Australian Government
Indigenous Land Corporation

ABN: 59 912 679 254

13 March 2013

Ms Fiona Ward
Director
Aboriginal Affairs and Reconciliation Division
Department of Premier and Cabinet
State Administration Building
200 Victoria Square
ADELAIDE SA 5000

By Email: DPCAboriginallandstrustreview@sa.gov.au

Dear Ms Ward,

Aboriginal Lands Trust Bill 2012

I refer to the Aboriginal Lands Trust Bill 2012 which has been released for consultation purposes. I note that as part of the consultation process, the Minster for Aboriginal Affairs and Reconciliation, the Hon. Ian Hunter MLC has invited written submissions regarding the matter. Accordingly, I **enclose** a written submission prepared by the Indigenous Land Corporation dated 13 March 2013.

Representatives of the ILC would be very happy to meet with representatives of your Department at a mutually agreeable time to discuss the content of the submission.

Yours faithfully,

PAUL HAYES
General Counsel

Australian Government

Indigenous Land Corporation

SUBMISSION

of the

INDIGENOUS LAND CORPORATION

to the

SOUTH AUSTRALIAN GOVERNMENT

on the

ABORIGINAL LANDS TRUST BILL 2012

13 March, 2013

INTRODUCTION

On 27 March, 2009, the ILC made a submission (***the ILC 2009 Submission***) to the South Australian Government regarding a review the Government was undertaking in relation to the *Aboriginal Lands Trust Act 1966 (SA)* ***(the 1966 ALT Act)***.

The South Australian Government's review has now progressed to the stage that a draft bill has been released for discussion purposes entitled the *Aboriginal Land Trusts Bill 2012* ***(the 2012 Bill)***.

The ILC has reviewed the 2012 Bill and now makes this submission which is divided into three parts. First, an Executive Summary summarises the ILC's principal points. Secondly, a more detailed critique of the 2012 Bill is provided. Finally, a comparison is made of the 2012 Bill against the recommendations of the ILC 2009 Submission. There is some overlap and repetition between these three parts which is useful by way of emphasis of the most salient points.

The 2012 Bill preserves the Aboriginal Lands Trust (***the Trust***) albeit in modified form and regulates dealings and other matters relating to lands vested in the Trust (***Trust Land***). Some of the public policy objectives underlying particular provisions of the 2012 Bill are unclear. The 2012 Bill is not accompanied by an explanatory memorandum[1] which could have assisted interested members of the public (including the ILC) in better understanding those provisions.

[1] Explanatory memoranda usually accompany draft Commonwealth Bills and can helpfully explain the underlying thinking of the proponent of the Bill.

EXECUTIVE SUMMARY

The most important point of note from the ILC's perspective is that the Trust as provided for in the 2012 Bill will be subject to Ministerial control. Accordingly, the Trust will not be Aboriginal controlled and leaves the ILC with no option other than to consider that Trust land will ***not*** be ***Indigenous-held land***[2]. This will mean that the Trust and Trust Lands will cease to be eligible to access ILC land acquisition and land management programs. This is the most significant aspect of the 2012 Bill and represents a seriously backward step in terms of Aboriginal self-determination. If this 2012 Bill becomes law, then all ILC programs will cease in respect of Trust Land. The ILC suggests the South Australian Government reconsiders this position.

The mechanism for appointment of Trust members has no requirement for Aboriginal involvement or participation. This is a significant deficiency. There should be a meaningful consultation obligation on the Minister prior to appointments to the Trust proceeding. That obligation should include the Minister being required to actively seek recommendations from nominated Aboriginal organisations, communities or representatives.

There should be a secure and statutorily guaranteed funding base for the Trust. The Bill does not provide for this. The provision for royalty equivalent payments is of no practical effect as payments have never been made under the existing provision in the 1966 ALT Act. The absence of a guaranteed funding formula detracts from both the efficacy and independence of the Trust. This long term deficiency remains unaddressed.

