

The Senate

Finance and Public Administration
Legislation Committee

Aboriginal and Torres Strait Islander
Amendment (Indigenous Land Corporation)
Bill 2018 [Provisions] and related bills

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Acronyms and abbreviations

ATSI Act	<i>Aboriginal and Torres Strait Islander Act 2005</i>
ATSILS Future Fund Bill	Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018
ATSILS Future Fund Special Account	Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account
Consequential Amendments Bill	Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018
CPI	Consumer price index
Fund	Aboriginal and Torres Strait Islander Land and Sea Future Fund
FFBG	Future Board of Guardians
GLSC	Goldfields Land and Sea Council
ILC	Indigenous Land Corporation
ILC Bill	Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018
Land Account	Aboriginal and Torres Strait Islander Land Account
Murray Panel	Land Account Expert Advisory Panel
National Congress	National Congress of Australia's First Peoples
NSWALC	NSW Aboriginal Land Council
PJCHR	Parliamentary Joint Committee on Human Rights
PM&C	Department of the Prime Minister and Cabinet

Recommendations

Recommendation 1

2.31 The committee recommends that the **Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018** be amended to ensure that the *Aboriginal and Torres Strait Islander Act 2005* gives the Indigenous Land Corporation management of water or waters for which the Indigenous Land Corporation has water-related rights.

Recommendation 2

2.35 Subject to consideration of Recommendation 1, the committee recommends that the bills be passed.

Chapter 1

Introduction

Referral

1.1 On 28 March 2018, the following bills were introduced into the House of Representatives:

- Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 (ILC Bill);
- Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (ATSILS Future Fund Bill); and
- Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018 (Consequential Amendments Bill).¹

1.2 On the same day, pursuant to the Senate Selection of Bills Report, the provisions of the bills were referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 7 May 2018.² On 1 May 2018, the committee reported its progress to the Senate and sought an extension until 8 May 2018.³

Conduct of the inquiry

1.3 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: www.aph.gov.au/senate_fpa.

1.4 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 13 April 2018. The committee continued to accept submissions after this date. Submissions received by the committee are listed at Appendix 1.

1.5 The committee thanks those who made submissions.

Background to the Indigenous Land Corporation and the Land Account

1.6 In its submission, the Department of the Prime Minister and Cabinet (PM&C) described the establishment and purpose of the Indigenous Land Corporation (ILC) and the Aboriginal and Torres Strait Islander Land Account:

The [ILC] is a corporate Commonwealth entity established in 1995 as a key component of the Government's response to the Mabo (No. 2) High Court decision and a growing awareness of the need to redress the wrongs of the dispossession of Aboriginal and Torres Strait Islander people from their lands.

1 *House of Representatives Votes and Proceedings*, No. 106—28 March 2018, p. 1480.

2 *Journals of the Senate*, No. 94—28 March 2018, pp. 2978–2980.

3 Senate Finance and Public Administration Legislation Committee, *Progress Report*, tabled 1 June 2018.

The purposes of the ILC are to assist Aboriginal and Torres Strait Islander people to acquire and manage land to provide economic, environmental, social or cultural benefits. It is specifically directed towards those whose native title rights have been extinguished. The ILC achieves this purpose through funding from the Aboriginal and Torres Strait Islander Land Account (the Land Account). The Land Account was intended to provide a secure and ongoing source of funds to the ILC.⁴

1.7 PM&C stated that the 'Land Account is shrinking in real terms because its mandate does not match its purpose'. Primarily, this is because the Chief Financial Officer of PM&C (under delegation from the Minister for Finance) is restricted to investment in 'cash and cash-like products by section 58 of the' *Public Governance, Performance and Accountability Act 2013*. PM&C observed that 'Land Account investments have failed to meet the target rate of return in each of the last four years' with 'this trend likely to continue under the current investment environment'.⁵

Purpose of the bills

ILC Bill

1.8 This government bill proposes amendments to the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) to give the ILC functions to enable it to support Aboriginal and Torres Strait Islander peoples to care for, manage and benefit from freshwater and sea country.⁶

1.9 The ILC Bill will also alter the name of the ILC to the 'Indigenous Land and Sea Corporation', to reflect the expansion of the ILC's functions to water.⁷

ATSILS Future Fund Bill

1.10 The ATSILS Future Fund Bill proposes the establishment of a dedicated financial asset fund, the Aboriginal and Torres Strait Islander Land and Sea Future Fund (the Fund), to replace the Aboriginal and Torres Strait Islander Land Account (Land Account).⁸

4 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

5 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

6 The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, p. 27.

7 ILC Bill, Explanatory Memorandum (EM), p. 4.

8 Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018, Explanatory Memorandum (ATSILS Future Fund Bill EM), p. 4 and The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, pp. 25–26. The closure of the Land Account will be effected by the Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018, which is discussed below.

