

Chapter 1

Introduction

Referral

1.1 On 28 March 2018, the following bills were introduced into the House of Representatives:

- Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 (ILC Bill);
- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (ATSILS Future Fund Bill); and
- Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018 (Consequential Amendments Bill).¹

1.2 On the same day, pursuant to the Senate Selection of Bills Report, the provisions of the bills were referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 7 May 2018.² On 1 May 2018, the committee reported its progress to the Senate and sought an extension until 8 May 2018.³

Conduct of the inquiry

1.3 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: www.aph.gov.au/senate_fpa.

1.4 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 13 April 2018. The committee continued to accept submissions after this date. Submissions received by the committee are listed at Appendix 1.

1.5 The committee thanks those who made submissions.

Background to the Indigenous Land Corporation and the Land Account

1.6 In its submission, the Department of the Prime Minister and Cabinet (PM&C) described the establishment and purpose of the Indigenous Land Corporation (ILC) and the Aboriginal and Torres Strait Islander Land Account:

The [ILC] is a corporate Commonwealth entity established in 1995 as a key component of the Government's response to the Mabo (No. 2) High Court decision and a growing awareness of the need to redress the wrongs of the dispossession of Aboriginal and Torres Strait Islander people from their lands.

1 *House of Representatives Votes and Proceedings*, No. 106—28 March 2018, p. 1480.

2 *Journals of the Senate*, No. 94—28 March 2018, pp. 2978–2980.

3 Senate Finance and Public Administration Legislation Committee, *Progress Report*, tabled 1 June 2018.

The purposes of the ILC are to assist Aboriginal and Torres Strait Islander people to acquire and manage land to provide economic, environmental, social or cultural benefits. It is specifically directed towards those whose native title rights have been extinguished. The ILC achieves this purpose through funding from the Aboriginal and Torres Strait Islander Land Account (the Land Account). The Land Account was intended to provide a secure and ongoing source of funds to the ILC.⁴

1.7 PM&C stated that the 'Land Account is shrinking in real terms because its mandate does not match its purpose'. Primarily, this is because the Chief Financial Officer of PM&C (under delegation from the Minister for Finance) is restricted to investment in 'cash and cash-like products by section 58 of the' *Public Governance, Performance and Accountability Act 2013*. PM&C observed that 'Land Account investments have failed to meet the target rate of return in each of the last four years' with 'this trend likely to continue under the current investment environment'.⁵

Purpose of the bills

ILC Bill

1.8 This government bill proposes amendments to the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) to give the ILC functions to enable it to support Aboriginal and Torres Strait Islander peoples to care for, manage and benefit from freshwater and sea country.⁶

1.9 The ILC Bill will also alter the name of the ILC to the 'Indigenous Land and Sea Corporation', to reflect the expansion of the ILC's functions to water.⁷

ATSILS Future Fund Bill

1.10 The ATSILS Future Fund Bill proposes the establishment of a dedicated financial asset fund, the Aboriginal and Torres Strait Islander Land and Sea Future Fund (the Fund), to replace the Aboriginal and Torres Strait Islander Land Account (Land Account).⁸

4 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

5 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

6 The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, p. 27.

7 ILC Bill, Explanatory Memorandum (EM), p. 4.

8 Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018, Explanatory Memorandum (ATSILS Future Fund Bill EM), p. 4 and The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, pp. 25–26. The closure of the Land Account will be effected by the Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018, which is discussed below.

1.11 The ATSILS Future Fund Bill would also transfer investment responsibility for the fund from the PM&C to the Future Fund Board of Guardians and allow the investment of funds in a broader range of financial assets.⁹

Consequential Amendments Bill

1.12 According to the accompanying Explanatory Memorandum, the Consequential Amendments Bill:

...makes a number of consequential amendments to other pieces of legislation required to enable the effective operation of the [ATSILS Future Fund] at commencement. It accompanies the Aboriginal and Torres Strait Islander Future Fund Bill 2018 (the substantive Bill that has prompted the necessity for this Bill). It also takes account of the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018, which will extend the functions of the ILC to rights in relation to water, and rename the ILC the 'Indigenous Land and Sea Corporation.' Together, these Bills form a suite of reforms to support the ILC to assist Aboriginal persons and Torres Strait Islanders acquire and benefit from land and waters.¹⁰

Summary of the bills

ILC Bill

1.13 The ILC is established under subsection 191A(1) of the ATSI Act to assist Aboriginal and Torres Strait Islander people to acquire and manage land.¹¹ Schedule 1 of the ILC Bill amends the ATSI Act to give the ILC functions in relation to 'water-related rights'.¹² Examples of water-related rights include rights to:

- take or receive water;
- retain or use water taken;
- take resources from waters;
- undertake an activity in or on waters.¹³

1.14 Section 191B sets out the purpose of the ILC as assisting Aboriginal persons and Torres Strait Islanders to acquire land and to manage Indigenous-held land so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders. The amendments in the ILC Bill extend the purpose of the

9 The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, pp. 25–26.

10 Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018, Explanatory Memorandum (Consequential Amendments Bill EM), p. 4.

11 ILC Bill, EM, p. 3.

12 'Water related rights' is defined in proposed section 4C. See Item 6, Schedule 1 of the ILC Bill.

