

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

**Indigenous Land Corporation
Annual Report 1999-2000**

Submission No: 3b

8 June 2001

Mr R G Haebich

Acting Chief Executive Officer

Indigenous Land Corporation

PO Box 586

Curtin ACT 2605

 02 6269 2500  02 6260 3899

E-mail:



INDIGENOUS LAND CORPORATION
ABN 59 912 679 254



LAND ENTERPRISE AUSTRALIA PTY LTD
ABN 32 084 704 423

8 June 2001

Mr Peter Grundy
Secretary
Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund
Parliament House, Canberra ACT 2600



Dear Mr Grundy

Annual Report 1999/2000 - Indigenous Land Corporation

A number of questions were taken on notice during the Indigenous Land Corporation's last appearance before the Committee.

I have prepared answers on certain questions and these are below. I understand the Chairman is providing material directly to you on those questions directed specifically to her. The Board will be considering additional questions at its 18 June meeting and the results will be sent to you as soon as possible.

As the answer to the question on NT82 and the third paragraph of Attachment C relate to the possible settlement with Mr Johnstone, I would ask that these amounts be kept confidential. This information may affect the ILC or the Chairman (should Mr Johnstone proceed against her as a private person).

NT65

"At that stage, was there an investigation going on into the purchase of Roebuck Plains by the ILC?"

ANSWER

No. The meeting at which the suspension of Mr Wilson was declared null and void occurred on 21 March 2000.

While an article in the Sydney Morning Herald on 5 February 2000 made reference to an inquiry into the acquisition of Roebuck Plains, it was not until 6 June 2000 that the Board passed a motion instituting an enquiry into the purchase of Roebuck Plains and Cardabia Station and any related management agreements. There is no record in the minutes of any previous Board meeting that the question of an inquiry into this acquisition had been raised. However, the Board had reviewed various aspects of the acquisition and subsequent management regime prior to commissioning the investigation under discussion.

NT66

Q2 (Chair) "When the report (Rogers) was commissioned, was there any mention then that it would be a confidential report or was it commissioned on the basis that at any time it would become a public document?"

Head Office

(Adelaide) X:\Policy and Research\ministerials&parliamentary business\PJC\PJ-C-Mar_2001\QoNAnswers2ndhearing v.2.doc
GPO Box 652
Adelaide SA 5001
Ph: (08) 8216 4100
Fax: (08) 8212 7264
Email: ilcinfo@ilc.gov.au

Offices located in-

Brisbane
Canberra
Perth

ANSWER

The Board's decision to commission an enquiry into the acquisition of Roebuck Plains contains no indication that the report of the enquiry should be public or otherwise.

At its 15 May 2001 meeting the Board of Directors agreed that a decision in relation to the distribution of the report would be made after the report is to hand.

The Acting CEO wrote to Directors on 7 June to convey the Committee's concern in this regard.

NT82

"How much has the ILC spent on all this (legal fees related to unlawful appointment of Mr Johnson)?"

ANSWER

The following amounts have been spent to date.

• Australian Government Solicitors	11,689
• Minter Ellison	2,162
• Meyer Clapham (for Mr Wilson)	2,300
	<u>\$16,151</u>

Invoices are attached (Attachment A).

The Board decided to suspend any decision on this issue until the results of the Rogers Report were known. There will undoubtedly be further expenditure after this but it is not possible to accurately estimate either costs relating to legal fees or of any settlement.

In relation to these legal fees and to assist the Committee, the following chronology of events relating to the suspension of Mr Wilson is provided.

8 March The Chairman informed Mr Wilson that she was suspending him from office until the next Board meeting.

9 March The Chairman was informed by telephone by the ILC's Central Divisional Manager (Len Owen) of the existence of an Instrument of Appointment created by the Board in 1998 appointing an Acting General Manager in circumstances where the position of General Manager is vacant. The Chairman later informed Mr Owen that she was making her own arrangements to fill the position and that these would take effect on 13 March.

9 March The ILC Human Resources Manager was requested to prepare a contract for three months for Mr Johnstone to act in the position from which the Chairman had purported to suspend Mr Wilson. The Chairman sought the ILC common seal so it could be affixed to the Instrument of Appointment of Mr. Johnstone.

13 March The ILC received confirmation from the Australian Government Solicitor that the 1998 Instrument of Appointment that identified an alternative General Manager could only be revoked by the full Board and that a Board decision was needed to appoint an acting General Manager.

16 March The ILC receives advice from the Australian Government Solicitor that it was not within the power of the Chairman to suspend the General Manager.

20 March Mr Johnstone wrote to the Chairman outlining his version of the events and asserting that the Chairman had offered him the position of Acting General Manager and seeking redress. Mr Johnstone copied this correspondence to all Board members. (Attachment B.)

21 March An emergency Board meeting moved that "...the Board does not accept that there has been a valid suspension of John Wilson and that action taken by the Chair in this respect is null and void". A motion of no confidence in the Chairman was made and carried as a result.

4 April The ILC having sought legal opinion on its liability to Mr Johnstone, the Australian Government Solicitor provided advice (4 April) to the effect that while the ILC, itself, had no legal liability it should, for the sake of its reputation, "make some payment in the nature of an act of grace" (Attachment C). This was followed by further advice that it was within the power of the ILC to make such a payment (Attachment D and E).

8 May The ILC Board passed a unanimous motion to deal fairly with Mr Johnstone's claim.

NT95

"Can you tell me what it is the \$6,800 is determined to be used for as part of the chairman's package? What were the words that were used?"

ANSWER

The \$6,800 is "supplementary remuneration in lieu of performance remuneration".

Clause 5.1, Part 5 of Remuneration Tribunal Determination 2001/6 - Remuneration and Allowances for Holders of Full Time Public Office allows \$8,500 per annum supplementary remuneration for the salary range in which the Chairman's basic rate of salary falls.

Determination 2001/06 - table 1 Notes advise in Note 14

"If appointed on a part-time basis, the Chair of the Indigenous Land Corporation may be paid base salary and supplementary remuneration in lieu of performance pay specified in Part 5 on a pro-rata basis in accordance with the hours worked, with effect from 24 September 1999".

As the Chair is working on a 0.8 times basis then the payment is 80% of \$8,500 being \$6,800. The amount is incorporated in her salary.

NT102

"On appendix 7, page 152, there is a notation of income from Roebuck Plains of \$52,982. I simply want a clarification as to what that income is from..."

ANSWER

The following items and amounts account for the income from Roebuck Plains.

• Diesel Fuel Rebate	32,062
• Insurance Recovery	1,400
• Sales of Hay	225
• Reimbursements by staff for stores and telephone use	2,669
• Recovery of expenses from Myroodah Station	8,926
• Hire-out of equipment and yards	7,440
• Property Tours	160
• Other Government rebate	100
	<hr/>
	\$52,982

NT103

"That requires a great deal of answering from the board ..." referring to the Chairman's statement that the Roebuck cattle count was 2,500 down and the fact that Dr Philpott was in Broome on ILC business.

ANSWER


At Attachment F is a summary of 1999, 2000 and 2001 muster and sale figures for Roebuck Plains Station.

The figures show a higher number of cattle mustered in 2000 than in 1999 but a lower calving percentage. The difference between the 1999 and 2000 calves amounts to 1933 head. It is believed that two factors contributed to this, the first is that the herd bulls were taken out of the herd in December 1999 and not returned to the herd until April 2000. This delay was partly due to flooding caused by cyclone Rosita, which could also have caused a loss of calves due to the flooding and stress.

Finally, I have also provided a copy of the Chairman's Instrument of Appointment (Attachment G).

I hope that the above addresses the Committee's concerns.

