

The Senate

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Community Affairs  
Legislation Committee

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

March 2015

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# MEMBERSHIP OF THE COMMITTEE

## 44<sup>th</sup> Parliament

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Senator Sue Boyce, Chair (to 30 June)	Queensland, LP
Senator Zed Seselja, Chair (from 1 July)	Australian Capital Territory, LP
Senator Rachel Siewert, Deputy Chair	Western Australia, AG
Senator Carol Brown	Tasmania, ALP
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Senator Linda Reynolds (from 1 July)	Western Australia, LP
Senator Zed Seselja (to 30 June)	Australian Capital Territory, LP
Senator Dean Smith	Western Australia, LP

### Participating members for this inquiry

Senator Claire Moore	Queensland, ALP
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# ABBREVIATIONS

ALRC	Australian Law Reform Commission
ARR	Ayers Rock Resort
ATSI	Aboriginal and Torres Strait Islander
ATSI Act	<i>Aboriginal and Torres Strait Islander Act 2005</i>
ATSIC	Aboriginal and Torres Strait Islander Commission
DoF	Department of Finance (Australian Government)
DPMC	Department of the Prime Minister and Cabinet (Australian Government)
IBA	Indigenous Business Australia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	Indigenous Land Corporation
Land Account	Aboriginal and Torres Strait Islander Land Account
LI Act	Legislative Instruments Act
NCA	National Commission of Audit
NQLC	North Queensland Land Council
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
TSRA	Torres Strait Regional Authority



# **LIST OF RECOMMENDATIONS**

## **Recommendation 1**

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



# Chapter 1

## Introduction

1.1 On 24 June 2014, the Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 (Bill) was introduced into the Senate as a private Senator's Bill by Senator Rachel Siewert.<sup>1</sup>

1.2 On 26 June 2014, the Senate referred the Stronger Land Account Bill to the Community Affairs Legislation Committee for inquiry and report by 2 September 2014.<sup>2</sup> The Senate granted extensions of time to report until 29 October 2014<sup>3</sup>, 3 December 2014<sup>4</sup>, 4 March 2015<sup>5</sup>, and then until 25 March 2015.<sup>6</sup>

### Purpose of the Bill

1.3 The Bill seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) to strengthen Indigenous control over the Aboriginal and Torres Strait Islander (ATSI) Land Account (Land Account) and the Indigenous Land Corporation (ILC) by:

- introducing a clearer purpose for the Land Account, specifying that it is a compensatory mechanism in acknowledgment of past injustices and dispossession of traditional lands and acknowledging the special relationship indigenous people have with their land;
- preventing the Land Account from being utilised for any purpose other than the land-related benefit of indigenous people;
- strengthening indigenous control over the Land Account and the ILC;
- introducing strong new measures requiring the ILC to comply with the highest standards of corporate governance, transparency and accountability; and
- introducing measures to ensure the Land Account increases in value to meet future land acquisition and management needs into the future.<sup>7</sup>

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1 *Journals of the Senate*, No. 35—24 June 2014, p. 976.

2 *Journals of the Senate*, No. 37—26 June 2014, p. 1013.

3 *Journals of the Senate*, No. 45—17 July 2014, p. 1240.

4 *Journals of the Senate*, No. 59—2 October 2014, p. 1582.

5 *Journals of the Senate*, No. 70—27 November 2014, p. 1893.

6 *Journals of the Senate*, No. 79—2 March 2015, p. 2202.

7 Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014, Explanatory Memorandum, p. 3.

## Conduct of the Inquiry

1.4 Details of the inquiry, including a link to the Bill and associated documents, were placed on the committee's website.<sup>8</sup> The committee also wrote to 40 organisations and individuals, inviting submissions by 29 August 2014. Submissions continued to be submitted after that date.

1.5 The committee received 20 submissions for the inquiry, which are listed at Appendix 1. All submissions and the transcript may be accessed through the committee's website.

