where the disposal of land by the Trust is land which has been purchased, the resolution to sell the land needs only to be approved by 80% of the members present and eligible to vote.

129 Consideration would need to be given as to whether the appropriate means to give effect to this approach is an amendment to the *Administration and Probate Act 1958* (Vic).

130 See for example ss 10 (7)-(8) of the *Anangu Pitjantjatjara Yankunytjatjara Act 1981* (SA).

Key Issue	Section of ALA	Challenges	Potential reform
Facilitating Economic Activity			
Mining	Section 11(3)	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,[131] or provide for the ownership of certain minerals on Aboriginal land.[132] 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.[133] A similar mechanism is in the *Aboriginal Land (Northcote Land) Act 1989* (Vic).[134] For consistency, consideration should be given to whether the Lake Tyers and Framlingham Aboriginal Trusts should have the same veto power.	Amend the ALA to make the requirements in relation to mining consistent with s31 of the *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth).
Modernisation of the ALA			
Objects	Section 1	The ALA does not have any clearly stated objects. It is not essential that legislation has stated objects. *The Aboriginal Lands Act 1995* (Tas) does not have an express objects clause. An objects clause can however be relevant in the interpretation of statutory provisions or guide the exercise of statutory power. It also assists in identifying an Act's fundamental purpose. An example of a statutory objects clause found in land rights legislation is s 5 of the *Aboriginal Land Trust Act 2013* (SA) which provides: *"The objects of this Act include—* *(a) enabling the Trust to acquire, hold and deal with Trust Land in accordance with this Act for the continuing benefit of Aboriginal South Australians; and* *(b) ensuring that Trust Land is not alienated except in accordance with this Act; and*	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 Act. An example of what this might look like is: 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;

131 Section 31 *Aboriginal Land Rights (Lake Condah and Framlingham Forest) Act 1987* (Cth).

132 See for example ss 40-48J of the *Aboriginal Land Rights (Norther 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 Pitjanntjatjara Yankunytjjatjara Act 1981* (SA), s 45, ALRA (NSW).

133 See for example s 45(2), ALRA (NSW).

134 See s 5 *Aboriginal Land (Northcote Land) Act 1989* (Vic).

Key Issue	Section of ALA	Challenges	Potential reform
Modernisation of the ALA (continued)			
Objects *(cont.)*	Section 1	*(c) establishing mechanisms for the efficient and effective administration of the Trust; and* *(d) providing for the efficient and effective management and development of Trust Land; and* *(e) ensuring Aboriginal people with an interest in particular Trust Land are consulted, and their views considered, in any decisions relating to that Trust Land; and* *(f) increasing opportunities for economic development on Trust Land."*[135] Another example of an objects clause is section 4A of the *Anangu Pitjantjatara Yankunytjatjara Land Rights Act 1981* (SA) (**the APY Land Rights Act**).[136]	(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. These are just by way of example and the Review is hopeful of hearing from community members about what objects could be included in the ALA that meet their aspirations for the Trusts.
Use of term *"Aborigine"*	Section 2	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.[137]	The ALA be amended to replace the term "Aborigine" with "Aboriginal person". This would 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.[138]

135 Section 5 of the *Aboriginal Lands Trust Act 2013* (SA).
136 Section 4A of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights 1981* (SA).
137 See for example the definition of "Aboriginal person" in s 3 of the *Children, Youth and Families Act 2005* (Vic).
138 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).

Key Issue	Section of ALA	Challenges	Potential reform
Modernisation of the ALA (continued)			
Use of term *"Husband or Wife"*	Section 14(2)	The ALA uses the term "husband or wife" to refer to one of the classes of people to whom shares may be transferred.[139] That term is not consistent with the contemporary approach to marriages and relationships.	Amend the ALA to replace the phrase "husband and wife" with "spouse and domestic partner". This would mean those terms are defined as having the same meaning as in the *Equal Opportunity Act 2010*, 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* *(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)."* [140]
Use of term *"Remoter Issue"*	Section 14(2)	The term *"remoter issue"* is used to describe some of the people to whom shares can be transferred.[141] While the language is outdated (and "grandchild" might be a more appropriate term), as the term is consistent with the *Administration and Probate Act 1958* (Vic) it may be beneficial to keep the terminology consistent.	Do not amend the ALA.
Use of term *"Infants"*	Section 12	When the ALA was enacted it was anticipated that shares could be held by infants. The Act 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.[142]	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"*.[143] 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.

