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Indigenous Land Corporation

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27 March 2009

Aboriginal Affairs and Reconciliation Division
Department of Premier and Cabinet
Level 13
State Administration Centre
200 Tarndanyangga (Victoria Square)
Adelaide, SA. 5000.

Dear Sir/Madam,

REVIEW OF THE *ABORIGINAL LANDS TRUST ACT 1966 (SA)*

I enclose (*) the ILC's submission to the Review of the *Aboriginal Lands Trust Act 1966 (SA)* currently being undertaken by the Government of South Australia.

The ILC would be happy to discuss the content of this submission with the Review team and looks forward to hearing the outcome of the Review.

Yours faithfully

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SUBMISSION

of the

INDIGENOUS LAND CORPORATION

to the

SOUTH AUSTRALIAN GOVERNMENT REVIEW

of the

ABORIGINAL LANDS TRUST ACT 1966 (SA)

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Introduction

The ILC is an Australian Government statutory authority established pursuant to the *Aboriginal and Torres Strait Islander Act 2005 (Cth)* (***ATSI Act***)[1]. The ILC provides social, cultural, environmental and economic benefits for Indigenous Australians through land acquisition and land management functions.[2]

The ILC's land management function allows it to carry out a wide range of land management activities on Indigenous-held land.[3] ***Indigenous-held land*** is defined as land in which Indigenous persons or corporations hold an interest.[4]

In all States and Territories, the ILC has been actively engaged with Indigenous people and their representatives to deliver beneficial land management outcomes on Indigenous-held land. A number of these jurisdictions have included the ILC administering land management activities on lands held pursuant to various statutory land rights regimes. The ILC finds that it can more actively engage with Indigenous people on their lands where:-

1. tenure to those lands is underpinned by a clear and functional statutory land rights regime;
2. the statutory land rights regime has a clear and functional process for the granting of leasehold tenures or licences;
3. the bodies established by that statutory regime to administer the lands are well resourced and well governed; and
4. those administering bodies are clearly controlled by Aboriginal people and have the necessary statutory degree of independence to qualify the land as Indigenous-held land under the ATSI Act.

The ILC acknowledges that in 1966, the *Aboriginal Land Trust Act 1966 (SA)* (***ALT Act***) was at the fore-front of Australia's legislative progress in addressing issues of Indigenous dispossession. However, with the passage of time, the ALT Act is no longer cutting-edge and is in need of considerable reform to bring the statutory regime into the 21st Century. Overall, the ALT Act is antiquated, poorly drafted, not user friendly and contains numerous problematic and moribund provisions. Accordingly, the ILC very much welcomes the current review by the South Australian Government of the ALT Act (***the Review***).

This submission is in three parts. The submission will address briefly some principal structural issues that underpin all land rights models, drawing on the experience of land rights legislation around the country. The submission then

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[1] See Part 4A
[2] See section 191B
[3] See section 191E
[4] See section 4B and the definition of ***Aboriginal or Torres Strait Islander Corporation*** contained in section 4 (1).

turns to principal suggested reforms to the ALT Act that would see the ALT Act conform to modern-day legislative best practice in the Land Rights field. A number of these reforms will have a direct impact upon the potential facilitation of ILC land management programs on Aboriginal Land Trust land (ALT Land). Finally, the submission will comment briefly on some of the specific existing provisions of the ALT Act.

This submission confines itself to essentially core Land Rights issues and does not attempt to deal with the more socially complex issues such as how communities should be run or substance abuse minimised. The ILC considers these important issues may be best dealt with in other legislation but also recognises that issues in relation to land tenure may require some calibration with these other legislative measures.

Part A: Suggested Structural Arrangements

The ALT Act establishes a land rights model that sees the land owning functions and the administration or executive functions merged into the one corporate and State-wide body being the Aboriginal Lands Trust (ALT). The ALT Act has no process to enable Aboriginal groups to make any claims to unalienated crown lands. Any comprehensive review of the ALT Act should have regard to other land rights models to see if any useful lessons can be drawn from those models.