The Trust should have a clear express power to acquire land in its own right and apply, at its option, to have the land declared Trust Land. An express function of the Trust should include giving priority to the protection of the rights and interests of traditional owners and native title holders of Trust Lands and by ascertaining their wishes in relation to any dealings in Trust Lands.

Central features of the legislative scheme are inappropriately left to regulation. Issues such as ministerial direction, consultation processes and arbitration of mining decisions should all be expressly dealt with in the 2012 Bill and not left to regulation at a later date.

If there is to be established a Commercial Development Advisory Committee, the 2012 Bill should expressly set out how that Committee and the Trust shall interact with each other.

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[2] As that term is defined in section 4B of the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*.

A CRITIQUE OF THE 2012 BILL[3]

(i) Principles

It is difficult to assess what legal status would be given to the *Principles* encapsulated on clause 6. Many of their terms are nebulous and it is uncertain if actions of the Trust would be exposed to legal challenge if a complainant wished to claim that the proposed action breached one or more of such principles. For example, the requirements that Trust Land,

- be administered so as to strengthen the relationship between Aboriginal communities and the Trust (Clause 6(c));
- be developed in a way that achieves improved environmental outcomes (Clause 6(g)); and
- be administered in a way that optimises the overall value of the Trust Lands(Clause 6(h));

are to some extent potentially contradictory and would be problematic in terms of assessing whether any particular proposal meets these benchmarks if subjected to judicial scrutiny.

A much more generic overarching principle such as *achieving effective and sustainable benefits for Aboriginals and Aboriginal communities* would be more appropriate and less open to becoming a lawyers' picnic. More detailed and consistent principles could be adopted by the Trust as a matter of policy over the course of time.

(ii) Trust Appointments

Clause 9 is one method to have people assume office as members of the Trust. This can be an effective measure if the nominating Minister makes genuine appointments based on a proper assessment of the criteria set out in paragraphs (a) to (h) of Clause 9(1). If however, appointments are made for other purposes, then the confidence of the Aboriginal communities in the Trust will quickly dissipate. Further, the mechanism provides no scope for Aboriginal involvement. If the *ministerial appointment* model is to gain widespread acceptance among Aboriginal communities, then there must be some formal mechanism for Aboriginal involvement. This could be through a consultation requirement on the Minister before proceeding to make appointments.

A statutory process should require the Minister to actively seek recommendations from the Native Title Representative Body[4], Aboriginal Community Councils, Community members and Registered Native Title Bodies Corporate. Such consultations could take a considerable time to undertake properly.

An alternative mechanism would be to provide that the Minister must first consult with the Commissioner for Aboriginal Engagement at least 120 days

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[3] All references in this section to clauses are to clauses in the 2012 Bill, unless indicated otherwise.

[4] Or the relevant body funded by the Commonwealth to perform that role.

prior to proceeding with any appointment and must take into account any advice received from the Commissioner. The Commissioner could then undertake his/her own consultations with the bodies and persons mentioned above in a timely and effective manner and advise the Minister accordingly. The Commissioner's position is a real sign of the present Government's commitment to Aboriginal engagement. However, the Commissioner for Aboriginal Engagement is not a statutory officer holder. It is suggested that this should be changed so that the Commissioner's role is cemented in legislation and cannot be abolished simply on a change of government[5] or through budget cuts.

(iii) Deputies

Clause 9(4) and (5) provide for a deputy for each member of the Trust. Such a provision may have been of some utility if members represented particular communities as is the case under the 1966 ALT Act.[6] However, that is not the case in the 2012 Bill and having, in effect, a proxy arrangement, (miscalled ***deputy)*** will not be conducive to good corporate governance within the Trust. Members of the Trust should take their responsibilities of attendance seriously and to have a mechanism that assumes their unavailability could become a self-fulfilling prophesy. Generally, other statutory bodies have no equivalent provision. Members in attendance at Trust meetings need a good understanding of the workings of the Trust and good corporate memory. That will not be achieved by changing membership from meeting to meeting through the use of proxies.