1.11 The ATSILS Future Fund Bill would also transfer investment responsibility for the fund from the PM&C to the Future Fund Board of Guardians and allow the investment of funds in a broader range of financial assets.⁹

Consequential Amendments Bill

1.12 According to the accompanying Explanatory Memorandum, the Consequential Amendments Bill:

...makes a number of consequential amendments to other pieces of legislation required to enable the effective operation of the [ATSILS Future Fund] at commencement. It accompanies the Aboriginal and Torres Strait Islander Future Fund Bill 2018 (the substantive Bill that has prompted the necessity for this Bill). It also takes account of the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018, which will extend the functions of the ILC to rights in relation to water, and rename the ILC the 'Indigenous Land and Sea Corporation.' Together, these Bills form a suite of reforms to support the ILC to assist Aboriginal persons and Torres Strait Islanders acquire and benefit from land and waters.¹⁰

Summary of the bills

ILC Bill

1.13 The ILC is established under subsection 191A(1) of the ATSI Act to assist Aboriginal and Torres Strait Islander people to acquire and manage land.¹¹ Schedule 1 of the ILC Bill amends the ATSI Act to give the ILC functions in relation to 'water-related rights'.¹² Examples of water-related rights include rights to:

- take or receive water;
- retain or use water taken;
- take resources from waters;
- undertake an activity in or on waters.¹³

1.14 Section 191B sets out the purpose of the ILC as assisting Aboriginal persons and Torres Strait Islanders to acquire land and to manage Indigenous-held land so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders. The amendments in the ILC Bill extend the purpose of the

9 The Hon Ken Wyatt MP, Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, pp. 25–26.

10 Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018, Explanatory Memorandum (Consequential Amendments Bill EM), p. 4.

11 ILC Bill, EM, p. 3.

12 'Water related rights' is defined in proposed section 4C. See Item 6, Schedule 1 of the ILC Bill.

13 Proposed new subsection 4C(2), see Item 6 of Schedule 1 of the ILC Bill.

ILC to include the provision of assistance to Aboriginal persons and Torres Strait Islanders to acquire water-related rights and manage indigenous waters.¹⁴

1.15 Section 191C of the ATSI Act provides that the ILC has 'land acquisition functions'¹⁵ and 'land management functions'.¹⁶

1.16 The ILC Bill proposes amendments to rename the land acquisition functions as 'acquisition functions' and to extend them to water-related rights.¹⁷ The ILC Bill also proposes that the land management functions be renamed as 'management functions' and to include management of indigenous waters as part of these functions. The ILC also renames a management function.¹⁸

1.17 Section 191N of the ATSI Act requires that the ILC Board prepare a national indigenous land strategy. The ILC Bill amends this requirement to provide for a national land and sea strategy.¹⁹

1.18 The ILC Board must also prepare regional indigenous land strategies.²⁰ The ILC Bill amends this requirement to provide for regional indigenous land and sea strategies.²¹

1.19 The ILC Bill also provides for the renaming of the Indigenous Land Corporation as the Indigenous Land and Sea Corporation.²²

ATSILS Future Fund Bill

1.20 The ATSILS Future Fund Bill provides for the establishment of the Fund, which comprises:

- the Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account (ATSILS Future Fund Special Account); and
- the investments of the Aboriginal and Torres Strait Islander Land and Sea Future Fund.²³

14 Items 7–8 of Schedule 1 of the ILC Bill.

15 ILC's land acquisition functions are set out in section 191D of the ATSI Act.

16 ILC's land management functions are set out in section 191E of the ATSI Act.

17 Item 9, Items 11–14 and Items 16–22 of Schedule 1 of the ILC Bill.

18 Item 10, Items 23–27, 30–31 and 33–37 of Schedule 1 of the ILC Bill.

19 Items 46–57 of Schedule 1 of the ILC Bill.

20 Section 191P of the ATSI Act.

21 Items 58–60, 62–67 and 69–70 of Schedule 1 of the ILC Bill.

22 Schedule 2 of the ILC Bill.

1.21 The balance of the Land Account will be transferred to the ATSILS Future Fund Special Account and investments of the Land Account will be transferred to the Special Account.²⁴

1.22 The main purposes of the ATSILS Future Fund Special Account are:

- to transfer amounts to the Indigenous Land Corporation Funding Special Account for the purposes of making annual payments to the ILC; and
- to transfer amounts to the Indigenous Land Corporation Funding Special Account for the purposes of making discretionary additional payments.²⁵

1.23 The Future Fund Board is responsible for the investment of the Fund and investments are held in the name of the Future Fund Board.²⁶

1.24 The responsible Ministers, the Treasurer and the Finance Minister, may give the Future Fund Board written directions about the performance of the Fund investment function. Before giving a direction, the responsible Ministers must consult with the Indigenous Affairs Minister. Collectively these directions are the 'Aboriginal and Torres Strait Islander Land and Sea Future Fund Investment Mandate'.²⁷

1.25 The ATSILS Future Fund Bill also establishes the ILC Funding Special Account.²⁸ The purpose of the ILC Funding Special Account is for making payments to the ILC.²⁹ Payments to the ILC may be made as annual payments³⁰ or discretionary additional payments.³¹ Part 4 of the Bill deals with investments by the Fund.

