

# **Governance of the Tiwi Land Council**

Tiwi Land Council

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Canberra ACT  
24 May 2023

Dear President  
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Tiwi Land Council. The report is titled *Governance of the Tiwi Land Council*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink that reads 'Grant Hehir'.

Grant Hehir  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## **AUDITING FOR AUSTRALIA**

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# Contents

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Summary and recommendations.....	7
Background .....	7
Conclusion .....	8
Supporting findings.....	8
Recommendations.....	10
Summary of entity response.....	14
<b>Audit findings.....</b>	<b>15</b>
1. Background .....	16
Introduction.....	16
About the Tiwi Land Council.....	21
Rationale for undertaking the audit .....	23
Audit approach .....	24
2. Exercise of decision-making authority.....	25
Has the Land Council appropriately delegated its functions and powers under the ALRA?.....	26
Has the accountable authority appropriately delegated its functions and powers under the PGPA Act? .....	28
3. Governance under the Aboriginal Land Rights (Northern Territory) Act 1976.....	31
Has the Land Council established and implemented appropriate governance arrangements to manage its operations? .....	32
Has the Land Council established and implemented appropriate governance arrangements to exercise its key legislative functions? .....	43
4. Arrangements to promote the proper use and management of resources .....	51
Has the Land Council established a system of risk oversight and management and a policy framework that are appropriate? .....	51
Are there appropriate arrangements to support the integrity of land council operations? .....	56
Are the corporate plan and annual report consistent with legislative requirements?.....	61
Do the Audit Committee and internal audit function provide adequate oversight and scrutiny of the Land Council's operations?.....	64
<b>Appendices .....</b>	<b>69</b>
Appendix 1     Entity responses .....	70
Appendix 2     Improvements observed by the ANAO .....	73
Appendix 3     Powers, functions and duties of the Land Councils.....	75
Appendix 4     Decision-making authority.....	77
Appendix 5     Delegation of ALRA powers and functions .....	80
Appendix 6     Requirements for governance arrangements .....	81
Appendix 7     Tiwi Land Council compliance with the Commonwealth fraud rule .....	83
Appendix 8     Tiwi Land Council compliance with corporate plan, annual report and performance statements requirements .....	84
Appendix 9     Tiwi Land Council compliance with Audit Committee requirements and guidance .....	87



# Audit snapshot

## Auditor-General Report No.25 2022–23

*Governance of the Tiwi Land Council*



### Why did we do this audit?

- ▶ This audit is part of a series of audits of the governance of the Northern Territory (NT) Land Councils. It was conducted to provide independent assurance to Parliament that the Land Councils' governance arrangements are effective in meeting legislative obligations.
- ▶ Land Councils play an important role in securing rights and realising benefits for Aboriginal constituents. Many stakeholders rely on the efficient and effective operation of the Land Councils.



### What did we find?

- ▶ The Tiwi Land Council's (TLC) governance arrangements under the ALRA and the PGPA Act are partly effective.
- ▶ There are instruments of delegation under the ALRA, however there is a lack of clarity as to whether the accountable authority can delegate.
- ▶ The TLC's governance arrangements under the ALRA are partly effective.
- ▶ The TLC's arrangements to promote the proper use and management of resources under the PGPA Act are largely inappropriate.



### Key facts

- ▶ The Tiwi Land Council (TLC) was established under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA).
- ▶ The TLC is also a corporate Commonwealth entity under the Public Governance, Performance and Accountability Act 2013 (PGPA Act).
- ▶ The TLC's jurisdiction covers the Tiwi Islands.
- ▶ The Council is comprised of 32 members from eight clans.



### What did we recommend?

- ▶ There were 13 recommendations to the TLC, one aimed at documenting governance arrangements; six aimed at improving governance arrangements under the ALRA; and six aimed at improving governance arrangements under the PGPA Act.
- ▶ There was also one recommendation to the National Australians Indigenous Agency (NIAA) to clarify the NT Land Council accountable authority's ability to delegate.
- ▶ The TLC and the NIAA agreed to the recommendations.

2030

Aboriginal and Torres Strait Islander population of the Tiwi Islands at the 2021 census.

\$4.3m

Received by the TLC from Aboriginals Benefit Account for operations in 2021–22.

\$5.9m

Land use and other payments distributed to Traditional Owners and Aboriginal corporations in 2021–22.

# Summary and recommendations

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## Background

1. Four Northern Territory (NT) Land Councils are established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to represent the interests of Aboriginal people within their respective regions and assist them with the management of Aboriginal land. The four NT Land Councils are corporate Commonwealth entities and must comply with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule).
2. The *Native Title Act 1993* (NTA) provides for the Land Councils' responsibilities as native title representative bodies. The NTA provides a mechanism for the recognition of the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs.
3. The Tiwi Land Council (TLC) was established in 1978 to represent the Aboriginal people of the Tiwi Islands, which includes Melville and Bathurst Islands. The Council has 32 members comprised of four representatives from each of the eight clans or 'Country' groups of the Tiwi Islands. In 2021–22, the TLC received \$4.3 million from the Aboriginals Benefit Account for its operations and approximately \$1.3 million from land use rents, royalties and access permits.

## Rationale for undertaking the audit

4. This performance audit is part of a series of audits of the governance of the NT Land Councils. It was conducted to provide independent assurance to Parliament that the Land Councils' governance arrangements are effective in meeting legislative obligations under the ALRA, the NTA and the PGPA Act.
5. Land Councils play an important role in securing rights and realising benefits for Aboriginal constituents. Many external stakeholders, including government entities, non-government organisations, and Indigenous and non-Indigenous businesses, rely on the efficient and effective operation of the Land Councils.

## Audit objective and criteria

6. The objective of the audit was to assess the effectiveness of the governance of the Tiwi Land Council under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Public Governance, Performance and Accountability Act 2013*.
7. To form a conclusion against this objective, the following high-level criteria were applied.
  - Has the TLC appropriately exercised its decision-making authority under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Public Governance, Performance and Accountability Act 2013*?
  - Is the TLC effectively governing its legislative functions under the *Aboriginal Land Rights (Northern Territory) Act 1976*?
  - Has the TLC established appropriate arrangements to promote the proper use and management of resources?

## Conclusion

8. The Tiwi Land Council's governance arrangements under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Public Governance, Performance and Accountability Act 2013* are partly effective.

9. Land Council decision-making authority is exercised under multiple pieces of legislation. The delegation of functions and powers under this legislative framework is complex. While the TLC has instruments of delegation for functions and powers under the ALRA, a lack of specificity raises questions over whether financial functions and powers belonging to the TLC accountable authority under the PGPA Act have been validly delegated by the Council. Greater clarity is required for the NT Land Councils in relation to how accountable authority delegations are meant to be implemented under the two Acts.

10. The TLC's governance of its legislative functions under the ALRA is partly effective. Governance arrangements to manage operations are deficient with respect to appointments, meetings and training. The governance arrangements to support the exercise of the TLC's key legislative functions are not fully fit for purpose. Since September 2022 the TLC has commenced addressing some of these deficiencies.

11. The TLC's arrangements to promote the proper use and management of resources are largely inappropriate. The TLC's policy framework and arrangements for risk management, fraud control and managing conflicts of interest are incomplete, not appropriately established, and inconsistently implemented. The TLC's corporate plan and annual report, including performance statements, are not fully consistent with legislative requirements. The TLC's Audit Committee, while properly established, is not effective in the delivery of some of its mandatory functions.

## Supporting findings

### Exercise of decision-making authority

12. The TLC has delegation instruments for powers and functions that belong to the Council under the ALRA. Greater specificity in the delegation instruments in relation to the functions and powers that are being delegated would improve the instruments and provide greater clarity to delegates. (See paragraphs 2.5 to 2.15)

13. A financial delegation instrument made in 2021 by the Council may invalidly attempt to delegate powers and functions that belong to the TLC accountable authority under the PGPA Act. A lack of specificity with regard to legislative sections in the delegation instrument makes this difficult to determine. There is no governance document regarding how the CEO and Chair of the TLC (the joint accountable authority) expect to manage their joint responsibilities. There is also a lack of clarity as to whether the accountable authority of the TLC has any power to delegate under the PGPA Act and ALRA. (See paragraphs 2.16 to 2.28)

### Governance under the *Aboriginal Land Rights (Northern Territory) Act 1976*

14. The TLC's arrangements to manage its operations are partly appropriate. An approved method of choice is followed, however Ministers have raised concerns about the way in which Trust members appointed Council members and the lack of female representation. The Minister for Indigenous Australians has requested a revised method for her approval. There is no handbook

outlining, or induction into, the roles and responsibilities of Council, Trust or Management Committee members, and ongoing training is limited. The 2018 recruitment of the previous CEO (who was dismissed by the Council in July 2022) was not competitive and his performance was not reviewed as required. There are approved meeting rules, which are largely followed, however their implementation does not fully support informed decision-making. Registers of Council members, Trust members and Traditional Owners are established. (See paragraphs 3.4 to 3.43)

15. The ANAO assessed the TLC governance arrangements for the key legislative functions.

- Negotiating land use and access — The TLC has procedures to negotiate and monitor section 19 agreements and permits, however these are not robust or complete.
- Assisting with commercial and other activities — Arrangements to perform this function were largely undeveloped, however there have been developments in governance arrangements since June 2021. The TLC's function to provide assistance with the protection of sacred sites has been operational primarily since early 2020 and has been appropriate.
- Consulting with Aboriginal people and obtaining consent — Although the TLC holds clan meetings, the minutes do not set out how consent was achieved. There are no procedures to guide the systematic establishment of consent. Improvements were made to the consultation process in November 2022. The TLC does not have a process for dispute or complaint resolution.
- Distributing royalties and payments — Most funds are distributed through an Aboriginal corporation, Tiwi Resources. The TLC has documented processes for distribution based on Council resolutions, however it does not seek assurance that Tiwi Resources has distributed the funds in accordance with these resolutions. (See paragraphs 3.1 to 3.77)

### **Arrangements to promote the proper use and management of resources**

16. While there is a risk management policy, the risk register is not complete or up to date. In terms of the policy framework, some essential policies do not exist. Of those that exist, several need to be improved and all need to be appropriately authorised. There is a lack of training on policies. The TLC has commenced a program of improvement of its policy framework. (See paragraphs 4.2 to 4.15)

17. The TLC does not have effective arrangements to support the integrity of its operations. The TLC is not compliant with the Commonwealth fraud rule. There are no regular fraud risk assessments, there is a lack of fraud training for staff, and there is no mechanism for reporting of incidents of fraud or suspected fraud. The TLC's management of conflicts of interest is ineffective. There is no register of interests for senior employees. A register of pecuniary interests required under the ALRA is not used by all Council members, and there is no management plan for declared pecuniary interests. Conflict of interest management during meetings, as recorded in minutes, is inconsistent. (See paragraphs 4.17 to 4.35)

18. The TLC 2021–2025 Corporate Plan complied with most of the PGPA Rule requirements. The primary weakness was in performance measures and targets, which were not clearly defined and were too focused on activities at the expense of outputs and outcomes. This impedes understanding of the TLC's performance against its key purposes. The draft 2021–22 Annual Report was untimely and was in draft form at March 2023. Council members and the accountable

authority were not substantively involved in the development of the Corporate Plan and Annual Report. There is a lack of assurance over performance reporting. (See paragraphs 4.37 to 4.46)

19. The TLC does not have an internal audit function. The TLC has established an Audit Committee which does not execute its mandatory functions effectively. The Audit Committee does not appropriately review the TLC's performance reporting; system of risk oversight and management; and system of internal control. The Audit Committee's mandatory reporting requirements were partly met. (See paragraphs 4.48 to 4.58)

## Recommendations

**Recommendation no. 1** The Tiwi Land Council establish a governance document setting out:  
**Paragraph 2.20**

- (a) how the accountable authority (that is, the CEO and Chair) intends to operate, with specific reference to those decisions which require joint authority, and those which can be made independently by one or the other party; and
- (b) the role of the accountable authority under the PGPA Act and the role of the Council under the ALRA.

**Tiwi Land Council:** *Agreed.*

**Recommendation no. 2** The National Indigenous Australians Agency, in consultation with relevant stakeholders, clarify the conditions and requirements under which a Land Council accountable authority may delegate its functions and powers.  
**Paragraph 2.23**

**National Indigenous Australians Agency:** *Agreed.*

**Recommendation no. 3** The Tiwi Land Council:  
**Paragraph 3.23**

- (a) develops a handbook or manual documenting the functions, roles and responsibilities of Council, Management Committee and Trust members, including the Council Chair and Deputy Chair; and
- (b) provides initial and regular refresher training to members of the Council and the Tiwi Aboriginal Land Trust about their roles and responsibilities.

**Tiwi Land Council:** *Agreed.*

**Recommendation no. 4** The Tiwi Land Council:  
**Paragraph 3.28**

- (a) implement its recruitment policy for all new appointments, including when recruiting a permanent CEO; and
- (b) establish performance plans for all its staff, including the CEO, and monitor and review performance against that plan periodically.

**Tiwi Land Council:** *Agreed.*

- Recommendation no. 5**  
**Paragraph 3.33**
- The Tiwi Land Council:
- (a) implement the ALRA requirement to provide the Management Committee meeting rules to the Minister for Indigenous Australians; and
  - (b) increase the accessibility of the Council and Management Committee meeting rules and minutes (which could include the use of the TLC website, newsletter, radio and social media platforms to promote how the rules and minutes can be accessed).

**Tiwi Land Council: *Agreed.***

- Recommendation no. 6**  
**Paragraph 3.38**
- The Tiwi Land Council:
- (a) review key governance documents in accordance with meeting rules; and
  - (b) implement meeting rules aimed at facilitating member understanding of matters discussed.

**Tiwi Land Council: *Agreed.***

- Recommendation no. 7**  
**Paragraph 3.55**
- The Tiwi Land Council:
- (a) develop an implementation plan to address the deficiencies in the management of section 19 agreements and permits that were identified in the 2020 and 2022 reviews; and
  - (b) monitor section 19 agreements to detect and address any non-compliance with agreement conditions, including non-financial conditions.

**Tiwi Land Council: *Agreed.***

- Recommendation no. 8**  
**Paragraph 3.77**
- The Tiwi Land Council improve the processes supporting the distribution of payments by seeking evidence from Tiwi Resources to demonstrate that all payments that are processed by Tiwi Resources have been made in accordance with the Council resolution.

**Tiwi Land Council: *Agreed.***

**Recommendation no. 9**  
**Paragraph 4.7**

The Tiwi Land Council:

- (a) update and periodically review the risk management policy and ensure that it is aligned with the *Commonwealth Risk Management Policy*, by including risk appetite, and risk monitoring and reporting arrangements;
- (b) update and periodically review the enterprise risk register; and
- (c) ensure that the enterprise risk register considers risk ownership, controls, and risk tolerance; and includes mitigations for risks that are considered outside of tolerance.

**Tiwi Land Council: Agreed.**

**Recommendation no. 10**  
**Paragraph 4.15**

The Tiwi Land Council:

- (a) develop and implement a framework for the development, approval and ownership of its policies;
- (b) provide mandatory and role-related training for Council members and staff to ensure that policies are appropriately understood; and
- (c) include in the policy framework consideration of how compliance with mandatory and role-related training will be monitored.

**Tiwi Land Council: Agreed.**

**Recommendation no. 11**  
**Paragraph 4.21**

The Tiwi Land Council:

- (a) produce a fraud control framework that is aligned to the Commonwealth fraud rule;
- (b) conduct fraud risk assessments regularly;
- (c) implement mechanisms to prevent and detect fraud that are proportionate to identified fraud risks;
- (d) implement mechanisms to record and report fraud to the Audit Committee; and
- (e) ensure that the fraud control system is reviewed and endorsed by the Audit Committee.

**Tiwi Land Council: Agreed.**

**Recommendation no. 12** The Tiwi Land Council:

**Paragraph 4.35**

- (a) consistently apply its requirement for a declaration of pecuniary interests and monitor non-compliance;
- (b) develop documented management plans for declared conflicts of pecuniary interests;
- (c) strengthen management and recording of conflicts during Council and Management Committee meetings; and
- (d) include, in governance training and guidance, material on the management of conflict of interest.

**Tiwi Land Council:** *Agreed.*

**Recommendation no. 13** The Tiwi Land Council improve the processes to develop its corporate plan, annual report and performance statements to ensure that:

**Paragraph 4.46**

- (a) the corporate plan is compliant with legislative requirements;
- (b) Council members and the accountable authority consider and approve the content;
- (c) performance measures and targets are clearly defined and provide meaningful information about the TLC's performance against its key purposes or activities; and
- (d) a process exists to provide assurance over the completeness and accuracy of the performance results published in annual reports.

**Tiwi Land Council:** *Agreed.*

**Recommendation no. 14** The accountable authority of the Tiwi Land Council ensure that it establishes an Audit Committee that executes the requirements of the Audit Committee Charter.

**Paragraph 4.58**

**Tiwi Land Council:** *Agreed.*

## Summary of entity response

20. The TLC's summary response is provided below and its full response is included at Appendix 1. An extract of the draft report was also provided to the National Indigenous Australians Agency (NIAA). The NIAA's response can be found at Appendix 1. The improvements observed by the ANAO during the course of this audit are at Appendix 2.

### **Tiwi Land Council**

The Tiwi Land Council has engaged with the ANAO throughout the period of the review and has considered the findings including the thirteen recommendations. The TLC takes from this report the desirability of strengthening its governance, revising policy and introducing new policies and procedures as appropriate. The TLC accepts the recommendations and has commenced their implementation. The TLC is particularly committed to member and staff training in all aspects of its governance particularly in the areas of risk management, HR process and agreement making and monitoring. This includes substantial reform in a number of areas. The TLC has sought and engaged appropriate new staff positions and external expertise and advice to undertake, complete and continue, where ongoing, this work.

# Audit findings

# 1. Background

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## Introduction

1.1 Four Northern Territory (NT) Land Councils are established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to represent the interests of Aboriginal people within their respective regions and assist them with the management of Aboriginal land: the Tiwi Land Council (TLC), the Central Land Council (CLC), the Northern Land Council (NLC) and the Anindilyakwa Land Council (ALC).

## Legislative framework

1.2 In addition to the ALRA, the NT Land Councils operate under two key legislative frameworks:

- the *Native Title Act 1993* (NTA), which provides for the Land Councils' responsibilities as Native Title Representative Bodies; and
- the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule), which set the Land Councils' requirements as corporate Commonwealth entities.<sup>1</sup>

## *Aboriginal Land Rights (Northern Territory) Act 1976*

1.3 The ALRA was the first legislation in Australia that enabled Aboriginal and Torres Strait Islander people to claim land rights for Country where traditional ownership could be proven. The ALRA recognises Aboriginal people's spiritual affiliation and traditional responsibility for Country as the basis for ownership of land.

1.4 The Aboriginal Land Commissioner undertakes inquiries into traditional land claims in the NT.<sup>2</sup> Upon the Aboriginal Land Commissioner's satisfaction that the Traditional Owners<sup>3</sup> have been correctly identified according to Aboriginal law, he or she provides a report to the Commonwealth minister responsible for the administration of the ALRA and the Administrator of the NT.<sup>4</sup> The Commonwealth minister decides whether to recommend to the Governor-General of Australia to grant all or part of the land under claim.

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1 The NT Land Councils also have functions under other legislation, including the: *Aboriginal Land Act* (NT); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Mining Management Act 2015* (NT), *Mineral Titles Act 2016* (NT); and *Territory Parks and Wildlife Conservation Act 2006* (NT).

2 In April 2022 the Minister for Indigenous Australians requested that the Aboriginal Land Commissioner commence a review into Part V (Aboriginal Land Commissioners) and other relevant provisions of the ALRA. The report from the review, including recommendations, should be provided to the Minister no later than 30 June 2023.

3 The ALRA defines Traditional Owners as 'a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land (...); and (b) who are entitled by Aboriginal tradition to forage as of right over that land'.

4 As at March 2023 the Commonwealth minister responsible for the administration of the ALRA was the Minister for Indigenous Australians. The Administrator of the NT represents the Crown in the NT. Their role is essentially the same as state governors across Australia.

1.5 Once land has been granted, it is held by a Land Trust<sup>5</sup>, and Traditional Owners manage their land with the help of their Land Council. Aboriginal land is a form of ‘inalienable’ freehold, which means it cannot be bought or sold, and Traditional Owners of the land have the right of exclusive access and the power to veto proposals to access or use land. As at 2016 Aboriginal people held freehold title to approximately 50 per cent of the NT land mass and 85 per cent of its coastline.<sup>6</sup>

### *Native Title Act 1993*

1.6 Determinations of native title recognise the ongoing connection of Aboriginal and Torres Strait Islander peoples to specific areas of land and waters. Successful claims under the NTA give Aboriginal and Torres Strait Islander peoples a collection of rights, which may include exclusive possession or such rights as the right to camp, hunt, use water, hold meetings, perform ceremony and protect cultural sites.<sup>7</sup> As at 2016 native title had been recognised over 238,120 square kilometres (17 per cent) of land and waters in the NT.<sup>8</sup>

1.7 Under the ALRA, land rights usually comprise a grant of freehold title to Aboriginal peoples. By contrast, native title arises as a result of recognition, under Australian common law, of pre-existing Indigenous rights and interests according to traditional laws and customs. It does not provide for a process to grant ownership of the land as the ALRA does.<sup>9</sup>

### *Public Governance, Performance and Accountability Act 2013*

1.8 The four NT Land Councils are corporate Commonwealth entities<sup>10</sup> and as such also must comply with the requirements of the PGPA Act and Rule. The four NT Land Councils are also registered as charities with the Australian Charities and Not-for-profits Commission (ACNC).<sup>11</sup>

## **Governance structures under the ALRA and NTA**

### *Northern Territory Land Councils*

1.9 The CLC and NLC were established in 1973 as part of the Australian Government’s Aboriginal Land Rights Commission (Woodward Royal Commission) to inquire into the appropriate way to

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5 Aboriginal land trusts are established by the Minister for Indigenous Australians under the ALRA to hold title and exercise their powers as owners of the land for the benefit of Aboriginal people. Land trusts must exercise their functions in accordance with the directions given by the Land Council for the area in which the land is situated.

6 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Native Title Information Handbook Northern Territory 2016*, p. 3. Schedule 1 of the ALRA defines the land that has been recognised as Aboriginal freehold.