The following is a very brief summary of the differing models that presently operate at the State/Territory level:

- Administrative and land owning functions merged into one state-wide body in a Land Council or Land Trust. (Tasmania[5] and South Australia[6])
- Administrative and land-owning functions merged but in tiers of local Land Council bodies and a state wide Land Council body and overseen by a government Registrar (New South Wales[7])
- Administrative and land-owning functions merged but in property-specific Land Trust bodies (Victoria[8]) or Land Council bodies. (SA APY Lands[9] and Maralinga Lands[10])
- Administrative and land-owning functions split between Land Councils and Land Trusts (Northern Territory[11])
- Localised land owning bodies in the form of Land Trusts with no statutory administrative support mechanisms (Queensland[12])
- Regimes that provide for a land claim process (Queensland, Northern Territory and New South Wales)

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[5] Aboriginal Lands Act 1995 (Tas)
[6] ALT Act
[7] Aboriginal Land Rights Act 1984 (NSW)
[8] Aboriginal Lands Act 1970 (Vic) and Aboriginal Lands Act 1991 (Vic)
[9] Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)
[10] Maralinga Tjarutja Land Rights Act 1984 (SA)
[11] Aboriginal Land Rights (Northern territory) Act 1976 (Cth)
[12] Aboriginal Land Act 1991 (Qld) and Torres Strait Islander land Act 1991 (Qld)

The ALT Act in its present form is lacking a number of the basic features of modern legislation which makes it difficult to interpret and administer. On balance, the ILC considers that the present ALT Act model of the land owning and administrative functions being merged into the one State-wide ALT is suited to the land rights circumstances of South Australia. However, the Review might have regard to the local land holding models in the NSW regime if it wishes the reformed ALT Act to accommodate, through land tenure means, the aspirations of a number of the communities for greater autonomy in their land dealings. The Review should give serious consideration to a regime allowing Aboriginal groups to make claims to unalienated crown lands in certain circumstances to overcome a number of the deficiencies in the *Native Title Act 1993 (Cth)*. Obviously, any such regime would have to be consistent with the native title regime provided for in the NTA. In those circumstances where the traditional owners cannot satisfy the weighty proof requirements to achieve a successful native title determination, a possible State-based statutory claim process might also achieve a measure of restorative land justice.

Part B: Specific Recommended Reforms

The ILC recommends that the Review give consideration to the following areas of reform.

- The ALT Act should have a long title clearly stating the purpose and objectives of the legislation. That purpose should be restricted to establishing a functional and effective land rights regime; that is dealing with land holding issues and establishing sound administrative support mechanisms. Although arguable, it should probably not attempt to deal with other important issues such as those relating to local government or substance control and the like which should be more logically addressed in other legislation dealing specifically with such issues. However, if other such legislative reform were to be introduced, it would be vitally important to ensure that each regime was consistent with, and complimentary to, the land rights model provided for in the ALT Act.
- The ALT Act should contain a concise definition of ***Aboriginal person*** that accords with the generally accepted federal definition.[13] The definition certainly should not be by means of cross-referencing other legislation that may or may not be extant over the course of time.[14]
- The ALT Act should clearly state what the functions of the ALT are and they should principally be land-holding functions.[15]
- The ALT Act should clearly state what the powers of the ALT are and how it should exercise those powers. In particular, when making specific decisions about land, there should be different broad categories of

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[13] See section 4(1) of the ATSI Act.

[14] The present definition contained in Section 6(1) cross-references the *Community Welfare Act 1972 (SA)* which has since been repealed.

[15] See for example section 191C of the ATSI Act or section106 of the Aboriginal Land Rights Act 1984 (NSW) or section 18 of the Aboriginal Lands Act 1995 (Tas).

decisions and prescribed statutory consultation regimes applying to each type of decision. This raises the very important conceptual question when a body is holding land on trust as to who the beneficiaries are. Under the present Act, this is unclear but the land appears to be held on trust for all Aboriginal persons of South Australia.[16] This blanket approach overcomes the ALT having to deal with complex issues of identifying traditional owners of particular land. However, it is arguable that for particular types of decisions, it may be appropriate to require at least some form of consultation with particular groups; which might include, those who identify as traditional owners and those who are resident in particular communities. Some decisions such as long term grants of tenure might also require ministerial consent.

