



**Australian Government**

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**Department of the Prime Minister and Cabinet**

**Submission to the Senate Finance and Public Administration  
Legislation Committee**

Inquiry into the Provisions of the Aboriginal and Torres Strait  
Islander Amendment (Indigenous Land Corporation) Bill 2018;  
Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill  
2018; and Aboriginal and Torres Strait Islander Land and Sea Future  
Fund (Consequential Amendments) Bill 2018

April 2018

## **Executive Summary**

The Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (ATSILSFF Bill); Aboriginal and Torres Strait Islander and Sea Future Fund (Consequential Amendments) Bill 2018 (Consequential Amendments Bill); and Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill represent significant reforms in Australia's land rights journey. These bills will build on the historic foundations of the Indigenous Land Corporation (ILC) developed following the seminal High Court decision in *Mabo v Queensland (No2)* (1992) 175 CLR 1 (Mabo No. 2).

The current Land Account, which provides annual funding for the ILC, has been plagued with poor returns. If action is not taken now, the balance of the Land Account will continue to erode over time. The ATSILSFF Bill and the Consequential Amendments Bill will replace the Land Account with a new Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF). A new ATSILSFF will enhance the ability of the Commonwealth to put the ILC on a sustainable footing so it can deliver on its purpose.

Equally as significant is the introduction of the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill to expand the functions of the ILC to rights in relation to freshwater and sea country. This Bill will bring the remit of the ILC into step with traditional understandings of country, and with developments in native title case law.

The ILC conducted public consultations in 2017 involving over 75 Indigenous organisations in 11 locations across Australia, where stakeholders expressed overwhelming support for these changes. The Government now seeks to implement these important reforms. They will ensure the ILC is best placed to support the aspirations of future generations of Aboriginal and Torres Strait Islander people.

## **1. The purpose of the Indigenous Land Corporation and the Land Account**

- 1.1. The Indigenous Land Corporation (ILC) is a corporate Commonwealth entity established in 1995 as a key component of the Government's response to the Mabo (No. 2) High Court decision and a growing awareness of the need to redress the wrongs of the dispossession of Aboriginal and Torres Strait Islander people from their lands.
- 1.2. The purposes of the ILC are to assist Aboriginal and Torres Strait Islander people to acquire and manage land to provide economic, environmental, social or cultural benefits. It is specifically directed towards those whose native title rights have been extinguished. The ILC achieves this purpose through funding from the Aboriginal and Torres Strait Islander Land Account (the Land Account). The Land Account was intended provide a secure and ongoing source of funds to the ILC.
- 1.3. The ILC is established by section 191A of the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act). This Act also continues the Land Account in existence (section 192W), and provides for annual and additional payments to the ILC (section 193). The Land Account is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and is invested in accordance with section 58 of that Act.

## **2. The Land Account is unsustainable**

- 2.1. The Land Account is shrinking in real terms because its investment mandate does not match its purpose.
- 2.2. The ATSI Act requires the Land Account to make annual CPI-indexed payments of \$45 million (in 2010 dollars) to the ILC (\$51.4 million in 2017). This provides reliable ongoing funding for the ILC, allowing it to acquire and manage land.
- 2.3. However, Land Account investments, which are currently made by the Chief Financial Officer of the Department of the Prime Minister and Cabinet (PM&C) on behalf of the Commonwealth under delegation by the Minister for Finance, are restricted to cash and cash-like products by section 58 of the PGPA Act. These investments are not earning enough to continue to provide a secure and ongoing source of funds to the ILC. If the earnings of the Land Account financial assets do not cover the annual CPI indexed payments to the ILC, then the capital of the Land account will be depleted.
- 2.4. The ATSI Act also provides for additional payments to avoid funds intended for Indigenous advancement being locked away in the Land Account. If Land Account capital exceeds a legislated, CPI indexed target, any excess is paid to the ILC as an additional payment (this occurred in 2011–12, 2012–13 and 2013–14). However, these arrangements undermine the financial sustainability of the Land Account capital base – in good years the ILC benefits, in bad years Land Account capital is depleted.
- 2.5. These changes are being sought now because returns of Land Account investments have failed to meet the target rate of return in each of the last four financial years. Independent advice suggests this trend is likely to continue under the current investment environment and with the Land Account being restricted to cash and cash

like investments. This trend brings into doubt the ILC's ability to perform its functions in supporting Aboriginal and Torres Strait Islander people.

