

INDIGENOUS LAND CORPORATION

SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

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

Matters on Notice

Introduction

The Board of the Indigenous Land Corporation (ILC) is pleased to provide the following additional information to 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), following our attendance at the Public Hearing of this Inquiry (the Hearing) on 13 February 2015.

The Board takes this opportunity to reiterate the position set out in our previous submissions to the Committee, urging 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; and
5. allow the Land Account to grow in real terms.

Matters on notice:

1. The ILC to provide a view as to the amendments recommended in the submission tendered by the Kimberly Land Council (Submission 9)

Attachment A to this submission provides an item by item response to each of the amendments suggested by the KLC.

The key amendments proposed by the Kimberley Land Council in submission 9 relate to:

- The deletion of the word 'prior' in item 1, New Objects of Part 4A
- Consideration of the insertion of an additional sub clause between the proposed s191AB(1)(c) and the proposed s191AB(1)(d) to recognise the grand bargain following the decision of the High Court in the Mabo case.

In relation to the deletion of the word 'prior', the ILC supports the assertion by the KLC of the continuance of Aboriginal and Torres Strait Islander interests in land through to the present day, irrespective of the legal recognition or otherwise of these interests. The ILC has no concerns regarding the impact of this proposed amendment in terms of the pursuit and achievement of the intent of the Bill. Accordingly, the ILC submits that Committee have regard to submissions in determining their response to:

Delete the word "prior" in s191AB(1)(d), to better reflect the fact that Aboriginal and Torres Strait Islander interests in land continue through to the present day both in areas where those interests are

recognised by legal and other means and in areas where there is no such formal recognition.

With regard to the insertion of an additional subclause:

“to acknowledge and recognise that past dispossession of land includes statutory mechanisms in the Native Title Act 1993 that validate non-native title interests and extinguish native title interests;”
“to recognise the enormous economic and other advantages bestowed on persons who owned, used or were otherwise able to exploit lands dispossessed from Aboriginal persons and Torres Strait Islanders, and the consequential loss of those opportunities to Aboriginal persons and Torres Strait Islanders;”
“to recognise the importance of economic self-sufficiency to the future of Aboriginal people and Torres Strait Islanders;”

The ILC recommends some caution. The ILC is mindful that, dependent on the wording of the subclause and its subsequent interpretation, there is a risk of restricting the ILC’s ability to work with Native Title holders. While this unintended consequence of the proposed amendment may be avoided through careful drafting; the ILC suggests that the existing drafting of the proposed section 191AB is adequate in its acknowledgement of the genesis of the Land Account and ILC.

2. The ILC to provide a view as to the amendments recommended in the submission tendered by the National Centre of Indigenous Studies, Australian National University (Submission 3)

The submission presented by the National Centre of Indigenous Studies recommends 12 amendments to the drafting of the Bill (Submission 3, pages 2-3). Attachment A to this submission provides an item by item response to each of the suggested amendments.

Broadly, the ILC believes that the majority of these suggested amendments go to the further strengthening of the Land Account, enhancing transparency measures and secures real growth in the value of the Land Account, reflecting the aims previously mentioned. The ILC would have no concerns should the Committee choose to adopt any or all of these amendments.

In contrast, the ILC does not support the proposed amendment to s192X(2)

That section 192X(2) be amended as follows

[...] from the Land Account must not be used for a purpose other than for:
(a)[...]

Delete subsections (b) and (c).

The ILC notes the intention of the amendment is to ensure that Land Account funds are only spent on land acquisition and management, however this amendment would have the unintended consequence of restricting the ILC’s capacity to use these funds for the administration its land acquisition and management functions. This amendment would undermine the independence of the ILC by making it reliant on an annual government appropriation. This would provide an

increased level of government control over the ILC, with implication for how the ILC utilises Land Account funds for the benefit of Aboriginal and Torres Strait Islander people.

