



NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

**Submission to the Indigenous Land Corporation on the *Aboriginal and Torres Strait
Islander Act 2005 (Cth)***

September 2017

About the National Congress of Australia's First Peoples

The National Congress of Australia's First Peoples ("Congress") is the peak representative body for Aboriginal and Torres Strait Islander Peoples. Established in 2010, Congress has grown steadily and now comprises over 180 organisations and almost 9,000 individual members, who elect a board of directors.

Congress advocates self-determination and the implementation of the United Nations Declaration on the Rights of Indigenous peoples. Congress believes that Aboriginal and Torres Strait Islander people should be central in decisions about our lives and communities, and in all areas including our lands, health, education, law, governance, and economic empowerment. It promotes respect for our cultures and recognition as the core of the national heritage.

To date, Congress's main foci have been Aboriginal and Torres Strait Islander issues in the areas of health, education, land and sea rights, justice, Constitutional recognition, and sovereignty. In addition, Congress has been involved in a wide range of other issues, including cultural maintenance and development, including languages; government relations, including treaty discussions; employment and economic empowerment; housing; family violence; children and youth; disabilities; and governance and leadership.

Discussion Topic 1: Sustainability of the Aboriginal and Torres Strait Islander Land Account

- 1.1. Should the investment mandate of the Land Account focus on growing capital and maximising returns within acceptable risk parameters? Accepting that there will be some volatility within a longer term investment timeframe and that this is acceptable, as the Land Account has the time to 'ride out' volatility in financial markets?
- 1.2. Do you support a change in legislation which will allow a new investment mandate to be issued for the investments of the Land Account which:
 - secures the perpetual nature of the fund, and includes a fit-for-purpose risk-appetite statement
 - consistent with the risk appetite, establishes a target return for the Land Account over the long term
 - envisages a strategic asset allocation consistent with the target return and the risk appetite
 - continues to provide for a \$45m (in 2010 dollars) indexed payment to the ILC annually
 - suspends any additional payments to the ILC, where investment earnings exceed \$45m (in 2010 dollars)?
- 1.3. What is the most appropriate agency or body to manage Land Account investments?

The National Congress of Australia's First Peoples ("Congress") is broadly supportive of the notion that the investment mandate of the Aboriginal and Torres Strait Islander Land Account ("Land Account") should focus on growing capital and maximising returns within acceptable risk parameters. This is particularly the case given that, as the Indigenous Land Council's ("ILC") discussion paper stipulates, the Land Account's investment timeframe is long term, blunting the effect of any short-term fluctuations in financial markets.¹ Congress notes, however, that some care should be taken to ensure that any investments in products other than cash and cash-like products are not excessively risky, given that any particularly severe period of market volatility could have the potential to either create losses for the Land Account or to lead to the erosion of annual payments made to the ILC. To that end, provided it is relatively conservative, Congress welcomes the recommendation that the new investment mandate should include a "fit-for-purpose risk-appetite statement," and that any investments that are made should be "consistent with the risk appetite."²

Congress understands that the suspension of current arrangements for additional payments to be made to the ILC when the real value of the Land Account exceeds the target value will lead to a diminution of the ILC's funding in the short-term. However, this arrangement effectively reduces the buffer which would otherwise exist to protect the Land Account during times of economic volatility. Therefore, Congress accepts that the abolition of *additional* (i.e. not annual) payments to the ILC may be necessary to ensure the long-term

¹ Indigenous Land Corporation, *Consultation Discussion Paper June 2017*, 5.

² *Ibid*, 8.

viability of the Land Account. Congress regards this viability to be particularly important, given the ILC's mission of purchasing land in order to further Aboriginal and Torres Strait Islander development, and to overcome barriers and inadequacies in the native title system which prevent our peoples from controlling and benefiting from our land.

Congress stresses that the agency charged with the management of the Land Account should retain some degree of independence from both the ILC and the Australian Government. Congress is particularly concerned by reports that former ILC Board Members sought a commitment from current Minister for Indigenous Affairs Nigel Scullion to allow the ILC to access the Land Account in order to fund the purchase of the Ayers Rock Resort if he were re-elected.³ Congress is also concerned about possible political interference in other decisions ostensibly made by the ILC, including the decision not to consider Congress' application for divestment, and the decision to replace Congress with a tenant closely associated with the Minister that reportedly pays a small fraction of market rent. Furthermore, the ILC acts under a shroud of secrecy. None of Congress' inquiries about its decisions has received a response. The Land Account must not be politicised, nor used as a "bargaining chip" to interfere in Aboriginal and Torres Strait Islander affairs, especially given its crucial role in funding the ILC. Similarly, a degree of separation must be maintained between the ILC and the Land Account to guarantee accountability. In this regard, Congress regards the Australian Government Future Fund, which is independently managed, to be a reasonably appropriate agency to manage the Land Account.

