

# Australian Greens' Dissenting Report

## Introduction

1.1 The Australian Greens do not support the majority report into the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (Bill).

The majority of the submissions made to the inquiry were in support of the Bill. The two submissions that raised concerns were both from government departments; the Department of the Prime Minister and Cabinet, and the Department of Finance.

1.2 The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 seeks to amend *the Aboriginal and Torres Strait Islander Act 2005* to strengthen indigenous control over the Aboriginal and Torres Strait Islander Land Account (the Land Account) and the Indigenous Land Corporation (ILC).

1.3 The Bill has two core aims, as raised by ILC CEO, Mr Dillon during the hearing:

to protect the Land Account, and to lock it in for future generations of Aboriginal and Torres Strait Islander people, and to ensure stronger corporate governance of the ILC and to lock that in for the future.<sup>1</sup>

1.4 Unfortunately previous decision making has meant that the ILC has found itself burdened by debt, as Mr Dillon drew to the committees attention during the hearing;

I have given evidence before the committee on this topic in the past, so I will not dwell on it, but there has been a huge loss from the purchase of Ayers Rock Resort—over \$100 million—to the ILC. The resort is running well, but we paid too much and we borrowed too much. The ILC currently owes \$200 million on the debt from that transaction. It falls due in next year in 2016. Our present situation is that we are looking at how we might refinance, but there is going to be a gap of how much we can finance at normal interest rates. We will be paying this loan off for 20 years. We are currently paying \$10 million a year, out of our \$45 million, in interest payments alone. Just back-of-the-envelope, if we paid down \$10 million a year of the \$200 million, that would be \$20 million per year for 20 years.<sup>2</sup>

This debt has significantly affected the ILC, in fact, Mr Dillon continues on to say:

It (the debt) is actually going to stop the ILC from fulfilling its statutory functions and nobody seems to have blinked about it. That is our concern<sup>3</sup>

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<sup>1</sup> Mr Michael Dillon, Indigenous Land Council, *Proof Committee Hansard*, p. 1.

<sup>2</sup> Mr Michael Dillon, Indigenous Land Council, *Proof Committee Hansard*, p. 1-2.

<sup>3</sup> Mr Michael Dillon, Indigenous Land Council, *Proof Committee Hansard*, p. 6.

1.5 The Land Account is important and must be strengthened. The Australian Greens welcome the overall positive response to the bill from the majority of submissions and witnesses.

Obviously, the proposal for the future of what is now called the Land Account—and I know there is a discussion about changing that to the Land Fund—is a very important one, and we support the proposition that has been put forward in relation to the bill to secure the future of the Land Account.<sup>4</sup>

Reconciliation Australia believes the measures outlined in the Bill will further protect the Aboriginal and Torres Strait Islander Land Account (the Land Account), and ensure the Land Account is only used for land-related purposes, the way in which it was originally intended.<sup>5</sup>

The authors strongly support the general thrust of this proposed Bill and applaud its object and purpose, particularly those provisions which are aimed at strengthening the governance and accountability measures surrounding the ILC. We also support the broader general intent to incorporate a greater active role of Indigenous people in all the substantive processes related to the acquisition and sound management of land that is purchased under this law.<sup>6</sup>

1.6 The Majority report raises several issues that are addressed below.

### **Proposed Amendments**

1.7 The Australian Greens welcome suggested amendments to the Bill from a number of submissions. The inquiry process is an important one because of the opportunity it provides for improvements to legislation. We are supportive of many of the amendments suggested as they help strengthen the Land Account and ensure the intent of the Bill is realised, further consultation with the sector will be necessary to ensure the best possible outcome.

These amendments are discussed in the majority report and include;  
ILC;

- 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.

Professor Dodson and Dr Wood;

- 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*;

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<sup>4</sup> Mr Joe Morrison, Northern Land Council, *Proof Committee Hansard*, p. 11

<sup>5</sup> Reconciliation Australia, *Submission 16*, p.1.

<sup>6</sup> Professor Mick Dodson and Dr Asmi Wood, *Submission 3*, p. 4.

- 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.

Torres Strait Regional Authority (TSRA);

- 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.

Cape York Land Council;

- 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.

