



**THE LAW SOCIETY
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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The Honourable Jay Weatherill MP
Minister for Aboriginal Affairs and Reconciliation
DX 138
ADELAIDE SA

Dear Minister

Review of the Aboriginal Lands Trust Act 1966

Further to your letter of 20 November 2008 in which you kindly invited the Society to participate in a Review of the Aboriginal Lands Trust Act 1966, I am pleased to enclose a submission by the Society, prepared by its Aboriginal Issues Committee.

Please do not hesitate to contact me, should you wish to discuss this matter.

Yours sincerely

John Goldberg
PRESIDENT



Aboriginal Lands Trust Act 1966 . Review

1. The Law Society appreciates the opportunity to make submissions in response to the Minister's invitation and acknowledges with thanks the extension of the deadline for this purpose to 15 May 2009.
2. The focus of these submissions is on land vested in the Aboriginal Lands Trust (ALT) pursuant to Section 16(1) and (2) of the *Aboriginal Lands Trust Act 1966*, including the management and use of that land.
3. The starting point in relation to our consideration of the existing Act as it relates to land vested in the ALT is that, insofar as it identifies beneficiaries, it appears to recognise three distinct groups of Aboriginal people:
 - (i) the Aboriginal people of South Australia as a whole (Section 16(5));
 - (ii) the native title holders of relevant land vested in the ALT (Section 16AAA);
 - (iii) the Aboriginal community resident on relevant land vested in the ALT (Sections 6(1), (6), 16AA, 16A(3), 21).
4. A particular problem in the legislation is its relative silence, and, where not silent, inconsistency as to the powers and responsibilities of the ALT in relation to these distinct groups.
5. This is not surprising as it speaks to the views of the Government as at the time of the original enactment of the legislation and then separately at the various times when the Act was amended, but without any apparent attempt to update the legislation so as to provide a unifying purpose in this regard. Whilst the Act is

considered significant as the first land rights legislation in Australia, it is very much showing its age for this reason.

6. The ALT Act is very different from the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (APY Land Rights Act) and the *Maralinga Tjarutja Land Rights Act 1984* (MT Land Rights Act). These later pieces of land rights legislation provided for the vesting of land in their respective traditional owners through bodies corporate representing them. The ALT is not such a body corporate, nor was it intended to be. It is an entity with Statewide representation, in particular with members representing each of the relevant resident Aboriginal communities. The ALT holds parcels of land in many different parts of the State, and, other than in urban areas, these parcels, which vary in size (the largest being the Yalata lands), are in the main occupied by a resident Aboriginal community and its members.
7. In some of these communities (eg Nepabunna, Gerrard, Raukkan), a clear majority of the population is made up of traditional owners. To the extent that the resident population includes traditional owners, these invariably do not comprise a majority (let alone all) of the traditional owners of the relevant area of land vested in the ALT. The other traditional owners of that area of land live elsewhere (whether or not on other parts of their traditional country) but they may frequently visit that ALT – held land.
8. On the other hand, there are communities (eg Point Pearce, Yalata, Umoona) where a significant proportion (even if not a majority) of the resident Aboriginal population is not (or may not be) comprised of traditional owners, but has nonetheless been resident on that land for several generations, following upon the dispossession of their traditional lands.
9. Where there are traditional owners (whether in occupation or otherwise), we expect that in most (if not all) instances they are entitled also to be recognised as the native title holders of the relevant land (or would be so entitled in light of Section 47A of the *Native Title Act 1993* (Commonwealth) (NTA)).