Yours sincerely



R G HAEBICH
A/g CHIEF EXECUTIVE OFFICER

ATTACHMENT

A



Indigenous Land Corporation
Head Office
GPO Box 652
ADELAIDE SA 5001

DATE: 26 April 2000
INVOICE NUMBER: 165076
OUR REFERENCE: 2000020506

YOUR REFERENCE:
INSTRUCTING OFFICER: Mr Simon Treloar

MEMORANDUM OF PROFESSIONAL FEES

RE: ILC - appointment of acting
General Manager

For the period 10 March 2000 to 11 April 2000

Professional fees incurred per attached Schedule: 3,676.00

Total amount payable: \$3,676.00
=====

ENTERED

Should you have any enquiries concerning this invoice please contact:

NAME: Lachlan Kennedy
TELEPHONE: (02) 6250 6462

Please arrange payment within 30 days quoting our reference and invoice number with your remittance.

E & O E

G+S Recd: TIL

Exp Approval:



Indigenous Land Corporation
Head Office
GPO Box 652
ADELAIDE SA 5001

DATE: 29 May 2000
INVOICE NUMBER: 166065
OUR REFERENCE: 2000020506

YOUR REFERENCE:
INSTRUCTING OFFICER: Mr Simon Treloar

MEMORANDUM OF PROFESSIONAL FEES

RE: ILC-Appointment of Acting General Manager

For the period 16 March 2000 to 18 April 2000

Professional fees incurred per attached Schedule:	3,243.00
AGS ACT	312.00
Total amount payable:	<u>\$3,555.00</u>

Received 07/06/00

Admin

Should you have any enquiries concerning this invoice please contact:

NAME: Lachlan Kennedy
TELEPHONE: (02) 6250 6666

Please arrange payment within 30 days quoting our reference and invoice number with your remittance.

& QE

Canberra (Barton) Office

10 Blackall Street, Barton ACT 2600 • Telephone (02) 6250 6217 • DX5678 • Fax (02) 6250 5944
OFFICES IN CANBERRA, SYDNEY, MELBOURNE, BRISBANE, PERTH, ADELAIDE, HOBART, DARWIN, TOWNSVILLE



Indigenous Land Corporation
Head Office
GPO Box 652
ADELAIDE SA 5001

DATE: 15 June 2000

INVOICE NUMBER: 166563

OUR REFERENCE: 2000020506

YOUR REFERENCE:

INSTRUCTING OFFICER: Mr Simon Treloar

MEMORANDUM OF PROFESSIONAL FEES

RE: ILC - appointment of acting
General Manager

For the period 12 May 2000 to 12 May 2000

Professional fees incurred per attached Schedule: 105.00

Total amount payable: \$105.00

Should you have any enquiries concerning this invoice please contact:

NAME: Lachlan Kennedy
TELEPHONE: (02) 6250 6462

Please arrange payment within 30 days quoting our reference and invoice number with your remittance.

E & O E



Indigenous Land Corporation
Central (SA, VIC, TAS, NT)
GPO Box 652
ADELAIDE SA 5001

DATE: 5 June 2000

INVOICE NUMBER: 33016

OUR REFERENCE: 1500012072

YOUR REFERENCE:

INSTRUCTING OFFICER: SIMON TRELOAR

MEMORANDUM OF PROFESSIONAL FEES AND DISBURSEMENTS

RE: ADVICE: CLAIM AGAINST CHAIRPERSON *Ma*

For the period 30 March 2000 to 17 April 2000

Professional fees incurred per attached Schedule: 484.00

Disbursements incurred:

4 Jun 00 Barristers
AGS - Barton Office

4,353.00

4,353.00

Total amount payable:

\$4,837.00

Should you have any enquiries concerning this invoice please contact:

NAME: Sarah Court
TELEPHONE: (08) 8205 4211

Please arrange payment within 30 days quoting our reference and invoice number with your remittance.

& O.E

Adelaide Office

Level 20, Grenfell Centre, 25 Grenfell Street, GPO Box 2150, Adelaide SA 5001 • Telephone (08) 8205 4211 • DX 105 • Fax (08) 8205 4499
OFFICES IN CANBERRA, SYDNEY, MELBOURNE, BRISBANE, PERTH, ADELAIDE, HOBART, DARWIN, TOWNSVILLE

Lindsay, Jodie

From: Treloar, Simon
Sent: Wednesday, 6 June 2001 2:55 PM
To: Lindsay, Jodie
Subject: FW: legal costs

-----Original Message-----

From: Donaldson, Lindy [mailto:Lindy.Donaldson@ags.gov.au]
Sent: Monday, 28 May 2001 4:33 PM
To: Treloar, Simon (ILC)
Subject: FW: legal costs

Hi Simon

Sorry for the delay. I had trouble getting an answer. However,

Invoice 165321, dated 28/4/00 included costs of:

Sykes - \$3738.00
Driver - \$90.00
Leahy - \$525.00

The file is Barton's Miscellaneous Advisings, so I can't tell if Driver and Leahy were for the same matter.

Please let me know if you need more information, or clarification.

Regards

Lindy Donaldson

Lindy Donaldson
Office Manager
Australian Government Solicitor
Tel: (08) 8205 4226
Fax: (08) 8205 4499
E-mail: lindy.donaldson@ags.gov.au
Find out more about AGS at <http://ags.gov.au>

Important: This transmission is intended only for the use of the addressee and may contain confidential or legally privileged information. If you are not the intended recipient, you are notified that any use or dissemination of this communication is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone and delete all copies of this transmission together with any attachments.

> -----
> From: Doherty, Vivien
> Sent: Monday, 28 May 2001 3:54 PM
> To: Donaldson, Lindy
> Subject: FW: legal costs
>
> Lindy,
> I think this one is for you - ILC - VIV.
> -----
> From: Williams, David
> Sent: Monday, 28 May 2001 3:07 PM
> To: Doherty, Vivien
> Subject: FW: legal costs

>
> Vivien, would you be able to check up on this? Paul Sykes is with OLT in
> Barton office. Could you please respond to Simon direct as I will be tied
> up for much of the pm.

> D

>

> -----

> From: Treloar, Simon
> Sent: Monday, 28 May 2001 1:28 PM
> To: 'david.williams@ags.gov.au'
> Subject: FW: legal costs

>

>

> David, I received an out of office reply to the message below. Would you
> be
> able to chase the matter up. It involves an advice received by Sarah Court
> for the ILC.

> > -----Original Message-----

> > From: Treloar, Simon
> > Sent: Monday, 28 May 2001 1:25 PM
> > To: 'sarah.court@ags.gov.au'
> > Subject: legal costs

> >

> > A hearing of a joint parliamentary committee on native title and the ILC
> > is seeking information on costs incurred by the ILC in obtaining legal
> > advice as a result of the action taken to suspend the former GM and the
> > subsequent attempted appointment of a new GM.

> > I have traced down your invoice numbers 164264,165076 and 166065 which
> > relate to the work in question but I don' t think they include the work
> > done on the advice dated 4/4/00 by Paul Sykes, addressed to Sarah Court
> > AGS -his reference OLT/20 0002 23838. Could you please check to see what
> > was invoiced for that advice.

> > the PJC require advice asap.

