

# Chapter 2

## Key issues

2.1 The majority of submissions to the inquiry support the proposed amendments to the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act).<sup>1</sup> The committee received a number of submissions that suggested minor changes, but were nonetheless largely supportive of the Bill.<sup>2</sup> Submitters expressed support for:

- recognising the object and purpose of the Land Account;
- ensuring the Land Account is used only for land-related purposes;
- increasing Aboriginal and Torres Strait Islander (ATSI) control of ILC and the Land Account;
- improving corporate governance, transparency and accountability; and
- increasing and protecting the Land Account's value.

2.2 The committee received two submissions that expressed reservations about the proposed legislation. The submission from the Department of the Prime Minister and Cabinet (DPMC) states:

Many of the proposed amendments are likely to add requirements or processes in relation to the ILC and the Land Account...

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

The Department is not aware of the Bill having been subject to any significant consultation process with the Indigenous or general community prior to its introduction.<sup>3</sup>

2.3 The submission from the Department of Finance (DoF) focuses on two issues of concern:

Firstly, there is a potential for the proposed changes to the payment mechanism from the Land Account to the ILC to erode the real value of the Land Account over time.

Secondly, some of the proposed amendments would add complexity in administering the ATSI Act and either duplicate or contradict requirements that already apply under the [PGPA Act].<sup>4</sup>

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1 See, for example: Indigenous Land Corporation, *Submission 1*; Northern Land Council, *Submission 6*; Wunan, *Submission 2*.

2 See, for example: Professor Mick Dodson and Dr Asmi Wood, *Submission 3*; Torres Strait Regional Authority, *Submission 18*; Cape York Land Council Aboriginal Corporation, *Submission 11*; North Queensland Land Council, *Submission 12*.

3 Department of the Prime Minister and Cabinet, *Submission 14*, pp 1–2.

4 Department of Finance, *Submission 20*, p. 1.

## Governance of the ILC

2.4 The committee received evidence from a number of submitters stating that the current governance of the ILC is inadequate. Some of these were quite specific allegations that are beyond the remit of this particular inquiry.<sup>5</sup> The ILC expressed concern with the ILC Board's decision-making process during the purchase of the Ayers Rock Resort (ARR) and the long term protection of the Land Account. Mr Dillon of the Indigenous Land Corporation stated:

It is clear from recent history that there has not been appropriate governance and management within the ILC...

[T]here has been a huge loss from the purchase of [ARR]—over \$100 million—to the ILC. The resort is running very well, but we paid too much and we borrowed too much.<sup>6</sup>

2.5 In additional information provided to the committee a previous director of the ILC, Mr David Baffsky, noted that a 2011 review into the ARR acquisition by KPMG concluded that:

[C]omprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles.<sup>7</sup>

Further Mr Baffsky noted that the losses referred to by Mr Dillon are incorrectly characterised. The losses are better described as impairments to the asset value rather than operating losses. In addition, these impairments will not be realised as the ILC is 'obliged to divest (at no cost)' to the partner Aboriginal Corporation that proposed to purchase ARR.<sup>8</sup>

2.6 In evidence to the committee, Mr Lembit Suur, First Assistant Secretary at the DoF stated that he 'did not see a failure in governance' at ILC and does not see 'that the Bill will strengthen governance':

There was a decision taken by the previous ILC board, which the current ILC board does not support, and there are implications for the ILC's balance sheet and indeed for its ability to disburse funds potentially as a result of that decision...

I am not in a position to judge whether it was flawed decision making or not. What I can tell you is that insofar as the duties of people who were on the ILC board are concerned, matters have been referred to us over the last few years, which we have looked at and taken legal advice on. And it is not

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5 During the hearing, Mr Mike Dillon (ILC) alleged that a former director of ILC did not disclose a substantial conflict of interest during a major ILC asset acquisition. The committee notes that this Bill inquiry is not the proper forum to investigate these allegations. The committee encourages the ILC to pursue these allegations through an appropriate legal process if there is evidence to support these claims.