23 Clause 9 of the ATSILS Future Fund Bill. Clause 12 of the ATSILS Future Fund Bill establishes the Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account (Special Account). The ATSILS Future Fund Bill EM, at p. 9, explains that a 'special account is an appropriation mechanism that sets aside an amount within the [Consolidated Revenue Fund (CRF)] to be expended for specific purposes Any amounts credited to the [Special Account] are quarantined from other amounts within the CRF and can only be debited from the [Special Account] for the purposes set out in the [ATSILS Future Fund] Bill'.

24 Clauses 10 and 11 of the ATSILS Future Fund Bill.

25 Clause 14 of the ATSILS Future Fund Bill. The ATSILS Future Fund Special Account can also be used for costs incurred by the Future Fund Board in managing the ATSILS Future Fund, see Clauses 15 and 16 of the ATSILS Future Fund Bill.

26 Clause 30 of the ATSILS Future Fund Bill.

27 Clause 32 of the ATSILS Future Fund Bill.

28 Clause 20 of the ATSILS Future Fund Bill.

29 Clause 21 of the ATSILS Future Fund Bill.

30 Clause 22 of the ATSILS Future Fund Bill.

31 Clause 25 of the ATSILS Future Fund Bill.

Consideration of the bills by other committees

Scrutiny of Bills

1.26 At the time of tabling, the Senate Standing Committee for the Scrutiny of Bills has made no comment on the bills.³²

Human Rights

1.27 At the time of tabling, the Parliamentary Joint Committee on Human Rights (PJCHR) has made no comment on the bills. The committee notes that the Explanatory Memorandums for all three bills state that the bills are compatible with human rights.³³

1.28 The National Congress of Australia's First Peoples noted its concerns that 'the bills do not appear to have been sent to the Human Rights Committee'.³⁴ Under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the PJCHR is required to 'examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings'.³⁵ The committee expects that the PJCHR will consider these bills and report in due course.

32 Senate Standing Committee for the Scrutiny of Bills, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills (accessed 17 April 2018).

33 See: ILC Bill, EM, p. 16; ATSILS Future Fund Bill, EM, p. 29; Consequential Amendments Bill, EM, p. 16.

34 National Congress of Australia's First Peoples, *Submission 4*, p. [4].

35 Parliamentary Joint Committee on Human Rights, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights (accessed 19 April 2018). See also: *Human Rights (Parliamentary Scrutiny) Act 2011*, s. 7.

Chapter 2

Key issues and committee view

2.1 The Selection of Bills Committee Report stated that 'these bills will have profound impacts on the role and governance of the Indigenous Land Corporation (ILC), and should be properly scrutinised by Indigenous organisations and other interested parties'.¹ This inquiry has provided an opportunity for the ILC, Indigenous organisations and other interested parties to put forward their views on the bills.

2.2 This chapter examines five key issues raised during the inquiry:

- Sustainability of the Land Account;
- Expansion of the Land Account to encompass sea and freshwater country;
- Consultation with Indigenous stakeholders;
- Management of the ILC; and
- Reporting requirements.

Sustainability of the Land Account

2.3 As noted in the previous chapter, there have been longstanding concerns about the sustainability of the Land Account under its current mandated investment strategy. Submitters spoke about the impact of additional payments and moving the management of the Land Account to the Future Fund Board of Guardians (FFBG).

Additional payments

2.4 The current process for the provision of additional payments to the ILC from the Land Account compounds the impact of poor investment returns from cash and cash-like products. Under current arrangements, 'an additional payment is made automatically if the Land Account capital exceeds a CPI-indexed target, i.e. any excess Funds are paid to the ILC'.² The Land Account Expert Advisory Panel (Murray Panel) found that this mechanism 'exacerbated the rate of decline in the account balance' and concluded that this approach 'undermined the financial sustainability of the Land Account capital base—in good years the ILC benefits, in bad years Land Account capital is depleted'.³

2.5 In its submission, the National Congress of Australia's First Peoples (National Congress) put forward a similar argument, noting that the current arrangement

1 Senate Selection of Bills Committee, *Report No. 4 of 2018*, Appendix 1, https://www.aph.gov.au/~media/Senate/committee/selectionbills_ctte/reports/2018/rep0418.pdf?la=en (accessed 17 April 2018).

