

Chapter 2

Key issues and committee view

2.1 The Selection of Bills Committee Report stated that 'these bills will have profound impacts on the role and governance of the Indigenous Land Corporation (ILC), and should be properly scrutinised by Indigenous organisations and other interested parties'.¹ This inquiry has provided an opportunity for the ILC, Indigenous organisations and other interested parties to put forward their views on the bills.

2.2 This chapter examines five key issues raised during the inquiry:

- Sustainability of the Land Account;
- Expansion of the Land Account to encompass sea and freshwater country;
- Consultation with Indigenous stakeholders;
- Management of the ILC; and
- Reporting requirements.

Sustainability of the Land Account

2.3 As noted in the previous chapter, there have been longstanding concerns about the sustainability of the Land Account under its current mandated investment strategy. Submitters spoke about the impact of additional payments and moving the management of the Land Account to the Future Fund Board of Guardians (FFBG).

Additional payments

2.4 The current process for the provision of additional payments to the ILC from the Land Account compounds the impact of poor investment returns from cash and cash-like products. Under current arrangements, 'an additional payment is made automatically if the Land Account capital exceeds a CPI-indexed target, i.e. any excess Funds are paid to the ILC'.² The Land Account Expert Advisory Panel (Murray Panel) found that this mechanism 'exacerbated the rate of decline in the account balance' and concluded that this approach 'undermined the financial sustainability of the Land Account capital base—in good years the ILC benefits, in bad years Land Account capital is depleted'.³

2.5 In its submission, the National Congress of Australia's First Peoples (National Congress) put forward a similar argument, noting that the current arrangement

1 Senate Selection of Bills Committee, *Report No. 4 of 2018*, Appendix 1, https://www.aph.gov.au/~media/Senate/committee/selectionbills_ctte/reports/2018/rep0418.pdf?la=en (accessed 17 April 2018).

2 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

3 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

'effectively reduces the buffer which would otherwise exist to protect the Land Account during times of economic volatility'.⁴

2.6 The Goldfields Land and Sea Council (GLSC) expressed concern about 'the provision of additional payments from the Aboriginal and Torres Strait Islander Land and Sea Future Fund' (the Fund). GLSC highlighted that the bills do not specify the circumstances in which an additional payment can be made, and that such payments do not adversely affect the capital of the Fund.⁵ GLSC recommended a different mechanism through which the ILC could access additional payments without drawing down on the capital of the Land Account:

Should the ILC find from time to time that the demand for land acquisition and management support is well in excess of the regular stipend it receives from the [Land Account], it can of course put its case to the government for additional specific purpose appropriations of Funds in the annual budget context, without affecting the established ILC/[Land Account] framework.⁶

2.7 The ILC also recommended that 'there should be no provision for discretionary Ministerial payments' if the FFBG advised that such payments would result in a decline in the capital base of the Fund. The ILC further recommended that if a discretionary payment were made against the advice of the FFBG, 'then the Ministers should provide joint advice documenting their rationale'.⁷

2.8 In its submission, the Department of the Prime Minister and Cabinet (PM&C) noted that the cessation of automatic additional payments, as provided for under these bills, will protect the capital base of the Land Account into the future.⁸ Discretionary payments, in addition to the CPI-indexed payments, may only be made once per year, and can be made only after the Minister for Finance and the Minister for Indigenous Affairs have sought 'advice from the [FFBG] on the sustainability of annual payments to the ILC'.⁹

Improving the investment returns

2.9 Submitters agreed that the transfer of the Land Account to FFBG management will lead to improved returns. The GLSC put forward its support for broadening the 'range of acceptable investment types, [defining] an acceptable risk appetite as 50% growth asset allocation and long term target return of CPI + 3.1%' to 'guarantee a consistent payment of \$45 [million] in (2010) real terms to the ILC'.¹⁰

