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Australian Government
Indigenous Land Corporation

INDIGENOUS LAND CORPORATION

SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

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

EXECUTIVE SUMMARY

The ILC is pleased at the level of public support for strengthening the Land Account and makes the following proposals to refine the Stronger Land Account Bill:

- The ILC's statutory remit should be broadened to cover the sea as well as land, recognising that native title can now extend offshore.
- The investment parameters of the Land Fund should be extended so that it can generate greater financial returns for future Indigenous generations and its management transferred to the Future Fund Agency.
- The Land Account should revert to its original name, the Aboriginal and Torres Strait Islander Land Fund, to better reflect the fund's compensatory nature.
- The following minor amendments should be made to the Bill:
    - Clarify the provisions in Items 3–7 to remove any risk that the value of the Land Account decreases over time.
    - Narrow the provisions that require consultation in Item 10 to the key provisions relating to the Land Account.
    - Clarify the definition of 'ILC Officer' in Item 22 to ensure consistency with the PGPA Act (see **Attachment A** for more detail).

INTRODUCTION

The Board of the Indigenous Land Corporation (ILC) has endorsed this briefing document to inform the Senate Community Affairs Legislation Committee's inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (the Stronger Land Account Bill). This Bill seeks to amend our enabling legislation, the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act).

The Board reiterates the position set out in our submission to the Committee, which urged that the Bill be legislated as it reflects five sensible and widely supported aims, namely to:

1. strengthen and protect the Aboriginal and Torres Strait Islander Land Account (the Land Account) for future generations of Aboriginal and Torres Strait Islander peoples
2. ensure the Land Account is used only for land-related purposes
3. provide for greater Indigenous input and involvement in the ILC and the Land Account
4. enforce the highest standards of corporate governance in the ILC
5. allow the Land Account to grow in real terms.

The ILC also submits that the Aboriginal and Torres Strait Islander Land Account should be renamed the Aboriginal and Torres Strait Islander Land Fund to better reflect its origins, nature and purpose.

Submissions to the Committee

We note that, of the 19 additional submissions so far received and published by the Committee, almost all are supportive of the Bill.

The submission from the Department of the Prime Minister and Cabinet (DPMC) analyses each provision in the Bill suggesting they are, for the most part, unnecessary. The submission of the Department of Finance analyses selected measures relating to Finance's responsibility, and comes to much the same conclusions as DPMC. However, neither of these submissions explicitly expresses a view that the Stronger Land Account Bill should not be legislated.

Supportive submissions come from significant Indigenous organisations that represent extensive Indigenous constituencies, in particular across remote and northern Australia. They include the Northern Land Council and Central Land Council (which together represent most Traditional Owners in the Northern Territory); in Western Australia, the Kimberley Land Council, Wunan Foundation, Central Desert Native Title Services and Goldfields Land and Sea Council; in north Queensland, the Cape York Land Council, North Queensland Land Council and the Torres Strait Regional Authority; and the New South Wales Aboriginal Land Council, the peak body for 119 Local Aboriginal Land Councils across that state.

Significant individuals who have made submissions include Dr Lowitja O'Donoghue AC, CBE, DSG, former chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC) who convened the group of Indigenous leaders that negotiated the native title settlement with the Keating Government; Professor Mick Dodson AM, also a native title negotiator, with Dr Asmi Wood, both of the National Centre for Indigenous Studies at the Australian National University; and Mr Bill Gray AM, former Australian Electoral Commissioner, former Secretary of the Department of Aboriginal Affairs and first Chief Executive Officer of ATSIC. The Hon Victor Dominello MP, New South Wales Minister for Aboriginal Affairs, submits that the original purpose of the Land Account should be preserved.

The submission from the Anti-Discrimination Commission Queensland (Commissioner Kevin Cocks AM) approaches the issues from the perspective of human rights, including human rights in relation to property ownership as reflected in the United Nations (UN) Declaration of Human Rights and the Australian Constitution. The UN Convention on the Elimination of Racial Discrimination and the UN Declaration on the Rights of Indigenous Peoples are invoked in several submissions.

Reconciliation Australia supports the Bill, and the need to protect the Land Account, as a means of furthering Reconciliation in Australia. Dr O'Donoghue's submission links the Bill to the cause of Indigenous constitutional recognition, which enjoys cross-party support in the Australian Parliament and was recently the subject of the Final Report of the Aboriginal and Torres Strait Islander Act of Review Panel. This report made recommendations to government on the timing and process for Indigenous constitutional recognition as 'the next important step in our maturity as a nation'.[1]

Engagement and consultation with the Indigenous community

The breadth of support for the Stronger Land Account Bill reflects the ILC Board's extensive outreach since the beginning of this year on matters affecting the future of the Land Account. The Board has met and consulted with Indigenous leaders and organisations across Australia, and the Chairperson, Dr Dawn Casey, has been corresponding with more than 300 individuals and organisations. She has written to this group on four occasions on Land Account issues.

This outreach was prompted initially by the review of the ILC and Indigenous Business Australia (IBA), established by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, in December 2013.[2] It was anticipated that this review would lead to a merger of the ILC and IBA. A merger would see revenues from the Land Account flowing into an agency with

[1] The Hon John Anderson AO, Ms Tanya Hosch and Mr Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, September 2014.
[2] Media release, Minister for Indigenous Affairs, 'Review into Indigenous Business Australia and the Indigenous Land Corporation', 2 December 2013.

responsibilities and functions that extend beyond land issues, and would lead inexorably to Land Account funds being used, sooner or later, for purposes other than those originally legislated. This danger was recognised in the report by Ernst & Young on the ILC/IBA Review (May 2014).[3]

More than ten months after it was initiated, no Government response to the ILC/IBA Review has been formally announced, though the Minister for Indigenous Affairs told the *Australian* newspaper on 14 October 2014 that he did not intend to make major changes to the ILC and IBA.[4]

The ILC Board's principal strategy in the face of these perceived threats to the Land Account was to develop an Exposure Draft Stronger Land Account Bill, released on 24 March 2014.[5] The ILC's Draft Bill is substantially reflected in the Bill currently before Parliament, introduced by the Australian Greens on 24 June 2014, though some drafting changes have been made.

