

9 March 2015

Senator Zed Seselja
Chairperson
Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

Further to my letter of 5 March 2015, I have now been able to read copies of the letters between the Minister for Indigenous Affairs, Senator Nigel Scullion, and the Minister for Finance, Senator the Hon Mathias Cormann, which apparently have been now tabled in the Senate, together with a statement issued by the ILC and particularly the Chairperson, Dr Dawn Casey, on 3 March 2015, a copy of which is attached.

The paragraph highlighted on the second page has already been found by the Aegis Report dated May 2014 to be both false and misleading and it is clear that the Senate and your Committee are being deliberately misled.

A copy of the May 2014 Aegis Report is attached for your consideration.

It is disconcerting in the extreme that such outrageous behaviour is allowed to continue without foundation and I note that despite the Minister for Indigenous Affairs requesting the so called "large information now available", no such information has currently been made available.

Please don't hesitate to contact me if I can provide any further information.

Yours sincerely

David Baffsky AO

Cormann reversal "inexplicable and incomprehensible" (Tuesday, 03 March 2015)

The Indigenous Land Corporation Chairperson Dr Dawn Casey today described the Minister for Finance's decision to reverse his earlier decision to commission an investigation into alleged serious corporate governance failures by the former Board of the ILC in relation to the purchase of Ayers Rock Resort as "inexplicable and incomprehensible".

"The ILC calls on Minister Cormann, the Minister responsible for regulation of public sector corporations, to reinstate his earlier decision to initiate a review of the former ILC Board's decision to acquire Ayers Rock Resort," Dr Casey said.

"The correspondence tabled in the Senate last week shows that Minister Scullion was instrumental in reversing Minister Cormann's original decision.

"Minister Scullion's antipathy to an investigation is difficult to understand. There is already a huge amount of information on the public record suggesting the decision making around the former Board's decision was fundamentally flawed.

"The Government must analyse the actions of all those involved in purchasing the resort to see if they met their legal obligations.

"The ILC believes the proposed investigation should be carried out by a respected and independent former judge or Senior Counsel. The investigation's terms of reference must be determined independently. In particular, the terms of reference should include a specific requirement to assess the compliance of the former ILC Directors with their statutory and common law duties.

"Good policy and good government demand it.

"The issues at stake are fundamental to proper public administration, and proper regulation of statutory corporations. If not dealt with appropriately, they will also impact on the ILC's core functions, and lead to diminished services to Indigenous land holders across Australia for years to come," Dr Casey said

The ILC is also releasing the statement (below) following the tabling of correspondence in the Senate Estimates Committee last week.

Media enquiries to Eric Roberts on 0417 818482

Statement by Indigenous Land Corporation Chairperson Dr Dawn Casey

Ayers Rock Resort, operated by ILC subsidiary Voyages Indigenous Tourism Australia, is operating successfully, and has improved its financial performance over the past two years since a significant refresh of its Board. Voyages continues to win tourism awards for its services and employs around 250 Indigenous employees and trainees, over 30 percent of its workforce at Yulara.

However, the acquisition of the resort has involved huge financial losses for the ILC. The transaction was also based on an extraordinary level of borrowings (around \$200m in total) which was to be covered by revenues from the operation of the resort. This has not been the case to date, and won't be the case for at least five to 10 years. In these circumstances, it falls to the ILC to cover the debt from the revenues allocated to it from the Land Account for its ongoing operations. These liabilities are adversely affecting the capacity of the ILC to deliver its statutory land acquisition and management functions and will do so into the future.

Letters tabled in Senate Estimates last week reveal that while the Minister for Finance Senator the Hon Mathias Cormann had agreed an investigation into the transaction is required, following a request from Minister for Indigenous Affairs Senator the Hon Nigel Scullion, a decision has been taken not to initiate that investigation.

Minister Scullion has claimed that the ILC has provided no new information to justify an investigation into the transaction, and claims that there have been three investigations which have already subjected the transaction to a high level of Government and independent scrutiny.

The ILC Board wishes to emphasise that none of the inquiries undertaken were focussed on assessing the compliance of the former ILC Directors and officers with their legal duties. An investigation is required to analyse the huge amount of information now available and to assess the legal ramifications.

The only independent and publicly available review of the transaction itself, undertaken by McGrathNicol, identified a large number of corporate governance and due diligence failings, including use of out of date forecasts and a failure to declare actual conflicts of interest. Given these findings, it is now essential that a further investigation examine in detail whether former ILC Directors and officers complied with their legal duties.

The ILC has recommended that Minister Cormann obtain an assurance from Minister Scullion that he does not have an actual or potential conflict of interest in relation to the former Board's decision to acquire the resort. Based on the correspondence tabled in the Senate, Minister Cormann does not appear to have obtained such an assurance. In these circumstances, the ILC does not consider it would be appropriate for Minister Scullion to oversight the investigation.

Persons who take remunerated directorships on statutory corporations must be held accountable for their actions, and if found to have breached their duties should not be re-appointed to similar positions.

The ILC Board notes Minister Scullion has recently appointed one of the former ILC Directors involved in this matter to the Board of a Statutory Corporation and an Expert Panel; and the Director of Public Prosecutions has recently withdrawn a criminal prosecution of another former ILC Director involved in the transaction related to the leak of Commonwealth information on the basis that such a prosecution was not in the public interest even though *there remained sufficient evidence to proceed with the prosecution*.

The letters tabled in the Senate are available at

http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/fapactte/estimates/add1415/cross/index

3 March 2015

Review of Indigenous Land Corporation Issues

Supplementary Report to January 2014 Aegis Report

Prepared for the former Directors of the ILC
and Voyages

May 2014

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About Aegis Consulting Group

Aegis is an independent advisor to government, corporate and non-government organisations on:

- Public Policy
- Economics
- Government
- Strategy

Aegis was established in 2002 and has an international team of consultants in Sydney, Cairns, Singapore and London.

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SUMMARY OF KEY FINDINGS

These findings relate to claims about the Ayers Rock Resort (ARR transaction), former Directors of the ILC and Voyages, advisors to the ILC, and the governance of the ARR transaction by the former ILC Board made in:

- A letter dated 5 January 2014 from the Chair of the ILC, Ms Dawn Casey, to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) and copied to the Hon Tony Abbott MP, Prime Minister (the ILC letter). The letter has been published on the ILC website.
- Evidence given by the ILC CEO, Mr Mike Dillon, to the Senate Finance and Public Administration Legislation Committee (Senate Committee) on 28 February 2014¹ (ILC Senate Committee evidence).
- Statements by the Chair of the ILC, Ms Dawn Casey, on 17 April 2014 made in a radio interview on the ABC Sunday Profile program (the radio interview)².

The ILC letter and ILC Senate Committee evidence explicitly suggest that the claims made are supported by the findings, conclusions or recommended actions in the McGrathNicol (MN) report (December 2013), commissioned by the ILC. The radio interview suggests that claims made are supported by the MN report and the Deloitte report (March 2013) which examined ILC governance arrangements.

ILC Actions and the Application of the Commonwealth Authorities and Companies Act 1997 (CAC Act)

Key Finding 1 - Claims in the ILC letter, ILC Senate Committee evidence and radio interview may breach CAC Act

The ILC letter makes claims that potentially cause detriment and damage to the reputations of former Directors of the ILC, advisors to the ILC, the ILC and the Minister. The ILC Senate Committee evidence makes claims that potentially cause detriment and damage to the reputations of former Directors of the ILC, advisors to the ILC and the ILC. The ILC letter and ILC Senate Committee evidence indicate that the claims are made on the basis of alleged evidence in the MN report.

This Aegis supplementary report has found that the claims made are not supported by any findings, conclusions or recommendations in the MN report, or are based on the selective use of information in the MN report which does not reflect the overall conclusions in the MN report. Accordingly it is a misleading or false statement to claim that the MN report provides evidence for the claims, particularly in relation to claims about one or more Directors.

The radio interview makes claims that potentially cause detriment and damage to the reputation of the former Directors of the ILC and Voyages Boards and advisors to the ILC. The interview includes statements that indicate the claims are based on alleged findings in the MN report and Deloitte report.