10. Aboriginal people in this State (as in other parts of Australia) generally recognise the rights of traditional owners to their land and that these traditional owners have social, economic and spiritual affiliations with their land, and responsibilities for it, under traditional law and custom. It is however also generally recognised that, where, as a result of dispossession, other groups of Aboriginal people have been resident for a number of generations on land which may have been traditionally owned by others (and have buried some of their deceased members of that land), they have acquired legitimate rights and interests in relation to that land, including, in particular, the right for themselves and their children to remain as residents.
11. It is an obligation on the part of Government to act fairly as between traditional owners and those other Aboriginal people who have been in occupation for many years in this way¹. The rights of the traditional owners/native title holders as a group should be acknowledged and so should those of the particular long-term residents of relevant ALT land (regardless of the extent to which they may also be traditional owners).
12. There is therefore a balance to be struck as to how the rights of these two groups should be respected. In the past, by virtue of 99 year or other long term leases granted by the ALT to incorporated associations, the members of which are the Aboriginal residents of the relevant community on ALT land, the balance was strongly weighted (at least under the ALT Act) in favour of the residents. Under the leases, control and management were given to the associations, covering (in some instances, eg Yalata, Nepabunna/Nantawarinna, Raukkan) quite large areas outside of where community houses and other buildings are located. The effect of this may have been tempered to a degree in recent years by the recognition of the rights of traditional owners of Aboriginal sites etc (through the *Aboriginal Heritage Act 1988* (SA)) and of the rights of native title holders (through the NTA, including section 47A, and *Native Title (South Australia) Act 1994* (SA), Part 9B of the *Mining Act 1971* (SA) and Section 16AAA of the ALT Act) – and perhaps also to some extent, as a consequence of the leases being viewed by the ALT and/or the State as of

¹ see, for example, Professor Paul Finn, *The Forgotten "Trust": The People and the State in Equity Issues and Trends* Federation Press (1995), edited by Malcolm Cope.

doubtful continuing validity, on the supposed basis that they have been forfeit² by virtue of Section 16(7) of the ALT Act (upon the granting of residential tenancies to community residents without the Minister's written consent).

13. We do not consider it would be appropriate for the Law Society to promote a precise way as to how the right balance should now be struck. It is pleased that the opportunity appears to exist for a proper consideration of the issue. However, we take the view that the decision on where the appropriate balance should lie is one primarily for the Aboriginal people themselves. Proper consultation with them is clearly necessary, and the Law Society hopes a consensus as between traditional owners and long-term residents will emerge.
14. More generally however the Law Society considers that, in relation to ALT land held pursuant to Section 16 of the ALT Act, similar statutory provisions to those set out in Sections 6(1) and 7 of the *APY Land Rights Act* may be appropriate, save that, in addition to the wishes, opinions and interests of traditional owners, those of the non-traditional owner Aboriginal (long term) residents should also be ascertained, given effect to (where practicable – subject to the balance to be struck, as per 12-13 above) and protected. In addition, the Act should impose an obligation on the ALT to act fairly as between their respective interests. Furthermore, if an amended ALT Act were to give the ALT only a consultative function without any decision-making role (other than perhaps in an emergency), then this should help to overcome the criticism sometimes heard from traditional owners in relation to ALT land that other Aboriginal people (eg on the ALT Board) are making decisions about “my country”.
15. The above sets out the general principles which the Law Society suggests should underpin the consultation and decision-making process in relation to the management and use of land vested in the ALT. We now add some more specific submissions:

15.1 The Law Society suggests that section 16 be amended to allow (at the request of traditional owners/native title holders) for the transfer of land

² without there necessarily having been any breach of lease conditions or other fault on the part of lessees.

(including pastoral land) acquired by the Indigenous Land Corporation (ILC) to the ALT and treated as vested in the ALT pursuant to section 16 of the ALT Act. In light of section 47A³ of the NTA, this would extend to traditional owners/native title holders rights under the NTA (and Part 9B of the Mining Act 1971(SA)) which would otherwise⁴ not exist following extinguishment⁵ of native title.