2 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

3 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

'effectively reduces the buffer which would otherwise exist to protect the Land Account during times of economic volatility'.⁴

2.6 The Goldfields Land and Sea Council (GLSC) expressed concern about 'the provision of additional payments from the Aboriginal and Torres Strait Islander Land and Sea Future Fund' (the Fund). GLSC highlighted that the bills do not specify the circumstances in which an additional payment can be made, and that such payments do not adversely affect the capital of the Fund.⁵ GLSC recommended a different mechanism through which the ILC could access additional payments without drawing down on the capital of the Land Account:

Should the ILC find from time to time that the demand for land acquisition and management support is well in excess of the regular stipend it receives from the [Land Account], it can of course put its case to the government for additional specific purpose appropriations of Funds in the annual budget context, without affecting the established ILC/[Land Account] framework.⁶

2.7 The ILC also recommended that 'there should be no provision for discretionary Ministerial payments' if the FFBG advised that such payments would result in a decline in the capital base of the Fund. The ILC further recommended that if a discretionary payment were made against the advice of the FFBG, 'then the Ministers should provide joint advice documenting their rationale'.⁷

2.8 In its submission, the Department of the Prime Minister and Cabinet (PM&C) noted that the cessation of automatic additional payments, as provided for under these bills, will protect the capital base of the Land Account into the future.⁸ Discretionary payments, in addition to the CPI-indexed payments, may only be made once per year, and can be made only after the Minister for Finance and the Minister for Indigenous Affairs have sought 'advice from the [FFBG] on the sustainability of annual payments to the ILC'.⁹

Improving the investment returns

2.9 Submitters agreed that the transfer of the Land Account to FFBG management will lead to improved returns. The GLSC put forward its support for broadening the 'range of acceptable investment types, [defining] an acceptable risk appetite as 50% growth asset allocation and long term target return of CPI + 3.1%' to 'guarantee a consistent payment of \$45 [million] in (2010) real terms to the ILC'.¹⁰

2.10 PM&C noted that:

4 National Congress of Australia's First Peoples, *Submission 4.1*, p. [3].

5 Goldfields Land and Sea Council, *Submission 2*, p. [2].

6 Goldfields Land and Sea Council, *Submission 2*, p. [1].

7 Indigenous Land Corporation, *Submission 6*, p. 2.

8 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

9 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

10 Goldfields Land and Sea Council, *Submission 2*, p. [1].

FFBG is an experienced, specialised and trusted investor of public money and the Government wants the ILC to benefit from the FFBG's investment performance over the last decade in managing other Commonwealth investment Funds.¹¹

2.11 The investment mandate of the Fund will be similar to 'other Funds currently managed by the FFBG, such as the Future Fund, the Medical Research Future Fund, the DisabilityCare Australia Fund, the Building Australia Fund and the Education Investment Fund'.¹² The investment parameters will be set by the Minister for Finance and the Minister for Indigenous Affairs, and will be tailored to its 'purpose to ensure targeted returns are consistent with the policy intent'.¹³

Expansion of the ILC and Land Account to encompass sea and freshwater country

2.12 As noted earlier, the 'ILC was established as part of the Commonwealth's response to the recognition of the dispossession of Aboriginal and Torres Strait Islander people from their country'.¹⁴ Indigenous people understand country to include both land and water, with this understanding now recognised in native title law:

These developments in the law acknowledged that the relationships of Aboriginal and Torres Strait islander people to waterscapes and between land and water are inseparable.¹⁵

2.13 Currently, the ILC can only 'engage in land-related activities' including the acquisition and management of land.¹⁶ These bills will expand the remit to sea and freshwater country to allow the ILC to invest in and support:

Further economic development aspirations through water-related business activities, including fishing, wild harvesting, aquaculture and tourism.¹⁷

2.14 This expansion is supported by all submitters.¹⁸ The Torres Strait Regional Authority highlighted the importance of water-related resources:

The resources from the sea in the Torres Strait region provide the primary, and in some cases, the only opportunities for economic development in Torres Strait communities. [These bills will] assist the Torres Strait and

11 Department of the Prime Minister and Cabinet, *Submission 3*, p. 5.

12 Department of the Prime Minister and Cabinet, *Submission 3*, p. 6.

13 Department of the Prime Minister and Cabinet, *Submission 3*, p. 6.

14 Department of the Prime Minister and Cabinet, *Submission 3*, p. 8.

15 Department of the Prime Minister and Cabinet, *Submission 3*, p. 8. See also: Torres Strait Regional Authority, *Submission 7*, p. [2].

