

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**Seventeenth Report of the  
Parliamentary Joint Committee  
on Native Title and the Aboriginal and Torres Strait  
Islander Land Fund**

**Examination of Annual Reports for 1998 – 1999**

September 2000

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ISBN 0 642 71051 1

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## MEMBERSHIP OF THE COMMITTEE

### Members

Senator Jeannie Ferris	LP, South Australia	Chairman
Hon Warren Snowdon MP	ALP, Northern Territory	Deputy Chairman
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Hon Ian Causley MP	NPA, New South Wales	
Mr Barry Haase MP	LP, Western Australia	
Mr Daryl Melham MP	ALP, New South Wales	
Mr Patrick Secker MP	LP, South Australia	

### Secretariat

Ms Robina Jaffray, Acting Secretary (from 10 July 2000)  
Ms Suzanne Wood, Senior Research Officer  
Ms Rosalind McMahon, Executive Assistant

The Senate  
Parliament House  
CANBERRA ACT 2600

Telephone: 02 6277 3419  
Facsimile: 02 6277 5706  
Email: [nativetitle.joint@aph.gov.au](mailto:nativetitle.joint@aph.gov.au)  
Website: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/index.htm)

## TERMS OF REFERENCE

The Native Title Committee's Terms of Reference are set out in Part 12 of the *Native Title Act 1993*. Section 206 provides:

### Section 206 Duties

The Parliamentary Joint Committee's duties are:

- (a) to consult extensively about the implementation and operation of this Act and Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* with:
  - (i) groups of Aboriginal peoples and Torres Strait Islanders; and
  - (ii) industry organisations; and
  - (iii) Commonwealth, State, Territory and local governments; and
  - (iv) other appropriate persons and bodies; and
- (b) to report from time to time to both Houses on the implementation and operation of this Act; and
- (c) to examine each annual report that is prepared by the President of the NNTT or by any person under Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* and of which a copy has been laid before a House, and to report to both Houses on matters:
  - (i) that appear in, or arise out of, that annual report; and
  - (ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed; and
- (d) from time to time, to inquire into and, as soon as practicable after the inquiry has been completed, to report to both Houses on:
  - (i) the effectiveness of the NNTT; and
  - (ii) the extent to which there are recognised State/Territory bodies; and
  - (iii) the appropriateness of powers of delegation exercisable by the Registrar under this Act; and
  - (iv) the extent of extinguishment or impairment of native title rights and interests as a result of the operation of this Act; and
  - (v) the operation of the National Aboriginal and Torres Strait Islander Land Fund established by Part 10; and
  - (vi) the effect of the operation of this Act on land management; and
  - (vii) the operation of the Indigenous Land Corporation and the Aboriginal and Torres Strait Islander Land Fund established by Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989*; and
- (e) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

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## **ABBREVIATIONS**

ATSIC	Aboriginal and Torres Strait Islander Commission
ILC	Indigenous Land Corporation
NNTT	National Native Title Tribunal
ILUA	Indigenous Land Use Agreements
CAC Act	Commonwealth Authorities and Companies Act
LEA	Land Enterprises Australia
ANAO	Australian National Audit Office





# CHAPTER ONE

## INTRODUCTION

### **The Committee's duty**

1.1 This report is prepared pursuant to s 206(c) of the *Native Title Act 1993* (the Act) as amended by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (the ATSIC Amendment Act). Section 206(c) of the Act requires the Committee to report, at its discretion, to both Houses of Parliament on matters to which Parliament's attention should be directed about annual reports prepared by the President of the National Native Title Tribunal (NNTT) or by any person under s 1931 in Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* (hereafter the ATSIC Act).

### **Reports for consideration**

1.2 Three annual reports prepared pursuant to s 206(c) of the Act are examined in this report. They are the 1998-99 reports of:

- a) the National Native Title Tribunal;
- b) the Indigenous Land Corporation<sup>1</sup>; and
- c) the Administration of the Aboriginal and Torres Strait Islander Land Fund Reserve.

1.3 The Land Fund report is not separately documented, but is included in ATSIC's *Annual Report 1998-99* as Appendix 11. It is also reproduced (in part) as Appendix 2 to the ILC annual report.

### **National Native Title Tribunal**

1.4 Pursuant to s 133 of the Act, the Tribunal President is required to prepare an annual report and present it to the Commonwealth Minister as soon as practicable after 30 June each year. The Tribunal's sixth annual report was presented out of session on 5 October 1999 and tabled in the Senate and the House of Representatives on 23 November 1999.

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1 There has been some uncertainty recently about the Committee's duty to examine the annual reports of the ILC. This matter is discussed below and in Chapter 4.

