



Government of South Australia

Department of the Premier
and Cabinet

Regulatory Impact Statement

Proposed New Aboriginal Lands Trust Act

Prepared by:

Department of the Premier and Cabinet
(Aboriginal Affairs and Reconciliation Division)

Date: 14 October 2011



This page is intentionally left blank

Table of Contents

1. Executive Summary	3
2. Description of the problem and need for government action.....	5
3. Consideration of Options.....	9
<i>Option 1: Status Quo - The Aboriginal Lands Trust Act 1966 continues to operate in its current form</i>	<i>9</i>
<i>Option 2: Non regulatory option.....</i>	<i>11</i>
<i>Option 3: Proposed new legislation - The Preferred Option.....</i>	<i>12</i>
4. Risk Factors associated with the Preferred Option and Strategies.....	15
5. The Consultation.....	16
6. Implementation, monitoring and review.....	18
<i>Annexure A.....</i>	<i>18</i>
Contact Us	21

This regulatory impact statement (RIS) has been prepared in support of a cabinet submission seeking approval for the drafting of legislation to repeal the *Aboriginal Lands Trust Act 1966* and to re-enact new legislation for the protection and management of the Aboriginal Lands Trust estate. The submission also seeks additional funding to support the Aboriginal Lands Trust to meet the requirements of the proposed legislation.

1. Executive Summary

In 1966 the *Aboriginal Lands Trust Act* (the Act) established the Aboriginal Lands Trust (ALT) for the purpose of holding land in trust for the benefit of the Aboriginal people of South Australia. The Act was the first Aboriginal land rights legislation in Australia.

There have been significant changes to both the scope and diversity of Aboriginal land ownership and the rights and responsibilities of all land owners since the Act was introduced. Aboriginal community organisations are now facing much higher expectations from their own members and from Government for accountability, stability and good administrative practice.

The current structure of the ALT Board and its administrative supports have not had the capacity to meet the challenges of the changing needs of land management of the ALT estate of 544,360 hectares valued at approximately \$60 million. A map of Aboriginal Lands Trust Land comprises “Annexure A” to the RIS. The Indigenous Land Corporation (ILC) and Indigenous Business Australia (IBA) have stated to the review that significant reform of the structure and functions of the ALT estate are a prerequisite for investment by them in ALT land projects. The types of investment undertaken by the ILC and the IBA and the likely flow on benefits to businesses from this investment are detailed in the body of this RIS.

Given the nature of the ALT land estate and the importance of it to Aboriginal people of South Australia, particularly those living on ALT land, there is a need for new legislation which clearly identifies the objectives of the Act and ALT estate and defines the ALT Board’s composition, skill base and functions of land management and administration as well as technical and strategic advice to Aboriginal communities.

An audit of existing ALT land holdings and lease arrangements is urgently required to create certainty of Aboriginal ownership and the ALT estate, and must accompany legislative change. Decades of informal leasing arrangements have created significant uncertainty. Most enterprises operating on ALT land are currently managed by non-Aboriginal organisations which do not pay commercial rents and have not consistently negotiated profit sharing or employment arrangements with communities. By and large, sub-leasing arrangements entered into by community councils with commercial operators have been without the Ministerial consent required by the Act and without the knowledge or consent of the ALT Board and are void or voidable. A process of rectification and reinstatement is required. A qualitative analysis of the types of enterprises currently operating on ALT land and the positive impact that the proposed legislation is likely to have on those enterprises is detailed below.

The competing needs of community residents, Aboriginal people with an historical or traditional connection with land, and native title claimants and holders are not being met by the current legislative regime. New legislation is required to guarantee all stakeholders capacity to be consulted and involved in decisions

regarding development, leasing, licensing or other land dealings and to provide them with a new dispute resolution process where stakeholder interests differ.

The proposed legislation is designed to:

- establish that the primary purpose of the ALT is the efficient management and administration of its freehold estate including the setting of relevant policy; provision of expert advice to communities and leadership in land management projects
- clearly state that ALT land is held for the benefit of all Aboriginal South Australians
- ensure that the forms of governance within organisations holding, managing and using ALT land are appropriate to ensure proper management of the land
- acknowledge native title rights and interests
- confirm the principle of inalienable title
- ensure consultation and decision making processes for particular land includes all Aboriginal groups that have a connection and provide a Review Panel process to resolve disputes.

2. Description of the problem and need for government action

There is a need for new legislation to increase the participation of Aboriginal people with an interest in ALT lands in the management and development of the ALT estate. The proposed legislation will contribute to South Australia's Strategic Plan which recognises that land and cultural heritage are assets that can be used to achieve improved Aboriginal wellbeing and contribute to 'closing the gap'. A new legislative framework for management of the ALT estate will enable rather than impede Aboriginal prosperity.

