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**Australian Government**  

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**Indigenous Land Corporation**

## **INDIGENOUS LAND CORPORATION**

### **SUBMISSION TO SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE**

#### **Inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014**

**July 2014**

## EXECUTIVE SUMMARY

- The Indigenous Land Corporation (ILC) strongly supports the need for the reforms in the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014*. The Bill contains practical measures to amend the *Aboriginal and Torres Strait Islander Act 2005*.

These measures would:

1. strengthen and protect the Aboriginal and Torres Strait Islander Land Account (the Land Account) for future generations of Aboriginal and Torres Strait Islander peoples
  2. ensure the Land Account is used only for land-related purposes
  3. provide for greater Indigenous input and involvement in the ILC and the Land Account
  4. enforce the highest standards of corporate governance in the ILC
  5. allow the Land Account to grow in real terms.
- The ILC recommends that Clause 10 of the Bill be amended to include reference to section 192X in new section 193IA(1)(b)(i), in addition to the reference to sections 191AB and 191B, to better reflect the intent of the new section. Subject to this change, the ILC recommends the Bill be passed in its current form.
  - The ILC urges all Senators and Members of Parliament to support the Bill.

## INTRODUCTION

The Board of the Indigenous Land Corporation (ILC) supports the reforms in the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014* (the Stronger Land Account Bill), tabled in the Senate on 24 June 2014 by Senator Rachel Siewert of the Australian Greens.

The Stronger Land Account Bill contains practical measures to amend the *Aboriginal and Torres Strait Islander Act 2005*. These measures would:

6. strengthen and protect the Aboriginal and Torres Strait Islander Land Account (the Land Account) for future generations of Aboriginal and Torres Strait Islander peoples
7. ensure the Land Account is used only for land-related purposes
8. provide for greater Indigenous input and involvement in the ILC and the Land Account
9. enforce the highest standards of corporate governance in the ILC
10. allow the Land Account to grow in real terms.

The Stronger Land Account Bill substantially reflects a Draft Bill released by the ILC on 24 March 2014<sup>1</sup>, and endorsed in principle on the same day by a group of senior Indigenous leaders, including a number who were involved in the native title negotiations of the 1990s.

The ILC's Draft Bill was released in the context of the review of the Indigenous Land Corporation and Indigenous Business Australia (IBA), initiated by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, in December 2013.<sup>2</sup>

Irrespective of this context, the ILC's Draft Bill and the Bill currently before Parliament represent progressive Indigenous policy that should be legislated whatever the outcomes of the ILC/IBA Review.<sup>3</sup> Legislating the Stronger Land Account Bill would build on the historic foundations of the Land Account in the post-Mabo settlement and be a significant advance for Indigenous rights and recognition within Australia.

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<sup>1</sup> Media release, 'Indigenous Land Corporation proposals look to future Indigenous generations', 24 March 2014. The ILC's Exposure Draft Bill can be found at [www.ilc.gov.au](http://www.ilc.gov.au).

<sup>2</sup> Media release, Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, 'Review into Indigenous Business Australia and the Indigenous Land Corporation', 2 December 2013.

<sup>3</sup> The ILC /IBA Review webpage is <http://ilcibareview.dpmc.gov.au/>. The report of the reviewers, Ernst & Young, is at <http://www.dpmc.gov.au/publications/index.cfm>. The Government's intentions following the review have not yet been announced.

## BACKGROUND

The Aboriginal and Torres Strait Islander Land Account and the ILC were established simultaneously through the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. This legislation continued the process that began with the High Court’s judgment in June 1992 in the *Mabo* case (*Mabo v Queensland [No 2]* [1992] 175 CLR 1) which recognised that Indigenous Australians’ traditional title to land—‘native title’—continued so long as it had not been extinguished by the acts of successive Australian governments. These extinguishing acts included the granting of freehold title to other parties.

The political settlement that followed the *Mabo* judgment was the subject of intense negotiation between the Australian Government and a group of Indigenous leaders. These included the chairperson of the then Aboriginal and Torres Strait Islander Commission (ATSIC); the Aboriginal and Torres Strait Islander Social Justice Commissioner; and representatives of major Indigenous land councils. This was the first time in Australia’s history that Indigenous leaders were able to negotiate with the executive power of government.<sup>4</sup>

The first part of the settlement was the *Native Title Act 1993* (Cth), which provided a statutory means to have native title recognised (as well as other processes). The Land Fund—now the Land Account—was the second part of this settlement, recognising that the native title rights of the majority of Indigenous Australians had most likely been extinguished. The Land Account therefore provides partial compensation for dispossessed Indigenous Australians, in particular those unlikely to benefit from the Native Title Act.

In order to gain the broader benefits under the Native Title Act (including the Land Account), Indigenous negotiators were forced to compromise. They agreed to the validation of government actions to extinguish native title between 1975, when the Racial Discrimination Act became law, and 1993, the date of the Native Title Act. This meant that many potential native title holders lost access to their land, and the land titles of other Australians were secured.