7 Native title rights can also include commercial rights and making decisions in relation to the management or development of the land. Native title may be claimed in areas such as Crown land, parks, land held by government agencies, some leases and waters that are not privately owned.

8 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Native Title Information Handbook Northern Territory 2016*, p. 3.

9 This form of native title is referred to as non-exclusive possession because others also have rights to the land. In some cases, native title rights may include possession of an area to the exclusion of all others. These are called exclusive possession native title rights which are valued like freehold title.

10 The ALRA established Land Councils as bodies corporate. With the introduction of the *Commonwealth Authorities and Companies Act 1997*, Land Councils became ‘Commonwealth authorities’ and were subject to financial statement audits by the Auditor-General for Australia.

11 Although the *Charities Act (Cth) 2013* subsection 5(d) states that a government entity cannot be a charity, the ACNC advised that the NT Land Councils do not meet the definition of a government entity for ACNC purposes.

recognise Aboriginal land rights in the NT. The function of the Land Councils at that time was to represent the views of Aboriginal people to the Woodward Royal Commission. The CLC and NLC are responsible for the southern and northern parts of the NT, respectively.

1.10 On 26 January 1977 the Woodward Royal Commission's recommendations were realised through the enactment of the ALRA, which established the CLC and NLC as independent statutory authorities with powers and responsibilities to assist Aboriginal people to acquire and manage their traditional land and seas. The ALRA also made provision for the establishment of other Land Councils in the NT. This led to the creation of the TLC in 1978 (representing the Aboriginal people of Bathurst and Melville Islands) and of the ALC in 1991 (representing the Aboriginal people of the Groote Archipelago).

1.11 The structure of the Land Councils consists of representatives chosen by Aboriginal people living in the region, referred to as 'members of the Council', and an administrative arm managed by a Chief Executive Officer (CEO), who is appointed by the Council. The accountable authority of the TLC is defined in the PGPA Rule (section 7A) as the group of persons made up of the Chair of the Land Council and the CEO of the Land Council.

1.12 The Aboriginals Benefit Account was established under the ALRA in 1976 and is the primary source of revenue for the Land Councils. Aboriginals Benefit Account distributions include funding for the administration of Land Councils, royalty payments for distribution to Traditional Owners, and grants to benefit Aboriginal people living in the NT.

### *Native Title Representative Bodies*

1.13 Once a native title determination is made, the NTA prescribes that native title holders must establish a prescribed body corporate<sup>12</sup> to manage and protect their native title rights and interests. Native Title Representative Bodies are organisations appointed under the NTA and funded by the National Indigenous Australians Agency (NIAA) to assist Indigenous people with all aspects of their native title claims, and in some cases the management of native title rights once a claim has been determined. There are 14 Native Title Representative Bodies in Australia, including two in the NT. The NLC is the Native Title Representative Body for the northern region, including the Tiwi Islands and Groote Archipelago, and the CLC represents those within the NT's southern region.

### *National Indigenous Australians Agency*

1.14 The NIAA was established as an executive agency in May 2019 to provide advice to and support the Minister for Indigenous Australians (the Minister), including in relation to Land Councils and the exercise of his or her powers under the ALRA and the NTA.<sup>13</sup> These functions were previously undertaken by the Department of the Prime Minister and Cabinet. The NIAA advised the ANAO that:

While [NIAA] is not involved in the daily operations of land councils, it does provide support where required, performance monitoring and some administrative oversight. A range of branches within the [NIAA] provide information and support on various issues, including land and native title

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12 This is a corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The CATSI Act provides for the ownership and control of corporate entities to be vested in groups of Aboriginal and Torres Strait Islander people.

13 Federal Register of Legislation, Order to establish the National Indigenous Australians Agency as an Executive Agency, 30 May 2019 [Internet], 2019, available from <https://www.legislation.gov.au/Details/C2019G00474> [accessed 14 December 2022].

programs, Indigenous Portfolio Bodies Section, environment and rangers programs, specific policy and program areas for grants activities, and finance teams.

1.15 Land Councils engage with the NIAA in relation to the administration of funds for operational and capital expenses (from the Aboriginals Benefit Account), land management programs and annual reporting obligations.

## Functions of the Land Councils

1.16 The Land Councils' key functions, under subsection 23(1) of the ALRA, are to:

- negotiate and enter into Aboriginal land use and access agreements with third parties on behalf of Traditional Owners and of other Aboriginal persons interested in the land;
- assist in carrying out commercial activities;
- assist with traditional land claims and the protection of sacred sites;
- consult with Aboriginal people in the Land Council area about the management of land, and protect their interests; and
- supervise, and provide administrative or other assistance for, Land Trusts in the area.

1.17 Section 35 prescribes how Land Councils must distribute the money received from Aboriginal land use and access.

1.18 The key functions of Native Title Representative Bodies are set out in section 203B of the NTA. They are: facilitation and assistance; certification; dispute resolution; notification; agreement making; and internal review. The powers and duties of Native Title Representative Bodies in respect of money received under the NTA arise from the general law and the terms of the relevant agreement.

1.19 The ALRA prescribes that, in carrying out its functions, a Land Council must not take any action unless it is satisfied that Traditional Owners understand the nature and purpose of the action and consent to it; and any Aboriginal group that may be affected by the proposed action has been consulted. The NTA prescribes that the Native Title Representative Body must consult with native title holders and for some of the functions, be satisfied that they consent to the course of action being taken on their behalf. Given that the vast majority of claims to land under the ALRA are settled as at March 2023<sup>14</sup>, facilitating the benefits that can be derived from land rights has been identified by the larger NT Land Councils as an increasing focus and priority.

1.20 A core objective of both the ALRA and the NTA is to establish and support land rights of Traditional Owners (under the ALRA) and native title holders (under the NTA). Land Councils are required to have the capability to confirm the identity and traditional connection of specific individuals to particular areas of land. To this end, Land Councils may collect anthropological data and engage specialist expertise.

1.21 Appendix 3 provides more detail on the Land Councils' powers, functions and duties under the ALRA, the NTA and the PGPA Act.

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14 A 1987 amendment to the ALRA prevents the Aboriginal Land Commissioner from dealing with claims lodged after 5 June 1997 (*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) subsection 67A(6)). As at March 2023, two land claims remained unresolved in the area of the CLC and 32 in the area of the NLC. There are no unresolved claims in the area of the ALC and TLC.

## Land use and access arrangements

1.22 The main types of arrangements for land use and access under the ALRA and NTA, and how the monies received from these arrangements are distributed, are shown Table 1.1.

**Table 1.1: Land use and access arrangements**

Land use and access arrangements	Description	Legislation	Selected provisions	Payment distribution
'Royalty equivalents'	Mining monies	ALRA	Subsection 64(3)	The monies take the form of royalties. Under the ALRA subsection 64(3), a defined amount of mining royalties must be debited from the Aboriginals Benefit Account from time to time and paid to Land Councils for distribution to Aboriginal corporations.
'Part IV agreements' <sup>a</sup>	Mining and exploration monies	ALRA	Part IV (sections 42, 43, 44, and 46)	The monies are specified in an agreement with the land use applicant. Payments are made to Aboriginal corporations, Traditional Owners or another entity as defined in an agreement that is established under Part IV of the ALRA.
'Section 19 (s19) agreements' <sup>a</sup>	Primarily non-mining and some mining related monies	ALRA	Sections 15, 16 and 19	The monies are specified in an agreement with the land use applicant. Payments are made to Aboriginal corporations, Traditional Owners or another entity, as defined in an agreement that is not established under Part IV of the ALRA.
'Township leases' <sup>b</sup>	Township lease monies	ALRA	Section 19A	The monies derive from township leases. Payments are made to Aboriginal corporations.
'Permits'	Enabling access to aboriginal land or roads	ALRA	Section 70	Fees are payable to and defined by the Land Council.
'Native title agreements' <sup>a</sup>	Any monies from land use for land subject to native title claim	NTA	Various	The monies are specified in an agreement with the land use applicant. Payments are made to native title holders.

Note a: Payment arrangements are made as per instructions from Traditional Owners and native title holders.

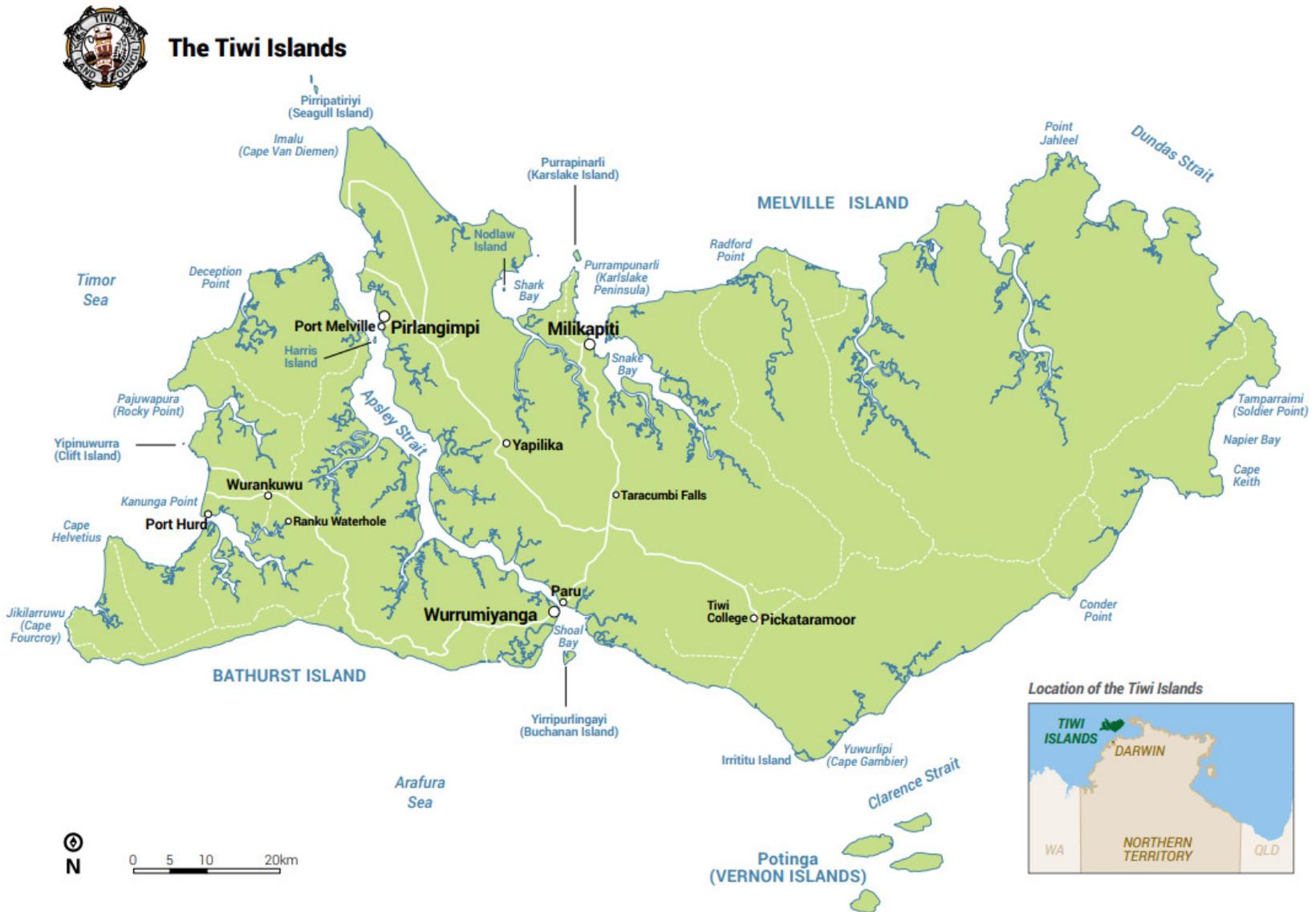
Note b: In this table, township leases are voluntary agreements between Traditional Owners and the Australian Government, established by the Executive Director of Township Leasing under ALRA section 19A. The Executive Director of Township Leasing manages the land in the township on behalf of the Traditional Owners and the community for up to 99 years, including sub-leases to business and governments and the protection of sacred sites. In the area of the TLC, the Executive Director of Township Leasing holds two Township Leases over the townships of Wurrumiyanga, Milikapiti and Wurankuwu.

Source: ANAO analysis.

## About the Tiwi Land Council

1.23 The TLC's jurisdiction covers the Tiwi Islands, which are located 80 kilometres north of Darwin in the Arafura Sea. The Tiwi Islands consist of two large, inhabited islands (Melville and Bathurst) and numerous smaller uninhabited islands. At the 2021 census, the population of the Tiwi Islands was 2348, including 2030 Aboriginal and/or Torres Strait Islander people. Three major communities are serviced by regular transport services operating from Darwin.

Figure 1.1: Map of the Tiwi Islands



Source: Tiwi Land Council.

1.24 The Council has 32 members comprised of four representatives from each of the eight clan or 'country' groups of the Tiwi Islands. There is one female member at December 2022. The Chair was appointed to the position in 2012 and, as at December 2022, was in his fourth three-year term. The Council elects an Executive Management Committee (Management Committee) from amongst its members, which is responsible for assessing and advising upon various land use and development proposals and which refers matters requiring decisions to the Council. The Management Committee has nine members (one representative from each clan and the Chair of the Council).

1.25 As at December 2022, 15 full time staff positions were funded (including that of the CEO), and 11 of these positions were filled. The TLC operates primarily from Darwin. In 2021–22 the TLC received \$4.3 million from the Aboriginals Benefit Account for its operations. In addition, the TLC received \$5.3 million under the NT Indigenous Economic Stimulus Package in 2021–22 and \$8 million in 2020–21.<sup>15</sup> It also received \$1.3 million from the Australian and NT governments for special projects, and \$1.3 million in income from rents and royalties to be distributed to Traditional Owners, Aboriginal corporations or other entities.

1.26 In November 2021 the Chair of the TLC Audit Committee engaged EY Australia to undertake a governance review of its operations. The final report (April 2022) found that:

- financial controls and governance practices needed improvement;
- key policies including relating to conflicts of interest, procurement, gifts and benefits and risk management did not exist;
- the TLC's method to elect Council members resulted in a Council that 'does not currently provide a proportionate representation of the interests of [those] living in the area of the TLC' as 'only 1 of 32 TLC members is female', that there were 'divergent views as to the cultural relevance and appropriateness of male dominated decision making' and that 'a number of traditional owners have indicated a preference for a democratic election process akin to that of the Central Land Council's method of choice'; and
- the TLC was at risk of not complying with its obligations under the ALRA and PGPA Act.

1.27 In May 2022 the Council decided to suspend the CEO on full pay and on 5 July 2022, the Council agreed to remove the CEO. An interim CEO took his position in August 2022 and an interim Business Manager was appointed in September 2022.

## Rationale for undertaking the audit

1.28 This performance audit is part of a series of audits of the governance of the NT Land Councils. It was conducted to provide independent assurance to Parliament that the Land Councils' governance arrangements are effective in meeting legislative obligations under the ALRA, the NTA and the PGPA Act.

1.29 Land Councils play an important role in securing rights and realising benefits for Aboriginal constituents. Many external stakeholders, including government entities, non-government

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<sup>15</sup> In total, \$100 million were allocated as part of the NT Indigenous Economic Stimulus Package to the four NT Land Councils, in two tranches. The CLC and NLC received \$36.7 million each and the ALC and TLC received \$13.3 million each.

organisations, and Indigenous and non-Indigenous businesses, rely on the efficient and effective operation of the Land Councils.

## Audit approach

### Audit objective, criteria and scope

1.30 The objective of the audit was to assess the effectiveness of the governance of the Tiwi Land Council under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Public Governance, Performance and Accountability Act 2013*.

1.31 To form a conclusion against this objective, the following high-level criteria were applied.

- Has the TLC appropriately exercised its decision-making authority under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Public Governance, Performance and Accountability Act 2013*?
- Is the TLC effectively governing its legislative functions under the *Aboriginal Land Rights (Northern Territory) Act 1976*?
- Has the TLC established appropriate arrangements to promote the proper use and management of resources?

### Audit methodology

1.32 The audit involved:

- reviewing legislation, regulations, policies and best practice standards;
- reviewing TLC documentation, including charters, meeting papers and minutes, policies and procedures, annual reports, corporate plans and correspondence;
- visits to the NT including Darwin and the Tiwi Islands;
- observing meetings of the Council, Management Committee, Audit Committee and clans;
- meetings with Council members and TLC staff;
- meetings with members of the Tiwi community, including the eight Tiwi clans;
- meetings with officers from relevant business areas within the:
  - Australian Government (including the NIAA, Office of Township Leasing and Office of the Registrar of Indigenous Corporations),
  - NT Government (including the Office of the Chief Minister and Cabinet; Department of Infrastructure, Planning and Logistics; and NT Electoral Commission),
  - NT local government; and
- nine meetings with and 12 submissions from businesses, Aboriginal corporations, members of the public, peak bodies and non-government organisations operating on the Tiwi Islands and NT mainland.

1.33 The audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of approximately \$547,300.

1.34 The team members for this audit were Dr Isabelle Favre, Eliza Glascott, Weinnie Zhou, Grace Sixsmith, Kai Swoboda, Sam Hayward, Graeme Corbett, Daniel Whyte and Christine Chalmers.

## 2. Exercise of decision-making authority

### Areas examined

This chapter examines the functions, powers and responsibilities of the Land Councils under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and whether these have been appropriately delegated for the Tiwi Land Council (TLC).

### Conclusion

Land Council decision-making authority is exercised under multiple pieces of legislation. The delegation of functions and powers under this legislative framework is complex. While the TLC has instruments of delegation for functions and powers under the ALRA, a lack of specificity raises questions over whether financial functions and powers belonging to the TLC accountable authority under the PGPA Act have been validly delegated by the Council. Greater clarity is required for the NT Land Councils in relation to how accountable authority delegations are meant to be implemented under the two Acts.

### Areas for improvement

The ANAO made one recommendation to the TLC to establish a governance document setting out how the accountable authority wishes to exercise its joint authority; and one recommendation to the Australian Government to clarify the conditions and requirements under which an NT Land Council accountable authority may delegate its functions and powers. The ANAO suggested to the TLC that it increases the specificity of its instruments of delegation; and amends the delegation given to the Chief Executive Officer (CEO) to employ and terminate staff.

2.1 Authorisations and delegations are a fundamental part of good governance. They play an important role in ensuring that the entity is acting in accordance with the legal framework that applies to it. An entity needs to put in place arrangements to devolve decision-making power from the ultimate repository of that power to the relevant officers of the entity, as the ultimate repository of that power cannot do everything.<sup>16</sup>

2.2 Appendix 4 shows how Land Council decision-makers are defined under the ALRA, *Native Title Act 1993* (NTA) and PGPA Act. Under the ALRA, the members of the Council, including an elected Chair and Deputy Chair, are the decision-makers. Under the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule), the accountable authority of the Land Council is defined as the Chair of the Council and the CEO. The former is to be elected by the Council and the latter is to be appointed by the Council under section 27 of the ALRA, which states that the Council may employ staff.

2.3 Whether the Council, Native Title Representative Body or accountable authority has decision-making authority depends upon the decision that is being made and whether that decision relates to powers and functions under the ALRA, NTA<sup>17</sup> or PGPA Act, respectively. Appendix 3 outlines the Councils', Native Title Representative Bodies' and accountable authorities' respective powers and functions under the ALRA, NTA and PGPA Act. In summary: the Land Council is the

16 Australian Government Solicitor, *Fact Sheet No 11: Corporate Commonwealth entities - authorisations and delegations*, AGS, 2014, p. 1.

17 The NTA is not relevant to the TLC's governance in that the TLC is not a Native Title Representative Body.

primary decision-maker in relation to the land; Native Title Representative Bodies have the power ‘to do all things necessary or convenient to be done for or in connection with the performance of its functions’; and the accountable authority is the primary decision-maker in relation to performance and proper use of resources under finance law.

2.4 Under the ALRA and PGPA Act, the Land Council and accountable authority’s functions are distinct except for the preparation of budget estimates (ALRA section 34 and PGPA Act section 36) and the preparation of the annual report (ALRA section 37 and PGPA Act section 46). Although functions are clearly distinct with these two exceptions, in practice powers and responsibilities may overlap.

## Has the Land Council appropriately delegated its functions and powers under the ALRA?

The TLC has delegation instruments for powers and functions that belong to the Council under the ALRA. Greater specificity in the delegation instruments in relation to the functions and powers that are being delegated would improve the instruments and provide greater clarity to delegates.

2.5 The Australian Government Solicitor has noted that when enabling legislation establishes a board or Council as having ultimate control over the operations of the entity, most commonly the enabling legislation prescribes the CEO or director as the officer responsible for the day-to-day management of the entity.<sup>18</sup> This may result in the CEO having ‘implied authority’, although the Australian Government Solicitor advises that even so it is generally better that decision-making power be expressly delegated.<sup>19</sup> The ALRA is silent on the role of the CEO (in both their capacity as a CEO and as one of the accountability authorities) or other officials, and an instrument of delegation for functions and powers under the ALRA is therefore required.

2.6 If there is a power to delegate, it will usually be found in the enabling legislation. Appendix 5 shows the ALRA provisions in relation to delegation of powers and functions from the Council to: the Chair of the Council; to committees of the Council; and to Land Council staff, including the CEO. These delegations must be made in writing under the Land Council’s common seal. The ANAO examined whether the decision-making authority as defined in the ALRA is properly exercised by the TLC through the Council’s delegation of ALRA powers and functions.

2.7 The *Performance Audit of the Northern Territory Land Councils*, conducted by Department of Finance’s Office of Evaluation and Audit<sup>20</sup> in 2008 concluded that the TLC did not have a clear instrument of delegation. The audit found that:

- the TLC had recorded the delegation of Council functions and powers through minuted decisions at full Council meetings;
- these minutes made broad ‘catch-all’ statements that did not specifically refer to sections of the ALRA;

18 Australian Government Solicitor, *Fact Sheet No 11: Corporate Commonwealth entities - authorisations and delegations*, AGS, 2014, p. 1.

19 *ibid*, p. 2.

20 In December 2009 the functions of the Office of Evaluation and Audit (Indigenous Programs) were transferred from the Department of Finance and Deregulation to the ANAO.

- staff needing to clarify whether they had delegated authority were referred to meeting minutes;
- this method of recording delegations lacked transparency and specificity, was inefficient, placed too great a burden on delegates to interpret the minutes, and was non-compliant with section 28 of the ALRA; and
- the management of delegations through multiple internal documents increased the risk of inaccuracy, inconsistency and inefficiency.

