



Australian Government

Department of the Prime Minister and Cabinet

**ANDREW FISHER BUILDING
ONE NATIONAL CIRCUIT
BARTON**

Reference: EC14/616

Jeanette Radcliffe
Secretary
Senate Standing Committee on Community Affairs
Legislation Committee
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Ms Radcliffe

Thank you for your letter of 30 July 2014 to Dr Ian Watt, Secretary of the Department of the Prime Minister and Cabinet, regarding the Senate Community Affairs Legislation Committee's inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014.

The Department of the Prime Minister and Cabinet appreciates your invitation to provide a written submission to this inquiry. A copy of the Department's submission is enclosed.

Please contact me if the Department can be of further assistance in the Committee's inquiry.

Yours sincerely

Caroline Edwards
A/g Deputy Secretary
Indigenous Affairs

29 August 2014

Department of the Prime Minister and Cabinet
Submission to the Senate Community Affairs Legislation Committee on the
Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill
2014

Executive Summary

The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (the Bill) proposes amendments to the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) that relate to the Indigenous Land Corporation (ILC) and the Aboriginal and Torres Strait Islander Land Account (Land Account).

The explanatory memorandum for the Bill sets out three key outcomes intended to be effected by enactment: to strengthen the Land Account by making its purpose clearer and ensuring a stricter process for any future amendments by Government through additional Parliamentary process; to strengthen the governance of the ILC; and to give a higher level of Indigenous control.

This submission provides some commentary on each provision of the Bill in turn. It sets out the Department of the Prime Minister and Cabinet's (the Department) assessment of how the provisions of the Bill would likely operate and offers a summary of the relevant current legislative arrangements as they relate to the ILC and the Land Account.

Many of the proposed amendments are likely to add requirements or processes in relation to the ILC and Land Account. In some cases these processes would be expected to add to the time and complexity of administering the legislation. This would be the case (for example) in relation to the proposal that certain amendments be referred to a joint parliamentary committee and the establishment of a Nomination Committee to be formally consulted on nominations for appointment to the ILC Board.

Other proposed amendments appear to wholly or substantially replicate existing requirements or duties that apply under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) and the ATSI Act. This includes the proposed changes regarding the use of Land Account funds by the ILC (Item 2 of Schedule 1), as well as several of the provisions relating to the internal governance of the ILC (e.g. the requirement to ensure the efficient performance of the organisation's functions and act in accordance with principles of good governance (Item 11, Schedule 1), to have an Audit and Risk Committee (Item 17, Schedule 1) and to disclose conflicts of interest (Item 17, Schedule 1). Details of the apparent duplication are set out in the body of this submission.

Additionally, the PGPA Act, which replaced the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act), establishes a single framework with a standard set of rules for the governance of all Commonwealth entities, including the use and management of public resources. As a general principle, the separate inclusion of comparable provisions in enabling legislation should only be undertaken where there is an operational need that varies from the requirements of the PGPA Act.

Duplication and the imposition of additional process and administration have the potential to add unnecessary complexity and cost and risk causing confusion.

The Department is not aware of the Bill having been subject to any significant consultation process with the Indigenous or general community prior to its introduction.

Introduction & Background

The Aboriginal and Torres Strait Islander Act 2005 (ATSI Act)

The ATSI Act regulates the functions and governance arrangements for both the ILC and the Land Account. It also regulates the Torres Strait Regional Authority and Indigenous Business Australia.

The preamble of the ATSI Act expressly acknowledges that Aboriginal persons and Torres Strait Islanders have been dispossessed of their lands.

Section 3 of the ATSI Act states that the objects of this Act are, in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society:

- to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
- to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
- to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- to ensure coordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

ILC and the Land Account

Originally established in 1995 under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Land Fund Act), the ILC and the Land Account were intended to assist Aboriginal and Torres Strait Islander people to acquire land and to manage any Indigenous-held properties (whether or not they were acquired under the Land Account). Following the historic High Court decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, the Land Account was established to recognise that past practices of dispossession would mean that not all Aboriginal people would be able to benefit from the recognition of native title, and to provide funding to allow the acquisition of land for these groups.

The Land Account is a Special Account for the purposes of the PGPA Act. It was established as a capital fund over ten years by annual appropriations from the Consolidated Revenue Fund. The final appropriation was made in June 2004. The Land Account and its investments are administered by the Department under delegation from the Finance Minister. The returns earned by the fund are to be used to fund the operations of the ILC as well as maintain adequate growth in the capital of the Land Account in order to maintain the future purchasing power of ILC funding.

