



Australian Government

Department of Finance

**Jane Halton PSM
Secretary**

Our Ref: SEC0010888

Jeanette Radcliffe
Secretary
Senate Standing Committee on Community Affairs
Legislation Committee
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Ms Radcliffe

Thank you for your email of 1 October 2014, regarding the Senate Community Affairs Legislation Committee's inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014.

I appreciate your invitation to provide a written submission to this inquiry. A copy of my Department's submission is attached.

Please contact Mr Mark Thomann, First Assistant Secretary, Social Policy Division if the department can be of further assistance in the committee's inquiry.

Yours sincerely

Jane Halton PSM
Secretary

5 November 2014

Department of Finance
Submission to the Senate Community Affairs Legislation Committee on the
Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account)
Bill 2014

Executive Summary

The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (the Bill) proposes amendments to the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) that relate to the Aboriginal and Torres Strait Islander Land Account (Land Account) and the Indigenous Land Corporation (ILC).

The main outcomes proposed by the Bill are to:

- strengthen Indigenous control over the Land Account and the ILC; and
- require the ILC to comply with corporate governance, transparency and accountability standards.

This submission provides the Department of Finance's (Finance) assessment of the impact of the proposed amendments, focussing on two key issues.

- Firstly, there is a potential for the proposed changes to the payment mechanism from the Land Account to the ILC to erode the real value of the Land Account over time.
- Secondly, some of the proposed amendments would add complexity in administering the ATSI Act and either duplicate or contradict requirements that already apply under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act).

Part 1: Aboriginal and Torres Strait Islander Land Account

Context

The Land Account and the ILC were established under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* to recognise that past practices of dispossession would mean that not all Aboriginal people would be able to benefit from native title and to provide funding to allow for the acquisition and management of land for these people.

The Land Account is a special account for the purpose of the PGPA Act. It was established as a capital fund over ten years by annual appropriations from the Consolidated Revenue Fund. The final appropriation was made in June 2004.

The returns earned by the Land Account are used to fund the operations of the ILC as well as to maintain sufficient growth in the capital of the Land Account to maintain its value in real terms over time.

The Land Account and its investments are administered by the Department of the Prime Minister and Cabinet under delegation from the Finance Minister.

The Land Account is a special account for the purposes of the PGPA Act. The amounts earned from investments made from the Land Account are used to fund the operations of the ILC.

In 2010, amendments to the ATSI Act established a new process for payments to the ILC from the Land Account to provide an annual guaranteed payment of \$45 million, indexed to the Consumer Price Index (CPI). An additional payment can also be made to the ILC where the annual return to the Land Account is greater than that required to maintain the real capital value of the Land Account, indexed to CPI. As at 30 June 2014, the Land Account's value was around \$1.99 billion.

Table 1 provides a breakdown of payments made to the ILC since the 2010 amendments.

Table 1: Payments to the ILC since 2010-11

Year	Annual Guaranteed Payment \$m	Additional Payment \$m	Total Payment \$m
2010-11	45.0	-	45.0
2011-12	46.4	4.9	51.3
2012-13	47.5	18.4	65.9
2013-14	48.6	3.9	52.5
2014-15	49.9	Not yet calculated	49.9

Items 3 to 7 – Varying arrangements for payments to the ILC

Proposals

Items 3 to 7 change the method for calculating an additional payment to be made to the ILC over and above its indexed annual statutory payment. These items of the Bill provide that if, in a financial year beginning on or after 1 July 2014, the return in real growth from investment of the Land Account is greater than \$50 million, the amount in excess of \$50 million must be divided equally between the Land Account and the ILC. This is a shift from the current method of calculation for the additional payment to the ILC which compares the actual total capital value of the Land Account with the real capital value of the Land Account for any given year.

The key amendments are as follows.

- Item 3 of the Bill would provide an end date of 1 July 2014 for the current method of calculation for additional payments to the ILC from the Land Account.
- Item 4 quarantines current arrangements for making additional payments above the guaranteed statutory payment to the period 2011-2014.
- Item 6 of the Bill provides that if, in a financial year beginning on or after 1 July 2014, the return in real growth from investment of the Land Account is greater than \$50 million, this excess would be divided equally between the Land Account and the ILC.

Impact of proposals

Item 4 of the Bill would cease the current arrangements for making additional payments above the guaranteed annual statutory payment from the Land Account to the ILC. Importantly, the current arrangements are designed so that any additional payments do not compromise the real capital value of the Land Account over time. Item 4 would

provide an end date of 1 July 2014 for the current arrangements, which were introduced in the 2010 amendments to the ATSI Act to provide for additional payments to the ILC.