¹ Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

² Sunday Profile, ABC Radio, 17 April 2014

This Aegis supplementary report has found that the claims made are not supported by any findings, conclusions or recommendations in the MN report or the Deloitte report. Accordingly it is a misleading or false statement to claim that the MN and Deloitte report provides evidence for the claims.

Asserting misleading or false statements may mean that the Chair and CEO of the ILC may have improperly used their positions or information available to them, in their capacities as Commonwealth officials for the purposes of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), to cause detriment to the former Directors of the ILC and Voyages, the ILC, advisors to the ILC, and the Minister. This is prohibited under sections 24 and 25 of the CAC Act.

ILC use of the MN Report

Key Finding 2 - Assessment of MN report support for claims in ILC letter, ILC Senate Committee evidence and radio interview

The tone, words and fabric of argument contained in the ILC letter, ILC Senate Committee evidence and radio interview seem to suggest that the claimants are attempting to use findings in the MN report to allege that there was at worst impropriety, and at least incompetence, at Board level in relation to the ARR transaction and that the purchase was flawed. This interpretation of the MN report findings is not consistent with the overall conclusions of the MN report.

The overall conclusion of the MN report (page 12) is that, in their opinion, when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that “*the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk*”.

However it should be noted that this conclusion is not consistent with the findings of KPMG in 2011. In its consideration of the ILC borrowing limits and guarantee powers KPMG examined the ARR transaction and related Board governance in detail and concluded that the “*comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles*”³.

³ KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits April 2011; p49. The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversighted by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

Claims about a particular former ILC Director

Key Finding 3 - Procurement of ARR transaction consultancies

The ILC letter and radio interview claim that the MN report found that a Director was responsible for the procurement of consultants in ways that did not comply with ILC procurement policies and that this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Key Finding 4 - Audit and risk management committee: length of Chair's term

The ILC letter claims that the MN report found that the length of time that one Director had been Chair of the ARMC and his simultaneous involvement in the ARR transaction created an inherent conflict of interest. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Key Finding 5 - Audit and risk management committee: oversight of ARR transaction

The ILC letter and ILC Senate Committee evidence claim that the ARMC did not oversight the ARR transaction because one Director had been the ARMC Chair for a long time and was also involved in the transaction, and that this was raised in the MN report as a key corporate governance issue. However, the MN report:

- Does not discuss in any way the role of the ARMC Chair and his involvement in the ARR transaction.
- Does not include any findings, conclusions or recommendations that one Director's chairmanship of the ARMC and involvement in the ARR transaction was a possible reason defining the ARMC role in the transaction or that the ARMC role was affected by any conflict of interest.
- Does not include any findings, conclusions or recommendations that the ARMC role, operation and membership, was a key corporate governance issue that the ILC should address.

Accordingly, any statements that explicitly or impliedly seek to create an impression to the contrary are false and misleading.

Key Finding 6 - Director's authority

The ILC letter and ILC Senate Committee evidence assert that one Director, rather than the Board as a whole, was instrumental in the ARR transaction and purchase and that the MN report found this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this assertion, and it would be a false or misleading statement to suggest otherwise.

Key Finding 7 - Conflict of interest

The ILC letter claims that a Director involved in the transaction had undeclared conflicts of interest arising from a connection with a major shareholder in the vendor of the ARR and that the MN report found this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Key Finding 8 - Reappointment of a Director to Voyages Board

The ILC letter claims that the MN report provides ample evidence to support the ILC Board's decision not to reappoint a particular Director to the Voyages Board. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Claims about former ILC Board governance

Key Finding 9 - Selective use of information

The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues. Selective use of some findings and not others can easily be misleading and lead to inaccurate conclusions about the ARR transaction.

The claims focus on findings in the MN report relating to ARR transaction issues that could have been better managed. However there are also a series of findings in the MN report relating to the good management of the ARR transaction that are not referred to in the communications by the ILC. Selective use of MN report findings can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the context of the full report.

To achieve a balanced view of the MN report and the implications for the ARR transaction it is critical to take account of all the findings together.

When discussing the Board's consideration of the purchase price and related revenue and commercial issues the MN report does not find or conclude that the Board failed to consider up to date revenue and commercial issues put before them as asserted in the radio interview.

Key Finding 10 - ARR purchase price and risk management

Given the nature of the findings in the MN report, it is not reasonable to selectively use some findings to criticise the ARR purchase, but ignore other findings that present a more positive picture of the transaction. This approach increases the risk that the ARR will be viewed negatively when this view is not entirely accurate. This outcome may have a negative impact on the capacity of the ARR to conduct and drive business with partners and suppliers.

Key Finding 11: Grant Samuel fees

The ILC Senate Committee evidence suggests that the MN report found that the success fee paid to Grant Samuel (GS) was based on the value of the ARR transaction, and that this may have improperly led GS to advise the ILC to accept a higher purchase for the ARR. The MN report does not find that GS acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.

Key finding 12 - Findings of Deloitte report

Contrary to assertions in the radio interview, the Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report found that the ILC governance arrangements were reasonable and that minor improvements were needed. The report did not find that these improvements were required because of the performance of the Voyages Board.

EXECUTIVE SUMMARY

Background

In December 2013 Aegis Consulting Group (Aegis) was commissioned by former Directors of the Indigenous Land Corporation (ILC) and Voyages to objectively and independently examine public criticism by the current ILC Board and management of the ILC purchase of Ayers Rock Resort (ARR) in October 2010. Former ILC and Voyages Directors were greatly concerned about the potential risks and damage to the ILC, ARR and its benefits arising from this criticism. They were equally concerned about the damage caused to their individual and collective reputations.

Aegis delivered its report in January 2014 and concluded that there is no irrefutable evidence contained in the independent reviews of the ARR or ILC/Voyages governance by KPMG (2011), Australian National Audit Office (ANAO) (2013), Deloitte (2013) and McGrathNicol (MN) (2013) to support the substance of, or rationale for, the public criticism of the ARR or termination of the Voyages Board. In fact KPMG and ANAO found that the purchase and board deliberations were consistent with good business principles and ILC obligations and MN concluded that it was not inappropriate. The MN report (2013) considered by Aegis was commissioned by the current ILC Board and tasked with reviewing the ARR purchase.

On 5 January 2014 the Chair of the ILC, Ms Dawn Casey, wrote (the ILC letter) to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) making a number of claims about a former Director of the ILC, and the governance by the former ILC Board in relation to the purchase of ARR. The ILC letter suggests that the MN report provides evidence to support the claims. The letter was copied to the Hon Tony Abbott MP, Prime Minister, and has been published on the ILC website.

On 28 February 2014, the ILC CEO, Mr Mike Dillon, gave evidence to the Senate Finance and Public Administration Legislation Committee (ILC Senate Committee evidence) that⁴:

- The MN report contains 25 headline findings of concern about the ARR transaction and related ILC Board governance.
- Commented on some of the findings in the MN report.
- Suggested the MN report raised concerns about the membership and role of the ILC Audit and Risk Management Committee.
- Suggested that the MN report raised concerns about the independence of due diligence advisers (Grant Samuel) to the ILC.

⁴ Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

On 17 April 2014, the ILC Chair, Ms Dawn Casey, claimed in a radio interview that⁵ :

- The MN report found that the ILC Board did not consider the latest figures put before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report⁶ found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

Purpose

Aegis has been commissioned by former ILC and Voyages Directors to prepare a supplementary report to its January 2014 report. Aegis has been asked to review the MN report again to:

- Assess whether its findings, conclusions or recommendations substantiate the claims made in the ILC letter, ILC Senate Committee evidence and radio interview;
- Assess whether, when taking into account all of its findings, the claims made about the former ILC Board's governance of the ARR transaction in the ILC letter, ILC Senate Committee evidence and radio interview are reasonable and accurate; and
- Assess whether the claims in the ILC letter, ILC Senate Committee evidence and radio interview that are not substantiated by the MN report are misleading or false and could cause detriment or damage to the former Directors of the ILC and Voyages, the ILC and advisors to the ILC.