>

>

>

>

MeyerClapham

LAWYERS

27 March 2000
Account Ref: 991889
Bill No: 37754

Manager
Corporate Services Indigenous Land Corporation
GPO Box 652
ADELAIDE SA 5001
PRIVATE & CONFIDENTIAL

John Wilson – Employment Advice

Professional Fees:-

27 Mar 00 To our fees for acting on your behalf in this matter including:-
24 Feb 00 Telephone attendance on Client re terminating contract and defamation by employer
3 Mar 00 Attendance meeting with Client
8 Mar 00 Perusing documents from Client
8 Mar 00 Telephone attendance on Client
8 Mar 00 Telephone attendance on Client re suspension on full pay
8 Mar 00 Telephone attendance on John Wilson
9 Mar 00 Perusing employment terms and conditions
9 Mar 00 Telephone attendance on Client
9 Mar 00 Perusing facsimile from Client
9 Mar 00 Research ATSIC Act in relation to functions and powers of ILC Board
9 Mar 00 Attendance meeting with Client
10 Mar 00 Drawing letter of demand to ILC Board
10 Mar 00 Faxing draft correspondence to Client for instructions
10 Mar 00 Telephone attendance on Client re amendments to letter and further developments
10 Mar 00 Drawing amendments to letter
10 Mar 00 Faxing letter to each ILC Board Member
10 Mar 00 Telephone attendance on Client re progress of matter
10 Mar 00 Telephone attendance on Matthew Coleman
10 Mar 00 Telephone attendance on Client re discussions with Matthew Coleman
10 Mar 00 Telephone attendance on Lois Peeler
10 Mar 00 Telephone attendance on Client re Lois Peeler
14 Mar 00 Perusing facsimile from Client



Andersons
ADELAIDE

Anderson Rice
MELBOURNE

Bain Gasteen
BRISBANE

Cutler Hughes & Harris
SYDNEY

Shieff Angland
AUCKLAND

Level 2
1 Farrell Place
Canberra City ACT 2601
Australia

GPO Box 764
Canberra City ACT 2601
DX 5647 Canberra

Tel: (02) 6279 4444
Fax: (02) 6279 4455
NT: +612 6279 4444
Email: enquiries@meyerclapham.com.au

27 March 2000
Account Ref: 991889
Page: 2

14 Mar 00	Telephone attendance on Client re recent developments and progress of any defamation proceedings	
15 Mar 00	Perusing letter from ATSIC	
17 Mar 00	Telephone attendance on Client re meeting on 21 March 2000	
17 Mar 00	Letter to Chairman re meeting on 21 March 2000	
17 Mar 00	Faxing draft letter to Client	
17 Mar 00	Telephone attendance on Client re draft letter	
17 Mar 00	Faxing finalised letter to Chairman	
18 Mar 00	Telephone attendance on Client re progress of matter	
19 Mar 00	Perusing facsimile from Chairman	
19 Mar 00	Telephone attendance on Client re correspondence	
19 Mar 00	Faxing correspondence to Client	
19 Mar 00	Telephone attendance on Client re correspondence and response	
20 Mar 00	Letter to Chairman and all directors re conduct of meeting on 21 March 2000	
20 Mar 00	Attendance meeting with Client to settle letter to Chairman and discuss case generally	
20 Mar 00	Faxing correspondence to all ILC Board members	
20 Mar 00	Telephone attendance on on ILC Board members offices to confirm receipt of facsimiles	
20 Mar 00	Telephone attendance on Client re progress	
20 Mar 00	Faxing correspondence to Client	
22 Mar 00	Telephone attendance on Client re outcome of meeting	
24 Mar 00	Letter to Client confirming outcome and finalising matter	
Total Fees		\$ 2,300.00

Summary of Amount Due:-

Total Fees	2,300.00
Total Disbursements	0.00

Total fees and disbursements now due:- \$ 2,300.00

Our payment terms are 7 days.

With Compliments,

MinterEllison

L A W Y E R S

MEMORANDUM OF FEES
AND DISBURSEMENTS

15 LONDON CIRCUIT CANBERRA
GPO BOX 2013 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minters.com.au
TELEPHONE +61 2 6274 3000 FACSIMILE +61 2 6274 3111

Your ref:
Our ref: WLS:JBW:71898
Direct line: (02) 6274 3229
Direct fax: (02) 6274 3111

30 August 2000

Indigenous Land Corporation
GPO Box 586
CANBERRA ACT 2605

TAX INVOICE

Australian Business Number : 91 556 716 819

William Johnstone

For acting on your behalf in relation to the above matter :

FEES FOR PROFESSIONAL SERVICES SUPPLIED

Fees subject to GST	1,437.50	
GST @ 10%	143.75	
	<hr/>	1,581.25
Total Fees including GST		<hr/> \$1,581.25
TOTAL AMOUNT DUE		<hr/> \$1,581.25

MINTER ELLISON

per 

Please pay in Australian dollars by:

1. cheque; or
2. E.F.T to our account at the ANZ Banking Group Limited, 17 London Circuit, CANBERRA ACT 2600, BSB number 012 952 account number 5925299 (quoting reference number WLS:JBW:71898)
3. When paying by EFT please notify our accounts department with the details by fax to (02) 6274 3111 or email to caccount@minters.com.au

If this invoice includes disbursements incurred by us on your behalf, the amount invoiced has been reduced to allow for any input tax credit available to us for that cost or expense.

This invoice is payable on receipt

MEMORANDUM OF FEES
AND DISBURSEMENTS

15 LONDON CIRCUIT CANBERRA
GPO BOX 2013 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minters.com.au
TELEPHONE +61 2 6274 3000 FACSIMILE +61 2 6274 3111

Your ref:
Our ref: WLS:JBW:71898
Direct line: (02) 6274 3229
Direct fax: (02) 6274 3111

30 September 2000

ENTERED

Indigenous Land Corporation
GPO Box 586
CANBERRA ACT 2605

TAX INVOICE

Australian Business Number : 91 556 716 819

William Johnstone

To acting on your behalf in the above matter :

FEES FOR PROFESSIONAL SERVICES SUPPLIED 725.00

Total fees \$ 725.00

PLUS: GST 72.50

Total amount due & payable including GST \$ 797.50

MINTER ELLISON

per



Please pay in **Australian dollars** by:

1. cheque; or
2. E.F.T to our account at the ANZ Banking Group Limited, 17 London Circuit, CANBERRA ACT 2600, BSB number 012 952 account number 5925299 (quoting reference number WLS:JBW:71898)
3. When paying by EFT please notify our accounts department with the details by fax to (02) 6274 3111 or email to caccount@minters.com.au

If this invoice includes disbursements incurred by us on your behalf, the amount invoiced has been reduced to allow for any input tax credit available to us for that cost or expense.

This invoice is payable on receipt

WLS:JBW:71898 ILC \$ 797.50
William Johnstone

27/03 '00 MON 15:16 FAX 02 62854300
27/03/2000 10:33
24/03 '00 FRI 13:48 FAX

LAND ENTERPRISE AUST

ILC HEAD OFFICE 02 0020
NJ.352 001
001

B

Dear ILC **ATTACHMENT**

This is a copy of a letter that went to the ILC Chairperson. I am seeking a speedy resolution to this matter.

Cheers
William Johnston
24/3/2000

William Johnston
510 Cummins street
Broken Hill NSW 2880
(PH) 0418 844480

20th March, 2000

Ms Sharon Firebrace
Chairperson
Indigenous Land Corporation
PO Box 586
Curtin ACT 2605

Dear Ms Firebrace,

EMPLOYMENT OFFER WITH THE INDIGENOUS LAND CORPORATION
["ILC"]

As you will recall, you initiated a meeting and I met with you on Tuesday 7 March 2000 at the Olymns Hotel (Ainslie) in Canberra to discuss my experience at senior management level and my views about the ILC.

On Wednesday 8 March 2000 I was asked to go over and meet with you in your office at Deakin in Football house, which I did. During discussions with yourself and Steve Gordon, you offered me the position of Acting General Manager of the ILC for 3 months. Although I was initially reluctant to start work on short notice you indicated that if I wanted the job I had to be in Canberra to start work on Monday 13th March, 2000. I 'juggled' my commitments and priorities. I arrived at a conclusion that I could meet your tight timelines and made up my mind 'on the spot' to accept your offer. I indicated that I would arrange 3 months 'leave without pay' from my current employer. I recall it was at that time I stated that I needed a letter formalising arrangements. I also discussed with you accommodation and motor vehicle facilities I needed once I commenced work on the next Monday as requested. At the time, I stated I needed a letter offering the appointment so I could organise 3 months leave without pay from my current employer.

I flew to Sydney on Thursday 9th March, 2000, to carry out my duties as previously arranged for my current employer. On Friday the 10/3/2000 your office faxed me the terms and conditions of employment for the Acting General Manager's position under Section 192P of the ATSIC Act.

In addition I was advised that (i) a Qantas flight to Canberra [QF837 departing Mascot at 2.35pm Saturday 1 March - booking number: 0811699741898] and (ii) a self drive rental car, had been booked for my arrival in Canberra on 13 March, 2000. On the afternoon of Friday 10th March, 2000 we again spoke and you assured me that "you would hand me a letter when I arrived in Canberra and that everything was fine".