The Bill proposes to change the current arrangements under subsection 193(3) which state that:

on the first business day in December in a financial year (the current year) beginning on or after 1 July 2011, an amount is to be paid to the ILC out of the Land Account if the actual capital value of the Land Account for the current year exceeds the real capital value of the Land Account for the current year. The amount to be paid is the excess.

In contrast to the current arrangements for making additional payments, the proposed mechanism for making additional payments as drafted has the potential to compromise the real capital value of the Land Account.

Item 6 of the Bill proposes that from 1 July 2014, annual returns in real growth that exceed \$50 million would be divided equally between the ILC and the Land Account. However, as the annual guaranteed payment to the ILC is indexed, and the proposed \$50 million threshold is not, over time the payment to the ILC could increase at a rate faster than the growth in the account and the reduction of the value of the Land Account would accelerate as the capital in the account is eroded. This could occur because the rates of return will need to increase to pay the indexed annual statutory payment to the ILC. But as that payment increases above the \$50 million threshold, 50 per cent of the excess will also need to be paid as an additional payment to the ILC and the Land Account.

This outcome may be contrary to the drafter's intention as the Explanatory Memorandum to the Bill states that the purpose of this item is to allow the Land Account to grow beyond CPI in order for future generations of Aboriginal people and Torres Strait Islanders to continue to benefit from the Land Account.

Table 2 on the following page provides a comparison of the proposed and existing payment arrangements and illustrates how the Land Account would erode over time. This is for illustrative purposes and based on assumptions of CPI of 2.5 per cent and an annual real return of 2.6 per cent.

Table 2: Comparison of proposed and existing additional payments models

	Year 1 (\$m)	Year 2 (\$m)	Year 3 (\$m)	Year 4 (\$m)	Year 5 (\$m)	Year 6 (\$m)	Year 7 (\$m)	Year 8 (\$m)	Year 9 (\$m)	Year 10 (\$m)
Real Return to Land Account	50.9	52.3	53.6	54.9	56.3	57.8	59.2	60.7	62.2	63.8
Existing model										
Annual Guaranteed Payment to ILC	49.8	51.0	52.3	53.6	55.0	56.4	57.8	59.2	60.7	62.2
Additional Payment to the ILC	1.1	1.2	1.3	1.3	1.3	1.4	1.4	1.5	1.5	1.6
Total Payment to the ILC (Guaranteed amount and Additional Payment)	50.9	52.2	53.6	54.9	56.3	57.8	59.2	60.7	62.2	63.8
Change in Land Account real value	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Cumulative change in Land Account real value	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Proposed model										
Annual Guaranteed Payment to ILC	49.8	51.0	52.3	53.6	55.0	56.4	57.8	59.2	60.7	62.2
Proposed real return threshold of \$50 million	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0	50.0
Additional Payment to the ILC	0.4	1.2	1.8	2.5	3.2	3.9	4.6	5.4	6.1	6.9
Value retained by the Land Account	0.4	1.2	1.8	2.5	3.2	3.9	4.6	5.4	6.1	6.9
Total Payment to the ILC (Guaranteed amount and Additional Payment)	50.3	52.2	54.1	56.1	58.1	60.3	62.4	64.6	66.8	69.1
Annual change in Land Account real value	0.6	0.1	-0.5	-1.2	-1.8	-2.5	-3.2	-3.9	-4.6	-5.3
Cumulative change in Land Account real value	2.0	2.1	1.5	0.3	-1.5	-4.0	-7.1	-11.0	-15.6	-20.9
Note: Year 1 uses 2014-15 annual guaranteed payment to the ILC and the actual capital value of the Land Account. For illustrative purposes, the statutory payment is indexed to 2.5% (midpoint of the Reserve Bank's target inflation range), real return to the Land Account is assumed to be 2.6% + CPI per annum (the target return for the Land Account is assumed to be slightly above what is required to maintain the real value of the Land Account).										

Item 9 –The Finance Minister to have regard to ILC advice about its financial requirements

Proposal

Item 9 of the Bill would require the Finance Minister to have regard to advice provided by the ILC on how the Land Account should be managed in order to meet the projected financial requirements of the ILC.

The Explanatory Memorandum explains this amendment is intended to give Aboriginal persons and Torres Strait Islanders a more direct mechanism to control the way that the Land Account is managed, on their behalf, by the Commonwealth.