1.6 The committee held a public hearing on 13 February 2015 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

## Background

### *Aboriginal and Torres Strait Islander Act 2005*

1.7 In 2005, the Aboriginal and Torres Strait Islander Commission (ATSIC) was abolished through the repeal of the *Aboriginal and Torres Strait Islander Commission Act 1989*. ATSIC's functions and responsibilities were transferred to two organisations—the ILC and Indigenous Business Australia (IBA)—which are operated under the ATSI Act.

1.8 The ILC is funded through an annual disbursement from the capital-preserved Land Account.<sup>9</sup> The Land Account was established for ATSI people that could not benefit from processes under the *Native Title Act 1993* or other legislative land claim/land acquisition mechanisms.<sup>10</sup> The Land Account is a Special Account as provided for by section 20(10) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and defined under the ATSI Act.<sup>11</sup> This account is the sole source of income for the ILC and is used to assist indigenous organisations to acquire and manage land 'so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders'.<sup>12</sup>

### *Historical context for proposed changes*

1.9 Recent events have highlighted potential deficiencies in the current legislation—in particular, the ILC purchase of the Ayers Rock Resort (ARR), and recent reviews of the ILC and IBA.

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8 See: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs)

9 *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act), s. 192X.

10 Central Land Council, *Submission 10*, p. 3.

11 ATSI Act, s. 192W. The ILC and Land Account were established under the *Land Fund and Indigenous Land Corporation (ATSIC) Amendment Act 1995*.

12 ATSI Act, s191B; Indigenous Land Corporation, *Annual Report 2012–13*, p. 21.

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### *Acquisition of Ayers Rock Resort by the Indigenous Land Corporation*

1.10 On 15 October 2010, ILC acquired a package of Central Australian assets including the ARR from GPT Limited for \$292 million. These assets were purchased on behalf of the Wana Ungkuntja Aboriginal Corporation which represents indigenous communities in the Uluru region. This followed negotiations between ILC and GPT Limited from December 2008 to October 2010.<sup>13</sup> Prior to the purchase, the Hon Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs) and Senator the Hon Penny Wong (Minister for Finance and Deregulation) expressed concern to the ILC about the acquisition process.<sup>14</sup>

1.11 In May 2013, the new Chair of the ILC Board, Dr Dawn Casey, wrote to Minister Macklin raising 'serious questions about the decision to acquire ARR and establish Voyages' and 'concerns in relation to the financial exposure of the ILC to the ARR project, including its deteriorating financial performance relative to acquisition forecast performance'.<sup>15</sup>

1.12 In November 2013, Mr Mike Dillon, Chief Executive Officer of the ILC, outlined the impact of the ARR acquisition on the ILC:

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- 13 McGrath Nicol Corporate Advisory, *Ayers Rock Resort Review—Final Report: Indigenous Land Corporation*, December 2013, p. 5, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/About%20Us/Files/05%20Released%20Documents%20Part%204.ashx> (accessed 23 July 2014).
- 14 See: The Hon. Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), letter to Ms Shirley McPherson (Chair ILC), dated 22 September 2010, pp 1–2, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/Media/Voyages/ILC%20correspondence%20with%20former%20Ministers%20Macklin%20and%20Wong%20-%20Ayers%20Rock%20Resor.ashx> (accessed 24 July 2014). Ms Shirley McPherson (Chair, ILC), letter to the Hon Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), dated 23 September 2010, pp 1–9, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/Media/Voyages/ILC%20correspondence%20with%20former%20Ministers%20Macklin%20and%20Wong%20-%20Ayers%20Rock%20Resor.ashx> (accessed 24 July 2014). Ms Shirley McPherson (Chair, ILC), letter to the Hon Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), dated 23 September 2010, p. 2, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/Media/Voyages/ILC%20correspondence%20with%20former%20Ministers%20Macklin%20and%20Wong%20-%20Ayers%20Rock%20Resor.ashx> (accessed 24 July 2014). Senator the Hon. Penny Wong (Minister for Finance and Deregulation), letter to Ms Shirley McPherson (Chair, ILC), dated 29 September 2010, pp 1–2, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/Media/Voyages/ILC%20correspondence%20with%20former%20Ministers%20Macklin%20and%20Wong%20-%20Ayers%20Rock%20Resor.ashx> (accessed 24 July 2014). Dr Dawn Casey (Chair, ILC), letter to the Hon Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), 14 May 2013, pp 1–3, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/Media/Voyages/ILC%20correspondence%20with%20former%20Ministers%20Macklin%20and%20Wong%20-%20Ayers%20Rock%20Resor.ashx> (accessed 24 July 2014).