With regard to the proposed amendments to (proposed) s191F(1),

It is generally suggested that the proposed law be amended as follows:

...Strengthen the corporate governance measures related to the ILC generally but with specific emphasis related to the activities of the Board. It is proposed that the Bill includes provisions to ensure that such control measures are commiserate [sic] with those of the corporate governance mechanisms mandated in the Corporations Laws, (including say for large organisations under the CATSI Act), enacted under s51(xx) of the Constitution. (Submission 3, page1)

In relation to section 191F(1A) ... While this submission supports the intent of the proposed amendment in improving governance and compliance with the regulatory framework for government statutory entities, it is suggested that the operation of the ILC is explicitly made subject to and regulated in a manner that is similar to that applying to corporations under the Corporations Law (including governance and regulatory measures that apply to large Indigenous Corporations under the CATSI Act). That is, if this is not already possible under the current law, that the ILC is subjected to both financial and performance audits. (Submission 3, page 3)

The ILC supports the intent behind this proposed amendment; however the ILC considers that the proposed measures will not ensure that a higher standard of governance will be required.

It is the ILC's view that given the significance of the Land Account to Aboriginal and Torres Strait Islander peoples, it is critical that the ILC be governed to the highest standards of corporate governance, accountability and transparency.

The governance of ILC Board has experienced serious and documented accountability failings in the past, and following several independent reviews has implemented a range of corporate governance reforms which we believe should be legislated to prevent any future recurrence.

The ILC is a complex hybrid of government entity and corporation and one of few Commonwealth agencies with full borrowing and guarantee powers. While the ILC and its subsidiaries operate in a commercial context, the ILC is a Commonwealth Entity (under the PGPA Act 2013) and is thus subject to a different set of accountability mechanisms to corporations operating in the private sector.

Whilst the PGPA was introduced after the purchase of the Ayers Rock Resort, the ILC Board has considered the PGPA and concluded it does not provide suitable assurance that would prevent a similar decision again. The existing legislative provisions relating to governance and accountability in the public sector are designed for Commonwealth agencies that do not have the full borrowing and guarantee powers or independence of the ILC.

In contrast to the private sector in which corporations are regulated by the Australian Securities and Investment Commission with strong powers of enforcement, in the public sector this role is undertaken by central agencies and at the discretion of the relevant Minister.

Noting the recommendation by NCIS with regard to the mechanisms mandated in Corporations Law, in conjunction with the definitional concerns raised by the Department of Finance during the Hearing, the ILC suggests that a more beneficial amendment may be to retain the provision as

drafted but to provide an explicit definition of the terms contained s191F(1)(1A). (See point 2 regarding definitional matters)

Supplementary comments:

1. The Application of 'stronger' governance requirements for the ILC, beyond the benchmark set by the PGPA Act (Commonwealth, 2013), with regard to proposed s191F(1)(1A)

The ILC's submission to the Senate Community Affairs Legislation Committee on the Inquiry into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (the Submission) and the subsequent Supplementary submission tendered in December 2014 provide detailed discussion of additional governance provisions, specifically in relation to the conduct of Directors, for the ILC.

In particular, the ILC directs the Committee to the Supplementary Submission which provides a point by point response to the Department of Finance and Department of Prime Minister and Cabinet submissions on these provisions.

In relation to whether these strengthened provisions may be regarded as 'discriminatory', the ILC Board strongly refutes a potential clash with the Racial Discrimination Act. This Bill does not place additional requirements on the ILC because it is an Indigenous managed entity, rather the requirements are proposed to provide the additional governance protections for this organisation with the unique role to ensure appropriate use of funds held in trust.

The ILC submits that the additional governance provisions included in proposed S191F(1)(1A), notwithstanding possible definitional matters (addressed below) are appropriate and desirable given the *sui generis* and fiduciary nature of the Land Account and ILC.

In developing the single piece of legislation to cover the diverse range of Commonwealth agencies, Government carefully balanced the need for robust governance and accountability while reducing red tape and onerous reporting arrangements. The resultant PGPA does this well for the majority of Commonwealth entities.

The ILC Board's position is that these governance protections are inadequate given the ILC's independence, unique ability to invest, borrow funds and provide guarantees drawing on the funds held in trust for Indigenous people.