2.8 The 2008 audit recommended to the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)<sup>21</sup> that the TLC record in writing under the common seal of the Land Council the functions and powers delegated by the full Council to persons and committees<sup>22</sup>, and record the functions and powers retained by the full Council.<sup>23</sup>

2.9 Between 2008 and 2020, the TLC had no delegation instrument recorded in writing under the common seal of the Land Council. There was no explicit and clear delegation of powers and functions to Council committees or to the CEO or staff of the TLC as allowed for under section 28 of the ALRA. No written delegation had been made to the Chair or the Deputy Chair. The ANAO's analysis of Management Committee and Council meeting minutes identified multiple instances where the Management Committee made decisions without delegation during this period.

2.10 The TLC provided to the ANAO an undated delegation instrument under TLC common seal which described delegations made in May and December 2021.

- Delegations to Council committee — At a 21 May 2021 meeting the Council agreed to make certain delegations to the 'Council committee'. The delegations covered the power to negotiate leases and licenses of less than \$1 million under section 19 of the ALRA<sup>24</sup>; and to grant agreements, variations and permits.
- Delegations to TLC CEO and other staff — At the 21 May 2021 and a 16 December 2021 meeting, the Council approved and revised expenditure approval limits for the Chair, CEO, General Manager and eight other staff. It delegated to the Chief Financial Officer, Office Manager/Coordinator and Finance Manager the power to make payments in relation to taxes, superannuation, insurance and wages and salaries.

2.11 The delegations to the Council committee did not clearly specify to which committee of the Council the delegations were made; however, it is implied that it is the Management Committee as this is the only Council committee. The delegations appropriately covered functions and powers that are vested in the Council under the ALRA in relation to section 19 leases and licences. The delegation did not specify which legislative powers or functions are being devolved in relation to grants and permits, and this can create ambiguity.

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21 As a result of an Administrative Arrangements Order issued on 18 September 2013, the Department of Social Services was established and assumed most of the responsibilities of FaHCSIA; while indigenous affairs functions were assumed by the Department of the Prime Minister and Cabinet.

22 As at December 2022 the Management Committee was the only committee established under section 29A of the ALRA.

23 Department of Finance and Deregulation, *Performance Audit of the Northern Territory Land Councils*, 2008, Recommendation 11, available from [https://www.aph.gov.au/~media/Estimates/Live/fapa\\_ctte/estimates/add\\_0809/finance/answers/F56\\_attachment.ashx](https://www.aph.gov.au/~media/Estimates/Live/fapa_ctte/estimates/add_0809/finance/answers/F56_attachment.ashx) [accessed 3 March 2023].

24 Section 19 covers dealings with interests in land by Land Trusts.

2.12 The financial delegations to TLC CEO and other staff are discussed further at paragraph 2.17.

2.13 In a report to the Land Council in August 2022, the interim CEO (see paragraph 1.27) referred to recent reviews (which included the April 2022 EY governance review (see paragraph 1.26)) in seeking a resolution from the Council that would 'ensure that the CEO of the Tiwi Land Council has the powers required to fulfill his, or her, duties as CEO and Accountable Authority ... [and] protect the TLC ... by ensuring staff compliance with legal, financial and ethical requirements'. The interim CEO requested that the Council resolve that:

The Full Council of the Tiwi Land Council delegates to the CEO of the TLC, the power to employ (after receiving HR advice and recommendations) and terminate the employment of all staff of TLC (and to engage consultants) and to determine the terms and conditions of their employment and engagement.

2.14 The full Council passed this resolution on 31 August 2022, and an instrument of delegation was established under the TLC common seal on the same day. The delegation, while valid, could be improved in one respect. Given the CEO is appointed under Section 27 of the ALRA like any other staff member, the specific wording of the resolution would imply that the CEO has the power to determine the terms and conditions of his or her own employment.

#### Opportunity for improvement

- 2.15 The Tiwi Land Council could improve the instruments of delegation under the ALRA by:
- increasing specificity by referring to the legislative sections for powers and functions it delegates; and
  - amending the delegation given to the CEO to employ, determine employment terms and conditions of, and terminate staff to explicitly exclude the CEO position.

## Has the accountable authority appropriately delegated its functions and powers under the PGPA Act?

A financial delegation instrument made in 2021 by the Council may invalidly attempt to delegate powers and functions that belong to the TLC accountable authority under the PGPA Act. A lack of specificity with regard to legislative sections in the delegation instrument makes this difficult to determine. There is no governance document regarding how the CEO and Chair of the TLC (the joint accountable authority) expect to manage their joint responsibilities. There is also a lack of clarity as to whether the accountable authority of the TLC has any power to delegate under the PGPA Act and ALRA. The National Indigenous Australians Agency has not supported the TLC in establishing appropriate systems of delegations under the ALRA or the PGPA Act.

2.16 The TLC accountable authority has not established any Accountable Authority Instructions under section 20A of the PGPA Act, and there is no delegation or authorisation instrument relating to the TLC accountable authority's functions and powers.

2.17 The May and December 2021 instrument described in paragraph 2.10 made financial delegations. A lack of specificity in the instrument means that it is unclear whether the powers and functions that were delegated belong to the Council or to the TLC accountable authority. If the

financial delegations related to an accountable authority's powers and functions under the PGPA Act, the instrument is not validly made as the power to make and delegate these decisions rests with the accountable authority, and not with the Council.

2.18 The Department of Finance advised the ANAO in February 2023 that how the accountable authority is required to operate is a matter for the accountable authority to determine between themselves (noting that they are jointly responsible for fulfilling the duties and legal obligations under the PGPA Act) and that the PGPA Act provides flexibility to accountable authorities to establish systems of internal control most appropriate to their operating environment (noting that this must be consistent with the proper use and management of public resources).

2.19 It is usual practice for an accountable authority made up of multiple individuals, such as boards, to have an operational charter setting out how the accountable authority operates. The TLC does not have such a document.

### Recommendation no. 1

2.20 The Tiwi Land Council establish a governance document setting out:

- (a) how the accountable authority (that is, the CEO and Chair) intends to operate, with specific reference to those decisions which require joint authority, and those which can be made independently by one or the other party; and
- (b) the role of the accountable authority under the PGPA Act and the role of the Council under the ALRA.

**Tiwi Land Council response:** *Agreed.*

2.21 *The TLC will assign the necessary review work and compilation to a team consisting of the Principal Legal Officer (PLO), Project Officer (PO) and Human Resource (HR) Manager. External advice will be sought including from similar organisations and others as part of this process.*

2.22 The Finance Minister delegates some of his or her functions and powers to the accountable authority of an entity under section 107 of the PGPA Act. Section 110 of the PGPA Act indicates when an accountable authority may delegate to an official of a non-corporate Commonwealth entity. This provision does not apply to corporate Commonwealth entities, which are legally separate from the Commonwealth. In the case of corporate Commonwealth entities, the delegation requirements should be specified in the enabling legislation — in this case the ALRA. However, the ALRA is silent regarding delegations by the Land Council accountable authority as defined by the PGPA Act. It appears that the accountable authority of a Land Council is not able to delegate his or her functions and powers under existing legislation.

## Recommendation no. 2

2.23 The National Indigenous Australians Agency, in consultation with relevant stakeholders, clarify the conditions and requirements under which a Land Council accountable authority may delegate its functions and powers.

**National Indigenous Australians Agency: Agreed.**

2.24 *While noting the report is primarily a matter for the Tiwi Land Council, the National Indigenous Australians Agency (the Agency) agrees to Recommendation no. 2.*

2.25 *As part of the Agency's ongoing support to Northern Territory Land Councils, we will work with relevant stakeholders to clarify the conditions and requirements under which an accountable authority may delegate its functions and powers taking into account both the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) and the Public Governance Performance and Accountability Act 2013 (PGPA).*

2.26 According to the *Order to Establish the NIAA as an Executive Agency*<sup>25</sup>, the NIAA's functions include to:

- lead and coordinate Commonwealth policy development, program design and implementation and service delivery for Aboriginal and Torres Strait Islander peoples;
- build and maintain effective partnerships with Aboriginal and Torres Strait Islander peoples, state and territory governments and other relevant stakeholders to inform whole-of-government priorities for Aboriginal and Torres Strait Islander peoples;
- analyse and monitor the effectiveness of programs and services for Aboriginal and Torres Strait Islander peoples, including programs and services delivered by bodies other than the [NIAA]; and
- coordinate Indigenous portfolio agencies and advance a whole-of-government approach to improving the lives of Aboriginal and Torres Strait Islander peoples.

2.27 The NIAA advised the ANAO that its role in relation to the NT Land Councils includes: representing the Land Councils to Commonwealth agencies on key issues; providing advice to the Land Councils on compliance with the PGPA Act in relation to annual reports and operational plans; providing budget support to Land Councils; supporting governance reviews of the Land Councils; and providing advice to the Minister on all decisions required under the ALRA. The NIAA advised the ANAO that it is not involved directly in Land Council operations.

2.28 As part of this audit, the ANAO approached the NIAA regarding a potential recommendation to the NIAA to support the Tiwi Land Council to develop appropriate delegation instruments. The NIAA responded that 'This is a matter for the Tiwi Land Council'.

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25 *Order to Establish the National Indigenous Australians Agency as an Executive Agency*, 30 May 2019, available from <https://www.legislation.gov.au/Details/C2019G00474> [accessed 26 April 2023].

### 3. Governance under the Aboriginal Land Rights (Northern Territory) Act 1976

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#### Areas examined

This chapter examines whether the Tiwi Land Council (TLC) has effectively governed its legislative functions under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).

#### Conclusion

The TLC's governance of its legislative functions under the ALRA is partly effective. Governance arrangements to manage operations are deficient with respect to appointments, meetings and training. The governance arrangements to support the exercise of the TLC's key legislative functions are not fully fit for purpose. Since September 2022 the TLC has commenced addressing some of these deficiencies.

#### Areas for improvement

The ANAO made six recommendations to the TLC aimed at: providing training to Council, Management Committee and Trust members and documenting their roles and responsibilities; implementing a recruitment policy and conducting performance reviews; providing the Management Committee meeting rules to the Minister for Indigenous Australians and increasing the accessibility of the Council and Management Committee rules and meeting minutes; fully implementing Council and Management Committee meeting rules; addressing the deficiencies in the TLC's management of section 19 agreements and permits; and improving the assurance processes for payment distribution. The ANAO suggested to the TLC that it more clearly documents meeting discussions.

3.1 The Northern Territory (NT) Land Councils' key purpose is to assist in claiming Aboriginal land and once a claim has been granted, to manage Aboriginal land on behalf of Traditional Owners and other Aboriginal people living in the area of the Land Council. To achieve this purpose, the ALRA prescribes that specific governance arrangements must be in place for Land Councils to manage their operations. The arrangements relate to: appointments to key governance positions; the establishment and conduct of Council and committee meetings; and the establishment of registers of Council and Land Trust members, and of Traditional Owners.<sup>26</sup>

3.2 Land Councils must also establish governance arrangements to support the delivery of their key legislative functions, which pertain to three main types of activities.

- Negotiation and assistance — Land Councils must assist Traditional Owners and Aboriginal people with land claims<sup>27</sup>, negotiate on behalf of Traditional Owners and other Aboriginal people with third parties wanting to use or access Aboriginal land; and assist Aboriginal people to carry out commercial activities and protect sacred sites.<sup>28</sup>

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26 *Aboriginal Land Rights (NT) Act 1976* (Cth) sections 29–30 — appointment of Council members, Chair and Deputy Chair; section 29A — establishment of Committees; paragraph 23(1)(g) — establishment of a register of Council and Land Trust members; and section 24 — establishment of a register of Traditional Owners.

27 There are no unresolved claims in the area of the TLC. The last claim, over the Vernon Islands, was granted to the Mantiyupwi Tiwi people in March 2018.

28 *Aboriginal Land Rights (NT) Act 1976* (Cth) paragraph 23(1)(f) — assistance with land claims; paragraphs 23(1)(d), (e), (fa) — negotiation; paragraphs 23(1)(ea), (eb) — assistance with commercial activities; paragraph 23(1)(ba) — protection of sacred sites.

- Consultation and consent — Land Councils must consult with Traditional Owners and Aboriginal people in the area of the Land Council about the management of land and endeavour to protect their interests.<sup>29</sup>
- Distribution of royalties and payments — Land Councils must distribute royalties and other payments, such as rents, to, or on behalf of, Traditional Owners.<sup>30</sup>

3.3 Land Councils and Land Trusts are exempt from compliance with the *Freedom of information Act 1982*.<sup>31</sup> There are also no appeal or review mechanisms in the ALRA. This reinforces the importance of effective governance arrangements to support the management of Land Councils' key activities.

## Has the Land Council established and implemented appropriate governance arrangements to manage its operations?

The TLC's arrangements to manage its operations are partly appropriate. An approved method of choice is followed, however Ministers have raised concerns about the way in which Trust members appointed Council members and the lack of female representation. The Minister for Indigenous Australians has requested a revised method for her approval. There is no handbook outlining, or induction into, the roles and responsibilities of Council, Trust or Management Committee members, and ongoing training is limited. The 2018 recruitment of the previous CEO (who was dismissed by the Council in July 2022) was not competitive and his performance was not reviewed as required. There are approved meeting rules, which are largely followed, however their implementation does not fully support informed decision-making. Registers of Council members, Trust members and Traditional Owners are established.

### Appointment of key governance positions

3.4 The ALRA prescribes how Council and Land Trust<sup>32</sup> members, including the Chair and Deputy Chair of the Council, must be appointed (see Appendix 6). The ALRA specifies that:

- Council members shall be chosen by Aboriginal people living in the area of the Land Council in accordance with a 'method of choice', which is to be approved by the Minister; and
- Land Trust members shall be appointed by the Minister based on nominations from the Council.

### *Development of the TLC's method of choice*

3.5 The TLC method of choice as at March 2023 was approved by the Minister for Indigenous Australians (the Minister) on 4 February 2017. It replaced the previous method of choice approved in 1992. The key characteristic of the 1992 method of choice was that the Council was comprised

29 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) paragraphs 23(1)(a)–(c) and subsection 23(3) — consultation and consent.

30 *ibid.* section 35.

31 *Freedom of information Act 1982* (Cth), Schedule 2, Part I Division 1.

32 Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) section 4, Aboriginal Land Trusts are established by the Minister responsible for the administration of the ALRA to hold title and exercise their powers as owners of the land for the benefit of Aboriginal people.

of the appointed members of the Land Trust and others who were solely selected by the Land Trust members.

3.6 Successive Ministers for Indigenous Australians had expressed their concerns with the TLC's 1992 method. The concerns, documented in several letters to the TLC Chair between 2011 and 2017, related primarily to the role of Trust members in appointing other Council members; and to the lack of female representation. Between 2011 and 2017, the Ministers approved short-term, interim appointments to the Land Trust (between three and 12 months) 'to allow the Tiwi Land Council time to review its current processes and work towards amending the method of choice for appointment to the Land Council.' In advice related to the development of the 2017 method of choice, the TLC advised the Department of the Prime Minister and Cabinet in 2014 that:

The fact that power to appoint members of the Land Council is vested in members of the Land Trust, reflects Aboriginal culture (including that of the Tiwi Islanders) and the concept that decisions are made by community elders. The appointment process of such elders is fluid and typically considers a potential appointee's seniority within the community, ancestry, experience and personal and family ties to the land. Whilst community consensus can often play a small role, the appointment process is in large part not democratic.

3.7 The 2017 method of choice establishes that:

- the eight members of the Tiwi Aboriginal Land Trust — one member representing each clan — are automatically members of the Council;
- in meetings of each of the eight clans, arranged by TLC staff, recommendations for Land Council members are sought from clan members, and approved by the 'senior traditional Aboriginal owner(s)' from each clan; and
- from the recommendations, the Trust member representing the clan selects a maximum of three persons who become members of the Council for a period of three years and can be re-appointed.

3.8 While the 2017 method partly addressed the Ministers' concerns outlined in paragraph 3.6 by requiring Trust members to base their choice on a list of names recommended by their respective clan members, the Ministers' concerns relating to Trust members being automatic members of the Land Council, and gender imbalance amongst the members, were not addressed.

3.9 At six clan meetings attended by the ANAO in June 2022, a consistent theme was concern about the method of choice: that Trust members had too much power over the selection of Council members; and that not enough women are members of the Council.<sup>33</sup> Several other stakeholders with activities related to the TLC expressed similar concerns to the ANAO.

3.10 In a letter dated 7 December 2022 the Minister expressed her support for an 'improved gender and diverse representation on the [Council]'. The Minister encouraged the TLC to consider appropriate revisions to the method of choice to reflect updated processes and to focus on strong governance. In December 2022 the Minister indicated to the TLC that she expected to be provided

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33 The ANAO attended six meetings with the eight Tiwi clans (three clans were represented at the same meeting) in June 2022. The meetings were arranged by Tiwi Resources on behalf of the TLC. Once the TLC agenda items had been discussed, the TLC staff (and, when the clan members decided so, the clan representatives on the Council) left the meeting venue and ANAO conducted group discussions with clan members to explore their views about the TLC. Based on clan members' preferences, the discussions were held with all participants in one group, or in small groups in different areas of the venue.

with a revised method of choice for her approval. In May 2023 the TLC advised the ANAO that a revised method of choice would be provided to the Minister following clan and other group consultations and discussions.

### *Land Trust member appointments*

3.11 The method to nominate Trust members is not documented in the 2017 method of choice, or in TLC policy documents. The ALRA does not require that the nomination method for Land Trust members be specified.

3.12 On 5 December 2017 the Minister appointed the eight clan members nominated by the TLC to the Tiwi Aboriginal Land Trust, for five years. The TLC advised the ANAO that the Trust members had been recommended by the clans.

3.13 The five-year term for the 2017 appointments expired on 4 December 2022. In preparation for the selection of the new Trust members, the TLC planned a series of meetings with the eight clans, to be conducted in November 2022. However, following the first clan meeting held on 16 September 2022, the TLC wrote to the Minister on 28 November 2022 to request an extension of the current Trust membership until 30 June 2023, to which the Minister agreed on 7 December 2022. The letter to the Minister noted, in support of the request:

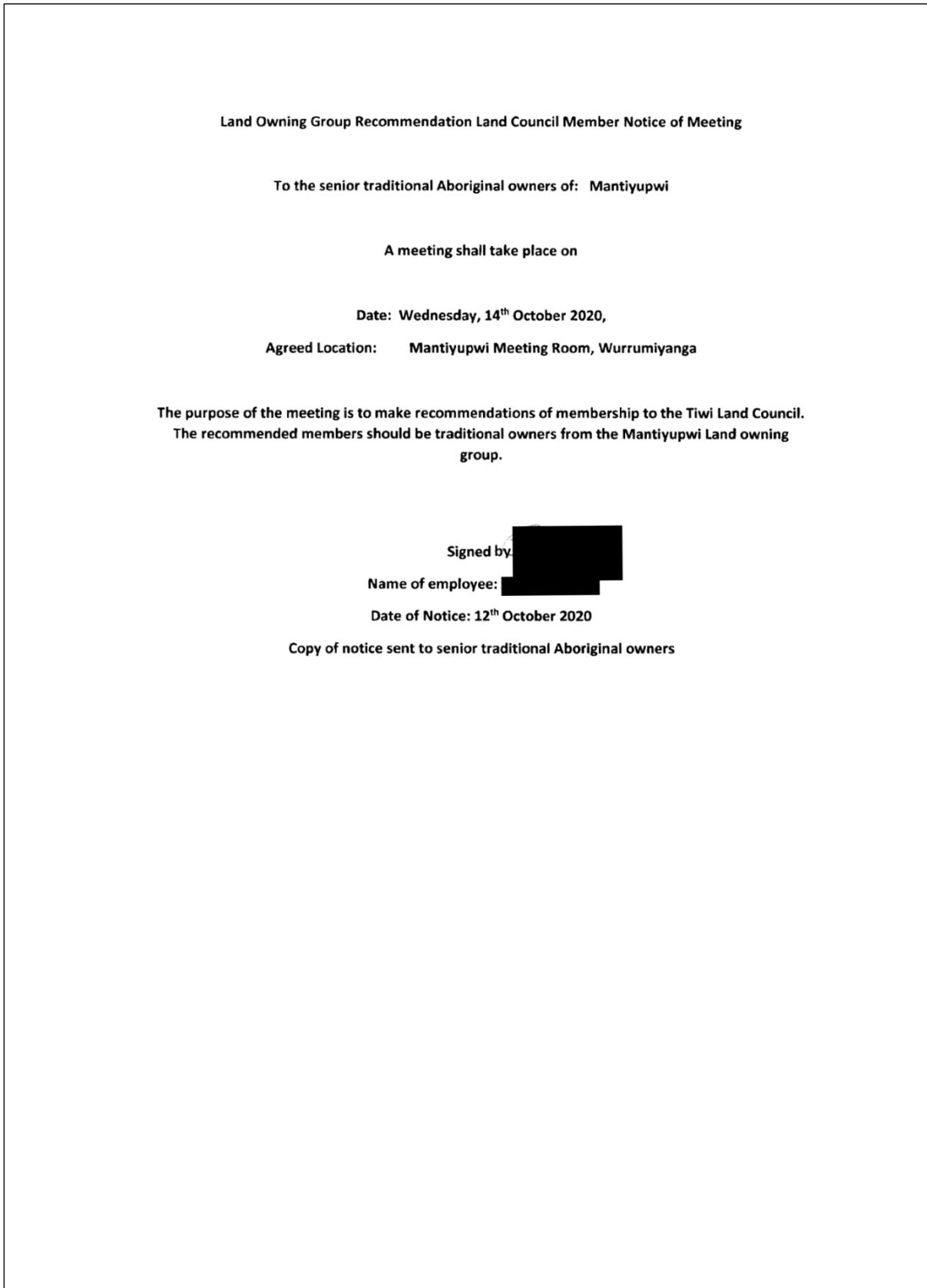
There is considerable disquiet among the wider Tiwi population with this [Trust member] election process that is seen as non-democratic and lacking in transparency.