(iv) Functions

Clause 14 provides for functions of the Trust. This should include an express provision allowing the Trust to receive grants or gifts of land and to buy land on its own account. There should then be a capacity to have such land gazetted (at the option of the Trust) as Trust Land. There should also be a function to receive grant funding to carry out land management activities. Alternatively, if there were a specific *powers* clause, then the ability to receive grants of land and moneys might be better classified as a power rather than as a function.

There should also be an express function of giving priority to the protection of the rights and interests of traditional owners and native title holders of Trust Lands and by ascertaining their wishes and aspirations in all matters where the Trust proposes to effect a dealing in Trust Lands.

(v) Resolutions

Clause 17(6) enables the Trust to make decisions by circular resolution without a meeting. There are dangers in such resolutions circumventing the more usual principal tool of good corporate governance, being the holding of meetings. For this reason, while the *Corporations Act 2001 (Cth)* also allows for the efficacy of

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[5] As happened in the Northern Territory in 2012 when the NT Government abolished the NT Co-ordinator-General role

[6] Indeed, this was the underlying reasoning for the insertion of section 6(5) of the 1966 ALT Act as shown in the second reading speech (Hansard – House of Assembly: 17 February, 1993 pp: 2097 – 2098)

such resolutions, it requires that they be signed off by **all Directors** and not merely a majority. Clause 7(6)(b) has two principal deficiencies in that it does not provide for a unanimity of Trust members to agree and it does not provide for all Directors to sign such a resolution. These deficiencies are conducive to poor corporate governance and possible fraud.

(vi) "Guidelines"

Clause 18(1) is emblematic of the increasing practice of legislation to provide the skeleton of how a statutory regime should work, but leave the meat to be put on at a later date through regulation. This means that substantive parts of the legislative scheme avoid Parliamentary oversight and can change significantly through ministerial regulation.

Clause 18(1) sets very few parameters about the nature and extent of any guidelines issued by the Minister. Further, the term ***guidelines*** is a misnomer as the section makes it clear that they will not operate as a guide, but will in effect constitute mandatory regulation. The regulations can regulate how the Trust and Chief Executive Officer (CEO) are to exercise their statutory functions in the crucial areas of dealing with land and commercial activities. Such regulations could be very specific in their content. This Clause in effect means that the Trust will not be an independent statutory body in the true sense of the word. This has very significant consequences for a range of reasons.

The most relevant consequence for the purposes of the ILC is that there is a strong argument that Section 18(1) means that the Trust will not be ***Aboriginal controlled***[7]. In that case, the Trust and the lands it owns will not be eligible for accessing grants of land under the ILC's enabling legislation, *the Aboriginal and Torres Strait Islander Act 2005 (Cth)* (***the ATSI Act***). The Trust Lands will not be ***Indigenous held land*** for the purposes of the ATSI Act so the land will be ineligible to benefit from the ILC's land management program. Grants of money that the ILC has made to benefit Trust Lands over the last several years will no longer be legally possible. To put it another way, Commonwealth land management assistance, via the ILC, would no longer be possible. From 2009 to 2012, the ILC has grant-funded projects totalling $773,050 for the benefit of Trust Lands. Attached at Annexure "A" is a table showing the details of those grants.

The ILC suggests that this provision be deleted and an express provision be inserted in its place making clear that the Minister cannot issue directions as to how the Trust carries out its functions[8]. Of course, such a provision would not prevent the operation of other statutory provisions allowing for ministerial intervention in the event that the Trust breached the Act or became insolvent etc.

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[7] This is a requirement if the Trust is to be considered an ***Aboriginal Corporation*** in accordance with the definition provided for in section 4(1) of the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*. If the Trust does not fit within that definition, it is then arguable that Trust Lands may not fit within the definition of ***Indigenous-held land*** as that term is defined in section 4B.