Discussion Topic 2: Supporting Water-related Activities

- 2.1 Should the ATSI Act be amended to extend the ILC's functions to water-related activity?
- 2.2 Should the ILC be able to assist Aboriginal and Torres Strait Islander people to manage, use and care for waters?

In principle, Congress supports the amendment of the *Aboriginal and Torres Strait Islander Act 2005* to extend the ILC's functions to water-related activity, and to allow the ILC to assist Aboriginal and Torres Strait Islander peoples in the management, use and care for waters. Although the significance of waters to Aboriginal and Torres Strait Islander peoples is impossible to homogenise or summarise in one report, Congress notes that waters possess a spiritual importance as the source of both life itself and values which shape our community life. Many traditional cultural activities, such as fishing, hunting and ceremony, are centred around waters which are important to our peoples.⁴ Given that the modern systems by which rivers and other bodies of water are managed by the Australian Government possess little in the way of protections for Aboriginal and Torres Strait Islander values, the empowerment of the ILC to manage waters could be a welcome development.⁵

³ Sally Brooks, "Allegations of largest ever 'evaporation' of Indigenous money in Uluru resort deal," *ABC News Online* (8 July 2015), <http://www.abc.net.au/news/2015-07-07/allegations-of-30-million-missing-in-uluru-resort-deal/6599576>.

⁴ Australian Human Rights Commission, *Native Title Report 2008*, 171-2.

⁵ *Ibid.*

However, Congress must express serious concerns regarding the ability of the ILC to appropriately manage both the funds that it has access to and the land which it has purchased under its mandate. The purchase of the Ayers Rock Resort in 2010 at the inflated cost of \$300 million, which led to the loss of approximately \$100 million, serves as an illustrative example of the inadequate implementation of accountability, auditing and risk assessment measures by the ILC.⁶

Congress is particularly concerned by the apparent failure of the processes usually put in place to ensure that decisions made by the ILC are accountable. The McGrathNicol report commissioned following the Ayers Rock Resort purchase highlighted that although \$6 million was spent on due diligence consultants, none appear to have actually been engaged during the process of purchasing the resort.⁷ Similarly, the ILC's own audit committee appears to have had "almost no involvement in the transaction."⁸ Congress is also concerned that the minutes taken during the relevant meetings of the ILC's Board did not indicate the views and votes of each of the board directors.⁹ This has the potential to silence dissenting voices on the ILC's Board and falsely portray the decision to purchase the Ayers Rock Resort as uncontroversial. Furthermore, Congress is troubled by the fact that the decision to spend \$300 million on a property could have been approved by a mere simple majority of the Board.

Congress is also concerned by the fact that the ILC appears to have ignored the risks identified prior to the purchase of the Ayers Rock Resort. These include the fact that the purchase price of the resort was significantly higher than even the most optimistic valuation which had been made 17 months prior to the purchase.¹⁰ Furthermore, the revenue estimates used to justify the purchase were "hopelessly optimistic,"¹¹ especially given the downturn in visitor numbers which could reasonably have been predicted due to the volatility of the Australian economy in 2010.¹² The remoteness of the Ayers Rock Resort similarly meant that its profitability was out of the control of the ILC, and reliant on decisions of third parties such as airline companies and tour operators.¹³ The failure to account for these risks indicates the existence of serious issues of accountability in the ILC's decision-making process. Congress asserts that such issues must be resolved before the ILC seeks to expand the scope of its operations.

There are many other examples of the ILC's incompetent or negligent management of assets. Among them we cite the ground floor of a major asset in Redfern, NSW lay vacant

⁶ "Ayers Rock Resort: GFC blamed as Indigenous Land Corporation secures \$65ml bailout," *ABC News Online* (8 May 2016), <http://www.abc.net.au/news/2016-05-08/ayers-rock-resort-65m-bailout-nigel-scullion/7393378>.

⁷ McGrathNicol, *Ayers Rock Resort Review – Final Report* (2013), 56.

⁸ *Ibid*, 64.

⁹ *Ibid*, 62.

¹⁰ "Ayers Rock Resort: GFC blamed as Indigenous Land Corporation secures \$65ml bailout."

¹¹ *Ibid*.

¹² McGrathNicol, 51.

¹³ *Ibid*, 50.

for almost seven years, providing no return on investment whatsoever other than capital gain. Another example is the former multi-storey ATSIIC building in Belconnen, ACT which appears to have been abandoned and has now been vandalised.