The ILC Board maintains that the Stronger Land Account Bill represents good and progressive policy that should be legislated on its merits, whatever the outcome of the ILC/IBA Review. We are confident from feedback received—and from the submissions received by this Committee from Indigenous interests—that our position has wide support across the Aboriginal and Torres Strait Islander community.

[3] Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014, published 3 May 2014, pp.20–1.
[4] *Australian* (Patricia Karvelas), 'Indigenous merger set aside', 24 October 2014.
[5] Media release, 'Indigenous Land Corporation proposals look to future Indigenous generations', 24 March 2014. The ILC's Exposure Draft Bill can be found at ilc.gov.au.

ILC COMMENTARY ON THIRD PARTY SUBMISSIONS

Most submissions strongly endorse the principles embodied in the Stronger Land Account Bill. A few ask that specific provisions in the Bill be changed. This document does not address all of these suggestions; we do, however, engage with some of the more significant suggestions made in third party submissions.

As a general principle, the ILC Board does not want to see the Stronger Land Account legislation made unnecessarily complicated.

The submission from the Department of the Prime Minister and Cabinet analyses each proposed new provision. In this document the ILC deals mainly with points made in the DPMC/Finance submissions. Detailed point-by-point commentary is provided in the table at **Attachment A**. The general commentary that follows is focused on three main issues:

1. the need to protect the Land Account by acknowledging its special history and status and quarantining its use to its broad compensatory remit
2. the need to enact provisions for strengthened corporate governance of the ILC, and
3. the need for the Land Account to grow in real terms.

The Executive Summaries of the DPMC and Finance submissions makea number of general observations about the amendments proposed in the Stronger Land Account Bill, namely, that:

- they are 'likely to add requirements or process' which would be expected to 'add to the time and complexity' of administering the *Aboriginal and Torres Strait Islander Act 2005*
- they '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 means, in short, that DPMC and Finance regard most of the proposed provisions as impractical or unnecessary. These agencies seem to have focused primarily on the convenience of administrators. The ILC Board contends that this is not an adequate perspective from which to view the issues at stake.

The DPMC/Finance perspective does not take account of the special nature of the Land Account. Nor does it recognise that egregious failures of governance are possible under past and, it can only be assumed, current regulatory systems for public authorities. The current ILC Board is dealing with the consequences of one of these failures, arising from a former Board's

purchase of Ayers Rock Resort.[6] Maintaining the legislative *status quo* would NOT ensure an end to such failures.

The ILC's Draft Stronger Land Account Bill and the Bill before Parliament are based not just on points of principle but on the ILC Board's working with its current legislation, both the ATSI Act and the overarching legislation—the former *Commonwealth Authorities and Companies Act 1997* (CAC Act) and its successor, the PGPA Act (though the latter Act has been in force only since 1 July 2014). The ILC's tangible experience over recent years has shone a light on problems that have effectively been ignored or overlooked by the agencies with responsibility for oversighting and regulating public sector corporations.

Given the origins of the Land Account and the disadvantage suffered by the majority of Indigenous Australians, it is imperative that those making decisions on use of revenues from the Land Account be held to a higher level of accountability than those responsible for allocating general government revenues. It is also highly desirable that consultation on matters relating to the Land Account and the ILC be broadened, with greater Indigenous input.

One submission to the Committee rebuts the notion that the proposed amendments in the Stronger Land Account Bill would be somehow inefficient:

> *The [Anti Discrimination] Commission [Queensland] believes the Bill ... addresses some of the Commission of Audit's broader concerns about duplication, overlap and inefficiencies within government, clarifies the role of the ILC and strengthens accountability.*

1. Strengthening and protecting the Land Account and ensuring it is used only for land-related purposes

The primary purpose of the ILC's Draft Bill was to protect and strengthen the Land Account. In urging all parties to legislate the Stronger Land Account Bill, this remains the Board's primary concern.

The DPMC submission is largely silent on the significance of the Land Account and treats it as just another Special Account established and administered by the Australian Government. In contrast, most other submissions are eloquent on this topic.

The ILC's initial submission explained why the Land Account is *sui generis*, a different sort of Special Account. It canvassed the long history Indigenous connection to land, the progressive dispossession of most Indigenous Australians after 1788, the landmark judgment in *Mabo* on native title, and the subsequent political settlement to accommodate native title within

[6] Publicly available material on the Ayers Rock Resort acquisition can be found at ilc.gov.au.

Australia's legal framework. After the *Native Title Act 1993*, the Land Account and the ILC were the second part of this settlement. They were established at the insistence of the Indigenous negotiators who were conscious that the *Mabo* judgment opened up new rights for Indigenous peoples but at the same time, in the words of Dr O'Donoghue's submission to the Committee, 'entrenched the history of Indigenous alienation on which modern Australia is built'. As Prime Minister Paul Keating said in his Second Reading speech (February 1995), the original legislation establishing these entities was 'for the single purpose of building and sustaining an adequate stock of land in the hands of Indigenous owners currently dispossessed'.[7]

It is in the light of this history that new objects for the Land Account are proposed in the Stronger Land Account Bill. DPMC argues that having objects within the ATSI Act that differ from objects of the ATSI Act itself has the potential to cause confusion, even though it is not uncommon for separate parts of legislation to have objects specific to those parts—e.g. the *Family Law Act 1975*. The new objects section specifically addresses the special relationship Indigenous peoples have with land, and the compensatory nature of the Land Account arising from its origins in the post-Mabo settlement. This section is unlikely to result in ambiguity.

While the language used in existing section 192XC and 193J is, on its face, similar to the language used in proposed new section 192X, the latter section, if enacted, would have a significant practical effect. Under the existing provisions of the ATSI Act, the purpose for the Land Account is not sufficiently clear. If the provisions relating to the ILC's purpose in existing section 191B were to change (e.g. if the Government moved to merge the ILC with another organisation such as IBA or if the ILC acquired additional responsibilities), then Land Account funds could potentially be used for purposes other than the land needs of Indigenous Australians. The proposed new provision would require that Land Account funds can be applied only to payments to the ILC for land acquisition and land management for the benefit of Indigenous Australians.