6 Mr Mike Dillon, Indigenous Land Corporation, *Proof Committee Hansard*, pp 1–2.

7 Additional Information, Letter from Mr David Baffsky, March 2015, p. 1.

8 Additional Information, Letter from Mr David Baffsky, March 2015, p. 2.

apparent that there has been any failure of duty. There is a difference of views about whether or not a particular purchase was prudent at the time or has proven to be prudent with the passage of time. But those sorts of things happen frequently in a whole range of organisations.<sup>9</sup>

### ***Imprecise use of terminology within the Bill***

2.7 It is important that definitions within legislation are precise in order to ensure that the intent of the legislation is reflected. Imprecise terminology is likely to result in uncertainty and unintended outcomes. In evidence to the committee, the DoF states that 'these terms that are proposed in [Items 11 and 13 of] the amending bill are...not terms that you find in publications from the people who usually set governance controls within Australia'.<sup>10</sup>

2.8 Mr Surr elaborated with a number of examples:

It is the phrase 'corporate governance'; it is the term 'transparency'; it is the term 'financial accountability'; and it is the principle of 'ethical procurement'. They are the four terms that appear in those two proposed amendments that I pointed to, and they are the terms that we think are imprecise and cause potential confusion because they are imprecise—not defined anywhere, not explained anywhere and not used broadly in the sense that you can point to something and say, 'When people talk about "ethical procurement", here is its normal meaning,' and therefore you can assign its normal meaning to the bill.<sup>11</sup>

2.9 Further to this, the department suggested a different approach that the ILC might take if it wanted to improve its procurement processes:

If the ILC were interested in linking itself to the ethical behaviour standards in procurement that apply broadly to Commonwealth procurement activity, the proper way to do that is to get itself listed under the PGPA Rules. If the ILC does not wish to be bound by the standards that relate to ethical procurement in the Commonwealth, it is not clear why it is invoking this imprecise term in relation to its procurement activity.<sup>12</sup>

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9 Mr Lembit Surr, Department of Finance, *Proof Committee Hansard*, p. 28. The DoF has responsibility for 'developing policy and providing whole-of-government advice on governance arrangements for the range of Commonwealth bodies' including the ILC. All Commonwealth agencies are governed by the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The PGPA Act 'establishes a coherent system of governance and accountability for public resources, with an emphasis on planning, performance and reporting. The Act applies to all Commonwealth entities and companies'.

10 Mr Lembit Suur, Department of Finance, *Proof Committee Hansard*, p. 26.

11 Mr Lembit Surr, Department of Finance, *Proof Committee Hansard*, p.26. See also: Department of Finance, *Submission 20.2*, pp 2–5.

12 Mr Lembit Surr, Department of Finance, *Proof Committee Hansard*, p. 27.

2.10 The DoF submitted that if it had been approached during the drafting of the Bill, the DoF would have provided guidance on these governance issues and assisted with 'develop[ing] arrangements that meet the desired objectives of the Bill'.<sup>13</sup>

### ***Discrimination***

2.11 The issue of the Bill being viewed as discriminatory was raised, as the Bill's additional governance requirements will only apply to an Aboriginal and Torres Strait Islander organisation—the ILC.

2.12 In its submission to the committee, the North Queensland Land Council submits that in relation to item 20 and 21:

[T]he Board of the ILC should not be expected to be more accountable than the Board of any similar Commonwealth agency. The NQLC supports the development of a code of conduct for ILC directors and staff.<sup>14</sup>

2.13 Other submitters contended that these 'additional accountability measures [would not] infringe any discrimination laws' and that the Bill is not 'consider[ed] to be discriminatory or unfair'.<sup>15</sup>

### **Unnecessary and duplicated processes**

2.14 DPMC submitted that this Bill was likely to 'add unnecessary complexity and cost and risk causing confusion'.<sup>16</sup> In its submission, DPMC provided a comprehensive analysis of most items within the Bill, arguing that many of the proposed changes are already requirements of the ATSI Act or of other related legislation.<sup>17</sup>

2.15 For example, item 11 of the Bill would require the 'ILC to operate efficiently and in accordance with good governance, transparency, financial accountability and ethical procurement'.<sup>18</sup> However, DPMC noted section 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...

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13 Department of Finance, *Submission 20.2*, p. 5.

14 North Queensland Land Council, *Submission 12*, p. 5.

15 Professor Michael Dodson, National Centre for Indigenous Studies, *Proof Committee Hansard*, p. 23. Answer to Questions on Notice, Torres Strait Regional Authority, p. 1. Also see: Mr Mike Dillon, Indigenous Land Corporation, *Proof Committee Hansard*, p. 3. The Parliamentary Joint Committee on Human Rights considered that the Bill does not give rise to human rights concerns (see Chapter 1).

16 Department of the Prime Minister and Cabinet, *Submission 14*, pp 1–2.

17 See: Mr Lembit Surr, Department of Finance & Ms Nadine Williams, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, p. 28.