27/03/2000 10:33

-2-

Believing this to be the confirmation that you had promised on 8th March, 2000, I took a number of steps to disengage myself from my present employment commitments, which included:

- a. My telephoning members of the Board of Directors of Maari Ma Aboriginal Health Corporation, as well as faxing a memo confirming my seeking of 'leave without pay' for a period of 3 months starting from the 13 February 2000 until 13 June 2000. My current employer approved this request on the Friday afternoon.
- b. The cancellation of flight bookings originally organised to return to Broken Hill on Friday 10th March, 2000.
- c. The purchase of new clothes suitable to the Canberra climate and the nature of the work.

I could not travel on the Saturday 11th March flight that had been booked by your office because my surname spelt incorrectly. I could not produce ID to collect the Qantas ticket that could only be issued in the name of "Johnson" not "Johnstone".

You rang me on Sunday afternoon for a chat. I informed you that I had obtained approval for 3 months leave without pay from my current employer and I was going to fly to Canberra on Monday after I bought some clothes to start work with the ILC. A fresh air ticket had to be organised by your office with my surname spelt correctly.

I rang your office on Monday 13 March to speak with you but I was told that you "were busy" and your Personal Assistant spoke with me. I had telephoned to confirm the flight and hire car details and advise of the need to spell my name correctly. Your Personal Assistant told me that I might not be starting due to some administrative problems relating to my appointment. I felt that I had commenced duties in Sydney with the ILC and it was only a matter of travelling to Canberra to start in the Canberra office. In reality, I was blocked by your staff from travelling to Canberra and taking up the duties of General Manager in the 'Head Office'. These unexpected events caused me great anxiety and the fact that you had broken contact with me heightened this anxiety. I felt that I could help you sort matters out. With the matter remaining unresolved I never started work in Canberra and I returned home to Broken Hill out of pocket, out of a job and professionally and personally embarrassed.

In summary the events over the last couple of weeks has cost me financially by incurring expenses for accommodation in Sydney, meals and clothing to the costs of approximately \$1,500.00.

Further I do not have a job for 3 months as the Board had appointed Mr Richard Weston to act in my position for that period of time. I don't recommence work until the 13th June, 2000 with my current employer. In addition, I have been forced to take one week's annual leave (last week) just to have some income for my family. I now find myself to be 'out of pocket' for up to 3 months wages.

27/03/2000 10:33

003

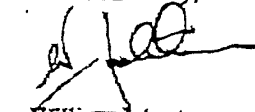
-3-

I have been personally embarrassed within my own family and professional circles. Somehow the word of my temporary appointment was doing the rounds. As an example the Deputy Premier of NSW (Andrew Refshauge) rang me on Monday morning 13th March, 2000 to congratulate me on my appointment as the acting General Manager of the ILC.

I believe that I will now suffer personally in professional circles when I apply for other jobs. I am already known to be the bloke who was offered a job and accepted without a contract. I now find myself down into the 'politics' associated with the ILC's established record and dealings with the existing and previous General Manager(s). In accepting the ILC's offer I was committed to working with yourself and the Board in an impartial, objective, loyal and professional manner. This would have included the giving of advice 'fearlessly' and without aligning myself to any particular political 'interest' or 'persuasion' of individual members of the ILC Board.

To this end I must emphasise that I have acted in 'good faith' in regards to this matter. Therefore I am seeking expenses incurred until the matter is resolved and the payment of 3 months wages as per the terms and conditions of employment for the General Manager ILC. I look forward to a speedy resolution to this matter and trust that you will understand the dilemma in which I now find myself, through acting upon your requests.

Yours Sincerely,



William Johnstone
20/3/2000

c.c. Board members of the Indigenous Land Corporation

**ATTACHMENT
CONFIRMATION
OF FAX****C**

OLT/20 00023838

4 April 2000

Ms Sarah Court
Director
Office of the Australian Government Solicitor
SOUTH AUSTRALIA

**CLAIM BY W. JOHNSTONE FOR COMPENSATION - LIABILITY OF
INDIGENOUS LAND CORPORATION**

1. We refer to your facsimile request of 31 March 2000 for urgent advice on whether the Indigenous Land Corporation ('the Corporation') is legally liable to Mr William Johnstone to pay him any of what he claims as compensation in his letter to Ms Sharon Firebrace, Chairperson of the Corporation, dated 20 March 2000, on account of what he sees as the apparent abandonment on 13 March 2000 of his appointment of Acting General Manager of the Corporation.

2. The main heads of Mr Johnstone's claim are three month's loss of wages (which he does not quantify) from his former employment (from which he took three months' leave without pay to be Acting General Manager) and \$1,500 in accommodation costs associated with aborted travel to Canberra and clothing purchases he made which he saw necessitated by a move from Broken Hill to Canberra.

3. We note our understanding that this request has been made by the Corporation as the client of the Australian Government Solicitor, and that the advice is to be tendered to the Corporation for its guidance.

Short Answer

4. We are of the view that the stronger position is that there is no liability on the part of the Corporation to pay damages or compensation to Mr Johnstone in relation to any loss or damage for which he claims compensation in his letter of 20 March 2000.

Office of Litigation

AUSTRALIAN GOVERNMENT SOLICITOR

This raises the question as a matter of policy whether, notwithstanding that there might be no legal liability on the part of the Corporation to pay compensation, it should, for the sake of its own reputation, make some payment to Mr Johnstone in the nature of an act of grace. Whether the Corporation has power to make such a payment is an issue not addressed in this advice.

Background

6. In his letter, Mr Johnstone claims that on 8 March 2000, at a meeting at Deakin in the Australian Capital Territory, Ms Firebrace offered him the position of Acting General Manager of the Corporation. According to Mr Johnstone, a 'Steve Gordon' was also present at that meeting. We note that the most recent *Commonwealth Government Directory* (published in February 2000) shows a Mr Stephen Gordon as being another Director of the Board of the Corporation (the Corporation under s. 191V of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the Act') having a full complement of seven Directors). On 10 March 2000, Mr Johnstone says that Ms Firebrace 'faxed' him 'the terms and conditions of employment for the Acting General Manager's position under s. 192P of [the Act]'. It appears that, later, on the same day, Mr Johnstone says that he spoke with Ms Firebrace who assured Mr Johnstone that she would hand him 'a letter' when he arrived in Canberra on 13 March 2000 and that everything was 'fine'. Due to an airline booking error, Mr Johnstone did not start his journey on 11 March 2000 from his residence in Broken Hill to Canberra on the flights on which he had been intending to travel. On 12 March, there was a telephone conversation between Mr Johnstone and Ms Firebrace in which Mr Johnstone advised Ms Firebrace, among other things, that he had obtained three months leave without pay from his current employment to enable him to serve in the position of Acting General Manager. Apparently, Ms Firebrace also undertook to rectify the booking error that had precluded Mr Johnstone's earlier departure.

7. On 13 March 2000 (a Monday), Mr Johnstone says that he telephoned Ms Firebrace's office but could only make contact with her personal assistant. This it appears was after he had already travelled from Broken Hill to Sydney. The purpose of this telephone call appears to have been to confirm some further travel and other details relating to his pending arrival in Canberra. In this conversation, Mr Johnstone says that he was told by the personal assistant that he might not be starting the appointment due to some administrative problems relating to the appointment. At about the same time as this conversation, it appears that the Corporation had his remaining travel from Sydney to Canberra cancelled. Mr Johnstone later returned to Broken Hill. There appears to have been no further material contact between him and Ms Firebrace prior to his writing to her in his letter of 20 March making the compensation claims in question.