Although in practice a future government could amend the proposed section, specifying the purposes the Land Account in the ATSI Act would ensure parliamentary consideration and debate of any change to the purposes of the Land Account and minimise the risk of inadvertent changes to the way Land Account funds are used if there are changes to ILC functions in the future. In addition, the ILC submits that the requirement to consult in Item 10 (proposed section 1931A[1][i]) should be extended to proposed section 192X to ensure Indigenous peoples have input on any changes to the way Land Account funds are used.

[7] Prime Minister, the Hon Paul Keating MP, Second Reading, Land Fund and Indigenous Land Corporation Bill 1994, House of Representatives Hansard, 28 February 1995.

The ILC contends that subtle changes to the legislation, rather than being unnecessary, can have positive and profound practical effects.

These changes would also enshrine the intentions of the original legislators and, most importantly, of the Indigenous negotiators who compromised and gave up rights in order to deliver the native title settlement. As the Queensland Anti-Discrimination Commission comments in its submission:

> *Significant human rights issues provided the background to the negotiations that led to the creation of the Indigenous Land Corporation and the establishment of the Land Account. Unfortunately, in hindsight those background issues were not adequately reflected in the legislation that established these entities ... What was apparent to the legislators at the time of their creation can become less clear with the effluxion of time, and the moving on of those involved in the negotiation and creation of the entities. There is a need to strengthen legislative recognition of the unique status of the Land Account.*

Mr Bill Gray submits that it is appropriate for Parliament to 'periodically amend and clarify the Parliament's intentions in a changing environment', given the clear will of the original legislators. The Land Account needs to 'protected by Parliament' against 'the churn of political intentions that characterises Indigenous affairs'.

The ILC acknowledges the current Australian Government's often-stated commitment to maintain the Land Account's original purpose, but submits that the Land Account remains vulnerable to the acts of future governments. Legislating the new provisions would reduce this vulnerability.

Consultation with the Indigenous community

The requirements for greater consultation with Indigenous peoples on changes to the Land Account should be read in this context. DPMC submits that the requirement to consult on any changes to Division 10, even minor ones, would add time and complexity to legislative processes. The ILC agrees that it would be undesirable for these consultative processes to apply to minor and technical amendments. Proposed section 193IA(1)(b)(i) should therefore be amended to include reference to section 192(W)(1), section 192X and to remove reference to 'or this Division'.

Recognition of sea

The ILC supports the submission from the Torres Strait Regional Authority (TSRA) which asks that the ATSI Act recognise sea in the same regard as land. This would enable the ATSI Act to move with the times, as it is now established that native title can exist offshore, a point that

had not been clarified when the Mabo settlement was negotiated. The TSRA submission emphasises the significance of the sea in Torres Strait culture, and the economic, social, cultural and environmental benefits that derive—and could derive in future—from the sea. The inclusion of seas in the ILC's remit would assist Indigenous Australians to acquire marine assets such as commercial fishing licences in the same manner as land-based assets. The ILC would also be able to assist in sea-based native title settlements.

2. Enforcing the highest standards of corporate governance in the ILC

The Stronger Land Account Bill contains a number of very important provisions related to the ILC's governance. The provisions for greater Indigenous input to the Land Account and ILC also link to greater transparency and accountability.

The ILC is the conduit through which Land Account funds flow to Indigenous groups and communities across Australia. It is essential that these funds are used scrupulously if Indigenous Australians are to receive the maximum benefit from the Land Account.

As pointed out in the ILC's submission to the Committee, the current Board has been dealing with the considerable challenges arising from a former Board's purchase of Ayers Rock Resort, the ILC's largest single acquisition since its establishment 20 years ago. The ILC has effectively lost in the order of $100 million in a commercial transaction where an independent investigation (by consultants McGrathNicol) has shown significant failures of process.[8] The ILC has also obtained formal advice from senior counsel in relation to Directors' duties.

A number of factors contributed to this unprecedented and extraordinary outcome, including an entrenched ILC Board largely composed of long-standing Directors who were reappointed for long periods, and a long-standing Audit and Risk Committee where one of the main proponents of the Ayers Rock transaction had served for 12 years. As a consequence, this committee played virtually no role in oversighting the purchase, despite the considerable commercial risks involved.

Prior to the investigation of this transaction, the current Board commissioned a review of ILC governance from consultancy firm Deloitte which identified numerous issues of concern in the governance of the ILC and its subsidiaries[9], with 19 key actions being followed up by the ILC Board.

[8] McGrathNicol, *Ayers Rock forecast and options review, Component 2 report*, 2013. This report is available on the ILC website.
[9] Deloitte Touche Tohmatsu, *Review of Indigenous Land Corporation Board Governance Arrangements*, 2013.

This is the background—the 'tangible experience' referred to above—to the governance measures in the Stronger Land Account Bill. These measures include staggering and limiting ILC Directors' appointments, mandating an independent chair of the Audit and Risk Committee that would otherwise be composed of current ILC Directors whose tenure on the Audit Committee would be limited, and legislating stronger disclosure requirements for Directors' direct or indirect pecuniary interests. Section 191X (5) and (6) would define the responsibilities of the ILC Board including stipulating that it must act with the 'highest standards of good governance, transparency, financial accountability and ethical procurement'.

The proposed Nomination Committee, of three eminent Indigenous Australians, would also facilitate the timely appointment of appropriately qualified persons to the Board. The ILC Board agrees with the submission from Professor Mick Dodson and Dr Asmi Wood that consultation with Indigenous Australians on appointments to the ILC Board be 'formal and substantive' and that the Minister adequately resource the Nominations Committee.

DPMC/Finance comment that these measures may replicate existing provisions in the PGPA and ATSI Acts. They are not intended, however, to be an alternative to existing requirements. They are additional requirements that, if enacted, would mandate higher and different standards of corporate governance for the ILC. This is important, given the unique independence of the ILC Board and the unique status of the Land Account, which is held for and on behalf of Aboriginal and Torres Strait Islander peoples. There is an operational need for provisions in the ATSI Act that vary from—indeed extend—the requirements in the PGPA Act, particularly in relation to the Land Account.