18 Department of the Prime Minister and Cabinet, *Submission 14*, p. 10. See also: Mr Lembit Suur, Department of Finance, *Proof Committee Hansard*, pp 25–26.

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the ATSI Act [s.191F(1)] requires the ILC to act in accordance with sound business principles whenever it performs its functions on a commercial basis.<sup>19</sup>

2.16 The DoF raised similar concerns to DPMC, specifically focusing on governance. The DoF submitted that the PGPA Act already 'establishes a coherent system of governance and accountability across Commonwealth entities'. The DoF states that the measures aimed at improving governance relating to the Board proposed in this Bill already exist under the PGPA Act and its framework. In addition, the proposed changes to the ATSI Act may lead to duplication and, in some cases, confusion. For example, item 17 of the Bill requires the ILC to establish an Audit and Risk Management Committee. However, the establishment of such a committee is already a requirement of the ILC under section 45 of the PGPA Act, with the ILC already having such a committee in place since 1997.<sup>20</sup>

2.17 In evidence to the committee, Mr Mike Dillon of the ILC disagreed with the proposition that the Bill would impose duplicative governance structures on the ILC stating that:

[W]hen regulation allows mischief, then clearly you need to take action. And that ought to be a combination of stronger regulation and stronger implementation.<sup>21</sup>

### **Proposed changes to the Land Account payment mechanism**

2.18 In its submission, the DoF presented economic modelling of the proposed changes to the Land Account showing the real value of the Land Account declining by \$20.9 million over ten years. This compares with no change to the real value if the mechanism is left unchanged.<sup>22</sup>

2.19 In a supplementary submission to the committee, the ILC has responded by recommending modifications to Items 3–7 in the Bill as a means to protect the real value of the Land Account. In a further supplementary submission to the committee, the DoF has agreed that 'assuming the target returns are achieved (Consumer Price Index plus 2.6 per cent per annum), these modifications would be likely to preserve the real capital value of the Land Account'. However, the DoF noted that these modifications would not result in the Land Account growing over time.<sup>23</sup> In contrast,

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19 Department of the Prime Minister and Cabinet, *Submission 14*, p. 10.

20 Department of Finance, *Submission 20*, pp 5–8. In its supplementary submission (20.2), the DoF observed that item 7 of the Bill actually restricts the Audit and Risk Committee (ARC) to selecting members from the ILC Board. This is contrary to best practice in which there should be an option to appoint ARC members from outside the organisation and 'is seen as a valuable assurance process'.

21 Mr Mike Dillon, ILC, *Proof Committee Hansard*, p. 5.

22 Department of Finance, *Submission 20.1*, p. 2.

23 Department of Finance, *Submission 20.2*, p. 6.

Professor Michael Dodson, National Centre for Indigenous Studies has indicated that he supports the growth of the Land Account.<sup>24</sup>

2.20 The ILC has also suggested that the Land Account should be managed by the Future Fund Guardians in order to maximise returns on Land Account investment and minimise the probability of capital losses.<sup>25</sup> Mr Mark Thomann outlined the logic behind the conservative investment strategy of the Land Account:

[W]hile the Future Fund has a long-term investment trajectory in that the funds are not required to be drawn out, I think, until 2020, it is the nature of the land account that, while it has a long-term trajectory in being maintained into perpetuity, in terms of the draw-down, there is a requirement to pay the ILC a guaranteed, indexed, statutory amount every year, which is one of the things that informs the conservative nature of the investment mandate in order to both juggle those two requirements to maintain the real value of the fund and provide benefits to Aboriginal and Torres Strait Islander people through the ILC on an annual basis.<sup>26</sup>

The higher returns on investment obtained by other funds managed by the Future Fund reflect different objectives—generally capital growth with no annual drawdown—with a 'greater appetite for risk' in the 'accumulation phase'. However, the Land Account has a different purpose—to preserve the capital and disburse funds annually—and as such, has a more conservative approach to investment which results in lower returns.

2.21 Mr Surr explained that the Land Account is 'explicitly tied to...section 58 of the PGPA Act' meaning that only conservative investment options are available, regardless of which entity manages the fund. Additional legislative changes would be required to modify this requirement. As such, it is not clear that changing the Land Account's fund manager would result in a larger return on investment.<sup>27</sup>

2.22 The committee notes the confusion around the specific changes that should be made to the Land Account, the impact these changes will have on the capital preservation of the Account and its capacity to disburse funds to the ILC in the future. It is the committee's view that the Land Account should not be modified without a more coherent and long term strategy.