13 Proposed new subsection 4C(2), see Item 6 of Schedule 1 of the ILC Bill.

ILC to include the provision of assistance to Aboriginal persons and Torres Strait Islanders to acquire water-related rights and manage indigenous waters.¹⁴

1.15 Section 191C of the ATSI Act provides that the ILC has 'land acquisition functions'¹⁵ and 'land management functions'.¹⁶

1.16 The ILC Bill proposes amendments to rename the land acquisition functions as 'acquisition functions' and to extend them to water-related rights.¹⁷ The ILC Bill also proposes that the land management functions be renamed as 'management functions' and to include management of indigenous waters as part of these functions. The ILC also renames a management function.¹⁸

1.17 Section 191N of the ATSI Act requires that the ILC Board prepare a national indigenous land strategy. The ILC Bill amends this requirement to provide for a national land and sea strategy.¹⁹

1.18 The ILC Board must also prepare regional indigenous land strategies.²⁰ The ILC Bill amends this requirement to provide for regional indigenous land and sea strategies.²¹

1.19 The ILC Bill also provides for the renaming of the Indigenous Land Corporation as the Indigenous Land and Sea Corporation.²²

ATSILS Future Fund Bill

1.20 The ATSILS Future Fund Bill provides for the establishment of the Fund, which comprises:

- the Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account (ATSILS Future Fund Special Account); and
- the investments of the Aboriginal and Torres Strait Islander Land and Sea Future Fund.²³

14 Items 7–8 of Schedule 1 of the ILC Bill.

15 ILC's land acquisition functions are set out in section 191D of the ATSI Act.

16 ILC's land management functions are set out in section 191E of the ATSI Act.

17 Item 9, Items 11–14 and Items 16–22 of Schedule 1 of the ILC Bill.

18 Item 10, Items 23–27, 30–31 and 33–37 of Schedule 1 of the ILC Bill.

19 Items 46–57 of Schedule 1 of the ILC Bill.

20 Section 191P of the ATSI Act.

21 Items 58–60, 62–67 and 69–70 of Schedule 1 of the ILC Bill.

22 Schedule 2 of the ILC Bill.

1.21 The balance of the Land Account will be transferred to the ATSILS Future Fund Special Account and investments of the Land Account will be transferred to the Special Account.²⁴

1.22 The main purposes of the ATSILS Future Fund Special Account are:

- to transfer amounts to the Indigenous Land Corporation Funding Special Account for the purposes of making annual payments to the ILC; and
- to transfer amounts to the Indigenous Land Corporation Funding Special Account for the purposes of making discretionary additional payments.²⁵

1.23 The Future Fund Board is responsible for the investment of the Fund and investments are held in the name of the Future Fund Board.²⁶

1.24 The responsible Ministers, the Treasurer and the Finance Minister, may give the Future Fund Board written directions about the performance of the Fund investment function. Before giving a direction, the responsible Ministers must consult with the Indigenous Affairs Minister. Collectively these directions are the 'Aboriginal and Torres Strait Islander Land and Sea Future Fund Investment Mandate'.²⁷

1.25 The ATSILS Future Fund Bill also establishes the ILC Funding Special Account.²⁸ The purpose of the ILC Funding Special Account is for making payments to the ILC.²⁹ Payments to the ILC may be made as annual payments³⁰ or discretionary additional payments.³¹ Part 4 of the Bill deals with investments by the Fund.

23 Clause 9 of the ATSILS Future Fund Bill. Clause 12 of the ATSILS Future Fund Bill establishes the Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account (Special Account). The ATSILS Future Fund Bill EM, at p. 9, explains that a 'special account is an appropriation mechanism that sets aside an amount within the [Consolidated Revenue Fund (CRF)] to be expended for specific purposes Any amounts credited to the [Special Account] are quarantined from other amounts within the CRF and can only be debited from the [Special Account] for the purposes set out in the [ATSILS Future Fund] Bill'.

24 Clauses 10 and 11 of the ATSILS Future Fund Bill.

25 Clause 14 of the ATSILS Future Fund Bill. The ATSILS Future Fund Special Account can also be used for costs incurred by the Future Fund Board in managing the ATSILS Future Fund, see Clauses 15 and 16 of the ATSILS Future Fund Bill.

26 Clause 30 of the ATSILS Future Fund Bill.

27 Clause 32 of the ATSILS Future Fund Bill.

28 Clause 20 of the ATSILS Future Fund Bill.

29 Clause 21 of the ATSILS Future Fund Bill.

30 Clause 22 of the ATSILS Future Fund Bill.

31 Clause 25 of the ATSILS Future Fund Bill.

Consideration of the bills by other committees

Scrutiny of Bills

1.26 At the time of tabling, the Senate Standing Committee for the Scrutiny of Bills has made no comment on the bills.³²

Human Rights

1.27 At the time of tabling, the Parliamentary Joint Committee on Human Rights (PJCHR) has made no comment on the bills. The committee notes that the Explanatory Memorandums for all three bills state that the bills are compatible with human rights.³³

1.28 The National Congress of Australia's First Peoples noted its concerns that 'the bills do not appear to have been sent to the Human Rights Committee'.³⁴ Under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the PJCHR is required to 'examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings'.³⁵ The committee expects that the PJCHR will consider these bills and report in due course.

32 Senate Standing Committee for the Scrutiny of Bills, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills (accessed 17 April 2018).

33 See: ILC Bill, EM, p. 16; ATSILS Future Fund Bill, EM, p. 29; Consequential Amendments Bill, EM, p. 16.

34 National Congress of Australia's First Peoples, *Submission 4*, p. [4].

35 Parliamentary Joint Committee on Human Rights, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights (accessed 19 April 2018). See also: *Human Rights (Parliamentary Scrutiny) Act 2011*, s. 7.