Under the ATSI Act, the purpose of the Land Account is to make payments to the ILC (s.192X). The government is required under the ATSI Act to consult with the ILC at least twice each financial year about the investment policy of the Land Account (s.193G).

The ILC is an independent statutory authority whose purpose is to assist Aboriginal persons and Torres Strait Islanders to acquire land, and to manage Indigenous-held land, so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders (s.191B). It was established to ensure that the funds from the Land Account were applied as part of a long-term strategy for the management of the Indigenous estate.

The internal governance arrangements for the ILC are regulated by the ATSI Act and also by the new PGPA Act, which sets a common governance framework across Commonwealth entities.

The ILC is overseen by a Board of Directors appointed by the Minister for Indigenous Affairs (the Minister) in consultation with the Finance Minister. The majority of the Board of Directors, as well as the Chair, must be Aboriginal persons or Torres Strait Islander people. Persons can only be appointed to the Board if the Minister is satisfied that they have experience in: land or environmental management; or business or financial management; or Aboriginal or Torres Strait Islander community life (s. 191(4)).

Additionally, unlike most other statutory organisations, there are no powers for Government or the Minister to direct the operations of the ILC in any way (see s. 191 of the ATSI Act).

Changes to the Land Account since 1995

The 1995 legislation which established the ILC also provided that the government was to allocate \$121 million (indexed) annually from Consolidated Revenue to the Land Account each year between 1995-6 and 2003-4. Of this, an indexed amount (which equated to \$45 million by 2004-5) was provided to the ILC each year. The legislation provided that from 2005-6, the ILC was to receive funds based on the realised real returns on investments of the Land Account.

Further amendments to the ATSI Act in 2010, revised the process of payment from the Land Account to the ILC to provide an annual payment to the ILC of \$45 million, indexed in future years by the Consumer Price Index (CPI). An additional top up payment is made to the ILC where the annual return to the Land Account is greater than that required to maintain the real capital value of the Land Account indexed to CPI.

The nominal value of the Land Account has grown every year since the minimum statutory payments to the ILC commenced in 2010. As at 30 June 2014, the Land Account's value was approximately \$1.99 billion.

An overview of the payments made to the ILC from the Land Account since 2010 is at Table 1 below.

TABLE 1: Summary of payments to ILC 2010-2014

Year	Minimum Annual payment \$'000	Additional Payment \$'000	Total Payment \$'000
2010-11	45,000	-	45,000
2011-12	46,395	4,939	51,334
2012-13	47,462	18,440	65,902
2013-14	48,554	3,910	52,464

Public Governance, Performance and Accountability Act 2013

The PGPA Act regulates the governance, performance and accountability of, and the use and management of public resources by, Commonwealth entities, including the ILC. It came into effect on 1 July 2014, and replaced the FMA Act and the CAC Act.

Section 5 of the PGPA Act outlines that its objects are:

- to establish a coherent system of governance and accountability across Commonwealth entities;
- to establish a performance framework across Commonwealth entities;
- to require the Commonwealth and Commonwealth entities:
 - to meet high standards of governance, performance and accountability; and
 - provide meaningful information to the Parliament and the public; and
 - to use and manage public resources properly; and
 - to work cooperatively with others to achieve common objectives, where practicable; and
- to require Commonwealth companies to meet high standards of governance, performance and accountability.

Aboriginal and Torres Strait Islander Land Account – Part 1

In March 2014, the ILC publicly released a draft Aboriginal and Torres Strait Islander (A Stronger Land Account) Amendment bill and explanatory memorandum. Media reports indicated that the ILC had consulted with some Indigenous leaders in development of the draft bill and the associated press release noted the need for further engagement with government and the wider Indigenous community - *"In advancing this package we ask that the Government talks with the ILC Board and with the wider Indigenous leadership"* (ILC press release 24 March 2014).

The proposed Bill appears closely based on this ILC draft, with some minor amendments. The Department is not aware of further consultation with Government, other Indigenous leaders, the wider Indigenous community or the broader Australian community on the proposed Bill ahead of introduction.