3.14 The Minister stated that she expected a more formal procedure for nomination of Trust Members to be developed and implemented by 30 June 2023. In May 2023 the TLC advised the ANAO that it had commenced conducting a series of workshops with clan members and Council members with the aim of developing a method to nominate Trust members that is more aligned with community expectations. These workshops were scheduled to be completed in May 2023, prior to the end of Trust members' extended term. The TLC also advised that the workshops would discuss the options of advertising the election on notice boards and in social and conventional media; conducting information sessions with clans prior to the election; and conducting the election of Trust members by secret ballot. The TLC expects that the Trust member elections to be conducted in June 2023 will be administered by the Australian Electoral Commission.

### *Council member appointments*

3.15 The most recent Council member appointments were made in December 2020, and were conducted in accordance with the approved method of choice. Meetings with the eight clans were conducted in November and December 2020 during which 88 persons were recommended by the clans for consideration by the Land Trust members (including 28 women, 32 per cent). Based on the clans' recommendations, the Land Trust members nominated 24 Land Council members in December 2020, of which one was a woman (four per cent). To inform the community, the TLC affixed A4 size notices to community notice boards two to three days before the meeting dates (Figure 3.1). The notice indicated that a copy of the notice had been sent to 'senior Traditional Aboriginal owners' of the relevant clan, however the TLC was unable to provide evidence to the ANAO that this had been done.

**Figure 3.1: Meeting notice for November 2020 Council member appointments**



Source: Tiwi Land Council.

3.16 The TLC advised the ANAO that awareness of disqualifying characteristics (see Appendix 6) was gained through local knowledge, which TLC staff then investigate further by requesting a certificate of proceedings from the Local Court of the NT. Given the small size of the Tiwi community, the TLC's approach to exercising due diligence in relation to Council member disqualifying events is appropriate.

3.17 In May 2023 the TLC CEO advised the ANAO that the Council had provided its support to the co-opting of five additional members to the Land Council, as allowed under subsection 29(2) of the ALRA, and that these five additional members would be women. The co-opting of additional members was to be further discussed during the May 2023 clan and Council members workshop (see paragraph 3.14).

#### *Election of the Chair and Deputy Chair*

3.18 The process to elect the Chair and Deputy Chair of the TLC was established in 1983 and approved by the Minister in 1984. It consists of an exhaustive ballot process in which the candidates with fewest votes are eliminated in successive rounds of voting. Subsequent to the December 2020 Land Council member appointments, the Chair and Deputy Chair of the Land Council were elected in February 2021. The February 2021 election process conformed to the process that had been approved by the Minister in 1984. The outcome of the February 2021 election was approved by the Minister on 15 March 2021.

#### *Remuneration of Council Chair and members*

3.19 The remuneration of Council members is determined by the Remuneration Tribunal.<sup>34</sup> As at March 2023 the prescribed remuneration of the Chair as a full-time office holder was \$130,650. The prescribed daily fees for Council members including the Deputy Chair were \$344 (when engaged on the functions or duties of the Land Council); or \$520 (when engaged on business of the Management Committee).<sup>35</sup> As March 2023 none of the members of the Council were also employees of the TLC.

3.20 Under subsection 7(11) of the *Remuneration Tribunal Act 1973*, a full-time public office holder is prohibited from receiving remuneration for holding, or performing the duties of, another public office. As at March 2023, the TLC Chair held, in addition to his full-time paid position as the Chair of the Council, two paid positions and one unpaid position in other entities. It is not clear to the ANAO that the Chair holding multiple paid positions in other organisations is consistent with the *Remuneration Tribunal Act 1973*. The ANAO did not examine whether the Chair's performance of duties for other entities impact on his capacity to complete his duties for the Council as a full-time remunerated public office holder.

#### *Guidance and training for Council and Trust members*

3.21 There is no handbook or manual documenting the roles and responsibilities of Council members, Chair, Deputy Chair, Trust members and Council committees. One of the recommendations to the Department of Families, Housing, Community Services and Indigenous

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34 The Remuneration Tribunal is the independent statutory body that handles the remuneration of federal parliamentarians, judicial and non-judicial offices of federal courts and tribunals, Australian Government department secretaries, holders of various public offices and principal executive offices. It was established under the *Remuneration Tribunal Act 1973*.

35 The Remuneration Tribunal determines that 100 per cent of the daily fee is to be paid if the meeting duration is more than three hours. A pro rata calculation is applied if the meeting is less than three hours' duration.

Affairs (FaHCSIA) in the 2008 audit of the TLC (see paragraph 2.8) was that FaHCSIA should identify and document the delegated functions of TLC Council sub-committees.

3.22 There is no induction or training for new Council and Trust members. In December 2021 the TLC organised for the Australian Institute of Company Directors to deliver training aimed at developing Council members' governance skills. The training program covered governance, finance, strategy and risk. The attendance lists demonstrate that of the 32 Council members, 26 attended at least one day of the three-day course, including 18 who attended the course in its entirety. No other governance training had been delivered to Council members since at least 2018. Council meeting minutes indicate that the TLC Principal Legal Officer occasionally provides information to Council members relating to their duties, for instance about the operation of the method of choice or of the code of conduct.

### Recommendation no. 3

3.23 The Tiwi Land Council:

- (a) develops a handbook or manual documenting the functions, roles and responsibilities of Council, Management Committee and Trust members, including the Council Chair and Deputy Chair; and
- (a) provides initial and regular refresher training to members of the Council and the Tiwi Aboriginal Land Trust about their roles and responsibilities.

**Tiwi Land Council response:** *Agreed.*

3.24 *The TLC has identified several external sources of expertise and with their assistance intends to develop and provide the above. Process to be overseen by Chief Finance Officer (CFO) and PLO to ensure necessary compliances.*

#### *Chief Executive Officer appointments, conditions and review*

3.25 The TLC recruitment policy requires staff positions, including the CEO's, to be advertised and applications to be assessed by a panel before the selected candidate is approved by the full Council. The last substantive CEO was not recruited in accordance with the TLC recruitment policy.

- In February 2018 the CEO was initially appointed as acting CEO by the Land Council (following the resignation of the prior CEO), having occupied the position of Deputy CEO since September 2016.
- On 1 August 2018 the acting CEO was appointed to the substantive CEO position by the Land Council, for a period of three years. Council meeting minutes do not indicate whether the CEO was assessed by a panel. Minutes from a meeting preceding this decision included discussion that the position be advertised, however this was not done.
- On 1 August 2021 the CEO's contract was renewed for a period of three years, following a resolution from the Council on 15 February 2021.

3.26 Council meeting rules state that the Council should review the CEO's performance annually. The 2018 Council meeting minutes relating to the CEO's initial appointment demonstrate there was discussion in relation to the length of the CEO's contract, and no discussion about remuneration or performance expectations. The employment contract included a statement of duties relating to the

delivery of responsibilities under the ALRA and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). There was no performance plan documenting specific performance expectations and there is no record of performance review in meeting minutes between 2019–20 and 2021–22 or in any other documentation. Reviews of the CEO performance were not conducted in other fora.

3.27 On 5 July 2022 a majority of the Council voted to dismiss the CEO from employment on the grounds of poor performance. The Minister was informed of this decision in accordance with the PGPA Act section 91. A confidential deed of settlement was executed on 28 July 2022, which included an employee termination payment of \$371,706. An interim CEO was appointed by the Council on 4 July 2022 and commenced his duties on 16 August 2022, initially for a period of six months. In March 2023 the interim CEO's appointment was extended to 16 February 2024. One of the responsibilities of the interim CEO is to recruit a permanent CEO.

#### **Recommendation no. 4**

3.28 The Tiwi Land Council:

- (a) implement its recruitment policy for all new appointments, including when recruiting a permanent CEO; and
- (b) establish performance plans for all its staff, including the CEO, and monitor and review performance against that plan periodically.

**Tiwi Land Council response:** *Agreed.*

3.29 *The TLC commenced this process in late 2022 using external HR advice for staffing matters including work contracts. The TLC's PO also obtained the recruitment policies of a number of other similar organisations including Territory Land Councils and has commenced work to review them for TLC suitability. In 2022 the TLC sought funding for and engaged a HR Manager and commenced the reform processes. This position has been tasked with working with the PO to complete the policy formulation. All positions over the past months have now followed policy by being advertised, (in print and other media) and applicants assessed by a committee that has often included external members. This committee makes the relevant recommendations to the CEO for the engaging of staff. It is expected that this will be regularised in the updated recruitment policy being prepared.*

3.30 *The TLC has also sought examples of Performance Evaluation procedures and documentation used by similar organisations and has tasked the HR Manager with assisting the PO to review and recommend an appropriate policy and procedure for the TLC.*

## **Establishing and implementing meeting and committee rules**

### *Establishment of committees*

3.31 The TLC has established one committee in accordance with the ALRA (see Appendix 6), the Management Committee. The Management Committee is comprised of ten members (a representative of each of the eight clans, plus the Chair and Deputy Chair of the Council). The Management Committee's functions, roles and responsibilities are not documented.

### *Establishment and communication of Council and Management Committee meeting rules*

3.32 The TLC has not complied with all the requirements of the ALRA (see Appendix 6) in relation to the establishment and communication of Council and Management Committee meeting rules.

- In accordance with the ALRA, the TLC Council meeting rules were submitted to the Minister on 27 November 2017 and approved on 28 June 2018.
- According to the draft 2021–22 Annual Report, the meeting rules for the Management Committee were provided to the Minister in March 1995. The rules have been amended since that time. However, the TLC has not provided the current version of the rules to the Minister.
- The ALRA prescribes that meeting rules and minutes must be made available for inspection. The TLC advised the ANAO that meeting rules and minutes are available for inspection upon request from the CEO. However, the TLC does not promote the fact that meeting rules and minutes are available, which reduces the transparency of the process.

### **Recommendation no. 5**

3.33 The Tiwi Land Council:

- (a) implement the ALRA requirement to provide the Management Committee meeting rules to the Minister for Indigenous Australians; and
- (b) increase the accessibility of the Council and Management Committee meeting rules and minutes (which could include the use of the TLC website, newsletter, radio and social media platforms to promote how the rules and minutes can be accessed).

**Tiwi Land Council response:** *Agreed.*

3.34 *The TLC intends to pass on to the Minister the rules as required.*

3.35 *The TLC has recently engaged a Media Officer (MO) who has been tasked with updating the land council's social and other media and recommendation 5b is among the changes to be implemented.*

### *Implementation of meeting rules*

3.36 The ANAO analysed the minutes of the Council and Management Committee meetings in 2021–22 to determine whether meeting rules had been complied with.<sup>36</sup> Overall, meeting rules were implemented appropriately in relation to meeting frequency, quorum and decision-making processes.<sup>37</sup> One exception was in relation to the annual review of key governance documents. Between 1 July 2019 and 30 June 2022:

- the meeting rules were reviewed by the Management Committee in 2020–21 and 2021–22, and not in 2019–20;
- the register of interests was reviewed by the Council once in December 2021; and

36 During 2021–22, eight Council meetings and 10 Management Committee meetings were conducted.

37 The Council and Management Committee meeting rules include provisions relating to the management of conflicts of interest during meetings. This is separately analysed in Chapter 4.

- the annual report (which the rules state should only be reviewed by the Council), was approved by the Management Committee in 2020–21, and by the Council in 2021–22. There is no evidence in the minutes that the annual report was discussed. The annual report was not mentioned in the Council meeting minutes for 2019–20 and 2020–21.

3.37 The Council and Management Committee rules include conditions which aim to facilitate members’ understanding of the matters discussed. In particular, briefing papers, presentations and reports supporting meeting discussions should ‘be presented in a simple English, non-technical form, concise, clear on what decision is required from the [Council]’. ANAO’s analysis of the papers supporting Council and Management Committee meetings in 2021–22 showed that these conditions were not met: papers for a single meeting were sometimes over 140 pages long and contained legal agreements and letters, financial reports, academic reports and copies of email exchanges. The TLC advised that the meeting papers are not provided ahead of meetings. During June 2022 Council and Management Committee meetings observed by the ANAO, large screen presentation technology was available but not used.

## Recommendation no. 6

3.38 The Tiwi Land Council:

- review key governance documents in accordance with meeting rules; and
- implement meeting rules aimed at facilitating member understanding of matters discussed.

**Tiwi Land Council response:** *Agreed.*

3.39 *The TLC has sought and obtained relevant policy and practice documentation from similar organisations including Territory Land Councils. These are being or will be reviewed by staff including PLO and PO to ensure suitability for the TLC’s requirements and with Tiwi and staff anthropologists to ensure cultural integrity as well as appropriate functionality.*

3.40 The ALRA states that Traditional Owners and Aboriginal people living in the area of the Land Council should be able to access meeting minutes. For access to be meaningful, the minutes should be clear and document the key discussion points and decisions. ANAO analysis found that the minutes lacked information on decisions made, referred to issues without context, or referred to items that should be actioned (such as ‘declaration of pecuniary interests’) as being ‘noted’.

### Opportunity for improvement

3.41 To better meet the intent of the ALRA with respect to access and transparency, the TLC could more clearly document key discussion points in meeting minutes, with regard to an appropriate balance between transparency and usability.

### **Compiling and maintaining registers**

3.42 The TLC complies with the ALRA in keeping a register of Council members and Land Trust members. The TLC has also maintained a register of Traditional Owners since 1978, which is updated intermittently. The register lists Traditional Owners and the territory of each of the eight clans is determined on the basis of a map (Figure 3.2).<sup>38</sup>

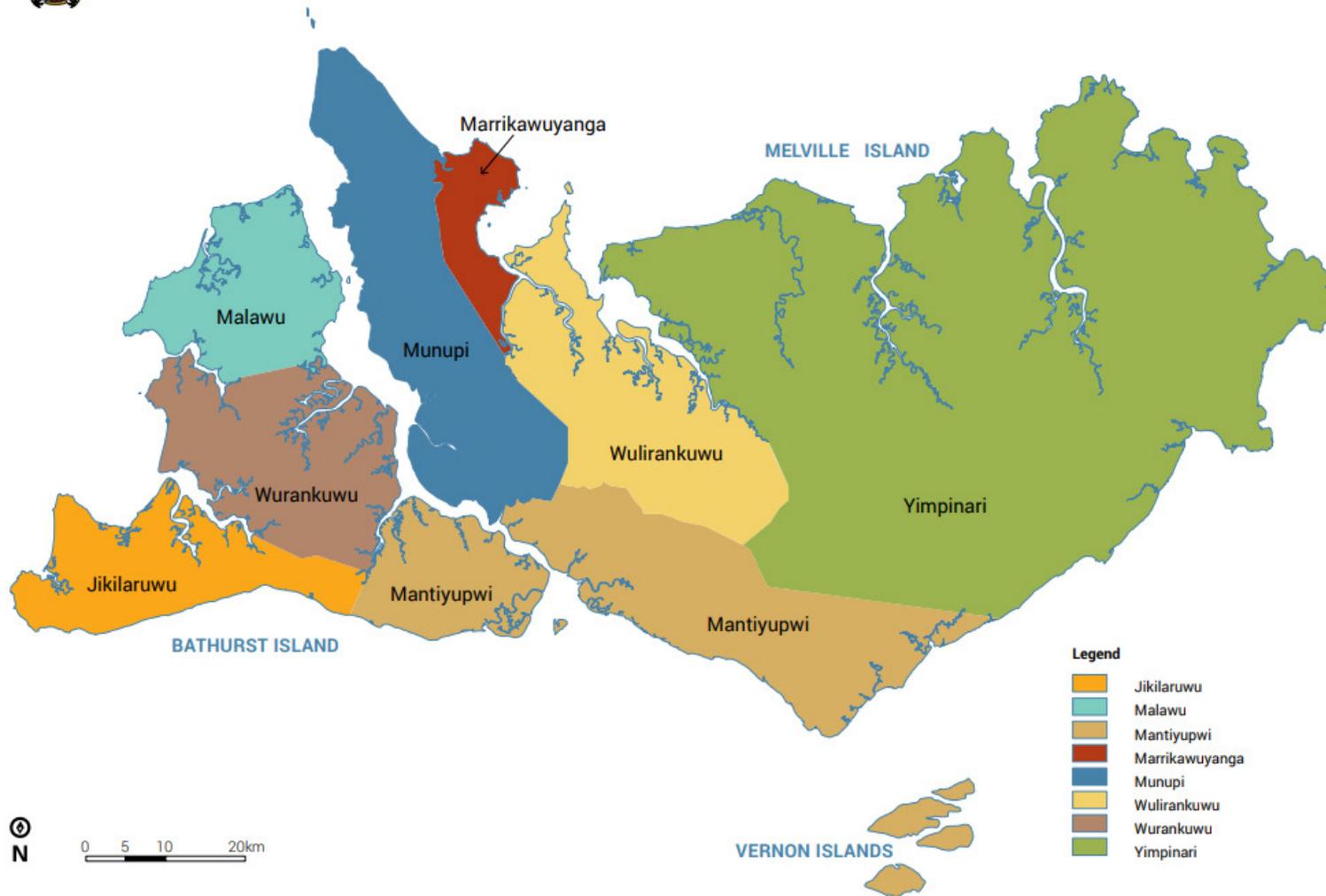
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38 Registers of Traditional Owners can establish genealogies, which are required for Traditional Owners pursuing land claims to prove their customary relationship with the land. The register can also be used to identify the Traditional Owners from whom consent must be obtained by the Land Councils when delivering other functions (for instance when negotiating land use and access).

Figure 3.2: Tiwi Islands land ownership map



**Tiwi Islands | LAND OWNERSHIP**



Source: Tiwi Land Council.

3.43 The TLC advised the ANAO that the register is not supported by a formal genealogy or other cultural information (such as cultural seniority). This information helps establish who is a Traditional Owner. The TLC register does not list other Aboriginal communities or groups that may be affected by proposed activities on the land and who must therefore be consulted by the Land Council. In January 2020 the TLC employed an anthropologist for the first time, whose functions included updating the register and developing a comprehensive genealogical and cultural information repository.<sup>39</sup> Since then, the position has been filled intermittently. The most recent appointment was made in September 2022. In November 2022 the TLC obtained additional funding from the National Indigenous Australians Agency (NIAA) for a second anthropologist position, which was filled in February 2023.

## Has the Land Council established and implemented appropriate governance arrangements to exercise its key legislative functions?

The ANAO assessed the TLC governance arrangements for the key legislative functions.

- Negotiating land use and access — The TLC has procedures to negotiate and monitor section 19 agreements and permits, however these are not robust or complete.
- Assisting with commercial and other activities — Arrangements to perform this function were largely undeveloped, however there have been developments in governance arrangements since June 2021. The TLC’s function to provide assistance with the protection of sacred sites has been operational primarily since early 2020 and has been appropriate.
- Consulting with Aboriginal people and obtaining consent — Although the TLC holds clan meetings, the minutes do not set out how consent was achieved. There are no procedures to guide the systematic establishment of consent. Improvements were made to the consultation process in November 2022. The TLC does not have a process for dispute or complaint resolution.
- Distributing royalties and payments — Most funds are distributed through an Aboriginal corporation, Tiwi Resources. The TLC has documented processes for distribution based on Council resolutions, however it does not seek assurance that Tiwi Resources has distributed the funds in accordance with these resolutions.

### Negotiating and assisting

#### *Negotiating Aboriginal land use and access*

3.44 The ANAO examined TLC processes in relation to section 19 (s19) agreements and permits. S19 agreements cover primarily non-mining land use arrangements, and permits enable access to aboriginal land or roads (see Table 1.1).

#### Section 19 agreements

3.45 The TLC has a documented process for establishing s19 agreements. Despite this, a 2020 internal review identified significant deficiencies in the TLC’s management of land use and access,

<sup>39</sup> The TLC advised that following the establishment of the TLC in 1978, the first TLC Chairman, and an advisor to the TLC conducted the documentation of anthropological and historical information. Several other anthropologists provided assistance to the TLC over the years.

including: insufficient record-keeping, inadequate communication with third party applicants, a lack of clan engagement, limited information available on the TLC website and unclear internal delegation of responsibilities.

3.46 The 2020 internal review noted that the number of processed land use applications had dropped significantly since 2018, from 385 applications processed between 2006 and 2018 (an average of approximately 30 per year) to three applications processed between 2018 and 2020 (an average of one per year). The TLC advised the ANAO that as at November 2022 nine applications were under consideration, six of them lodged since April 2022.

3.47 The Council has not taken any action to gain assurance that the decrease in the number of processed applications is not leading to activities taking place on Tiwi-owned land without the required agreement. A review of land use and land access procedures (land use review) commissioned by the TLC in early 2022 reported in November 2022 that 84 gravel pits were active in the second part of 2022, however ANAO analysis of the 32 active land use agreements indicates only two are related to gravel extraction.

3.48 The TLC maintains a spreadsheet listing the active s19 agreements, their duration and term, and the financial terms of the agreement. The TLC has no processes in place to ensure that the spreadsheet is up to date or complete, and that s19 agreements are appropriately monitored.

3.49 ANAO analysis of the 14 active s19 agreements that were executed between 1 June 2018 and 30 June 2022 identified that most impose conditions on the licensee or lessee, in addition to financial compensation for the use of the land. These include requirements such as provision of employment and training opportunities for Tiwi people, fire management and road maintenance, threatened species monitoring and protection, weed and feral animal control and site rehabilitation. The TLC advised that it does not monitor compliance with the non-financial conditions of the agreements.

#### Permits

3.50 Under ALRA section 70, unless a person holds a lease or a license, they cannot enter or remain on Aboriginal land, or use a road on Aboriginal land, without a permit.<sup>40</sup>

3.51 There are several categories of TLC permits, including fishing, hunting, visitor and work permits, some of them incurring a fee. To process permits, the TLC uses an online permit application system, which was upgraded in 2018 and is accessible, together with permit information, from the TLC website.<sup>41</sup>

3.52 The TLC annual report provides data on permits issued since 2016–17, and indicates that in 2021–22, just over 3000 permits were issued, with approximately 50 per cent issued for work purposes. The number of permits issued has increased over the period 2016–17 to 2021–22, while the amount of fees collected in 2021–22 is at the same level as in 2016–17. The TLC advised the ANAO that while the overall number of permits increased as more workers regularised their

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40 In some circumstances (for example, accessing common areas, boarding or disembarking aircraft, or for those with traditional rights to use the land), Aboriginal land can be accessed without a permit.

41 Tiwi Land Council, *Permits* [Internet], available from <https://www.tiwilandcouncil.com/index.cfm?fuseaction=page&p=267&l=2&id=68&smid=186> [accessed 2 December 2022].

positions by seeking permits, the number of permits involving a fee (mainly recreational permits) declined due to COVID-19 restrictions.