New legislation will create an appropriately structured Board whose role combines land management and land administration functions as well as technical and strategic advice to Aboriginal communities. The structure of the Board pursuant to current legislation has been representative of some ALT communities and there have been concerns expressed by other communities that they have not been able to speak for their country when decisions have been made about their land. The new legislation will provide for a Board which will have the requisite expertise to effectively manage a diverse land holding and to conduct consultations and negotiations with all parties who have an interest in ALT land. The proposed structure will require the Board to ensure that all Aboriginal groups, commensurate with their interest in the land, will have input into decisions about the use and management of the land.

In the past, the Board has been appointed on a regional representation basis and has not been required to possess a skills or knowledge base which would enable it to assist communities with the technical aspects of land management such as preparation of funding applications, commercial negotiations, contract administration and insurance. A newly constituted ALT Board will balance the

strong desire of communities to be represented by local Aboriginal members, with the need for relevant expertise, by requiring Board members to have both knowledge and experience of South Australian Aboriginal community life and culture and technical skills. The risk to Government is that not all parties will support any one model or configuration of the Board although the extensive review process has identified a model which is likely to receive wide acceptance. A newly constituted Board will be supported by a Commercial Development Advisory Committee (CDAC) nominated by the Board and appointed by the Minister. Additional information regarding the CDAC appears below at “Option 3, Business Impacts”.

In many ALT communities there are multiple providers of services to relatively small communities. This has led to duplication of basic administrative structures, has made coordination and planning unnecessarily complex, and has at times also caused, or exacerbated, community divisions. Divisions have arisen between residents in communities, native title holders and claimants and those Aboriginal people with a historical or traditional connection to ALT land. The Minister has been asked to intervene to resolve disputes which are more appropriately resolved by alternate dispute resolution processes, which will be included in the proposed legislation. New legislation will mandate all Aboriginal groups that need to be consulted by the ALT, when the ALT is notified of an application for development, mining tenement, license or lease. In the event of a dispute not being resolved, the Minister for Aboriginal Affairs and Reconciliation will be the final arbitrator.

New legislation is required to promote good governance processes of the ALT Board and community organisations. These processes will support greater accountability, wider regional involvement, better coordinated and more efficient management structures, and stronger communities. Investment in the management and development of ALT land by the Indigenous Land Corporation (ILC) and Indigenous Business Australia (IBA) ceased some years ago. In their submissions to the review of the Act both organisations were clear about the need for significant reform to the structure and functions of the ALT as a prerequisite for investment. The ILC invested \$33 million in Aboriginal land across Australia in 2008-09, none of which was invested directly in SA ALT land. Attracting ILC and IBA funding would represent significant community gains.

It has not been possible to provide a quantitative listing of the number of business enterprises currently operating on ALT land. The income sources from business activities are from leases, licences and rental income from private, community and government agencies operating on ALT land (eg Iluka Mineral Resource Pty Ltd, Wellington Dairies Pty Ltd, Aboriginal Family Support Services and the Council for Aboriginal Elders). In addition there is some income generated from economic activity. The proposed legislation is likely to have a beneficial impact on existing and new economic activity as it will provide operators with advice and assistance to access additional funds and training as detailed below through the IBA and ILC. Communities and individuals will of course be able to access investment funding and mortgages from other commercial sources as well as the IBA and ILC.

The governing legislation of the ILC and IBA is the *Aboriginal & Torres Strait Islander Act 2005*. Both organizations' policies and programs must comply with that legislation. The IBA currently operates a number of programs some of which are described below. IBA Investments aims to facilitate creation of wealth among Aboriginal communities through medium to large scale business activities. It differs from standard investment portfolios in that it seeks both financial and social returns. All business ventures are required to be commercially viable and sustainable. The activity must also include a clear set of social outcomes. IBA seeks to balance the two imperatives, accepting some impairment of economic gains to ensure the social aim is maintained. An evaluation of IBA conducted in 2007 found that IBA Investments maintains a diverse portfolio of investment types which has achieved returns only slightly below those of general market returns. Aboriginal co-investment was evident in about one third of IBA's ventures and almost half of the investments were found to provide direct Aboriginal employment opportunities.

IBA Enterprises aims to support Aboriginal small, medium and micro- businesses. Its primary objective is to facilitate the acquisition, establishment and development of commercially viable businesses by Aboriginal and Torres Strait Islander people. It provides Economic Development Initiatives to stimulate small business activity, business support/coaching for potential Aboriginal entrepreneurs and business finance loans. A national network of 150-200 Preferred Service Providers are contracted to provide business support services.