AUSTRALIAN GOVERNMENT SOLICITOR

Statutory Framework

8. Under s. 191V(1) there is to be a Board of Directors of the Corporation. Section 191W of the Act provides that it is the responsibility of the Corporation Board to ensure the proper and efficient performance of the functions of the Corporation and to determine the policy of the Corporation with respect to any matter. Under s. 192J(1) of the Act the Chairperson of the Corporation must convene such meetings of the Corporation Board as, in his or her opinion, are necessary for the efficient performance of the Board's responsibilities. Beyond that, and the conduct of meetings and deliberations of the Board, the Chairperson does not seem to have any other particular role.

9. Under s. 192J(6) of the Act questions arising at a meeting of the Corporation Board are to be determined by a majority of the votes of the Corporation Directors present and voting. Under s. 192J(7), the person presiding at a meeting of the Corporation Board has a deliberative vote and, in the event of an equality of votes, also has a casting vote. Under s. 192J(8), the Corporation Board may regulate the conduct of proceedings at its meetings as it thinks fit and must cause minutes of those proceedings to be kept. (Section 33B of the *Acts Interpretation Act 1901* (Cth) provides for participation in meetings by telephone.)

10. Under s. 192K(1) there is to be a General Manager of the Corporation, who is to be appointed by the Corporation Board. Under s. 192K(2), subject to subsection (3), the Corporation General Manager must manage the day-to-day administration of the Corporation. Under s. 192K(3), the General Manager must, in managing the administration of the Corporation and exercising any powers conferred on the General Manager by the Act, act in accordance with any policies determined, and any directions given, by the Corporation Board in writing. Under s. 192M, the General Manager holds office during the pleasure of the Corporation Board. Under s. 192N, the Corporation General Manager is to be paid such remuneration and allowances as are determined by the Corporation Board in writing.

11. Under s. 192P(1), the Corporation Board may appoint a person to act as the Corporation General Manager during a vacancy in the office of General Manager, whether or not an appointment has previously been made to the office or during any period, or during all periods, when the General Manager is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office, but a person appointed to act during a vacancy must not continue so to act for more than 6 months.

Discussion

12. The statutory framework under the Act for the appointment of an Acting General Manager, in our view, is so comprehensive that any legal liability in tort, contract or estoppel at general law which the Corporation incurs to a person who

AUSTRALIAN GOVERNMENT SOLICITOR

believes he or she had been in prospect for appointment to that position, in respect of anything done in the course of the purported appointment process, can only arise from an obligation or action that the Corporation Board itself has accepted or agreed to at a meeting conducted in accordance with the procedures laid down in s. 192J(6) of the Act.

13. There is nothing in the provisions of the Act that gives the Chairperson of the Corporation authority to arrange for an appointment of a person to the position of General Manager or Acting General Manager, and negotiate the terms and conditions of appointment to that position, without the approval of the Corporation Board given in accordance with the Act. This, in our view, precludes scope for any alleged 'ostensible authority', whereby, in the absence of actual authority from his or her principal, but by virtue of a representation which the principal had made to the contracting party that the agent had the principal's authority to enter into a contract of the type in question, the agent could bind the principal to the contract: *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v. Australian Direct Mail Advertising & Addressing Co. Pty Ltd.* (1975) 133 CLR 72; *Northern Developments Pty Ltd v. Registrar-General (NSW)* (1990) 170 CLR 146.

14. This principle of 'ostensible authority' rests on the premise that the principal is estopped from resiling from his or her representation that the agent had authority to enter into the contract in question: *Freeman & Lockyer*, at p. 503. While at the 8 March 2000 meeting, mentioned above, where it appears that two of the seven Directors of the Corporation Board, including the Chairperson, made representations to Mr Johnstone in relation to him becoming Acting General Manager, these representations, in our view, cannot amount to ones made by the Board itself. In order for them to have attained that character, their making would need to have been approved by the Corporation Board deliberating in accordance with the Act. There has been no evidence that the Board ever gave such approval. The fact that a motion of no confidence against the Chairperson in respect of these and related events was later passed by the Board, once it appears that other Directors learnt of the events, strongly suggests that there never was any Board approval to making any representations to Mr Johnstone of the type that were made to him over the period from 8 to 12 March by the Chairperson (and possibly Mr Gordon as well).

15. The 'ostensible authority' principle has a close nexus with the so-called 'indoor management rule' emerging from the decision in *Royal British Bank v. Turquand* (1856) 6 E&B 327. This rule is well-known within company law. It permits a third party to assume that a person with whom he or she is dealing has the authority of the company, when the person might have had such authority consistently with the company's publicly filed constituent documents, the premise being that the third party is entitled to assume that the internal procedures for conferring that authority upon the person have been observed. In *Lever Finance Ltd. v. Westminster (City)*

AUSTRALIAN GOVERNMENT SOLICITOR

London Borough Council [1971] 1 QB 222, the English Court of Appeal purported to apply this rule to the case of a statutory authority, being a local government body. The Court held that an officer of the body who could have, but had not, had delegated to him the exercise of a particular statutory power, had ostensible authority to make certain representations binding on his local government body which presumed exercise of the power, in the circumstances where there had been a past practice of the officer, and colleagues in the same position, acting as though they had been delegated the power. However, this decision was criticised by a differently constituted Court of Appeal in *Western Fish Products Ltd v. Penwith District Council and Anor* [1981] 2 All ER 204. In the latter case, it was held that, since there was nothing, apart from the position held by the officer, on which the plaintiffs could have assumed that the officer could bind the local government body, the body was not estopped from exercising certain discretionary powers under statute contrary to a representation which had been made by the officer to the plaintiffs.

16. In Australia, the Supreme Court of South Australia in *Jukovic v. Port Adelaide Corporation* (1979) 23 SASR 434 referred to *Lever Finance v. Westminster* with approval, though the impact of the decision in the latter case was seen as confined to a situation where there had been an established practice of delegating the relevant power to the class of officer concerned or where the officer in question, in making the representation had acted in breach of the authority's 'domestic or internal procedures' (see pp. 440-1). We think that, to the extent that *Jukovic* might aid any argument that the Corporation incurs liability in the present case, it is distinguishable on the ground that the processes applying to appointments to positions such as Acting General Manager have a speciality and importance that takes them out of the category of what might be categorised as 'domestic and internal procedures' applying to the exercise of statutory powers in day-to-day operational contexts.

17. More importantly, we note that in *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic* (1990) 92 ALR 93, Gummow J, as a member of the Full Court of the Federal Court, in referring to the 'indoor management rule' and *Lever Finance v. Westminster* (including criticisms of that case), said (at p. 114) that it remained to be seen whether in Australia there would be any development of the ostensible authority principle as an exception to the *ultra vires* doctrine. Later (at p. 116), Gummow J did suggest that the greater the discretion that lay in the exercise of a statutory power of a body that was 'operational' in character, the easier it might be to apply the principles of estoppel in the context of that power's exercise. (For further comment generally, see *Ostensible Authority in Public Law*, Campbell (1999) 27 *Fed. Law Rev.* 1.)

18. In our view, a rejection by the Corporation of any argument that Ms Firebrace (and Mr Gordon, to the extent he might have been involved) had 'ostensible authority' to bind the Corporation in dealing with Mr Johnstone, is strongly supported by the decision of the Privy Council in *Attorney-General for Ceylon v.*

AUSTRALIAN GOVERNMENT SOLICITOR

A.D. Silva [1953] AC 461. There, a customs official purported to enter into a contract with a third party for the sale of certain property that had apparently been left abandoned on premises of the customs service. The provisions of the customs legislation under which the official purported to act in taking this course did not apply to property of the Crown, which, as it turned out, was the owner of the property in question. The Privy Council held that no contract for sale of the property to the third party ever came into being, because the official had no authority, actual or ostensible, to enter into a contract binding the Crown. Addressing the issue of ostensible authority, the Privy Council said (at p. 479):

'All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists.'

The Privy Council went on to address the complaint that this position caused hardship to the other party to the contract. It said (at pp. 480-1):

'It may be said that it causes hardship to a purchaser ... if the burden of ascertaining whether or not the Principal Collector [ie. the customs official] has authority to enter into the sale is placed upon him. This is undoubtedly true. But where as in the case of the Customs Ordinance [ie. the customs legislation in question], the Ordinance does not dispense with that necessity, to hold otherwise would be hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one.'