3.53 The 2022 land use review outlines several issues relating to the management of permits.

- Although maps exist of areas accessible with permits, there is no signage on the ground.
- Companies and organisations based on the Tiwi Islands for more than three months can apply for a ‘business login’, which enables these organisations to issue work permits to their employees online. In 2022, over 140 business logins had been allocated by the TLC over time, and there was no monitoring over the permits delivered.
- Fishing permits are required for some of the intertidal waters around the Tiwi Islands (‘exclusion zones’) which cover most of the Islands’ north coast and rivers. Compliance with these conditions is ‘hard to monitor’.

3.54 The land use review suggested that these issues with respect to permits create a high risk of non-compliance with land access restrictions; ecological and sacred site damage; and a potential loss of financial benefits to Traditional Owners and Tiwi communities.

### Recommendation no. 7

3.55 The Tiwi Land Council:

- (a) develop an implementation plan to address the deficiencies in the management of section 19 agreements and permits that were identified in the 2020 and 2022 reviews; and
- (b) monitor section 19 agreements to detect and address any non-compliance with agreement conditions, including non-financial conditions.

**Tiwi Land Council response:** *Agreed.*

3.56 *The Tiwi Land Council agrees to recommendation no.7 and provides the following comments:*

- *Council staff have already implemented a workflow to facilitate the assessment of all land use request applications. That workflow has seen the development of a land use request application register and a coordinated internal approach whereby the anthropologists, environment team, and the PLO work together to:*
  - (a) *Ensure the relevant traditional owners and clan members are consulted regarding an application.*
  - (b) *Ensure that the consultation with the traditional owners and clan members provides sufficient information for them to either (as the case may be) consent to it or express its view to the Land Council and/or provide feedback.*
  - (c) *Decisions by the traditional owners (consent or otherwise) are documented in writing.*
  - (d) *Consultation with the clan members is recorded by way of minutes.*
  - (e) *Proponents are kept informed about the progress of their applications.*
  - (f) *The Land Council members are properly informed about the nature of the land use request and necessary resolutions are documented in writing.*

- *Monitoring of compliance with s19 agreements will be handled by council staff working together to actively inspect s19 sites and report back to the principal legal officer regarding any non-compliance. Non-compliance issues are to be considered as against the s19 lease terms and advice is to be provided by the PLO. A review of current s19 agreements has commenced and council staff will work together so that visits to the islands routinely include s19 site inspections monitoring or compliance with any non-monetary terms contained in the relevant lease.*

### *Assisting with commercial and other activities*

3.57 Under the ALRA, the Land Councils are to assist Aboriginal people in the area of the Land Council to carry out commercial activities in a manner that will not cause the Land Council to incur financial liability or enable it to receive financial benefit; and may provide administrative or other assistance to an Aboriginal corporation that received an amount of money from the Council.

3.58 Prior to 2020–21 the TLC did not have a dedicated function aimed at assisting Aboriginal people with commercial activities. It reported in its 2018–19 to 2021–22 annual reports that it provided this support through the delivery of its other functions, such as the purchase of good and services from Aboriginal corporations, the issuing of fishing and hunting permits, and the processing of land use agreements.

3.59 In 2020–21 several new positions were created to enable the TLC’s execution of this function.

- In June 2021 a grant officer was engaged by the TLC to assist with Aboriginals Benefit Account grant applications; identify other available sources of funding across government, non-government and philanthropic organisations; and assist Aboriginal people to access these alternative funding sources. The 2021–22 draft Annual Report indicated that the assistance provided to Aboriginal entities on Tiwi Islands had resulted in two successful grants being awarded to Aboriginal people in 2021–22.
- The 2020–21 Budget included provision for an economic development officer position. The position had been filled intermittently since June 2021, and was unoccupied as at March 2023.

3.60 In 2020–21 and 2021–22 the TLC received \$13.3 million from the Australian Government as part of the NT Indigenous Economic Stimulus, to support the Tiwi economy and jobs through the COVID-19 pandemic, and to help businesses prepare for an expected surge in domestic tourism following this period.<sup>42</sup> As at March 2023 15 projects worth \$5.9 million (45 per cent of total allocation) had been approved, including \$2.2 million committed and not yet allocated. Another three projects totalling \$1.3 million were under consideration. There is a risk that the TLC will not be able to meet the requirement to allocate the funding by June 2023.

### *Assisting with the protection of sacred sites*

3.61 The ALRA prescribes that the Land Councils must take measures to assist in the protection of sacred sites on land in the area of the Land Council.

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42 In total, \$100 million were allocated as part of the NT Indigenous Economic Stimulus Package to the four NT Land Councils, in two tranches. The CLC and NLC received \$36.7 million each and the ALC and TLC received \$13.3 million each.

3.62 The 2020 internal review found that there were no mechanisms to address impacts of proposed activities on sacred sites and on the environment, and of conditions to ensure site rehabilitation post-activity and compensation. As a result of this finding, a requirement for applicants to obtain an Authority Certificate from the Aboriginal Areas Protection Authority (AAPA) has been included in the TLC land use application form and had been implemented for several land use proposals.<sup>43</sup>

3.63 The TLC draft 2021–22 Annual Report includes a performance measure ‘assisting in the presentation of sacred, significant and culturally sensitive sites’. It indicates that the target for this measure was exceeded, with eight site assessments undertaken (against a target of two). The TLC advised that as at May 2023, two of the eight sites had been registered with AAPA; four had been submitted to AAPA and were awaiting outcome; and two were to be submitted after consultation with Tiwi people, which was ongoing. The draft Annual Report noted that work was ongoing with Indigenous Rangers to prioritise the protection of cultural sites, and with the NT Government and landowners to pursue heritage listing for four sites.

### Consulting and obtaining consent

3.64 The ALRA determines that, in carrying out its functions, a Land Council shall have regard to the interests of, and shall consult with, the Traditional Aboriginal Owners of the land in its area and any other Aboriginal people interested in the land. The ALRA further specifies that a Land Council shall not take any action unless it is satisfied that:

- the Traditional Owners of that land understand the nature and purpose of the proposed action and, as a group, consent to it<sup>44</sup>; and
- any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council.<sup>45</sup>

3.65 The TLC’s main mechanism for consulting with Traditional Owners and Aboriginal people living in the area of the Land Council are meetings held with the eight Tiwi clans, which other Aboriginal people living in the area of the Land Council are also able to attend. In 2021 the TLC requested and received additional funding from the NIAA to increase the number of clan meetings to five per clan, totalling 40 meetings a year. This budget provision was maintained for 2022–23. The TLC draft 2021–22 Annual Report indicates that 27 clan meetings were conducted in 2021–22.

3.66 The TLC subcontracts the organisation and conduct of the clan meetings to Tiwi Resources, an Aboriginal corporation owned by the eight clans. The TLC presents at these meetings, however does not take minutes, and does not request the minutes from Tiwi Resources.<sup>46</sup> The TLC was

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43 The AAPA is an independent statutory authority established under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). The AAPA issues Authority Certificates to ‘protect sacred sites from damage by setting out conditions for carrying out works proposed by a proponent on an area of land or sea’. The AAPA also states that the Authority Certificate is a legal document which ‘indemnifies the holder against prosecution under the Act’. Aboriginal Areas Protection Authority, *Authority Certificate*, [Internet], available from <https://www.aapant.org.au/our-services/authority-certificates>, [accessed 1 February 2023].

44 The ALRA (subsection 77A(1)) also states that where a particular traditional decision-making process exists, it must be followed.

45 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 25.

46 Tiwi Resources advised they keep minutes and provide them to the TLC on demand.

unable to provide information to the ANAO about the discussions or decisions made at clan meetings and cannot demonstrate it has conducted effective clan consultations.

3.67 The ANAO attended meetings with the eight clans in June 2022 (see paragraph 3.9). A consistent theme was that the TLC (including clan representatives on the Council) provided insufficient information to the clans about decisions taken on their behalf. ANAO analysis of Council and Management Committee meetings conducted in 2021–22 indicates that discussions were held in relation to proposed land use agreements, and consent or otherwise was recorded. The minutes do not set out how the consent was achieved. The Council has no procedure to guide the systematic establishment of consent or confirmation that consent has been given.

3.68 The TLC advised that from October 2022:

- all clan meetings would be organised and delivered by the TLC, and that minutes would be kept; and
- meetings would be advertised seven days ahead of the scheduled date, information would be presented on large screens when available or in printed copies when required, and papers and minutes would also be available on request.

3.69 In November 2022 a series of clan meetings was conducted. For each matter on the agenda, a paper was prepared that included background information (outlining, when relevant, a brief description of the risks and benefits associated with the matter); the TLC recommended decision; and a section to record the clan’s resolution, including provision for the name of the clan members moving and seconding the resolution. Presentation facilities, when available, were used. The TLC was unable to demonstrate whether meetings were advertised seven days ahead of the scheduled date.

### *Disputes and complaints*

3.70 The ALRA establishes a duty of Land Councils to attempt conciliation of disputes with respect to land in the area of the Council.<sup>47</sup> The ALRA does not include requirements for complaints management, however in order to ensure the Land Council is representing the interests of its constituents effectively and transparently, complaints should be handled effectively. The Commonwealth Ombudsman’s Better Practice Complaint Handling Guide identifies attributes of a strong complaints system, including: actively encouraging complaints; supporting early resolution; communicating outcomes; and feeding back systemic issues.<sup>48</sup>

3.71 As at February 2023 the TLC did not have a dispute or complaint resolution system. The TLC advised that it intends to establish, on the TLC website, a mechanism that will allow members of the community and the general public to lodge complaints. These complaints would, in the first instance, be administered by a TLC media officer recruited in February 2023. The TLC also advised that given the small size of the Tiwi Aboriginal population, disputes are resolved informally through discussions with the Chair of the TLC; and that the work conducted by the anthropologists to

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47 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 25.

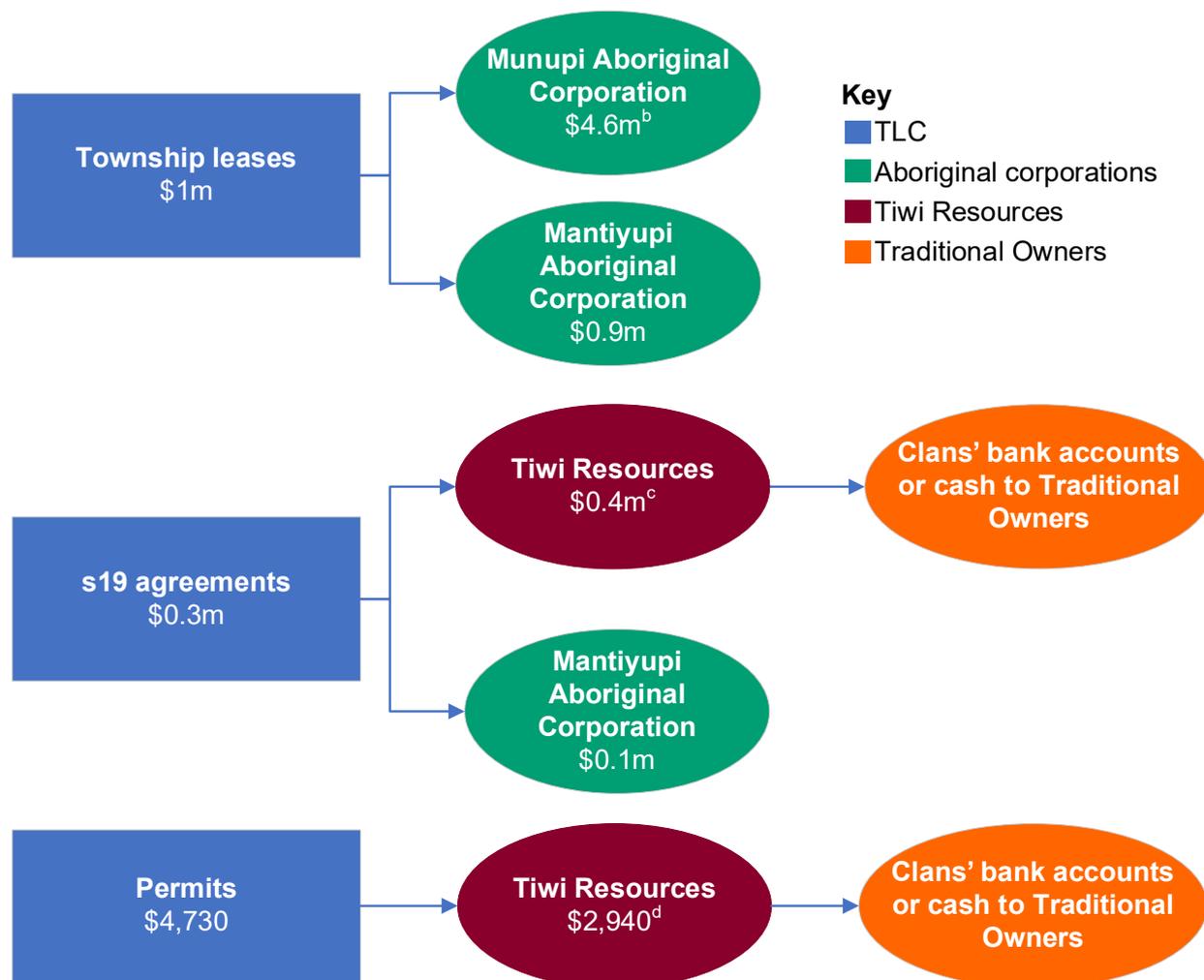
48 Commonwealth Ombudsman, *Better Practice Complaint Handling Guide* [Internet], 1 January 2023, available from [https://www.ombudsman.gov.au/publications-resources-and-faqs?form=simple&profile=default&num\\_ranks=&query=%21showall&collection=comomb-publications&f.Tab%7CFUN7lh9eghnqfzocccoegs0qpg=Better+practice+guides](https://www.ombudsman.gov.au/publications-resources-and-faqs?form=simple&profile=default&num_ranks=&query=%21showall&collection=comomb-publications&f.Tab%7CFUN7lh9eghnqfzocccoegs0qpg=Better+practice+guides) [accessed 5 February 2023].

document genealogies and update the Traditional Owner register will contribute to minimise disputes.

### Distributing royalties and other payments

3.72 Figure 3.1 describes how the payments received in 2021–22 by the TLC in respect of the use or occupation of Aboriginal land on the Tiwi Islands were distributed (see Table 1.1).

**Figure 3.3: Distribution of rents and other payments, 2021–22<sup>a</sup>**



Note a: Payments received are sometimes different from payments distributed as payments received in one financial year may have been paid in the following financial year.

Note b: \$4 million were received by the TLC in 2018 for the Pirlangimpi township lease and paid to the Munupi Aboriginal Corporation (plus \$0.6 million interest) in 2021–22.

Note c: \$0.2 million were received by the TLC in the 2020–21 and paid to Tiwi Resources in 2021–22.

Note d: \$1790 received by the TLC in 2021–2022 was paid to Tiwi Resources in 2022–23.

Source: ANAO analysis of TLC documentation.

3.73 The ANAO examined the distribution of payments from township leases, section 19 agreements, and permits, as they are the most material forms of agreements for the TLC.

3.74 Payments must be made within six months of their receipt by the Land Council, unless the Land Council has received written instruction from the Traditional Owners prior to distribution. The

TLC advised the ANAO that it had distributed all 2021–22 payments within six months, except for one, and for that one provided evidence that written instruction had been received from the relevant Traditional Owners to hold the funds.

3.75 The TLC has a documented process to distribute land use funds. When funds are received, the Finance Manager identifies how the money should be distributed, primarily based on the agreements' conditions, and requests confirmation through a resolution from the full Council or the Management Committee. This resolution can be given either at the next meeting or via email, whichever is the faster. Once the resolution has been recorded, payment is to be made either directly to the relevant clan's Aboriginal corporation bank account; or to Tiwi Resources, which manages some of the clans' funds.

3.76 The TLC advised that it does not seek evidence from Tiwi Resources that funds have been correctly distributed in accordance with the resolutions made by the Council. The audit did not verify whether documented processes were followed for all monies received, or that payments had been made as per resolutions.

### **Recommendation no. 8**

3.77 The Tiwi Land Council improve the processes supporting the distribution of payments by seeking evidence from Tiwi Resources to demonstrate that all payments that are processed by Tiwi Resources have been made in accordance with the Council resolution.

**Tiwi Land Council response:** *Agreed.*

3.78 *Agreed and due to be implemented.*

## 4. Arrangements to promote the proper use and management of resources

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### Areas examined

This chapter examines whether the Tiwi Land Council (TLC) has appropriate arrangements to promote the proper use and management of resources under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and Public Governance, Performance and Accountability Rule 2014 (PGPA Rule).

### Conclusion

The TLC's arrangements to promote the proper use and management of resources are largely inappropriate. The TLC's policy framework and arrangements for risk management, fraud control and managing conflicts of interest are incomplete, not appropriately established, and inconsistently implemented. The TLC's corporate plan and annual report, including performance statements, are not fully consistent with legislative requirements. The TLC's Audit Committee, while properly established, is not effective in the delivery of some of its mandatory functions.

### Areas for improvement

The ANAO made six recommendations aimed at improving risk management; implementing an updated policy framework; establishing an appropriate fraud control framework; improving management of conflicts of interest; improving the processes to develop its corporate plan, annual report and performance statements; and addressing the effectiveness of the Audit Committee.

4.1 Under the PGPA Act, Commonwealth entities are accountable to the Parliament and the public for the proper use and management of public resources to deliver programs and services and achieve outcomes. Effective management of risk, fraud and probity; a robust policy framework; a corporate plan and annual report, including a performance statements; and an audit committee are key mechanisms under the PGPA Act to implement this duty.<sup>49</sup>

### Has the Land Council established a system of risk oversight and management and a policy framework that are appropriate?

While there is a risk management policy, the risk register is not complete or up to date. In terms of the policy framework, some essential policies do not exist. Of those that exist, several need to be improved and all need to be appropriately authorised. There is a lack of training on policies. The TLC has commenced a program of improvement of its policy framework.

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49 *Public Governance, Performance and Accountability Act 2013* (Cth), section 15 (duty to govern), section 16 (duty to establish systems for risk and control), section 35 (corporate plan), section 39 (performance statements) and section 46 (annual report); and PGPA Rule 2014: section 10 (preventing, detecting and dealing with fraud), and Division 2 (duty to disclose interests). Subsection 12(2) of the PGPA Rule specifies that the duty to disclose interests does not apply to a member of a Land Council, if the interest arises because the official is a Traditional Owner or an Aboriginal person who has an entitlement, in accordance with Aboriginal tradition, to enter and use or occupy the land.

## Risk oversight and management

4.2 The PGPA Act (section 16) requires accountable authorities of Commonwealth entities to establish and maintain appropriate systems and internal controls for the oversight and management of risk. The Commonwealth Risk Management Policy supports the PGPA Act. As a corporate Commonwealth entity, the TLC is not required to comply with the Commonwealth Risk Management Policy, however the Policy states that corporate Commonwealth entities ‘should align their risk management frameworks and systems with this policy as a matter of good practice’.<sup>50</sup>

### *Risk management policies and risk appetite*

4.3 The TLC draft 2021–22 Annual Report notes that the TLC ‘worked during the year to further develop [its] Risk Management protocols, Registers, and Manuals’ and that it ‘maintains a comprehensive Risk Register’. An identical statement was included in the TLC’s annual reports for 2018–19, 2019–20 and 2020–21.

4.4 The Commonwealth Risk Management Policy specifies that entities should establish a risk management policy. The policy should define the entity’s approach to the management of risk and how this approach supports its strategic plans and objectives; establish a risk appetite and tolerance; and contain an outline of key accountabilities and responsibilities for managing risk.

4.5 The TLC’s Security Risk Management Plan, dated January 2018, relates to risk management more generally and represents the TLC’s risk management policy. The TLC was unable to provide evidence of the approval of the Security Risk Management Plan by the accountable authority or the Council. The risk management policy outlines the context, objective, definitions, benefits, steps to implementation and expected deliverables from risk management. The risk management policy states that all TLC representatives are responsible for managing risk within their area of control and that the Chief Executive Officer (CEO) has overall responsibility for implementation of the policy. The policy has several deficiencies.

- Checks and surveys conducted by the internal audit function are specified as one of the main mitigation strategies to identify and review critical risk areas. The TLC does not have an internal audit function.
- There are no reporting protocols for informing the Management Committee and Audit Committee of key risks.
- There is no statement about the TLC’s risk appetite or tolerance.

### *Risk assessment*

4.6 The TLC’s risk management policy states that TLC will maintain a risk register, which will be updated annually. In November 2018 the TLC advised the Audit Committee that a risk register was in place but outdated. A new risk register was presented to the Audit Committee in May 2019 and presented again, largely unchanged, in August and November 2020 and in November 2021. The TLC’s 2021–2025 and 2022–2026 Corporate Plans broadly reproduced the 2019 risk register.

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50 Department of Finance, *Commonwealth Risk Management Policy* [Internet], Finance Minister’s Forward, updated 29 November 2022, available from <https://www.finance.gov.au/government/comcover/risk-services/management/commonwealth-risk-management-policy> [accessed 20 March 2023].

- The risk register presented in 2021 included 23 identified risks across 10 categories.<sup>51</sup> Controls or mitigations were listed for most risks regardless of risk rating; however, two reputational risks (both rated ‘high’) had no treatment indicated.
- The risk register does not capture risk owners responsible for treating the risk.
- The risk register includes a risk that Tiwi Plantations Corporation and ‘Port Melville operations’<sup>52</sup> pose a reputational risk to the TLC. Tiwi Plantations Corporation and Port Melville Pty Ltd are not declared as related entities in TLC annual reports, and it is unclear from the risk register what the basis for this risk is or why this risk is relevant to the TLC.
- After the application of mitigations, one risk (business continuity risks associated with unforeseen emergency events) was rated as ‘extreme’, two as ‘high’ (reputational risks associated with Tiwi Plantations Corporation and Port Melville operations), and one as ‘medium’ (TLC’s ability to meet Land Trust expenses). All the other risks were rated as ‘low’. As there is no statement of risk tolerance or appetite, it is not possible to determine which risks are outside of tolerance.
- The 2020 risk register was presented in the Audit Committee in 2021 and has not been updated since 2020. There has been no consideration of risks associated with the COVID-19 pandemic or with TLC’s administration of the Northern Territory Indigenous Economic Stimulus Package, which required the TLC to manage a \$13.3 million grant program within a short timeframe.