[T]his transaction is going to impact for at least 15 or 20 years on the ILC's core statutory functions—our land acquisition and land management functions. Of a budget of \$50 million each year, which comes from the land account, around \$15 million or so goes on our internal processes. Of the \$35 million available for our core functions, at least \$20 million will have to go to paying off this debt, the interest and the principal.<sup>16</sup>

*Recent Reviews of Indigenous Land Corporation and Indigenous Business Australia*

1.13 On 2 December 2013, the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion commissioned Ernst & Young to conduct a review into the ILC and IBA, and recommend how to improve the effectiveness of these two bodies.<sup>17</sup> A report was provided to the Minister on 17 February 2014 and released to the public on 3 May 2014.<sup>18</sup>

1.14 This review highlighted two broad options that would help to improve the purpose and governance of these organisations—a reconfigured stand-alone option (option 3) or new entity recommendations (option 4). Option 3 has five recommendations that focus on changes to the ILC's purpose, finance and capital, governance and strategy, indigenous enterprise development, and land tenure. Although some of the review's recommendations exceed the provisions of the Stronger Land Account Bill there is clear overlap between some of the Ernst & Young recommendations and the Bill.<sup>19</sup>

1.15 After releasing the report, the Minister stated:

I will continue to consider future options and will consult on this matter with relevant stakeholders.<sup>20</sup>

1.16 The National Commission of Audit (NCA) recommends that the ILC and IBA merge to 'achieve efficiencies, avoid duplication (these organisations already share a

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16 Mr Mike Dillon, *Proof Estimates Hansard*, 22 November 2013, p. 39.

17 Media Release, Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, 'Review into Indigenous Business Australia and the Indigenous Land Corporation', 2 December 2013, [http://minister.indigenous.gov.au/sites/default/files/media/2013-12-02\\_ilc\\_iba\\_review.pdf](http://minister.indigenous.gov.au/sites/default/files/media/2013-12-02_ilc_iba_review.pdf) (accessed 7 August 2014).

18 Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014, [http://www.dpmc.gov.au/publications/docs/EY\\_final\\_report\\_review\\_of\\_ILC\\_IBA.PDF](http://www.dpmc.gov.au/publications/docs/EY_final_report_review_of_ILC_IBA.PDF) (accessed 7 August 2014).

19 Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia*, 17 February 2014, pp 62–63, [http://www.dpmc.gov.au/publications/docs/EY\\_final\\_report\\_review\\_of\\_ILC\\_IBA.PDF](http://www.dpmc.gov.au/publications/docs/EY_final_report_review_of_ILC_IBA.PDF) (accessed 7 August 2014).

20 Media Release, Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, 'Ernst & Young review ILC/IBA', <http://minister.indigenous.gov.au/media/2014-05-03/ernst-young-review-ilciba> (accessed 7 August 2014).

common chair) and be more convenient for clients'.<sup>21</sup> The Audit also recommends that the Land Account 'should be maintained to provide a stable revenue stream to fund indigenous land acquisition and management activities'.<sup>22</sup> Minister Scullion confirmed this:

I specifically excluded the Land Account from the Ernst and Young review because it is not the Government's intention to change this iconic Indigenous fund.<sup>23</sup>

*Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014*

1.17 In 2013, Dr Dawn Casey (ILC Chair) and Mr Mike Dillon (ILC CEO) conducted a review of the ILC and its governance during the 2010 acquisition of the ARR. Dr Casey has conveyed the Board's concerns about alleged failings during this time to the Government.<sup>24</sup> Further to this, the ILC Board noted in its submission that:

The Stronger Land Account Bill substantially reflects a Draft Bill released by the ILC on 24 March 2014, and endorsed in principle on the same day by a group of senior Indigenous leaders, including a number who were involved in the native title negotiations of the 1990's.<sup>25</sup>

1.18 Upon introducing the Bill into Parliament, Senator Siewert expressed concern as to whether the Government will accept the recommendations of the NCA or Ernst & Young reviews, and whether this will compromise the intended purpose of the ILC and the Land Account.