In our view, the statement of principle by the Privy Council in this case can still be argued to be good law in Australia.

19. It is possible that the representations made by Ms Firebrace (and Mr Gordon, to the extent he might have been involved) to Mr Johnstone may have involved tortious conduct (eg. negligent misstatement, deceit or misfeasance in public office) thereby exposing her to personal liability at the suit of Mr Johnstone. It is also possible that the representations might give rise to liability on the part of Ms Firebrace to pay compensation under the principles of estoppel enunciated by the High Court in *Walton Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387. We make no further comment on Mr Firebrace's liability exposure in these areas. Assuming that there was a liability on her part for any tortious conduct of the type mentioned, the only basis on which this liability could, in turn, give rise to a liability on the part of the Corporation, would be if the Corporation could be held vicariously liable for Ms Firebrace's tortious conduct. On the current information, we cannot see any basis for

vicarious liability arising. We have already above disavowed any basis for her being the agent of the Corporation in the representations made to Mr Johnstone. That eliminates one ground that might have founded vicarious liability. The only other ground would be if Ms Firebrace were the servant or employee of the Corporation. However, as created by the Act, her role as Chairperson, in our view, is incompatible with any relationship approximating to a contract of master and servant (or, for that matter, between the Commonwealth and a member of the Australian Public Service which could also give rise to vicarious liability).

21. Please contact us if you have any questions.



Paul Sykes
Principal Solicitor
Australian Government Solicitor

Telephone: (02) 6250 5836
Facsimile: (02) 6250 5912
E-mail: paul.sykes@ags.gov.au

Indigenous Land Corporation - Ex gratia payment

1. Thank you for your oral request for advice of 10 April 2000 on the question of whether the Indigenous Land Corporation ('ILC') has any power to make ex gratia payments.

Summary of advice

2. In my view, there may be scope to make a payment under s.27M of the CAC Act, but if there is not, there would be scope to make such a payment under s.193J of the *Aboriginal and Torres Strait Islander Commission Act 1989* ('ATSIC Act').

Background

3. On 8 March 2000 the Chair of the ILC wrote to the ILC General Manager officially suspending him on full pay until the next ILC Board Meeting. At the same time, the Chair invited another person to act as General Manager for this interim period.

4. In the event, the Board supported the re-instatement of the General Manager, but in the mean time he had sought legal advice in relation to his purported suspension. The General Manager has now asked the ILC to re-imburse those legal expenses. In our advice of 16 March 2000 to the ILC we gave urgent advice that, as then informed, the ILC does not have a liability in relation to the General Manager's suspension on full pay. At the time of writing that advice, we were not aware that the General Manager had incurred any legal costs as a result of his purported suspension.

Office of General Counsel

50 Blackall Street, Barton ACT 2600 • Telephone (02) 6250 6663 • DX5678 • Fax (02) 6250 5915
OFFICES IN CANBERRA, SYDNEY, MELBOURNE, BRISBANE, PERTH, ADELAIDE, HOBART, DARWIN,
TOWNSVILLE

5. I note that the Office of Litigation ('OLT') has also recently advised the ILC that it probably does not have any liability in relation to the costs incurred by the person who was asked by the Chair to act as General Manager during the period of suspension of the General Manager (see OLT advice of 4 April 2000, reference 2000023838). In my view, the reasons for that advice are equally applicable to the question of the ILC's liability in relation to the costs of the General Manager. In these circumstances, I do not think that it is necessary to re-examine the question of the ILC's liability to the General Manager.

6. This advice will therefore be based on the view that the ILC has no legal liability for the costs incurred by the General Manager. However, you should note that the OLT advice also points out that the ILC might feel it should consider making an act of grace payment to the person who was asked to act as General Manager. This issue arises in relation to the General Manager as well, and it is in relation to the latter's claims that you have sought advice on whether the ILC has a power to make an *ex gratia* payment.

Reasons for advice

Section 27M of the Commonwealth Companies and Authorities Act 1997

7. Section 27M(1) of the *Commonwealth Companies and Authorities Act 1997* ('CAC Act') provides as follows -

'27(1) Except as provided in this section, a Commonwealth authority may indemnify a person who is or has been an officer of the authority from any liability incurred by the person as an officer of the authority.'

Subsections 27M(2) - (4) set out circumstances in which indemnities for conduct covered by s.27M(1) must not be given.

8. The ILC is an 'authority' for the purposes of the CAC Act. An 'officer' in relation to a Commonwealth authority is defined in s.5 of the CAC Act as a director of the authority, or any other person who is concerned in, or takes part in, the management of the authority. The General Manager is therefore clearly an 'officer' in relation to the ILC.

9. It does not necessarily follow that therefore all expenses or liabilities incurred by the General Manager are incurred by him 'as an officer of the authority'. Some expenses or liabilities will be incurred by him in his personal capacity. In the present case, the legal expenses were incurred by the General Manager as a direct consequence of his employment with the ILC, and it is arguable that they were incurred by the General Manager 'as an officer of the authority'. If this is the case, then the ILC could indemnify the General Manager under this provision, so long as

an indemnity was not precluded by ss.27M(2) - (4). I understand that there is no suggestion that the liability in question was incurred by the General Manager in bad faith (see s.27M(3)(c)), and nor do I think any of the other exclusions in s.27M are applicable. If the General Manager's conduct is covered by s.27M(1), I think that the ILC Board would probably be entitled to indemnify him under that provision.

10. If, however, the expenses were incurred by the General Manager in his personal capacity, (albeit, as a result of his employment as an officer of the ILC), and not 'as an officer of' the ILC, then the conduct would not be covered by s.27M(1). In my view, that section does not comprehensively codify all the circumstances in which an authority or body may indemnify persons. It is therefore necessary to consider whether the ILC has any other power to indemnify officers for liability arising from conduct undertaken in good faith.

ILC's implied power to make an ex gratia payments

11. The functions of the ILC are set out in s.191C of the ATSIC Act. Section 191C(d), in particular, provides that the ILC is authorised to do anything incidental or conducive to the performance of any of its functions. The powers of the ILC are set out in s.191H. Section 191H(1) gives the ILC the general power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

12. Section 193J of the Act, which restricts the application of the ILC's moneys, provides:

- '193J. (1) Money held by the [ILC] must be applied only:
- (a) in payment or discharge of the costs, expenses and other obligations incurred by the [ILC] in the performance of its functions or the exercise of its powers under this Act or any other law;
 - (b) in payment of any remuneration and allowances payable to any person under this Act or any other law; and
 - (c) in making any other payments which the [ILC] is authorised or required to make under this Act or any other law.'

13. Paragraphs 193J(b) and (c) are clearly inapplicable in the present case. However, paragraph 193J(a) authorises the application of ILC moneys 'in payment or discharge of the costs, expenses and other obligations incurred by the ILC' in the performance of its functions or the exercise of its powers. The reference to payment of 'costs' and 'expenses' is not, in my view, limited to a payment under an antecedent legal obligation. The words, in my view, cover any expenditure properly undertaken by the ILC in the performance of its functions.

14. The powers of the ILC plainly extend to the *bona fide* settlement of legal proceedings brought against it. They also arguably extend to a *bona fide* payment made pursuant to a claim made on legal grounds outside legal proceedings. In my view, such a power can be related to the performance of the ILC's functions. Without it, the ILC would be unable to forestall legal proceedings and thereby conserve the resources of the ILC which might otherwise be expended on legal costs or in payment of a possibly larger settlement of legal proceedings or court judgement. Of course, the ILC would not be empowered to make payments in relation to spurious or plainly indefensible legal claims.

15. In my view, s. 193J(a) would also authorise an *ex gratia* payment in some circumstances, where those circumstances were not covered by s.27M of the CAC Act. An *ex gratia* payment is a payment which is not legally required to be made but which is made on some other basis, eg. because a person has a moral claim arising from the conduct of the other party. In my view, the ILC may make such a payment where it is sufficiently linked with the performance of its functions.