- 15.2 The reference in Section 16(5) of the ALT Act to “the Aboriginal people of South Australia”, as referred to in 3(i) above is in the form of a proviso designed to ensure that land held by the ALT is retained in Aboriginal ownership. It is appropriate that there be a provision in the Act to prevent alienation of land away from Aboriginal ownership other than in exceptional circumstances. We see little reason however for the maintenance of an inappropriate reference to “the Aboriginal people of South Australia” as a whole, when the proper beneficiaries of the ALT’s land holding should be recognised as being the traditional owners/native title holders and the resident Aboriginal population.
- 15.3 Sections 16(8) and (9) exclude access to ALT – held land for the purposes of exploration or mining under the *Mining Act 1971* or the *Petroleum Act 1940* (presumably now the *Petroleum Act 2000*), other than pursuant to a proclamation by the Governor allowing for such access. It is understood that such proclamations have been made only in relation to the Yalata and Nantawarinna lands and that these currently provide for access only with the consent of, in the case of the Yalata lands, Yalata Community Inc and, in the case of Nantawarinna, Nepabunna Community Inc; and that, in the absence of such consent, the issue can be determined through arbitration pursuant to the *Commercial Arbitration Act*. These proclamations pre-date the High Court’s *Mabo* decision and the NTA - and also the insertion of Part 9B into the *Mining Act 1971*. The Law Society does not propose substantial

³ which provides for the revival of previously extinguished native title rights in certain circumstances.

⁴ see, for example, *Moses v Western Australia* [2007] FCAFC 78

⁵ eg by prior grant of a freehold title or perpetual or miscellaneous lease.

amendments to Section 16(8) or (9)⁶. However, it considers that any consent provided pursuant to a proclamation should not only be required to come from the relevant incorporated community association but also from the traditional owners/native title holders⁷.

- 15.4 Section 16(4) allows Parliament to appropriate statutory royalties in respect of mining or petroleum production tenements over ALT – held land for payment by the Treasurer to the ALT. It is understood that no such appropriation has ever been made, in part no doubt because there are no such production tenements. However, the same may be said in relation to the APY lands and the Maralinga lands, in respect of which the relevant statutory provisions⁸ provide for the sharing of statutory royalties as between APY or MT (as the case may be), the Minister of Aboriginal Affairs⁹ and the General Revenue of the State. The Law Society submits that the ALT Act should be amended to provide for at least equivalent provisions to these.

⁶ other than by way of including a reference to the *Opal Mine Act* 1995 and updating the *Petroleum Act* reference.

⁷ this is particularly desirable in light of Section 233(3) of the NTA which appears to envisage (wrongly) that the ALT Act includes the equivalent (if not stronger) provisions protecting the interests of native title holders to the “right to negotiate” provisions in the NTA.

⁸ Section 22 APY Land Rights Act; Section 24 MT Land Rights Act

⁹ “to be applied towards the health, welfare and advancement of the Aboriginal inhabitants of the State generally”.

APPENDIX

6 – Powers and functions of Anangu Pitjantjatjara Yankunytjatjara

- (1) The functions of Anangu Pitjantjatjara Yankunytjatjara/Antakirinja are as follows:
- (a) to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinion; and
 - (b) to protect the interests of traditional owners in relation to the management, use and control of the lands; and
 - (c) to negotiate with persons desiring to use, occupy or gain access to any part of the lands; and
 - (d) to administer land vested in Anangu Pitjantjatjara Yankunytjatjara.

7 – Requirement of Consultation

Anangu Pitjantjatjara Yankunytjatjara shall, before carrying out or authorising or permitting the carrying out of any proposal relating to the administration, development or use of any portion of the lands, have regard to the interests of, and consult with, traditional owners having a particular interest in that portion of the lands, or otherwise affected by the proposal, and shall not carry out the proposal, or authorise or permit it to be carried out, unless satisfied that those traditional owners –

- (a) understand the nature and purpose of the proposal, and
- (b) have had the opportunity to express their views to Anangu Pitjantjatjara Yankunytjatjara; and
- (c) consent to the proposal.