



Australian Government

Department of Finance and Deregulation

Office of Evaluation and Audit (Indigenous Programs)



May 2009

Audit of the
Northern Land Council
—Governance Component
Report on Recommendations

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COVER IMAGE

Tingari Dreaming at Walukurtitje

2001

Linda Syddick Napaltjarri (c.1937 -)

Acrylic on Canvas

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Overview

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Introduction

1. The Office of Evaluation and Audit (Indigenous Programs) (OEA) undertook an audit of the Northern Land Council (NLC) at the request of the Minister for Finance and Deregulation in response to concerns over the health of the executive governance of the NLC and relationships between senior management and the elected council. The overall audit consisted of a financial management component and a governance component. Separate reports were prepared for each component and reported to the Minister for Finance and Deregulation. Draft reports were provided to the NLC and some individuals for formal comment. All submissions from the NLC and those individuals were considered in the preparation of the final reports prior to submission. The Governance component report was finalised and issued to the Minister on 18 December 2008. This Report on Recommendations was prepared following further submissions by the NLC to the Minister for Finance and Deregulation, which the Minister referred to OEA.
2. This report is a report on the recommendations of the governance component audit.

Request for audit

3. On 17 March 2008 OEA was requested by the Minister for Finance and Deregulation to audit the NLC pursuant to section 193X(1)(ca) of the *Aboriginal and Torres Strait Islander Act 2005*.¹ The Minister raised concerns about executive governance arrangements in the NLC.
4. In the period leading up to the audit request, the NLC had undergone a period of instability and alleged conflict at senior staffing levels. Insurance claims had been lodged by staff members for work-related stress and the NLC had been involved in legal action in relation to the employment of the Principal Legal Officer (PLO). Comcare commenced an investigation into two particular complaints and reported on their findings on 25 February 2009. It is not within the scope of OEA's audit to publicly disclose the findings of that report.
5. The NLC had made a submission to the Australian Government for extra funding of \$1 282 721 to cover additional expenses relating to the NLC's new premises and '...unforeseen projects or extraordinary matters...'. These extraordinary matters included termination payouts for the Chief Executive Officer (CEO) and Deputy

¹ Part 4B of the *Aboriginal and Torres Strait Islander Act 2005* provides for OEA to evaluate and audit Indigenous programs administered by Australian Government bodies or organisations receiving funding under such programs. More specifically, under section 193X(1)(ca) OEA may, when requested by the Minister, audit or evaluate the activities or operations of a Land Council (within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*).

Overview

CEO (DCEO), legal costs associated with the attempted dismissal of the PLO, and additional meetings of the Executive Council to deal with matters arising from a series of management issues.²

Audit objective

6. The objective of the governance component audit was to determine:
 - whether the governance and management structures and processes of the NLC are appropriate, efficient and effective for a statutory authority established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA)
 - whether the alleged current internal conflicts are systemic and indicative of structural issues within the NLC, or otherwise.

The NLC: functions and structure

7. The NLC is one of four Land Councils established as statutory authorities under the ALRA and is also a representative body for native title claimants in its area under the *Native Title Act 1993*. It is a Commonwealth Authority under the *Commonwealth Authorities and Companies Act 1997*.
8. The core responsibility of the NLC is to represent, assist and advise Aboriginal people with respect to matters affecting their traditional lands and seas, through the exercise of their legal rights under Commonwealth land rights and native title legislation.
9. The NLC comprises of two parts: the representative arm and the Administration.
10. The representative arm consists of the 83 elected members of the Full Council. Seventy-eight members come from individual Aboriginal communities and outstations within the NLC's seven regional areas and five come from co-opted positions for women. The Executive Council is a committee established under section 29A of the ALRA. It consists of nine members, being the Chairman of each of the seven Regional Councils and the elected Chairman and Deputy Chairman of the Full Council. The Executive Council acts similarly to the board of directors of a traditional corporation, making decisions on behalf of the Full Council.
11. The Administration undertakes the operational activities of the NLC. It is managed by the Senior Management Group (SMG), which consists of the CEO, DCEO and the branch managers of the seven branches of the Administration.

² Letter from NLC Acting Chairman to the Minister for Families, Housing, Community Services and Indigenous Affairs, 12 March 2008. The NLC has subsequently advised that it underestimated the total termination costs of the CEO. OEA understands that since this request was made to the Minister, at least two other staff have received termination payments.



Recommendations

Recommendations

Recommendations

12. The following is a list of the recommendations from the governance component report and the NLC's formal response to those recommendations. The NLC's responses express their view that there were deficiencies with the audit. OEA does not agree with the NLC's views on the conduct of the audit.