The Land Account as currently established provides a secure stream of income, in perpetuity, to provide economic, environmental, social and cultural benefits for Aboriginal people and Torres Strait Islanders by assisting in the acquisition and management of land. The conduit for these funds is the ILC which is established by *Aboriginal and Torres Strait Islander Act 2005* as a Commonwealth corporation with statutory functions to acquire land for Indigenous people and support management of Indigenous-owned land, howsoever acquired.

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<sup>4</sup> PJ Keating, The Lowitja O’Donoghue Oration, Don Dunstan Foundation, University of Adelaide, 31 May 2011. ‘...[for] the first time, ... Aboriginal people were brought fully and in an equal way to the centre of national executive power. In the 204-year history of the formerly colonised Australia, this had never happened.’

The first appropriation to the Land Account occurred in 1994–95, and the ILC began operations on 1 June 1995. The capital of the Land Account was built through successive Budget appropriations for ten years to 2003–04.

The continued existence of the Land Account in its present form and with its present programs is dependent on government policy and the will of the Australian Parliament. Enacting the Stronger Land Account Bill would help to place the Land Account above and beyond politics, and ensure it is available as originally intended—in perpetuity and to support the land needs of Indigenous Australians in compensation for their widespread dispossession.

## 1. STRENGTHENING AND PROTECTING THE LAND ACCOUNT

**Ensuring that the Land Account is a compensatory mechanism that recognises past injustices and dispossession and acknowledges the special relationship Aboriginal and Torres Strait Islander peoples have with their lands.**

### Part 1, Division 1A—Objects of Part

#### 191AB Objects of Part

#### WHAT WOULD CHANGE

The proposed new Objects make specific a number of important facts:

- that Indigenous Australians have a special relationship with their lands
- that land has a range of values for Indigenous peoples: social, cultural, environmental and economic
- that the dispossession of Indigenous peoples from their traditional lands gave rise to suffering and injustice
- that Indigenous peoples' prior rights and interests in land and the rich and diverse cultures generated from their relationship to land entitle them to special recognition within the modern Australian nation
- that the Land Account is a compensatory mechanism that addresses the continuing land needs of Indigenous Australians.

#### WHY MAKE THESE CHANGES?

The current *Aboriginal and Torres Strait Islander Act 2005* does not articulate the significance of the Aboriginal and Torres Strait Islander Land Account and the historic settlement from which it arose.

Land has been fundamental to the wellbeing of Aboriginal and Torres Strait Islander peoples over tens of thousands of years of occupation of this continent. Traditionally land was, and over wide areas of Australia still is, both a source of sustenance and the source of Indigenous spirituality. Relationship to land continues to inform the social and cultural lives—indeed the very identity—of Indigenous peoples. Caring for land, ensuring its productivity and maintaining spiritual connections, has been a necessary part of the day-to-day and ceremonial lives of Indigenous groups.

After 1788, as European settlement spread progressively across the continent, many Indigenous peoples were dispossessed of their lands, often violently. The loss was not just

economic, but also social and spiritual. It disrupted kinship systems and religious observance. Dispossessed Indigenous peoples became demoralised, dependent and impoverished.

Land has remained at the heart of Indigenous peoples' continuing struggle for recognition and justice within Australia. What had once been an unequal physical struggle has in modern Australia turned increasingly to the political and legal spheres. In response to the movement for 'land rights', Australian parliaments have over the last 50 years granted interests in land to traditional owners and, in some cases, set up land claims processes, most extensively in the Northern Territory.

In 1992, as a result of the activism of Eddie Mabo and his fellow claimants, the *Mabo* judgment recognised native title in Australia's common law, overturning *terra nullius*—the legal assumption that Australia had been unoccupied at the time of European settlement. The *Mabo* judgment was not just a legal revolution; it also had immense symbolic value for the position of Indigenous peoples within the Australian nation. It recognised Indigenous peoples' existence and inherent rights, reinforced by the fact that Indigenous leaders were invited to negotiate the subsequent political settlement. This settlement involved compromises on the Indigenous side to ensure non-Indigenous Australians had certainty over their land titles.

The Indigenous leaders who negotiated the native title settlement were very conscious of the history of Indigenous dispossession since 1788, and the land needs of those unlikely to benefit from the *Mabo* decision and the Native Title Act.

These needs were acknowledged in the Second Reading speech of then Prime Minister Paul Keating, when first speaking to legislation to establish the Land Account and the ILC. Mr Keating said that many Indigenous peoples lived 'on the margins of economic, social and cultural life in this country' and that 'the vast majority ... have been dispossessed either in whole or part, of that which is most precious to their sense of history and spirituality, that most essential part of their heritage—their land'. The Land Account was envisaged as giving Indigenous peoples 'a significant and recurring opportunity to re-establish their relationship with the land'. This was seen as 'fundamental to Indigenous wellbeing', without removing the need for other programs aimed at overcoming Indigenous disadvantage.<sup>5</sup>

The *Aboriginal and Torres Strait Islander Act 2005* recognises, in defining the objectives of the ILC, that land has a range of values for Indigenous Australians: economic, social, cultural and environmental. Prime Minister Keating's Second Reading speech acknowledged that these values are held with an intensity largely unmatched in non-Indigenous Australia: 'Contemporary

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<sup>5</sup> Prime Minister, the Hon Paul Keating MP, Second Reading, ATSIIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994, House of Representatives Hansard, 3 August 1994.