## **Indigenous Land Corporation and the Land Fund**

1.5 The 1998-99 Indigenous Land Corporation (ILC) report and the 1998-99 Land Fund report are the fifth such publications produced. Under s 193H of the ATSIC Act, ATSIC is required to keep accounts and prepare financial statements in respect of the Land Fund and s 193I of the Act requires an annual report to be prepared on the administration of the Fund.

1.6 The ATSIC annual report for 1998-99 (containing the Land Fund report) was presented to the Minister on 15 October 1999. It was tabled in the Senate on 22 November 1999 and in the House of Representatives on 23 November 1999.

1.7 The 1998-99 annual report of the ILC (with part of the Land Fund report appended) was presented out of session on 30 September 1999. It was tabled in the Senate and the House of Representatives on 19 October 1999.

### *Implications of the Commonwealth Authorities and Companies Act 1997*

1.8 The ILC's first three annual reports were prepared pursuant to s 63H of the *Audit Act 1901* as applied by s 193K of the ATSIC Act. The *Commonwealth Authorities and Companies Act 1997* (the CAC Act) replaced the Audit Act. Accordingly, the ILC's 1997-98 and 1998-99 Annual Reports have been prepared pursuant to s 9 of the CAC Act.

1.9 The change in legislation had no practical implications for reporting on the ILC's 1997-98 annual report. As a consequence of the transitional provisions for the CAC Act, that report remained subject to the Committee's scrutiny pursuant to s 206(c) of the *Native Title Act 1993* and the Committee duly reported on it in its fourteenth report.

1.10 However, the Committee remains concerned that, as a result of the amendment of s 193K of the ATSIC Act and the operation of the *Commonwealth Authorities and Companies Act 1997*, the Committee may not have the same statutory duty to examine and report on ILC reports from 1998-99. In any event, the Committee retains the power to examine and report on the ILC's reports pursuant to paragraph one of its terms of appointment passed by the House of Representatives on 3 December 1998:

That the Committee have power to examine and report on such annual and related reports as may be referred to it by the President of the Senate or the Speaker of the House of Representatives.

1.11 The Committee has taken action since the tabling of its fourteenth report to clarify its reporting obligations and powers in relation to the annual reports of the ILC. This has been the subject of ongoing correspondence between the Committee, various government departments and the office of the Minister for Aboriginal and Torres Strait Islander Affairs.

1.12 The Minister wrote to the Committee on 18 April 2000 to advise that he had directed ATSIC to prepare an amendment to s 206(c) of the *Native Title Act 1993* to ensure that the Committee had the explicit obligation to report on the annual reports of the ILC. This amendment will be included in a proposed bill which will also include amendments to Part 4A of the ATSIC Act. This bill is expected to be introduced into Parliament later this year. A copy of the Minister's letter to the Committee and his letter to the CEO of ATSIC requesting such an amendment is included in this report as Appendix 2.

### **Public hearings**

1.13 The Committee considered it desirable to hold public hearings prior to the preparation of this report. Public hearings were held on 15 February 2000 and 14 March 2000, where evidence was taken from the ILC and the Tribunal respectively. The Committee is grateful to the Tribunal and the ILC for their continuing cooperation in regard to the examination of annual reports.

### **Adoption of report**

1.14 This report was adopted by the Committee at a private meeting on 4 September 2000. Chapter Two discusses the Tribunal's annual report, Chapter Three discusses the Land Fund report, while Chapter Four considers the Indigenous Land Council annual report.



## CHAPTER TWO

### ANNUAL REPORT OF THE NATIONAL NATIVE TITLE TRIBUNAL

#### **Presentation and Style**

2.1 The Tribunal's 1998-99 annual report is more substantial than the 1997-98 report, but remains accessible and easy to read. The additional material is largely attributable to the comment on the significant legislative and other changes in the reporting period, which have impacted substantially on the Tribunal's operations.

#### *Corporate overview and corporate reports*

2.2 Separate sections in the report provide a Corporate Overview<sup>1</sup> and discussion on Corporate Reports.<sup>2</sup> The Corporate Overview essentially provides an overview of relevant issues in the reporting period in relation to matters such as corporate governance, social justice and equity, and internal and external scrutiny. The Corporate Reports section provides information on such issues as client services, records management, human resources management, property and contracts, finance and information technology. The Committee is of the view that the two sections are not sufficiently differentiated, resulting in some confusion for the reader.

2.3 The Committee also notes the existence of some minor errors, for example:

- a) In the discussion on the registration test at page 74, the report states that further information about the registration test and conditions is contained at page 163. Page 163 is part of the Corporate Directory; the correct reference is Appendix 8, pages 224-230; and
- b) the section on consultants notes that the agreed cost of consultancies is listed at page 145, when the material is actually at page 181.