Proposed changes relevant to the Land Account

Part 1 of Schedule 1 of the Bill seeks to make a number of changes relevant to the administration and ongoing regulation of the Land Account. The Explanatory Memorandum states that the purpose of these amendments is to:

- introduce a clearer purpose for the Land Account in the Act, specifying that the Land Account is a compensatory mechanism in acknowledgement of past injustices and dispossession of traditional lands and acknowledging the special relationship Aboriginal people and Torres Strait Islanders have with their lands;
- prevent the Land Account from being utilised for any purpose other than the land-related benefit of Aboriginal people and Torres Strait Islanders;
- introduce measures to ensure the Land Account grows over time, so that it continues to meet the land acquisition and management needs of future generations of Aboriginal people and Torres Strait Islanders; and,
- strengthen Indigenous control over the Land Account by:
 - strengthening the provisions that allow the ILC Board to give advice to Ministers regarding the management of the Land Account; and
 - introducing a mechanism that requires the Parliament to consult with Aboriginal and Torres Strait Islander people before making any changes to the provisions in the Act that relate to the Land Account.

The provisions of Part 1 of Schedule 1 of the Bill are examined in turn below.

Clearer purpose for the Land Account & prevent it from being utilised for certain purposes

Item 1

Proposed Provisions

Item 1 of Schedule 1 sets out proposed new objects for Part 4A of the ATSI Act. These objects (among other things) include an acknowledgement of the special relationship that Aboriginal

persons and Torres Strait Islanders have with their lands and an intention to provide a “compensatory mechanism” to address the ongoing land needs of Aboriginal persons and Torres Strait Islanders.

Analysis

Although apparently intended to clarify the purpose of the Land Account, the proposed new objects are expressed to apply to the entirety of Part 4A, which establishes not only the Land Account but also the ILC. They differ from the objects for the ATSI Act (s.3) as a whole, although both sets of objects acknowledge the impact of past policies of dispossession and the extent of substantially varying sentiment is unclear. The enactment of similar but not identical objects within the ATSI Act would have the potential to create ambiguity, and may diminish the utility of the objects as an aid to interpretation.

Item 2

Proposed Provisions

Item 2 of Schedule 1 would provide that the purpose of the Land Account is to make payments to the ILC. It also proposes that money paid to the ILC from the Land Account can only be used to: discharge costs and other expenses; pay wages and allowances; and to make any other payments authorised by law.

Analysis

This provision largely replicates existing provisions by combining the existing s.192X (which sets out that the purpose of the Land Account is to make payments to the ILC) and existing s.193J (which provides that all money paid to the ILC must be paid only in payment or discharge of the costs, expenses and other obligations lawfully incurred by the ILC; and in payment of any remuneration and allowances lawfully payable to any person under this Act or any other law; and in making any other payments which the ILC is authorised or required to make by law). It is not clear that this reformulation of the provisions would have a significant practical impact.

The ILC’s ability to apply money is already limited in that it must be linked to the performance of its functions and the exercise of its powers under the ATSI Act and other laws. Item 2 of Schedule 1 purports to further limit the ILC’s ability to apply money to the laws that are in force at the commencement of the new provision (and not those laws as amended from time to time, as would ordinarily be the case). In practice, this could mean that even if those laws are amended, the ILC would continue to apply money under old laws. This approach is not typical of Commonwealth legislation.

In addition, even if Item 2 of Schedule 1 became law in its current form, it could not constrain a future Parliament from amendment or repeal of the provision.

Ensuring the Land Account grows over time

Item 6

Proposed Provisions

Item 6 of Schedule 1 would provide that from the 2014-15 financial year onwards, the ILC would receive half of any real returns to the Land Account in excess of \$50 million. Currently, the ILC receives the full value of the real return to the Land Account (see Table 1 above for additional amounts paid to the ILC since 2011-12).

Analysis

The intention of this provision is to ensure that the Land Account grows over time by increasing the principal in the account. The Department is not aware of any modelling which would indicate by how much more the Land Account would grow over time and/or whether this presents the optimal strategy for growing the Land Account.

Currently, investment activities are undertaken by Department officials in accordance with the PGPA Act and an Investment Policy agreed between the Land Account's Consultative Forum and the Department's Chief Finance Officer, who is the Finance Minister's Delegate for the purposes of the PGPA Act.

The investment objectives are to achieve a return on the investments which will preserve the capital value of the fund in real terms and cover the annual payment to the ILC. This equates to a return of at least the CPI +2.6% per annum. In 2012-13, the return on investments for the Land Account was 5.05 per cent. In 2013-14, it was 4.11 per cent.

Item 8

Proposed Provisions

Item 8 of Schedule 1 would require the projected financial requirements of the ILC to be discussed at the existing Consultative Forum on investment policy of the Land Account.