2.10 PM&C noted that:

4 National Congress of Australia's First Peoples, *Submission 4.1*, p. [3].

5 Goldfields Land and Sea Council, *Submission 2*, p. [2].

6 Goldfields Land and Sea Council, *Submission 2*, p. [1].

7 Indigenous Land Corporation, *Submission 6*, p. 2.

8 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

9 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

10 Goldfields Land and Sea Council, *Submission 2*, p. [1].

FFBG is an experienced, specialised and trusted investor of public money and the Government wants the ILC to benefit from the FFBG's investment performance over the last decade in managing other Commonwealth investment Funds.¹¹

2.11 The investment mandate of the Fund will be similar to 'other Funds currently managed by the FFBG, such as the Future Fund, the Medical Research Future Fund, the DisabilityCare Australia Fund, the Building Australia Fund and the Education Investment Fund'.¹² The investment parameters will be set by the Minister for Finance and the Minister for Indigenous Affairs, and will be tailored to its 'purpose to ensure targeted returns are consistent with the policy intent'.¹³

Expansion of the ILC and Land Account to encompass sea and freshwater country

2.12 As noted earlier, the 'ILC was established as part of the Commonwealth's response to the recognition of the dispossession of Aboriginal and Torres Strait Islander people from their country'.¹⁴ Indigenous people understand country to include both land and water, with this understanding now recognised in native title law:

These developments in the law acknowledged that the relationships of Aboriginal and Torres Strait islander people to waterscapes and between land and water are inseparable.¹⁵

2.13 Currently, the ILC can only 'engage in land-related activities' including the acquisition and management of land.¹⁶ These bills will expand the remit to sea and freshwater country to allow the ILC to invest in and support:

Further economic development aspirations through water-related business activities, including fishing, wild harvesting, aquaculture and tourism.¹⁷

2.14 This expansion is supported by all submitters.¹⁸ The Torres Strait Regional Authority highlighted the importance of water-related resources:

The resources from the sea in the Torres Strait region provide the primary, and in some cases, the only opportunities for economic development in Torres Strait communities. [These bills will] assist the Torres Strait and

11 Department of the Prime Minister and Cabinet, *Submission 3*, p. 5.

12 Department of the Prime Minister and Cabinet, *Submission 3*, p. 6.

13 Department of the Prime Minister and Cabinet, *Submission 3*, p. 6.

14 Department of the Prime Minister and Cabinet, *Submission 3*, p. 8.

15 Department of the Prime Minister and Cabinet, *Submission 3*, p. 8. See also: Torres Strait Regional Authority, *Submission 7*, p. [2].

16 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

17 NSW Aboriginal Land Corporation, *Submission 1*, p. [2].

18 See, for example: NSW Aboriginal Land Council, *Submission 1*; Goldfields Land and Sea Council, *Submission 2*.

Northern Peninsula Area region to address some of the ongoing challenges and increase opportunities for marine related industries.¹⁹

2.15 A concern was raised about the possibility of 'uncertainty among stakeholders about the inclusion of fresh-water country within the remit of the ILC' as the new name describes the organisation as the Indigenous Land and Sea Corporation. The ILC has proposed a preamble to the ATSILFF bill to clarify this matter.²⁰ A similar approach was taken in the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act). The preamble to the ATSI Act recognises the dispossession without compensation of Aboriginal and Torres Strait Islander people and notes the intention of the Australian people to provide rectification for this dispossession and past injustices. One of the purposes of the ATSI Act was to establish the ILC and the Land Account.²¹

2.16 The ILC has also highlighted what appears to be an unintended omission in the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 (ILC Bill). The ILC noted that in relation to current section 191E(1)(b) of the ATSI Act:

The [ILC Bill] fails to include an amendment to the effect "or water related rights held by the ILC" at the conclusion of that section. It is recommended that an amendment be sought to that effect.²²

Consultation with Indigenous stakeholders

2.17 From July to September 2017, the ILC underwent a wide-ranging consultation process to understand how the Land Account could be better managed and whether the remit of the ILC should be expanded. The consultation consisted of:

face-to-face consultation sessions [that] saw more than 75 Indigenous organisations join us in 16 sessions over 11 locations across the country. An additional 23 Indigenous organisations and individuals made written submissions to the consultation process.²³

2.18 The ILC noted that the consultation process gave overwhelming support for change:

- 75% of the consultation sessions provided consensus support for both areas of proposed reform;
- Over 85% of sessions provided consensus support to the reform of management and governance arrangements for the Land Account;

19 Torres Strait Regional Authority, *Submission 7*, p. [2].

20 Indigenous Land Corporation, *Submission 6*, pp. 3–4.

21 *Aboriginal and Torres Strait Islander Act 2005*.