Aegis has also been asked to examine the Deloitte report again to assess whether its findings, conclusions or recommendations substantiate the claims made in the radio interview.

Claims about a particular former ILC Director

The MN report does not include any findings, conclusions or recommendations that support the claims about a particular former Director, and it would be a false or misleading statement to suggest otherwise. The claims and related MN report discussion are discussed below.

⁵ Sunday Profile, ABC Radio, 17 April 2014

⁶ Deloitte, Review of ILC Board Governance Arrangements, March 2013

- The ILC letter and radio interview claims that the MN report concludes that a particular Director failed to comply with ILC **procurement policies** in relation to the engagement of consultants on the ARR transaction. However, at no point during the discussion of procurement issues does the MN report refer to the role of individual ILC directors in the procurement of consultants. It is assumed in the MN discussion that procurement decisions were made by the Board as a whole.
- The ILC letter claims that the MN report considered that a particular Director's lengthy membership of the **Audit and Risk Management Committee** (ARMC) and simultaneous involvement in the ARR transaction created an inherent conflict of interest. The ILC letter is crafted in a way that infers a link between these issues and the MN report finding that the ARMC had a minimal role in overseeing the transaction. The ILC Senate Committee evidence also infers this link and states that "*the review found that that was a key corporate governance issue the ILC should address*".⁷ However the MN report (page 64): (1) considers the role of the ARMC briefly and acknowledges that reviewing the ARMC was not within the scope of is project brief from the ILC; (2) does not discuss any other Director's membership of the ARMC at all; (3) does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction; and (4) does not make any findings that the membership of the ARMC or any other matter relating to the ARMC is a key corporate governance issue needing attention.
- The ILC Senate Committee evidence asserts that a particular Director, Mr David Baffsky, '**drove**' the **ARR transaction**. This statement suggests that one Director was acting in a single capacity without the full remit or authority of the Board and therefore was able to make decisions about the transaction alone. However there are no suggestions, findings or conclusions in the MN report which in any way indicate that any one Director was instrumental to the transaction in ways that enabled him to make decisions without Board scrutiny and agreement. The MN report focuses on Board decision making in relation to the ARR transaction and concludes that, while Board decisions could have been better documented, the Board was responsible for decisions to undertake the due diligence on the ARR transaction and purchase the ARR.
- The ILC letter claims that the MN report considered that a serious issue requiring to be addressed is a particular Director's undeclared potential **conflict of interest** arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it. However the MN report (page 69) concluded that it "*has no further knowledge regarding this connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be remote*".
- The ILC letter refers to the Minister's request to ILC in October 2013 that a particular Director be reappointed as Chair of the Voyages Board. The ILC letter claims that in part the ILC decision not to reappoint him was correct because the MN report delivered in December 2013 provides "ample evidence" to support that decision. However that decision is not supported by any findings, conclusions or recommendations in the MN report.

⁷ Hansard, Australian Senate Finance and Public Administration Committee, 28 February 2014, p28

Claims about former ILC Board governance

- The ILC letter, ILC Senate Committee evidence and radio interview make a number of claims about the governance of the ARR transaction by the former ILC Board, and rely on the MN report to support these claims. The Aegis January 2014 report makes a detailed assessment of the public criticism of the ARR transaction by the ILC Board and management. Many of the issues raised in the ILC letter, ILC Senate Committee and radio interview evidence were considered as part of this assessment. The analysis in the Aegis January 2014 report shows that the claims made about the ARR transaction by the ILC in a range of public forums are potentially misleading, when taking into account all of the information contained in the MN report (2013), Deloitte report concerning ILC governance (2013), KPMG report concerning ILC borrowing powers (2011), Dransfield advice on tourism asset valuation (2013), and the ILC's own submission to the review of the ILC and Indigenous Business Australia (2014).
- The MN report focuses on the documentation of the ILC Board's consideration of ARR transaction issues and makes a number of positive and negative findings about this. To achieve a balanced view of the MN report, and the implications for the ARR transaction, it is critical to take account of all the findings together. Selective use of some findings and not others can easily be misleading. The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues, such as purchase price and risk management. This can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the content of the full report.
- Contrary to the suggestions made in the ILC Senate Committee evidence, the MN report does not find that Grant Samuel acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.
- Contrary to the claims in the radio interview, the Deloitte report found that the ILC governance arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries⁸. These findings related to actions that the ILC needed to undertake and did not suggest in any way that the actions were necessary because of the performance of the Voyages Board. The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail.

⁸ Deloitte, Review of ILC Board Governance Arrangements, March 2013, pp7-9

1. BACKGROUND TO THIS REPORT

In December 2013 Aegis Consulting Group (Aegis) was commissioned by former Directors of the Indigenous Land Corporation (ILC) and Voyages to objectively and independently:

- Examine whether public criticisms by the current Chair of ILC, Dawn Casey, the Deputy Chair, Ian Trust, and CEO, Mike Dillon about the ILC purchase of the Ayers Rock Resort (ARR) are appropriate given the full range of facts and benefits associated with and previous independent reviews of the transaction;
- Consider the implications for the ARR of the public criticisms;
- Review and prepare a detailed history of the ARR transaction; and
- Consider any related ILC and Voyages governance issues.

Former ILC and Voyages Directors engaged Aegis because they were greatly concerned about the potential risks to the ILC, ARR and its benefits arising from the apparent public campaign being conducted by the current Board and management against the ARR purchase. Aegis was commissioned because of its public policy and program evaluation experience, which included being engaged by the ILC in 2010 to review its performance against its legislative objectives.

Aegis delivered its report in January 2014.

Summary of January 2014 Aegis report findings

The report found that:

- In 2011 the ILC purchased the ARR for a net price of \$292M to create an iconic asset with the commitment and economies of scale to significantly increase Indigenous training, employment and leadership opportunities at the ARR and in the national tourism sector.
- The purchase has enabled the ILC to lift Indigenous employment from 1 to 215 at ARR and 283 across all Voyages businesses.
- This employment reduces Federal Government welfare spending by about \$21M annually and \$840M over 40 years. At current rates the ARR could train another 7,400 Indigenous people over 40 years for the benefit of tourism around Australia, particularly in the towns and cities in which they and their families live. These benefits cannot be replicated by other tourism assets.

- ARR is profitable and that any future financial liability to ILC arising from the ARR purchase can be covered by ILC if need be, which had approximately \$65M in cash on 31 December 2013.
- Public criticism may have (1) undermined the appeal of business, investment and/or sponsorship arrangements with the ARR; (2) reduced consumer confidence in the ARR, leading to less visitors and events and associated revenue; and (3) disillusioned existing and potential Indigenous employees and trainees about participating in the ARR.
- If public criticism has damaged the reputation and commercial position of the ARR, Directors and management may be in breach of sections 22-26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) requiring them to always act in the interest of the ILC.
- Before a Board or management publicly criticise their own organisation or activities they should formally consider and ensure that the strategic and commercial benefits outweigh any negative public attention and response.
- It is not clear what strategic or commercial benefit the criticism levelled at the ARR is intended to achieve, or that the ILC Board formally considered all the non-public alternatives to achieve its objectives.
- There is no irrefutable evidence contained in the independent reviews of the ARR or ILC/Voyages governance by KPMG (2011), Australian National Audit Office (ANAO) (2013), Deloitte (2013) and McGrathNicol (MN) (2013) to support the substance of, or rationale for, the public criticism of the ARR or termination of the Voyages Board. In fact KPMG and ANAO found that the purchase and board deliberations were consistent with good business principles and ILC obligations and MN concluded that it was not inappropriate.
- Despite publicly criticising the ARR purchase, in its submission to the ILC/IBA review (January 2014), the ILC relied on the ARR and its benefits to demonstrate why the ILC should remain a distinct organisation.
- Accordingly, the public statements of the current Chair, CEO and other Directors regarding the ARR and its governance by the former ILC Board and Voyages may be potentially misleading.

2. PURPOSE OF THIS REPORT

Reasons for this report

On 5 January 2014 the Chair of the ILC, Ms Dawn Casey, wrote (the ILC letter) to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) making a number of claims about a former particular Director of the ILC, and the governance by the former ILC Board in relation to the purchase of ARR. The ILC letter suggests that the MN report provides evidence to support the claims. The letter was copied to the Hon Tony Abbott MP, Prime Minister, and has been published on the ILC website.