### **3. The Murray Panel report**

- 3.1. In 2016 the ILC engaged an Expert Panel led by David Murray AO (the Murray Panel) to provide advice on how to ensure sustainability of the Land Account. A key recommendation of the Murray Panel was to align the investments of the Land Account with their purpose, which is to provide a secure and ongoing source of funds to the ILC.
- 3.2. The Murray Panel recommended investing in higher risk assets to give the investments of the Land Account a better chance of producing higher long term returns. The Murray Panel recommended that the Future Fund Board of Guardians (FFBG) invest Land Account funds.
- 3.3. The Murray Panel commissioned the Australian Government Actuary (AGA) to provide advice on the likely investment performance of the Land Account. AGA modelling suggests that, in the current and foreseeable investment environment, the Land Account's current investment settings will not allow it to fund the ILC and maintain its real value.
- 3.4. Recent performance supports this view. From 2013–14 to 2016–17, Land Account annual investment returns have been 3.92 per cent, 3.57 per cent, 3.02 per cent and 2.90 per cent, respectively. In each of these years it failed to meet its target. If this continues the balance of the Land Account would diminish, which is not in keeping with the original policy intent of providing a secure and ongoing source of funds to the ILC.

### **4. The ILC conducted public consultations**

- 4.1. From July to September 2017 the ILC conducted public consultations on the financial sustainability of the Land Account and on expanding the ILC's remit to include sea and freshwater country. Stakeholders had previously raised both issues with the ILC. Sixteen meetings were held in 11 locations across Australia, involving over 75 Indigenous organisations. The ILC also invited written submissions from stakeholder groups and individuals, receiving 24 submissions.
- 4.2. On 20 October 2017, the ILC provided its report on the consultations to the Government. The ILC found that stakeholders overwhelmingly supported transferring the investment of Land Account funds to the FFBG and expanding the ILC's remit to include sea and freshwater country. The Government took these views into account in designing these reforms.

### **5. A new Aboriginal and Torres Strait Islander Land and Sea Future Fund should be established**

- 5.1. The Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (the ATSILSFF Bill) gives effect to the Government's decision to establish the ATSILSFF to support the making of annual and additional payments to the ILC. The ATSILSFF replaces the Land Account, the closure of which will be effected by the Aboriginal and

Torres Strait Islander and Sea Future Fund (Consequential Amendments) Bill 2018  
(Consequential Amendments Bill).

- 5.2. The ATSILSFF Bill provides for the transfer of the monies and financial assets currently allocated to the Land Account to the ATSILSFF, which will be invested by the FFBG.
- 5.3. The ATSILSFF consists of the ATSILSFF Special Account and the investments of the ATSILSFF. The balance of the existing Land Account will be transferred to the ATSILSFF Special Account, and the investments of the Land Account will become investments of the ATSILSFF.
- 5.4. The Consequential Amendments Bill makes a number of consequential amendments to other pieces of legislation required to enable the effective operation of the ATSILSFF at commencement.

The underlying purpose of the Land Account remains the same

- 5.5. This ILC was established to assist Aboriginal and Torres Strait Islander people to acquire land in recognition that many are unable to assert native title rights and interests. The new ATSILSFF, just like the current Land Account, is a mechanism to enable the ILC to achieve this.
- 5.6. The Bills aim to enhance the Commonwealth's ability to fund the ILC over the long-term. Enhancing the Commonwealth's ability to make payments to the ILC will assist in alleviating the impact of dispossession on Aboriginal and Torres Strait Islander people. In this way, the Bills and the ILC's enabling legislation together ensure that the Fund is used most effectively for the benefit of Aboriginal and Torres Strait Islander people.