The ILC notes that of the witnesses appearing before the Committee Inquiry, none of those representing Indigenous interests were concerned that the provisions in the proposed Bill were discriminatory in nature.

2. Definitional matters relating to proposed s191F(1)(1A)

The ILC notes that the Department of Finance have provided new comment regarding the language employed to describe the duties of Directors with regard to operation in accordance with *'good governance principles'*.

In their evidence to the Hearing, the Department asserts with reference to the proposed additional requirements, *"that they will be different, ...the problem is that they are so imprecise as to be poorly conceived"* (Hansard Transcript Proof, p.26) The Department clarified that in particular, the terms; *'corporate governance'*, *'financial accountability'*, *'transparency'* and *'ethical procurement'* are *"imprecise and cause potential confusion because they are imprecise"*.

While these terms have been used in other legislation, government regulations and guidelines, the ILC supports ensuring that there is clarity around the terms used in the Bill regarding accountability in the duties of Directors. The ILC supports the course of action proposed by Senator Siewert that the Explanatory Memorandum of the Bill be amended *"to clearly define those definitions"* (Hansard Proof p.28) with the expectation that this would *"address ...concerns about the technical nature of the failures"* and go to *"help those who are reading the legislation and those who are conducting their business under the legislation, to understand the expectations that are put on them"* (Hansard Proof p.29). The ILC notes the Department of Finance will be providing a further response to the Committee regarding definitions. The ILC would be willing to be further consulted on the appropriate drafting of such definitions in conjunction with the Department of Finance.

3. Calculation of additional payments to the Land Account relating to proposed s193(5)(5A)-(5C)

The ILC is committed to working with both the Department of Finance and the Department of Prime Minister and Cabinet on the development of an appropriate mechanism to secure the growth of the real value of the Land Account. Further the ILC is eager to explore opportunities for the expansion of the Land Account's investment parameters and welcomes the comments from both the Department of Finance and the Department of Prime Minister and Cabinet regarding the possible nature of 're-balancing' the need to protect the real value of the Land Account over time and the imperative to generate higher returns.

4. Recognition of 'sea' in the same context as 'land'

The ILC takes this opportunity to reiterate their support for the broadening of the ILC's statutory remit to cover the sea as well as land, recognising that native title can now extend offshore. The ILC, as per evidence provided to the Committee, endorses the use of an expanded definition of land, to explicitly include seas, as a mechanism for this recognition throughout the proposed Bill.

ITEM 1:*191AB New Objects of Part 4A***1 Before Division 1 of Part 4A**

Insert:

Division 1A—Objects of Part**191AB Objects of Part**

- (1) The objects of this Part are the following:
- (a) to acknowledge the special relationship that Aboriginal persons and Torres Strait Islanders have with their lands;
 - (b) to acknowledge that land has an economic, cultural, social and environmental value for Aboriginal persons and Torres Strait Islanders;
 - (c) to acknowledge the past injustices suffered by Aboriginal persons and Torres Strait Islanders, arising from the dispossession of their land;
 - (d) to ensure that Aboriginal persons and Torres Strait Islanders receive the recognition within the Australian nation to which their prior rights and interests in their traditional lands and their rich and diverse culture entitle them to aspire;
 - (e) to provide a compensatory mechanism for Aboriginal persons and Torres Strait Islanders that addresses their ongoing land needs.
- (2) Division 10 provides for the Aboriginal and Torres Strait Islander Land Account, which was established for the land-related benefit of Aboriginal persons and Torres Strait Islanders.
- (3) In this Act:

land-related benefit means the acquisition and management of land by or on behalf of Aboriginal persons and Torres Strait Islanders, as mentioned in sections 191B and 192X.