IBA Homes' objective is to increase the rate of Aboriginal home ownership to approach the national average. The 2007 evaluation found that the program is instrumental in giving Aboriginal households entry into the housing market.

The ILC was established to acquire and manage land for Indigenous organisations to provide economic, social, cultural or environmental benefits. More than 80% of ILC projects are in regional or remote Australia, which encompasses the vast majority of ALT land, and where there are few income generating activities or employment opportunities. The ILC has program mechanisms which are proactive as well as reactive and collaborates on projects that it initiates and those which are initiated by other parties. The ILC's investment and funding decision framework imposes rigorous criteria against which applicants and ILC initiated programs and projects are assessed. A key criterion for applicants is their capacity to deliver sustainable benefits consistent with the legislated purpose of the ILC. The ILC seeks to facilitate the outcomes of the National Indigenous Land Strategy by:

- operating businesses in the agricultural, pastoral and tourism sectors
- providing residential training facilities
- building the capability of the Indigenous organisations to operate businesses
- initiating and collaborating with other government agencies on national/regional projects to provide Indigenous landowners with training, mentoring, planning and other direct and indirect support

- supporting education outcomes through helping to establish student hostels and training facilities.

New legislation is required to promote investment and development in the ALT estate. The current legislation requires parliamentary approval for the sale or transfer of ALT land outside the ALT estate. The proposed legislation would maintain that requirement, with the exception of some commercial land, in clearly prescribed circumstances. No ALT land has ever been mortgaged thereby severely limiting the capacity of the ALT Board, communities and other parties to raise capital for investment. There are risks associated with mortgaging land but successful commercial activities can both add value to existing land and provide income for further investment. To mitigate those risks, land would first be required to be designated as “commercial”. Designation would involve negotiation with Aboriginal people with an interest in the land. The land would then be transferred to a Schedule, which would require a regulation. Regulations are required to be laid before parliament and can be disallowed. Land entered on the Schedule would not require parliamentary approval for subsequent mortgage, sale or transfer thereby facilitating commercial opportunities without delay.

The proposed legislation would contain provision for a statutory caveat or similar mechanism to that which is available to the Indigenous Land Corporation (ILC). Section 191S of the *Aboriginal & Torres Strait Islander Act 2005* enables the ILC to place a caveat on the title to land in order to prevent sale or mortgage without the consent of the ILC Board. Providing for a statutory caveat for some dealings in land would provide flexibility of transfer and distribution of interests in land within the Aboriginal estate, at the same time as providing some general level of protection against loss of land through mortgagee sales and long-term alienation to non Aboriginal interests. The proposed legislation will stipulate the process for dealing with Native Title claims which revive when land is alienated from the Aboriginal estate, in line with the processes contained in the Commonwealth *Native Title Act 1993* (NTA). Potential risk factors regarding native title issues are raised below.

Many ALT communities are entering into tripartite lease agreements with Housing SA and the Australian Government pursuant to the Commonwealth National Partnership Agreement for Remote Indigenous Housing. Under this scheme Housing SA will construct, refurbish and maintain houses in some ALT communities and residents will pay rent to Housing SA. Yalata and Koonibba communities have entered into those agreements; negotiations are proceeding with other communities. For those ALT communities which do not enter into agreements with the Commonwealth and Housing SA, the new legislation will enable mortgages to be raised to construct and or refurbish homes. A regime of transfer of title to Aboriginal communities, with individual households obtaining long sub-leases (up to 99 years) or Licences to Occupy would make it possible for tripartite agreements to be negotiated between individual residents, the community, or ALT Board as land owner and the lender (Homestart) to construct and refurbish homes. Equally, tripartite agreements could be entered into between the ALT Board, the community and the lender, should freehold title

remain with the ALT. This will empower individuals and communities and create economic opportunities.

An audit of existing ALT land holdings and lease arrangements must accompany any legislative change. The audit is urgently required to create certainty of Aboriginal ownership of the ALT estate. To facilitate construction of houses pursuant to the National Partnership Agreement on Remote Indigenous Housing, Housing SA has undertaken limited surveying of some ALT communities, which will to an extent reduce the cost of a good order audit of the ALT estate. A detailed analysis of the costs associated with the audit appears below at “Option 3, Compliance” and in the costings attached to the submission.