On 28 February 2014, the ILC CEO, Mr Mike Dillon, gave evidence to the Senate Finance and Public Administration Legislation Committee (ILC Senate Committee evidence) that⁹:

- The MN report contains 25 headline findings of concern about the ARR transaction and related ILC Board governance.
- Commented on some of the findings in the MN report.
- Suggested the MN report raised concerns about the membership and role of the ILC Audit and Risk Management Committee.
- Suggested that the MN report raised concerns about the independence of due diligence advisers (Grant Samuel) to the ILC.

On 17 April 2014, the ILC Chair, Ms Dawn Casey, claimed in a radio interview that¹⁰:

- The MN report found that the ILC Board did not consider the latest figures put before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report¹¹ found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

Scope of this report

Aegis has been commissioned by former ILC and Voyages Directors to prepare a supplementary report to its January 2014 report. Aegis has been asked to review the MN report again to:

⁹ Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

¹⁰ Sunday Profile, ABC Radio, 17 April 2014

¹¹ Deloitte, Review of ILC Board Governance Arrangements, March 2013

- Assess whether its findings, conclusions or recommendations substantiate the claims made in the ILC letter, ILC Senate Committee evidence and radio interview;
- Assess whether, when taking into account all of its findings, the claims made about the former ILC Board's governance of the ARR transaction in the ILC letter, ILC Senate Committee evidence and radio interview are reasonable and accurate; and
- Assess whether the claims in the ILC letter, ILC Senate Committee evidence and radio interview that are not substantiated by the MN report are misleading or false and could cause detriment or damage to the former Directors of the ILC and Voyages, the ILC and advisors to the ILC.

Aegis has also been asked to examine the Deloitte report again to assess whether its findings, conclusions or recommendations substantiate the claims made in the radio interview.

3. ILC ACTIONS AND THE CAC ACT

The Aegis January 2014 report concluded that in their public criticism of the ARR transaction the ILC Chair and CEO may have breached sections 22 to 26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

Sections 24 and 25 of the CAC Act require that a person must not improperly use their position or information that becomes available to them as an official of a Commonwealth entity to cause detriment to a Commonwealth entity, the Commonwealth or any other person.

The publication of the ILC letter has the potential to cause detriment to the reputations of former ILC Board members, the ILC (a Commonwealth entity), advisors to the ILC and possibly the Minister. This is because the ILC letter either claims, asserts and/or infers that:

- A particular Director may have acted improperly in relation to the ARR transaction.
- The former ILC Board may have been negligent in its governance of the ARR transaction.
- There are questions to answer regarding the engagement of and motivations for the advice provided by advisors to the ILC.
- The Minister may have been seeking to influence the MN report by seeking a draft copy before its finalisation.

The ILC Senate Committee evidence, which echoes many of the issues raised in the ILC letter may similarly have the potential to cause detriment to the reputations of former ILC Board members, the ILC (a Commonwealth entity) and advisors to the ILC.

The radio interview which echoes some of the issues raised in the ILC letter and ILC Senate Committee evidence and also suggests that the Voyages Board performance was responsible for 'shortcomings' in ILC governance may also potentially damage the reputations of Voyages Board directors.

It seems incongruous that officials of a statutory corporation created by the Australian Government would act in a way that could potentially publicly embarrass or cause other damage to the reputations of former members of its Board, the Commonwealth entity in which they hold positions, and its portfolio Minister.

The issue of a Commonwealth official's improper use of their position, or information that is made available to them as a result of their position, arises in relation to the claims in the ILC letter, ILC Senate Estimates evidence and radio interview if it is found that the claims are misleading or false. As the claims are made on the basis of alleged evidence in the MN report and Deloitte report, they may become misleading or false if they are not supported by evidence in the MN report and Deloitte report.

Key Finding 1: The analysis in sections 5, 6 and 7 of this report indicate that the claims made in the ILC letter, ILC Senate Estimates evidence and radio interview are not supported by any findings, conclusions or recommendations in the MN report or Deloitte report, or are based on the selective use of information in the MN report which does not reflect the overall conclusions in the MN report. Asserting misleading or false statements may mean that the Chair and CEO of the ILC may have improperly used their positions or information available to them, in their capacities as Commonwealth officials, to cause detriment to the former Directors of the ILC and Voyages, the ILC, advisors to the ILC, and the Minister. There is no definition of the term improperly in the CAC Act and therefore its ordinary meaning may apply.

4. LIMITATIONS ON MN REPORT FINDINGS

The terms of reference for the MN report required a forensic audit of the ARR transaction. However in its report (page 2) MN state that:

"We have not carried out an audit, nor have we verified any of the information given to us by ILC. We have relied upon assurances from management as to the accuracy of the information provided. As the achievement of any prediction as to the results of subsequent trading is dependent upon future events, the outcome of which cannot be assured, the actual results achieved may vary materially from the projections included in this report. In all circumstances, whilst we believe that the statements made by us in this report are accurate, no warranty of accuracy or reliability is given".

Accordingly it is not clear that MN had access to all relevant information necessary to reach a fully balanced set of conclusions. In its report (page 14) MN states that is was not provided the opportunity to consider the KPMG report (April 2011) on the borrowing limits and guarantee powers of the ILC.

Aegis had the opportunity to review the KPMG report during the preparation of its January 2014 report.

In its consideration of the ILC borrowing limits and guarantee powers KPMG examined the ARR transaction and related Board governance in detail and concluded that the “comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles”¹².

The KPMG report recommended some further legislative controls on ILC borrowings to align it with other government authorities. The previous Federal Government does not appear to have implemented these controls, which would have been an expected response if there were concerns within government about the ARR purchase.

Furthermore, an independent review in 2013 by Deloitte of the ILC’s Board governance arrangements found that the arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries¹³.

Thus, as indicated in the Aegis January 2014 report, the findings in the MN report appear to be in significant conflict with the KPMG report about the way in which the ARR transaction was managed, and in conflict with the Deloitte report about general Board governance of ILC and Voyages.

The Aegis January 2014 report also raised concerns that the MN report included a value for money assessment of the ARR purchase, without considering any of the benefits or outcomes that may have been taken into account by the Board at the time or achieved since. A value for money assessment cannot occur without proper consideration of benefits/outcomes. In its report, MN admits (page 8) that “the scope of our review does not include any consideration of non-financial factors that may impact on value for money and which may have been considered by the ILC (e.g. Indigenous employment)”.

One of the purposes of the Aegis January 2014 report was to examine the benefits of the ARR transaction. It found that the ARR transaction has delivered significant benefits for the ILC, Federal Government and Indigenous people and would continue to deliver benefits into the future.

5. ASSESSMENT OF ILC USE OF MN REPORT

The ILC letter appears to claim that the MN report has concluded there are serious questions to answer arising from its findings.

¹² KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits April 2011; p49. The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and overseight by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

¹³ Deloitte, Review of ILC Board Governance Arrangements, March 2013

It is important to note that the MN report draws no conclusions nor makes any recommendations about actions that should be taken in response to its findings. The decisions of the ILC Board to pursue the actions (such as the publication of the ILC letter) or suggest that the MN report findings raise serious questions to be answered through public forums are entirely those of the ILC.

The overall conclusion of the MN report (page 12) is that, in their opinion, when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that *“the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk”*.

By its own words this conclusion indicates that the ILC may have needed to apply more appropriate process and record management measures during the ARR transaction. However, this conclusion cannot be used to support claims that the ARR transaction was subject to any impropriety on the part of Directors or that the purchase was misguided.

Key Finding 2: The tone, words and fabric of argument contained in the ILC letter, ILC Senate Estimates evidence and radio interview seem to suggest that the ILC is attempting to use findings in the MN report to claim that there was at worst impropriety, and at least incompetence, at Board level in relation to the ARR transaction and that the purchase was flawed. This interpretation by the ILC of the MN report findings is not consistent with the overall actual conclusions of the MN report.