[8] For example, see section 191L of the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*.

(vii) Insolvency

On the face of it, Clause 27(1) (c) seems reasonable in terms of allowing a degree of ministerial intervention if the Trust is at the risk of insolvency. However, when it is noted that the 2012 Bill provides no guaranteed source of funding for the Trust, Clause 27(1) (c) is open to being enlivened in the event that a future Government deliberately under-funded the Trust in its annual budgetary allocation and then a Minister acted under Clause 27(1)(c). In that case, the statutory trigger has only come to fruition as a direct result of governmental underfunding. These concerns could be addressed by the statutory scheme providing a guaranteed funding formula. The 2012 Bill is silent on this issue.

(viii) Trust Suspension

Clause 28(1) provides for a power of Ministerial suspension of the Trust. This is a serious step and should be capped by a maximum period; for example, the provision might say that the Minister can suspend the Trust for a period as specified in the notice but not in excess of 18 months.

(ix) Commercial Development Advisory Committee

Part 3 of the 2012 Bill enables the Minister to establish a Commercial Development Advisory Committee (**the CDAC**). The CDAC provisions have not been well structured.

There are no criteria or trigger points for when the Minister might establish the CDAC. There is no requirement that any members be of Aboriginal descent. There is a requirement that both genders be represented on the CDAC. This is an odd requirement when the giving of commercial advice should be relatively gender neutral compared to the wider brief of the Trust, which includes a strong social context. In stark contrast, the Trust membership has no gender criteria yet there is a much more compelling public policy reason for a gender requirement in the make-up of the Trust than in the make-up of the CDAC.

Most importantly, there is no statutory mechanism for the Trust and the CDAC to deal with each other or even exchange information. Accordingly, the Trust could become involved in a detailed commercial proposal and simply not inform the CDAC of the proposal or it could positively deny CDAC access to information about the proposal. In those circumstances, the CDAC would be in no position to perform one of its principal roles being to advise the Trust about the proposal. The nature of the relationship between the Trust and the CDAC will be most problematic in the absence of a statutory mechanism to guide interaction. The 2012 Bill is silent on this issue. Will the CDAC only give advice to the Trust upon the Trust's request; that is, the CDAC is a resource for the Trust? Alternatively, can the CDAC unilaterally and in an unsolicited fashion give advice to the Trust? The fact that Clause 36(b) gives the CDAC an avenue of direct access to the Minister suggests the CDAC is more than just a resource to the Trust, but is in fact a watchdog over the commercial dealings of the Trust. The potential for friction between the two entities is considerable. Of course, the ***guidelines*** referred to in Clause 18(1) might be used to flesh out the relationship between the Trust and the CDAC. It is unclear if these are the same ***guidelines*** as those

referred to in Clause 36(1)(d). However, the relationship should be one spelt out expressly in this enabling legislation and approved by Parliament rather than lying in wait in regulatory backwaters to be proclaimed at some indeterminate time in the future. Some obvious links that could be built into the statutory scheme would include ensuring the CDAC clearly operates under the direct authority of the Trust through:

- a reporting requirement from the CDAC to the Trust;
- an obligation on the CDAC to assist the Trust as directed;
- The Chair of the Trust also being the *ex officio* chair of the CDAC; and
- The Trust being able to appoint independent external expertise to the CDAC at its own discretion.

Such statutory clarity in the relationship would add considerably to the efficacy of the arrangements.

Like the Trust, the CDAC, while having a commercial focus, should also have the function of giving priority to the protection of the rights and interests of traditional owners and native title holders of Trust Lands by ascertaining their wishes and aspirations in all matters where the Trust proposes to effect a dealing in Trust Lands.