Analysis

Section 193G of the ATSI Act requires the Minister to convene a Consultative Forum at least twice each financial year. Its members must include two or more ILC Directors nominated by the ILC Board, a delegate of the Finance Minister, and any other person the Minister considers appropriate to specifically discuss the investment policy of the Land Account (s.193G(1)).

A participant of the Consultative Forum may request the Minister to provide to each participant, specified information relating to the management and/or performance of the investments of the Land Account. The Minister must comply with this request.

The Consultative Forum has a broad remit to discuss the investment policy of the Land Account. There is nothing in the current ATSI Act to prevent the Consultative Forum from discussing the projected financial requirements of the ILC.

Item 9

Proposed Provisions

Item 9 of Schedule 1 provides that the ILC may give the Finance Minister advice as to how the Land Account should be managed and the Finance Minister must have regard to this advice.

Analysis

The ILC can currently provide advice to the Finance Minister at any time. The Finance Minister has responsibility for the investment of Commonwealth money and considers an appropriate risk profile for investments, in accordance with the investment powers under s.58 of the PGPA Act. In discharging this duty, the Finance Minister will take account of all relevant advice and considerations rather than prefer the advice from one particular source. The proposed legislation would be inconsistent with current practice and the broad objective of the PGPA Act to encourage greater alignment of resource management across all Government entities.

Strengthening Indigenous control over the Land Account

Item 10

Proposed Provisions

Item 10 of Schedule 1 of the Bill would require that an amendment to the proposed new purposes for Part 4A of the ATSI Act (new s.191AB) or the purposes of the ILC (s.191B) must be referred to a joint parliamentary committee. This requirement would apply to any amendment to those provisions, including amendments of a technical or consequential nature. Under Item 10, the committee would be required to consult nation-wide with Aboriginal persons and Torres Strait Islanders, including prominent Indigenous organisations, and prepare a report.

Analysis

Although the Department understands that the intention is for this process to apply wherever there is a change to the ATSI Act related to the Land Account, the proposed amendments are not expressed as limited to changes to existing Division 10 which relate to the Land Account. The requirement for inquiry by a joint parliamentary committee would also not apply if changes were made to the special account provisions of the PGPA Act even if they impacted on the Land Account. The need to refer all amendments (even those that are minor in nature) to a joint parliamentary committee for inquiry would add significant time and complexity to existing processes for ensuring that legislation is up to date. It would also potentially constrain the capacity of the Parliament to tailor and adopt its processes depending on the particular circumstances and the view of elected members and senators.

As the Land Account is established under statute, the Government currently cannot change the Land Account without passing legislation through both Houses of Parliament. It is common practice for a house of the Parliament to refer proposed legislation for Parliamentary Inquiry. As such, the Department notes that this process can already be instituted in relation any proposed amendment in relation to the ILC or the Land Account without the need for mandatory statutory referral as proposed.

Indigenous Land Corporation – Part 2

Proposed changes to the Indigenous Land Corporation

Part 2 of Schedule 1 of the Bill proposes a range of corporate governance requirements applying to the ILC, including in relation to appointments to the Board as well as the setting of standards for the operations of the ILC and the conduct of its staff and contractors etc.

The Explanatory Memorandum states that the purpose of these amendments is to:

- Introduce strong new measures requiring the ILC to comply with the highest standards of corporate governance, transparency and accountability including:
 - introducing a more rigorous, consultative, merit-based and transparent appointments process for ILC Directors;
 - limiting tenure and re-appointments of the ILC Chair and Directors;
 - introducing stronger disclosure requirements for the ILC Chair and Directors;
 - introducing provisions requiring a Code of Conduct for ILC Directors; and

- strengthening the ILC's Audit and Risk Management Committee, including by ensuring it is managed by a chair who is independent of the ILC.
- Strengthen Indigenous control over the ILC by:
 - introducing stronger appointment processes requiring the Minister to consult with a new Indigenous Nomination Committee before making an appointment to the ILC Board; and,
 - introducing measures to strengthen the ILC's status as an independent Indigenous-controlled entity.

The provisions of Part 2 of Schedule 1 of the Bill are examined in turn below.

Items 11 and 13

Proposed Provisions

Item 11 of Schedule 1 would require the ILC to operate efficiently and in accordance with principles of good governance, transparency, financial accountability and ethical procurement. Item 13 of Schedule 1 proposes additional responsibilities of the ILC Board, including to ensure the efficient performance of the ILC and to also ensure that the ILC, its subsidiaries and ILC officers comply with high standards of good governance.