139 Section 14(2)(i), ALA.
140 Section 4 of the *Equal Opportunity Act 2010* (Vic).
141 Section 14(2)(d), ALA.
142 See ss 13(4), 22(3), 22(4), 23(5)(a), ALA.
143 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).

ATTACHMENT C

Current Standard Transfer Application Form (Framlingham Aboriginal Trust)

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)

(_____)

W(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 ☐ 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)

☐ Husband or Wife ☐ Husband or Wife ☐ Husband or Wife

☐ 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 Transferor this date ____/____/_____

NAME _____

(Signature of Transferee)

OFFICE USE ONLY		
All documentary evidence provided	☐ YES ☐ NO	**COMMON SEAL**
Date accepted by Trust Administration	____/____/_____	
Date approved by Committee of Management	____/____/_____	

ATTACHMENT D

Considerations for an Alternative Model of Land Holding

Corporate Structure

a) Keep current structure; or

b) Corporation; or

c) ORIC Corporation; or

d) Incorporation under the *Corporations Act 2001* (Cth); or

e) a Cooperative under the Cooperatives National Law.

Membership of Corporation

a) Existing Shareholders; and/or

b) Residents from time to time; and/or

c) People with an historic association with the land; and/or

d) People with a traditional association with the land.

How Land is Held

a) Land is held by corporation on trust for a class of beneficiaries; or

b) Land is held by corporation on trust for a class of members; or

c) Land is held by corporation to be dealt with in accordance with its objects.

Beneficiaries if Land is Held Under Trust

a) Existing Shareholders; and/or

b) Residents from time to time; and/or

c) People with an historic association with the land; and/or

d) People with a traditional association with the land.

GLOSSARY

ASIC:	Australian Securities and Investments Commission.
Auditor:	A person appointed and authorised to inspect the accounts and records of an organisation and check the organisation is complying with the rules that govern it.
Committee of Management or Management Committee:	The governing body of the Trust, responsible for managing the Trust and the Trust Land, and elected by Members.
Company constitution:	A document that sets out the rules governing the relationship between, and activities of, the company and its shareholders.
Corporation:	an entity with "legal personality" which means it can act as a person by entering into contracts, buying and selling land etc.
Dividends:	A payment made by a company or organisation to its shareholders to distribute profits.
Executor:	The executor of a Will is responsible for carrying out the wishes of a person after they die.
Freehold title:	To hold a freehold title over land is to have full and free control and ownership of it into the future.
Governance:	When referring to companies and organisations, governance relates to the set of systems, practices, rules and processes the organisation operates under.
Holding land "on trust":	To hold land on trust for another person means to be named as the owner of the land, but to hold it for the benefit of another party.
Members:	The people who own a share in the Trust. The original Members were people who were living on the Trust Land on a certain day specified in the ALA. Members may have passed on their shares, for example to relatives, who then become Members.
Minister:	The Minister responsible for administering the ALA, being currently, the Victorian Minister for Aboriginal Affairs.
ORIC:	Office of the Registrar of Indigenous Corporations.
ORIC or CATSI Corporation:	A corporation established under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) and regulated by ORIC. This structure is similar to a company limited by guarantee and strives to take into account Aboriginal customs and traditions. This structure is only available for organisations that meet an Indigeneity requirement.
Quorum:	The minimum number of members needed at a meeting for the proceedings and decisions made to be valid.
Shareholders:	Another term for Members.
Statutory corporation:	A company or corporation created through an Act of Parliament. It is governed by the Law that creates it and answerable to the Parliament
Trust:	The body corporate established by the ALA which owns the Trust Land. It comprises the Members of the Trust but is a separate legal entity from the Members of the Trust.
Trust Land:	The land owned by each of the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust under the ALA.
Wills:	A document written by a person before they die, which sets out want they want to happen to their property after they die.

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