## Recommendation no. 9

4.7 The Tiwi Land Council:

- update and periodically review the risk management policy and ensure that it is aligned with the *Commonwealth Risk Management Policy*, by including risk appetite, and risk monitoring and reporting arrangements;
- update and periodically review the enterprise risk register; and
- ensure that the enterprise risk register considers risk ownership, controls, and risk tolerance; and includes mitigations for risks that are considered outside of tolerance.

**Tiwi Land Council response:** *Agreed.*

4.8 *The TLC has engaged external expertise to review, make recommendations, and assist with overseeing their implementation for all aspects of Risk and Risk Management. Their team is to work with the Audit Committee members, all staff and the TLC council members. This will have commenced by the time this present report is published.*

## Policy framework

4.9 Policies and procedures are an important part of an entity’s system of internal controls. The TLC has a Policies and Procedures Manual which states that it was last reviewed in August 2020. Of

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- 51 These are: ‘reputational’, ‘people’, ‘financial and systems’, ‘security/privacy’, ‘technical’, ‘compliance/legislation’, ‘business continuity’, ‘fraud’, ‘items’, ‘Act requirements’ and ‘mining & extraction’.
- 52 Tiwi Plantations Corporation Pty Ltd manages forestry plantations on the Tiwi Islands and exports forestry products from Port Melville. Facilities at Port Melville are owned by Port Melville Pty Ltd. Several TLC members are directors of these two entities.

the 19 policies listed in the Policies and Procedures Manual, the TLC was able to provide 10 to the ANAO. There is also a Recruitment Policy, which is not mentioned in the Policies and Procedures Manual (see Table 4.1).

4.10 The TLC has not established several key resource management policies, namely: gifts and benefits; procurement; records management; whistle-blowers; and training. While the TLC has established a policy in respect to vehicles and ICT usage, it does not have an asset policy. There is no documented evidence that the policies that do exist were approved by the accountable authority, the full Council or the Management Committee. The April 2022 EY governance review (see paragraph 1.26) made several recommendations about the TLC’s organisational policies, highlighting gaps and areas where policies should be developed or reviewed. There is no policy framework that establishes roles and responsibilities for developing, maintaining and approving policies. The absence of a documented policy framework reduces accountability for effective implementation of policies.

4.11 Table 4.1 provides an overview of ANAO’s assessment of TLC’s available governance policies, focusing on whether the policies are sufficiently detailed and clear and are consistent with the PGPA Act’s requirement for proper use and management of resources.

**Table 4.1: TLC available governance policies<sup>a</sup>**

Title	Clear and detailed <sup>b</sup>	Consistent with PGPA Act
Code of Conduct	◆	◆
Travel	▲	▲
Vehicles	■	■
Security (three policies)	■	■
ICT Usage	◆	◆
WHS	■	■
Child Safety	■	N/A
Disciplinary	■	N/A
Recruitment	▲	▲

Key: ◆ Fully demonstrated ▲ Partially demonstrated ■ Not demonstrated N/A – Not relevant to the PGPA Act

Note a: Risk management and fraud policies are examined in separate sections of this report.

Note b: Assists the reader to clearly understand what their obligations are and what actions are required of them.

Source: ANAO analysis.

4.12 Except for the Code of Conduct and the ICT Usage Policy, most of the remaining nine policies could be improved.

- The Travel and Recruitment Policies were mostly clear however lacked important elements, such a requirement to have an authorisation form completed and approved prior to travel. The Recruitment Policy lacked any information about responsibility for

conducting interviews and procedures for conflicts of interest management for selection processes.

- The other policies were either incomplete or in draft form; or were complete and sometimes not fit for purpose. They made general statements without guidance about how to apply the statements; and referred to complementary policy documents or functions that did not exist at the TLC.

4.13 A lack of awareness of and induction to organisational policies for Council members and staff creates risks that policies are implemented inconsistently or not at all. There was little evidence that most of the policies had been implemented.

- Analysis of meeting minutes indicates that some policies (Code of Conduct, Travel and Vehicle) are referred to during Council and Management Committee meetings.
- TLC staff employment contracts include requirements relating to the need to adhere to organisational policies. However the induction checklist does not include specific information about the suite of policies available (focussing primarily on WHS and office security arrangements and procedures); and several TLC staff advised the ANAO that they were not made aware of other policies when they commenced with the TLC.
- The last page of the Policies and Procedures Manual requires employees to sign a declaration confirming that they have read and agreed to the terms and conditions of the Manual and the 19 policies listed in it. The TLC was unable to provide signed records to the ANAO.
- Three of the 10 Policies and Procedures Manual policies provided to the ANAO are required to be signed by staff and Council members (the Code of Conduct, Travel and ICT policies). This requirement was not always met. The TLC provided to the ANAO signed copies of the Code of Conduct for all staff as at July 2022. However, of the 32 members of the Council as at December 2022, nine had not signed the Code of Conduct. The TLC was unable to provide signed records for the ICT and Travel policies.
- Recruitment undertaken by the TLC in mid-2022 involved external advertising and a merit-based selection process, as required by the policy. However, the TLC was unable to provide evidence to the ANAO of a competitive and merit-based selection of senior positions prior to this date.
- As at March 2023 no TLC staff had undertaken specific training to assist them understand the full organisational policy suite, with staff training largely restricted to financial systems, work health and safety and cultural awareness. There is no mandatory training and completion of training is not monitored.

4.14 A number of activities were commenced in late 2022 in relation to policies.

- A policy officer was recruited in October 2022 to review human resource and risk management policies and procedures. In April 2023 the TLC also engaged a human resource manager whose duties include the 'continuous improvement of human resource systems and processes, policies, and procedures'.
- In November 2022 the TLC advised the ANAO that work to develop a complete policy framework had commenced, using policy templates developed by other NT Land Councils

or Aboriginal organisations. The TLC aimed to have the new set of policies developed by March 2023; this was later extended to the end of 2023.

- On 9 November 2022 the NIAA approved funding for the TLC to undertake a ‘staff retreat’ to review operations and to present the revised policy set and procedure manuals. The TLC intended to conduct this retreat in March, which was later rescheduled to June-July 2023.

## Recommendation no. 10

4.15 The Tiwi Land Council:

- (a) develop and implement a framework for the development, approval and ownership of its policies;
- (b) provide mandatory and role-related training for Council members and staff to ensure that policies are appropriately understood; and
- (c) include in the policy framework consideration of how compliance with mandatory and role-related training will be monitored.

**Tiwi Land Council response:** *Agreed.*

4.16 *The TLC has sought and obtained advice of relevant practice from similar organisations including Territory Land Councils. These are being reviewed and will be adapted for use by the TLC. Along with development and implement work by staff including the HR Manager and PO, it is intended that external advice be sought regarding appropriate training including for Members.*

## Are there appropriate arrangements to support the integrity of land council operations?

The TLC does not have effective arrangements to support the integrity of its operations. The TLC is not compliant with the Commonwealth fraud rule. There are no regular fraud risk assessments, there is a lack of fraud training for staff, and there is no mechanism for reporting of incidents of fraud or suspected fraud. The TLC’s management of conflicts of interest is ineffective. There is no register of interests for senior employees. A register of pecuniary interests required under the ALRA is not used by all Council members, and there is no management plan for declared pecuniary interests. Conflict of interest management during meetings, as recorded in minutes, is inconsistent.

### Fraud control

4.17 Under section 27 of the PGPA Act and under section 10 of the PGPA Rule, an official of a Commonwealth entity must not improperly use his or her position to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person, and the accountable authority of a Commonwealth entity must take all reasonable measures to prevent, detect and deal with fraud relating to the entity. Requirements for fraud control by Commonwealth entities are contained in the 2017 *Commonwealth Fraud Control Framework*<sup>53</sup>, which consists of three tiered documents —

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53 Department of the Attorney-General, *Commonwealth Fraud Control Framework*, August 2017.

the fraud rule, fraud policy and fraud guidance. As a corporate Commonwealth entity, the TLC must comply with the fraud rule, which ensures a minimum standard for managing the risk and incident of fraud. While Land Councils are not bound by the fraud policy or fraud guidance, the government 'considers both documents as better practice for corporate Commonwealth entities and expects that these entities will follow the fraud guidance and fraud policy where appropriate in meeting the requirements of the fraud rule'.<sup>54</sup>

4.18 The TLC has a Fraud Control Policy in which it states that its aim is to 'reflect best practice in identifying and controlling our fraud risks'. However, TLC policy and mechanisms fall short of the minimum requirements established in the fraud rule (see Appendix 7). The TLC:

- does not conduct fraud risk assessments;
- has not developed a fraud control plan that deals with identified risks;
- has identified some activities to prevent fraud, and has not undertaken any fraud training;
- has identified one fraud detection method, and does not have a confidential reporting process; and
- does not have a mechanism for recording and reporting incidents of fraud or suspected fraud.

4.19 The Fraud Control Policy (which includes financial delegations, see paragraph 2.10) was presented to the Council in December 2021. The minutes of the meeting do not record discussion of the policy and note that the financial delegations documented in the policy were considered and approved. The Fraud Control Policy was presented to the Audit Committee in March 2022. The minutes from the meeting record that a question was raised in relation to the determination of the financial delegations for the CEO and office manager, and the policy was not otherwise discussed.

4.20 The TLC draft 2021–22 Annual Report noted that the accountable authority takes reasonable measures to prevent, detect and deal with fraud, including data collection, reporting, and subsequent consideration; and that the Land Council is satisfied that it has in place appropriate fraud control mechanisms to meet the needs and integrity of the Land Council. The report also noted that there were no detected or reported incidents during 2021–22. This audit did not examine potential instances of fraud, although the ANAO identified instances from December 2021 where expenses were incurred without approved purchase orders.

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54 *ibid*, p. iv.

## Recommendation no. 11

4.21 The Tiwi Land Council:

- (a) produce a fraud control framework that is aligned to the Commonwealth fraud rule;
- (b) conduct fraud risk assessments regularly;
- (c) implement mechanisms to prevent and detect fraud that are proportionate to identified fraud risks;
- (d) implement mechanisms to record and report fraud to the Audit Committee; and
- (e) ensure that the fraud control system is reviewed and endorsed by the Audit Committee.

**Tiwi Land Council response:** *Agreed.*

4.22 *The TLC has sought and obtained copies of relevant policies from similar organisations including Territory Land Councils. These are being reviewed and will be adapted for use by the TLC. It is intended that external advice be sought for this process including for relevant staff training.*

4.23 *External advice has been sought and engaged for a review of all aspects of Risk and Audit including by reference to the ANAO report will have commenced by the time this report is published. This review will work with the TLC's Audit Committee, Council members and staff to both recommend reforms and changes and to assist with their implementation.*

## Conflict of interest management

### *Conflict management policy*

4.24 The Australian Commission for Law Enforcement Integrity's guide on conflict of interest management states:

Agencies should provide clear and consistent guidance to employees on how to identify, declare and manage conflicts of interest. Agency executives and management should regularly communicate about the conflict of interest framework and how it is implemented.<sup>55</sup>

4.25 The TLC Policies and Procedures Manual includes a section on conflict of interest management, aimed at staff members. The manual explains what constitutes a conflict of interest, including pecuniary interest, and states that conflicts of interest must be declared to a manager. The TLC Code of Conduct, which must be signed by staff and Council members (see paragraph 4.10) also includes a section describing conflicts of interest that should be declared to a manager or the TLC Chair. As mentioned at paragraph 4.14, nine of the 32 members of the Council had not signed the Code of Conduct as at December 2022.

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55 Australian Commission for Law Enforcement Integrity, *Prevention in Practice – Understanding Conflict of Interest*, [Internet], [no date], p.10, available from <https://www.aclei.gov.au/preventing-corruption/corruption-risks-and-vulnerabilities/conflicts-of-interest> [accessed 22 December 2022].

## *Conflict of interest management*

### Staff members

4.26 As mentioned at paragraph 4.13, the TLC provided signed copies of the Code of Conduct for all current staff as at July 2022. There is no register of interests for senior staff.

### Council members

4.27 Section 29AA of the ALRA requires that each member of a Land Council make a written declaration of their direct or indirect pecuniary interests, in a register of interests kept by the Council. This is to be done in accordance with a determination made by the Minister for Indigenous Australians (the Minister) regarding the kind of interests to be disclosed, the manner in which the disclosures are to be made and the form in which the register is to be kept. Such a determination had not been made by the Minister as at March 2023. Despite this, the Council and Management Committee meeting rules state that:

- members must make a written disclosure of their direct or indirect pecuniary interests when they first hold office;
- members must update their details when there is a change or at the time of the first meeting of each calendar year; and
- for each member, a register of interests must document details of directorships and board level positions within Aboriginal corporations, institutions, businesses and other organisations that have regular dealings with the TLC.

4.28 The TLC has developed a detailed form for Council members to declare their pecuniary interests. The TLC has not provided guidance to Council members to ensure they understand the purpose of their declaration of pecuniary interest and are able to complete it correctly.

4.29 Declarations of pecuniary interest, signed between 6 October and 2 November 2021, were provided to the ANAO for 22 of the 32 members who served from July 2021. Of the 22 members who made a declaration, five stated they had no pecuniary interest and 17 declared a pecuniary interest. The ANAO cross-checked the declarations that were provided with a list of directors (where available) for 19 organisations operating on Tiwi Islands and registered with the Australian Charities and Not-for-profits Commission or the Office of the Registrar of Indigenous Corporations. The analysis found that:

- the five members who declared not having a pecuniary interest were not found to be directors of any of these 19 organisations; however:
- seven of the 10 members who did not make any declaration were found to be director or member of at least one of the 19 organisations; and
- six out of the 17 members who declared an interest did not include their interest in at least one of the 19 organisations operating on Tiwi Islands of which they were a director.

4.30 There is no management plan for declared pecuniary interests.

4.31 The TLC has adopted clear rules to seek to manage conflicts of interest in meetings, which are documented in the Council and Management Committee meeting rules. The meeting rules

include exceptions.<sup>56</sup> During meetings, members are required to proactively announce a material personal or pecuniary interest in a matter under consideration in the meeting and to not participate in the discussion and decision-making on the matter. Such a declaration is required to be noted in the minutes of the meeting.

4.32 The agenda for Council and Management Committee meetings includes, as a standing item at the beginning of each meeting, a declaration of conflicts of interest. Of the 17 Council and Management Committee meetings held in 2021–22:

- all except two sets of minutes recorded ‘noted’ against this item; and
- conflicts of interest were declared in two instances. In the first instance, the minutes do not record how this conflict was managed, and indicate that the member participated in the discussion. There was no indication that any exception applied. In the second instance, the relevant member excluded themselves from the discussion.

4.33 Analysis of the meeting minutes indicates that conflicts of interest during meetings were not always managed effectively. For instance, at the Council meeting of August 2022, \$1.3 million funding was approved for a project sponsored by an entity of which two Council members were directors. The minutes did not record any declaration of a conflict of interest or whether the members participated in the discussion and decision.

4.34 Given the small size of the Tiwi population, Council members are involved with major projects within the community or on the governing bodies of external organisations. This increases the need for effective management of conflicts of interest and transparent decision-making in order for the TLC to provide assurance that Council decisions are in the best interests of all constituents.

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56 These exceptions are where: the matter relates to all or substantially all Traditional Owners of the Tiwi Islands; the matter relates to the payment of royalties, rents and other mining derived income to individual Traditional Owners of the Tiwi Islands, other than to an organisation; or the member holds knowledge and information that will be useful to inform the discussion and decision-making pertaining to the matter. In such instances, the member may be present to provide such knowledge and information, but is to be excluded from other discussion and decisions pertaining to the matter.

## Recommendation no. 12

4.35 The Tiwi Land Council:

- (a) consistently apply its requirement for a declaration of pecuniary interests and monitor non-compliance;
- (b) develop documented management plans for declared conflicts of pecuniary interests;
- (c) strengthen management and recording of conflicts during Council and Management Committee meetings; and
- (d) include, in governance training and guidance, material on the management of conflicts of interest.

**Tiwi Land Council response:** *Agreed.*

4.36 *The TLC intends to follow policy and with regard to improvements has sought and obtained advice of relevant practice from similar organisations including Territory Land Councils. These are being reviewed and will be adapted for use by the TLC. It is intended that external advice be sought for this process including for relevant Management, member and staff training.*

## Are the corporate plan and annual report consistent with legislative requirements?

The TLC 2021–2025 Corporate Plan complied with most of the PGPA Rule requirements. The primary weakness was in performance measures and targets, which were not clearly defined and were too focused on activities at the expense of outputs and outcomes. This impedes understanding of the TLC’s performance against its key purposes. The draft 2021–22 Annual Report was untimely and was in draft form at March 2023. Council members and the accountable authority were not substantively involved in the development of the Corporate Plan and Annual Report. There is a lack of assurance over performance reporting.

### Corporate plan

4.37 The ANAO assessed the TLC’s compliance with requirements for its 2021–2025 Corporate Plan as set out in the PGPA Rule and Department of Finance (Finance) guidance (see Appendix 8).<sup>57</sup> In summary, the 2021–2025 Corporate Plan met the requirements for its reporting period; introduction; explanation of entity purpose and key activities to achieve that purpose; and timeliness of publication. However, improvements could be made in relation to operating context and performance measurement.

- Operating context — The 2021–2025 Corporate Plan includes content relating to the environment, risk management, and stakeholders, as required by the PGPA Rule. However it does not include discussion about specific strategies or plans that will be implemented by the TLC to maintain or improve its capability as part of its operating context.

57 Tiwi Land Council, *2021–2025 Corporate Plan*, available from [https://www.tiwilandcouncil.com/documents/Uploads/Corporate\\_Plan\\_2021-2025.pdf](https://www.tiwilandcouncil.com/documents/Uploads/Corporate_Plan_2021-2025.pdf) [accessed 14 December 2022].

- Performance — The strategies, performance criteria, key performance indicators (KPIs) and targets present several shortcomings, including:
  - for several strategies, it is not clear what the strategy is and what it is aiming to achieve;
  - performance criteria and KPIs are not defined with sufficient detail to enable the reader to understand what is being measured;
  - some of the performance criteria and KPIs relate to mandatory legislative requirements (failure to meet targets for these key performance indicators is an indicator of legislative non-compliance, not an indicator of performance);
  - all the targets are counts and there is no explanation of what is being counted or how the targets (which are sometimes zero) were derived; and
  - the measures are focused on activities mainly and outputs occasionally; they do not measure effectiveness in achieving outcomes or efficiency.

4.38 A comparison between the section titled ‘performance measures’ in the TLC 2021–2025 Corporate Plan and the corresponding section in the TLC 2022–2026 Corporate Plan shows that only one strategy (Managing land – mining) has been significantly reviewed and updated; the other sections are substantially identical.

### **Annual report**

4.39 The TLC’s draft 2021–22 Annual Report was partly compliant with the PGPA Act and Rule and the ALRA requirements (see Appendix 8).

- Timeliness — Subsection 46(1) of the PGPA Act requires that ‘an entity’s annual report must be given to the responsible minister by the 15th day of the fourth month after the end of the reporting period’ (15 October for Land Councils). The TLC met the 15 October timeframe once between 2017–18 and 2021–22, and it was significantly delayed for 2020–21 and 2021–22. The 2021–22 Annual Report did not meet the 15 October deadline. On 13 April 2023 the Minister approved the report for presentation to Parliament, and the TLC advised that it aims to have the report presented to Parliament during the June 2023 Parliamentary sittings.
- ALRA requirements — The ALRA requires the TLC to include information about eight specific items including certain fees, determinations, amounts paid or held in trust, approved entities if a certain lease is granted or transferred to approved entities, the appointment of a committee and details of consultants. The draft 2021–22 Annual Report contains amounts paid, committees appointed and consultants engaged. The TLC did not receive any fees for a service and no relevant determinations were made, therefore none were listed. The TLC did not list three townships leases that are held by the Executive Director of Township Leasing in the area of the TLC.

## Annual performance statements

### *The 'clear-read' principle*

4.40 A clear line of sight between an entity's planning documents (corporate plan) and its key reporting document (annual report) is known as the 'clear-read' principle.<sup>58</sup> There was a largely clear line of sight between the 2021–2025 Corporate Plan and the annual performance statements in the draft 2021–22 Annual Report. There were two exceptions.

- The corporate plan links each performance measure to a strategic goal. The performance statements do not mirror this structure.
- Two of the 24 performance measures reported in the annual performance statements are worded differently to the corporate plan. One of the differences is trivial. The other difference substantively changed the meaning of the performance measure from 'demonstrate increased income year on year' to 'demonstrate increased Land Use Fund income year on year'.

### *PGPA Rule section 16F requirements*

4.41 The annual performance statements of an entity, published in the annual report, must provide information about the entity's performance in achieving its purposes and comply with any requirements prescribed under section 16F of the PGPA Rule. The TLC 2021–22 performance statements met these requirements (see Appendix 8).

## Development of the corporate plan and annual report

4.42 While a Land Council accountable authority is required to prepare and submit a corporate plan and annual report to the Minister under the PGPA Act, the Council has specific functions under the ALRA and should be involved in the development of the corporate plan and the annual report. The accountable authority should also gain assurance that the information published in the corporate plan and annual report, including in the performance statements, is complete and accurate.

4.43 The TLC accountable authority and Council have had limited engagement in the development and approval of the recent corporate plans and annual reports.

- There is no documented evidence that the Council, Management Committee or accountable authority considered or approved the 2021–2025 Corporate Plan prior to its publication on the TLC website. The Management Committee minutes for its 30 August 2021 meeting noted that 'the corporate plan has been uploaded to the website'. Similarly, the TLC's 2022–2026 Corporate Plan was not considered by the Management Committee or the Council prior to its publication on 31 August 2022.
- The TLC draft 2020–21 Annual Report was presented to the Council at its 16 December 2021 meeting. The Council approved the Annual Report at that meeting, and there is no documented evidence that Council members were able to review a draft of the report prior to that date.

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58 Department of Finance, *Why is performance information reported in a PBS?* [Internet], Finance, January 2022, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/reporting-performance-information-portfolio-budget-statements-rmg-129/why-performance-information-reported-pbs> [accessed 20 March 2023].

4.44 The TLC accountable authority does not have processes to gain assurance that the published results in the performance statements are complete and accurate. The Audit Committee was told that performance information was collected by asking specific staff (for instance, the resource and environment manager or the anthropologist) to complete the results and analysis of the measures relevant to their activities. No further verification was conducted.