(x) Trust Lands Dealings

Part 4 deals with the regulation of Trust Lands. As stated above, the Trust should have the ability to buy and receive grants of land. Such land could be held according to the general laws of property; but there could be a mechanism to have the land converted to Trust Lands and then dealings in such land would be regulated pursuant to this Part 4. The definition of ***Trust Land*** in Clause 3(1) seems to imply such a scheme as does Clause 45(1). However, Clause 45 only relates to commercial transactions. If the power to acquire land is so limited, it would prevent the Trust, for example, acquiring land by grant from the ILC for social, cultural or environmental reasons. In conclusion on this point, the 2012 Bill should contain express provisions allowing the Trust to acquire land on its own account and setting out a process for the Trust, at its option, to apply to the Minister to have such land gazetted as Trust land.

Clause 41(1)(a) speaks of the Trust ***making a grant of fee simple***. While the Trust might transfer land, normally only the Crown can make grants of fee simple. It is arguable that Clause 41(1)(a)(i) is too prescriptive and should simply provide as the first criteria that native title has been extinguished or surrendered. Native title may well have been extinguished over the course of history without the need for an ILUA to have effected a surrender.[9]

Further, there should be a successor provision to the current section 16AAA to generally apply the non-extinguishment principle to dealings in Trust Lands *vis-à-vis* native title rights and interests.

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[9] It is possible that the drafter had section 47A of the *Native Title Act 1993 (Cth)* in mind which may have led to an understanding that an ILUA would still be necessary given the application of the non extinguishment principle.

(xi) Consultations

Clause 41(3) provides that the Trust must consult with traditional owners and residents of Trust Land. The efficacy of this provision depends on the definition of ***traditional owner*** and how the regulations might prescribe for consultations to be carried out. The second limb of the definition of ***traditional owner*** is a new statutory formula and is likely to become the subject of dispute and judicial comment in due course. In this context, it may be appropriate to adopt a definition that has previously been the subject of extensive judicial comment. The 2012 Bill should also set out how the Trust should carry out consultations with traditional owners rather than leave it to regulations down the track.

(xii) Leases

If the 2012 Bill provided that all leases were to be registered on title, then there would be no need for Clause 41(6).

(xiii) Manager of Trust Lands

Clause 42 provides for the Trust to appoint a manager of Trust Lands which are the subject of a lease. There does not appear to be any trigger to permit the Trust to act; it can simply act on its own volition without there being a requirement of a breach of the lease. Although this is a continuation of section 16AA in the 1966 ALT Act, it is not clear why such a provision is necessary.[10] An accompanying Explanatory Memorandum might be appropriate to explain this issue. It may be that the provision is really directed to long-term community wide leases to a community council to assist in the running of a community. However, the drafting does not make this at all clear. The only description of the leases to which it applies is ***leases granted for the benefit of a particular community.*** This vague description could equally apply to a lease on commercial terms over a community store in favour of a private operator. The drafting should put more precise parameters around what types of leases it applies to. The present drafting of Clause 42 would be a powerful disincentive for private businesses to take out leases over Trust Land.

(xiv) Commercial Transactions

Clause 45 deals with the Trust entering commercial and other transactions and its drafting is very wide. It is presumed that its actual operation would be constrained by the functions of the Trust as set out in Clause 14. For the avoidance of doubt, Clause 45 should be expressly so constrained. Clause 45(2) is a very low financial threshold to require ministerial consent. For example, if the Trust were to receive a grant of moneys from the ILC for $150,000, it would

[10] Nor does the Minister's second reading speech from 1993 assist (see footnote 6).

require ministerial consent. The threshold should be higher such as $1,000,000.[11]

(xv) Public Intoxication

Clause 47 deals with public intoxication on prescribed Trust Land. The public policy underpinnings behind Clause 47 are sound. However, the drafting of Clause 47(5) is vague and would make any recommendation of the Trust unnecessarily exposed to challenge. The drafting needs to be considerably tighter. For example it is difficult to understand what is meant by a proposal for a proclamation *being initiated by a community*. A more precise consultation process should be set out and criteria should be provided for demonstrating that a community is satisfied that a proclamation should be made.