The Minister for Indigenous Affairs has indicated he is considering a 'major overhaul' of both the ILC and [IBC]. It is unclear why Government would consider significant change that has the potential to weaken the ILC and put the land account at risk...Any new arrangement proposed for the ILC

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21 National Commission of Audit, *The Report of the National Commission of Audit—Phase 1*, February 2014, p. 175, [http://www.ncoa.gov.au/report/docs/phase\\_one\\_report.pdf](http://www.ncoa.gov.au/report/docs/phase_one_report.pdf) (accessed 23 July 2014).

22 National Commission of Audit, *The Report of the National Commission of Audit—Phase 1*, February 2014, p. 216, [http://www.ncoa.gov.au/report/docs/phase\\_one\\_report.pdf](http://www.ncoa.gov.au/report/docs/phase_one_report.pdf) (accessed 23 July 2014).

23 Media Release, Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, 'Ernst & Young review ILC/IBA', <http://minister.indigenous.gov.au/media/2014-05-03/ernst-young-review-ilciba> (accessed 7 August 2014).

24 See: Dr Dawn Casey, (Chair, ILC), letters to the Hon Tony Abbott (Prime Minister), 14 November 2013; Dr Dawn Casey, (Chair, ILC), letter to the Hon Tony Abbott (Prime Minister), 18 December 2013; Dr Dawn Casey, (Chair, ILC), letter to the Hon Tony Abbott (Prime Minister), 8 January 2014, <http://www.ilc.gov.au/~media/ILC/ILC%20Website/Content/About%20Us/Files/04%20Released%20Documents.ashx> (accessed 7 August 2014).

25 Indigenous Land Corporation, *Submission 1*, p. 3.

comes with a risk that funds from the land account will be diverted to non-land commercial purposes.<sup>26</sup>

At the time of writing, the Minister had not announced any legislative changes to the ILC, IBA or the Land Account. On 24 October, 2014, Minister Scullion stated to *The Australian* that he does not intend to make changes to the ILC, IBA or the Land Account.<sup>27</sup> As such, it is not clear which unannounced changes this Bill is seeking to pre-empt.

### **Key provisions of the Bill**

1.19 This Bill seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) as outlined in Table 1 below.

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26 Second Reading Speech, *Senate Hansard*, 24 June 2014, p. 38.

27 Patricia Karvelas, 'Indigenous merger set aside', *The Australian*, 24 October 2014, p. 6. <http://www.ilc.gov.au/IndigenousLandCorporation/media/Items/Content/Media/Media%20Coverage/Indigenous-merger-set-aside-The-Australian-24-Oct-2014-p6.pdf> (accessed 24 March 2015).

**Table 1: Key provisions and purpose of Bill**

	<b>Proposed amendments to ATSI Act</b>	<b>Purpose of amendments to ATSI Act</b>
i.	<b>Insert</b> Part 1, Division 1A—Objects of Part, section 191AB Objects of Part	introduce a clearer purpose for the Land Account, specifying that it is a compensatory mechanism in acknowledgment of past injustices and dispossession of traditional lands and acknowledging the special relationship indigenous people have with their land
ii.	<b>Substitute</b> section 192X Purpose of Land Account	prevent the Land Account from being utilised for any purpose other than the land-related benefit of indigenous people
iii.	<b>Insert</b> section 191XA <b>Insert</b> section 191XB <b>Substitute</b> subsection 191X(3) <b>Substitute</b> section 191L <b>Insert</b> section 193GA <b>Insert</b> section 193IA	strengthen indigenous control over the Land Account and the ILC
iv.	<b>Substitute</b> section 191W <b>Insert</b> section 191X <b>Insert</b> section 191YA <b>Insert</b> section 191YB <b>Substitute</b> section 191Z <b>Substitute</b> section 192F <b>Insert</b> section 192SA	introduce strong new measures requiring the ILC to comply with the highest standards of corporate governance, transparency and accountability
v.	<b>Substitute</b> subsection 193(3) <b>Insert</b> subsection 193(5) <b>Insert</b> section 193G	introduce measures to ensure the Land Account increases in value to meet future land acquisition and management needs into the future. <sup>28</sup>