16 Department of the Prime Minister and Cabinet, *Submission 3*, p. 3.

17 NSW Aboriginal Land Corporation, *Submission 1*, p. [2].

18 See, for example: NSW Aboriginal Land Council, *Submission 1*; Goldfields Land and Sea Council, *Submission 2*.

Northern Peninsula Area region to address some of the ongoing challenges and increase opportunities for marine related industries.¹⁹

2.15 A concern was raised about the possibility of 'uncertainty among stakeholders about the inclusion of fresh-water country within the remit of the ILC' as the new name describes the organisation as the Indigenous Land and Sea Corporation. The ILC has proposed a preamble to the ATSI Act bill to clarify this matter.²⁰ A similar approach was taken in the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act). The preamble to the ATSI Act recognises the dispossession without compensation of Aboriginal and Torres Strait Islander people and notes the intention of the Australian people to provide rectification for this dispossession and past injustices. One of the purposes of the ATSI Act was to establish the ILC and the Land Account.²¹

2.16 The ILC has also highlighted what appears to be an unintended omission in the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 (ILC Bill). The ILC noted that in relation to current section 191E(1)(b) of the ATSI Act:

The [ILC Bill] fails to include an amendment to the effect "or water related rights held by the ILC" at the conclusion of that section. It is recommended that an amendment be sought to that effect.²²

Consultation with Indigenous stakeholders

2.17 From July to September 2017, the ILC underwent a wide-ranging consultation process to understand how the Land Account could be better managed and whether the remit of the ILC should be expanded. The consultation consisted of:

face-to-face consultation sessions [that] saw more than 75 Indigenous organisations join us in 16 sessions over 11 locations across the country. An additional 23 Indigenous organisations and individuals made written submissions to the consultation process.²³

2.18 The ILC noted that the consultation process gave overwhelming support for change:

- 75% of the consultation sessions provided consensus support for both areas of proposed reform;
- Over 85% of sessions provided consensus support to the reform of management and governance arrangements for the Land Account;

19 Torres Strait Regional Authority, *Submission 7*, p. [2].

20 Indigenous Land Corporation, *Submission 6*, pp. 3–4.

21 *Aboriginal and Torres Strait Islander Act 2005*.

22 Indigenous Land Corporation, *Submission 6*, p. 4.

23 Indigenous Land Corporation, *Consultations on the ATSI Act*, June 2017, [http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-\(1\)](http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-(1)) (accessed 19 April 2018). See also: Indigenous Land Corporation, *Submission 6*; Indigenous Business Australia, *Submission 5*, p. [2].

- 75% of sessions supported the extension of the ILC's remit to include water-based activities;
- Unanimous support for reform to the investment mandate of the Land Account was evidenced in the written submissions received on the issue;
- Of the 17 submissions received that addressed both areas of proposed reform, 77% gave support to both; and
- Only 8% noted that they did not support one or other area of reform.²⁴

2.19 In October 2017, the ILC provided a report to government detailing the consultation process and the support for reforms to the ILC and the Land Account. PM&C noted that 'the Government took these views into account in designing these reforms'.²⁵

2.20 Consistent with the endorsement received during the consultation process, all submissions received by the committee were broadly supportive of the objectives of the bills.²⁶ The NSW Aboriginal Land Council (NSWALC) expressed its support for the bills,²⁷ whilst the GLSC described the bills' purposes—which accept the advice of the Murray Panel—as 'sensible and realistic'.²⁸

Management of the ILC

2.21 The NSWALC commented on the 'relatively low investment by the ILC in NSW to date'.²⁹ The National Congress raised its concerns around the current management of the ILC and its resources.³⁰ These concerns are unrelated to the bills before the committee.

24 Indigenous Land Corporation, *Consultations on the ATSI Act*, June 2017, [http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-\(1\)](http://www.ilc.gov.au/Home/About-Us/Publications/Atsiactconsultation-(1)) (accessed 19 April 2018). See also: Indigenous Land Corporation, *Submission 6*; Indigenous Business Australia, *Submission 5*, p. [2].

25 Department of the Prime Minister and Cabinet, *Submission 3*, p. 4.

26 See, for example: Indigenous Land Corporation, *Submission 6*.

27 NSW Aboriginal Land Council, *Submission 1*, p. [1].

28 Goldfields Land and Sea Council, *Submission 2*, p. [1]. See also: Indigenous Land Corporation, 'The Aboriginal and Torres Strait Islander Act 2005: Consultation Discussion Paper (Specifically Part 4A—Indigenous Land Corporation and Aboriginal and Torres Strait Islander Land Account', June 2017, p. 5, <http://www.ilc.gov.au/IndigenousLandCorporation/media/Items/Content/Publications/Corporate%20Documents/The-Aboriginal-and-Torres-Strait-Islander-Act-2005-Consultation-Discussion-Paper-web.pdf> (accessed 17 April 2018). The Land Account Expert Advisory Panel comprised Mr David Murray AO, Mr Bill Moss AO, Mr Doug McTaggart, Ms Elayne Grace and Mr Glen Brennan PSM.