4.45 The TLC has not attended the training workshops on the development of the corporate plan and annual report organised by the Department of Finance since at least 2018–19. The TLC regularly engaged with the NIAA in preparing its corporate plans and annual reports, and provided drafts of these documents to NIAA for review. The NIAA has been active in assisting the TLC meet relevant requirements for the production of these documents and has provided comments on drafts to improve their content and presentation.

### Recommendation no. 13

4.46 The Tiwi Land Council improve the processes to develop its corporate plan, annual report and performance statements to ensure that:

- (a) the corporate plan is compliant with legislative requirements;
- (b) Council members and the accountable authority consider and approve the content;
- (c) performance measures and targets are clearly defined and provide meaningful information about the TLC's performance against its key purposes or activities; and
- (d) a process exists to provide assurance over the completeness and accuracy of the performance results published in annual reports.

**Tiwi Land Council response:** *Agreed.*

4.47 *The TLC has commenced work in this area with the recently established and recruited Media officer's and PO's positions having been given carriage of the work and any relevant reforms with input and oversight by the CEO, PLO, CFO, Accountant and Operations Manager to ensure accuracy and compliance.*

## Do the Audit Committee and internal audit function provide adequate oversight and scrutiny of the Land Council's operations?

The TLC does not have an internal audit function. The TLC has established an Audit Committee which does not execute its mandatory functions effectively. The Audit Committee does not appropriately review the TLC's performance reporting; system of risk oversight and management; and system of internal control. The Audit Committee's mandatory reporting requirements were partly met.

### Internal audit function

4.48 An internal audit function may be established, and is an important mechanism in relation to the accountable authority's responsibility under section 16 of the PGPA Act to establish a system of

internal control.<sup>59</sup> As at March 2023 the TLC did not have an internal audit function. The absence of an in-house or outsourced internal audit function reinforces the importance of the Audit Committee to provide advice and assurance to the accountable authority that its key responsibilities under the PGPA Act are met.

## **Establishment and composition of the Audit Committee**

4.49 As at September 2022 the TLC was mainly compliant with the PGPA Rule requirements and Finance guidance in relation to the establishment and composition of an Audit Committee (see Appendix 9).

### *Charter*

4.50 The TLC has an Audit Committee and an Audit Committee Charter, as required. The Audit Committee Charter content meets requirements. However, the Audit Committee reviewed its Charter at its June 2022 meeting and indicated that it did not agree with the range of duties documented in the Charter, although these were consistent with Finance guidance for audit committees. The reason for their disagreement was that they did not believe that this reflected the expectation that had been conveyed to them when they agreed to take on the role of being an audit committee member at the specified level of remuneration. A charter is meaningless if those to whom it is directed consider it to be unachievable or irrelevant.

### *Member characteristics*

Skills, experience and independence

4.51 The TLC Audit Committee is composed of three persons who are not employees of the TLC and who are independent from management, as required. Members' qualifications, as at September 2022, were relevant, and covered the fields of law, accountancy and architecture.

Remuneration

4.52 Finance guidance does not establish a standard for Audit Committee remuneration and indicates that the remuneration should be commensurate with the importance of responsibilities and the commitment required.<sup>60</sup> The TLC draft 2021–22 Annual Report noted that the Audit Committee met five times and members other than the Chair each received \$418 for each meeting attended.<sup>61</sup> The Chair of the Audit Committee received, for the five meetings attended, \$2780.<sup>62</sup>

Rotation

4.53 The 2018 *Independent Review into the operation of the Public Governance, Performance and Accountability Act 2013 and Rule* recommended that accountable authorities 'establish an audit

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59 Department of Finance, *Resource Management Guide 206 - Model Accountable Authority Instructions for Corporate Commonwealth Entities*, Finance, 2021, p. 14.

60 Department of Finance, *Resource Management Guide 202 - A guide for corporate Commonwealth entities on the role of audit committees*, September 2021, p. 24.

61 By comparison, in 2021–22 the other NT Land Councils provided the following annual remuneration to each of the Audit Committee members (excluding the Chair): Anindilyakwa Land Council — between \$334 and \$1336; Central Land Council — between \$6050 and \$6450; and Northern Land Council — between \$156 and \$1984. The remuneration described here does not include the remuneration related to being a Council member.

62 By comparison, in 2021–22 the other NT Land Councils provided the following annual remuneration to the Audit Committee Chairs (excluding travel and other expenses): Anindilyakwa Land Council — \$58,352 (three meetings); Central Land Council — \$5500 (five meetings); and Northern Land Council — \$3048 (four meetings).

committee membership rotation policy, with maximum appointment terms to ensure regular rotation of committee membership'.<sup>63</sup> Finance guidance indicates that the Finance Secretary wrote to all accountable authorities in August 2019 drawing their attention to this recommendation.<sup>64</sup> The TLC Audit Committee Charter indicates that 'Membership of the committee will be reviewed periodically (but at least every three years)' and does not set a maximum appointment term. As at September 2022, the Chair of the TLC Audit Committee had been a member of the committee since 2008. The two other members had been on the Audit Committee since 2009 and 2014 until their terms expired in June and December 2022, respectively, and their membership was not renewed.<sup>65</sup>

## **Effectiveness of Audit Committee operations**

### *Frequency of meeting*

4.54 The Charter requires that the Audit Committee meet at least four times annually. The Audit Committee met four times each year between 2017–18 and 2020–21 and met five times in 2021–22.

### *Mandatory functions and reporting*

4.55 Appendix 9 presents the ANAO's assessment of the effectiveness of the TLC Audit Committee's operations against the PGPA Rule requirements and Finance guidance.

#### Mandatory functions

4.56 The PGPA Rule requires that the audit committee review the appropriateness of the accountable authority's financial reporting, performance reporting, system of risk oversight and management and system of internal control. These mandatory functions have largely not been executed effectively.

- Review of financial reporting — Financial information was presented to the Audit Committee at each meeting. The Audit Committee, and in particular the member of the Audit Committee with accounting qualifications, examined this information, interrogating results and anomalies, and discussed the TLC annual financial statement with the ANAO observer. However, there is no evidence that the Audit Committee reviewed the TLC's processes and systems for preparing financial reporting information in 2021–22.
- Review of performance reporting — The Audit Committee's review of the TLC's performance reporting, including the annual performance statements required under the PGPA Act, was not effective. There was no consideration of the appropriateness or completeness of the performance measures in 2021–22, and while some questions were asked by the Audit Committee about how performance information is reported in the

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63 E Alexander and D Thodey, *Independent Review into the operation of the Public Governance Performance and Accountability Act and Rule*, Department of Finance, September 2018, p. 29, available from [https://www.finance.gov.au/sites/default/files/2019-08/PGPA\\_Independent\\_Review\\_-\\_Final\\_Report.pdf](https://www.finance.gov.au/sites/default/files/2019-08/PGPA_Independent_Review_-_Final_Report.pdf) [accessed 12 January 2023]. While the PGPA Rule 2014 does not mandate minimum or maximum periods of appointment for audit committee members, it states that the rotation of audit committee members allows for a flow of skills and talent through the committee, enhancing its effectiveness and ensuring its objectivity.

64 Department of Finance, *Resource Management Guide 202 - A guide for corporate Commonwealth entities on the role of audit committees*, 2021, p. 24.

65 Two new members were appointed by the TLC in September 2022 and January 2023, for three years. The Chair's term is due to end in June 2023.

annual report, the Audit Committee did not seek further assurance over the reliability of the data (see paragraph 4.44).

- Review of risk oversight and management.
  - There was no evidence in the meeting minutes and papers examined by the ANAO that the Audit Committee requested presentations from TLC staff other than the Chief Financial Officer and another finance officer. The members of the Audit Committee had not visited the Tiwi Islands for a number of years.
  - Between 2018–19 and 2021–22, the Audit Committee met 17 times. The TLC was unable to provide the minutes for the meetings held in 2018–19. For the 13 meetings in 2019–20, 2020–21 and 2021–22, the CEO attended three times, and the Chair of the Council once.<sup>66</sup>
  - The Audit Committee’s review of the appropriateness of the TLC’s system of risk oversight and management was not effective. The TLC risk register and risk management framework were presented at one of the meetings in 2021–22. While the minutes record that the Audit Committee suggested adding columns for the management and mitigation status of risks to the risk register, there was no discussion about the risks, whether the risks were within risk tolerance, and whether controls and mitigations were sufficient. There was no discussion relating to the implementation of the risk framework.
- Review of system of internal control — The Audit Committee’s review of the appropriateness of the TLC’s system of internal control was not effective, based on an assessment of the Audit Committee’s consideration of fraud risks and controls. The TLC fraud management framework was presented at one meeting in 2021–22. The minutes record limited discussion or comments on the document, and no probing into the implementation of the framework. The ANAO did not examine the Audit Committee’s consideration of other forms of internal control discussed in this report, namely probity (conflict of interest management) and the policy framework.

#### Mandatory reporting

4.57 The audit committee has mandatory functions in relation to reporting in the annual report, and to the Land Council. The TLC Audit Committee’s mandatory reporting requirements were mostly not met.

- Charter and committee members — The TLC draft 2021–22 Annual Report included a direct electronic link to the Audit Committee Charter, and information about the committee members including name, qualifications, meeting attendance and remuneration.
- Written statement — In 2021–22, the Audit Committee did not provide a written statement to the accountable authority of its view on the appropriateness of the financial reporting; performance reporting; system of risk oversight and management; and system of internal control.
- Assessment of Audit Committee performance — The Audit Committee’s Charter includes a provision that the Chair of the committee, will initiate a self-assessment of the

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66 The CEO was suspended in May 2022.

performance of the committee at least once every two years. The Audit Committee meeting agenda of December 2021 includes an item called 'self-assessment', and the minutes record that the Audit Committee reminded the TLC that the suggestions they provide as members of the Audit Committee are advice and not binding. The Audit Committee's performance was not reviewed in 2021–22.

#### **Recommendation no. 14**

4.58 The accountable authority of the Tiwi Land Council ensure that it establishes an Audit Committee that executes the requirements of the Audit Committee Charter.

**Tiwi Land Council response:** *Agreed.*

4.59 *The TLC has engaged external expertise to review procedures and practice with regard to the Audit Committee, and particularly in the light of the recommendations of the external reviews including the present ANAO Performance Audit. From this they are to generate relevant documentation including policies and manuals as appropriate and make recommendations for and assist with the implementation of reforms. This will have commenced by the time this present report is published.*

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Grant Hehir  
Auditor-General

Canberra ACT  
24 May 2023

# Appendices

## Appendix 1 Entity responses

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116 Reichard Rd  
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Grant Hehir

3/5/2023

Auditor-General for Australia

Australian National Audit Office.

The Tiwi Land Council (TLC) welcomes external review and engaged with the reviewers throughout the period of their work. The TLC has examined and considered the draft and now final findings (the ANAO report). These recommendations highlight a number of issues and deficiencies.

As noted in the ANAO report the senior management of the TLC changed in July 2022. Since that time the TLC has been undergoing an extensive and challenging reform process with the staffing complement expanded and recruited. This has been deliberately aimed at strengthening the TLC's capabilities and performances (these being among the areas that the report looks at) and substantial progress has already been made. The TLC now has a HR / Corporate Services manager. By not previously having this position; by having a single Legal Officer (the PLO) who was also the CFO ; by not having a staff-anthropologist for almost the entirety of the TLC's life-time ; by only forming a single person Environment unit ; by having no media manager or team the existing staff structure limited the land council's ability to adequately perform its ALRA functions and impaired its ability to manage and oversee its works. Adequately addressing any of the issues or reforms envisaged by the ANAO report would have been difficult to near impossible with the earlier staffing level and structure. In the TLC's view this staff reform (that is underway and largely complete) was, is, essential and prerequisite to acquiring the capacity to provide good governance and to meet ALRA and other legislative requirements.

This includes that there is now a PLO whose sole job description is providing legal advice and support for the TLC's legal requirements and including assisting with the matters in ANAO report recommendations numbered 1, 3, 4, 6, 9, 11, 12 and in particular 7 and 13. This frees up the CFO component of the 'old' position for oversight, compliance and other financial matters particularly in areas involved in the recommendation numbers 8 and 11 . Having, as the TLC now does an expanded anthropology and environment team allows the TLC to address its functions with regard to cultural and environment matters. This will assist with the issues raised by recommendations regarding consent and the monitoring of agreements. The HR / Corporate services manager's position will be central in addressing the issues involved with Recommendation 4. The recently created Media Officer position allows the TLC to professionally and thoroughly address its Advocacy functions. As noted in the report, a number of this position's duties involve matters raised by and recommendations of the ANAO report including the use of the land council's social media for information regarding Tiwi access to meeting minutes and a complaints procedure (Recommendation 5). The position is now also responsible for overseeing the preparation of the Annual Report and assisting in addressing Recommendation 13. External advice has been sought to



*The Tiwi Land Council is the Statutory Authority of Owners of the Tiwi Islands*



assist with the issues involved with Recommendations 9 (Risk and Risk Management) and 14 (the Audit Committee).

To assist with both client communication and transparency the TLC is updating its social media resources including using them to provide a complaints process and advice on accessing services such as inspections of meeting minutes (as mentioned in the ANAO report) as well as others.

The TLC's plans for 2023, actions as encouraged by the ANAO report are aimed at strengthening its governance arrangements, revising and, or introducing new policies and processes and conducting reviews such as that currently underway for Risk Management and Audit and monitoring progress and performance.



Robert Graham  
Chief Executive Officer  
Tiwi Land Council.



Australian Government

National Indigenous Australians Agency

CHIEF EXECUTIVE OFFICER  
JODY BROUN

Reference: EC23-000716

Mr Grant Hehir  
Auditor-General  
Australian National Audit Office  
[OfficeoftheAuditorGeneralPerformanceAudit@anao.gov.au](mailto:OfficeoftheAuditorGeneralPerformanceAudit@anao.gov.au)

Dear Mr Hehir

**Re: Extract from the proposed s19 audit report on the Governance of the Tiwi Land Council**

Thank for the opportunity to respond to the above audit report.

While noting the report is primarily a matter for the Tiwi Land Council, the National Indigenous Australians Agency (the Agency) agrees to Recommendation no. 2.

As part of the Agency's ongoing support to Northern Territory Land Councils, we will work with relevant stakeholders to clarify the conditions and requirements under which an accountable authority may delegate its functions and powers taking into account both the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)* and the *Public Governance Performance and Accountability Act 2013 (PGPA)*.

Thank you again for the opportunity to comment on the report.

Yours sincerely

JODY BROUN  
Chief Executive Officer

2 May 2023

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## Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.

2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's 2022–23 Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.

3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:

- strengthening governance arrangements;
- introducing or revising policies, strategies, guidelines or administrative processes; and
- initiating reviews or investigations.

4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

Report paragraph no.	Actions observed during the course of the audit
3.13 and 3.14	In November 2022 the Tiwi Land Council (TLC) requested an extension to the current Trust membership until 30 June 2023, to allow for time to consult with clan members on a method to nominate Trust members that is more aligned with community expectations. In May 2023 the TLC advised the ANAO that it had commenced conducting a series of workshops with clan members and Council members with the aim of developing a method to nominate Trust members that is more aligned with community expectations. These workshops were scheduled to be completed in May 2023, prior to the end of Trust members' extended term.
3.27	On 5 July 2022 a majority of the Council voted to dismiss the CEO from employment on the grounds of poor performance. An interim CEO was appointed by the Land Council on 4 July 2022 and commenced his duties on 16 August 2022, initially for a period of six months, and renewed until 16 February 2024. .
3.43	In January 2020 the TLC employed an anthropologist for the first time, whose functions included updating the register and developing a comprehensive genealogical and cultural information repository. Since then, the position has been filled intermittently. The most recent appointment was made in September 2022. In November 2022 the TLC obtained additional funding from the National Indigenous Australians Agency (NIAA) for a second anthropologist position, which was filled in February 2023.

Report paragraph no.	Actions observed during the course of the audit
3.69 and 3.70	The clan meetings conducted by the TLC in November 2022 were organised by the TLC (rather than subcontracted to an external organisation), and demonstrated an improvement in the manner that information was presented to the participants: for each matter on the agenda, a paper was prepared that included background information; the TLC recommended decision; and a section to record the clan's resolution, including provision for the name of the clan members moving and seconding the resolution. Presentation facilities, when available, had been used, and papers had been provided at the meetings.
3.71	In February 2023 the TLC recruited a media officer, whose duties would include administering the new complaints mechanisms to be established on the TLC website.
4.14	<ul style="list-style-type: none"> <li>• A policy officer was recruited in October 2022 to review human resource and risk management policies and procedures. In April 2023 the TLC also engaged a human resource manager whose duties would include the 'continuous improvement of human resource systems and processes, policies, and procedures'.</li> <li>• On 9 November 2022 the NIAA approved supplementary funding for the TLC to undertake a 'staff retreat' to review operations and to present the revised policy set and procedure manuals. The TLC intended to conduct this retreat in late June-July 2023.</li> </ul>
4.53	The TLC refreshed the membership of its Audit Committee and two new members were appointed by the TLC in September 2022 and January 2023, for three years.

## Appendix 3 Powers, functions and duties of the Land Councils

### Land Councils' powers

1. The Land Councils' powers are mainly described in section 23AA, section 27 and Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). The Land Council has the power to determine priorities, allocate resources, employ staff, give directions to Land Trusts, receive moneys and grant licenses.
2. Section 203BK of the *Native Title Act 1993* (NTA) establishes that a native title representative body has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
3. Section 20A of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) indicates that the accountable authority has the power to give instructions to an official about a matter relating to finance law.

### Land Councils' functions

4. The Land Councils' functions are mainly described in subsection 23(1) of the ALRA. In summary, these include to:
  - ascertain and express the wishes of Aboriginal people living in the area of the Land Council regarding the management of Aboriginal land;
  - protect the interests of relevant Aboriginal people;
  - assist Aboriginal people to protect sacred sites;
  - consult with relevant Aboriginal people regarding any proposal relating to the use of the land;
  - negotiate with persons having interests in the land;
  - assist Aboriginal people living in the area of the Land Council to carry out commercial activities (so long as this is done in a manner that will not cause the Land Council to incur financial liability or receive financial benefit);
  - assist Aboriginal people with traditional land claims; and
  - keep registers of Council and Land Trust members.
5. Sections 34 and 37 also establish the Land Councils' functions in relation to preparing estimates of administrative or capital costs for ministerial approval; and obligations in relation to preparing an annual report under the PGPA Act.
6. Under the NTA (section 203BB), Native Title Representative Bodies' key functions are to facilitate and assist through research and preparation of native title applications; and assist Prescribed Body Corporates and native title holders in consultations, mediations, negotiations and proceedings relating to native title applications, future acts, Indigenous land use agreements and rights of access. Other functions include certification of applications for determination and registration of native title (section BE), dispute resolution (section BF), notifications (section BG) and agreement making (section BH).
7. Under the PGPA Act, accountable authority functions include to keep records (section 37), including those relating to the approvals of a commitment of relevant money (section 18) and

those relating to financial transactions and position (section 41); prevent, detect and deal with fraud (Section 10); establish and determine the functions of an audit committee (sections 17 and 45); and prepare a corporate plan (sections 16E and 35), budget estimates (section 36), performance statements (sections 16F and 39), annual financial statements (section 42) and an annual report (section 46).

### **Land Councils' duties**

8. Under the ALRA, Land Councils' primary duties relate to: consulting and obtaining consent from Traditional Owners and affected Aboriginal people (subsection 23(3) and section 23AA); attempting dispute conciliation (subsection 25(1)); disclosing pecuniary interests (section 29AA); spending money and disbursing royalties, and exploration and mining interest payments, within six months (section 35). The various provisions set out when the Land Council has a duty to seek the Minister's approval and keep the Minister informed.

9. Under the NTA, the duties of the Land Councils as Native Title Representative Bodies relate primarily to financial management and access to information.

10. The duties applying to the Land Council accountable authority under the PGPA Act include: disclosing material personal interests that relate to the affairs of the entity (section 13); governing the entity to promote the proper use and management of public resources (section 15); establishing and maintaining systems relating to risk and control (section 16); encouraging cooperation of officials with others (section 17); taking account of the risk and effect of imposing requirements on others (section 18); and keeping the Minister informed (section 19). This is in addition to general duties prescribed in sections 25–29.

## Appendix 4 Decision-making authority

**Table A.1: Decision-makers under the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)***

Membership of the Land Council	
Section 29	<p>(1) The members of a Land Council shall be Aboriginals living in the area of the Land Council, or whose names are set out in the register maintained by the Land Council in accordance with section 24, chosen in accordance with the method of choice approved by the Minister.</p> <p>(2) A Land Council may, with the approval of the Minister, co-opt members but not more than 5 such members may hold office at any one time.</p>
Chair and Deputy Chair under the ALRA	
Section 30	<p>(6) A Land Council may, at any time, by resolution, elect a new Chair or Deputy Chair who holds office for 3 years and is eligible for re-election.</p> <p>(7) A co-opted member of a Land Council is not eligible to be elected as the Chair or the Deputy Chair of the Land Council.</p>
Section 31	<p>(1) The Chair shall convene such meetings of a Land Council and shall preside if present, if not the Deputy Chair presides.</p> <p>(2) At the request of minimum 6 members, the Deputy Chair may convene a meeting of the Land Council and preside.</p>

Source: Extracts from the *Aboriginal Land Rights (Northern Territory) Act 1976*.

**Table A.2: Decision-makers under the *Performance and Accountability (PGPA) Act 2013* and the *Public Governance, Performance and Accountability Rule 2014***

Definition of accountable authority														
PGPA Act subsection 12(2)	The accountable authority for a body corporate is the governing body of the entity unless otherwise prescribed by an Act or the rules.													
PGPA Act section 8	The governing body of a corporate Commonwealth entity is the board or Council (if it has one).													
PGPA Rule section 7A	(7) The following table has effect as follows:													
	a) each body corporate referred to in Column 1 of an item is a Commonwealth entity;													
	b) the accountable authority of the entity is the person or group of persons referred to in Column 2 of the item.													
	Bodies corporate established under a law of the Commonwealth													
		<table border="1"> <thead> <tr> <th></th> <th>Column 1</th> <th>Column 2</th> </tr> </thead> <tbody> <tr> <td>Item</td> <td>Commonwealth entity</td> <td>Accountable authority</td> </tr> <tr> <td>1</td> <td>Anindilyakwa Land Council</td> <td>The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.</td> </tr> <tr> <td>2</td> <td>Central Land Council</td> <td>The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.</td> </tr> </tbody> </table>		Column 1	Column 2	Item	Commonwealth entity	Accountable authority	1	Anindilyakwa Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.	2	Central Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.
		Column 1	Column 2											
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1	Anindilyakwa Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.												
2	Central Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.												