The ILC further notes that current governance provisions for public authorities are not adequately enforced—the relevant regulatory oversight is, to all appearances, missing. The ILC Board has called for a public or parliamentary inquiry into the Ayers Rock Resort transaction, without success. [10]

The *Review of Operation Sunlight: Overhauling Budgetary Transparency* (Senator Andrew Murray, 2008) recommended the establishment of a 'Public Sector Regulator focused on financial administration and management matters, with strong and comprehensive enforcement powers that promote an efficient regulatory system for the public sector'.[11] This recommendation was not adopted, but it points to a gap in the current accountability framework, a gap that is also highlighted in the ILC's lack of success in calling for public scrutiny of the abuses of process evident in the Ayers Rock Resort transaction.

[10] Media release, Dr Dawn Casey, ILC Chairperson, 'Report criticises Ayers Rock Resort purchase', 18 December 2013.
[11] Go to http://www.finance.gov.au/archive/financial-framework/financial-management-policy-guidance/operation-sunlight/

At this point it must also be emphasised that the current ILC Board is committed to doing everything possible to ensure that the Ayers Rock Resort continues to operate in Indigenous ownership, and that its outstanding Indigenous employment outcomes are sustained. Setting aside the ILC's debt, the resort is currently operating profitably, its financial performance is improving, and Indigenous employment is flourishing. However, the borrowings and debt associated with its acquisition, which fall to the ILC and not the resort, are having a deleterious impact on the ILC's capacity to fulfil its core statutory functions consistent with the original reasons for its establishment. The benefits flowing at Ayers Rock Resort are effectively being paid for by other Indigenous land owners who are missing out on essential land management support.

3. Allowing the Land Account to grow in real terms

Real growth in the size of the Land Account is necessary to ensure that the Land Account meets the land needs of a growing Indigenous population, estimated to reach almost one million by 2026, as well as the land management costs generated by an increasing Indigenous estate. More than 20 per cent of Australia is currently owned by Indigenous peoples, with native title determinations the main engine of increase. Long-term trends show a reasonably consistent rise in the number of native title determinations after June 2000, with a significantly higher number post-2010. [12]

The Stronger Land Account Bill contains a provision to allow half of any excess Land Account revenue to be invested back into the Land Account rather than paid to the ILC (the current arrangement). The ILC is anxious to see the Land Account grow in real terms, and the measure in the Bill is just one of several potential means to achieve this.

The Department of Finance submission contends that the proposed mechanism in the Bill for making additional payments has the potential to compromise the real capital value of the Land Account. The ILC believes Finance's calculations of the real return are not actually in accordance with the formulae in the proposed amendments; however,
the ILC recommends, for certainty, that the Bill be amended to make a minor change to existing section 193(3) of the ATSI Act as follows:

On the first business day in December in a financial year (the current year) beginning on or after 1 July 2011, an amount is to be paid to the Indigenous Land Corporation, out of the Land Account, if the actual capital value of the Land Account for the current year exceeds the real

[12] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2013*, p.80. This trend is also noted in the *Federal Court of Australia Annual Report 2012–13*, p.15.

*capital value of the Land Account for the current year. The amount to be paid is an amount equal to **half** the excess.*

The ILC recommends that this amendment replace Items 3-7 in the Bill. It would remove the risk associated with the possibility that the Land Account may not increase with inflation in years when the interest rate is lower than the long term average and inflation is higher than the long term average.

The ILC has also been in discussion with DPMC and the Department of Finance, and made representations to relevant Ministers, about other measures to increase the size of the Land Account in real terms. These include widening the investment parameters of the Account (where currently investment is limited to low yielding government-issued bonds and term deposits) and transferring the Account's management to the Future Fund Agency.

If a short-term timeframe is adopted, then the types of investment currently permitted for the Land Account represent the least risky approach. Over a ten-year or longer timeframe, however, these types of investment constitute the highest risk approach as they are guaranteed to minimise Land Account returns, resulting in substantial potential losses to Aboriginal and Torres Strait Islander peoples. Assuming an average 3 per cent greater return (a safe assumption given the reported performance of the Future Fund at a greater than 10 per cent return in recent years), it is estimated that the Land Account would now hold at least half a billion dollars more than its current balance.

The ILC Board is keen to maximise returns on Land Account investment in the longer term, while managing risk and minimising the probability of capital losses, and would like to draw on the substantial expertise of the Future Fund Agency. Drafting changes could be made to the Bill before Parliament to effect the changes the ILC Board is seeking.

RENAMING THE LAND ACCOUNT

The ILC suggests that the Aboriginal and Torres Strait Islander Land Account, as established in section 192W(1) of the ATSI Act, should be renamed the Aboriginal and Torres Strait Islander Land *Fund*. Rather than being just another government account from which money can be withdrawn or deposited, these funds are set aside for a special purpose: the land needs of Aboriginal and Torres Strait Islander peoples. Use of the term 'fund' would better reflect the intent of the original legislators and the original Indigenous negotiators of the post-Mabo settlement—namely that there would be a fund available in perpetuity as compensation for Indigenous dispossession.

IN CONCLUSION

The ILC is pleased that almost all submissions support the measures that provide for greater Indigenous input into the ILC and the Land Account. This has been a constant theme of Indigenous advocacy. As the Central Land Council writes in its submission: 'Indigenous people in Australia are continuously left out of the discussion about matters that directly affect them and find themselves the subjects of decisions and policies that they have not been involved in shaping.' Indigenous leader Noel Pearson has recently written about the profoundly unequal relationship between Indigenous peoples and the Australian state: '… the rule book should be amended to make provision for Indigenous people to be heard in Indigenous affairs … Indigenous people comprise only 3 per cent of the population and hardly get a fair say in parliament, even on matters directly concerning them.'[13]

It should also be noted that the DPMC/Finance comments on the Stronger Land Account Bill—in both their content and their tone—appear not to take into account the wider Indigenous affairs framework set by the Australian Government. To the extent that some proposed measures in the Bill have a symbolic as well as practical significance, Senator Scullion, the Minister for Indigenous Affairs, has often stated: 'Symbolism matters.'