29 NSW Aboriginal Land Council, *Submission 1*, p. 2.

30 National Congress of Australia's First Peoples, *Submission 4*, pp. 3–4.

2.22 The ILC recorded its support for the 'increased powers of the Minister for Indigenous Affairs in ensuring the financial sustainability of the' Fund; however, noted that these 'powers are distinct from the statutory injunction against ministerial direction in the ATSI Act designed to ensure the independence of the ILC'.³¹

2.23 The ILC is an independent statutory body that is not directed by Government. The financial independence of the ILC will not be affected by the passage of these bills with the continuation of annual payments from the Fund.³² In addition, PM&C noted that 'no Minister has the power to direct the ILC in relation to any of its activities' and that these 'bills do not change these arrangements'.³³ Furthermore:

It will be for the ILC, in consultation with local Indigenous groups, to determine what specific Aboriginal and Torres Strait Islander corporations to assist, and how that assistance is provided.³⁴

Reporting requirements

2.24 During the consultation period, stakeholders expressed their strong support to the ILC to maintain 'the current reporting and accountability of the Fund to Aboriginal and Torres Strait Islander peoples—recognising the compensatory and perpetual nature of the Fund'.³⁵

2.25 Clause 48 of the ATSILFF bill authorises the Finance Minister to require the FFBG to 'prepare reports or give information'.³⁶ The ILC has proposed further reporting requirements:

to ensure the Minister for Indigenous Affairs, the ILC Board and the broader Aboriginal and Torres Strait Islander community can readily access information about the performance of the Fund.³⁷

2.26 These additional amendments would include the requirement for a minimum of quarterly reporting and publication 'on the internet'.³⁸ The ILC notes that similar reporting requirements are in place for the FFBG managed DisabilityCare Australia Fund, which also has a diverse range of stakeholders.³⁹

2.27 The ATSILFF bill currently provides for the Finance Minister to require the FFBG to report, and provides for the Finance Minister to publish such reports or

31 Indigenous Land Corporation, *Submission 6*, p. 2.

32 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

33 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

34 Department of the Prime Minister and Cabinet, *Submission 3*, p. 9.

35 Indigenous Land Corporation, *Submission 6*, p. 2.

36 Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018, clause 48.

37 Indigenous Land Corporation, *Submission 6*, p. 2.

38 Indigenous Land Corporation, *Submission 6*, pp. 2–3.

39 Indigenous Land Corporation, *Submission 6*, p. 3.

documents on the internet. There is no limit on the Finance Minister's capacity to require reports from the FFBG.

Committee view

2.28 The committee recognises that there are long-standing and widely held concerns about the sustainability of the Land Account. These bills seek to address these concerns and move the Land Account to a stronger footing by improving the investment options and removing automatic additional payments from the Land Account. The committee is confident that future additional payments will only occur in circumstances where the sustainability of the Fund is not compromised. The passage of these bills will ensure that the capital base of the Land Account will continue to grow and provide economic opportunities for Indigenous corporations and communities into the future.

2.29 The committee endorses the expansion of the ILC and the Land Account to encompass sea and freshwater country. This approach is consistent with an Indigenous understanding of country and recent developments in native title law. The committee has heard the arguments for the inclusion of a preamble to the ATSILFF Bill. The committee notes that the ATSI Act (2005) has a preamble which outlines the reasons for the establishment of the ILC and the Land Account. It is the committee's view that the ATSILFF bill is of an administrative nature—that is, the transfer of the management of the Land Account to FFBG—and amends other acts including the ATSI Act for which a preamble already exists.

2.30 The committee notes the ILC's recommendation that the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 should include an amendment giving the ILC a management function in relation to water or waters in which the ILC has water-related rights.

Recommendation 1

2.31 The committee recommends that the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 be amended to ensure that the *Aboriginal and Torres Strait Islander Act 2005* gives the Indigenous Land Corporation management of water or waters for which the Indigenous Land Corporation has water-related rights.

2.32 The committee acknowledges that two submitters raised concerns about the management of the ILC. The committee notes that these concerns do not relate to the bills. The committee supports the on-going independence of the ILC, in consultation with local Indigenous groups, to make its own decisions on how and where to invest the annual payment from the Fund.

2.33 The committee understands the importance that stakeholders place on ensuring that reporting arrangements do not change for a Fund of such symbolic and financial importance. The committee is satisfied that these bills do not impede the Finance Minister from seeking reports and other information from the FFBG at any time, and making these reports and information publicly available.

2.34 The committee notes that the reforms to the ILC and Land Account have been led by the ILC and have been overwhelmingly endorsed by Indigenous stakeholders

through a series of wide-ranging consultations. The government has drafted these bills on the basis of these consultations and the advice of the ILC.

Recommendation 2

2.35 Subject to consideration of Recommendation 1, the committee recommends that the bills be passed.

**Senator James Paterson
Chair**

Additional Comments from Labor Senators

1.1 The ILC is not an ordinary fund. It has enduring symbolic importance that stretches beyond its activities.

1.2 As noted by the Department of the Prime Minister and Cabinet in its submission, the 'ILC was established as part of the Commonwealth's response to the recognition of the dispossession of Aboriginal and Torres Strait Islander people from their country.'¹ This is not a discrete aim—the fund is intended to operate indefinitely. The ILC and other stakeholders drew attention to the 'compensatory and perpetual nature of the Fund' in their submissions to this inquiry.