On balance, this provision would be better dealt with in more appropriate legislation rather than land rights legislation. An obvious Act to accommodate such a provision would be the *Public Intoxication Act 1984(SA).*

(xvi) Mining Operations on Trust Land

Part 7 of the 2012 Bill deals with mining on Trust Land. Three principal issues arise in addition to other subsidiary issues. First, Part 7 should be expressed as being subject to the *Native Title Act 1993 (Cth).* While this would be the case as a matter of law[12], it would still be useful if the 2012 Bill expressly so provided.

The second issue is the practical issue as to whether the Trust will be adequately funded and resourced to assess applications to mine on Trust Land. Only through such funding and resources will the Trust have the ability to effectively deal with mining companies and negotiate conditions appropriate for the exploration or mining operation as is envisaged by Clause 49(5)(b). Without adequate resourcing, provisions such as Clause 49(5)(b) will not effectively protect Aboriginal interests. The Trust would need to be able to employ, or engage externally, appropriately qualified lawyers, anthropologists and mineral economists to assess any proposal and carry out the necessary consultations. While the 2012 Bill does contain a provision allowing the Trust to pass on its reasonable expenses to the mining company, such a provision does not allow the Trust to employ full time staff on an ongoing basis and thereby build up good corporate memory and expertise in the mining field. This can only be done through the Trust having a core secure funding base guaranteed through a statutory formula.

The third issue of note is that the Trust's consent can be overridden through an arbitration process as set out in Clause 50. The Trust does not have a veto.[13]

Clause 49(4) makes reference to consultations carried out in accordance with regulations. The consultation provisions should be set out in the body of the

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[11] See for example section 27(3) of the *Aboriginal Land Rights (Northern territory) Act 1976 (Cth.)*

[12] Given the primacy of Commonwealth legislation in the case of inconsistency with State laws (see section 109 of the Australian Constitution)

[13] Contrast this model with section 40 of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).*

2012 Bill and not left up to later regulation; or as a bare minimum, there should be some skeletal references to consultation processes and any regulations later passed should be consistent with the statutorily prescribed processes.

In the interests of transparency and public accountability, all terms and conditions finally attached to the grant of an exploration or mining proposal should become a matter of public record. The long history of poor agreement making between the mining industry and Aboriginal parties means that the issue of public accountability in such agreements overcomes, on balance, any arguments about commercial confidentiality.

Clause 51(1)(c) sets a four -month period for the Trust to receive an application, carry out consultations, negotiate terms and conditions (if applicable) and make a determination. This time constraint is unrealistic and should be 12 months. The period should only commence running from the date the Trust has received a complete application that properly conform to the requirements of Clause 49(2). Finally, the time constraint should also be referred to in Clause 49(5) which is silent on any time constraint requirement.

Clause 51(4) is unduly limited and should be extended to former Judges of the relevant courts. Many sitting Judges would refuse such a commission as the arbitral power is in the nature of an administrative rather than judicial function and would offend the Commonwealth constitutional separation of powers. The same strict separation may not apply to State judicial office holders, but this is an issue which would still prevent many such Judges from accepting such a commission.

Clause 51(8) should include as relevant criteria the impact of a grant of a mining interest on any cultural heritage issues. An assumption cannot be made that cultural heritage sites are adequately protected by the antiquated *Aboriginal Heritage Act 1988 (SA).*

Clause 52 is poorly drafted in that it limits royalty equivalent payments to the Trust to a *prescribed limit* but that term is nowhere defined (except by reference to the *Acts Interpretation Act 1915 (SA)*). Better drafting would include a definition in the 2012 Bill. Further, the public policy reason why there should be a cap is unclear. In the absence of a limit being prescribed at the time of negotiations, it would be difficult for the Trust to impose terms and conditions on a grant (including financial conditions) in any informed manner. It is submitted that there should be no cap, but the full royalties equivalent be paid to the Trust.