Western culture tends to view land as something of a commodity, something which may enrich us, but not something which goes to the essence of our culture.’<sup>6</sup>

Indigenous attitudes to land have of necessity changed over time. The intrusion of alien and dominant cultural, economic and legal systems means that no Indigenous Australians can live entirely off their lands as they traditionally did. The Australian landscape itself has been transformed, by more intensive land uses (arable farming, grazing, high-density settlements), the infrastructure of a modern nation (roads, railways, dams, communication and energy grids), and the introduction of exotic animals and plants. Much Australian land has been degraded by these impositions, creating the need for environmental repair.

In setting up the Land Account, the then Australian Government addressed the land needs of Indigenous peoples in contemporary Australia, and into the future. The Government recognised that land is central to Indigenous identity but that it may now hold different values for different groups of Indigenous people; that land management must go hand in hand with land acquisition; and that more and more Indigenous Australians will have aspirations relating to land. For Indigenous Australians, land is a powerful symbol of loss; land acquisition brings with it a sense of justice and renewal and the prospect of a more prosperous and culturally centred future.

The wider Indigenous estate now covers as much as 20 per cent of Australia, mostly as a result of successful native title claims since 1993 and land-rights legislation. The vast extent of this land is in remote areas; most would be regarded as marginal in economic terms. The Land Account and the ILC have become an important source of funding and expertise to manage and care for Indigenous-owned and/or Indigenous-controlled land across Australia to ensure it provides benefits to its owners and to Australian society as a whole.

In recent years there has been increasing recognition of Indigenous Australians’ status within the nation. The movement for Reconciliation has raised awareness of Indigenous history and culture. The National Apology has acknowledged the wrongs of the past. The current Prime Minister, the Hon Tony Abbott MP, has promised to place Indigenous affairs at the heart of his Government.<sup>7</sup> There is a multi-party commitment to recognise Indigenous peoples in the Australian Constitution, though whether this happens and what form that recognition will take depends on a vote of the Australian people.

The amendments to include these new objects of Part 4A would put in place further formal acknowledgment of the injustices done to Indigenous Australians, further enhance Indigenous

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<sup>6</sup> *Ibid.*

<sup>7</sup> Tony Abbott, Leader of the Opposition, speech to the Sydney Institute, ‘Indigenous issues will be at the heart of a Coalition Government in word and deed’, 15 March 2013.



status within the modern Australian nation, and entrench a significant Indigenous gain towards achieving land justice. They would serve to protect the Land Account and highlight its origins in the historic native title settlement—where Indigenous negotiators accepted the loss of rights (in many cases with serious reservations) in order to achieve other rights, including a Land Account in perpetuity.

The practical implications of the proposed new objects of Part 4A would be realised in the future interpretation of the Part. The *Acts Interpretation Act 1901* requires that: ‘In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.’<sup>8</sup> The new objects would make clear the purpose for which Part 4A of the Aboriginal and Torres Strait Islander Act was legislated, and ensure that future interpretation of Part 4A aligns with that purpose.

These amendments are in the spirit of the times. They reflect both the full intent of the original legislation and the current political will to be ‘at our best’ on the subject of Indigenous affairs.<sup>9</sup> Enacting the Stronger Land Account Bill would represent a significant next step in the progress towards constitutional recognition of Indigenous Australians.

## **2. ENSURING THE LAND ACCOUNT IS USED ONLY FOR LAND-RELATED PURPOSES**

**Ensuring that the Land Account isn't, now or in the future, utilised for any purpose other than the land-related benefit of Aboriginal and Torres Strait Islander peoples.**

### **Section 192X Purpose of Land Account**

#### **WHAT WOULD CHANGE**

This amended section would ensure that payments can be made from the Land Account to the ILC only to assist Aboriginal people and Torres Strait Islanders to acquire and manage land for economic, environmental, social or cultural benefits.

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<sup>8</sup> Section 15AA, *Acts Interpretation Act 1901*.

<sup>9</sup> Prime Minister, the Hon Tony Abbott MP, Statement on Closing the Gap, House of Representatives Hansard, 12 February 2014. ‘There is probably no aspect of public policy on which there is more unity of purpose and readiness to give others the benefit of the doubt. On this subject, at least, our parliament is at its best. Our duty is to make the most of this precious moment.’

## WHY MAKE THESE CHANGES?

This amended section would further protect the Land Account and ensure it continues to be available for future Indigenous generations to establish links to their land.