16. I think therefore that it would be open to the Board to take the view that the effective performance of the ILC's functions depends to a significant extent on its maintaining a reputation for fair dealing with its staff, so that it will be able to recruit good quality staff in the future, thus preserving its ability to efficiently perform its functions. A power to make *ex gratia* payments may therefore be implied for this purpose, so long as such a payment would not be inconsistent with s.24M of the CAC Act.

17. Such a payment would obviously need to be made cautiously and in the light of all the circumstances of the case, and should not be made if there is any suggestion of bad faith on the part of the officer (cf. s.24M(3)(c) of the CAC Act).

18. If I can be of any further assistance in relation to this matter, please let me know.

Yours sincerely

Lachlan Kennedy
Counsel
Australian Government Solicitor

Tel: 026250 6462
Fax: 026250 5976
E-mail: lachlan.kennedy@ags.gov.au

ATTACHMENT

E



Our ref: 2000020506

18 April 2000

Ms Sarah Court
Director
Australian Government Solicitor
ADELAIDE SA 5001

Dear Ms Court

Indigenous Land Corporation - Ex gratia payment re claim by person invalidly appointed by the Chair as acting General Manager

1. Thank you for your oral request for advice of 10 April 2000 on the question of whether the Indigenous Land Corporation ('ILC') has any power to make ex gratia payments.

Background

2. On 8 March 2000 the Chair of the ILC wrote to the ILC General Manager officially suspending him on full pay until the next ILC Board Meeting. At the same time, the Chair invited another person to act as General Manager for this interim period (the 'nominated General Manager').

3. In the event, the Board supported the re-instatement of the General Manager. In the meantime the nominated General Manager had incurred some costs in making his arrangements to take up the position, and has sought re-imburement of those costs from the ILC.

4. I note that we have previously advised that the Chair does not have the authority to suspend the General Manager or appoint an acting General Manager (see our advice of 16 March 2000). The Office of Litigation ('OLT') has also recently advised the ILC (see OLT advice of 4 April 2000, reference 2000023838) ('OLT advice') that the ILC probably does not have any liability in relation to the costs incurred by the nominated General Manager (see paragraph 4). That advice also suggest that the Chair might be personally liable for these costs (see paragraph 19).

Office of General Counsel

5. Finally, I note that the OLT advice also points out that the ILC might feel it should consider making an act of grace payment to the nominated General Manager, although it makes no findings in relation to the power of the ILC to make such a finding.

6. In another earlier advice (see my advice of 17 April 2000), we advised that the ILC had power, either under s.27M of the *Commonwealth Authorities and Corporations Act 1997* ('CAC Act), or by implication from its own legislation, to make an *ex gratia* payment to the General Manager in respect of his costs, notwithstanding that the ILC was not liable for his costs. That advice did not consider the power of the ILC Board to make an *ex gratia* payment in relation to the costs of the nominated General Manager.

- pmg

Summary of advice

7. In my view, there may be scope for the Board of the ILC to make a payment to the nominated General Manager under s.27M of the CAC Act if the Board is of the view, after seeking legal advice on this point, that the Chair is personally liable for the claim, and incurred the liability in good faith as an officer of the ILC. If the Board is of the view that the Chair's conduct is covered by s.27M of the CAC Act, but that her personal liability arose out of conduct not in good faith, it should not indemnify the Chair by making a payment to the nominated General Manager.

8. But if the Board is of the view, after seeking legal advice on this point, that the Chair is not personally liable there would in any case be scope to make an *ex gratia* payment to the nominated General Manager under s.193J of the *Aboriginal and Torres Strait Islander Commission Act 1989* ('ATSIC Act') so long as the Board was satisfied the liability arose out of conduct in good faith.

Reasons for advice

Section 27M of the CAC Act

9. In the present case, the claim for compensation for costs arises from conduct of the Chair vis a vis a third party who, I understand, acted in good faith on the basis of statements made by the Chair.

10. The OLT advice mentions the possibility (at paragraph 19) that the Chair *may* be personally liable in tort (eg for negligent misstatement, deceit or misfeasance in public office) thereby exposing her to personal liability at the suit of the nominated General Manager, but does not make any conclusions as to the likelihood of her being liable. If the Chair is personally liable, then any payment to the nominated General Manager in respect of his costs would in effect be an indemnity to the Chair, and any payment would have to be consistent with s.27M of the CAC Act. (If the Chair is not personally liable, then no question of indemnity to the Chair arises, and

the question of whether the ILC should make a payment would depend on whether it has an express or implied power to make the payment under its own legislation. This issue is discussed later in this advice.)

11. While the OLT advice clearly identifies the possibility that the Chair *may* be personally liable, it is necessary, in considering whether s.27M of the CAC Act is relevant, to make a judgement about whether she *is* personally liable. We are not in a position to advise on this point in the absence of all the relevant facts, and it may be that no certainty on this question can be reached short of litigation of the issue.

12. Assuming the Board were of the view, after receiving legal advice on the point, that the Chair is personally liable for the nominated General Manager's claim, then the question of whether the ILC could indemnify the Chair would first need to be considered in accordance with s.27M(1) of the CAC Act. That section provides as follows -

'Power to indemnify officers

- (1) Except as provided in this section, a Commonwealth authority may indemnify a person who is or has been an officer of the authority from any liability incurred by the person as an officer of the authority.'

(Sections 27M(2) - (4) place limitations on this power. To the extent they are relevant they are discussed below.)

13. The ILC is an 'authority' for the purposes of the CAC Act. An 'officer' in relation to a Commonwealth authority is defined in s.5 of the CAC Act as a director of the authority, or any other person who is concerned in, or takes part in, the management of the authority. The Chair is therefore clearly an 'officer' in relation to the ILC.

14. Not all conduct engaged in by the Chair is engaged in 'as an officer of the authority'. The Chair's conduct giving rise to the claim in the present case was not authorised by the relevant legislation. Nevertheless, it seems likely that the person who accepted the Chair's offer to act as General-Manager did so on the basis of representations from the Chair given erroneously in her capacity as an officer of the authority, to the effect that the position was available and that he should re-arrange his personal affairs so that he could take it up. It was the Chair's position as Chair of the ILC Board that gave credibility to these representations. Although it is not beyond doubt, in my view, the Chair's conduct could therefore be said to be undertaken 'as an officer of the authority', notwithstanding that the Chair may have been misinformed about the extent of her authority to engage in this conduct.

15. If this is the case, then the ILC could indemnify the Chair under section 27M(1) of the CAC Act, so long as such an indemnity was not precluded by the

exemptions in ss.27M(2) - (4). Neither ss.27M(2) or (4) are relevant to the present circumstances. Of the exemptions in s.27M(3) only that in paragraph 27M(3)(c) could be relevant. That paragraph is as follows -

‘s.27M(3) A Commonwealth authority, or a subsidiary of a Commonwealth authority, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the authority:

.....

(c) a liability that is owed to someone other than the authority or a subsidiary of the authority and did not arise out of conduct in good faith.

16. The conduct in question is the conduct of the officer of the authority - in this case, the Chair. In my view ‘conduct in good faith’ here would mean conduct done honestly, whether or not it was done negligently. You should note that the threshold for establishing bad faith in the conduct of public officers is high, and is close to that required to establish the tort of misfeasance in public office (cf *Sanders v Snell* (1998) 157 ALR 491 at 504). Whether there is an intention to cause harm, or if the officer knowingly acted in excess of his or her power, will be relevant considerations. As we have no instructions on many of the relevant circumstances of the Chair’s conduct, we therefore cannot give an opinion. (We are, of course, available to give an opinion on this issue if the relevant information becomes available.) However, if the Board, having obtained the relevant information and properly advised, is of the view that the Chair acted honestly, but with a mistaken view as to the extent of her power to suspend the General Manager and to appoint the nominated General Manager, then I think it would be open to the Board to conclude that the liability arose out of conduct in good faith, and therefore the Chair’s personal liability in respect of that conduct could be indemnified.

