



26 August 2014

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam

Please find enclosed a submission from the Anti-Discrimination Commission Queensland to the Senate Community Affairs Legislation Committee on the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014*.

Thank you for the opportunity to make this submission.

Yours sincerely

KEVIN COCKS AM
Anti-Discrimination Commissioner
Queensland

STATEWIDE

telephone 1300 130 670
teletypewriter 1300 130 680
www.adcq.qld.gov.au
info@adcq.qld.gov.au

BRISBANE

level 17 53 Albert Street
Brisbane Q 4000
City East Post Shop
PO Box 15565
City East Q 4002
DX 44037
FAX 07 3247 0960

CAIRNS

McLeod Chambers
78 Spence St
PO Box 4699
Cairns Q 4870
DX 41346
FAX 07 4039 8609

TOWNSVILLE

level 2 St James Place
155-157 Denham St
Townsville Q 4810
DX 41421
FAX 07 4799 7021

ROCKHAMPTON

level 1 James Lacombe Place
209 Bolsover St
PO Box 1390
Rockhampton Q 4700
DX 41168
FAX 07 4938 4459



Stronger Land Account Bill Submission

**Submission by the Anti-Discrimination Commission Queensland
to the Australian Parliament, Senate Community Affairs
Legislation Committee on the *Aboriginal and Torres Strait
Islander Amendment (A Stronger Land Account) Bill 2014***

21 August 2014

Introduction

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991* (AD Act).
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights.
3. On 26 June 2014, the Senate of the Australian Parliament referred the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014* to the Senate Community Legislation Committee for inquiry and report.
4. The Commission is pleased to provide this submission in response to the Inquiry.
5. This submission focuses on the human rights issues associated with the creation of the Aboriginal Land Account. The submission also makes suggestions on how those issues should be dealt with in the legislative framework associated with the administration of the Land Account.

Historical Background

6. In 1992 the High Court Australia delivered one of the most significant legal decisions in Australia's history in the *Mabo* case¹ which recognised that:
 - At the time of colonial settlement in Australia Aboriginal and Torres Strait Islander peoples had native title to their traditional lands and that that title survived Crown annexation, and
 - Since 1788 much of that title had been extinguished without compensation to the original owners of that title.

¹ *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

Human rights

7. One of the most basic human rights is the right to own property and possessions.
8. The Universal *Declaration of Human Rights* at Article 17 states:
 1. Everyone has the right to own property alone as well as in association with others.
 2. No one shall be arbitrarily deprived of his property.
9. The Australian *Constitution* recognises this basic human right. Under the *Constitution*, if the Commonwealth government wishes to compulsorily acquire property from a person, it is required to pay just terms to compensate that person for the acquisition of their property.
10. Section 51 of the *Constitution* provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxi.) The acquisition of property **on just terms** from any State or person for any purpose in respect of which the Parliament has power to make laws.
(emphasis added)

11. Article 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination* requires Australia, *inter alia*, to:

... undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

...

12. However, until the Commonwealth passed the *Racial Discrimination Act* (RDA) in 1975, there was no prohibition on race discrimination in Australia.

Human rights and the Mabo case

13. The decision by the High Court in the first *Mabo* case made it clear that any alienation of land from Aboriginal and Torres Strait Islander people after 1975 had to be done in a non-discriminatory way in order not to breach the RDA.² Since the handing down of the *Mabo* decision, there has been much legal debate about the legal nature of native title, and whether or not it is a proprietary right or a right to property.³
14. Whatever its legal nature, from 1975 onwards, any extinguishment or alienation of native title held by Aboriginal and Torres Strait Islander people by the Commonwealth or the States had to be done in a non-discriminatory way, which in most cases would require the payment of compensation.
15. This is the context for the establishment of the Aboriginal Land Account. The Land Account came out of the negotiations that took place between Aboriginal and Torres Strait Islander leaders and the Australian Government following the delivery of the *Mabo* decision in 1992 and the passing of the *Native Title Act* in 1993.
16. Among a group of other measures, the creation of the Land Account was in recognition of and partial compensation for all the native title lands that had been appropriated since 1788, including those native title lands appropriated after 1975 and before the passing of the *Native Title Act* in 1993. An Indigenous Land Corporation was established to administer the

² *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988).

³ Chief Justice Robert French, 'Native Title – A Constitutional Shift?' (Speech delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009).

Aboriginal Land Account, and to utilise the funds to assist Aboriginal and Torres Strait Islander persons to acquire and manage land.

17. In her second reading speech for the Bill, Senator Siewert outlined some of the highly significant history that led to the establishment of the Aboriginal Land account, and the Indigenous Land Corporation. She said:

So the Land Account was established to provide recognition and partial compensation for the fact that most Aboriginal and Torres Strait Islander peoples were unlikely to benefit from the Native Title Act. For those Aboriginal and Torres Strait Islander peoples, the Land Account provided them with an opportunity to be—at least in part—compensated for what had been taken from them.

The ILC was set up with the Land Account for one purpose: ‘to enable Indigenous people to acquire land and maintain it in a sustainable way to provide economic, social and cultural benefits for themselves and for future generations of their people’. **But it wasn’t just Aboriginal and Torres Strait Islander peoples who were to benefit from this bargain. Through these negotiations, Aboriginal people gave up significant rights in order to give non-Indigenous Australians certainty over their land title, and the Land Account recognised this fact.** (emphasis added)⁴

Recent events – review reports

18. On 2 December 2013, the Commonwealth Minister for Indigenous Affairs initiated a review of the Indigenous Land Corporation (ILC) and the Indigenous Business Australia (IBA) to be undertaken by Ernst & Young.
19. The terms of reference were to review IBA and the ILC and to develop recommendations on the following:
- The effectiveness of IBA and the ILC, as currently constituted, in driving economic development through employment, training, business development, land acquisition and management and home ownership;

⁴ Parliament of Australia. Senate. *Hansard*, Second reading speech, 24 June 2014, page 37.