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC assessment
Kimberley Land Council	<p>Proposed section 191AB should be amended as follows.</p> <ul style="list-style-type: none"> (a) Delete the word “prior” in s191AB(1)(d), to better reflect the fact that Aboriginal and Torres Strait Islander interests in land continue through to the present day both in areas where those interests are recognised by legal and other means and in areas where there is no such formal recognition. (b) Consideration should be given to 	<ul style="list-style-type: none"> (a) The ILC has no concerns in relation to this proposal. (b) The ILC considers the drafting of proposed section 191AB to be adequate. Further, the ILC cautions that the amendment of the Bill to reflect the KLC’s

	<p>inserting additional subclauses between s191AB(1)(c) and s191AB(1)(d) to recognise the “grand bargain” and compromises that were made by Aboriginal people and Torres Strait Islanders in negotiations with the Australian Government following the decision of the High Court in the Mabo case. These subclauses could be in terms such as:</p> <p><i>“to acknowledge and recognise that past dispossession of land includes statutory mechanism in the Native Title Act 1993 that validate non-native title interests and extinguish native title interests”;</i></p> <p><i>“to recognise the enormous economic and other advantages bestowed on persons who owned, used or were otherwise able to exploit lands dispossessed from Aboriginal persons or Torres Strait Islanders, and the consequential loss if those opportunities to Aboriginal persons and Torres Strait Islanders”;</i></p> <p><i>“to recognise the importance of economic self-sufficiency to the future of Aboriginal people and Torres Strait Islanders”.</i></p>	<p>additional objects may have the unintended consequence of limiting the ILC’s ability to exercise its functions in relation to Indigenous Held Land on which the Indigenous interest held is via native title determination. The functions of the ILC are complementary to the mechanism of native title; the undue restriction of the ILC’s ability to work with native title groups runs contrary to the broader intent of the Bill.</p>
<p>National Centre for Indigenous Studies (Prof Mick Dodson and Dr Asmi Wood)</p>	<p>Submits that the Bill be amended as follows:</p> <p>191AB(1)(e) – <i>to provide both retrospective and prospective compensatory mechanisms in the meaning of section 51(xxxi) of the Constitution</i></p> <p>191AB(3) – Land related benefit ... ‘means <u>the acquisition of interests in land [...]</u> in the meaning of ss191B and 192X.</p>	<p>The ILC would have no concerns should either of these amendments be recommended by the Committee.</p>

ITEM 2:

192X Purpose of the Land Account

2 Section 192X

Repeal the section, substitute:

192X Purpose of Land Account

- (1) The purpose of the Land Account is the making of payments to the Indigenous Land Corporation under this Division.
- (2) Despite section 193J, money held by the Indigenous Land Corporation that was paid to it from the Land Account must be applied only:
 - (a) in payment or discharge of the costs, expenses and other obligations incurred by the Corporation in the performance of its functions or the exercise of its powers under:
 - (i) this Act; or
 - (ii) any other law;as in force at the commencement of this subsection; and
 - (b) in payment of any remuneration and allowances payable to any person under:
 - (i) this Act; or
 - (ii) any other law;as in force at the commencement of this subsection; and
 - (c) in making any other payments which the Corporation is authorised or required to make under:
 - (i) this Act; or
 - (ii) any other law;as in force at the commencement of this subsection.

Note: The purposes of the Indigenous Land Corporation are:

- (a) to assist Aboriginal persons and Torres Strait Islanders to acquire land; and
- (b) to assist Aboriginal persons and Torres Strait Islanders to manage indigenous-held land;

so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders (see section 191B).

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	<p>That section 192X(2) be amended as follows</p> <p><i>[...] from the Land Account must not be used for a purpose other than for:</i></p> <p><i>(a)[...]</i></p> <p><i>Delete subsections (b) and (c).</i></p>	<p>The ILC understands that this proposed amendment to the Bill is intended to ensure Land Account funds are only spent on land acquisition and management.</p> <p>However, the ILC submits that amending the Bill in this way would have the unintended consequence of making the ILC reliant on a government appropriation. This amendment would seriously undermine the independence of the ILC through a reliance on government</p>

		funds. This would give the government a level of control over the administration of the ILC and would have implications for how the ILC utilises Land Account funds for Aboriginal and Torres Strait Islander peoples' benefit.
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ITEMS 3 – 5

193(3) *Technical amendments*

3 Subsection 193(3) (heading)

Repeal the heading, substitute:

Additional payments—2011-2014

4 Subsection 193(3)

After “1 July 2011”, insert “and before 1 July 2014”.