The ILC Board has been concerned at the implications of the review of the ILC and Indigenous Business Australia (IBA), announced in December 2013 by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion. From the Minister's public statements, both in Opposition and as Minister, it was anticipated the review would result in a merger of the ILC with IBA.<sup>10</sup> An amalgamation of the two bodies was also recommended in the report of the Australian Government's Commission of Audit (released May 2014).<sup>11</sup>

Both agencies are strongly opposed to any amalgamation on a number of grounds, including the risks of combining two very different organisations with mature systems and processes, and the divergent histories and purposes of the two agencies—IBA operates like a bank, while the ILC buys and manages land for a range of Indigenous benefits.

The ILC Board has been anxious, in particular, about potential threats to the purpose of the Land Account if its revenues flowed into a broader organisation with potentially conflicting priorities. This could result in Land Account funds being diverted—sooner or later—to non-land-related projects and contrary to the compensatory intent of the *Aboriginal and Torres Strait Islander Act 2005*.

The Minister for Indigenous Affairs has acknowledged the 'iconic' status of the Land Account, and placed the Land Account outside the scope of his review. In April 2013, Senator Scullion, in his then role as Opposition Spokesperson on Indigenous Affairs, said when speaking about the ILC and IBA: 'We ... need to protect and ensure the long-term viability of the Land Account.'<sup>12</sup> Notwithstanding the views of the current Minister, the ILC believes that the Land Account remains vulnerable to the policies of future ministers and parliaments.

The report of the ILC/IBA Review was released by Minister Scullion on 3 May 2014.<sup>13</sup> The reviewers, Ernst & Young (EY), gave proper weight to the significance of the Land Account. The Land Account is 'more than a fund', the EY report states, it is 'a marker in the history of

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<sup>10</sup> Senator Nigel Scullion, Senate Hansard, 24 June 2013: 'Should we win government, substantial structure reforms to the Indigenous Land Corporation and Indigenous Business Australia will be priorities for us.'

<sup>11</sup> The Report of the National Commission of Audit—Phase One: Towards Responsible Government, February 2014, p.176.

<sup>12</sup> Senator Nigel Scullion, quoted in the *Australian*, 16 April 2013, 'Liberals signal revamp of indigenous land agencies' by Patricia Karvelas.

<sup>13</sup> Media release, Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, 'Ernst & Young review ILC/IBA', 3 May 2014.

recognition and land rights for Indigenous Australians'.<sup>14</sup> EY were also concerned that any new organisation combining the functions of the ILC and IBA would create conflict in relation to the use of the Land Account. The new entity's board would have to 'quarantine its commercially focused decisions from activities funded by the Land Account'. Amalgamation would also present 'an opportunity in practice for the Board to apply the funds it receives from the Land Account to purposes other than its compensatory function'.<sup>15</sup>

The EY report supported the retention of the ILC and IBA as stand-alone organisations; however, the Minister has yet to announce the Government's intentions arising from the ILC/IBA Review.

In the context of this proposed amendment to lock in the purpose of the Land Account, it should also be noted that proposals have been put to government in the past to divert Land Account funds to other purposes—for example, to provide a stream of income for the operations of the representative body, the National Congress of Australia's First Peoples, or to assist the States to meet their obligations under native title settlements. These calls have rightly been rejected, because they would erode the purpose and integrity of the Land Account. Such calls may be made again, however, and future governments may be prompted to divert Land Account funds, especially if Budget funds are scarce.

The amendments to section 192X proposed by the Stronger Land Account Bill would ensure that Land Account funds held by the ILC can be applied only to the ILC's performance of its current functions or the exercise of its powers, the payment of remuneration and allowances under current law, and the making of other payments the ILC is authorised or required to make under current law.

A future amendment to this section would be required if a government wanted to utilise Land Account funds for any new purpose. The ILC is also recommending that Clause 10 of the Stronger Land Account Bill (inserting new section 193IA) be amended to require consultation with the Aboriginal and Torres Strait Islander community on any proposed amendments to section 192X (discussed further below). This would protect the Land Account for the future and ensure that Indigenous peoples have the opportunity to provide input into any proposed future change to the way Land Account funds are used.

By strengthening the legislation establishing the purposes of the Land Account, this provision of the Stronger Land Account Bill would further protect the Land Account from the vicissitudes of politics. This need should be recognised by all parties.

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<sup>14</sup> Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014, p.7. This report is available at <http://www.dpmc.gov.au/publications/index.cfm>

<sup>15</sup> Ernst & Young, pp.20-1.

### 3. INCREASING INDIGENOUS INVOLVEMENT AND INPUT

#### Ensuring Aboriginal and Torres Strait Islander control over the Land Account and the Indigenous Land Corporation.

##### Sections 191XA and B and subsection 191X(3)

##### Section 191L

##### Section 193GA

##### Section 193IA

#### WHAT WOULD CHANGE

The Stronger Land Account Bill would increase Indigenous input and involvement in the ILC and the Land Account in a number of ways.