In summary, the proposed policy objectives of new legislation are:

- the primary objective is the promotion of commercial and community development in land management, agriculture, pastoral, tourism and other sectors and increased investment in residential development on ALT lands
- inclusion of clear objects in the Act and clear functions and powers for the ALT Board
- restructuring of the Board into a smaller, independent skills based body appointed by the Minister and supported by the Commercial Development Advisory Committee
- inclusion of decision making processes that require the ALT to ensure that Aboriginal people with an interest in ALT land (residents, people with historical or traditional connection, native title claimants and holders) are included in those processes
- introduction of a review process to assist Aboriginal people, the ALT, lessees and the Minister to resolve disputes or disagreements about rights and interests in land (Review Panel)
- removal of the requirement for ministerial consent to dealings in land but retention of limited power by Minister to give written directions to the ALT Board where rights, interests and assets of the ALT and Aboriginal people are being disregarded or adversely affected or where the ALT Board is acting outside its statutory powers and obligations
- to provide for transfer of title in some cases to Aboriginal communities which have demonstrated good governance structures to enable them to promote commercial, residential and recreational uses on ALT land
- introduction of a ‘good order audit’ of the ALT land holding prior to the new processes being applied.

3. Consideration of Options:

Option 1: Status Quo - The Aboriginal Lands Trust Act 1966 continues to operate in its current form -

The key elements and objectives of the current Act are readily identifiable from the legislators' debate as the Act passed through Parliament and can be summarised as:

- righting historical wrongs
- Aboriginal ownership and control of land
- creation of an Aboriginal Lands Trust with an Aboriginal membership
- Crown land and Aboriginal reserve land transfers vesting inalienable freehold title to the Aboriginal Lands Trust
- dealing with and developing land for the benefit of Aboriginal South Australians
- just compensation through mining royalties (in lieu of mineral rights)
- public accountability
- independence of the Trust from government and increasing independence of the Trust from Ministerial authority.

There have been 11 amendments to the Act from 1968 to 2006, and three Regulations passed pursuant to section 21 of the Act in 1990, 2005 and 2007. There have been 31 Proclamations made transferring Aboriginal reserve and Crown land to the Aboriginal Lands Trust between 1967 and 2004. Most transfers were between 1967 and 1977, with other transfers throughout the 1980s until 1991. There were no transfers for 12 ½ years until the last gazetted transfer in 2004. The Aboriginal Lands Trust now holds title to about 80 properties covering approximately 544,360 hectares with an approximate value of \$60 million.

The ALT Board has pursued different approaches and priorities at different times. In the early 1970s the ALT took a "hands off" approach and did little more than lease land. In contrast, the 1980s was a period when the ALT took a much more active role in land and natural resources management and enterprise development. There has not been consistency of approach.

In 1991 the Act was amended to establish the Aboriginal Lands Business Advisory Panel (ALBAP) to advise and assist Aboriginal communities and Aboriginal persons ordinarily residing on the Lands, in the establishment and management of business or community enterprises and in the development of skills required for the effective operation of such enterprises. The Indigenous Land Council in their submission recommended that the ALBAP be disbanded as it had not successfully progressed land management and development. It has not met for a number of years.

Although the intended function of the *Aboriginal Lands Trust Act 1966* has not fundamentally changed in 45 years, maximisation of the beneficial potential of Trust lands for Aboriginal South Australians has not been achieved through the amendments and proclamations described above.

A qualitative cost analysis of this option indicates that the impacts below will continue to have a negative impact on communities and the ALT estate:

Compliance:

- Evidence indicates a lack of compliance in terms of management and recording of dealings in ALT Lands

Economic Impact:

- likelihood of ongoing lost opportunities to develop ALT land (pastoral/farming, mining, recreation/tourism and residential)
- likelihood of loss of opportunity for increased prosperity and wealth creation in ALT communities if leases/licences and decision making authority is not devolved to local communities (with demonstrated good governance) supported by expert ALT advice

Business Impact

- It is likely that the impact of this option will be on going stagnation of flow on benefits for business.

Family and Social Impacts

- ongoing difficulty for ALT communities to attain sustainability/build or improve their communities
- deterioration of ALT assets
- deterioration of community well being
- lost opportunities to foster creativity and innovation.

Environmental Impacts

- likelihood of on going lack of improvement in land management, in particular with respect to natural resource management without ALT Board restructure
- likelihood of impeding development with a negative environmental impact in that housing and other structures will be energy inefficient and progressively increase greenhouse gas emissions.

Regional Impacts:

- loss of economic stimulus and employment growth to regional areas if the current legislation remains in force.

Option 2: Non regulatory option

- **Self-regulation by ALT Board**

The above option is not supported. A detailed analysis of this option is not provided as there is sufficient anecdotal evidence that self regulation by the ALT Board has not produced the desired objects of the Act.