	3	Northern Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) the CEO of the Land Council.
	4	Tiwi Land Council	The group of persons made up of: a) the Chair of the Land Council; and b) b) the CEO of the Land Council.
<b>Powers of accountable authorities</b>			
PGPA Act section 20A	(1) Accountable authorities may by written instrument give instructions to an official about a matter relating to finance law.		

Source: Extracts from the *Public Governance, Performance and Accountability Act 2013* and the *Public Governance, Performance and Accountability Rule 2014*.

**Table A.3: Decision-makers under the *Native Title Act 1993* (NTA)**

Land Councils as Native Title Representative Bodies	
Section 203AD	<p><i>Commonwealth Minister may recognise representative bodies</i></p> <p>(1) The Commonwealth Minister may, by legislative instrument, recognise, as the representative body for an area or areas, an eligible body that has applied under section 203AB to be the representative body for the area or areas if the Commonwealth Minister is satisfied that:</p> <ul style="list-style-type: none"> <li>c) if the body is already a representative body — the body satisfactorily performs its existing functions; and</li> <li>d) the body would be able to perform satisfactorily the functions of a representative body.</li> </ul> <p><i>Period of recognition</i></p> <p>(2) The recognition of the body as a representative body:</p> <ul style="list-style-type: none"> <li>a) takes effect on the day specified in the instrument of recognition; and</li> <li>b) subject to subsection (3), ceases to have effect at the end of the day specified in that instrument unless the body's recognition is earlier withdrawn under section 203AH.</li> </ul> <p>(3A) The period of recognition specified in the instrument of recognition must be at least 1 year but not more than 6 years.</p>
Section 201A	<p><i>Definitions</i></p> <p>In this Part, unless the contrary intention appears:</p> <p>director, in relation to a representative body, means a member of the governing body of the representative body.</p>
Section 203EA	<p>(3) A director of the representative body who has a material personal interest in a matter that is being considered by the body's governing body:</p> <ul style="list-style-type: none"> <li>a) must not be present during any deliberation by the governing body on the matter; and</li> <li>b) must not take part in any decision of the governing body on the matter.</li> </ul>
Section 5 (Instrument)	For subsection 203AD(1) of the Act, the Central Land Council is the recognised Representative Body for the area described in Schedule 1.
Section 5 (Instrument)	For subsection 203AD(1) of the Act, the Northern Land Council is the recognised Representative Body for the area described in Schedule 1.

Source: Extract from *Native Title Act 1993* (Cth), Native Title (Recognition as Representative Body – Central Land Council) Instrument 2018, and Native Title (Recognition as Representative Body–Northern Land Council) Instrument 2018.

## Appendix 5 Delegation of ALRA powers and functions

1. Under section 28, the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) prescribes that the Land Council may delegate its functions and powers, with some exceptions: to the Chair or another member of the Council; or to a member of staff.<sup>67</sup>
2. Under subsection 28(2) and section 29A, the Council may also appoint one or more committees of its members to assist it in relation to the performance of any of its functions or the exercise of any of its powers<sup>68</sup>, also with some exceptions.

**Table A.4: Delegation under the *Aboriginal Land Rights (Northern Territory) Act 1976***

Delegations under the <i>Aboriginal Land Rights Northern Territory Act 1976</i> (ALRA)	
Section 28	(1) A Land Council may, in writing under its common seal, delegate to the following: <ol style="list-style-type: none"> <li>a) the Chair or another member of the Council; and</li> <li>b) a member of the staff of the Council;</li> </ol> any of the Council's functions or powers under this Act other than the following:
Section 28	<ol style="list-style-type: none"> <li>c) the giving or withholding of consent in relation to the acquisition or grant of an estate or interest in Aboriginal land under an agreement or agreements:               <ol style="list-style-type: none"> <li>(i) that will have effect for a period that exceeds, or for periods that together exceed, 2 years; or</li> <li>(ii) in respect of which the approval of the Minister is required by subsection 27(3);</li> </ol> </li> <li>ca) the making of a request under section 21E; (variation of LC boundaries);</li> <li>d) the making of determinations under section 35; (application of money);</li> <li>e) the giving or refusing of a consent under subsection 42(1);</li> <li>f) the giving of a consent under section 48C; (exploration licence);</li> <li>g) any function or power prescribed by the regulations.</li> </ol>
Section 28	(2) A Land Council may, in writing delegate to a committee appointed under section 29A any of the Council's functions or powers under this Act other than the following: <ol style="list-style-type: none"> <li>aa) section 21E (varying the border);</li> <li>a) section 35 determinations (application of money);</li> <li>b) any function or power prescribed by the regulations.</li> </ol>
Section 28	(4) If the Land Council delegates consenting to an act or things according to the section 23(3) standards then the delegate applies the same standards.
Section 29A	(1) A Land Council may, by notice in writing, appoint a committee or committees of its members to assist the Council in relation to the performance of any of its functions or the exercise of any of its powers.

Source: Extracts from the *Aboriginal Land Rights (Northern Territory) Act 1976*.

67 The ALRA used to enable the delegation of all or some of the Land Councils' functions or powers to an Aboriginal corporation under section 28A. This was repealed on 13 December 2021.

68 Subsection 27(1) of ALRA also gives the Land Council the power to delegate a function conferred on the Land Council by another Act, provided that the delegation was necessary or convenient. For there to be an authorised delegation it must meet the requirement of conducting 'more effective administration'. The other Act has the capacity to exclude or limit the delegation of the function it confers on the Land Council. *Northern Land Council v Quall* [2020] HCA 33, 7 October 2020.

## Appendix 6 Requirements for governance arrangements

### Appointment of key governance positions

1. The *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) prescribes how Council and Land Trust members, including the Chair and Deputy Chair of the Council must be appointed.
  - Land Trust members — ALRA (section 7) establishes that, unless the Minister for Indigenous Australians (the Minister) determines otherwise, the membership of Land Trusts will consist of a Chair and three other members, appointed by the Minister upon receiving from the Land Council nominations of Aboriginal people living in the area of the Land Council, or whose names are set out in a Traditional Owners register. Trust members are appointed for a maximum of five years and are eligible for re-appointment. It does not specify a method to nominate Land Trust members.
  - Council members — ALRA (section 29) establishes Council members' eligibility criteria and that Council members shall be Aboriginal people living in the area of the Land Council, or whose names are set out in a Traditional Owners register, chosen by Aboriginal people living in the area of the Land Council in accordance with a 'method of choice'. The method of choice is to be approved by the Minister. Section 29 also establishes that a Land Council may, with the approval of the Minister, co-opt a maximum of five Aboriginal people living in the area of the Land Council as additional members of the Council. A range of disqualifying events apply to candidates for election or to elected members.<sup>69</sup>
  - Chair and Deputy Chair — ALRA (section 30) establishes that the Land Council shall elect two members of that Council as the Chair and the deputy Chair for a period of three years. The Chair and Deputy Chair are eligible for re-election.
  - Land Council staff — ALRA (subsections 27(1) and 27(2)) establish that Land Councils have the power to employ staff and to determine the terms and conditions of the employment of Land Council staff. It is implied that this includes the Chief Executive Officer (CEO) of the Land Council.

### Establishment of committees

2. ALRA (section 29A) establishes that a committee can be appointed by the Council to assist it in relation to the performance of any of its functions or the exercise of any of its powers and must comprise at least seven members or such other number as is prescribed by the regulations.

### Establishment of Council and Committee meeting rules

3. In relation to Council meetings, ALRA (section 31) establishes that:
  - a Land Council must have written rules, which must be approved by the Minister;
  - these rules must be made available for Traditional Owners in the area of the Land Council and any Aboriginal people living in the area of the Land Council to inspect;

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<sup>69</sup> The disqualifying events are: the person is convicted of an offense (or of two or more offenses, taken cumulatively) not involving dishonesty and sentenced to a period of imprisonment of 12 months or more; or the person is convicted of an offense (or of two or more offenses, taken cumulatively) involving dishonesty and sentenced to a period of imprisonment of three months or more.

- the quorum for meetings must be half the number of the Council members if there is an even number of members in the Council; or half minus one if there is an odd number;
  - a Land Council must keep minutes of its meetings, which Traditional Owners and any Aboriginal living in the area of the Land Council must be able to inspect; and
  - decisions must be made by a majority of the members present, and in the case of an equal vote, the member presiding the meeting will have a casting vote.
4. In relation to committee meetings, section 29A of the ALRA establishes that:
- rules must be established for committee meetings and provided to the Minister; and
  - minutes of meetings must be kept by the Land Council, and made available for Traditional Owners and any Aboriginal living in the area of the Land Council to inspect.

### **Compiling and maintaining registers**

5. ALRA (paragraph 23(1)(g)) prescribes that Land Councils must keep a register of Council members; and a register of Land Trust members which includes descriptions of each area of the land held by the Land Trust(s). Under ALRA (section 24), Land Councils may compile and maintain a register of the Traditional Owners.

## Appendix 7 Tiwi Land Council compliance with the Commonwealth fraud rule

1. Section 10 of the Public Governance, Performance and Accountability Rule 2014 prescribes the six primary measures that the accountable authority of a Commonwealth entity must take to prevent, detect and deal with fraud.

**Table A.5: Tiwi Land Council's compliance with the Commonwealth fraud rule**

Requirement		Rating
(a) Conduct fraud risk assessments regularly	Although the TLC's Fraud Control Policy states that 'a thorough assessment of fraud risks particular to the operating environment of the TLC' will be conducted, it makes no provision for how this will be done. The TLC does not conduct fraud risk assessments.	■
(b) Develop and implement a fraud control plan that deals with identified risks	The TLC developed its Fraud Control Policy in 2021. This does not reference fraud risks as these have not been assessed.	■
(c) Have an appropriate mechanism for preventing fraud, including making employees aware of what constitutes fraud	The Fraud Control Policy identifies some activities to prevent fraud including debit card limits; payment of member sitting fees by bank transfer rather than cash; a requirement for authorised purchase orders to be in place prior to the payment of invoices; and password security. The policy also includes a section on financial delegations.  Although the policy states that the TLC will train 'all employees and relevant contractors in fraud awareness' and will offer specialised training to employees involved in fraud control activities, no fraud training has been undertaken.	▲
(d) and (e) Have an appropriate mechanism for detecting and investigating fraud, including a confidential reporting process	The Fraud Control Policy includes a template for recording instances of fraud through self-declaration, which must be signed by the staff member. The policy does not specify how this template is to be used. The TLC provided to the ANAO completed copies of the template for 10 TLC staff (of 11 employed at the time). All 10 staff declared, in July 2021, that they had not committed any fraud.  One detection method is outlined in the policy: having a personal code recorded against staff and members' expenses in the accounting system. There is no mention in the Fraud Control Policy of a confidential fraud reporting process, and a confidential reporting process does not exist.	▲
(f) Have an appropriate mechanism for recording and reporting incidents of fraud or suspected fraud.	There is no discussion in the policy of a mechanism for recording and reporting incidents of fraud or suspected fraud.	■

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Source: ANAO analysis of TLC fraud control policy and other records.

## Appendix 8 Tiwi Land Council compliance with corporate plan, annual report and performance statements requirements

### Corporate Plan

- Section 35 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) requires the accountable authority of a Commonwealth entity to prepare a corporate plan in accordance with any prescribed rules and give the corporate plan to the responsible Minister and Finance Minister.
- Section 16E of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) sets out the relevant requirements for corporate plans which includes the period it is to cover, mandated topics, and presentation and publication requirements. The Department of Finance (Finance) also prepares guidance to assist entities prepare their corporate plan.<sup>70</sup>

**Table A.6: Compliance of Tiwi Land Council’s 2021–2025 Corporate Plan with PGPA Rule 16E requirements**

PGPA Rule 16E	Requirement	Compliance assessment
Reporting period	Was a corporate plan prepared and did it cover the reporting period for which the plan is prepared and at least the following three reporting periods?	◆
1. Introduction	Did the corporate plan include the mandated statements about the report preparation, the reporting period for which it is prepared and the reporting periods covered?	◆
2. Purposes	Does the corporate plan reflect the purpose of the TLC as included in the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (ALRA) in a clear and concise way?	◆
3. Key activities	Does the corporate plan identify the key activities the TLC will undertake in order to achieve its purposes?	◆
4. Operating context	Does the corporate plan include discussion of the TLC’s operating context in relation to the environment, capabilities, risk oversight, cooperation and subsidiaries, for the entire period covered by the plan?	▲
5. Performance	Does the corporate plan set out details of how the TLC’s performance in achieving its purposes will be measured and assessed through: a) performance measures which meet the requirements of the PGPA Rule; and b) targets for each performance measure where it is reasonably practicable to set a target?	▲
Publication timeliness	Was the corporate plan published on the entity’s website by 31 August?	◆

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Source: ANAO analysis of Tiwi Land Council 2021–2025 Corporate Plan.

<sup>70</sup> Department of Finance, *Corporate plans for Commonwealth entities, Resource Management Guide No. 132*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/corporate-plans-commonwealth-entities-rmg-132/what-include-corporate-plan> [accessed 9 March 2023].

## Annual report

3. Annual reporting requirements are established in the PGPA Act and the PGPA Rule. Guidance issued by Finance outlines mandatory content, preparation and publication arrangements and defines mandatory digital publication requirements.

4. The ALRA also requires Land Councils to include in their annual report information relating to fees; amounts held or paid under certain agreements; and details about committees, township leases and consultants.

**Table A.7: Compliance of Tiwi Land Council's draft 2021–22 Annual Report with PGPA Act, PGPA Rule and ALRA requirements**

PGPA Act or Rule/ALRA	Requirement	Compliance assessment
Timeliness <i>PGPA Act section 46</i>	Has the TLC's accountable authority prepared and given the Minister an annual report by 15 October for presentation to the Parliament? If not, has the Minister granted an extension of the period to provide the report?	◆
Approval <i>PGPA Rule Section 17BB</i>	Was the TLC's annual report approved and signed by the accountable authority or a member of the accountable authority, and did it state that the accountable authority is responsible for preparing and giving the annual report to the Minister?	◆
Regard to audience <i>PGPA Rule Section 17BD</i>	Was the TLC's annual report prepared having regard to the interests of the Parliament and any other persons who are interested in the annual report and was the information included relevant, reliable, concise, understandable and balanced?	◆
Content <i>PGPA Rule section 17BE</i>	Did the TLC's annual report include selected details: the legislation establishing the body; information on the accountable authority, or each member of the accountable authority; and any significant activities and changes that affected the operations or structure of the entity during the period?	◆
<i>ALRA section 37</i>	Did the TLC's annual report include specific details under the ALRA including certain fees received, determinations made, amounts paid, leases granted, committees appointed and consultants engaged?	▲

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Source: ANAO analysis of Tiwi Land Council draft 2021–22 Annual Report.

## Performance statements

5. The annual performance statements of an entity, published in the annual report, must provide information about the entity's performance in achieving its purposes and comply with any requirements prescribed under section 16F of the PGPA Rule.

6. This audit examined whether, at a high level, the measures and targets provide meaningful performance information. It did not assess whether the Land Council's performance statements met the requirements of the PGPA Rule, and in particular draws no conclusions about reliability, verifiability, potential bias or measurability over time. The Auditor-General's functions include auditing the annual performance statements of Australian Government entities in accordance with the PGPA Act as set out in section 15 of the *Auditor-General Act 1997*. These audits apply a

comprehensive methodology to the assessment of selected entities' performance statements. See Auditor-General Report No.23 2021–22 *Audit of the Annual Performance Statements of Australian Government Entities – Pilot program 2020–21..*

**Table A.8: Compliance of Tiwi Land Council's 2021–22 Annual Performance Statement with PGPA Rule section 16F requirements**

PGPA Rule 16F	Requirement	Compliance assessment
1. Statement <sup>a</sup>	Does the accountable authority statement include the relevant information about the basis of preparation of the Annual Performance Statement?	◆
2. Performance results	Does the performance statements include the results of the measurement and assessment in the reporting period in achieving its purposes?	◆
3. Performance analysis	Does the performance statements include an analysis of the factors that may have contributed to the entity's performance in achieving its purposes in the reporting period?	◆

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Note a: The statement should include a declaration that the performance statements were prepared as soon as practicable after the end of each reporting period for the entity; specifying the relevant reporting period; and presenting accurately the entity's performance, including by providing information about the entity's performance in achieving its purposes and complying with any requirements prescribed by the PGPA Rules.

Source: ANAO analysis of the Tiwi Land Council's 2021–22 Annual Performance Statement.

## Appendix 9 Tiwi Land Council compliance with Audit Committee requirements and guidance

1. The purpose of an audit committee is to provide independent advice and assurance to the entity’s accountable authority. Section 45 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) states that the accountable authority of a Commonwealth entity must ensure that the entity has an audit committee. The Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) states that the accountable authority of a Commonwealth entity must, by written charter, determine the functions of the audit committee for the entity, and that these must include reviewing the appropriateness of the accountable authority’s financial and performance reporting; system of risk oversight and management; and system of internal control for the entity.<sup>71</sup> The PGPA rule also states that the audit committee of a corporate Commonwealth entity must consist of at least three persons who are not employees of the entity and who have appropriate qualifications, knowledge, skills and experience.

2. In September 2021 the Department of Finance released a guide (Finance guidance) for corporate Commonwealth entities on the role of audit committees.<sup>72</sup> The Finance guidance sets out the better practice principles for the establishment and operation of a corporate Commonwealth entity audit committee, to help ensure that the committee provides independent advice and assurance to the entity’s accountable authority. The Finance guidance states that:

Audit committees are integral to good corporate governance. They provide advice to accountable authorities, assist them to meet their duties and obligations, and support the development of key practice and capacity within corporate Commonwealth entities.<sup>73</sup>

**Table A.9: Effectiveness of the Tiwi Land Council Audit Committee Charter and member composition**

Requirement/ Guidance	Detail	Compliance assessment
Charter		
Mandatory inclusions <i>PGPA Rule subsections 17(1) and (2)</i>	The accountable authority must, by written charter, determine the functions of the audit committee for the entity, which must include the review of the entity’s financial reporting; performance reporting; system of risk oversight and management; and system of internal control.	▲
Other functions and matters <i>Finance guidance, p. 10</i>	The charter may also cover other functions and matters including: membership and tenure of the audit committee, administrative arrangements for the conduct of the audit committee, requirement to disclose conflicts of interest and assessment of the audit committee performance.	◆

71 Public Governance and Performance Accountability Rule 2014, section 17.

72 Department of Finance, *A guide for corporate Commonwealth entities on the role of audit committees*, September 2021.

73 Department of Finance, *Resource Management Guide 202 - A guide for corporate Commonwealth entities on the role of audit committees*, 2021, p. 5.

Requirement/ Guidance	Detail	Compliance assessment
Member characteristics		
Skills and experience <i>PGPA Rule subsection 17(3)</i>	The audit committee must consist of at least three persons who have appropriate qualifications, knowledge, skills or experience to assist the committee to perform its functions. The members of the audit committee must be persons who are not employees of the entity.	◆
Independence <i>Finance guidance, section 2.1</i>	To effectively deliver its function, the audit committee needs to be independent from management.	◆
Remuneration <i>Finance guidance, section 2.4</i>	The remuneration of audit committee members should be commensurate with the importance of their responsibilities and the commitment required.	▲
Rotation <i>Finance guidance, section 2.5</i>	It is important to rotate the audit committee members to allow for a flow of skills and talent through the committee, enhancing its effectiveness and ensuring its objectivity.	▲

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Source: ANAO analysis.

3. Finance guidance states that the audit committee 'should inherently have sound knowledge of the entity's operating context ... In order to understand and review the entity's processes and systems the committee also actively pursues information from relevant areas of the entity'.<sup>74</sup>

**Table A.10: Effectiveness of the Tiwi Land Council Audit Committee operations**

Requirement/ Guidance	Detail	Compliance assessment
Delivering the Audit Committee's mandatory functions		
Financial reporting <i>PGPA Rule paragraph 17(2)(a)</i>	The PGPA Rule requires that the audit committee review the appropriateness of the accountable authority's financial reporting. This could entail the audit committee reviewing the financial information systems and the entity's compliance with the mandatory legislative and accounting standards requirements.	▲
Performance reporting <i>PGPA Rule paragraph 17(2)(b)</i>	The PGPA Rule requires that the audit committee review the appropriateness of the accountable authority's performance reporting. To fulfil this function an audit committee must review the entity's performance information, systems and framework and the completeness and appropriateness of performance reporting.	■

<sup>74</sup> Department of Finance, *Guide for corporate Commonwealth entities on the role of audit committees*, September 2019, p. 11.

Requirement/ Guidance	Detail	Compliance assessment
System of risk oversight and management <i>PGPA Rule paragraph 17(2)(c)</i>	The PGPA Rule requires that the audit committee review the appropriateness of the accountable authority's system of risk oversight and management. The audit committee role would include reviewing whether identified risks and their treatments are consistent with the entity's operating context and the committee's experience in risk management.	■
System of internal control <i>PGPA Rule paragraph 17(2)(d)</i>	The PGPA Rule requires that the audit committee review the appropriateness of the accountable authority's system of internal control. The audit committee could take a risk-based approach to ensure that the key elements of internal control are present.	■
Mandatory reporting		
Charter and committee members <i>PGPA Rule section 17AG</i>	The annual report must include a direct electronic link to the charter, and information about the committee members including name, qualifications, meeting attendance and remuneration.	◆
Written statement <i>Finance guidance, sections 1.1.3; 1.2.3; 1.3.3; and 1.4.3</i>	The advice to the [accountable authority] from its audit committee should be documented in the form of a written statement of its view of the appropriateness of the [accountable authority's] financial reporting; performance reporting; system of risk oversight and management; and system of internal control.	■
Assessment of committee performance <i>Finance guidance, section 3.7</i>	It is good practice for a [accountable authority] to regularly review the audit committee's performance and assess its conduct and deliverables against the committee charter.	■

Key: ◆ Fully compliant ▲ Partly compliant ■ Not compliant

Source: ANAO analysis, based on analysis of Audit Committee meeting minutes and papers for 2021–22; direct observation of a June 2022 Audit Committee meeting; and discussions with the Audit Committee members and TLC officials.