Proposed new sections 191XA and B would **establish a Nomination Committee** of at least three eminent Indigenous Australians, appointed by the Minister after consultation with the relevant parliamentary committee, to make recommendations to the Minister about appropriate persons for appointment as ILC Directors. The Nomination Committee would meet at least once a year, and maintain and update a confidential list of up to ten potential candidates who have appropriate skills and expertise and are fit and proper persons for appointment to the ILC Board. Maintenance of this list would ensure timely advice to the Minister, preventing any delays in the appointment process. The new provision would ensure the privacy of the individuals listed was maintained, by preventing the list's public disclosure. Provisions in the Bill would also require consideration of the gender balance of the Nomination Committee and the ILC Board, in accordance with best practice and government policy.<sup>16</sup>

If the Minister makes an appointment to the ILC Board, he or she must state in writing whether the person appointed was proposed by the Nomination Committee. The new subsection 191X(3) would require the Minister to consult both the Nomination Committee and the Finance Minister in making appointments to the ILC Board.

Section 191L would **more precisely define the role of the Minister**. The *Aboriginal and Torres Strait Islander Act 2005* currently states: 'Except as expressly provided in this Act or the *Commonwealth Authorities and Companies Act 1997*, the Minister is not empowered to direct the Indigenous Land Corporation in relation to any of its activities.' The amended section 191L would ensure that, in making any requests of the ILC, the Minister must have regard to

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<sup>16</sup> See <http://www.dpmc.gov.au/women/woag/gender-balance.cfm>

maintaining the independence of the ILC. This would reinforce the principle of independence in the ILC's charter.

The amendments proposed to section 193GA would **allow the ILC to give advice to the Minister for Finance** about the projected financial requirements of the ILC and how the Land Account should be managed. In making any decisions on the investment policy of the Land Account, the Finance Minister would be required to have regard to this advice.

Section 193IA would require any Bill introduced into the Parliament to amend sections of the *Aboriginal and Torres Strait Islander Act 2005* relating to the new objects of Part 4A (section 191AB) or the purpose of the ILC (section 191B) to be referred to a parliamentary committee (the joint parliamentary committee responsible for the scrutiny of issues relating to Aboriginal persons and Torres Strait Islanders, or, if none exists, both the House of Representatives and Senate committees). This **parliamentary committee would have to consult with the Aboriginal and Torres Strait Islander community** on the proposed amendment(s) and then make an assessment as to whether the amendment(s) were supported by them, and report back to Parliament within six months on the consultations. This report would be required to include details of the consultation process undertaken.

## WHY MAKE THESE CHANGES?

It is the ILC Board's strong view that Aboriginal and Torres Strait Islander peoples must have the opportunity to be involved in any future decisions made by government about the ILC and the Land Account. As Prime Minister Keating said in his Second Reading speech: 'The legislation is designed to meet the aspirations of Indigenous people and they must therefore have control over decisions of the corporation.'<sup>17</sup>

The ILC currently has an independent, Indigenous-majority Board, appointed by the Minister. The Indigenous Nominations Committee proposed by new section 191XA to advise the Minister on ILC Board appointments would serve to ensure that the ILC is as apolitical as possible so the Aboriginal and Torres Strait Islander community can have confidence that Land Account funds are managed on their behalf by appropriately representative and qualified individuals. It would also facilitate timely appointments to the ILC Board as vacancies arise.

The Stronger Land Account Bill is drafted so as not to constrain the role of the executive arm of government in making appointments to the ILC Board. The Bill provides a mechanism to assist the Minister to consult formally with Aboriginal peoples and Torres Strait Islanders on potential appointees. If the Bill were to become law, the Minister would retain the authority to make appointments, but he or she would be required to make a public statement as to whether a

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<sup>17</sup> Prime Minister, the Hon Paul Keating MP, Second Reading, ATSIIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994, House of Representatives Hansard, 3 August 1994.

person appointed to the ILC Board was recommended by the Nomination Committee. This would improve transparency in the appointments process.

The *Aboriginal and Torres Strait Islander Act 2005* includes a provision that prevents the Minister from directing the ILC in relation to any matter. This provision, together with the requirement that the ILC's Board be comprised of a majority of Indigenous members, enforces the principle that the ILC was established for Aboriginal people and Torres Strait Islanders and intended to be controlled by them.

The ILC notes, however, that under the current legislation it has been common for Ministers to make requests of the ILC (for example, in relation to appointments to committees and subsidiaries, and ILC and subsidiary operational matters). The provisions in the Bill acknowledge this fact, and require the Minister to have regard to the ILC Board's independence in making such requests. This would ensure the ILC Board is not placed in a situation of conflict between making decisions independently and complying with the Minister's requests. These changes more fully reflect the intentions of the original legislators.

The proposed new section 193GA would strengthen the ILC Board's powers to advise the Finance Minister on the ILC's financial requirements, and would require the Finance Minister to have regard to the advice of the ILC when making decisions about the investment policy of the Land Account. The proposed new provisions strengthen the current provisions in the Act. These allow for a Consultative Committee on the investment policy of the Land Account, but do not oblige the Finance Minister to take account of advice given by the ILC in this forum.