Clause 53 appears to unduly limit the conditions which the Trust and the mining company might independently and freely negotiate. It inhibits the parties from freely contracting. The Clause might be relevant to any arbitral body imposing terms and conditions. However, even then, its terms are unduly restrictive and not consistent with other analogous regimes.[14]

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[14] For example, see section 38 of the *Native Title Act 1993 (Cth).*

(xvii) "Conciliator"

Part 9 is a peculiar provision which repeats provisions of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)* (*The APY Act*)[15]. The APY Act provision has rarely been utilised. For example, although the APY Act is expressed in mandatory terms, there are presently no conciliators appointed. In practice Part 9 is likely to be of little utility and should be replaced with a provision saying that:

- the Minister, or
- any traditional owner of Trust Lands who is aggrieved by a decision of the Trust; or
- any resident of Trust Lands who is aggrieved by a decision of the Trust,

would have standing to seek judicial review in the District Court of South Australia. There is no convincing public policy position as to why the Trust needs special dispute resolution provisions over and above the normal processes of judicial review.

(xviii) Review

Clause 64 provides for a review of all Trust Lands within three years. This one off process should be updated at regular intervals (say, every five years) and such reviews should be expressly provided for in Clause 64.

[15] See section 35.

A COMPARISON OF THE 2012 BILL AGAINST THE ILC 2009 SUBMISSION

The ILC 2009 Submission set out on its first page four underlying principles for a statutory land rights regime that is conducive to the ILC to effectively engaging with Indigenous people. The Table below sets out whether the 2012 Bill meets these four principles:

Principle 1

Tenure to lands is underpinned by a clear and functional land rights regime.

The 2012 Bill is an improvement on the 1966 ALT Act and sets out with much greater clarity how the land rights scheme should work.

Principle 2

Land rights regime has a clear and functional process for the granting of leasehold tenures and licences.

The 2012 Bill is only a marginal improvement on the 1966 ALT Act and leaves it to regulations to possibly deal with these issues in greater detail. This is a missed opportunity.

Principle 3

Bodies administering the regime are well resourced and well governed.

The 2012 Bill could potentially result in a well governed Trust but some provisions (such as deputies) detract from this potential.

The 2012 Bill is almost silent on the resourcing of the Trust and provides no guaranteed source of funding. In this regard, the 2012 Bill is seriously deficient.

Principle 4

Bodies administering the regime are clearly controlled by Aboriginal people and have the necessary degree of statutory independence.

The Trust will not be independent and this threatens the ability of the Trust to access all ILC funding programs. This is a very significant deficiency in the 2012 Bill.

Specific Recommendations

Turning to the specific recommendations of the ILC 2009 Submission, the following comments are noted.

- The ILC 2009 Submission recommended the insertion of a long title. The 2012 Bill does not do this.

- The ILC 2009 Submission recommended the insertion of a definition of ***Aboriginal person.*** The 2012 Bill does not do this.

- The ILC 2009 Submission recommended clearly enunciated functions of the Trust. The 2012 Bill effectively does this. However, the matter is then somewhat confused by the ***Principles*** provision in Clause 6.

- The ILC 2009 Submission recommended the provision of clearly enunciated powers and consultation regimes. The 2012 Bill touches on these, but appears to leave much of the content to regulation.

- The ILC 2009 Submission recommended a statutory provision for the CEO of the Trust. The 2012 Bill does this.

- The ILC 2009 Submission recommended Ministerial appointment of Trust members but with Aboriginal consultation. The 2012 Bill provides for ministerial appointment, but has no prerequisite of Aboriginal consultation.

- The ILC 2009 Submission recommended that the Trust be expressly independent of Ministerial direction. The 2012 Bill does the opposite through the use of ***guidelines*** which amount to mandatory ministerial regulation.