5 Subsection 193(5)

Omit “For the purposes of subsections (3) and (4), the”, substitute “The”.

ITEMS 6 – 7

193(5A), 193(5B), 193(5C): *Half of returns over the ILC base draw down amount (plus indexation, nominally \$45m) to be paid back into the Land Account*

6 After subsection 193(5)

Insert:

Additional payments—later financial years

- (5A) On the first business day in December of a financial year (the **current year**) beginning on or after 1 July 2014, an amount is to be paid to the Indigenous Land Corporation, out of the Land Account, if the real return from investment of the Land Account for the previous financial year exceeds \$50 million.
- (5B) The amount to be paid is half of the excess.
- (5C) The **real return** from investment of the Land Account for the previous financial year is the amount worked out using the following formula:

$$\text{Indexation factor} \times \text{Return}$$

where:

indexation factor means the indexation factor for the current year worked out under section 192Y.

return is the actual capital value of the Land Account for the current year less the actual capital value of the Land Account for the previous financial year.

Note: If income is received by the Commonwealth from the investment of an amount standing to the credit of the Land Account, an amount equal to the income must be credited to the Land Account (see subsection 192W(4)).

7 Subsection 193(6)

Omit “subsection (2) or (3)”, substitute “this section”.

RESPONSES TO ITEM 3-7 IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	It is suggested that the proposed law be amended as follows: ... To support the growth of the land fund in <i>real</i> terms. However that this growth is to be achieved while ensuring that investment options available to the Land Fund are circumscribed by what would reasonably be characterised as ‘conservative investment options’.	The ILC supports this proposition. The ILC suggests that transferring the management of the Land Account to the Future Fund Agency would be an appropriate means of appropriately managing risk while also ensuring that the Land Account grows in real terms.

ITEMS 8 and 9:

193G(1) *Consultative Forum on the investment policy of the Land Account – ILC is able to give advice to Finance Minister on the projected financial requirements of the ILC*

193G *Consultative Forum on the investment policy of the Land Account – Finance Minister to have regard to the advice of the ILC*

8 Subsection 193G(1)

Omit “the investment policy”, substitute “the projected financial requirements of the Indigenous Land Corporation and the investment policy”.

9 After section 193G

Insert:

193GA Finance Minister to have regard to advice of Indigenous Land Corporation

- (1) The Indigenous Land Corporation may give the Finance Minister advice about the projected financial requirements of the Indigenous Land Corporation.
- (2) The Indigenous Land Corporation may give the Finance Minister advice as to how the Land Account should be managed, in order to meet the projected financial requirements of the Indigenous Land Corporation.
- (3) The Finance Minister must, in making a decision in relation to the investment policy of the Land Account, have regard to any advice given by the Indigenous Land Corporation under subsection (2).

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Response
National Centre of Indigenous Studies	Submits the Bill should be amended as follows: 193GA(3) – <i>The Finance Minister must [...] <u>or provide written substantive reasons as to why such advice was not followed.</u></i>	The ILC suggests that this drafting goes beyond the proposal in the current Bill in that it would require the Minister to give written reasons if the ILC’s advice wasn’t followed. The ILC notes that this amendment would add an element of transparency to the process proposed by the Bill and would have no concerns if the Committee were to recommend that the Bill be amended in this way.