Option 3: Proposed new legislation - The Preferred Option

There is substantial community support for new legislation which would provide for fundamental changes to the structure and function of the ALT Board, establish mechanisms for the efficient management and administration of the ALT land estate, including the setting of relevant policy, and ensure consultation and decision making processes for ALT land includes Aboriginal people with an interest in that land.

Extensive consultation with the assistance of an Aboriginal Reference Group has taken place from the end of 2008 through to 2011. This process is described in detail at point 5 Consultation (below).

A qualitative benefit analysis of the positive impacts of this option is provided below:

Compliance:

- An essential prerequisite for new ALT legislation will be a one-off audit over a three year period, of all ALT land holdings to ensure certainty of land tenure in the ALT estate and future compliance for transactions involving ALT land.
- New ALT legislation will mandate the maintenance of a register for recording all future dealings in ALT land.
- Housing SA have undertaken recent surveying in ALT communities at Point Pearce, Davenport, Koonibba, Yalata, Raukkan, Gerard, Dunjiba (Oodnadatta) and Nipapanha (Nepabunna). The cost has been approximately \$232,000.00. The work undertaken has been confined to small areas immediately in and about housing clusters in the communities and defines individual housing allotments sufficient for registration of individual leases. The majority of File Plans have been approved by the Lands Title Office. This work is a significant but limited contribution towards the totality of the audit which is required to be undertaken. The ALT estate is in excess of 500,000 hectares across 80 titles. During the review process a number of communities identified land which they believe was once included in missions and reservations but which is not vested in the ALT estate. In addition to further private sector surveying required to be undertaken there may be a need for some expert anthropological and archeological analysis to be undertaken. The cost per hectare of further surveying has been estimated at between \$5,000.00 and \$10,000.00 per 500 hectares dependent upon remoteness, terrain and desk top identification of potential title problems, placing the approximate further cost of surveying at between \$250,000.00 and \$500,000.00. It is recommended that the average amount of \$375,000.00 over 3 years be allocated for surveying and \$20,000.00 for anthropological and archeological consultations. This amount does not take into account the

cost of 2 FTE staff members for a period of three years to conduct the Good Order Audit.

Economic

- The proposed structure of the ALT Board, administrative and technical employees supporting the Board, the CDC and the 'good order audit' have budget implications which are detailed in the submission accompanying this RIS.
- The proposed legislation will have positive impacts for business and Aboriginal people in relation to any future mining on ALT land. The effect of the current Act (Sections 16(8) and 16(9)) is to remove ALT land from the provisions relating to rights of entry, prospecting, exploration or mining pursuant to the *Mining Act 1971* and to replace it with a process of proclamation by the Governor. In effect the residents of ALT land and the ALT Board are required to negotiate with the government about mining and exploration on ALT land. The Act does not set out any processes or other requirements for how the negotiation is conducted.
- The proposed legislation will include similar provisions to those contained in Division 3 of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (APYLR Act). To date there has been no mining on ALT land. Should mining take place on ALT lands in the future similar provisions to those contained in the APYLR Act regarding negotiation and agreement about mining and exploration will have the potential to positively benefit affected communities, the ALT estate and the Aboriginal community as a whole.
- The proposed legislation will also have a positive impact for developers. The current process for granting of mining tenements is proclamation by the Governor. Pursuant to the proposed legislation this requirement will be removed. Notification and negotiation by persons wishing to carry out mining activities (including exploration) will be by application to the ALT Board. The new process will reduce time lines and red tape for mining companies. If the Board does not respond within a legislated time frame, the Minister for Mines & Energy may be requested to refer the application to an arbitrator.

Family & Social

- The proposed legislation will have a positive impact on Aboriginal families and communities within the ALT estate. A fundamental issue for many ALT communities is insecurity of housing tenure and incapacity to raise finance to improve the amenity of homes on ALT lands. The proposed legislation will have a positive impact as it will enable the granting of long leases to individual residents which will form the basis of tripartite lending agreements (eg from Homestart). As a result, communities will be able to construct and refurbish homes which can be transferred to family members, improving wellbeing and investment in communities. Not all ALT communities have indicated agreement to participate in the National Partnership Agreement on Remote Indigenous Housing. Some

communities on ALT lands are not eligible to participate. The proposed legislation will provide those communities with an alternative.

- Communities with demonstrated good governance practices are likely to be given approval by the ALT Board for freehold transfer of land to them. This will increase community control, development capacity, employment, preservation and improvement of assets and wellbeing. Voluntary assumption of risk will enhance individual and community capacity for sound decision making.