### **Suggested modifications to the Bill**

2.23 In addition to broadly supporting the proposed Bill, several submissions suggested minor modifications to the Bill.

2.24 In its supplementary submission, the ILC has identified a number of potential modifications to the Bill. These include:

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24 Professor Michael Dodson, National Centre for Indigenous Studies, *Proof Committee Hansard*, p. 20. See also, section below on consultation.

25 Indigenous Land Corporation, *Submission 1.1*, p. 13.

26 Mr Mark Thomann, Department of Finance, *Proof Committee Hansard*, p. 34.

27 Mr Lembit Suur, Department of Finance, *Proof Committee Hansard*, p. 35.

- narrowing the provisions that require consultation in Item 10 to the key provisions relating to the Land Account; and
- clarifying the definition of 'ILC Officer' in Item 22 to ensure consistency with the PGPA Act.<sup>28</sup>

2.25 Professor Dodson and Dr Asmi Wood, (Senior Research Fellow—National Centre for Indigenous Studies) proposed a number of changes to the Bill, including:

- prohibition of non-land related purchases from the Land Account;
- stronger corporate governance within the Bill in line with a number of Corporations laws including the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;
- targeting real growth in the Land Account with the use of conservative investment options to protect the principal; and
- provision for the ILC to invest in land over which native title is held to encourage business and employment opportunities for traditional owners. There should be commercial arrangements in place that protect the investment by the ILC and do not jeopardise the status of the Native Title.<sup>29</sup>

### ***Expansion of the remit of the ILC***

2.26 In evidence to the committee, Professor Dodson also suggested broadening the powers of the ILC to include the 'purchase of interests in land' over which native title exists. Professor Dodson posed an example whereby:

[T]he construction of infrastructure in which the ILC could acquire a proprietary interest but without having to incur the expenses of creating Indigenous land use agreements within the meaning of the Native Title Act. Also, we propose the ability to create new estates on land that apply purely to such native title land and which recognise the need for such lands not to be alienated and remain inalienable but for the ILC or its subsidiaries alone to be permitted to invest in such develop[ments] and programs on such land and who are permitted to acquire and own legal estate in real property but interests which are limited to real property interests other than the land.<sup>30</sup>

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28 Indigenous Land Corporation, *Submission 20.1*, p. 2.

29 Professor Dodson and Dr Asmi Wood, *Submission 3*, p. 1.

30 Professor Michael Dodson, National centre for Indigenous Studies, *Proof Committee Hansard*, p. 20

2.27 In addition, the Cape York Land Council submitted that the Bill be expanded to allow the ILC to invest in programs that will build ATSI capacity to manage lands, develop businesses and enable home ownership in remote locations.<sup>31</sup>

2.28 The committee notes that there are a range of propositions to expand the remit of the ILC to benefit Aboriginal and Torres Strait Islander peoples that have not received adequate consultation.

### ***Inclusion of sea***

2.29 In its submission, the Torres Strait Regional Authority (TSRA) states that the sea is as culturally and economically important to some indigenous communities as land. TSRA believes that 'explicit inclusion of 'sea' in the same context of 'land' should be considered within the Bill'. This inclusion would allow the ILC to purchase commercial fishing licences and businesses in the Torres Strait on behalf of indigenous communities providing economic development opportunities. Although this proposition was supported by some witnesses<sup>32</sup>, one witness was inclined to 'be very cautious about it'.<sup>33</sup>

2.30 The Australian Law Reform Commission (ALRC) is currently conducting a review of the *Native Title Act 1993* and will report in April 2015. One of the terms of reference is to confirm 'that connection with the land and waters does not require physical occupation or continued or recent use'.<sup>34</sup>

2.31 It is the committee's view that a significant change to the definition of land—as it pertains to native title—to include sea in the ATSI Act should await the recommendations of the ALRC.

### **Consultation**

2.32 The committee has examined the extent of consultation that this Bill received during its development and prior to introduction into the Senate with most witnesses and submitters to this inquiry being satisfied with the level of consultation.<sup>35</sup>

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31 Cape York Land Council, *Submission 11*, pp 2–6. CYLC submits that ILC should provide vocational training to the entities that will manage the land in the future. This will improve local capacity to manage land and businesses more effectively when they are handed over to local ATSI groups. Further support from ILC such as in the preparation of business plans and guidance through development processes would ensure the success of these ventures once handed over. See also, Mr Joseph Morrison, Northern Land Council, *Proof Committee Hansard*, p. 12.