> *Clearly those who would diminish the importance of symbolism as something that doesn't have a role to play in practical outcomes are quite wrong. Symbolic change must happen if practical changes are to succeed.*[14]

Both the Prime Minister, the Hon Tony Abbott MP, and the Minister for Indigenous Affairs have spoken strongly about the need to recognise the separate Indigenous strand of our shared history. They are fully aware that Indigenous peoples across Australia have undertaken, in the recent words of Minister Scullion, 'a struggle and journey … to have their land, culture and vision recognised'.[15] The *Mabo* judgment and subsequent settlement were national landmarks in this struggle, though the struggle has also taken place—and continues to take place—in the myriad localities and regions across Australia where Indigenous groups are striving to build a more prosperous, culturally-centred and land-based future.

The Stronger Land Account Bill therefore presents an opportunity for the Australian Government and all parliamentarians. Legislating the Bill would advance Indigenous recognition within the Australian nation, give the Indigenous community more say in matters affecting them, and help to place the Land Account above and beyond politics. Again, Minister Scullion

[13] Noel Pearson, 'Time to bring us into the nation', *Weekend Australian*, 13 September 2014.
[14] The Indigenous Affairs Minister has emphasised the importance of symbolism in a number of recent speeches posted on his website. The quote is from Senator Scullion's address to the Nationals Conference, 30 August 2014.
[15] Senator Nigel Scullion, speech at the Carpentaria Land Council Aboriginal Corporation's 30th Anniversary, 28 September 2014.

has often expressed the wish that Indigenous peoples will ultimately be able to take charge of their own destinies, placing themselves beyond the 'whims of government'.[16]

The Bill also provides an opportunity for a multi-partisan approach to Indigenous affairs, of the kind the Prime Minister extolled in his Closing the Gap address to the House of Representatives in February 2014: 'There is probably no aspect of public policy on which there is more unity of purpose and readiness to give others the benefits of the doubt. On this subject, at least, our Parliament is at its best.'[17]

The Stronger Land Account Bill is thoroughly consistent with the Indigenous policy aims of the current Government and Opposition. It protects the iconic Land Account, strengthens corporate governance, and makes changes to the 'rule book' to advantage Indigenous Australians. The ILC congratulates the Australian Greens on their vision in introducing this Bill and urges that it be supported by this Committee and legislated by Parliament.

[16] The desire to see Indigenous peoples 'break free of dependency on the whims of government' was expressed in Minister Scullion's speech to the National Native Title Conference, 2 June 2014, and in the speech cited above.
[17] Prime Minister, the Hon Tony Abbott MP, Statement on Closing the Gap, House of Representatives Hansard, 12 February 2014.

ATTACHMENT A

Indigenous Land Corporation

Senate Community Affairs Legislation Committee Inquiry into the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014*

ITEM No.	Submissions made by Department of Prime Minister and Cabinet / Department of Finance	ILC Comments
ITEM 1	**DPMC** 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.	The ILC notes it is not uncommon for separate parts of legislation to include objects provisions specific to those parts (see, for example, the *Family Law Act 1975* and the *Competition and Consumer Act 2010*). While both existing section 3 and proposed section 191AB(1) refer to the needs of Aboriginal peoples and Torres Strait Islanders arising from dispossession, the objects section proposed in Item 1 of the Bill is specifically addressed to the special relationship Aboriginal peoples and Torres Strait Islanders have with land, and the ILC submits this is therefore unlikely to result in any ambiguity.
ITEM 2	**DPMC** 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	While the language used in existing sections 192X and 193J is, on its face, similar to the language used in proposed new section 192X, if enacted proposed new section 192X would have a significant practical effect that would provide a stronger protection to the Land Account. Under the existing provisions of the *Aboriginal and Torres Strait Islander Act 2005*, the purposes for the Land Account are not sufficiently clear. Under the current legislative arrangements, if the provisions relating to the ILC's purpose in existing section 191B were to change (e.g. if the Government moved to merge the ILC with another organisation such as Indigenous Business Australia or if additional responsibilities were conferred on the ILC) then Land Account funds could potentially be used for a purpose other than the land needs of ATSI people.

	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.	The proposed new provision would require that Land Account funds can only be applied to payments to the ILC <u>for land acquisition and land management</u> for the benefit of Aboriginal persons and Torres Strait Islanders. If, in future, a government were to make changes to the statutory purpose of the ILC which conferred additional functions, proposed section 192X would quarantine the Land Account from being used to subsidise those additional functions. While in practice a future government could amend the proposed section, specifying the purposes of the Land Account in the ATSI Act will ensure parliamentary consideration and debate of any change to the purposes of the Land Account. This will minimise the risk of inadvertent changes to the way Land Account funds can be used consequent to changes to the functions of the ILC. In addition, the ILC submits that the requirement to consult in Item 10 (proposed section 193IA[1][i]) will ensure that Aboriginal persons and Torres Strait Islanders have the opportunity to provide input into any changes in the way Land Account funds are to be used. This is important given the significance of the Land Account to Aboriginal and Torres Strait Islander peoples.
ITEMS 3 TO 7	**FINANCE** In contrast to the current arrangements for making additional payments, the proposed mechanism for making additional payments as drafted has the potential to compromise the real capital value of the Land Account ... Item 6 of the Bill proposes that from 1 July 2014, annual returns in real growth that exceed $50 million would be divided equally between the ILC and the Land Account. However, as the annual guaranteed payment to the ILC is indexed, and the proposed $50 million threshold is not, over time the payment to the ILC could increase at a rate faster than the growth in the account and the reduction in the value of the Land Account would	Any risk that there be a reduction in the value of the Land Account over time would be contrary to the aims of the Bill. While the Department of Finance's calculations of the real return are not actually in accordance with the formulae in the proposed amendments, the ILC recommends, for certainty, the Bill be amended to make a minor change to existing section 193(3) of the ATSI Act as follows: *On the first business day in December in a financial year (the current year) beginning on or after 1 July 2011, an amount is to be paid to the Indigenous Land Corporation, out of the Land Account, if the actual capital value of the Land Account for the current year exceeds the real capital value of the Land Account for the current year. The amount to be paid is an amount equal to **<u>half</u>** the excess.*