Dry Zones

- There are a number of ALT communities which are negatively impacted by alcohol consumption on their land. Section 16A of the ALT Act operates to apply the *Public Intoxication Act 1984* (PIA) to ALT land, by empowering the Governor to declare land “vested” in the ALT as a “public place”. Police and others are then empowered to detain people who are intoxicated or suspected of being intoxicated, stop and search vehicles, enter and search premises and confiscate alcohol or other prescribed drugs (petrol has been proclaimed a prescribed drug in relation to the Yalata lands). Some ALT land is not “vested” in the ALT pursuant to section 16(2) of the Act and therefore the provisions relating to dry zones do not apply to some roads and other areas within the ALT estate. The proposed legislation would provide that the provisions of the PIA apply to all land held by the ALT thus enabling all ALT communities to exercise control over decisions about alcohol management.
- The proposed legislation would include the capacity for the ALT to negotiate service agreements with local councils for delivery of municipal services pending the outcome of negotiations which are proceeding between State, Commonwealth and Local Government and Aboriginal communities about what services should be funded and how they should be administered.

Environmental

- The proposed legislation will have a positive environmental impact by providing for a restructured skills based ALT Board with knowledge and skill in environmental and natural resource management, nature conservation, agricultural and pastoral land management activities and ecologically sustainable development and the precautionary principle. The proposed Board will provide advice and publish policies and guidelines with respect to land management. The proposed legislation will have an over all primary objective of enhanced land and natural resource management. As a consequence there would be an expected environmental benefit from improved natural resource management on ALT land.

- There is likely to be increased environmental impacts, including increases in greenhouse gas emissions arising from future development pursuant to the proposed legislation. These impacts will be managed through the adoption of ecologically sustainable development practices such as construction of energy efficient structures.

Business Impacts

- There are potential flow on impacts to businesses arising from investment in the ALT estate by the ILC and the IBA as detailed in the body of this RIS.
- Any potential negative impact on existing businesses pursuant to the “Good Order Audit” is likely to be mitigated by the process of rectification and reinstatement which will take place regarding leases, licences, boundaries and easements.
- The proposed legislation will promote development by way of mortgaging of ALT land for commercial and residential housing creating a positive business impact on ALT land and flow on benefit for business generally.
- The demise of the Aboriginal Lands Business Advisory Panel (ALBAP) of the ALT will not have a negative impact on business as it has not been functioning for several years. The structure and skills base of the ALBAP appears to have focused on technical skills development for employment readiness rather than commercial and land development projects. The members of the ALBAP were drawn from government employees. It appears that the ALT Board has sought the assistance of private consultants to fill the gap created by the inactivity of the ALBAP. In the proposed legislation the role that the ALBAP was expected to fill will be undertaken by a combination of ALT Board expertise and a Commercial Development Advisory Committee (CDAC) nominated by the ALT Board and appointed by the Minister. The members of the CDAC will be drawn primarily from the private sector and will have qualifications and commercial experience in the establishment and management of business enterprises including agricultural, pastoral, natural resource management, tourism, hospitality and community enterprises. The CDAC will have the capacity to identify gaps in skills development required for effective operation of such enterprises and the resources required to fill those gaps. Members of the CDAC will be remunerated at the appropriate board level and meet on the same number of occasions per year as the ALT Board either separately or jointly as required.

Regional Impact

- The ALT estate is diverse and primarily located in regional South Australia (see Annexure “A”). The proposed legislation along with community information will generate business and commercial activity on the ALT lands which will in turn provide much needed economic stimulus to regional centres and have a positive impact on employment growth.