1.3 Labor Senators believe that the special nature of the ILC and the fund should be reflected in its governing legislation. The legislation should clearly state the purpose of the ILC and the fund, namely to address the dispossession of Aboriginal and Torres Strait Islanders from their land. It should also clearly state that the Fund is established and operated by the Commonwealth on the basis of a fiduciary obligation to sustain the Fund into perpetuity.

1.4 Labor Senators note the comments in the main report regarding oversight and accountability. Given the nature and purpose of the ILC and the Fund, however, it is appropriate that the Fund be subject to ongoing Indigenous oversight. Labor Senators support the establishment of an Indigenous oversight body (consisting of members of the ILC Board) to monitor the operations of the Fund.

1.5 Labor Senators note the complex overlapping jurisdictions and regulatory schemes governing water. In light of this, the Bill should make clear that the ILC has the right to hold water licenses in all jurisdictions regardless of any potential limitations placed on licensing by state or territory governments.

Senator Jenny McAllister
Deputy Chair

Senator Kimberley Kitching
Senator for Victoria

1 Department of the Prime Minister and Cabinet, *Submission 3*, p. 5.

Additional Comments from the Australian Greens'

1.1 The Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 establishes the Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF) to replace the Aboriginal and Torres Strait Islander Land Account (ATSILA). The ATSILFF will receive the money and financial assets of the ATSILA.

1.2 Due to the restrictions on the investment mandate of the ATSILA, it is not generating sufficient investment returns to ensure the financial sustainability of the Indigenous Land Corporation (ILC) into the future.

1.3 The investment function of the ATSILSFF will be overseen by the Future Fund Board of Guardians, rather than by the Department of the Prime Minister and Cabinet as is the case currently with the ATSILA. The ATSILSFF will also have a broader investment mandate, which should see more sustainable returns produced and allow annual payments to the ILC to continue, without the current concerns of slowly depleting the ATSILA.

1.4 The Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 amends the *Aboriginal and Torres Strait Islander Act 2005* to expand the responsibility of the Indigenous Land Corporation "to enable it to support Aboriginal and Torres Strait Islander peoples to care for, manage and benefit from freshwater and sea country."¹

1.5 The expansion of its remit beyond land-based activities is consistent with developments in native title case law.

1.6 The ILC held consultations in the second half of 2017 with Aboriginal and Torres Strait Islander organisations about the potential for expansion of its remit to include functions relating to water. A majority of those consulted supported this reform.

1.7 This Bill will also amend the name of the ILC to the Indigenous Land and Sea Corporation (ILSC).

1.8 The Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018 amends five additional acts to "enable the effective operation of the ATSILSFF at commencement."² It also includes minor technical amendments relating to the renaming of the ILC to the ILSC.

1.9 The Australian Greens support the intent of these three Bills.

1.10 The Australian Greens note that there were not a large number of submissions to the inquiry but some of the submissions that were received raised a number of concerns and/or proposed changes to these Bills. These concerns and proposed changes are outlined below.

1 Hon Ken Wyatt MP, Minister for Aged Care and Minister for Indigenous Health, Second Reading Speech, *House Hansard*, 28 March 2018, p. 3052.

2 Department of the Prime Minister and Cabinet, *Submission 3*, p. 5.

Additional payments to the ILC/ILSC

1.11 As outlined in the Majority Committee Report, currently an additional, automatic payment is made from the ATSILA to the ILC when the capital of the ATSILA exceeds a CPI-indexed target.

1.12 Under the Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 this process will be amended; automatic, additional payments will cease. Instead, there is provision for one discretionary payment per year if determined by the Minister for Finance and the Minister for Indigenous Affairs.

1.13 The Department of the Prime Minister and Cabinet said in its submission:

Prior to making a determination, the Minister for Finance and the Minister for Indigenous Affairs are required to seek advice from the FFBG on the impacts of making the proposed payment on the sustainability of annual payments to the ILC.³

1.14 However, the Australian Greens are concerned that this does not go far enough.

1.15 The Goldfields Land and Sea Council expressed concern about the lack of limitation placed on the provision of additional payments to the ILC in the Bills.⁴

1.16 The ILC itself suggested that there were improvements that could be made with regards to the discretionary payments provisions. In its submission it said:

If the fund is to remain a true perpetual fund, it is proposed there should be no provision for discretionary Ministerial payments if they were to result in a diminution of its capital base. Alternatively, there could be some form of specialised limit (e.g. Minister not permitted to make such payments if in the opinion of the Future Fund Board it is likely to affect the ability to make payments under s 22.).⁵

1.17 It continued:

The ILC recommends that, in the unlikely event, that the Minister for Finance and the Minister for Indigenous Affairs makes payments to the ILC in contravention to the advice provided by the Future Fund Board (pursuant to Section 27), then the Ministers should provide joint advice documenting their rationale. This would be relevant for annual payments made over or under the Future Fund Board's recommendation.⁶

1.18 The Australian Greens want to see stronger controls and limits on potential future discretionary payments to the ILC/ILSC. We also want to see stronger requirements for community consultation if discretionary payments are to be made.