	accelerate as the capital in the account is eroded. This could occur because the rates of return will need to increase to pay the indexed annual statutory payment to the ILC. But as that payment increases above the $50 million threshold, 50 per cent of the excess will also need to be paid as an additional payment to the ILC and the Land Account. This outcome may be contrary to the drafter's original intention ...	The ILC recommends that this amendment replace Items 3-7 in the Bill. This amendment would remove the risk associated with the possibility that the Land Account may not increase with inflation in years when the interest rate is lower than the long term average and inflation is higher than the long term average.
ITEM 6	**DPMC** 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. **FINANCE** – see above	See ILC comments above. Currently, and as noted in the DPMC's submission, the Land Account is not able to grow over time as all excess earnings, once the Land Account balance meets the hurdle of increasing year on year with CPI, are paid to the ILC. If the excess earnings were equally divided between the ILC and the Land Account, it follows logically that the result would be that the Land Account grows over time. Growth in the size of the Land Account is necessary in order to ensure that the Land Account meets the land needs of a growing Indigenous population and the increasing land management costs associated with a growing Indigenous estate into the future.

ITEMS 8 and 9	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. 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. **FINANCE** The Finance Minister has responsibility for the investment of relevant money and considers what would be an appropriate	Item 8 would ensure that the projected financial requirements of the ILC (and therefore of the growing Indigenous estate and population) are taken into account by the Minister (or Delegate) when making decisions about the future investment of the Land Account. While under the current legislative arrangements the projected financial requirements could be discussed at a meeting of the consultative forum, Item 8 requires that the ILC's advice be taken into account by the Minister. This is important in order to ensure the future land needs of Aboriginal and Torres Strait Islander peoples are actively considered in the decision-making process. If enacted, neither Item 8 nor Item 9 would prevent the Minister, or their delegate, from taking into account advice from other sources. This section is not inconsistent with the Minister's powers under section 58 of the PGPA Act. It is not clear how this provision is inconsistent with the PGPA Act objective of encouraging alignment of resource management across government entities—the amendment is directed to the way in which a special account (the Land Account) is invested and the considerations to be taken into account by the Minister (or delegate) in their decision-making process.

	risk profile for investment in accordance with the investment powers under s58 of the PGPA Act. Finance Min delegates powers to relevant [agency heads]. ... delegations allow relevant monies to be invested in a standard set of conservative financial instruments. The proposed legislation would be inconsistent with the broad objective of the PGPA Act to encourage greater alignment and consistency of resource management across all Australian Government entities.	
ITEM 10	**DPMC** 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	The ILC agrees that it would be undesirable for the consultative process proposed in Item 10 to apply to minor or technical amendments. The ILC submits that proposed section 193IA(1)(b(i) in Item 10 be amended to include reference to section 192(W)(1), section 192X and to remove reference to 'or this Division' as follows: *amend section 191AB, 191B, 192W(1) or 192X ~~or this Division~~* This would ensure that a Bill proposing minor amendments to Division 10 (the Division that relates to the Land Account) would not be captured by the requirement to be referred to a parliamentary committee and for the committee to consult Aboriginal and Torres Strait Islander peoples. The ILC notes the intent of the section is to ensure that Aboriginal peoples and Torres Strait Islanders are consulted on proposed legislative change that would have a significant impact on the Land Account. The ILC notes that while *in practice* a parliamentary committee may consult on a future Bill, there is no legislative requirement to ensure that Indigenous Australians would be consulted as part of any future process. The ILC submits that on matters as significant to Aboriginal and Torres Strait Islander peoples as the Land Account there is a need for this requirement to be legislated. The ILC notes that, were it to be enacted, Item 10 leaves significant flexibility for the Parliament to tailor and adapt processes.

	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.	
ITEMS 11 and 13	**DPMC** 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 ILC notes that the provisions in Items 11 and 13 are not intended to be an alternative to existing requirements in other legislation. These provisions are <u>additional</u> requirements which, if enacted, would operate to ensure high standards of corporate governance. In relation to the duties of officials, section 31 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) specifically states that the PGPA Act does not limit a law of the Commonwealth relating to the duty or liability of a person because of his or her position or employment in relation to a Commonwealth entity. In very recent history, the ILC has experienced serious and documented governance and accountability failures. The consequence has been a loss of funds that is unprecedented in Indigenous affairs. The ILC has responded by implementing cutting edge governance and accountability requirements which should be legislated to prevent the recurrence of these past failings. Given the special nature of the ILC as an independent Commonwealth statutory body and the unique and *sui generis* status of the Land Account as being held for and on behalf of Aboriginal and Torres Strait Islander peoples, it is important that the highest possible governance standards are implemented. The ILC further notes that existing legislative provisions relating to governance and accountability in the public sector are rarely enforced. This may be due to an inadequacy of the current regulatory framework or that those Commonwealth bodies charged with enforcement responsibilities have inadequate powers or

	• The ATSI Act requires the ILC to act in accordance with sound business principles whenever it performs it functions on a commercial basis (s.191F[l]). • 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). **FINANCE** The objectives of the PGPA Act are to establish a coherent system of governance and accountability across all Australian Government entities. With the scope of items 11 and 13 already covered by provisions in the PGPA and ATSI Acts there is a risk of disrupting this coherence and creating confusion and inconsistent application across Australian Government entities.	resourcing to perform this role. The ILC notes Recommendation 37 of the report of Operation Sunlight[18], which called for a stronger enforcement mechanism for public sector agencies. While in the private sector, corporations are regulated by the Australian Securities and Investment Commission with strong powers of enforcement, in the public sector this role is undertaken in theory by central agencies and at the discretion of the relevant Minister of the day. In practice, it is a regulatory void. In recent years under a previous Board, the ILC has experienced serious and documented governance and accountability failings, as evidenced by a number of independent reviews. At this stage, there has been no accountability in relation to this, despite significant effort on the part of the ILC to bring this matter to the attention of government. It is partly this experience that prompted the ILC to prepare draft legislation proposing stronger governance, transparency and accountability arrangements for the ILC. Many of the provisions in this Bill reflect the ILC's draft legislation.
ITEM 12	**DPMC** 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.	The ILC notes that while the language of existing section 191L is similar on its face to the amendment proposed in Item 12 of the Bill (in particular proposed section 191L[1]), Item 12 imposes a significant additional requirement in proposed section 191L(2)—that in making any *request* of the ILC, the Minister must have regard to the independence of the ILC. This is necessary because while the Minister is not currently empowered to 'direct' the ILC, there is nothing preventing the Minister making 'requests' of the ILC Board. This places the ILC Board in a position of potential conflict between compliance with the Minister's requests, and the independent exercise of Directors' responsibilities as ILC Board Members. For example, this situation has previously occurred where the Minister requested the Chair to make a specific appointment to a subsidiary board. The amendments proposed in Item 12 would