## Consultation

1.8 The majority report raised issues about the process of consultation for the Bill.

1.9 As was mentioned during the hearing the Bill has been adapted from the ILC's exposure draft bill which was put out for significant public consultation, witnesses confirmed that they were satisfied with the level of consultation in regard to the Bill. The ILC outlined its consultation process during the hearing:

The ILC board did liaise with—I do not know the exact number—scores, if not more than 100, Indigenous organisations in terms of our concerns. At the time that the ILC bill was drafted, our concern was with the Ernst & Young review and the potential amalgamation issue. So it, in a sense, rolled into that. But there was extensive consultation in the Indigenous community, and that culminated in a group of Indigenous leaders—Noel Pearson, Lowitja O'Donoghue, Tom Calma and the land councils—coming together in Canberra and, in a sense, supporting the concerns of the ILC around the Land Account. It is incontrovertible that the Indigenous community, generally, have serious concerns about any attempt to water down the status of the Land Account.<sup>7</sup>

1.10 Other organisations including the Northern Land Council also expressed their satisfaction with the process:

I think the ILC has consulted relatively well. People on the ground know what has happening. I have spoken to my constituents about it and they have come up and asked questions about it. I have been open and frank with them, and people are really supportive of the move that is taking place.<sup>8</sup>

<sup>7</sup> Mr Michael Dillon, Indigenous Land Council, *Proof Committee Hansard*, p. 5.

<sup>8</sup> Mr John Daly, Northern Land Council, *Proof Committee Hansard*, p. 12.

1.11 In light of the amendments suggested, there would need to be a similar process of ensuring that the changes to the Bill also have widespread support.

### **Governance Arrangements**

1.12 The majority report questioned the need for a separate set of governance arrangements for the ILC outside of the PGPA Act. The regulatory arrangements proposed within the Bill go further than the PGPA, and are necessary because of the unique nature of the Land Account. Mr Dillon argued for the need for a special set of arrangements:

The first is that past history tells us that the existing regulatory arrangements have not worked. The second is that the Land Account and the ILC are sui generis; they are unique; they are put there for a special purpose. As a result, the Commonwealth has a fiduciary responsibility in relation to its Indigenous citizens. If you are a fiduciary, you put in place special arrangements to ensure that your fiduciary arrangements are complied with. It is not just the same responsibility that the Commonwealth has in respect of all of its citizens—that is, that it is accountable through the ballot box. There is actually this special responsibility that goes back to the bargain that was done between the Commonwealth and Aboriginal leaders at the time of the native title debate, where Aboriginal people gave up rights. A lot of native title rights were extinguished or validated at the time of that and, in exchange, Aboriginal people got this account. That is why there is a fiduciary arrangement, or something akin to a fiduciary arrangement, in place, and that is why you need special arrangements<sup>9</sup>

In light of past experience and given the strong support from Aboriginal and Torres Strait Islander organisations for the Bill we believe that the proposed changes to governance requirements are necessary and justified.

### **Key terms and definitions**

1.13 The majority report has questioned the clarity around key terms and definitions used in the Bill. The Australian Greens agree that the terminology used in the legislation should be clear. The Department of Finance suggested that there were some key issues over definitions in the Bill:

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

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<sup>9</sup> Mr Michael Dillon, Indigenous Land Council, *Proof Committee Hansard*, p. 9.

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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>10</sup>

To address this concern Senator Siewert has suggested explicitly addressing the terms that have caused confusion and defining them within the explanatory memorandum. Mr Suir from the Department of Finance agreed that this would address the concern:

I think it would 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.<sup>11</sup>

1.14 The Australian Greens agree that these terms should be defined and explained in the explanatory memorandum.

### **Purpose of the Bill**

1.15 The majority report has raised a lack of clarity around what changes to the ILC, IBA or Land Account that the Bill seeks to address.

At the time of drafting this legislation the Government was generally canvassing changes to ILC and IBA, however the Minister has now indicated they are unlikely to continue with changes for the time being. Given the essential nature of the ILC and the Land Account and the issues highlighted during this inquiry, it is important to protect and strengthen the ILC and Land Account into the future.

### **Scrutiny of Bills**

1.16 The Senate Standing Committee for the Scrutiny of Bills raised issues around proposed subsection 192SA. The Australian Greens will seek to include an explanation in the explanatory memorandum that clarifies that the Code of Conduct is merely declaratory of the law.

### **Recommendation 1**

**1.17 That the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 should be amended as identified during the inquiry after extensive consultation.**

**1.18 That the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 once amended be passed.**

### **Senator Rachel Siewert**

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<sup>10</sup> Mr Lembit Suur, Department of Finance, *Proof Committee Hansard*, p. 26.

<sup>11</sup> Mr Lembit Suur, Department of Finance, *Proof Committee Hansard*, p. 29.