6. ASSESSMENT OF ILC CLAIMS ABOUT A PARTICULAR FORMER ILC DIRECTOR

Summary of ILC claims

In summary it is claimed that the MN report provides evidence that:

- A particular Director failed to comply with ILC procurement policies in relation to the engagement of consultants during the ARR transaction, and this raises questions which should be answered (claim made in ILC letter and radio interview).
- The ILC Audit and Risk Management Committee (ARMC) (1) was conflicted because its Chair of twelve years was also involved in the ARR transaction and (2) failed to perform appropriate oversight of the ARR transaction, and accordingly there are questions to answer (claims made in ILC letter and ILC Senate Committee evidence).

- One particular Director 'drove' the transaction (claim made in ILC Senate Committee evidence).
- During his involvement in the ARR transaction a particular Director did not declare potential conflicts of interest arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it, and accordingly there are questions to answer (claim made in ILC letter).
- The ILC was correct in terminating a particular Director as Chair of Voyages and refusing to reappoint him to this position as subsequently requested by the Minister (claim made in ILC letter).

Claim 1: Procurement of ARR transaction consultancies

The ILC letter and radio interview claim that the MN report concludes that a particular Director failed to comply with ILC procurement policies in relation to the engagement of consultants on the ARR transaction.

The MN report considers the engagement of consultants on the ARR transaction in section 6.2 (page 59). The MN report concludes that:

"In respect of the engagement of consultants advising on the purchase of the ARR, we have found no evidence that competitive tender or quotation processes were used by the ILC in making procurement decisions. Furthermore, the ILC is unable to demonstrate that its procurement processes were conducted in accordance with the ILC purchasing guidelines and generally accepted procurement principles".

At no point during the discussion of procurement issues does the MN report refer to the role of individual ILC directors in the procurement of consultants. It is assumed during the discussion in the MN report that the decisions to engage consultants was made collectively by the management and/or Board of the ILC.

Key Finding 3: There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Claim 2: Audit and risk management committee (ARMC)

Claims in ILC letter

The ILC letter suggests that the Chair of the ILC Audit and Risk Management Committee (ARMC) at the time of the ARR transaction had been in that position for twelve years. In fact he was a member of the ARMC for a total of fourteen years, of which he spent nine years as Chair.

The MN report briefly considers the role of the ARMC in section 6.3 (page 64), even though it acknowledges that it was not within its scope to do so. It is not clear why MN reviewed the role of the ARMC if it was not within the scope provided by the ILC.

The ILC letter claims that the MN report considered that the Director's lengthy membership of the ARMC and involvement in the ARR transaction created an inherent conflict of interest. However the MN report:

- Does not discuss his or any other Director's membership of the ARMC at all; and
- Does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction.

The ILC letter also claims that the MN report concluded that the ARMC failed to oversight the ARR acquisition process appropriately.

In preparing its report MN reviewed the minutes of the ARMC meetings between June 2008 and March 2011 and found that the only meeting where the minutes recorded a discussion about the ARR transaction was 22 March 2011. Based on this review the MN report concludes that:

- The ARMC had almost no role in the oversight of consideration of the ARR transaction.
- It was unusual for the ARMC to have no oversight given that the transaction occurred over two years.
- Given the potential impact of the ARR investment on the financial position of the ILC, the minimal involvement of the ARMC was a deficiency in the then ILC governance process.
- The ARMC should have considered the ILC's risk management practices for the ARR transaction.

The MN report does not examine any possible reasons why the ARMC seemed to have a minimal role. For example, the discussion about the ARMC role does not include any information about other formal or informal measures (such as sub-committees) used by the ILC Board at the time to manage the ARR transaction and its risks. Examination of these issues may have concluded that the ARMC had a limited role because the ILC Board instituted other mechanisms to manage the transaction.

The MN report also does not consider or discuss why the limited involvement of the ARMC is unusual in the context of other examples of similar transactions undertaken by comparative organisations.

The ILC letter is crafted in a way that conjoins in one paragraph the claims that a particular Director's chairmanship of the ARMC and involvement in the ARR transaction represented a conflict of interest, and that the ARMC failed to oversight the transaction properly. Whether intentionally or otherwise, by conjoining these quite separate issues, the ILC letter creates an inference that the particular Director may have had conflicts of interest that influenced the minimal role of the ARMC.

Claims in ILC Senate Committee evidence

In his evidence to the Senate Committee on 28 February 2014, the ILC CEO, Mr Dillon, states that: *"The audit risk committee should have had a key role in over sighting the transaction. The transaction was driven by Director Baffsky. Director Baffsky chaired the Audit and Risk Management Committee. The review notes that the audit and risk committee did not give due attention to the transaction. Director Baffsky had been on the audit and risk committee – I do not have the exact figure – for somewhere in excess of 10 years. The Audit Office guidelines say two terms, five years or thereabouts, and another member of the audit and risk committee, Director Jeffries, had been on the audit and risk committee for nine years. So the committee had been locked in place for too long and the review found that that was a key corporate governance issue the ILC should address. Of course when the new board was appointed in October 2011, they immediately took action to renew the audit committee. That was when, suddenly, conflict emerged within the board"*¹⁴.

Like the ILC letter, this statement also seeks to conjoin separate issues which can create the impression that a particular Director's chairmanship of the ARMC and involvement in the ARR transaction represented a conflict of interest which somehow influenced the minimal role of the ARMC in overseeing the ARR transaction. As discussed above the MN report does not discuss any Director's membership of the ARMC and does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction.

While Mr Dillon suggests that the MN report reached a conclusion that the length of time Mr Baffsky and Mr Jeffries had been on the ARMC was a key corporate governance issue the ILC should address, the MN report does not in any way:

- Discuss the make-up of the AMRC or the length of time Directors served on it.
- Discuss any of the Directors on the AMRC and the roles they played in the ARR transaction.
- Suggest, find or conclude that the AMRC was conflicted.
- Suggest, find or conclude that there was any reason why the AMRC had a minimal role in the ARR transaction.
- Suggest, find or conclude that the AMRC, its role, operation or membership was a "key corporate governance issue the ILC should address".

Key Finding 4: Audit and risk management committee: length of Chair's term: The ILC letter claims that the MN report found that the length of time that one Director had been Chair of the ARMC and his simultaneous involvement in the ARR transaction created an inherent conflict of interest. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

Key Finding 5: Audit and risk management committee: oversight of ARR transaction: The ILC letter and ILC Senate Committee evidence claim that the ARMC did not oversight the ARR transaction because one Director had been the ARMC Chair for a long time and was also involved in the transaction, and that this was raised in the MN report as a key corporate governance issue. However, the MN report:

- Does not discuss in any way the role of the ARMC Chair and his involvement in the ARR transaction.

¹⁴ Hansard, Australian Senate Finance and Public Administration Committee, 28 February 2014, p28

- Does not include any findings, conclusions or recommendations that one Director's chairmanship of the ARMC and involvement in the ARR transaction was a possible reason defining the ARMC role in the transaction or that the ARMC role was affected by any conflict of interest.
- Does not include any findings, conclusions or recommendations that the ARMC role, operation and membership, was a key corporate governance issue that the ILC should address.

Accordingly, any statements that explicitly or impliedly seek to create an impression to the contrary are false and misleading.

Claim 3: Director's authority

The ILC Senate Committee evidence asserts that a particular Director 'drove' the transaction, and names this Director as Mr David Baffsky. The ILC letter claims that the Chair of the ARMC was "directly involved in driving the acquisition" and the MN report considered this serious issues needing to be addressed.

These statements seem intended to suggest that a particular Director was acting in some single capacity without the full remit or authority of the Board and therefore was able to make decisions about the transaction alone.

There are no suggestions, findings or conclusions in the MN report which in any way indicate that one Director was instrumental to the transaction in ways that enabled him/her to make decisions without Board scrutiny and agreement. The MN report focuses on Board decision making in relation to the ARR transaction and concludes that while Board decisions could have been better documented, the Board was responsible for decisions to undertake the due diligence on the ARR transaction and purchase the ARR.