Impact of proposal

The Finance Minister has responsibility for the investment of relevant money and considers what would be an appropriate risk profile for investments in accordance with the investment powers under s58 of the PGPA Act. The Finance Minister delegates these powers to the relevant Secretaries (in departments) or Chief Executives (in relevant non-corporate Commonwealth entities) in respect of the management of special accounts under the PGPA Act. These delegations allow relevant monies to be invested in a standard set of conservative investment instruments.

The proposed legislation would be inconsistent with the broad objective of the PGPA Act to encourage greater alignment and consistency of resource management across all Australian Government entities.

Part 2: ILC

Context

The PGPA Act commenced on 1 July 2014 when it replaced the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

The purpose of the PGPA Act is to:

- establish a coherent system of governance and accountability across Commonwealth entities;
- establish a performance framework across Commonwealth entities; and
- require the Commonwealth to:
 - meet high standards of governance, performance and accountability;
 - provide meaningful information to the Parliament and the public;
 - use and manage public resources properly;
 - work cooperatively with others to achieve common objectives; and
 - require Commonwealth companies to meet high standards of governance, performance and accountability.

The Finance Minister has delegated some powers and functions in the PGPA Act and Public Governance, Performance and Accountability Rule 2014 to accountable authorities of non-corporate Commonwealth entities.

Items 11 and 13 – Responsibilities of the ILC and ILC Board

Proposals

Item 11 of the Bill would require the ILC to operate efficiently and in accordance with principles of good governance, transparency, financial accountability and ethical procurement.

Item 13 proposes further responsibilities of the ILC Board, including to ensure the efficient performance of the ILC and to also ensure that the ILC, its subsidiaries and ILC officers comply with high standards of good governance.

Impact of proposals

The objectives of the PGPA Act are to establish a coherent system of governance and accountability across all Australian Government entities. With the scope of items 11 and 13 already covered by provisions in the PGPA and ATSI Acts there is a risk of disrupting this coherence and creating confusion and inconsistent application across Australian Government entities.

The relevant existing provisions of the PGPA and ATSI Acts are as follows:

- Section 15 of the PGPA Act requires the accountable authority of a Commonwealth entity to govern the entity in a way that ‘promotes the proper use and management of public resources for which the authority is responsible; and promotes the achievement of the purposes of the entity; and promotes the financial sustainability of the entity’.
- Section 16 of the PGPA Act also requires the accountable authority to establish and maintain appropriate systems of risk oversight and management and appropriate systems of internal control.
- Sections 25 to 29 of the PGPA Act require all officials to comply with a series of general duties, including the duty of care and diligence, the duty to act honestly, in good faith and for proper purpose and the duty to disclose material personal interests.
- Section 191F(1) of the ATSI Act requires the ILC to act in accordance with sound business principles whenever it performs its functions on a commercial basis.
- Section 191W of the ATSI Act states that it is the ‘responsibility of the ILC Board to ensure the proper and efficient performance of the functions of the ILC and to determine the policy of the Corporation with respect to any matter’.

Items 14 to 16 – Appointments to the ILC Board of Directors

Proposals

Items 14 to 16 of the Bill propose a new process for appointing persons to the ILC Board of Directors.

- Item 14 would require the Minister for Indigenous Affairs to consult both a new Nomination Committee and the Finance Minister before appointing a person to the Board.
- Item 15 would require the Minister for Indigenous Affairs to ensure that the majority of the appointments to the ILC Board would not expire at or about the same time.

- The requirements for the Nomination Committee and the procedure for engaging with it are set out in Item 16. Specifically, Item 16 would require:
 - the Nomination Committee to consist of at least three members of Aboriginal or Torres Strait Islander descent and with skills and experience relevant to the ILC’s functions;
 - the Minister for Indigenous Affairs to consult Parliament before a person is appointed as a member of the Nomination Committee; and
 - if an appointment to the ILC Board is made, the Minister for Indigenous Affairs to make a statement on whether the person was a Nomination Committee-proposed candidate, and this statement must be published on the ILC’s website or by means considered appropriate by the Board.

Impact of proposals

The ATSI Act already includes a number of safeguards and procedural and consultative requirements around ILC Board appointments.

- For example, section 191X of the ATSI Act states that all appointees must have experience in land or environmental management; or business or financial management; or Aboriginal and Torres Strait Islander community life.
- The Minister for Indigenous Affairs must make sure that at least two Directors (not including the Chairperson and Deputy Chairperson) have experience in business or financial management.
- The majority of the Board (minimum four Directors), as well as the Chairperson, must also be Aboriginal persons or Torres Strait Islanders.
- In addition, under section 191X(3) the Minister for Indigenous Affairs must consult the Finance Minister before appointing a person as an ILC Director.