The new role of the FFBG

- 5.7. The management of the Land Account, currently carried out by PM&C, will be transferred to the FFBG (supported by the Future Fund Management Agency (FFMA)). These changes do not change the purpose of the Land Account, nor the purpose of the FFBG.
- 5.8. The FFBG is an experienced, specialised and trusted investor of public money and the Government wants the ILC to benefit from the FFBG's investment performance over the last decade in managing other Commonwealth investment funds. The FFBG will not be subject to the same investment constraints as PM&C in managing the Land Account.
- 5.9. The FFBG currently invests over \$164 billion across five public asset funds with different purposes and investment mandates. While the transfer will add some complexity to their role, it is consistent with their current operations. These arrangements ensure the separation of each fund managed by the FFBG.
- 5.10. The FFBG, as manager of the ATSILSFF, will be responsible for deciding how to invest the assets of the Fund, taking into account the investment mandate set by the

Minister for Finance and the Treasurer (the ‘responsible Ministers’). This approach is consistent with the approach adopted for other funds invested by the FFBG, and is necessary to preserve the independence of the FFBG as a sovereign investor of public money.

Were other options considered for the management of the Land Account?

- 5.11. Stakeholder consultations showed there was strong support for transferring management to the FFBG.
- 5.12. Other options were not considered as effective. The option of a capital injection would not address the ongoing fundamental issue that the investment restrictions hinders the Land Account’s potential earnings and would be a significant impost on the Budget.
- 5.13. The option of establishing a new board to manage the Land Account would be expensive and would duplicate functions already performed by the FFBG.

Setting the investment mandate of the Fund

- 5.14. The investment mandate for the Fund will be set by the Minister for Finance and the Treasurer in consultation with the FFBG and the Minister for Indigenous Affairs. The purpose of the investment mandate is to provide a mechanism for the Government to provide strategic guidance to the FFBG on its expectations for the investment of the Fund.
- 5.15. This will be consistent with the arrangements for other funds currently managed by the FFBG, such as the Future Fund, the Medical Research Future Fund (MRFF), the DisabilityCare Australia Fund, the Building Australia Fund, and the Education Investment Fund. The investment mandates for the different funds are tailored to their purpose to ensure targeted returns are consistent with the policy intent.

Annual payments will continue to be made to the ILC

- 5.16. Annual payments to the ILC will continue to be made by the Minister for Indigenous Affairs. The timing and calculation of the indexed annual payments remain as currently provided for under the ATSI Act.
- 5.17. The ATSILSFF Bill will require the Minister for Indigenous Affairs to make an annual payment to the ILC. To this end, the ATSILSFF Bill establishes the ILC Funding Special Account, through which annual payments to the ILC will be channelled.
- 5.18. Once each financial year, the Minister for Finance must cause an amount determined under the legislation to be debited from the ATSILSFF Special Account, and credited to the ILC Funding Special Account for the Minister for Indigenous Affairs to make the annual payment.
- 5.19. The Secretary of the Indigenous Affairs Department is responsible for the ILC Funding Special Account.

5.20. The annual payment to the ILC will remain an amount indexed in accordance with CPI (based on an initial payment of \$45 million in 2010-11).

5.21. As is currently the case, the ILC will determine how these annual payments are spent.

#### Additional payment arrangements are changing

5.22. Current arrangements for additional payments mean that an additional payment is made automatically if the Land Account capital exceeds a CPI-indexed target, i.e. any excess funds are paid to the ILC. However, when the Land Account falls below the target there is no reduction in the annual payment to the ILC.

5.23. The Murray Panel found that these additional payment arrangements exacerbated the rate of decline in the account balance.

5.24. In light of this, the Government agreed to cease the automatic additional payments and replace it with discretionary payments, limited to once each financial year, to be determined by the Minister for Finance and the Minister for Indigenous Affairs.

5.25. Prior to making a determination, the Minister for Finance and the Minister for Indigenous Affairs are required to seek advice from the FFBG on the impacts of making the proposed payment on the sustainability of annual payments to the ILC. Determinations for additional payments are notifiable instruments, and will be registered and be made publicly available on the Federal Register of Legislation.

5.26. The new arrangements regarding discretionary payments will not compromise the financial independence of the ILC. The continuation of annual payments preserves the financial independence of the ILC.