Analysis

It is not clear how the content of the proposed specific duty to act in accordance with the principles of "good governance, transparency, financial accountability and ethical procurement" would interact with the general obligations ILC Directors are expected to comply under the existing law. While this means that the position could be open to legal debate, a likely interpretation would be that the proposed provisions replicate existing obligations under the PGPA and ATSI Acts.

- For example, s.15 of the PGPA Act requires the accountable authority of a Commonwealth entity to govern the entity in a way that "promotes the proper use and management of public resources for which the authority is responsible; and promotes the achievement of the purposes of the entity; and promotes the financial sustainability of the entity".
- In addition, s.16 of the PGPA Act requires the accountable authority to establish and maintain appropriate systems of risk oversight and management and appropriate systems of internal control.
- Furthermore, under ss.25-29 of the PGPA Act, all officials of the ILC are required to comply with a series of general duties, including the duty of care and diligence and the duty to act in good faith and for proper purpose.
- The ATSI Act requires the ILC to act in accordance with sound business principles whenever it performs its functions on a commercial basis (s.191F(1)).
- There are also requirements in the ATSI Act stating that it is the 'responsibility of the ILC Board to ensure the proper and efficient performance of the functions of the ILC and to determine the policy of the Corporation with respect to any matter' (s.191W);

Item 12

Proposed Provisions

Item 12 of Schedule 1 proposes that, except as expressly provided under the ATSI or PGPA Acts, the Minister for Indigenous Affairs cannot direct the ILC in relation to any of its activities. It also requires the Minister to have regard to the ILC's independence in deciding where to make a request of the ILC.

Analysis

This appears to duplicate existing s.191L of the ATSI Act, which already states that except as expressly provided in the ATSI Act or PGPA Act, the Minister is not empowered to direct the ILC in relation to any of its activities.

Items 14-16

Proposed Change

Items 14-16 of Schedule 1 propose a new process for appointing persons to the ILC Board of Directors. Item 14 would require the Minister to consult both a new Nomination Committee and the Finance Minister before appointing a person to the Board. The requirements for the Nomination Committee and the procedure for engaging with it are set out in Item 16.

Specifically, Item 16 would require:

- The Nomination Committee to consist of at least three members, all who are Aboriginal persons or Torres Strait Islanders and have relevant skills and experience to the ILC's functions.
- The Minister to consult Parliament before a person is appointed as a member of the Nomination Committee.
- If an appointment to the ILC Board is made, the Minister to make a statement stating whether the person was a Nomination Committee-proposed candidate, and this statement must be published on the ILC's website or by means considered appropriate by the Board.

Analysis

The ATSI Act already includes a robust process and consultative requirements around ILC Board appointments. For example, s.191X of the ATSI Act states that all appointees must have experience in land or environmental management; or business or financial management, or Aboriginal or Torres Strait Islander community life. The Minister must make sure that at least two Directors (not including the Chairperson and Deputy Chairperson) have experience in business or financial management. The majority of the Board (minimum four Directors), as well as the Chairperson, must also be Aboriginal persons or Torres Strait Islanders. In addition, the Minister must consult the Finance Minister before appointing a person as an ILC Director (s.191X(3)).

It is also the long standing practice that board appointments be approved by Cabinet and nominations are therefore also subject to the requirements of the Cabinet Handbook, which (among other things) requires nominees to be subject to a robust vetting process and that gender balance and appropriate geographical balance are considered.

Generally (and subject to Freedom of Information requirements), government does not publish the details of individuals who nominate for Board positions, including because this would act as a significant disincentive for people to put their names forward.

The establishment of a new Nomination Committee is also inconsistent with the Government's Smaller Government Agenda announced as part of the 2014-15 Budget. This agenda aims to limit the number of new entities established across the Commonwealth Government. It would also add significant process and cost including in relation to the appointment by the Minister of the nomination committee and appropriate remuneration and support for that committee.

Items 15, 18 and 19

Proposed Provisions

Item 15 of Schedule 1 would require the Minister to ensure that the majority of the appointments to the ILC Board would not expire at, or about the same time. Items 18 and 19 of Schedule 1 limit the maximum period of appointment to three years and re-appointments are only for one term.

Analysis

It is already the case that government gives careful consideration to the need to refresh boards and the staggering of Director appointments. This is a matter of practice for all appointments and the Department is not aware of the matter being the subject of legislation in relation to any other body. The mandating of the staggered approach may not be practical in all circumstances having regard to the position and preferences of nominees or other external circumstances.