- The optimal structure and function of government effort to drive Indigenous economic development, including consideration of whether outcomes could be enhanced by integrating IBA and ILC into a single entity;
 - If a statutory body is considered the best approach, how to structure arrangements to ensure:
 - efficient administration and reduced red tape
 - transparency and accountability of public funds
 - appropriate powers of Ministerial direction or Government control.⁵
20. The review commenced on 3 December 2013 and the final report was submitted on 17 February 2014. The Minister publicly released the report on 4 May 2014. While the report recommended that the ILC and IBA remain separate organisations, the Government’s Commission of Audit report released on 3 May 2014 recommended a merger of the two agencies. The Government has not yet indicated if it will be acting on the recommendations of either report.

Ernst & Young report

21. In their report, Ernst & Young discussed the history behind the establishment of the Land Account and the Indigenous Land Corporation in these terms:

Many stakeholders were equally clear that the matter of compensation for the dispossession of land remains fundamental. We have referred to this phenomenon as “honouring the land promise”. The “land promise” reflects the establishment of the Aboriginal and Torres Strait Islander Land Account (the Land Account) to provide a secure income to the ILC. In effect the ILC was the culmination of decades of action by Indigenous Australians to seek recognition to address their dispossession from traditional lands and seas. The most significant and high profile achievement was the

⁵ Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014.

Mabo decision when the High Court of Australia recognised common law native title for the first time. There were many consequences arising from this decision, and three commitments made by the Keating Government: “to enact native title legislation, to establish a land fund for Aboriginal and Torres Strait Islander people whose native title had been extinguished and a social justice package.” The native title legislation was enacted, the ILC and the land account established but while the features of a social justice package were identified these were never enacted formally. Seen in this context the “land promise” is more than a fund but a marker in the history of recognition and land rights for Indigenous Australians.⁶

22. Ernst and Young noted that:

The Land Account was established to provide a secure income in perpetuity to the ILC to provide economic, social, cultural and environmental benefits to Indigenous people by assisting in the acquisition and management of an Indigenous land base. We understand that there is no interest on the part of the Government to change the purpose of the Land Account or the ILC’s functions towards commercial activity. Instead we are clear that by virtue of the Land Account effectively being annexed from the review that its original intent remains intact and thus the Board of a new entity emerging from the ILC and IBA would be required to quarantine its commercially focused decisions from activities funded by the Land Account.

23. They also observed:

The purpose of the ILC and IBA was a constant theme in submissions and during our consultation and what emerges is a consensus that the original mandates of the organisations require refocusing and clarification because while at times the purpose and functions of the ILC and IBA appeared to overlap, they remain, from our observations, distinct in nature and scope.

Commission of Audit report

24. The Government’s Commission of Audit report was released on 3 May 2014 and recommended that the ILC merge with Indigenous Business Australia to achieve efficiencies.

25. The Anti-Discrimination Commission Queensland is concerned that any new arrangement proposed for the ILC comes with a risk that funds from the Land Account will be diverted to non-land commercial purposes. The

⁶ Ibid 7.

beneficial owners of the Land Account are Aboriginal and Torres Strait Islander peoples. The intention of the legislation setting up the Land Account and the ILC was that the government of the day would ensure Land Account funds were used for their original purpose - to provide land acquisition and management assistance to Aboriginal and Torres Strait Islander peoples across Australia.

The Stronger Land Account Bill 2014

26. Significant human rights issues provided the background to the negotiations that lead to the creation of the Indigenous Land Corporation and the establishment of the Land Account. Unfortunately, in hindsight those background issues were not adequately reflected in the legislation that established these entities.

Anti-Discrimination Commission Qld support for the Bill

27. What was apparent to the legislators at the time of their creation can become less clear with the effluxion of time, and the moving on of those involved in the negotiation and creation of the entities. There is a need to strengthen legislative recognition of the unique status of the Land Account.
28. For these reasons, the Commission supports the passing of the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014*. The Bill before Parliament would protect and strengthen the Land Account in the longer term, and ensure the human rights compromises that were made at the time of the Native Title negotiations are reflected in the legislation.
29. In her second reading speech Senator Seiwart said:

This Bill makes it clear that it is the Commonwealth's responsibility to manage the Land Account for the sole benefit of Aboriginal and Torres Strait Islander peoples. It reinforces the nature and purpose of the Land Account as being partial acknowledgement for the dispossession of Aboriginal and Torres Strait Islanders' lands. It

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gives Aboriginal people and Torres Strait Islanders an assurance that the Land Account will be protected for the benefit of future generations.

The Bill prevents Land Account funds from being utilised for any purpose other than the original intended purpose of acquiring and managing land for the environmental, social, cultural and economic benefit of Aboriginal and Torres Strait Islander peoples. The Bill also includes provisions to enable the Land Account to grow over time, to ensure that future generations of Aboriginal and Torres Strait Islander peoples can continue to benefit from the opportunities it provides to strengthen their links to the land.

30. In particular the Commission supports the Bill:
- Expanding the objects of the Land Account, to properly articulate its significance and its origins in the native title settlement of the 1990s.
 - Making sure that the Land Account can be used only as originally intended: to buy and manage land for Indigenous Australians.
31. The Commission believes the Bill also addresses some of the Commission of Audit's broader concerns about duplication, overlap and inefficiencies within government, clarifies the role of the ILC and strengthens accountability.
32. The Commission thanks the Committee for the opportunity to make this submission.