The proposed legislative requirement for consultation would give Indigenous Australians a say in the event any government moves to make significant legislative changes to either the new objects of Part 4A (section 191AB) or the purpose of the ILC (section 191B). The ILC supports this new provision but recommends Clause 10 of the Stronger Land Account Bill, section 193IA(1)(b)(i), be amended so that any legislative change proposed to section 192X dealing with the purpose of the Land Account also be included in the requirement to consult.

The requirement for consultation is appropriate given the intensive negotiations between the then Government and Indigenous Australians that led to the establishment of the ILC and Land Account. After the *Mabo* judgment the Australian Government entered into an historic settlement with Indigenous peoples, giving rise to the need for further consultation and negotiation if a government wants to change the terms of this compact. The proposed requirement that a parliamentary committee include details of the consultation process would be an important accountability measure ensuring an adequate level of consultation and engagement with Aboriginal and Torres Strait Islander peoples.

The overall effect of these changes would be to increase Indigenous involvement in managing the ILC and the Land Account, further ensuring that Land Account funds make a real difference to the lives of Aboriginal and Torres Strait Islander peoples in re-connecting them to their lands.

#### **4. LOCKING IN STRONGER CORPORATE GOVERNANCE**

**Ensuring high standards of corporate governance, transparency and accountability within the ILC and appointments made by the Government to the ILC.**

**Section 191W**

**Section 191X**

**Section 191YA and B**

**Section 191Z**

**Section 192F**

**Section 192SA**

#### **WHAT WOULD CHANGE**

The Stronger Land Account Bill includes measures to implement the highest standards of corporate governance in relation to the ILC's performance of its functions to ensure the ILC continues to act in the best interests of Aboriginal people and Torres Strait Islanders.

The proposed new section 191W defines the responsibilities of the Board including stipulating that the Board must act with the 'highest standards of good governance, transparency, financial accountability and ethical procurement'.

The proposed new subsections 191X (5) and (6) would stagger appointments to the Board, and ensure that the majority of appointments do not expire around the same time, thus maintaining corporate knowledge and fluidity and effectiveness in Board functions.

Proposed new sections 191YA and 191YB would enable the ILC Board to establish committees, and mandate the establishment of an Audit and Risk Management Committee (in addition to the requirement in section 92 of the *Public Governance, Performance and Accountability Act 2013*). Members of the Audit and Risk Committee would have to be current ILC Board members—with the exception of an external, independent chairperson—and their terms could

not exceed four years. The independent chairperson of this committee would hold office on terms and conditions determined by the Minister.

Proposed new section 191Z would limit the terms of ILC Directors; they would be appointed initially for three years, and not reappointed more than once. The Minister would also not be able to decide to reappoint an ILC Director more than three months before the end of his/her term.

Section 192F would legislate stronger disclosure requirements for direct or indirect pecuniary interests for the ILC Chairperson and Directors. It would also require the Board to keep a register of interests disclosed.

Section 192SA would mandate in the *Aboriginal and Torres Strait Islander Act 2005* that the Board determine a Code of Conduct for Directors and ILC officers, with reference to the Australian Public Service Code of Conduct.

## WHY MAKE THESE CHANGES?

These measures in the Stronger Land Account Bill reflect the current ILC Board's commitment to operating in accordance with the highest standards, as well as the findings of independent reviews commissioned by the ILC Board into ILC governance.

Given that the ILC is the conduit between the compensatory Land Account and Indigenous citizens, it is imperative that the ILC be managed in ways that ensure maximum benefits to Indigenous beneficiaries.

In December 2012 the ILC Board engaged Deloitte Touche Tohmatsu (Deloitte) to identify potential enhancements to improve the transparency, structure and governance of the ILC and its subsidiaries. Deloitte found that there was a need to strengthen the ILC's governance structure and framework. Key findings of the Deloitte report in relation to the ILC's then processes were:

- a 'lack of appropriate staggering of sunset dates of Board members' which 'increases the potential for negative impact on Board effectiveness where multiple members are replaced at once',<sup>18</sup> and
- an inconsistent process for documenting declaration of interests.<sup>19</sup>

The current ILC Board has also had to deal with significant and complex issues as a result of a former ILC Board's purchase of the Ayers Rock Resort, the largest acquisition the ILC has made.

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<sup>18</sup> *Review of Indigenous Land Corporation Board Governance Arrangements*, Deloitte Touche Tohmatsu p.34.

<sup>19</sup> *Review of Indigenous Land Corporation Board Governance Arrangements*, Deloitte Touche Tohmatsu p.35.