Item 17

Proposed Provisions

Item 17 requires the ILC Board to establish an Audit and Risk Management Committee with specified functions and an independent Chairperson.

Analysis

Establishing an Audit Committee is already a requirement of the ILC in accordance with existing PGPA Act provisions. Section 45 of the PGPA Act states that the accountable authority of a Commonwealth entity must ensure that the entity has an audit committee, and that this committee must be constituted, and perform functions, in accordance with any requirements prescribed by the rules.

Section 17 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) sets out the minimum requirements of audit committees to ensure they provides independent advice and assurance to the entity's accountable authority. This section also stipulates that the accountable authority of a Commonwealth entity must determine the audit committee's functions; but must include reviewing the appropriateness of the accountable authority's financial reporting, performance reporting, system of risk oversight and management and system of internal control for the entity.

Furthermore, this section of the PGPA Rule sets out the membership requirements of the audit committee, including for it to consist of at least three people who have appropriate qualifications, knowledge, skills or experience. The section also provides that as of 1 July 2015, the majority of the members of the audit committee for a corporate Commonwealth entity such as the ILC must not be employees of the entity. Additionally, it stipulates persons who must not be members of the committee (such as the Chair, Chief Financial Officer or Chief Executive Officer).

Further, the ILC already has the authority to set up any committee it believes is necessary to assist it to perform its functions and has had an Audit and Risk Management Committee in place since 1997. The primary objective of this Committee is to provide 'independent assurance and advice to the ILC Board on the risk, control and compliance framework, financial statement responsibilities and external accountability framework for the ILC' (ILC Annual Report 2012-13, p.13). In August 2012, the ILC Board appointed an independent chair to this Committee (ILC Annual Report 2012-13, p.14).

Item 20

Proposed Provisions

Item 20 of the Bill requires the Chair of the ILC Board to notify the Minister of all pecuniary interests and the Directors must disclose all pecuniary interests to the Board. The Board must keep a register of disclosed interests.

Analysis

The PGPA and ATSI Acts already regulate the disclosure of interests. Specifically ss.25-29 of the PGPA Act set out general duties that apply to all officials, which includes the duty to disclose interests. In particular, s.29(1) requires an officer who has a material personal interest that relates to the affairs of the entity to disclose details of the interest.

There are also requirements in the ATSI Act stating that it is the 'responsibility of the ILC Board to ensure the proper and efficient performance of the functions of the ILC and to determine the policy of the Corporation with respect to any matter' (s.191W); as well as the Chair's disclosure to the Minister of all direct or indirect pecuniary interests that the Chair has or acquires in any business, or in any body corporate carrying on a business (s.192F).

Item 21

Proposed Provisions

Item 21 requires the ILC Board to determine and publish a code of conduct, which all officers (including a member, officer, employee or consultant of a subsidiary) must comply.

Analysis

The PGPA Act does not stipulate a separate Code of Conduct, but rather, sets out general duties that apply to officials. Establishment of a Code of Conduct is good practice, and many statutory bodies and other organisations have one as part of general management. It would constitute an important practical element of a strategy by the ILC Board to comply with its general obligation under the PGPA Act.

Other amendments – Part 3

Item 22

Proposed Provisions

Part 3 of Schedule 1 of the Bill (Item 22) inserts several new definitions into s.4(1) of the ATSI Act. In particular, the proposed amendments define an ILC officer as: an ILC Director; an employee engaged under s.192S; a person performing duties on behalf of the ILC under s.192T; an officer or employee made available to the ILC under s.192U; a consultants engaged under s.192V; and a member, officer, employee or consultant of a subsidiary of the ILC.

Analysis

This would diverge from the PGPA Act which defines the term “official” as an individual who is in, or forms part of, the entity (s.13(2)). This includes an individual who is, or is a member of the accountable authority of the entity; is an officer, employee or member of the entity; or is an individual, or an individual in a class prescribed by the rules (s.13(3)).

However, under the PGPA Act, the term ‘officer’ does not include consultants or independent contractors (other than of a kind prescribed by the rules); or a member, officer, employee or consultant of a subsidiary (s. 13(3)(b)). If passed, the proposed new definitions would create inconsistent duties for different ILC officials. This is because only ILC officials that are also officials for the purpose of the PGPA Act would be subject to the relevant PGPA Act duties.