22 Indigenous Land Corporation, *Submission 6*, p. 4.

23 Indigenous Land Corporation, *Consultations on the ATSI Act*, June 2017, [http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-\(1\)](http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-(1)) (accessed 19 April 2018). See also: Indigenous Land Corporation, *Submission 6*; Indigenous Business Australia, *Submission 5*, p. [2].

- 75% of sessions supported the extension of the ILC's remit to include water-based activities;
- Unanimous support for reform to the investment mandate of the Land Account was evidenced in the written submissions received on the issue;
- Of the 17 submissions received that addressed both areas of proposed reform, 77% gave support to both; and
- Only 8% noted that they did not support one or other area of reform.²⁴

2.19 In October 2017, the ILC provided a report to government detailing the consultation process and the support for reforms to the ILC and the Land Account. PM&C noted that 'the Government took these views into account in designing these reforms'.²⁵

2.20 Consistent with the endorsement received during the consultation process, all submissions received by the committee were broadly supportive of the objectives of the bills.²⁶ The NSW Aboriginal Land Council (NSWALC) expressed its support for the bills,²⁷ whilst the GLSC described the bills' purposes—which accept the advice of the Murray Panel—as 'sensible and realistic'.²⁸

Management of the ILC

2.21 The NSWALC commented on the 'relatively low investment by the ILC in NSW to date'.²⁹ The National Congress raised its concerns around the current management of the ILC and its resources.³⁰ These concerns are unrelated to the bills before the committee.

24 Indigenous Land Corporation, *Consultations on the ATSI Act*, June 2017, [http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-\(1\)](http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-(1)) (accessed 19 April 2018). See also: Indigenous Land Corporation, *Submission 6*; Indigenous Business Australia, *Submission 5*, p. [2].

25 Department of the Prime Minister and Cabinet, *Submission 3*, p. 4.

26 See, for example: Indigenous Land Corporation, *Submission 6*.

27 NSW Aboriginal Land Council, *Submission 1*, p. [1].

28 Goldfields Land and Sea Council, *Submission 2*, p. [1]. See also: Indigenous Land Corporation, 'The Aboriginal and Torres Strait Islander Act 2005: Consultation Discussion Paper (Specifically Part 4A—Indigenous Land Corporation and Aboriginal and Torres Strait Islander Land Account', June 2017, p. 5, <http://www.ilc.gov.au/IndigenousLandCorporation/media/Items/Content/Publications/Corporate%20Documents/The-Aboriginal-and-Torres-Strait-Islander-Act-2005-Consultation-Discussion-Paper-web.pdf> (accessed 17 April 2018). The Land Account Expert Advisory Panel comprised Mr David Murray AO, Mr Bill Moss AO, Mr Doug McTaggart, Ms Elayne Grace and Mr Glen Brennan PSM.

29 NSW Aboriginal Land Council, *Submission 1*, p. 2.

30 National Congress of Australia's First Peoples, *Submission 4*, pp. 3–4.

2.22 The ILC recorded its support for the 'increased powers of the Minister for Indigenous Affairs in ensuring the financial sustainability of the' Fund; however, noted that these 'powers are distinct from the statutory injunction against ministerial direction in the ATSI Act designed to ensure the independence of the ILC'.³¹

2.23 The ILC is an independent statutory body that is not directed by Government. The financial independence of the ILC will not be affected by the passage of these bills with the continuation of annual payments from the Fund.³² In addition, PM&C noted that 'no Minister has the power to direct the ILC in relation to any of its activities' and that these 'bills do not change these arrangements'.³³ Furthermore:

It will be for the ILC, in consultation with local Indigenous groups, to determine what specific Aboriginal and Torres Strait Islander corporations to assist, and how that assistance is provided.³⁴

Reporting requirements

2.24 During the consultation period, stakeholders expressed their strong support to the ILC to maintain 'the current reporting and accountability of the Fund to Aboriginal and Torres Strait Islander peoples—recognising the compensatory and perpetual nature of the Fund'.³⁵

2.25 Clause 48 of the ATSILFF bill authorises the Finance Minister to require the FFBG to 'prepare reports or give information'.³⁶ The ILC has proposed further reporting requirements:

to ensure the Minister for Indigenous Affairs, the ILC Board and the broader Aboriginal and Torres Strait Islander community can readily access information about the performance of the Fund.³⁷

2.26 These additional amendments would include the requirement for a minimum of quarterly reporting and publication 'on the internet'.³⁸ The ILC notes that similar reporting requirements are in place for the FFBG managed DisabilityCare Australia Fund, which also has a diverse range of stakeholders.³⁹

2.27 The ATSILFF bill currently provides for the Finance Minister to require the FFBG to report, and provides for the Finance Minister to publish such reports or

31 Indigenous Land Corporation, *Submission 6*, p. 2.

32 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

33 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

34 Department of the Prime Minister and Cabinet, *Submission 3*, p. 9.

35 Indigenous Land Corporation, *Submission 6*, p. 2.

36 Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018, clause 48.

37 Indigenous Land Corporation, *Submission 6*, p. 2.

38 Indigenous Land Corporation, *Submission 6*, pp. 2–3.

39 Indigenous Land Corporation, *Submission 6*, p. 3.

documents on the internet. There is no limit on the Finance Minister's capacity to require reports from the FFBG.

Committee view

2.28 The committee recognises that there are long-standing and widely held concerns about the sustainability of the Land Account. These bills seek to address these concerns and move the Land Account to a stronger footing by improving the investment options and removing automatic additional payments from the Land Account. The committee is confident that future additional payments will only occur in circumstances where the sustainability of the Fund is not compromised. The passage of these bills will ensure that the capital base of the Land Account will continue to grow and provide economic opportunities for Indigenous corporations and communities into the future.

2.29 The committee endorses the expansion of the ILC and the Land Account to encompass sea and freshwater country. This approach is consistent with an Indigenous understanding of country and recent developments in native title law. The committee has heard the arguments for the inclusion of a preamble to the ATSILFF Bill. The committee notes that the ATSI Act (2005) has a preamble which outlines the reasons for the establishment of the ILC and the Land Account. It is the committee's view that the ATSILFF bill is of an administrative nature—that is, the transfer of the management of the Land Account to FFBG—and amends other acts including the ATSI Act for which a preamble already exists.

2.30 The committee notes the ILC's recommendation that the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 should include an amendment giving the ILC a management function in relation to water or waters in which the ILC has water-related rights.

Recommendation 1

2.31 The committee recommends that the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 be amended to ensure that the *Aboriginal and Torres Strait Islander Act 2005* gives the Indigenous Land Corporation management of water or waters for which the Indigenous Land Corporation has water-related rights.

2.32 The committee acknowledges that two submitters raised concerns about the management of the ILC. The committee notes that these concerns do not relate to the bills. The committee supports the on-going independence of the ILC, in consultation with local Indigenous groups, to make its own decisions on how and where to invest the annual payment from the Fund.

2.33 The committee understands the importance that stakeholders place on ensuring that reporting arrangements do not change for a Fund of such symbolic and financial importance. The committee is satisfied that these bills do not impede the Finance Minister from seeking reports and other information from the FFBG at any time, and making these reports and information publicly available.

2.34 The committee notes that the reforms to the ILC and Land Account have been led by the ILC and have been overwhelmingly endorsed by Indigenous stakeholders

through a series of wide-ranging consultations. The government has drafted these bills on the basis of these consultations and the advice of the ILC.

Recommendation 2

2.35 Subject to consideration of Recommendation 1, the committee recommends that the bills be passed.

**Senator James Paterson
Chair**