Recommendation No. 1

OEA recommends that the NLC initiates a period of change management to:

- re-establish the authority and leadership of the CEO
- improve the internal culture and relationships
- review the approach of the organisation to managing people and relationships
- clarify the role, authority and reporting line of the PLO in relation to various management matters of the NLC.

NLC's Response

Accepted in part.

The purpose of the Executive Council's actions in November 2007 was to resolve existing concerns and to implement positive change at the NLC, including through a pre-existing structural review and through improved relationships.

However the thrust of the recommendation concerns adverse findings of fact in the four dot points of the recommendation which are seriously flawed and have no basis in fact or law.

This serious deficiency has arisen because the audit was not competently conducted, and that the auditors were biased due to preconceived views and/or due to incorrect information provided by other sources or the media.

In relation to point 4, the draft report is also deficient because it fails to properly analyse and appreciate the structure, functions and governance of the NLC, including in light of statutory requirements and legal ethics.

Recommendations

Recommendation No. 2

OEA recommends that the Minister for Families, Housing, Community Services and Indigenous Affairs consider whether there would be benefit in developing a Statement of Expectations of her requirements in the governance, management and performance of the NLC and seeking a Statement of Intent in return.

NLC's Response

Not accepted.

This recommendation derives from a 2007 departmental misinterpretation of the Uhrig Report. First, that report only applied to “authorities where the Minister has a role in providing direction”, and “will not be appropriate” where the Minister has no such role (e.g. the Auditor-General, which “has been established with statutory independence reporting directly to the Parliament and ... not subject to direction by a Minister”).¹ Land councils established under the Land Rights Act fall within this exception. They are established as independent bodies governed by, and responsible to, traditional owners in their region. The recommendation is inconsistent with this independence.

Secondly, it was also acknowledged that the recommendation “may not be necessary where the existing governance framework provides for a comparable arrangement”, such as a corporate planning process involving “accountability and broad performance expectations” (e.g. key performance indicators).² The governance framework applicable to land councils include strategic and corporate plans with key performance indicators. This “comparable arrangement” confirms that the Uhrig recommendation regarding statements of expectations and intent is not appropriate in relation to land councils.

¹ Uhrig Report, p 8.

² Uhrig Report, p 60.

Recommendations

Recommendation No. 3

OEA recommends that the NLC undertake a range of actions to clarify and improve in practice, the separation of responsibility between the elected members and the Administration of the NLC which can be included in an updated Council Handbook or NLC Charter. These are:

Full Council

The operation of the Full Council should be reviewed so that its meetings focus more clearly on setting the direction of the NLC, approving the NLC's four year Strategic Plan and approving major policies in regard to its functions under the ALRA.

The Full Council should authorise the Executive Council to manage the performance of the CEO which should include, as a minimum, an annual performance assessment based on expected results, values and behaviours set out in the CEO's contract or annual performance plan.

Executive Council

The Executive Council should be established as a Board to direct and monitor the organisation within the context of its Strategic Plan. The Executive Council's role statement and delegations should clearly reflect its role as being to:

- develop and approve the Corporate Plan and approve the annual Output Group Business Plans in support of the Strategic Plan
- select and formally monitor the performance of the CEO, using external HR assistance if required
- supervise the financial and operational performance of the Administration in implementing the policies of the NLC
- inform the Full Council of the performance of the CEO and the Administration and alert the Full Council to emerging issues regarding the operation of the Administration.

Administration

The CEO should be empowered to take full responsibility for the operations of the NLC having clear responsibility to:

- manage the Administration on a day-to-day basis
- develop the Output Group Business Plans
- engage and performance manage the Senior Management Group (SMG)
- brief the Executive and Full Councils, making recommendations on relevant matters.

Recommendations

NLC's Response

Accepted in part.

The NLC has committed to reviewing its Council Handbook, including so as to more clearly identify the responsibilities and delegated powers of members of the Full Council and the Executive Council.

However the thrust of the recommendation derives from a 2007 departmental misinterpretation of the Uhrig Report, and is also factually flawed. First, that report only applied to “authorities where the Minister has a role in providing direction”, and “will not be appropriate” where the Minister has no such role (e.g. the Auditor-General, which “has been established with statutory independence reporting directly to the Parliament and... not subject to direction by a Minister”).¹ Land councils established under the Land Rights Act fall within this exception.

Secondly, the draft report is deficient because it fails to properly analyse and appreciate the structure, functions, governance and existing practice of the NLC, including in light of statutory requirements, duty statements and legal ethics, and including given that the Full Council, Executive Council, and CEO already broadly perform the functions specified in the recommendation.

Thirdly, this recommendation is deficient in that it reflects adverse finding of facts in the draft audit report which are seriously flawed and have no basis in fact or law.