All significant board appointments are also approved by Cabinet and nominations are therefore subject to the requirements of the Cabinet Handbook, which (among other things) requires nominees to be subject to a robust vetting process and that gender balance and appropriate geographical balance are considered.

Items 18 and 19 limit the maximum period of appointment to three years, and re-appointments are only for one term. While these would be new requirements under the ATSI Act, it is already the case that in practice Government gives careful consideration to the need to refresh boards and the staggering of Director appointments.

The creation of a Nomination Committee (under Item 16) with the sole purpose of identifying ILC Directors would not be consistent with Government policy to reduce and rationalise the number of government advisory bodies.

Item 17 – Establishment of Audit and Risk Management Committee

Proposal

Item 17 of the Bill requires the ILC Board to establish an Audit and Risk Management Committee with specified functions and an independent Chairperson.

Impact of proposal

This is already a requirement of the ILC. Section 45 of the PGPA Act states that the accountable authority of a Commonwealth entity must ensure that the entity has an audit

committee, and that this committee must be constituted, and perform functions, in accordance with any requirements prescribed by the rules of the PGPA Act.

Section 17 of the PGPA Rule 2014 sets out the minimum requirements of audit committees to ensure they provide independent advice and assurance to the entity's accountable authority. The proposed changes are not consistent with the PGPA Act and its objective to align audit committee arrangements across all Australian Government entities.

The ILC Board already has the ability to set up any committee it believes is necessary, and has had an Audit and Risk Management Committee in place since 1997. The primary objective of this Committee is to provide 'independent assurance and advice to the ILC Board on the risk, control and compliance framework, financial statement responsibilities and external accountability framework for the ILC' (ILC Annual Report 2012-13, p.13). In August 2012, the ILC Board appointed an independent chair to this Committee.

Item 20 – Disclosure of interests

Proposal

Item 20 of the Bill requires the Chair of the ILC Board to notify the Minister for Indigenous Affairs of all pecuniary interests and the Directors to disclose all pecuniary interests to the Board. The Board must keep a register of disclosed interests.

Impact of proposal

The PGPA and ATSI Acts already regulate the disclosure of interests. Specifically sections 25-29 of the PGPA Act set out general duties that apply to all officials, which includes the duty to disclose interests. In particular, section 29(1) requires an officer who has a material personal interest that relates to the affairs of the entity to disclose details of the interest.

Section 191W of the ATSI Act states that it is the 'responsibility of the ILC Board to ensure the proper and efficient performance of the functions of the ILC and to determine the policy of the Corporation with respect to any matter'. Section 192F also requires the Chair to disclose to the Minister for Indigenous Affairs all direct or indirect pecuniary interests that the Chair has or acquires in any business, or in any body corporate carrying on a business.

Item 21 – Determining and publishing a Code of conduct

Proposal

Item 21 of the Bill requires that the ILC Board must determine and publish a Code of Conduct which all officers (including a member, officer, employee or consultant of a subsidiary) must comply with.

Impact of proposal

Although the PGPA Act does not stipulate a separate Code of Conduct, but rather, sets out general duties that apply to officials, there is nothing limiting the ILC from having its own Code of Conduct.

Part 3: Other amendments

Context

As noted in Part 2, the purpose of the PGPA Act is to establish a coherent system of governance and accountability across Commonwealth entities.

Item 22 – Inserting new definitions

Proposal

Item 22 of the Bill inserts several new definitions into section 4(1) of the ATSI Act. In particular, the proposed amendments define an ILC officer as:

- an ILC Director;
- an employee engaged under section 192S;
- a person performing duties on behalf of the ILC under section 192T;
- an officer or employee made available to the ILC under section 192U;
- consultants engaged under section 192V; and
- a member, officer, employee or consultant of a subsidiary of the ILC.

Impact of proposal

This is broader than section 13(2) of the PGPA Act which defines the term ‘official’ as an individual who is in, or forms part of, the entity. This includes an individual who is, or is a member of, the accountable authority of the entity; is an officer, employee or member of the entity; or is an individual, or an individual in a class prescribed by the rules under section 13(3) of the PGPA Act.

However, under the PGPA Act, the term ‘officer’ does not include consultants or independent contractors (other than of a kind prescribed by the rules); or a member, officer, employee or consultant of a subsidiary (section 13(3)(b)). If passed, the proposed new definitions would create inconsistent duties for different ILC officials. This is because only ILC officials that are also officials for the purpose of the PGPA Act would be subject to the relevant PGPA Act duties.