[18] Former Senator Andrew Murray, 2008

		remove this potential conflict by requiring the Minister to have regard to the ILC's independence before making any such requests.
ITEMS 14-16	**DPMC** 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	The ILC disagrees with the DPMC's submission that the ATSI Act already includes 'a robust process and consultative requirements' in relation to ILC Board appointments. The ILC notes that under existing arrangements, the only consultation the Minister is required to undertake is with the Minister for Finance (under current section 191X[3]). There are currently no requirements in the ATSI Act for the Minister to consult more widely than this, nor any specific requirements to consult with Aboriginal peoples or Torres Strait Islanders. The ILC also notes that the Cabinet Handbook does not include any requirement to consult but merely a requirement to specify, in a proposal to Cabinet to make an appointment, whether any consultation with other Ministers has occurred. The Cabinet Handbook is not legislative in character and its requirements are therefore not legally binding. The requirement to give consideration to gender balance, for example, is subject to the preferred policy and practices of the government of the day. Further, there is a lack of transparency in the current process. Under current practice and in accordance with the security classification given to proposals put before the Cabinet, the details of any consultation process undertaken are unlikely to be made public. The ILC notes that the amendments proposed by the Bill do not make changes to the existing requirements as to the composition of the ILC Board in section 191X(2), or to the qualification requirements for ILC Board members in section 191X(4). The ILC notes there is an important distinction between requirements as to the *qualifications* necessary for appointment to the ILC Board and any required process of *consultation.* There is a precedent for the establishment of nomination panels to make recommendations to the Executive about appointments to Commonwealth institutions which have significant importance in Australian life. For example,

	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. **FINANCE** The ATSI Act already includes a number of safeguards and procedural and consultative requirements around ILC Board appointments ... All significant board appointments are also approved by Cabinet and therefore subject to the requirements of the Cabinet Handbook ... ... it is already the case that in practice Government gives careful consideration to the need to refresh boards and the staggering of Director appointments. The creation of a Nomination Committee ... would not be consistent with Government policy to reduce and rationalise the number of government advisory boards.	'under the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Act 1991* (SBS Act), a merit-based selection process must be followed before the appointment of non-executive Directors to the ABC and SBS boards by the Governor-General. A Nomination Panel (the Panel) was established under the ABC Act and is responsible for conducting a selection process for each ABC and SBS board vacancy to assist the Minister for Communications (or the Prime Minister in the case of the Chairperson of the ABC Board) in identifying suitably qualified applicants for appointment by the Governor-General.'[19] The rationale for the establishment of nomination panels for the ABC and SBS was that these organisations 'play an important and critical role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. … Strong boards appointed through this robust and transparent process are in the best interests of the nation and of the broadcasters themselves.'[20] The ILC submits that the Land Account, and thus the ILC, play a similarly important and critical role (particularly in the life of Aboriginal peoples and Torres Strait Islanders) such that a nominations panel for appointments to the ILC Board is also necessary.
ITEMS 15, 18 and 19	**DPMC** 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	It is important that appointments to the ILC Board are 'staggered' to ensure a continuity of corporate knowledge on the Board. The ILC is not aware of any existing government mechanisms to ensure a staggered approach to making appointments, but if these exist they should be welcomed.

[19] Department of Communications: http://www.communications.gov.au/television/abc_and_sbs_board_appointments
[20] Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, *National Broadcasting Legislation Amendment Bill – Second Reading*, House of Representatives Hansard, 4 February 2010.

	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.	Historically it has not always been the practice of governments to ensure appointments to the ILC Board are staggered. For example, in 2007 the then Minister reappointed the entire ILC Board for a period that would exceed the next electoral cycle. This resulted in all appointments expiring at the same time. This had ongoing implications for the maintenance of corporate knowledge through Board appointments. Despite the circumstances where a government chooses to stagger appointments, under existing arrangements there is nothing requiring this be done or preventing partisan reappointments of entire Boards in alignment with the electoral cycle. The requirement to stagger appointments in conjunction with a limitation on tenure of Directors will ensure the ILC Board is refreshed with new Directors and does not become entrenched, while ensuring that there is a continuation of corporate knowledge and experience. The staggering of appointments is also an important mechanism to ensure that the ILC Board is non-partisan.
ITEM 17	**DPMC** Establishing an Audit Committee is already a requirement of the ILC in accordance with existing PGPA Act provisions. S.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 provide	While the PGPA Act requires that the ILC has an Audit Committee constituted in accordance with the Rules, the ILC submits that these are minimal requirements. Given recent history at the ILC, there is a need to legislate more detailed requirements that complement existing requirements in order to promote best practice. While the current ILC Board has committed to the appointment of an independent Chair of its Audit Committee in accordance with the ANAO's Better Practice Guide[21], there is currently no legislative requirement for an independent member of the ILC's Audit Committee. Importantly, the ANAO's Better Practice Guide states: *The distinguishing feature of an Audit Committee is its independence. An Audit Committee is independent of the activities of*

[21] Australian National Audit Office, *Better Practice Guide: Public Sector Audit Committees*, available at <http://www.anao.gov.au/html/Files/BPG%20HTML/BPG_PublicSectorAuditCommittees/3_2.html>