2.4 Overall, however, the Tribunal report is of a high standard and contains fewer errors than previous reports. The Committee appreciates the continuing efforts of the Tribunal to improve the quality of its annual reports.

#### **Formal requirements and compliance**

2.5 The Tribunal, although a statutory authority, has chosen to observe the annual reporting requirements for government departments. Those requirements, updated in February 1996, are as follows:

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1 pp 26-36

2 pp 156-160

Annual Report Requirements (compliance mandatory)

Letter of Transmission

Aids to Access

Portfolio and Corporate Overview

Program Performance Reporting

Staffing Overview

Financial Statements

Attachment 1: Information on Specific Statutory

Provisions Relating to Annual Reports

(compliance mandatory)

Industrial Democracy

Occupational Health and Safety

Freedom of Information

Advertising and Market Research

Attachment 2: Program Financial and Staffing

Resources Summary and Appropriations

to Programs Reconciliation – Proformas

(guidance document only)

Attachment 3: Information Available to Members

of Parliament and Senators on Request

(material to be available but inclusion in  
annual report not mandatory)

Social Justice and Equity

Staffing Matters

Financial Matters

Internal and External Scrutiny

Privacy

Environmental Matters

Other Matters

2.6 In its annual report for 1998-99 the Tribunal has fulfilled the reporting requirements that are mandatory for government departments in the following manner.

*Letter of Transmission*

2.7 The President's letter to the Attorney General was dated Thursday 5 October 1999. The report was tabled in the Senate and the House of Representatives on 23 November 1999; which was within 15 sitting days of the day on which the Minister received it, and satisfies the requirement.

*Aids to Access*

2.8 The Tribunal's report provides:

Table of Contents (pp 3-5);

President's Report (pp 8-19);

Compliance Index (p 231);

Glossary (pp 232-235);

Index (p 236-238); and  
Contact Officer (p ii).

2.9 The Tribunal has appropriately set out aids which allow proper access to its annual report. In response to the Committee's comments in its Thirteenth and Fourteenth reports, the 1998-99 annual report provides the name of the Tribunal contact officer.<sup>3</sup>

#### *Portfolio and Corporate Overview*

2.10 A Portfolio Overview is not applicable.

2.11 The Corporate Overview<sup>4</sup> provides an account of the following activities:

- a) corporate governance, including members' roles;
- b) administration – executive restructure, corporate strategies;
- c) employee relations, Australian Workplace Agreements and the outsourcing of IT infrastructure;
- d) the Tribunal's Customer Service Charter;
- e) social justice and equity issues;
- f) internal and external scrutiny of Tribunal finances and activities, including by this Committee.

#### *Program Performance Reporting*<sup>5</sup>

2.12 The 1998-99 annual report of the Tribunal contains a separate Performance Report, which complies with the mandatory obligation for performance reporting. In previous years, this information has been included in the Corporate Overview section of the Tribunal report. The Committee considers that the format for performance reporting in the current report is clearer and makes the Tribunal's report more accessible.

#### *Staffing Overview*

2.13 The report sets out details of the Tribunal Members and the Tribunal Executive.<sup>6</sup> Staffing matters are dealt with in a number of places in the Tribunal's annual report. Pages 22 and 23 outline the Tribunal's organisational structure, including the changes as the result of a restructure on 15 March 1999. The Corporate

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3 p ii

4 pp 26-36

5 pp 58 - 124

6 pp 20-21 and p 24 respectively

overview deals with a range of staffing issues including members' roles and the executive restructure, employee relations and workplace diversity. Other sections of the report discuss issues such as the expanding role of Tribunal members and the impact of legislative and operational changes on Tribunal staff.<sup>7</sup>

2.14 The main details in relation to staffing are contained in Appendix 3<sup>8</sup>, which includes:

- a) a staffing profile outlining the total number of staff and expenditure on salaries;
- b) tables on staff classification, location and gender;
- c) lists of members, including those members whose terms expired or ended during the reporting period;
- d) details of staff training and development undertaken throughout the year.

#### *Financial Statements*

2.15 Appendix 7 of the Annual Report provides the audit report and notes to the Tribunal's financial statements.<sup>9</sup> The statements received an unqualified audit.

