

SUBMISSIONS OF ANANGU PITJANTJATJARA YANKUNYTJATJARA
ANANGU PITJANTJATJARA YANKUNYTJATJARA LAND RIGHTS
AMENDMENT BILL NO 52 OF 2005

1. By Section 32 of the *Amendment Bill* the Minister is required to ensure that an independent review is undertaken of the amendments made by the Bill.

2. Anangu Pitjantjatjara Yankunytjatjara (“APY”) makes submissions in relation to the amendments introduced by the *Amendment Bill* under the following headings, that is to say;
 - (a) S4A(c) attempt to reduce powers of APY to Administration and Management of the Land;
 - (b) Section 6(8) Fetter on right to refuse leases;
 - (c) Section 6(6)(a) restriction on right to mortgage;
 - (d) Conferral of additional classes of exemption to permit requirement
 - (e) Section 19A right of residence on the Lands; and,
 - (f) Governance amendments.
 - (g) Ministerial intervention.
 - (h) The submission refers to documents contained in the attached bundle of Documents (“Bundle”).

3. The materials preceding the amendment (Bundle pages 5 to 19) show that in terms of parliamentary debate (upper house) the Bill was introduced at short notice; there was no oral explanation or clauses or debate; and, that the written explanation incorporated into Hansard by leave did not refer to Section 6(8).

Working backwards from here, there is nothing in the materials or consultation processes (Bundle pages 20 to 41) which suggest that attention was given to the matters referred to in this submission.

The matters were not mentioned in the evidence given before the select committee (Bundle pages 42 to 57).

(a) S4A(c) attempt to reduce powers of APY to Administration and Management of the Land;

The 1981 Act acknowledged the pre existing Aboriginal title system and gave discretion to the governor to grant a freehold title which he did. APY can do anything with the freehold that an owner of freehold can do unless power is expressly taken away by the Act. For example the power of leasing is limited and tightly controlled.

S4A(c) is relied on to preclude APY supplying services to its own members on its own lands.

This is contrary to the legislature's intent to provide full ownership to the Anangu. One only has to have regard to the provisions of the Premier's second reading speech (Bundle page 1 to 4) and the provisions of the 1977 Working Party Report to which the Premier referred.

The Anangu were intended to build their own schools and hospitals. It is clear that a substantial income stream from mining was envisaged.

A limitation of functions of the kind asserted would be to substantially detract from the property rights enjoyed under the freehold granted by the Governor and/or the underlying Aboriginal title system.

As such the amendment is likely to be struck down by Section 10 of the *Racial Discrimination Act 1975(Commonwealth)* (RDA).

The amendment also stifles competition for service delivery if it has the effect contended for by the SA Crown.

If the amendment does have that effect then Anangu arte disadvantaged by being unable to compete for service delivery funding or contracts particularly in relation to employment of MSO's, homelands servicing and housing R&M.

(b) Section 6(8): Fetter on right to refuse leases

The Amendment Bill introduced Section 6(8) which provides as follows.

(8) The Executive Board—

(a) must not unreasonably withhold consent under subsection (6) (b); and

(b) must not require the payment of a fee for giving such consent, or considering an application for such consent, that exceeds the reasonable expenses of Anangu Pitjantjatjara Yankunytjatjara in relation to that Act.

This Section introduces for the first time a requirement of reasonableness in respect of any refusal of consent to transfer, assign or sublet a lease by APY and prohibits the charging of a premium in respect of such consent.

There is no precedent for this kind of fetter or interference upon the freedom of an owner of real property in South Australia.

The introduction of Section 6(8) discourages commercial development in that Anangu cannot choose who an assignment ect is made to. This is likely to impede the grant of leases in the first place.

(c) Section 6 (6) (a) restriction on right to mortgage.

The prohibition on mortgaging of interests was introduced for the first time by the Amendment Bill. The prohibition was not contained in the original Act.

The provision was sought to be removed by the Commonwealth in recent negotiations relating to an offer of money for housing. This now seems to have been abandoned.

The Commonwealth announced in mid 2007 a policy for the encouragement of home ownership by Anangu and adopted the stance that an amount of \$25,000,000.00 for additional housing would not be provided unless, inter alia, there were amendments to the *Act* to enable mortgaging of interests in land.

Such an amendment would of course not have been necessary had the prohibition not been introduced in the first place by the Amendment Bill.

Given that Anangu have always been able to be granted long leases of land under the Act, (S6(2)(b) an amendment to permit mortgaging by Anangu to a mortgagee approved by the Minister would facilitate economic development by way of a market in relation to land among the Anangu.

Potential lenders include Home Start and Indigenous Business Australia (IBA).