The ILC acquired the resort in October 2010 for \$317 million. The purchase involved substantial debt finance. The ILC and the resort’s operator—the wholly-owned ILC subsidiary, Voyages Indigenous Tourism Australia Pty Ltd—currently carry debt of some \$198 million as a result of the acquisition. The former Board’s intention and understanding was that the revenue from Ayers Rock Resort would cover both the principal and the interest involved in the debt. However, revenues have fallen well below the forecasts at the time of the acquisition. Debt servicing will potentially compromise other ILC programs for many years to come. The resort has also been independently revalued downward since its acquisition, establishing that the ILC clearly paid too much for the resort.

Consultants McGrathNicol were engaged in 2013 to undertake a review of the purchase of the Ayers Rock Resort as well as to advise on options for future management. McGrathNicol found that the acquisition process revealed a number of deficiencies in the ILC’s governance and decision-making processes, including that:

- consultants advising on the purchase were not engaged in accordance with ILC purchasing guidelines<sup>20</sup>
- key risks associated with the transaction were not identified or addressed<sup>21</sup>
- the ILC’s Audit and Risk Management Committee did not have an appropriate level of involvement in the transaction or the risk-management processes in place for the transaction<sup>22</sup>
- a potential conflict of interest relating to the transaction was not disclosed, and that the ILC at the time had no conflict of interest register, and no process to require Directors and staff to actively declare potential conflicts, or attest that there were no conflicts.<sup>23</sup>

In response to the findings of both the Deloitte and the McGrathNicol reports, the ILC has put in place a range of measures to strengthen its governance, and to enhance transparency and accountability in decision making. The current ILC Board considers amendments to the Act necessary in order to make these reforms permanent.

Changes proposed in the Stronger Land Account Bill affecting the operation of the Board would limit the terms of Directors, so that the Board does not become an entrenched elite with little incentive to disclose conflicts of interest. Appointments to the Board would be staggered to ensure corporate knowledge is maintained. These changes go hand in hand with the

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<sup>20</sup> *Ayers Rock Resort forecast and options review*, Component 2 report, McGrathNicol, p.56.

<sup>21</sup> *Ayers Rock Resort forecast and options review*, Component 2 report, McGrathNicol, pp.50-1.

<sup>22</sup> *Ayers Rock Resort forecast and options review*, Component 2 report, McGrathNicol, p.64.

<sup>23</sup> *Ayers Rock Resort forecast and options review*, Component 2 report, McGrathNicol, p.69.

establishment of the Nomination Committee (sections 191XA and B), to help determine fit and proper persons to be appointed and ensure that appointments are as apolitical as possible.

The provisions relating to the Audit and Risk Management Committee would ensure this committee does not become entrenched and inattentive. The independent chairperson (already in place, but needing to be mandated by legislation) would ensure objectivity in the assessment of risk. These provisions are in line with the Australian National Audit Office's Better Practice Guide *Public Sector*, but take them a step further.

On 24 June 2014 David Murray, head of the Australian Government's Financial Systems Inquiry, was quoted in the media calling for the adoption of guidelines for greater transparency in the investment decisions made by Indigenous corporations that now manage a significant asset base across Australia.<sup>24</sup> The Stronger Land Account Bill would apply similarly high fiduciary standards to the management of the Land Account.

The inclusion of a mandated code of conduct based on the Australian Public Service code of conduct would add further assurance that all ILC officers and Directors behave honestly and with integrity. It is the ILC's view that this code of conduct should apply to both ILC Directors and staff.

The current ILC Board has committed considerable resources and energy to strengthening the ILC's corporate governance, and the amendments in the Stronger Land Account Bill would ensure this work is locked in for the future. If these changes were legislated, the Aboriginal and Torres Strait Islander community would be assured that the ILC is governed in accordance with the highest standards and that the ILC Board is accountable for its decision making.

Accountability in the use of Land Account funds is critical given the extent of the need in Indigenous Australia and the growing Indigenous population.

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<sup>24</sup> *Australian Financial Review*, 24 June 2014, 'Murray fears land council waste tragedy' by Sally Rose

## 5. ALLOWING THE LAND ACCOUNT TO GROW IN REAL TERMS

### Ensuring that the Land Account can grow over time.

#### Subsection 193(3–5) and section 193G

#### WHAT WOULD CHANGE

The Land Account currently has a fixed capital base and is invested conservatively to:

- preserve the capital value of the fund in real terms—that is, after the impact of Consumer Price Index (CPI) inflation, and
- cover the scheduled ILC payment, in any financial year.

Amendments to the *Aboriginal and Torres Strait Islander Act 2005* in June 2010 provide a minimum guaranteed annual payment to the ILC of \$45 million from 1 July 2010, indexed annually by the CPI.

The 2010 amendments also provide for additional payments to be made to the ILC where the actual capital value of the Land Account exceeds the real capital value of the Account. The additional amount to be paid is the excess above the real capital value. The effect of the 2010 amendments is to provide the ILC with all excess revenue derived from the Account, but to leave the Land Account static in real terms (albeit growing in nominal terms).

Changes proposed in the Stronger Land Account Bill would ensure that half of any excess revenue was invested back into the Land Account so that over time the capital base of the Land Account is able to increase in real terms, with the other half paid to the ILC.