ITEM 10

193 IA *Changes to the Purpose of the ILC and or Land Account to be subject to parliamentary inquiry process.*

10 At the end of Division 10 of Part 4A

Add:

193IA Changes to purpose of Indigenous Land Corporation and Land Account

- (1) This section applies to a Bill for an Act that:
 - (a) is introduced into either House of the Parliament; and
 - (b) contains a provision (the *proposed provision*) that would:
 - (i) amend section 191AB or 191B or this Division; or
 - (ii) would otherwise alter the operation of any of the provisions mentioned in subparagraph (i).
- (2) Subject to subsection (6), the Bill is referred to the joint parliamentary committee responsible for the scrutiny of issues related to Aboriginal persons and Torres Strait Islanders (the *joint committee*).
- (3) The joint committee must, not less than 10 sitting days and not more than 6 months after the introduction of the Bill, table in each House a report that meets the requirements contained in subsections (4) and (5).
- (4) In preparing the report, the joint committee must consult with Aboriginal persons and Torres Strait Islanders, including prominent Indigenous organisations in all States and Territories, on the proposed provision.
- (5) The report must include:
 - (a) an assessment of whether the Aboriginal persons and Torres Strait Islanders consider that the proposed provision is necessary, having regard to the likely impact of the proposed provision on the ability of Aboriginal persons and Torres Strait Islanders to acquire or manage land for their economic, social, cultural or environmental benefit; and
 - (b) details of the consultation process that was undertaken by the joint committee in preparing the report, including the number of Aboriginal and Torres Strait Islander persons or organisations that were consulted.
- (6) If there is no joint parliamentary committee:
 - (a) the Bill is referred to both the House of Representatives and Senate committees responsible for the scrutiny of issues related to Aboriginal persons and Torres Strait Islanders; and
 - (b) the House of Representatives committee must, not less than 10 sitting days and not more than 6 months after the introduction of the bill, table in the House a report that meets the requirements contained in subsections (4) and (5); and
 - (c) the Senate committee must, not less than 10 sitting days and not more than 6 months after the introduction of the bill, table in the Senate a report that meets the requirements contained in subsections (4) and (5).

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	<p><i>The NCIS submission makes a general comment in relation to consultation with the Indigenous community, suggesting that the proposed law be amended as follows:</i></p> <p><i>“To strengthen the consultation provisions with the Indigenous community. To provide in the Act that any resulting consent was free, prior and informed in the meaning of the United Nations Declaration on the Rights of Indigenous Peoples.</i></p>	The ILC would have no particular concerns should the Committee recommend an amendment to incorporate the NCIS’s suggestion.
Kimberley Land Council	<p>The KLC specifically supports the submission of the ILC that the proposed section 193IA(1)(b)(i) should also apply to section 192X.</p> <p>...The KLC specifically supports the submission of Professor Dodson [NCIS] that consultation under proposed section 193IA(4) should be real, substantive and consistent with the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples.</p>	The ILC agrees with this submission and would support that these amendments be adopted by the Committee.

ITEM 11

191F(1A) *ILC to operate in accordance with good governance principles*

11 After subsection 191F(1)

Insert:

Indigenous Land Corporation to operate in accordance with good governance principles etc.

- (1A) Without limiting subsection (1), the Indigenous Land Corporation must, in performing its functions and exercising its powers, ensure that its business and administration is conducted:
- (a) efficiently; and
 - (b) in accordance with principles of good governance, transparency, financial accountability and ethical procurement.

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	<p>It is suggested that the proposed law be amended as follows: ...Strengthen the corporate governance measures related to the ILC generally but with specific emphasis related to the activities of the Board. It is proposed that the Bill includes provisions to ensure that such control measures are commiserate [sic] with those of the corporate governance mechanisms mandated in the Corporations Laws, (including say for large organisations under the CATSI Act), enacted under s51(xx) of the Constitution.</p> <p>In relation to section 191F(1A) ... While this submission supports the intent of the proposed amendment in improving governance and compliance with the regulatory framework for government statutory entities, it is suggested that the operation of the ILC is explicitly made subject to and regulated in a manner that is similar to that applying to corporations under the</p>	<p>It is the ILC's view that given the significance of the Land Account to Aboriginal and Torres Strait Islander peoples, it is critical that the ILC be governed to the highest standards of corporate governance, accountability and transparency.</p> <p>The ILC has experienced serious and documented accountability failings in the past, and following several independent reviews has implemented a range of corporate governance reforms which we believe should be legislated to prevent any future recurrence.</p> <p>It should also be noted that while the ILC and its subsidiaries operate in a commercial context, the ILC is a public sector agency and is thus subject to a different set of accountability mechanisms to corporations operating in the private sector.</p> <p>The ILC further notes that existing legislative provisions relating to governance and accountability in the public sector are designed for all Commonwealth agencies. Few if any, have</p>