(d) Conferral of additional classes of exemption to permit requirement S19 (8)

As the Lands are private property consent to enter is required the absence of which makes the person entering a trespasser. The provisions of the Summary Offences Act apply. The permit system introduced by S19 creates an additional offence if there is entry without a permit. It also allows those without an invitation to apply for permission to enter and regulates the application process.

There are classes of persons who do not require a permit (“authorised persons”) prescribed by s19 (8). However being a prescribed person only exempts from an offence under the rest of the section. Apart from this exemption an authorised person does not have a right of entry conferred by S19 (8).

The Act needs to make clear that that a person cannot be an authorised person if the purpose of entry conflicts with a duty assigned to APY, i.e. land management of consultation with traditional owners.

A recent example of a problem of this kind occurred when the State and federal Governments sought to confer directly with communities over housing where APY needed to conduct consultations with traditional owners for the Land on which communities are built. Objection was taken to the Director of DPC-AARD entering the lands for this purpose without a permit. See the attached letter from Finlayson’s to the Minister (Bundle pages 58 - 61)

(e) Section 19A right of residence on the Lands

The Amendment Bill introduced for the first time a right of residence to those authorised to enter the lands under Section 19(8).

This is in conflict with the overriding principle that only Anangu may reside on the Lands. No other owner of Real Property in Australia can have residence by third parties on their land forced upon them.

The Act contains provision for a lease to the Crown for fifty years Section 6 (2) (b). To the knowledge of the author of this submission, no application for a lease by the Crown has ever been refused. The provision relating to Crown leases is, it is submitted, a sufficient provision to facilitate residence on the Lands by offices of the Crown where necessary for the operation of some facility put in place by the Crown.

The provisions of Section 19A go beyond this and confer a right of residence to a range of parties who may or may not be acceptable.

The fact that the Crown is entitled to occupation of premises which it created or occupied as at 1981 for fifty years pursuant to Section 30 of the Act should not be overlooked.

The Act should be amended to provide that any right of residence shall only be in premises leased to the crown for the purpose of such lease and as are approved by APY consent not to be unreasonably withheld

(f) **Governance Amendments.**

The Amendment Bill introduced governance changes and anti-corruption protocols.

The office of General Manager and Director of Administration were created with the holders of those offices being immune from arbitrary dismissal by the Executive Board. The General Manager has control of the hire and the fire of staff thereby extending that independence to staff.

There are also duties in relation to honesty, conflict of interests, care and diligence and for the observance of a code of conduct, breach of which may attract civil liability and constitute grounds of removal from the Board.

The workability of those provisions is being tested presently and as at the date of this submission, three members of the Executive Board face removal for alleged breaches of Section 12D in respect of conflicts of interest.

It is submitted that the governance changes did not go far enough. The changes did not affect the operation of community councils and the position of non-government agencies, such as AP Services Aboriginal Corporation (APS), was completely overlooked.

These entities, all of which receive direct funding from State and Commonwealth are controlled by Aboriginal Committees or Councils. They are neither subject to anti-corruption or governance protocols in the case of those Councils constituting incorporated associations under State Law or, in the case of entities incorporated under the *CATSI Act*, rely on ORATSIC to oversee compliance with the *Act*.

This situation leaves up to a dozen corporate entities operating on the Lands with access to funds, order books, vehicles and other facilities all of which can be the source of, or a mechanism for, unwanted influence and engender corruption.

The undesirability of this situation is easily tested by looking at the situation of AP Services.

As a result of complaint by the Office for Aboriginal Housing, APY has been pursuing outstanding financial reports and an accounting or handling of rentals collected, or which ought to have been collected, from social housing on the Lands.

In response to this situation and long standing complaints about service delivery, the APS Governing Committee took action to ascertain the Corporation's financial position; return operations to the Lands; promote the employment of Anangu; and, review the position of the General Manager. When resolutions were made calling for a financial report and replacing the General Manager, a minority of the Governing Committee sought to overthrow the majority through a series of irregular proceedings.

This has led to a situation where the minority and the dismissed General Manager remain (with the support of staff) in possession of the APS office and facilities. The majority of the 2006 to 2008 Governing Committee is now invited to join a larger Governing Committee where they would be reduced to a minority faction.

APY attempts to obtain an accounting of rentals are rebuffed apparently because of a feeling or a position of impunity on the part of APS because of the above situation.

In the meantime, three Executive Board members of APY have been drawn into a conflict of interests through dual membership (or claimed membership) of the Executive Board and APS Governing Committee while contractual disputes exist between APY and APS.