5.27. No Minister has the power to direct the ILC in relation to any of its activities, except as expressly provided by law. The Bills do not change these arrangements. This means no Minister could direct the ILC to use an additional payment in a particular way or for a particular purpose.

5.28. It remains a matter for the ILC to make spending decisions in the exercise of its powers and the performance of its functions under the ATSI Act.

#### Accountability and reporting

5.29. The *Future Fund Act 2006* specifies the accountability arrangements for the FFBG and the FFMA, including the requirement to table in the Parliament an Annual Report (including audited financial statements for the Future Fund).

5.30. The Annual Report, which is published on the Future Fund website, provides extensive information on the investment performance of each of the investment funds managed by the FFBG. The same level of information will be provided in relation to the ATSILSFF. The Department of Finance's Annual Report will include the audited financial statements for the ATSILSFF, consistent with the practice in place for the other Funds invested by the FFBG (excluding the Future Fund).

- 5.31. In addition, quarterly portfolio updates that provide investment commentary and information on the performance of each of the investment funds, are published online on the Future Fund website. This level of reporting provides regular information on investments and performance, which has proven sufficient and satisfactory for other government investment fund stakeholders, such as the Department of Health in respect of the MRFF and the Department of Social Services in respect of the DisabilityCare Australia Fund.
- 5.32. The ATSILSFF Bill also allows the Minister for Finance to request that the FFBG prepare reports or give information. The Minister for Finance may give these reports or information to a relevant Minister.
- 5.33. The ATSILSFF Bill also requires the responsible Ministers to cause a review of the operation of the Act before the tenth anniversary of commencement. This will give the Government an opportunity to consider how the ATSILSFF is working and whether the Fund is providing the outcomes envisaged.

## **6. The functions of the ILC should be expanded to include sea and freshwater country**

- 6.1. The ILC was established as part of the Commonwealth's response to the recognition of the dispossession of Aboriginal and Torres Strait Islander people from their country.
- 6.2. 'Country' includes both land and water, but the ILC can currently only engage in land-related activities. This is inconsistent with traditional understandings of country and with the recognition of native title over land and waters.
- 6.3. Developments in native title case law following the passage of the *Native Title Act 1993* and the establishment of the ILC clarified the common law was capable of recognising native title rights with respect to the use of water, and the taking of resources from waters, for any purpose. These developments in the law acknowledged that the relationships of Aboriginal and Torres Strait Islander peoples to waterscapes and between land and water are inseparable.
- 6.4. Expanding the ILC's remit will enable it to support the full range of opportunities for economic development in sectors such as fisheries, agriculture and tourism, to benefit Aboriginal and Torres Strait Islander people.
- 6.5. The Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 amends the ATSI Act to extend the functions of the ILC to rights in relation to water. The ILC would exercise these additional functions in a manner that is consistent with how it performs its functions in relation to land. These amendments will enable the ILC to assist Aboriginal and Torres Strait Islander peoples to obtain economic, environmental, social or cultural benefits from waters so far as the Commonwealth, or the states and territories, have sovereign rights.



6.6. The amendments enable the ILC to:

- acquire and hold water rights, rights to take resources from waters, and other rights to engage in activities on or in waters;
- divest those rights to Aboriginal or Torres Strait Islander corporations;
- undertake management functions in relation to waters; and
- assist Aboriginal and Torres Strait Islanders to acquire those rights or undertake those management functions in relation to waters (including by way of a grant or loan of money).

6.7. The amendments would not authorise the ILC to exercise these additional functions in a manner that is inconsistent with the rights and interests of other persons or international law. Nor will the amendments grant the ILC any new or additional rights over existing players in relevant markets.

6.8. It will be for the ILC, in consultation with local Indigenous groups, to determine what specific Aboriginal and Torres Strait Islander corporations to assist, and how that assistance is provided. Any costs associated with expanding the ILC's remit would be managed within existing ILC funding.

#### Renaming of the ILC

6.9. The Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 also alters the name of the ILC to the 'Indigenous Land and Sea Corporation' to reflect the expansion of the ILC's functions to water. This alteration does not affect the legal identity of the ILC.