4. Risk Factors associated with the Preferred Option and Strategies

- Relationship between the ALT and the Crown: The ALT Board in the proposed legislation will continue to be a statutory authority and any liabilities attaching to land dealings within the ALT estate (whether title is vested in the ALT or has been transferred to an Aboriginal community) or debts arising from failed commercial ventures will be a liability of the Crown unless land is sold to recover debt. This is the situation under the current legislation, and pertaining to other statutory authorities, but the risk to Government should be noted.
- The risk would be mitigated by the inclusion in the proposed legislation of a statutory caveat similar to section 191 S of the *Aboriginal & Torres Strait Islander Act 2005* which would enable the ALT Board to place a caveat on land preventing mortgage or sale without the consent of the Board.
- The risk would also be mitigated by the requirement that ALT land designated commercial would be placed on a Schedule requiring a regulation which could be disallowed by parliament. Other ALT land designated residential or community will continue to require parliamentary approval for sale.
- Native Title: Sale and transfer of ALT land outside of the Aboriginal estate will cause native title to revive. Extinguishment or surrender of native title would be required so that “clear title” could be passed on to a non-Aboriginal party (including the Government). The risk to Government is that extinguishment of native title could give rise to a requirement to pay compensation (or equivalent) to the native title holders. The proposed legislation will be subject to the *Native Title Act 1993* (NTA)
- Because the “future act” provisions of the NTA do not apply to ALT land the proposed legislation would include similar procedural rights and rights to negotiate that apply to compulsory acquisition under the NTA.
- Native title could be surrendered to government by way of an Indigenous Land Use Agreement which could pass compensation costs to a developer.
- Where ALT land is to be alienated from the estate Government may consider the creation of a “registerable interest” which is subject to native title and similar to a perpetual lease. There is a precedent with pastoral leases. An Indigenous Land Use Agreement would be registered against this interest.
- The proposed legislation would provide that extinguishment or surrender of native title would be either in accordance with compulsory acquisition under the *Land Acquisition Act 1969* or through negotiation of an Indigenous Land Use Agreement pursuant to the NTA.
- There may be costs associated with negotiation of Indigenous Land Use Agreements conducted by the ALT where native title is revived when land is sold for a commercial purpose

5. The Consultation

In November 2008, the former Minister for Aboriginal Affairs and reconciliation, the Hon Jay Weatherill MP, announced a comprehensive review of the ALT Act

and appointed a Reference Group to provide expert advice about the process of the review and to make recommendations about new legislation. Members of the Reference Group included the Chair, Deputy Chair and General Manager of the ALT, the then Commissioner for Aboriginal Engagement, Chair of the Aboriginal Advisory Council and two community representatives.

The review was underpinned by the following Guiding Principles:

- effective and accountable governance of Aboriginal communities that reside on ALT land, or are connected to that land
- protection of Aboriginal ownership of the ALT estate
- certainty of control for groups which use and occupy the ALT estate
- decision-making based on known and understood policies for land allocation and leasing/ licensing
- clear, simple and accountable administration and management of the ALT estate.

A Discussion Paper was released in 2008 (available at www.aboriginalaffairs.sa.gov.au). In the first half of 2009, the Reference Group and Government officers conducted community consultations in 24 locations across South Australia, including ALT residential communities (Annexure "C" comprises a list of communities consulted). 21 submissions were received following the first consultation round which are available at the above website. A Consultation Paper was released in November 2010 (available at website) and 13 written submissions were received after a second round of consultations was undertaken.

Major themes emerging out of the second stage of consultations and written submissions are as follows:

- Aboriginal people with interests in the land including people with native title rights and interests, should be consulted and integrated in decision making powers.
- The ALT needs a strong, expert, and properly resourced Board to allow strategic thinking, independence, stable income and long term planning.
- Processes for commercial development, home ownership and lease transfers should be transparent.

Generally, submissions supported a legislative framework that enabled economic development and improved governance, greater accountability, wider regional involvement and stronger communities with better, co-ordinated and efficient management structures.

There are a few areas over which the submissions reveal some divergence of views, namely:

The Role of native title holders and claimants

South Australian Native Title Services Inc (SANTS) and Congress have submitted that native title holders and claimants should have significantly more involvement in decision making. Conversely, the ALT has suggested that the proposal to include native title holders who are 'not resident' may create tensions.

The ALT Board

While most submissions have expressed support for the proposed reforms the ALT has expressed strong opposition to reducing the size of the ALT Board. The Congress of Native Title Management Committee has expressed support for ensuring that appropriate gender, age, community and culture balance is achieved. Congress have submitted that the proposed membership of eight is not enough.

Some of the submissions offer more detailed suggestions for reform. The Registrar of Indigenous Corporations (ORIC) for example, has proposed that Aboriginal organisations seeking to hold interests in ALT land should be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) so that those organisations can come under the regulatory umbrella of ORIC and receive assistance with internal dispute resolution and governance. Similarly, the District Council of Ceduna has focused on municipal services and alcohol management issues and the Aboriginal Congress of South Australia has focused on the role of native title groups in the ALT.