- The ILC 2009 Submission recommended a statutorily guaranteed funding formula for the Trust. The 2012 Bill is silent on this. The payment of mining royalty equivalents provides no guaranteed funding given the only Trust Lands that might be subject to this would be Yalata and given that the ***prescribed limit*** is not yet prescribed.

- The ILC 2009 Submission recommended that clear provision be made for how mining grants would be made with an assumption that it could not proceed without Trust consent. The 2012 Bill partially does this by setting out detailed provisions but Trust decisions can be over-ruled by an arbitration process.

- The ILC 2009 Submission recommended that the Trust be able to employ its own staff. The 2012 Bill does this.

- The ILC 2009 Submission recommended that there should be clear regime for entry onto Trust land. The 2012 Bill does not do this.

- The ILC 2009 Submission recommended a significant upgrading of the role of the Aboriginal Lands Parliamentary Standing Committee. The 2012 Bill does not do this. It does the opposite by not referring to the Committee at all.

- The ILC 2009 Submission recommended the deletion of Trust ***deputies***. The 2012 Bill retains equivalent provisions.

- The ILC 2009 Submission recommended deletion of the role of the ministerial representative. The 2012 Bill does this.

- The ILC 2009 Submission recommended a more flexible delegations regime. The 2012 Bill does this.

- The ILC 2009 Submission recommended a clearer regime for dealings with Trust Lands and criteria for consultations. The 2012 Bill does this in part but leaves much of the substantive regime to be determined by regulation at a later date.

- The ILC 2009 Submission recommended the deletion of a regime to appoint managers of leases on Trust Land. The 2012 Bill does not do this but retains those provisions.

- The ILC 2009 Submission recommended that laws relating to intoxication should be dealt with in other Acts. The 2012 Bill retains equivalent provisions.

- The ILC 2009 Submission recommended the deletion of the Business Advisory Panel. The 2012 Bill retains this concept and renames it the Commercial Development Advisory Committee. Its functionality as presently drafted in the 2012 Bill is problematic.

Annexure "A"

Property	Beneficiary	Funding ($)	Project Description
Head of the Bight	Aboriginal Lands Trust	$135,000	Grant funding provided to repair and refurbish accommodation at White Wells Depot for use by Yalata IPA Rangers. Funding also supported repairs to the public toilets and the erection of a shaded area at Head of the Bight Whale Watch Centre.
Bartsch Farm, Gerard	Aboriginal Lands Trust	$40,000	Grant funding provided to develop a property management plan for Bartsch Farm, Gerard. The plan assesses the feasibility of establishing a horticulture enterprise on the property including infrastructure, human resource and training requirements.
Yalata Community Lands, Colona Station	Yalata Community Inc.	$40,000	Grant funding supported Yalata Community Inc. to develop a property management plan for Colona Station. The plan focused on the business case for re-establishing Colona Station as a meat sheep enterprise, along with identifying a range of ongoing land management needs on the property.
Wanilla Forest, Pt Lincoln	Pt Lincoln Aboriginal Community Council	$101,000	Grant funding provided for the purchase of plant, equipment and capital infrastructure to support the development of a firewood and timber supply business at Wanilla Forest, Pt Lincoln.
Poonindie, Pt Lincoln	Pt Lincoln Aboriginal Community Council	$80,250	Grant funding provided for the purchase of plant, equipment and capital infrastructure to support the development of a market garden horticulture enterprise at Poonindie, Pt Lincoln.
Warevilla, Ceduna	Tjutjunaku Worka Tjuta	$76,800	Grant funding provided for the purchase of plant, equipment and capital infrastructure to support the development of a market garden horticulture enterprise at Warevilla, Ceduna.
Raukkan Farm,	Raukkan Ngarrindjeri	$300,000	Interest free loan provided to establish a viable cattle and cropping enterprise

Raukkan	Pty Ltd		on Raukkan Farm. Funding supported the purchase of plant, equipment and stock along with improvements to pasture and property infrastructure.
	TOTAL	**$773,050**	