These serious deficiencies have arisen because the audit was not competently conducted, and that the auditors were biased due to preconceived views and/or due to incorrect information provided by other sources or the media.

Specifically, in relation to the Full Council, its meetings already focus on setting the direction of the NLC, approving the strategic plan, and approving major policies. The Land Rights Act, however, also imposes other functions of an operational and representational character. The NLC does not accept that limitations should be placed on the powers and ultimate authority of the Full Council. It is the representative character and functions of the Full Council, including its capacity to make decisions, which is the NLC's true strength.

The NLC commenced a structural review last year, well before the events of 21 February 2008. The Executive Council's prompt and proper response regarding those events proves that the current delegations operate effectively. Nonetheless, as part of the review, matters such as delegations and an annual performance assessment for the CEO may be appropriately considered.

In relation to the Executive Council, the NLC does not accept that it should be established as a Board with only the limited functions referred to in the recommendation. The CEO employment contract includes an annual review of performance clause.

Recommendations

In relation to administration, the NLC does not accept that the extensive powers suggested in the recommendation should be delegated or vested in the CEO position. The improper events which occurred on 21 February 2008 prove that such a course is inappropriate and unjustifiable. The omission of the draft report to recognise this fact, or the importance that the Executive Council and the Chairman retain the power to supervise and direct the CEO, is a fundamental flaw in the draft report.

¹ Uhrig Report, p 8.

Recommendation No. 4

OEA recommends that the NLC and the Minister for Families, Housing, Community Services and Indigenous Affairs agree to jointly appoint an independent person with general management, financial and corporate board expertise to the Executive Council as an independent director to strengthen its capacity to supervise the Administration. Legislative amendment would be required.

NLC's Response

Not accepted.

This recommendation is deficient in that it reflects the draft audit report's adverse findings of fact which are seriously flawed and have no basis in fact or law.

The draft report is also deficient because it fails to properly analyse and appreciate the structure, functions, governance and practice of the NLC (which has always included advice from outside of the organisation, including from independent persons appointed to the audit committee), particularly in relation to its representational character.

These serious deficiencies have arisen because the audit was not competently conducted, and that the auditors were biased due to preconceived views and/or due to incorrect information provided by other sources or the media.

Recommendations

Recommendation No. 5

OEA recommends that the NLC increase the focus given to the effective delivery of training to elected members, possibly through independent and professional delivery of the current governance training package over a longer period.

NLC's Response

Accepted.

The manner in which training and services to Executive Council and Full Council members will be improved is being considered as part of the structural review.

It should be noted in the draft report that the previous governance training for the Executive Council was developed and delivered by a private company.

Recommendation No. 6

OEA recommends that the Executive Council increase the number of meetings to between six and eight per year, including engagement with relevant senior managers on issues relating to their area of responsibility and two standing items:

- financial performance against budget
- progress against corporate and operational objectives and targets.

NLC's Response

Accepted.

This recommendation has been implemented.

Recommendations

Recommendation No. 7.

In addition to Recommendation No. 1, OEA recommends that the NLC CEO undertake a structural review of the SMG and branch structure and report to the Executive Council on how he intends to reform the group in terms of role, accountability and authority. This would include a review of the current responsibilities of all SMG officers so as to, if necessary, align them with their new roles, authority and responsibilities.

This review should also consider the:

- need for a position of DCEO and what expertise this position should have, if needed
- authority, role (including duty statement) and reporting line of the PLO
- relationship and perceived importance of the Legal and Anthropology Branches in comparison to the other NLC branches.

NLC's Response

Accepted in part.

The NLC commenced a structural review last year,¹ well before the events of 21 February 2008 and before its Full Council meeting in November 2007. As part of the review, matters such as the deputy CEO position, branch structure, and role of all managers is being considered.

The rationale put in the recommendation to justify a structural review is not accepted. That rationale is based on adverse findings of fact in the draft report which are seriously flawed and have no basis in fact or law.

This serious deficiency has arisen because the audit was not competently conducted, and that the auditors were biased due to preconceived views and/or due to incorrect information provided by other sources or the media.

The draft report is also deficient because it fails to properly analyse and appreciate the structure, functions and governance of the NLC, including in light of statutory requirements and legal ethics.

¹ *The NLC's review did not arise from serious governance problems, but reflected (inter alia) the importance of improving efficiencies and also better aligning the branch structure in relation to output groups including given the expansion of the Caring for Country and Jobs and Careers Service programmes.*

Recommendations

Recommendation No. 8

OEA recommends that, given it is eight years since they were last considered, there should be a full review of the delegations which should consider, consistent with Recommendation 3:

- the respective roles and authority of the Full Council and the Executive Council
- the role and authority of the Chairman outside the formal operation of the Executive Council
- the delegation to the CEO of all staffing and operational matters
- the elected members' role in the selection and monitoring of the CEO position.

