



Australian Government

Department of the Prime Minister and Cabinet

ANDREW FISHER BUILDING
ONE NATIONAL CIRCUIT
BARTON

Mr Tas Larnach
A/g Committee Secretary
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Larnach

Thank you for your correspondence of 26 April 2018 seeking clarification in relation to the drafting matter raised by the Indigenous Land Corporation in its submission to the Senate Committee's inquiry into the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018, Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 and the Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018 provisions.

The Department of the Prime Minister and Cabinet (the Department) understands the Committee is seeking to confirm whether the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 (the Bill) purposefully omits amendments to paragraphs 191E(1)(a), (b) and (c) to include the words "or water related rights held by the ILC".

In response to this query, the Department makes the following points:

1. Subsection 191E(1) of the *Aboriginal and Torres Strait Islander Act 2005* lists the management functions of the ILC. Paragraphs 191E(1)(a), (b) and (c) list the specific land management functions of the ILC. New subparagraph 191E(1)(ca) would list a new water management function of the ILC.
2. This drafting approach is deliberate, as it ensures that each of the ILC's management functions remain separate and discrete. That is, it is not an oversight in the Bill in not inserting reference to waters or water-related rights in existing paragraphs 191E(1)(a), (b) or (c).
3. However, there is a technical drafting oversight in the Bill in relation to the enumeration of the ILC's new water management functions.

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4. For land, the ILC has management functions in relation to:
 - a. 'Indigenous-held land' (s 191E(1)(a) and (c)) (Indigenous-held land is land in which an Aboriginal or Torres Strait Islander corporation or an Aboriginal person or a Torres Strait Islander holds an interest – see s 4B); and
 - b. Land held by the ILC (s 191E(1)(b)).
5. The Bill would give the ILC management functions in relation to 'Indigenous waters' (new s 191E(1)(ca). 'Indigenous waters' would be defined as water or waters in relation to which water-related rights are held by an Aboriginal or Torres Strait Islander corporation, or an Aboriginal person or a Torres Strait Islander (see item 1 of the Schedule 1 of the Bill). New paragraph 191E(1)(ca) corresponds with the ILC's management functions in relation to Indigenous-held land in s 191E(1)(a) and (c).
6. However, as drafted, the Bill would not give the ILC management functions in relation to water or waters in which the ILC alone has water-related rights. That is, the Bill does not provide for a water management function that corresponds with the ILC's management function in s 191E(1)(b) in relation to ILC-held land. This oversight means the policy intention of giving the ILC water management functions that correspond to its land management functions remains unfulfilled.
7. The management concept as used in the Act and the Bill is one of managing the physical thing (land or water) not the legal construct of a 'right' or 'interest.' The Department considers any amendment to the Bill to address this oversight should follow this approach, rather than adopting the ILC's suggestion for s 191E(1)(b). That is, the Department considers any amendment should have the effect of giving the ILC a new and discrete management function in relation to water or waters in which the ILC has water-related rights, rather than a management function in relation to water-related rights held by the ILC.

Yours sincerely

Jamie Fox
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Indigenous Employment and Recognition Division
4 May 2018