- The ALT should have a statutory position of Chief Executive Officer responsible for the day-to-day administration of the ALT including the employment of staff. Such statutory provisions generally work well to assist statutory corporations in avoiding internal demarcation disputes between Board issues and daily management issues and are generally conducive to good corporate governance.[17]
- The provisions relating to the makeup of the ALT should be reviewed. In particular, the ALT should be made up a membership fixed in number, limited in duration and appointed by the Minister. The responsibilities of the ALT Board should be clearly delineated. There should be provisions regulating the holding of meetings.[18] The Review should consider whether ALT members should represent the particular communities in which they reside or whether they should simply act in the best interests of the ALT Lands but in accordance with relevant instructions. A conclusion on this point would inform the processes (such as community consultations) that the Minister should be obliged to undertake prior to making appointments to the ALT.
- The relationship between the Board and the Minister should be clearly set out with express provision for the general independence of the ALT by prohibiting the Minister issuing general directions.[19] This degree of independence will ensure that the ALT lands are properly considered as ***Indigenous-held land*** as that term is used in the ATSI Act and ensure that the ALT lands are eligible to receive assistance from the ILC's land management program.
- There should be a guaranteed statutory source of income for the ALT[20] to ensure a high degree of independence and a stable source of income adequate to carry out its functions properly. That source might be referable to a separately established account[21] possibly funded by moneys

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[16] This is not at all clear but there are references to the Aboriginal people of South Australia in Sections 16(5), for example.

[17] See for example Division 8 of the ATSI Act.

[18] For a good statutory model, see generally Divisions 5,6 and & of Part 4A of the ATSI Act.

[19] For a good statutory model, see section 191L(1) of the ATSI Act.

[20] For a good statutory model see Division 10 of Part4A of the ATSI Act, or Part VI of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

[21] As funds the ILC and the NSW Aboriginal Land Council.

referable to sums received by the State through mining royalties[22] or a percentage of land tax revenue[23] or through some other transparent and sustainable formula. Such arrangements would not be inconsistent with Ministerial oversight of budgets and a possible power in the Minister to appoint an Administrator in particular circumstances.[24]

- The ALT should contain provisions that deal expressly with the circumstances in which mining interest (be they for exploration or mining) may be granted. Generally, such interests should not be granted unless the ALT has consented to their grant and prior to consenting to a grant, the ALT should be obliged to carry out certain consultations with relevant community members and traditional owners. The term ***traditional owners*** may entail some difficulties in practice in relation to an appropriate identification of a group of traditional owners. Accordingly, this consultation obligation might be tempered by a *best endeavours* clause. Ideally, there should be an on-going obligation on the ALT to determine over the course of time issues of traditional ownership.[25] The ALT should be able to give its consent subject to such conditions as it considers appropriate. The ALT Act should not be prescriptive about what those conditions might be or what the financial arrangements might be.
- The ALT should be able to employ its own staff and have adequate resources to carry out its statutory functions effectively. For example, a model ALT might be made up of the following sections; a secretariat, a legal unit, an anthropology unit, a natural resources unit, a business development unit and a corporate support unit.
- The ALT should clearly prescribe the circumstances for lawful entry onto ALT land through an efficient licensing regime.

Part C: Miscellaneous Observations on the Existing ALT Act

Section 3 (1) Includes a definition of the ***Aboriginal Lands Parliamentary Standing Committee.*** The existence of this Committee is laudable but its role in this legislation is illusory. It should be considerably upgraded. For example, the ALT could be obliged to submit its Annual Reports to the Committee. The Minister could be obliged to consult with the Committee about a range of decisions.

Presently, the only statutory role of the Committee is provided for in Section 20A(4) which requires ministerial consultation prior to appointments to the Business Advisory Panel established by that section. Regrettably this Panel is a phantom. No State officials seem to be able to advise if anyone is presently appointed to this Panel and it has not held any meetings for a number of years.

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[22] As Land Councils are funded through the Aboriginal Benefits Account in the Northern Territory.

[23] As was the case in relation to the funding of the NSW Aboriginal Land Council.