NLC's Response

Accepted in part.

The NLC commenced a structural review last year, well before the events of 21 February 2008. As part of the review, the current delegations is being considered, and Executive Council monitoring of the CEO has been implemented. However the starting point for this consideration is the fact that the prompt and proper response of the Executive Council and the Chairman to the events of 21 February 2008 proved that the current delegations operate effectively.

The rationale put in the recommendation to justify a structural review, including its reference to recommendation 3, is not accepted. That rationale is based on adverse findings of fact in the draft report which are seriously flawed and have no basis in fact or law.

This serious deficiency has arisen because the audit was not competently conducted, and that the auditors were biased due to preconceived views and/or due to incorrect information provided by other sources or the media.

The draft report is also deficient because it fails to properly analyse and appreciate the structure, functions and governance of the NLC, including in light of statutory requirements and legal ethics.

Recommendations

Recommendation No. 9

OEA recommends that the NLC review the staff performance management process to ensure it meets the contemporary needs of the organisation, including ensuring that performance assessment of all relevant staff is undertaken at least annually. Further, the CEO should consider using the services of an external HR professional to assist in the annual performance assessment of SMG members.

NLC's Response

Accepted in part.

The NLC will review the staff performance management process as part of its structural review, but until that process is finished cannot commit to particular methods of achieving outcomes as suggested in the recommendation.

It should be noted in the draft report that the interim CEO, [name deleted] conducted an independent review in relation to the human resources section.

Recommendation No. 10

OEA recommends that the NLC review the procedures for probation and ensure that they are consistently applied.

NLC's Response

Accepted.

The NLC will review the procedures for probation to ensure that probation is not waived or backdated unless exceptional or justificatory circumstances apply, and to ensure that probationary procedures are consistently applied.

Recommendation No. 11

OEA recommends that the Executive Council and SMG consider the perceptions that external stakeholders hold of the NLC, as noted in the report, and consider how they might address them through regular and serious contact at a senior level. The NLC should commission its own independent survey of its stakeholders to further explore these perceptions.

Recommendations

NLC's Response

Accepted in part.

The NLC is naturally always prepared to address perceptions held – or claimed to be held – by external stakeholders, and indeed has always actively sought to do so. Such perceptions have not prevented regular and serious contact at a senior level.

The existence of perceptions, given the NLC's functions, is of itself not surprising. In 1983 the Aboriginal Affairs Minister, Clyde Holding, received a list of complaints which he forwarded to the NLC. Subsequently the Minister accepted that these were a "series of complaints which I think one could almost expect, in respect of a body like the NLC, which has to cover such a large area and such wide and diverse interests of Aboriginal people.

"The Minister added¹

"Given the tremendous responsibilities they [i.e. the NLC] have it is inevitable one will get some complaints."

The starting point for any assessment of external perceptions must be this observation by the Minister in 1983. The draft report accords no recognition to it. The report's omission to do so is a significant deficiency.

The NLC does not accept that any review or survey, properly conducted, would find that external stakeholders held concerns, or validly held concerns, regarding working with the NLC (and if such concerns exist, they should be particularised so that a detailed rebuttal may be provided). To the contrary there are many examples of a close and cooperative relationship between governments and the NLC, for example in relation to resolving practical issues relating to the Blue Mud Bay case, the Alice Springs to Darwin Railway, the Bonaparte gas pipeline, leasing for housing in Aboriginal communities, the comprehensive national park negotiations, and minerals exploration. The NLC considers that the said concerns held by some persons or stakeholders, properly investigated, will in fact relate to differing and conflicting positions legitimately held regarding matters of public interest or where traditional owners exercise their right to reject development proposals regarding their country.

*There are also many persons and stakeholders who hold positive views of working with the NLC, a fact confirmed by stakeholder surveys in relation to the NLC's Caring for Country and Jobs and Careers Service programmes. These surveys were conducted in accordance with evaluation methodology, unlike the auditors who applied no methodology when recording perceptions. The auditors did not interview persons who are positive of the NLC, and indeed only – and apparently selectively – interviewed a small number of persons being persons known to be negative towards the NLC (particularly from parts of the NT bureaucracy, but not from resources, private industry, or the conservative side of politics), including persons evidently identified by reference to the text *Beyond Humbug* which was authored by Michael Dillon and Neil Westbury.*

¹ Land Rights News No 33, 1983, Lake Bennett – Drained, p 11.