In relation to Board decision making, the MN report states that (page 61):

"Our main focus has been on the quality of board minutes and decision making in relation to the 1 October 2010 decision to acquire the ARR. However, based on our review of all board meeting minutes for the period 27 August 2008 to 20 June 2011, we make the following general observations:

- *The ILC has a dedicated board secretariat function. Board packs appear to have been prepared and made available to directors in advance of each meeting;*
- *For each of the board meetings reviewed, the secretariat would personally attend, draft the minutes, and finalise the minutes after implementing any required changes. McGrathNicol was able to locate minutes for each of the board meetings held over the relevant period; and*
- *The Board meeting minutes appear to record the key decisions of the board, important discussions, and the resolutions passed".*

The MN report also concludes that (page 61):

“From our review of the Board minutes and the Board Land Acquisition Decision dated 1 October 2010, we note that whilst the Board Land Acquisition Decision provides a summary of the due diligence work undertaken, it does not clearly set out the findings of the due diligence activities and the relevance to the decision to pursue the acquisition. The ILC Board resolved that the transaction was in the ILC’s best interests and for its benefit. It is considered prudent to support an overarching comment such as this with a summary of the reasons why the transaction was considered to be in the best interests of the ILC”.

The Aegis January 2014 report included consideration of the evidence of the former ILC Chair, Ms Shirley McPherson, to the Senate Committee. Her written evidence makes clear that 5 of the 7 Directors of the ILC voted in favour of the ARR purchase and 2 Directors abstained¹⁵. This evidence of the former ILC Chair who presided over the purchase of the ARR is a powerful counter point to the assertion that one Director was responsible for directing the ARR towards the purchase.

Key Finding 6: There are no findings, conclusions or recommendations in the MN report that support this assertion, and it would be a false or misleading statement to suggest otherwise.

Claim 4: Conflict of interest

The ILC letter claims that the MN report considered that a serious issue requiring to be addressed is a particular Director’s undeclared potential conflict of interest arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it.

The MN report considers conflict of interest issues in section 6.5 (page 69).

In relation to the connection referred to in the ILC letter, the MN report identified this as a Directorship held by Mr David Baffsky of Singapore Airport Terminal Services, which is 43% owned by Temasek Holdings. Temasek holdings is 100% owned by the Singapore Government. The Singapore Government is also the 100% owner of GIC Private Limited which has an 11.65% shareholding in General Property Trust, the vendor of ARR.

The MN report concluded that it *“has no further knowledge regarding this connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be remote”*.

Key Finding 7: There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

¹⁵ Ms Shirley McPherson, letter to the Chair of the Senate Finance and Public Administration Committee, 9 December 2013

The MN also considers Mr Baffsky's role as Honorary Chairman of Accor Asia Pacific, which was awarded the hotel service contract for the ARR by Voyages after a competitive process. The MN found that he properly declared his conflict of interest and took no part in considerations and decisions by the Voyages Board about the hotel services contract.

It is curious that the ILC letter ignores the MN findings about the propriety with which Mr Baffsky managed an immediate conflict of interest, but seeks to infer that he may have behaved improperly in relation to a connection that the MN report considers is remote.

Claim 5: Reappointment of a Director to Voyages Board

The ILC letter refers to the Minister's request to ILC in October 2013 that a particular Director be reappointed as Chair of the Voyages Board. The ILC letter claims that in part the ILC decision not to reappoint him was correct because the MN report delivered in December 2013 provides "ample evidence" to support that decision.

Based on the reviews of the MN report as part of the Aegis January 2014 report, and now as part of this assessment, it is clear that there are no findings, conclusions or recommendations in the MN report which could in any way be regarded as evidence to support the initial removal of the Chair of the Voyages Board, or the refusal of the ILC to reappoint him as apparently requested by the Minister.

Key Finding 8: There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

7. ASSESSMENT OF ILC CLAIMS ABOUT FORMER ILC BOARD GOVERNANCE

Summary of ILC claims

The ILC letter claims that the MN report suggests questions need to be answered because:

- The Board failed to consider the most recent financial performance of the ARR and relied on a valuation that was 17 months old.
- The Board failed to adequately mitigate risks identified in the due diligence.
- The Board relied on financial projections that were not conservative.
- The Board did not adequately record the voting intentions of all Directors.

The ILC Senate Committee evidence claims that¹⁶:

- The MN report includes 25 headline findings of concern.
- The ILC Board paid too much for the ARR.
- Grant Samuel was paid partly via a success fee (percentage of the purchase price) which would have incentivised them to recommend a higher purchase price.

The radio interview claims that¹⁷:

- The MN report found that the ILC Board did not consider the latest figures before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report¹⁸ found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

¹⁶

Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

¹⁷ Sunday Profile, ABC Radio, 17 April 2014

¹⁸ Deloitte, Review of ILC Board Governance Arrangements, March 2013

Aegis January 2014 report

The Aegis January 2014 report makes a detailed assessment of the public criticism of the ARR transaction by the ILC Board and management. Many of the issues raised in the ILC letter and ILC Senate Committee evidence were considered as part of this assessment. This is particularly in relation to:

- The valuations used by the ILC Board when considering the ARR purchase, and the ARR purchase price.
- The risk management undertaken by the Board.

The analysis in the Aegis January 2014 report shows that the claims made about the ARR transaction by the ILC in a range of public forums are potentially misleading, when taking into account all of the information contained in the MN report (2013), Deloitte report concerning ILC governance (2013), KPMG report concerning ILC borrowing powers (2011), Dransfield advice on tourism asset valuation (2013), and the ILC's own submission to the review of the ILC and Indigenous Business Australia (2014).

Assessment of claims

As discussed in this current report, and the Aegis January 2014 report, the overall conclusion of the MN report (page 12) is that when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that *“the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk”*.

The Aegis January 2014 report also identified that, while the MN report made a number of findings to support this conclusion, it also made a number of positive findings about the governance of the ARR transaction. These included that (pages 5-12):

- The financial model relied on by the ILC Board when assessing the ARR purchase was conservative.
- The ILC was a motivated purchaser, but the process indicates it was not prepared to purchase at any price.
- The transaction was consistent with ILC powers and obligations under ATSI and CAC Acts.
- Vendor finance arrangements were reasonable and not disadvantageous to the ILC.
- A comprehensive risk management plan dealing with operational and transactional risks was prepared.
- The post purchase risk assessment and mitigation strategy in relation to occupancy was reasonable.
- The ILC Board decision was based on and followed the advice of consultants.

Key Finding 9: Selective use of information: The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues. Selective use of some findings and not others can easily be misleading and lead to inaccurate conclusions about the ARR transaction.

The claims focus on findings in the MN report relating to ARR transaction issues that could have been better managed. However there are also a series of findings in the MN report relating to the good management of the ARR transaction that are not referred to in the communication by the ILC. Selective use of MN report findings can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the context of the full report

To achieve a balanced view of the MN report and the implications for the ARR transaction it is critical to take account of all the findings together.

When discussing the Board's consideration of the purchase price and related revenue and commercial issues the MN report does not find or conclude that the Board failed to consider up to date revenue and commercial issues put before them as asserted in the radio interview.

Purchase price

A good example of the need to consider all the findings in the MN report arises in relation to the issue of the ARR purchase price.

On the one hand the MN report found that (pages 19-46):

- The Grant Samuel (GS) financial model was influential on the Board. The GS model is standard practice in mergers and acquisitions.
- The price was consistent with the NPV suggested in the GS model.
- GS model assumptions about NPV of cash flows was conservative and more conservative than comparable assessments by Colliers and CBRE in their valuations.
- GS model consideration of forecast capex was higher than CBRE and Colliers.
- Ultimately value is subjective and it is possible that the Board had good reason to assess the price as appropriate.
- The ILC was a motivated purchaser, but the length of time for purchase and negotiations indicate it was not prepared to purchase at any price.
- Vendor finance arrangements were reasonable, based on competitive interest rates and not disadvantageous to the ILC.

On the other hand the MN report found that (pages 19-46):

- GS model was arguably ambitious on forecast revenue, given findings by other consultants such as Howarth HTL. This may have inflated NPV.
- GS model capex forecast consisted of essential capex only and may not have been at levels needed to support the forecast growth in operating projections in the GS model. Higher capex projections may have lowered NPV.