	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).	*management and this independence assists in ensuring that an Audit Committee acts in an objective, impartial manner free from any conflict of interest or inherent bias or undue external influence ...* and *It is better practice for the committee to include one or more members external to the entity ... the appointment of an external member as Chair strengthens the actual and perceived independence of the committee.* While from July 2015 section 17(4)(b) of the PGPA Rules will come into force which requires that the majority of members of the audit committee must not be employees of the entity, this will not prevent Directors from being appointed as members of the committee (ILC Directors are statutory appointments—they are not 'employees' of the ILC). The ILC also notes that the PGPA Act and Rules do not specify any limitation on the tenure of membership of an entity's audit committee. The ANAO Better Practice Guide states: *The rotation of members is also an important vehicle for strengthening the independence of the committee. ...Generally, an individual's tenure on the Audit Committee would be three years, with a one plus one year option, particularly for external members. Any extension of a member's tenure on the committee should be approved only after the Chief Executive/Board, as appropriate, has made an assessment of the member's performance as a committee member.* The ILC strongly submits that the requirement for an independent chair of the Audit Committee and a limitation on the tenure of Audit Committee membership be legislated. Recent history demonstrates the importance of an Audit Committee providing independent and objective advice and assurance. The ILC's acquisition of the Ayers Rock Resort, which has led to a financial loss for the ILC unprecedented in Indigenous affairs (in the order of around $100 million), is an example of the necessity of the provisions proposed in Item 17. The ILC's Audit Committee in operation at the time was comprised entirely of ILC Directors, with no independent members. In addition, the members of the Committee had been reappointed a number of times (such that members had

	FINANCE This is already a requirement of the ILC [Section 45 of the PGPA Act] ... Section 17 sets out minimum requirements of audit committees ... The proposed changes are not consistent with the PGPA Act and its objective to align audit committee arrangement across all Australian Government entities. ILC already has an audit committee ... with an independent chair ...	been on the Committee for 12 or more years). An independent review of the Ayers Rock Resort acquisition found that the ILC Audit Committee appeared to have had 'almost no involvement in the transaction to purchase ARR' and 'should have given some consideration as to the risk management practises in place within the ILC for this specific transaction'[22]. Had the ILC's Audit Committee at the time had improved mechanisms to ensure its independence, key risks may have been identified and mitigated and some of the significant negative consequences of the transaction avoided. The amendments to the ATSI Act proposed in Item 17 would complement the current regulatory regime and fill some gaps to ensure the ILC's Audit Committee adheres to best practice as outlined above. The ILC reiterates that the unique, compensatory nature of the Land Account means that Indigenous peoples deserve robust assurances that financial management within the ILC – which is the conduit for these compensatory funds – should be of the highest standard.
ITEM 20	**DPMC** 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	The amendments proposed in Item 20 of the Bill are intended to complement the requirements in sections 25–29 of the PGPA Act. Item 20 proposes a best practice mechanism for ensuring that any potential conflicts of interest are avoided. The ATSI Act currently requires the ILC Chairperson to give written notice to the Minister of 'all direct or indirect pecuniary interests that the Chairperson has or acquires in any business, or in any body corporate carrying on a business'. The amendments proposed in Item 20 would extend this requirement to all ILC Board Members (without limiting the requirements of the PGPA Act) and would require that a register of interests be kept. Recent history demonstrates the necessity of the provisions proposed in Item 20. An independent review of the ILC's acquisition of the Ayers Rock Resort found that a potential conflict of interest of a key Director and proponent of the

[22] McGrathNicol Ayers Rock Resort Review, p 64, available at < http://www.ilc.gov.au/Publications/Corporate-Documents>

	matter' (s.191 W); 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). **FINANCE** The PGPA and ATSI Acts already regulate the disclosure of interests ...	transaction was not disclosed. It also found that the ILC at the time had no conflict of interest register, and no process to require Directors and staff to actively declare potential conflicts, or attest that there are no conflicts[23]. As outlined above, the Ayers Rock Resort acquisition has led to a financial loss unprecedented in Indigenous affairs. Given the significance of the Land Account to Aboriginal peoples and Torres Strait Islanders, it is essential that the highest standards of corporate governance are applied to the organisation responsible for the expenditure of Land Account funds.
ITEM 21	**DPMC** 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. **FINANCE** Although the PGPA Act does not stipulate a separate Code of Conduct ... there is nothing limiting the ILC from having its own Code of Conduct.	The ILC submits that a requirement for a code of conduct should be legislated so that the community can be assured that the ILC is operating in accordance with the highest standards. If there is no legislative requirement for a code of conduct then it would exist only at the Board's discretion. Given the significance of the Land Account to Aboriginal peoples and Torres Strait Islanders, it is essential that the highest standards of corporate governance are applied to the organisation responsible for the expenditure of Land Account funds.
ITEM 22	**DPMC** 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	The ILC notes that the PGPA Act sets a certain standard (sections 25–29 of the PGPA Act) for an identified class of individuals but it does not prevent the ILC from seeking to impose further standards and for a wider identified class either via its own individual employment agreement with the relevant officer or in other legislation.

[23] McGrathNicol Ayers Rock Resort Review, p 69, available at < http://www.ilc.gov.au/Publications/Corporate-Documents>

	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. **FINANCE** Inserting new definitions ... under the PGPA Act, the term 'officer' does not include consultants or independent contractors ...; or a member, officer, employee or consultant of a subsidiary ... 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.	The ILC further notes that under current arrangements individual employees have duties under several pieces of legislation and different categories of ILC employees have different duties (e.g. employees of ILC subsidiaries and general ILC employees). The definition proposed in Item 22 of the Bill appears to be included for the purpose of proposed section 192SA in Item 21 which deals with a code of conduct for ILC officers. The ILC notes that the approach taken in this Bill in relation to the proposed code of conduct for ILC officers is consistent with government issued guidance notes on the on the PGPA Act in relation to the APS Code of Conduct: *The duties imposed by section 13 of the Public Service Act 1999 (PS Act), being the Australian Public Service (APS) Code of Conduct, are broader in scope than the general duties that apply to officials, and therefore adherence with the APS Code of Conduct will ordinarily meet the requirements of the duties under the PGPA Act.*[24] However, for clarity, the definition of ILC officer in the Bill could be amended to ensure consistency with the PGPA Act.

[24] Department of Finance, *Resource Management Guide No 203: General duties of officials*, June 2014, p.2.