	Corporations Law (including governance and regulatory measures that apply to large Indigenous Corporations under the <i>CATSI Act</i>). That is, if this is not already possible under the current law, that the ILC is subjected to both financial and performance audits.	the full borrowing and guarantee powers or independence of the ILC. As a result the ILC Board supports the proposed Bill as it sets out governance standards, some drawn from Corporations Law to ensure investment and fiduciary obligations are adequately managed.
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ITEM 12

191L *Powers of the Minister; the Minister is not empowered to direct the ILC and must have regard to the ILC's independence.*

12 Section 191L

Repeal the section, substitute:

191L Powers of Minister

- (1) Except as expressly provided in this Act or the *Public Governance, Performance and Accountability Act 2013*, the Minister is not empowered to direct the Indigenous Land Corporation in relation to any of its activities.
- (2) In deciding whether to make a request of the Indigenous Land Corporation for any reason, the Minister must have regard to the importance of maintaining the independence of the Indigenous Land Corporation.

Nil responses tendered.

ITEM 13

191W *Responsibilities of the ILC Board – must ensure the ILC operates in accordance with good governance*

13 Section 191W

Repeal the section, substitute:

191W Responsibilities of Indigenous Land Corporation Board

The responsibilities of the Indigenous Land Corporation Board are to:

- (a) ensure the proper and efficient performance of the functions of the Indigenous Land Corporation for the purposes mentioned in section 191B; and
- (b) determine the policy of the Indigenous Land Corporation with respect to any matter; and
- (c) ensure that the Indigenous Land Corporation, its subsidiaries and Indigenous Land Corporation officers comply with the highest standards of good governance, transparency, financial accountability and ethical procurement.

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	<p>It is suggested that the proposed law be amended as follows: ...Strengthen the corporate governance measures related to the ILC generally but with specific emphasis related to the activities of the Board. It is proposed that the Bill includes provisions to ensure that such control measures are commiserate [sic] with those of the corporate governance mechanisms mandated in the Corporations Laws, (including say for large organisations under the CATSI Act), enacted under s51(xx) of the Constitution.</p> <p><i>The NCIS submission in relation to this item refers to its comments against Item 11:</i></p> <p>In relation to section 191F(1A) ... While this submission supports the intent of the proposed amendment in improving governance and compliance with the regulatory</p>	<p>Note ILC assessment at Item 11.</p>

	<p>framework for government statutory entities, it is suggested that the operation of the ILC is explicitly made subject to and regulated in a manner that is similar to that applying to corporations under the Corporations Law (including governance and regulatory measures that apply to large Indigenous Corporations under the <i>CATSI Act</i>). That is, if this is not already possible under the current law, that the ILC is subjected to both financial and performance audits.</p>	
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ITEM 14

191X(3), *Nomination Committee: Minister must consult Nomination Committee and Finance Minister before making appointments.*

14 Subsection 191X(3)

Repeal the subsection, substitute:

Consultation

- (3) The Minister must, before appointing a person as an Indigenous Land Corporation Director, consult:
 - (a) the Nomination Committee; and
 - (b) the Finance Minister.

ITEM 16

191XA, 191XB *Nomination Committee; composition*

Nomination Committee; Consultation process

16 After section 191X

Insert:

191XA Nomination Committee

- (1) The Minister must establish a Nomination Committee, to make recommendations to the Minister about appropriate persons for appointment as Indigenous Land Corporation Directors.
- (2) The Nomination Committee must consist of at least 3 members.
- (3) The members of the Nomination Committee must:
 - (a) be eminent persons; and
 - (b) be Aboriginal persons or Torres Strait Islanders; and
 - (c) have skills and expertise relevant to the functions of the Indigenous Land Corporation.
- (4) In appointing persons to the Nomination Committee, the Minister must have regard to the gender balance of the Nomination Committee.