17. If the Board takes the view that the Chair is probably not personally liable for the nominated General Manager’s costs, or if it takes the view that the Chair is personally liable, but that that liability was incurred by the Chair in her personal capacity and not ‘as an officer of’ the ILC, then it could conclude the conduct is not covered by s.27M(1). In my view, that section does not comprehensively codify all the circumstances in which an authority or body may indemnify persons. It is therefore necessary to consider whether the ILC has a power to make an *ex gratia* payment to the nominated General Manager.

ILC’s implied power to make an ex gratia payments

18. The functions of the ILC are set out in s.191C of the ATSI Act. Section 191C(d), in particular, provides that the ILC is authorised to do anything incidental

or conducive to the performance of any of its functions. The powers of the ILC are set out in s.191H. Section 191H(1) gives the ILC the general power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

19. Section 193J of the Act, which restricts the application of the ILC's moneys, provides:

- '193J. (1) Money held by the [ILC] must be applied only:
- (a) in payment or discharge of the costs, expenses and other obligations incurred by the [ILC] in the performance of its functions or the exercise of its powers under this Act or any other law;
 - (b) in payment of any remuneration and allowances payable to any person under this Act or any other law; and
 - (c) in making any other payments which the [ILC] is authorised or required to make under this Act or any other law.'

20. Paragraphs 193J(b) and (c) are clearly inapplicable in the present case. However, paragraph 193J(a) authorises the application of ILC moneys 'in payment or discharge of the costs, expenses and other obligations incurred by the ILC' in the performance of its functions or the exercise of its powers. The reference to payment of 'costs' and 'expenses' is not, in my view, limited to a payment under an antecedent legal obligation. The words, in my view, cover any expenditure properly undertaken by the ILC in the performance of its functions.

21. In the present case, the nominated General Manager's claims are not spurious. Further, it is likely that if he brings an action to recover these costs, the ILC would be joined as a codefendant, since the issue of whether the ILC itself or the Chair was liable for the costs would have to be resolved. The powers of the ILC plainly extend to the *bona fide* settlement of legal proceedings brought against it. They also arguably extend to a *bona fide* payment made pursuant to a claim made on legal grounds outside legal proceedings. In my view, such a power can be related to the performance of the ILC's functions. Without it, the ILC would be unable to forestall legal proceedings and thereby conserve the resources of the ILC which might otherwise be expended on legal costs or in payment of a possibly larger settlement of legal proceedings or court judgement. Of course, the ILC would not be empowered to make payments in relation to spurious or plainly indefensible legal claims.

22. In my view, s.193J(a) would also authorise an *ex gratia* payment in some circumstances, where those circumstances were not covered by s.27M of the CAC Act. An *ex gratia* payment is a payment which is not legally required to be made but which is made on some other basis, eg. because a person has a moral claim arising

from the conduct of the other party. In my view, the ILC may make such a payment where it is sufficiently linked with the performance of its functions.

23. I think therefore that it would be open to the Board to take the view that its is in the ILC's interests to maintain its reputation for fair dealing, and, since it might be joined as a codefendant in any action by the nominated General Manager to recover his costs either from the Chair or the ILC itself, to take action to minimise risks arising from claims against it. A power to make *ex gratia* payments may therefore be implied for this purpose, so long as such a payment would not be inconsistent with s.27M of the CAC Act.

24. As mentioned in my previous advice of 16 April 2000, such a payment would obviously need to be made cautiously and in the light of all the circumstances of the case, and should not be made if there is any suggestion that the Chair's conduct was not done in good faith (cf. s.27M(3)(c) of the CAC Act).

25. It follows from the discussion of the possible personal liability of the Chair for the nominated General Manager's costs in this advice that if the Board were of the view, after getting legal advice, that the Chair would be liable for the nominated General Manager's costs, it could also be possible that the Chair would also be liable for the General Manager's costs. If this liability arose from conduct otherwise than in good faith, then the payment in respect of the General Manager's costs which we discussed in our advice of 16 April 2000 probably could not be made consistently with s.27M(3)(c) of the CAC Act.

26. If I can be of any further assistance in relation to this matter, please let me know.

Yours sincerely

Lachlan Kennedy
Counsel
Australian Government Solicitor

Tel: 026250 6462
Fax: 026250 5976
E-mail: lachlan.kennedy@ags.gov.au

F

ROEBUCK PLAINS STATION

ATTACHMENT

MUSTER and SALE FIGURES for 1999

Stock at Muster

Adult Cattle	17,828	¹
Natural Increase	3,253	²
Purchases	2,060	
Less: Sales	(5,441)	
Total	<u>17,700</u>	

1. All cattle were eartagged and earmarked.

2. As a result of Director Driscoll's negotiations, these calves were not paid for as part of the settlement.

MUSTER and SALE FIGURES for 2000

Stock at first round of Muster

July-October	18,332	²
Natural Increase		
July-October	1,320	³
November-December	<u>415</u>	
	1,735	
Purchases	126	
Sub-total	<u>20,193</u>	
Less: Sales		
July-October	(1,820)	
November-December	<u>(295)</u>	
	(2,115)	
Less: Deaths	(250)	
Total	<u>17,828</u>	

2. All cattle were tagged, ears marked and cross branded

3. The reduction in calve numbers is directly related to the bulls being taken out of the herd in December 1999 and not put back into the herd until April 2000.

ROEBUCK PLAINS STATION

MUSTER and SALE FIGURES for 2001

Stock 2000 muster		17,828
Jan - May	<u> </u>	-
Natural Increase Jan - May		331
Purchases		
Sub-total		<u>18,159</u>
Less: Sales		
Jan - May		<u>(2,418)</u>
		15,741
Less: Deaths		(11)
Total		<u>15,730</u>

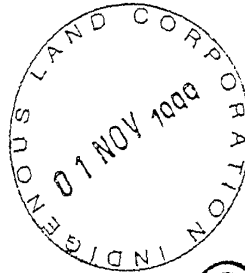
ATTACHMENT

G



Office of the
Minister for Aboriginal and Torres Strait Islander Affairs

PARLIAMENT
CANBERRA



28 OCT 1999

Ms Sharon Firebrace
Chairperson
Indigenous Land Corporation
GPO Box 652
ADELAIDE SA 5001

COPY

Dear Ms Firebrace

The Minister for Aboriginal and Torres Strait Islander Affairs, Senator the Hon John Herron, has been advised that the Remuneration Tribunal has agreed to a new determination relating to payment for the office of Chairperson of the Indigenous Land Corporation.

The Tribunal has agreed to determine a pro rata salary equal to four-fifths of the full-time rate of \$115,800 per annum and an office holder supplement equal to four fifths of the full-time rate of \$8,500 per annum with effect from 24 September 1999.

92,
6,

Consistent with the Tribunal's determination for full-time office holders (1999/05), the rates and conditions of travelling allowance are those determined from time to time for officers of the Senior Executive Service of the Australian Public Service.

SES
disc
rate

I am copying this letter to the General Manager of the Indigenous Land Corporation for his information.

Yours sincerely

Yvonne Fetherston
Departmental Liaison Officer (PM&C)

1999

INDIGENOUS LAND CORPORATION

COMMONWEALTH OF AUSTRALIA

INSTRUMENT OF APPOINTMENT

I, SENATOR JOHN JOSEPH HERRON, Minister for Aboriginal and Torres Strait Islander Affairs, in accordance with Section 191 of the *Aboriginal and Torres Strait Islander Commission Act 1989* hereby appoint SHARON LYNETTE FIREBRACE as Chair of the Board of Directors of the Indigenous Land Corporation on a part time basis from the date of this instrument until 8 August 2001.

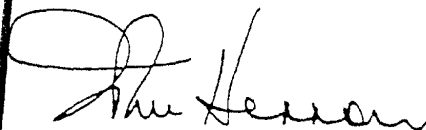
Dated this

Ninth

day of

August

1999.



SENATOR JOHN HERRON