#### WHY MAKE THESE CHANGES?

A larger and growing Land Account would help to ensure that the future land needs of an expanding Indigenous population are met.

Indigenous peoples make up one of the most rapidly growing sections of Australian society. On 30 April 2014 the Australian Bureau of Statistics issued a statement on its projections for Indigenous population growth, saying that the number of Aboriginal and Torres Strait Islander Australians will increase by over a third to between 907,800 and 945,600 people by 2026. The Indigenous population is growing by 2.2 per cent a year, against 1.6 per cent for the total Australian population.<sup>25</sup>

The proposed new requirements in section 193GA (see above) would allow the ILC to give the Finance Minister advice as to how the Land Account should be managed in order to meet the

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<sup>25</sup> See <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>

growing land needs of Aboriginal and Torres Strait Islander peoples and require the Finance Minister to have regard to this advice in making decisions in relation to the investment policy of the Land Account.

The ILC continues to explore other options to allow the Land Account to grow over time, outside this legislation, including widening the investment parameters of the Land Account to ensure greater returns.

## CONCLUSION

The Indigenous Land Corporation is a mature agency, approaching its 20<sup>th</sup> anniversary in 2015. The ILC has two priorities: 1) access to and protection of cultural and environmental values and 2) socio-economic development. These priorities were established in wide consultation with Indigenous Australians, and are set out in the *National Indigenous Land Strategy 2013–17*. The ILC's charter and independence enable it to pursue sustainable, land-related benefits for Indigenous peoples over the longer term.

Since 1995 the ILC has purchased 246 properties, totaling more than six million hectares across all States and Territories, from inner Sydney to remote Australia. Of these properties, 174 have been divested to Indigenous corporations since 1996. Around 230 individual land-holding groups have been provided with land-management assistance since 1996, involving more than \$260 million in grants.

The ILC creates and runs businesses in a private-sector environment, and through these businesses provides quality training leading to real jobs for Indigenous Australians. Seventeen tourism and agricultural businesses are operating in partnership with Indigenous groups. The ILC has four wholly-owned subsidiaries set up to undertake specific functions. In 2012–13 almost 400 Indigenous staff were directly employed in ILC-managed businesses, with 350 trainees. Land-acquisition and land-management projects enabled 1450 Indigenous employment outcomes in 2012–13, and 2350 training outcomes. More than 25,000 Australian carbon credit units were sold in 2012–13 from the innovative Fish River Fire Project. The ILC's pastoral businesses run around 90,000 head of cattle on Indigenous-owned properties, making the ILC one of the nation's top 15 cattle producers.

The ILC has a strong record of collaboration, partnering across the business, philanthropic and government sectors in more than three quarters of its current projects to maximise Indigenous benefits.

The ILC's expertise enables it to play a role in managing the wider Indigenous estate, now covering up to 20 per cent of Australia. It helps to bring Indigenous land into production and is

supporting Indigenous groups to grasp opportunities in agriculture, tourism and environmental services.

The reforms set out in the Stronger Land Account Bill, and based on the ILC's own Draft Bill, are the product of experience and mature consideration. They reflect considerable work on the part of the current ILC Board and executive to look to the future of the ILC and the Land Account.

The Bill emphasises and clarifies the principles on which the original Land Account legislation was based. It rectifies deficiencies in this legislation notably in relation to the purposes of the Land Account. It provides a stronger framework for the ILC's corporate governance. It reinforces the principle of the ILC's independence. It provides for greater Indigenous input in managing the ILC and the Land Account. Above all, the Bill strengthens the proposition that the Land Account is held by the Commonwealth for, and on behalf of, Aboriginal people and Torres Strait Islanders, and should be managed by the Commonwealth to the strictest standards and for the sole benefit of Indigenous Australians. The Land Account is partial compensation for the loss of land, just as other Australians are entitled to compensation when their land is alienated by government action. The Land Account is not charity on the part of the Australian Government.

Government priorities in Indigenous affairs will inevitably change over time. The legislation before Parliament is, however, based on a growing consensus in Indigenous affairs that party-political differences often disguise. All parties agree that land ownership provides an important base for Indigenous socio-economic development; that limited resources should be used scrupulously and effectively if Indigenous needs are to be met; and that Indigenous peoples should be in charge of their own futures. As Prime Minister Tony Abbott said in his Closing the Gap address to the House of Representatives in February 2014: '... a generation or two back, our tendency was to work "for" Aboriginal people, rather than "with" them. We objectified Aboriginal issues rather than personalised them. We saw problems to be solved rather than people to be engaged with.'<sup>26</sup>

Land will always be an Indigenous priority, whatever the political priority of the day. The ILC Board asks that the Australian Government and all parliamentarians support the *Aboriginal and Torres Strait Islander Amendments (A Stronger Land Account) Bill 2014*.

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<sup>26</sup> Prime Minister, the Hon Tony Abbott MP, Statement on Closing the Gap, House of Representatives Hansard, 12 February 2014.