3 Department of the Prime Minister and Cabinet, *Submission 3*, p. 7.

4 Goldfields Land and Sea Council, *Submission 2*, pp. 1–2.

5 Indigenous Land Corporation, *Submission 6*, p. 2.

6 Indigenous Land Corporation, *Submission 6*, p. 2.

Reporting requirements

1.19 The Australian Greens note the section of the Majority Committee Report on reporting requirements⁷ and acknowledge the need for further reporting requirements, as suggested by the ILC in its submission,⁸ of the Future Fund Board of Guardians to meet the needs of the ILC Board and the Aboriginal and Torres Strait Islander community. There needs to be certainty that reports will be available at regular intervals that illustrate the performance of the ATSILSFF, rather than reliance placed on the Minister for Finance to request such reports.

Preamble

1.20 The Majority Committee Report at paragraph 2.15 outlines the ILC's proposal for a preamble to the Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018.⁹ The Majority Committee Report also states at paragraph 2.29, "It is the committee's view that the ATSILFF bill is of an administrative nature—that is, the transfer of the management of the Land Account to FFBG—and amends other acts including the ATSI Act for which a preamble already exists."¹⁰ The Australian Greens do not share this view. We want to see a preamble included in the Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 that sets out "a context for its effect and interpretation"¹¹ and that clarifies any potential uncertainty relating to the addition of fresh-water country to the ILC's remit, given its new name is proposed to be the Indigenous Land and Sea Corporation.¹²

Omission

1.21 The Australian Greens support Recommendation 1 of the Majority Committee Report, which recommends "that the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 be amended to ensure that the Aboriginal and Torres Strait Islander Act 2005 gives the Indigenous Land Corporation (ILC) management of water or waters for which the ILC has water-related rights."¹³

1.22 The Majority Committee Report makes this recommendation having regard to the ILC's submission to the inquiry,¹⁴ which draws attention to the above mentioned omission in the Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 and recommends an amendment to that Bill.¹⁵

7 *Majority Committee Report*, Ch. 2, pp. 6–7.

8 Indigenous Land Corporation, *Submission 6*, pp. 2–3.

9 See: *Majority Committee Report*, Ch. 2, p. 4.

10 See: *Majority Committee Report*, Ch. 2, p. 7.

11 Indigenous Land Corporation, *Submission 6*, p. 3.

12 Indigenous Land Corporation, *Submission 6*, p. 3.

13 See: *Majority Committee Report*, Ch. 2, p. 7.

14 See: *Majority Committee Report*, Ch. 2, pp. 4 & 7.

15 See: Indigenous Land Corporation, *Submission 6*, p. 4.

Recommendation 1

1.23 Subject to amendments being made to address the above matters, the Australian Greens recommend that the Bills be passed.

Divestment by ILC

1.24 In its submission to the inquiry, the National Congress of Australia's First Peoples (National Congress) stated:

National Congress is very concerned about the inadequate progress towards divestment of properties purchased by the ILC to First Peoples, as divestment is the ILC's mandate. It has been disappointing to see too many properties still rented to Aboriginal and Torres Strait Islander organisations rather than divested.¹⁶

1.25 The Australian Greens acknowledge the concerns of National Congress with regards to divestment but also note that at Additional Estimates in March of this year Mr John Maher, Chief Executive Officer, Indigenous Land Corporation, said:

We continue our commitment of divestment of properties, and I'm pleased to say that, since the last estimates hearing, the ILC have completed a divestment plan for every one of the 52 properties now held by the ILC.¹⁷

Senator Rachel Siewert
Senator for Western Australia

16 National Congress of Australia's First Peoples, *Submission 4*, p. 3.

17 Mr John Maher, CEO, Indigenous Land Corporation, *Estimates Committee Hansard*, 2 March 2018, p. 10.

Appendix 1

Submissions and additional information received by the committee

Submissions

1. NSW Aboriginal Land Council (NSWALC)
2. Goldfields Land and Sea Council (GLSC)
3. Department of the Prime Minister and Cabinet
4. National Congress of Australia's First People
5. Indigenous Business Australia (IBA)
6. Indigenous Land Corporation
7. Torres Strait Regional Authority (TSRA)

Additional Information

- Correspondence from Mr Jamie Fox, First Assistant Secretary, Indigenous Employment and Recognition Division, Department of the Prime Minister and Cabinet, received 3 May 2018.