- The GS model did not include any sensitivity analysis on the NPV prior to the Board decision in October 2010.
- The GS sensitivity analysis provided to the Board in November 2010 would have reduced the NPV to between \$237M (\$55 below price paid) and \$274M (\$18M below price paid).
- The price was \$22M higher than the value suggested by CBRE (\$270M).
- An updated full speaking valuation should have been undertaken, rather than the CBRE one being relied on as it was 17 months old.

Considering all of these findings offers a fuller understanding of the Board's decision to purchase the ARR and related governance than the view being promoted in the ILC letter, ILC Senate Committee evidence and radio interview.

Risk management

Another good example of the need to consider all findings together arises in relation to risk management.

On the one hand the MN report found that (pages 48-52):

- A comprehensive risk management plan dealing with operational and transactional risks was prepared with assistance of consultants and presented to the Board. Risk management strategies for extreme, high and moderate risks were prepared and documented.
- Of the 9 key risks identified in the ARR transaction risk management plan MN considered that 5 had reasonable risk treatments and post risk ratings. This included the satisfactory development of a sensitised 10 year financial forecast based on conservative occupancy, reflecting a downturn in world economic conditions.

On the other hand, the MN report found that (pages 48-52):

- While the due diligence included 10 year financial forecasts, the risk treatment for the purchase price should have included a full speaking valuation.
- The post purchase risk treatment of government support should have been high, not moderate.
- The post purchase risk treatment of remoteness of ARR and reliance on airlines should have been high, not moderate.
- While the financial analysis of the ARR projected capex in the first 5 years is consistent with the independent expert assessment, these capex forecasts were based on "essential capex" only, to maintain the standard of the ARR and this appears inconsistent with the optimistic operating forecasts.

Considering all of these findings offers a fuller understanding of the Board's decision to purchase the ARR and related governance than the view being promoted in the ILC letter, ILC Senate Committee evidence and radio interview.

Key Finding 10: ARR purchase price and risk management: Given the nature of the findings in the MN report, it is not reasonable to selectively use some findings to criticise the ARR purchase, but ignore other findings that present a more positive picture of the transaction. This approach increases the risk that the ARR will be viewed negatively when this view is not entirely accurate. This outcome may have a negative impact on the capacity of the ARR to conduct and drive business with partners and suppliers.

Grant Samuel fees

The ILC Senate Committee evidence suggests that the MN report found that the success fee paid to Grant Samuel (GS) was based on the value of the ARR transaction, and that this may have improperly led GS to advise the ILC to accept a higher purchase for the ARR. The relevant section in the evidence is as follows.

“Mr Dillon: The first point to note from McGrathNicol was that the CBRE valuation that the board had available to it when it made the acquisition was 17 months old. McGrathNicol did some calculations. They indicated that had they had an up to date valuation the value of the resort would have been in the order of \$250 million-not \$300 million. That goes to the point of paying too much. A further key finding was that the due diligence, which cost \$6 million was on a success-fee basis. There was no appropriate selection process around the selection of due diligence consultants. Grant Samuel received one per cent of the purchase price which –

Senator Seselja: So the higher the purchase price the more the person would receive?

Mr Dillon: Absolutely.

Senator Siewert: Is that usual? I am not an expert on due diligence but –

Mr Dillon: We understand there are precedents in the industry about this but –

Senator McKenzie: Which industry?

Mr Dillon: The due diligence for the real estate industry – hotel acquisitions.

Senator Seselja: It was effectively an incentive for the individual or company to value it at a higher rate because they would get more of a success fee.

Mr Dillon: Exactly. That is the concern that McGrathNicol raised¹⁹.

The MN report does not find that there was any improper conduct on the part of GS. The MN report found that (page 9):

“GS’s advisory fee was based on a percentage of the purchase price of the ARR. Whilst commonplace in the financial services sector, a fee arrangement of this nature does not incentivise an advisor to seek the lowest possible transaction price or advise against the transaction. We make no finding that GS acted improperly in this respect. However we consider that it may have been prudent for ILC to consider alternative fee structures”.

The nature of the ILC Senate Committee evidence may be damaging to the reputation of GS, even though the MN report found GS did not act improperly.

¹⁹ Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp27

Key Finding 11: Grant Samuel fees: The MN report does not find that GS acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.

Deloitte report findings

In the radio interview it is claimed that the Voyages Board needed to be terminated because its members were responsible for the shortcomings identified in the Deloitte report which included a poor relationship between the ILC and Voyages. It is also claimed that the Deloitte report recommended that the ARR transaction be examined further.

The Aegis January 2014 report examined the Deloitte report in detail. The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report considered the ARR purchase as one case study for its governance review, in addition to other case studies. The Deloitte report considered that the ARR transaction provided examples of where the ILC could formalise its protocols for communicating with government; ensure its procurement policies are adhered to; conduct appropriate communication with stakeholders and formalise its conflict of interest declaration policies²⁰.

With respect to the ILC Board governance in general the Deloitte report found that the arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries²¹. These findings related to actions that the ILC needed to undertake, and did not suggest in any way that the actions were necessary because of the performance of the Voyages Board.

Key Finding 12: Deloitte report findings: The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report found that the ILC governance arrangements were reasonable and that minor improvements were needed. The report did not find that these improvements were required because of the performance of the Voyages Board.

²⁰ Deloitte, Review of ILC Board Governance Arrangements, March 2013, p57

²¹ Ibid, pp7-9

5 March 2015

Senator Zed Seselja
Chairperson
Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in regard to the appearance before your Committee by Mr Michael Dillon, CEO, Indigenous Land Corporation (ILC) at a public hearing on 13 February 2015 into *The Aboriginal and Torres Strait Islander Amendment Bill 2014*.

I submit that various aspects of Mr Dillon's evidence served to misinform the Committee in relation to the purchase by the ILC of Ayers Rock Resort (ARR) in May 2011. Regrettably, this is the second occasion where Mr Dillon has provided misinformation to your Committee in relation to the purchase of ARR as much of what he said was repeated from his appearance on 28 February 2014. Outlined below are the clear instances of Mr Dillon misinforming the Committee.

- *"It is clear from recent history that there has not been appropriate governance and management within the ILC" (Dillon).*

On the contrary, a report by KPMG in 2011, commissioned by the then Department of Families, Housing, Community Services and Indigenous Affairs and overseen by the Department of Finance, (in its consideration of the ILC borrowing limits and guarantee powers), examined the ARR transaction and related Board governance in detail and concluded that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*.

- *"I have given evidence before the committee on this topic in the past, so I will not dwell on it, but there has been a huge loss from the purchase of ARR – over \$100 million – to the ILC (Dillon)."*

In fact, according to the ILC's own financial statements for the year ended 30 June 2014, impairment (NOT LOSS) of assets was \$62,359,000 in 2013 and \$19,218,000 in 2014, a total of \$81,577,000.

Interestingly, for the same reporting periods, Indigenous Business Australia (IBA) reported write-down and impairment of assets of \$53,529,000 in 2014 (with a further loss from asset sales of \$1,250,000 in 2014) and \$38,365,000 in 2013, a total of \$93,245,894 representing a loss of \$11,668,894 more than the ILC.

During that time Dawn Casey was Chairperson of both the ILC and IBA. However, Dawn Casey has never called for an enquiry into IBA's losses and the governance processes relating to those losses. Why then is she and the ILC CEO fixated on the purchase of ARR when its impairment losses are less than those of the IBA? More especially so when ILC's contribution to Indigenous training and employment far outweighs IBA's contribution?

The ILC's consideration of the ARR purchase began after the opportunity was referred to it by Mr Dillon, when he was a Senior Adviser in Minister Macklin's office (I note that Mr Dillon did not formally declare his second hat at the opening of his evidence). Mr Dillon indicated to the ILC that the Aboriginal Corporation called Wana Ungkuntja (WU) had a proposal to partner with the ILC to purchase ARR for the eventual divestment of the asset to an Indigenous Corporation consistent with the objectives of the ILC under the *Aboriginal and Torres Strait Islander Act 2005* (ATSIA Act).