## **Consideration of the Bill by other committees**

### ***Human Rights***

1.20 The Parliamentary Joint Committee on Human Rights considered that the Bill does not appear to give rise to human rights concerns. The committee noted that to the

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28 Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014, Explanatory Memorandum, p. 3.

extent the Bill strengthens indigenous control over the Land Account and the ILC, the Bill promotes the right to self-determination in Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>29</sup>

### ***Scrutiny of Bills***

1.21 The Senate Standing Committee for the Scrutiny of Bills considered that Item 21, proposed subsection 192SA(5), may 'insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.' The committee noted:

Proposed subsection 192SA(5) provides that a determination of a 'code of conduct for Indigenous Land Corporation officers' under subsection 192SA(1) is not a legislative instrument. Such determinations will therefore be exempt from the operation of the disallowance and sunset provisions of the *Legislative Instruments Act 2003* (the LI Act). Given that the code will operate to impose general obligations on Indigenous Land Corporation officers, such a determination would appear to fall within the definition of legislative instrument contained in the LI Act. As the explanatory memorandum does not justify what appears to be a substantive exemption from the requirements of the LI Act, **the committee seeks the Senator's advice as to the justification for this exemption.**<sup>30</sup>

### **Acknowledgement**

1.22 The committee thanks those organisations who made submissions and who gave evidence at the hearing.

### **Note on References**

1.23 Reference to the committee *Hansard* is to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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29 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 23–26 June 2014, Legislative Instruments received 7–20 June 2014*, p. 1.

30 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2014*, p. 1.

# 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**

## **Labor Senators Additional Comments**

1.1 Labor Senators support strengthening the Land Account and commend the Indigenous Land Corporation (ILC) for its efforts with this Bill.

1.2 Labor Senators however cannot support the Bill as we have too many concerns about its current form. The Bill adds complexity, duplication and cost to the Land Account and the ILC.

1.3 There has been recent trouble in the governance of the ILC and its decision making in reference to the Ayers Rock Resort. To the credit of the current Board the issues surrounding the purchase of the Resort have been addressed.

1.4 Labor Senators cannot see how the Bill in its current form would have prevented the previous Board from the mistakes it made concerning the purchase.

1.5 The Bill contains some imprecise terms not defined elsewhere. No guidance was sought from the Department of Finance re drafting concerning governance matters.

1.6 Labor Senators note the ILC is committed to work with the Department of Finance and the Department of Prime Minister and Cabinet on appropriate drafting and recommend it does so.

1.7 Labor Senators do not accept the argument that the Bill is discriminatory as it adds further governance requirements to the ILC.

1.8 There is duplication in governance requirements. For example, the Bill seeks to establish an Audit and Risk Committee when under the Public Governance, Performance and Accountability Act 2013 an Audit Committee is required already.

1.9 In respect of the appointment of ILC Directors there is no mechanism in regards to the staggering of appointments. Labor Senators do have some concerns with the loss of experience and lack of continuity of Directors.

1.10 Labor Senators are also concerned with the establishment of a Nomination Committee. Labor Senators are not opposed to a Nomination Committee of eminent Indigenous persons with gender balance taken into account.

1.11 Labor Senators think it however unnecessary, time consuming and adds little value to the nominating process to bind future Parliaments and Parliamentary Committees as to what they must do.