Comments from agencies proposed the following:

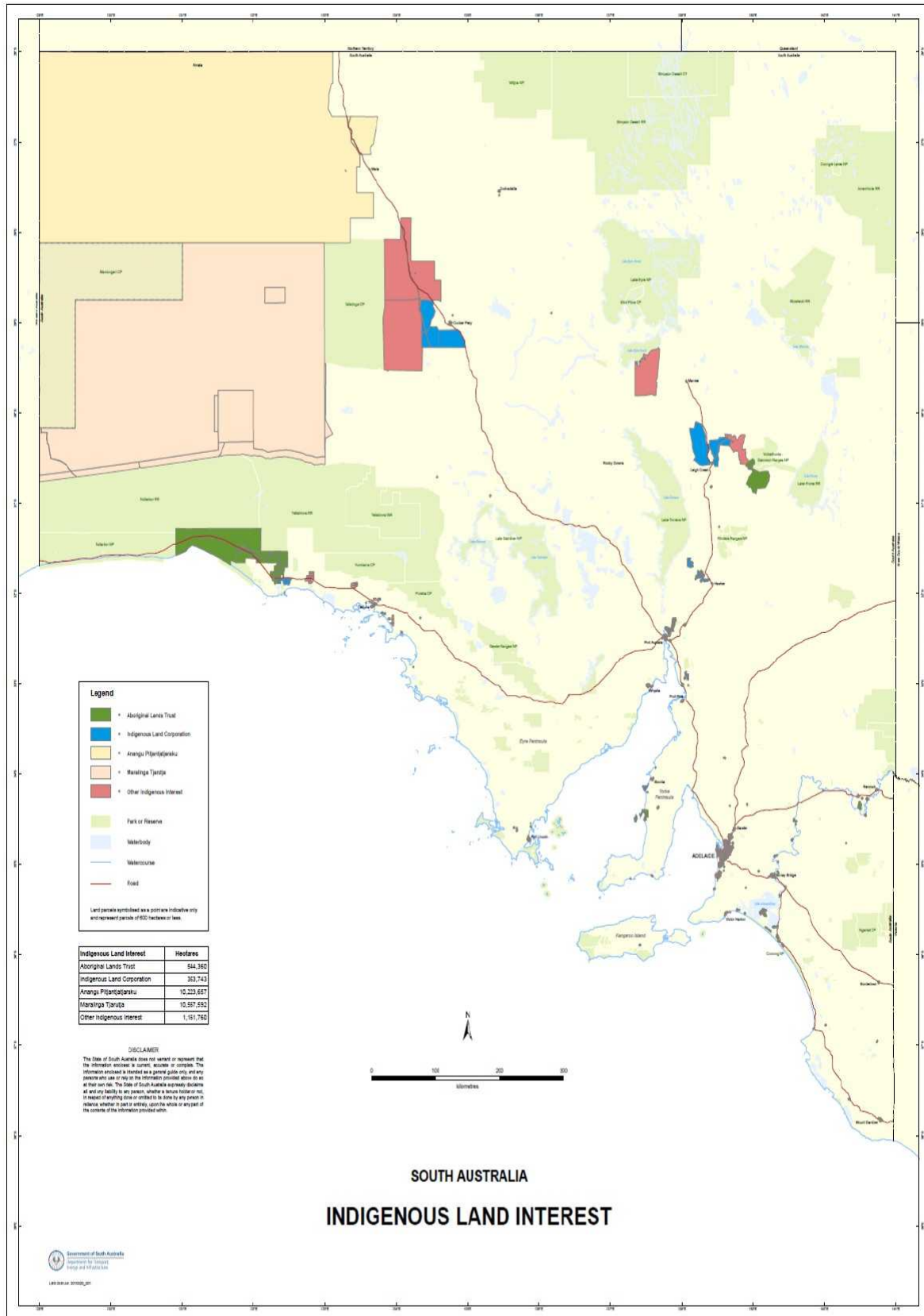
- support for identification of land tenure and management of tenancies
- alternate mediation tools for dispute resolution used as a component of the pre-trial procedure for proceedings which have been instituted in the ERD court
- changes to the dry zone provisions to increase the effectiveness of enforcement by police
- provision of clear lines of accountability, including mandated responsibility, in relation to municipal and environmental health services

Other comments from agencies and the ERD Court were directed at more detailed provisions and greater clarity, as well as future resourcing.

6. Implementation, monitoring and review

An implementation, monitoring and review process is attached to the submission (Appendix 3).

Annexure A



Contact Us

Please direct all feedback and enquiries to the Department of the Premier and Cabinet as outlined below.

Street Address: Aboriginal Affairs and Reconciliation Division
State Administration Centre
200 Tarndanyangga (Victoria Square)
Adelaide SA 5000

Postal address: GPO Box 2343
Adelaide SA 5001

Telephone: +61 8 8226 3184

Fax: +61 8 8226 8999

Email: aboriginallandstrustreview@saugov.sa.gov.au

Website: www.aboriginalaffairs.sa.gov.au