The WU, which represents business interests of the local Anangu communities surrounding Uluru, was granted first right of refusal over the ARR by the previous owners. Following the ILC purchase of the ARR, WU received two seats on Board of the ILC subsidiary (Voyages) created to manage the ARR and other ILC owned tourism assets, and 7% equity ownership in Voyages approximately in 10 years' time. As part of the ARR divestment strategy a process was to be developed by the ILC and Central Land Council to identify an appropriate Indigenous Corporation to which the ARR could be divested once free of any financial encumbrances.

Consequently, the write-down of the asset is immaterial to the ILC as it is obliged to divest (at no cost) the asset, including ARR, to an Indigenous Corporation over time so that fluctuations in its value over time, prior to its divestment, are ultimately of no consequence. The key point is that ILC is not an investor holding the asset for sale, unlike IBA.

It is of considerable concern that neither Mr Dillon nor his Chairperson seem to understand this basic principle. It is also of considerable concern that they don't seem to have even the basic understanding of accounting standards and their consequences.

- "The resort is running very well, but we paid and we borrowed too much" (Dillon).

However, the McGrathNicol report, commissioned by the ILC itself into the purchase of ARR, found that (pages 19-46):

- *"The Grant Samuel financial model was influential on the Board and is standard practice in mergers and acquisitions.*
- *The price was consistent with the Net Present Value (NPV) suggested in the Grant Samuels model.*
- *The assumptions made by the Grant Samuels model about cash flows was conservative, and more conservative than comparable assessments by Colliers and CBRE in their valuations.*
- *Grant Samuel's consideration of forecast CAPEX was higher than that of CBRE and Colliers.*
- *Ultimately value is subjective and it is possible that the Board had good reason to assess the price as appropriate.*
- *The ILC was a motivated purchaser, but the length of time for purchase and negotiations indicate it was not prepared to purchase at any price.*
- *Vendor finance arrangements were reasonable, based on competitive interest rates, and were not disadvantageous to the ILC".*

It should also be noted that Voyages Indigenous Tourism Australia Pty Ltd, was able to borrow \$60 million from the ANZ bank for major works, which was secured by ARR with no collateral or obligation

from the ILC. No doubt the ANZ undertook its own valuation and was happy to facilitate the loan. This gives lie to Mr Dillon's assertions that the ILC paid and borrowed too much money.

- "In essence, it turns on the question of whether the then directors made a sound business decision. The advice we have is that, prima facie, they did not (Dillon)."

Mr Dillon has not provided evidence to support his assertions. On the contrary, KPMG's report of 2011, which was not made available to McGrathNicol by the ILC, states, "comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles".

Furthermore, it is beyond question that the greatest single pathway to achieving the Closing the Gap objectives is scalable, effective and sustainable employment and training programs for Indigenous people that equip them to work in current and future export and other growth markets. The ARR's focus on hospitality training is achieving this and it is arguably the most effective Indigenous training and employment program in Australia by volume, reach and success.

It is estimated that the cost to the Federal Government of supporting welfare dependent Indigenous people is an average of \$75,000 per person each year [H and M Hughes, Centre for Independent Studies 2011]. By this estimate the Voyages employment and training programs, deliverable because of the ARR economies of scale, are saving the Federal Government about \$20M (based on 263 people employed) in welfare payments each year. Over a 40 year period in which these young people will continue to work, rather than collect welfare benefits, the Federal Government is potentially saving up to \$760M (2013 prices). If it is assumed that over the next 40 years the ARR trains for employment a further 7,400 Indigenous people (an average of 185 people per year based on throughput over the last 2 years), and those people gain employment at the ARR or in the broader tourism or other sectors, the Federal Government is saving up to a further \$555M in welfare payments. There would be further savings when taking into account the multiplier effect of each of these trainees working for the rest of their lives, instead of receiving welfare payments. Again, this characterises the ILC performing its functions using sound business principles and foresight.

- "The audit committee of the ILC of the time did not take a role in the transaction. In fact, the chair of the audit committee at the time was chief driver of the transaction within the ILC ... The members of the audit committee had been members for 12 years. The Auditor General's provisions say six years maximum" (Dillon).

I was the Chair of the Audit at that time and the McGrathNicol report:

- Does not discuss in any way the role of the ARMC Chair and his involvement in the ARR transaction.
- Does not include any findings, conclusions or recommendations that one Director's chairmanship of the ARMC and involvement in the ARR transaction was a possible reason defining the ARMC role in the transaction, or that the ARMC role was affected by any conflict of interest.
- Does not make any findings, conclusions or recommendations that the ARMC role, operation and membership, was a key corporate governance issue that the ILC should address.

Mr Dillon's evidence asserts that one Director (myself), rather than the Board as a whole, was instrumental in the ARR transaction and purchase. However, in the MN report there are no findings, conclusions or recommendations that support his assertion. There was also no rule, at that time, from the Australian National Audit Office (ANAO) that precluded a Director serving more than six years on the ILC

Audit Committee. If there had been, then ANAO would have pointed this out to the ILC and I would have immediately stood down. I am immensely proud that during my time on the ILC Audit Committee we delivered 12 unqualified audits.

- *“Things like the due diligence that was undertaken was done by Grant Samuel – a very respected firm. The contract required, or allowed, that we would pay them a proportion of the purchase price – one percent – as their fee. The higher the purchase price, the higher the fee the people undertaking the due diligence received” (Dillon).*

The MN report does not find that there was any improper conduct on the part of Grant Samuel. The McGrathNicol report found that (page 9):

“Grant Samuel’s advisory fee was based on a percentage of the purchase price of the ARR. Whilst commonplace in the financial services sector, a fee arrangement of this nature does not incentivise an advisor to seek the lowest possible transaction price or advise against the transaction. We make no finding that Grant Samuel acted improperly in this respect. However, we consider that it may have been prudent for ILC to consider alternative fee structures”.

- *“The McGrathNicol report found that one of the directors – in fact, the director driving the transaction – had a **substantial undisclosed conflict-of-interest**. That is a concern” (Dillon).*

Mr Dillon’s evidence states the McGrathNicol report considered that I had an undeclared potential conflict of interest arising from my connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time of the ILC’s purchase.

The McGrathNicol report considers conflict of interest issues in section 6.5 (page 69). In relation to the connection referred to by Mr Dillon, the report identified this as a Directorship held by myself of Singapore Airport Terminal Services, a listed public company, which is 43% owned by Temasek Holdings. Temasek Holdings is 100% owned by the Singapore Government. The Singapore Government is also the 100% owner of GIC Private Limited which has an 11.65% shareholding in General Property Trust, the vendor of ARR.

The McGrathNicol report concluded that it *“has no further knowledge regarding this connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be remote”.*

Mr Dillon has misrepresented McGrathNicol’s findings on this issue and has sought to mislead your Committee.

The Committee might also wish to note that McGrathNicol also considered my role as Honorary Chairman of Accor Asia Pacific, which was awarded the hotel service contract for the ARR by Voyages after a competitive process. It found that I properly declared my conflict of interest and took no part in considerations and decisions by the Voyages Board about the hotel services contract.

It is curious that Mr Dillon ignores McGrathNicol’s findings about the propriety with which I managed an immediate conflict of interest, but seeks to infer that I may have behaved improperly in relation to a connection considered to be remote. So remote in fact that I myself did not know about it.

I ask that the Committee call Mr Dillon to account for his misleading statements at the hearing on 13 February 2015, particularly those relating to me. If Mr Dillon repeated his misleading statements outside the privilege of

Parliament committees I would no doubt have legal remedy. However, he has used parliamentary privilege to defame my good name and I trust that will be seen by the Committee as a misuse of parliamentary privilege by a senior Commonwealth officer.

Finally, to put into context the apparent dysfunction of the ILC and the role of the CEO and Chairperson therein, please find a copy of a staff letter which apparently appears on the ILC's own extranet website. It requires no further comment and this in relation to a person who received a \$60,000 "performance bonus" last year and at a time when the ILC is crying poor.

Yours sincerely

David Baffsky AO