APS has no tenure on the Lands and can be ejected at any time. There seems to be a reluctance to accept the reality of this position and/or the statutory jurisdiction of management and administration of the Lands conferred on APY by the *APY Land Rights Act*.

APS is not the only contractor operating on the Lands with no tenure or arrangements with APY. Other contractors (involving substantial value paid by funding bodies) operate with extensive dealings with Anangu, each contractor with its own set of networks and influence throughout the communities.

Other Government Departments also interact on the Lands.

None of these parties are directly subject to the anti corruption protocols of the *APY Land Rights Act* or subject to any kind of code of conduct or oversight except APY's ability to direct contractors and/or individuals to quit the Lands.

It is submitted that this situation ought to be addressed so as to enable Anangu Pitjantjatjara Yankunytjatjara to be the peak body on the Lands with powers of inspection and seizure in relation to at least communities but ideally any corporate entity operating on the Lands. Ideally, this would include legislation in respect of community entities so as to provide Anangu Pitjantjatjara Yankunytjatjara with an oversight role and to introduce similar governance and anti-corruption protocols as are found in the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*.

Anti-corruption and code of conduct protocols should apply to contractors and individuals.

It should not be overlooked that the members of the Executive Board of Anangu Pitjantjatjara Yankunytjatjara and its staff are public officers within the meaning of Part 7 of the *Crimes Consolidation Act (SA) 1935* and so subject to the further anti-corruption provisions contained therein.

This is not presently the position with Community Councils and other incorporated bodies.

It is submitted that it would be preferable for Municipal Service Officers in communities to be employed by APY so that they too would be public officers and subject to Part 7. And both immune from arbitrary dismissal and required to be party to a code of conduct.

A recent example of a problem involving MSOs employed by an NGO was that NGOs have been pressured and bullied into procuring the signature of documents by community members and told that they will be sacked if they talk to anyone other than the NGO. The NGO has sought to advance its own commercial interests in obtaining new funding and contract by these methods. This would not have occurred had the MSOs been employed by APY. See letter from APY to GM of AP Services (Bundle pp 62-65)

Although introduced by amendments in 2004, the requirement for elections of Executive Board Members by election conducted by the SA Electoral Commission should be applied to communities for Community Council elections

(g) Ministerial intervention

The amendments introduced a number of powers of direction, approval of contracts and budgets, directed removal from the executive board and appointment of an Administrator. They are listed in S13Q.

For the most part the in exercising the powers the Minister is not focused on any criteria and in some cases he can take into consideration any matter he thinks fit.

There is no obligation to give reasons for his decision.

There is no right of appeal for Merits review to the District court.

Accordingly the powers are open to abuse.

It is submitted that the powers should prescribe criteria for consideration limited to advancing the interests of Anangu, require reasons and provide for a right of Merits review to the District Court.

(h) Specific Submissions.

It is submitted that;

- a. Section 4A(c) should not limit APYs functions
- b. Section 6(8) should be repealed.
- c. Section S6(6)(a) should be amended to permit the mortgage of interest in lands by Anangu to a mortgagee approved by the Minister,
- d. Sections 19(8) and 19A should be amended as discussed above
- e. Governance and anti-corruption protocols (including code of conduct requirements) should be extended to communities and third parties operating on the Lands so as to provide powers of direction, oversight, investigation, search and seizure on the part of Anangu Pitjantjatjara Yankunytjatjara or a Registrar of APY Lands. A Registrar could also grant exclusion orders on request of APY and/or SAPOL. There should be provision of adequate funding for Anangu Pitjantjatjara Yankunytjatjara to carry out these expanded governance functions.
- f. Communities should be subject to elections for council conducted by the SA Electoral Commissioner,
- g. While technically Municipal Services Officers could be the subject of legislative attention so as to qualify them as public officers within the meaning of Part 7 of the *Crimes Consolidation Act (SA) 1935*, it is submitted that this could also be addressed through the appropriate arrangements in relation to funding of the positions of those Officers and a Human Resources Officer so that Anangu Pitjantjatjara Yankunytjatjara would be able to employ those Officers as opposed to them being employed by communities and third parties.
- h. At a practical level the management and administration jurisdiction of APY over the Lands, as well as its position as Head Lessor, need to be recognised and contractual arrangements and strategic partnerships put in place between APY, businesses and contractors. The Lands mean big business to contractors and businesses presently operating without tenure or oversight of any kind. There is a

perception that there is a failed market applicable to the Lands in respect of contracting arrangements. This perspective may, in no small measure, be linked to the performance and attitude of contractors and businesses presently operating with impunity and in some case in an arbitrary and un-businesslike fashion.

- i. The powers of ministerial intervention need to be amended as discussed above.