1.12 Further evidence was given, in the course of the Inquiry, albeit disputed, that the Bill in its current form would have an adverse impact on the value of the Land Account. Labor Senators are not in a position to dispute the evidence of the Department of Finance on this matter.

1.13 Labor Senators are attracted to the proposed changes to the Bill outlined by Professor Patrick Dodson and Dr Asmi Wood.

1.14 Further the submission of the Torres Strait Regional Authority to include “the sea” in the same context as “land” has merit.

1.15 In summary, while Labor Senators cannot support the Bill in its current form, the Inquiry has revealed some helpful and appropriate suggested changes to the Bill.

1.16 Serious consideration should be given to these changes and more consultation is needed so a modified Bill can be presented back into Parliament.

**Senator Carol Brown**

**Senator Nova Peris**

**Senator Claire Moore**

# 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.



# **APPENDIX 1**

## **Submissions and additional information received by the Committee**

### **Submissions**

- 1** Indigenous Land Corporation (plus a supplementary submission)
- 2** Wunan
- 3** Professor Mick Dodson and Dr Asmi Wood
- 4** Mr Bill Gray AM
- 5** Anti-Discrimination Commission Queensland
- 6** Northern Land Council
- 7** Centre for Appropriate Technology Ltd
- 8** NSW Aboriginal Land Council
- 9** Kimberley Land Council
- 10** Central Land Council
- 11** Cape York Land Council Aboriginal Corporation (plus an attachment)
- 12** North Queensland Land Council
- 13** Goldfields Land and Sea Council
- 14** Department of the Prime Minister and Cabinet
- 15** Dr Lowitja O'Donoghue
- 16** Reconciliation Australia
- 17** Minister Victor Dominello MP
- 18** Torres Strait Regional Authority
- 19** Central Desert Native Title Services Ltd
- 20** Department of Finance (plus two supplementary submissions)

**Answers to Questions on Notice**

- 1 Answers to Questions taken on Notice during 13 February public hearing, received from Northern Land Council, 20 February 2015
- 2 Answers to Questions taken on Notice during 13 February public hearing, received from Indigenous Land Corporation, 23 February 2015
- 3 Answers to Questions taken on Notice during 13 February public hearing, received from Department of Prime Minister and Cabinet, 26 February 2015
- 4 Answers to Questions taken on Notice during 13 February public hearing, received from Torres Strait Regional Authority, 26 February 2015

**Additional Information**

- 1 Additional information, dated 5 March 2015, received from Mr David Baffsky, former Director of the Indigenous Land Council
- 2 Additional information, dated 9 March 2015, received from Mr David Baffsky, former Director of the Indigenous Land Council

# **APPENDIX 2**

## **Public hearings**

*Friday, 13 February 2015*

*Parliament House, Canberra*

### **Witnesses**

#### **Northern Land Council**

MORRISON, Mr Joe, Chief Executive Officer

BUSH BLANASI, Mr Samuel, Chairman

DALY, Mr John, Deputy Chairman

#### **Indigenous Land Corporation**

DILLON, Mr Michael, Chief Executive Officer

HAYDEN, Ms Rebecca, Senior Policy Advisor

#### **National Centre for Indigenous Studies**

DODSON, Professor Michael, Director

WOOD, Dr Asmi, Senior Research Fellow

#### **Torres Strait Regional Authority**

ELU, Mr Joseph, Chairperson

SEE KEE, Mr Wayne, Chief Executive Officer

#### **Department of Finance**

SUUR, Mr Lembit, First Assistant Secretary

THOMANN, Mr Mark, First Assistant Secretary

GRAHAM, Mr Martin, Assistant Secretary

ROBERTSON, Mr Neil, Assistant Secretary

#### **Department of the Prime Minister and Cabinet**

WILLIAMS, Ms Nadine, First Assistant Secretary, Jobs and the Economy Division

McINTYRE, Ms Amanda, Acting First Assistant Secretary

STUART-FOX, Ms Maya, Assistant Secretary