Perhaps most worryingly, Congress notes that the ILC has historically had a tendency to operate against the wishes of the Aboriginal and Torres Strait Islander communities. According to the McGrathNicol report, for instance, the ILC's purchase of the Ayers Rock Resort was completed with the support of neither the Aboriginal and Torres Strait Islander sector nor the Australian Government.¹⁴ Aboriginal groups in the Kimberley, where the ILC has been particularly proactive in purchasing properties, have also expressed the view that there has been a lack of communication and consultation from the ILC.¹⁵ Although the ILC has committed to regional consultations as one of its key principles, many people are not adequately informed of when meetings occur, or do not receive the support they require to attend.¹⁶ Indeed, Congress notes that it has been forced to relocate from its previous premises by the ILC, despite its significant position as the peak representative body for Aboriginal and Torres Strait Islander peoples. Congress urges the ILC to re-evaluate its commitment to consultation and working alongside First Peoples before seeking to expand its mandate to cover water-related activities: many of our peoples feel that the ILC is out of touch and does not adequately protect our interests.

Congress further notes that many communities affected by the ILC's purchasing decisions have felt that inadequate progress has been made towards divestment, and that they have not received any benefits from the acquisition of land.¹⁷ Money earned from properties purchased by the ILC, for instance, is often reinvested by the ILC for its own purposes, instead of being placed in a trust for traditional owners or the original native title applicants.¹⁸ Furthermore, the offer of employment is not always particularly helpful: many people employed on the ILC's properties are either not Aboriginal or not from the area, and many are also employed on only a casual basis.¹⁹ Although employment and training benefits are more pronounced in projects such as the Ayers Rock Resort, the actual potential for Aboriginal and Torres Strait Islander peoples to gain self-determination and actual control over our land from such projects is limited. The Ayers Rock Resort, for instance, is owned by Voyages Indigenous Tourism Australia, a Sydney-based subsidiary of the ILC, and therefore local peoples have very little actual control over the ways in which the ILC's properties are operated.²⁰ As a result, communities largely do not have a say in how training programs can best benefit them.²¹ The training that is provided is frequently of a practical (i.e. fencing, yard building or service provision) rather than commercial nature,

¹⁴ Ibid.

¹⁵ Patrick Sullivan, *Policy Change and the Indigenous Land Corporation*, AIATSIS (2009), 12.

¹⁶ Ibid, 12-13.

¹⁷ Ibid, 13.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Voyages Indigenous Tourism Australia, "At a Glance,"

<https://www.voyages.com.au/about-us/at-a-glance> (Accessed 19 September 2017).

²¹ Sullivan, 13.

and therefore does not provide our peoples with the skills they need to attain financial independence.²²

Progress towards divestment of ILC-owned properties has also been stymied by a lack of support for local Aboriginal and Torres Strait Islander communities. While Congress recognises that the ILC provides native title applicants with some funds and the use of qualified consultants in order to develop business plans, mere funding is inadequate.²³ Communities, which are frequently under-resourced and lack the skills required to undertake the ILC's application process, require *ongoing support and communication*. The difficulties which our peoples face have been exacerbated by the complexity of the ILC's divestment requirements and inadequate clarification of how communities may meet them.²⁴ Furthermore, as in Congress' case, the ILC can dismiss consideration of applications for the flimsiest reasons and is unwilling to enter into any discussions about its processes or justify its decisions. As a result, Congress believes that the ILC's primary function – to provide our peoples with the means to benefit from and control our land where they are unable to access native title protections – is being ineffectively carried out.

Congress supports in principle the notion that a body responsible for managing water-related activities should exist. However, we possess serious doubts as to the ILC's capacity to bear this responsibility. As discussed above, the ILC's attempts to depart from its original purpose of land management and engage in property development have been largely unsuccessful: Aboriginal and Torres Strait Islander communities receive sub-optimal benefits from ILC investment, and the ILC continues to lack the skills to efficiently manage property, assess divestment applications on their merits, and remain independent from political interference.

Congress recommends that while Aboriginal and Torres Strait Islander water rights should be represented by a specialist body, we are not convinced that the ILC is the appropriate body. Instead of seeking to expand its mandate to include water management, the ILC should engage in a thorough, external review of its own procedures in which the views of the intended beneficiaries of its services are primary. There is little use in allowing the ILC to manage waters (or indeed, land) if such management does not fulfil the purpose of providing our peoples with assistance in the acquisition and management of our own land.

²² Ibid.

²³ Ibid.

²⁴ Ibid, 13-14.