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Senate Standing Committees on Community Affairs
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CRICOS Provider No. 00120C

Dear Honorable Senators,

Inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 [The Bill]

I refer to your letter of 30 July 2014 and thank you for the invitation to make this this submission. This submission consists of two Parts. Part I contains some general reflections on the proposed law. Part II makes some specific points on the clauses which are part of the proposed amending law

PART I

It is suggested that the proposed law be amended as follows:

- To strengthen the Bill by including provisions that prohibit non-land related *purchases* from the Land Account, and further to prohibit *transactions* that do not have a close, reasonable nexus with such purchases.
- To provide strong and strict control measures over the use of the Land Fund. Oppose actions that will weaken such measures [E.g. the amalgamation of the substantive functions of the ILC and IBA thus creating potential conflicts of interest within a combined organisation].
- Strengthen the corporate governance measures related to the ILC generally but with specific emphasis related to the activities of the Board. It is proposed that the Bill includes provisions to ensure that such control measures are commiserate with those of the corporate governance mechanisms mandated in the Corporations Laws, (including say for large organisations where applicable under the *CATSI Act*¹), enacted under s 51(xx) of the Constitution.
- To support the growth of the land fund in *real* terms. However that this growth is to be achieved while ensuring that investment options available to the Land Fund are circumscribed by what would reasonably be characterised as 'conservative investment options'.
- To include provisions that broaden the scope of the powers of the ILC to allow the ILC to purchase interests in land (but interests which are by legislation deemed, to not *ipso facto* alienate the land in which such interests lie) and applies to such lands over which Traditional Owners have native title

¹ *Corporations (Aboriginal and Torres Strait Islander) Act 2006.*

interests (in the meaning of section 223 of the *Native Title Act 1993* (Cth)]. The purpose of the creation of these interests is to enable the ILC to assist and encourage Traditional Owners to carry out economic activity for the benefit of the Traditional Owners. For example, this law could allow the creation of a fee simple type interest on, but not over the whole land, on which native title has been found to survive, so that economic activities involving, and reasonably for the benefit of traditional owners, will become easier to pursue (for example the construction of infrastructure in which the ILC could acquire a proprietary interest). That is, to create new estates in land that apply peculiarly to such native title land, and which recognises the need for such lands not to be alienated and remain inalienable, but for the ILC (or its subsidiaries alone) to be permitted to invest in such development programmes on such land, and who are permitted to acquire and own legal estate in real property, but interests which are limited to real property interests other than the land. Once such transaction run their term and/or the loans discharged and profits paid to the ILC, that the full beneficial ownership of these small parcels of land and the buildings upon this land are returned to the Traditional Owners and that native title rights and interests resume henceforth.

- To provide definitional guidance to interpreters of the legislation so that ‘new’ terms can be interpreted more closely and in accordance with Parliament’s intention. [e.g., the use of the word ‘despite’ as opposed to the traditional term ‘notwithstanding’ that would normally have been used in this context [at the proposed 192X(2)].
- To ensure that all legislative tests related to the activities of stakeholders related to what may constitute ‘land related benefits to Aboriginal and Torres Strait Islander people’, are required to be objective.
- To strengthen the consultation provisions with the Indigenous community. To provide in the Act that any resulting consent was free, prior and informed in the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples*.
- We oppose the merger of the ILC and IBA and request the Minister take cognisance of the conflicts to which the Ernst and Young Report² allude.

PART II

This part contains a Table (*Table 1* below) which refers to the provisions of the proposed Bill with some suggested related amendments which appear in the adjacent column.

Provision	Suggested amendment/s to the provision
191AB(1)(e)	to provide both retrospective and prospective compensatory mechanisms in the meaning of section 51(xxxi) of the Constitution
191AB(3)	Land-related benefit ... ‘means <u>the acquisition of interests in land</u> [...] in the meaning of ss 191B and 192X.
192X(2)	[...] from the Land Account must not be used for a purpose other than for: (a) [...]
192X(2)	Delete subsections (b) and (c)

² Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014, 7.

Provision	Suggested amendment/s to the provision
193GA(3)	The Finance Minister must [...] <u>or provide written substantive reasons as to why such advice was not followed.</u>
191F(1A)	While this submission supports the intent of the proposed amendment in improving governance and compliance with the regulatory framework for government statutory entities, it is suggested that the operation of the ILC is explicitly made subject to and regulated in a manner similar to that applying to corporations under the Corporation Law (including governance and regulatory measures that apply to large Indigenous Corporations under the CATSI Act). That is, if this not already possible under the current law, that the ILC is subjected to both financial and performance audits.
191W(3)	See comment and suggestion under 191F (1A) above with respect to the Corporations Law.
191X(3)	Add: To avoid ambiguity, consultation in this provision means formal and substantive consultation.
191XA(1)	The Minister must establish <u>and reasonably and adequately resource</u> a Nomination Committee [...]
191XB(4)(c)	[...] <u>ILC Director and to provide an opinion as to whether the person is reasonably likely to be able to discharge his/her duties as a Director in the meaning of the Corporations Law.</u>
191XB(6)	Replace 'If the Minister makes an appointment' with ' <u>When the Minister makes appointments a Director to the ILC under this Act</u> ' [...]
191YA	Replace 'considers necessary' with 'reasonably considers necessary'.

Provision	Suggested amendment/s to the provision
191YB	Agree in principle but see also #191F(1A) above
192F	Provisions on the disclosure of interests should mirror disclosure provisions stipulated under the Corporations Law. For example see section 268.1 <i>CATSI ACT</i>
192SA(1)	Replace 'determine' with 'establish'. In addition to the Public Service Act 1999 referred to in subsection (3), Directors should as mentioned above be held to standards that reflect the Corporations Law.

Table 1

The authors strongly support the general thrust of this proposed Bill and applaud its object and purpose, particularly those provisions which are aimed at strengthening the governance and accountability measures surrounding the ILC. We also support the broader general intent to incorporate a greater active role of Indigenous people in all the substantive processes related to the acquisition and sound management of land that is purchased under this law. We are happy to provide further information and to appear before the Committee if necessary.

Yours Sincerely

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