32 Torres Strait Regional Authority, *Submission 18*, p. 5. See also: Mr Mike Dillon, ILC, *Proof Committee Hansard*, p. 1; Mr Joseph Morrison, Northern Land Council, *Proof Committee Hansard*, p. 11.

33 Professor Michael Dodson, National Centre for Indigenous Studies, *Proof Committee Hansard*, p. 22.

34 Australian Law Reform Commission, *Terms of reference: Review of the Native Title Act 1993*, <http://www.alrc.gov.au/inquiries/native-title-act-1993/terms-reference> (accessed 23 February 2015).

35 Mr Dillon, ILC, *Proof Committee Hansard*, p. 5; and Mr John Daly, Northern Land Council, *Proof Committee Hansard*, pp 12–13.



However, a number of submitters and witnesses conceded that consultation could be improved. DPMC expressed concern as to whether the Bill had been subject to consultation prior to its introduction into the Senate.<sup>36</sup> Mr Joseph Elu, Chairman of the TSRA observed that:

We just had the information sent to us, and we put it in front of our members, but there was no sort of formal consultation with ILC...<sup>37</sup>

To our knowledge there has not been any personal consultation up in Torres Strait with this particular bill. As I said, we have had notice of it through PM&C officers; we have talked with them over the phone. And we have put before our board the papers we received. Some of the board members looked at it, and some have said that it is too far away and that ILC never did anything so they are not going to even bother reading this. So, that type of thing is happening. And probably out in the remote areas, unless it is going to affect those people at the community level, they do not take particular notice of what the government sends us.<sup>38</sup>

2.33 Professor Dodson acknowledged that:

With respect to the consultations...we certainly have not discussed it. But I really cannot answer your question about whether there has been sufficient or effective consultation—I suspect the answer is 'No'. I reckon that most Aboriginal people around the country would not know anything about this bill or what is happening.<sup>39</sup>

2.34 In answers to questions on notice, ILC has stated that is 'committed to working with both the [DoF] and the [DPMC] on the development of an appropriate mechanism to secure the growth of the real value of the Land Account'. ILC has also expressed a willingness 'to be further consulted on the appropriate drafting of definitions in conjunction with the [DoF]'.<sup>40</sup>

2.35 It is clear that fundamental aspects of this Bill have not received adequate consultation. The committee notes that during the hearing many witnesses observed that they had not considered proposed modifications to the Bill that other submitters had suggested.<sup>41</sup> It is the committee's view that further consultation is required to ensure that the broader Aboriginal and Torres Strait Islander community understand all proposed changes to the ATSI Act.

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36 Department of the Prime Minister and Cabinet, *Submission 14*, pp 1–2.

37 Mr Joseph Elu, Torres Strait Regional Authority, *Proof Committee Hansard*, p. 16.

38 Mr Joseph Elu, Torres Strait Regional Authority, *Proof Committee Hansard*, p. 18.

39 Professor Michael Dodson, National Centre for Indigenous Studies, *Proof Committee Hansard*, p. 23.

40 Answers to Questions on Notice, Indigenous Land Corporation, p. 6.

41 See: Mr Mike Dillon, ILC, *Proof Committee Hansard*, p. 9; Mr Joe Morrison, Northern Land Council, *Proof Committee Hansard*, p.15; Mr Joseph Elu, Torres Strait Regional Authority, *Proof Committee Hansard*, p. 18.

## **Committee View**

2.36 The committee does not consider that a coherent case for legislative change has been made by the Bill's proponents or that this Bill would address the concerns raised.

2.37 A lack of consultation within the Aboriginal and Torres Strait Islander community has resulted in fundamental components of the Bill remaining unresolved. One of the more important changes—the new mechanism for disbursement of the Land Account—remains unclear. At the committee's public hearing on 13 February 2015, the ILC, one of the key proponents of the Bill, were still considering possible amendments to a number of key provisions in the Bill.

2.38 Evidence from the Department of Finance identified a number of concerns relating to the drafting of the Bill. These include a lack of clarity around key terms and definitions, and the apparent duplication of provisions found in existing legislation. The committee considers it important that legislation of this type is capable of being clearly and precisely interpreted.

2.39 The committee notes that the PGPA Act currently provides uniform governance controls for all Commonwealth agencies including the ILC. This Bill seeks to establish a separate set of governance arrangements for the ILC over and above obligations that already exist for similar agencies.

## **Recommendation 1**

**2.40 The committee recommends that the Senate not pass the Bill.**

**Senator Zed Seselja**

**Chair**