[24] For a good statutory model, see section 233 of the Aboriginal Land Rights Act 1983 (NSW).

[25] For a good statutory model, see section 24 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

Section 6 References to Aboriginal communities are problematic given that the *Community Welfare Act 1972 (SA)* was repealed some years ago. ALT members should simply be appointed by the Minister. The concept of deputy members as provided for in Section 6 (5) is misconceived and not conducive to good corporate governance as it potentially sees a revolving door of people coming and going from ALT meeting to meeting.

Section 9 Assuming this is a completely historical section, it should be deleted.

Section 9A The Minister's representative has an uncertain statutory role other than to attend meetings. It is unclear whether or not the representative is a member of the ALT. Either this role should be abolished or more specifically enunciated. A statutory role akin to that played by the Registrar in NSW may provide an appropriate oversight mechanism.[26]

Section 11A The current drafting imposes unnecessarily strict parameters on delegations and appear not to allow delegations to staff. It appears unworkable that no staff of the ALT can expend more than $5000 and such expenditure must go to the ALT Trustees. All day-to-day administration should be the responsibility of a statutory Chief Executive Officer.

Section12 This section appears to make clear that the ALT is independent of the State but would appear inconsistent with section 15 dealing with staffing arrangements.

Section 15 Sub-section 15 (11) expressly prohibits the ALT from employing any staff. It appears extraordinary that those working for the ALT are not formally employed by it. It is assumed this section was inserted to prevent ALT staff becoming subject to the WorkChoices reforms of the Commonwealth Government in 2006. However, section 15 has a great capacity to detract from the independence of the ALT especially having regard to provisions such as section 15(5) which appears to make those working under the ALT Act subject to Ministerial direction.

Section 16 This is a very important section prescribing how dealings in ALT land are to be effected. It needs a major redraft to be much more user friendly and to permit timely dealings in land. It should contain some form of consultation mechanisms before dealings are effected and set out more defined criteria for when the ALT may effect a dealing in land.[27]

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[26] See section Division 1 of Part 9 of the Aboriginal Land Rights Act 1984 (NSW).

[27] For example, see generally section 19 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

Sub-section 16(4) is misplaced and should appear in that part of the ALT Act dealing with finances. The present formula set out by this provision still ultimately leaves the amounts to the Parliament to prescribe on a yearly basis but sets a cap of the mining royalty equivalents. In other words, no payments are guaranteed and the very notion of the Parliament imposing a cap on what it might set is without meaning. Further, even if the formula were reviewed to provide for the payment of mining royalty equivalents, the paucity of mining activity on ALT Lands to date would mean that such a formula would not provide adequate funding. Accordingly, a more comprehensive formula with some prospect of producing an adequate income-stream should be considered by the Review.

Sub-sections 16(8) and (9) are misplaced and should be dealt with in a separate part of the ALT Act dealing with mining. Sub-section 16(9) in effect can operate to prevent either the ALT or the affected Aboriginal communities from having any real say on the grant of exploration or mining interests on ALT Lands.

Section 16AA This appears to be an extra-ordinary provision that would have great capacity to threaten the attractiveness to any potential lessees of taking up either short term or long term leasing arrangements over ALT Land. In this sense, it could act as a serious disincentive to private investment in ALT Lands. It should be deleted and ALT should simply rely on all the usual powers that vest in lessors under the general law of landlord and tenant.

Section 16A As a Land Rights Act, the ALT Act should not have provisions dealing with intoxication but such provisions should be included in other relevant legislation.

Section 18 This section is poorly drafted and unnecessarily cumbersome. It appears very much like the ILC's land management assistance function and should be redrafted in that fashion.[28]

Section20A Such a statutory panel is as novel as this one is moribund. If the ALT is appropriately resourced to include a business unit within its corporate structure, there is no need for such a statutory panel.

Section 21 The regulation-making power should be confined to land related matters (eg; terms of standard leases, terms and conditions of permits for entry onto ALT land etc). Regulations relating to alcohol or substance abuse should be dealt with in other more appropriate legislation.

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[28] See section 191E of the ATSI Act