Chairperson

- (5) The Minister must appoint a member of the Nomination Committee as its Chairperson.
- (6) The Minister must, before appointing a person as a member, or as the Chairperson, of the Nomination Committee, consult:
 - (a) the joint parliamentary committee responsible for the scrutiny of issues relating to Aboriginal persons and Torres Strait Islanders on the suitability of the candidate proposed for appointment, or
 - (b) if there is no joint parliamentary committee—both the House and the Senate committee responsible for the scrutiny of issues related to Aboriginal persons and Torres Strait Islanders on the suitability of the candidate proposed for appointment.

Terms and conditions

- (7) A member of the Nomination Committee holds office on such terms and conditions (if any) as are determined by the Minister by notice published in the *Gazette*.

191XB Consultation with Nomination Committee

- (1) The Minister must, before appointing an Indigenous Land Corporation Director, request that the Nomination Committee prepare a report proposing potential candidates for appointment.
- (2) Subject to subsections (3), (4) and (5), the Nomination Committee must determine procedures for its operation.
- (3) The Nomination Committee must:
 - (a) maintain a list of potential candidates for appointment as Indigenous Land Corporation Directors; and
 - (b) meet at least once in every 12 month period for the purposes of discussing and updating the list.
- (4) In preparing a report under subsection (1), or in maintaining the list under subsection (3), the Nomination Committee must have regard to the following:

<ul style="list-style-type: none"> (a) the gender balance of the Indigenous Land Corporation Board; (b) the requirements of subsection 191X(4); (c) whether a person recommended for appointment is a fit and proper person to be an Indigenous Land Corporation Director. <p>(5) A report under subsection (1), or a list under subsection (3):</p> <ul style="list-style-type: none"> (a) must not contain more than 10 potential candidates for appointment; and (b) must not be disclosed by a member of the Nomination Committee or an Indigenous Land Corporation officer, other than for a purpose authorised by the Indigenous Land Corporation Board. <p>(6) If the Minister makes an appointment, the Minister must make a statement, in writing, indicating whether or not the person appointed was a candidate proposed by the Nomination Committee.</p> <p>(7) A statement under subsection (6) must be published:</p> <ul style="list-style-type: none"> (a) on the Indigenous Land Corporation’s website; or (b) by any other means that the Indigenous Land Corporation Board considers appropriate.

RESPONSES TO ITEM IN SUBMISSIONS

Organisation	Submission	ILC Assessment
National Centre for Indigenous Studies	<p><i>The NCIS submission makes a general comment in relation to consultation with the Indigenous community, suggesting that the proposed law be amended as follows:</i></p> <p>“To strengthen the consultation provisions with the Indigenous community. To provide in the Act that any resulting consent was free, prior and informed in the meaning of the <i>United Nations Declaration on the Rights of Indigenous Peoples</i>.</p> <p><i>The NCIS submission makes the following specific suggestions for amendments to the Bill in relation to Items 14 and 16:</i></p> <p>191XA(1) – The Minister must establish <u>and reasonably and adequately resource</u> a Nomination Committee [...]</p> <p>191XB(4)(c) – [...] <u>ILC Director and to provide an opinion as to whether</u></p>	<p>If the Committee were to recommend an amendment to incorporate the NCIS’s suggestion, the ILC would have no particular concerns.</p> <p>The ILC notes that these suggestions go to further strengthening the Indigenous Control of the ILC. The ILC has no concerns in relation to the adoption of these suggestions.</p>

	<p><u>the person is reasonably likely to be able to discharge his/her duties as a Director in the meaning of the Corporations Law.</u></p> <p>191XB(6) – Replace ‘If the Minister makes an appointment’ with ‘When the Minister makes appointments as a Director of the ILC under this Act’ [...]</p>	
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