#### *Industrial Democracy/ Occupational Health and Safety*

2.16 As noted in both the Compliance Index and General Index, industrial democracy (also referred to as participative work practices) and occupational health and safety are reported on in Appendix 6 of the report.<sup>10</sup>

#### *Freedom of Information*

2.17 Appendix 5 of the Annual Report provides details of a range of matters, including access to Tribunal documents under the *Freedom of Information Act*.<sup>11</sup>

#### *Advertising and Market Research*

2.18 As noted in the Fourteenth report, the 1997-98 Annual Report of the Tribunal contained no reference to advertising and market research. In its 1998-99 report, the Tribunal reports on advertising and market research at page 181, setting out the amount spent on advertising. The report advises that the Tribunal did not use the services of advertising agencies, market research organisations or polling organisations during the reporting period.

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7 pp 45-47 and p 50 respectively

8 pp 167-178

9 pp 197-223

10 p 194

11 p 186



## Major issues

### *Response to the Committee's 14th Report*

2.19 The role of the Parliamentary Committee, both in terms of scrutiny and reporting, has been properly acknowledged by the Tribunal in the 1998-99 report. In particular, the Committee has previously considered the issues of Tribunal impartiality; Tribunal workload; budget and running costs; the amendments to the Native Title Act; and the Tribunal's role in the dissemination of information to the public. Several of these issues continue to be relevant in the current reporting period.

### *Tribunal impartiality*

2.20 Tribunal impartiality has been an issue of ongoing interest for the Committee and was reported on in some detail in its Fourteenth report. In that report, the Committee indicated that it would continue to monitor the issue of Tribunal impartiality. The Committee is pleased to note that no new matters in relation to the impartiality of the Tribunal or its members have arisen in the reporting period. However, given the critical importance of the Tribunal operating impartially in the exercise of all of its powers and functions, the Committee will continue to monitor this issue closely.

### *Tribunal workload*

2.21 The issue of the Tribunal's workload was particularly relevant in the reporting period, which saw the commencement of most of the provisions of the *Native Title Amendment Act 1998*. The effect of the changes to the Act on the Tribunal's workload are discussed in detail in the 1998-99 annual report.<sup>12</sup>

2.22 The main workload issue that arose in the reporting period related to the Tribunal's obligation to apply the new registration test to most existing claims, constituting claims in existence at 30 September 1998 plus new native title claimant applications.

2.23 At the time of the commencement of the amendments to the Native Title Act on 30 September 1998, there were 678 native title claimant applications subject to the new registration test. By 30 June 1999, the Registrar and his delegates had made 136 registration test decisions, 102 in relation to old Act applications and 34 in relation to new Act applications. The Registrar advised the Committee of the following:

As of ... 10 March, I and my delegates had made a total of 415 decisions under the registration test, and we have yet to make 121 on the current numbers of cases before us. Looking at the aggregates, out of that 415, 240 have passed since the commencement on 30 September 1998 and 175 failed. That corresponds to 58 per cent passing and 42 per cent failing.<sup>13</sup>

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12 pp 62-113

13 Evidence, 14 March 2000, pp NT 5-6

2.24 The Tribunal advises that in 1998-99 an estimated 85 per cent of the Tribunal's officer resources were devoted to either applying the registration test or matters associated with the application of the registration test.<sup>14</sup> Pressure on Tribunal resources was also increased by the strict time frames imposed by the legislation for the application of the registration test, in particular to applications where s 29 notices had been, or were, issued.

2.25 The application of the registration test significantly affected the Tribunal's ability to carry out many of its other functions and in particular to engage in mediation of native title applications. However, the Committee notes the Tribunal President's expectation that a substantial drop in the volume of work created by the administration of the registration test is anticipated and a consequential freeing up of resources for other activities, particularly mediation.<sup>15</sup>

2.26 The outcome of attempts by certain states and territories to establish alternative regimes to deal with native title issues, particularly in relation to the right to negotiate, has the potential to significantly affect the Tribunal's workload.<sup>16</sup> The Committee accepts that this may impact on the available resources of the Tribunal, particularly for mediation of native title claimant applications. The Committee will monitor developments in this area.

### *Consultants*

2.27 In its Fourteenth Report, the Committee commented on the use of consultants by the Tribunal and in particular its concern that the declining number of members may mean that the Tribunal may engage consultants to do the work of members. The Committee was pleased to note that this had not yet been necessary and expressed the view that this was not desirable. It undertook in its Fourteenth Report to continue to monitor this issue.

2.28 The Tribunal's report advises that in 1998-99, it engaged 37 consultants with a total expenditure of \$1,007,218. Several of the consultancies will continue into the 1999-2000 financial year.<sup>17</sup>

2.29 The annual report also notes that, in the current reporting year, several former members of the Tribunal have been engaged as consultants to continue mediation services in relation to applications they had been working on before their terms expired. In at least one case, a former member of the Tribunal was also engaged on a consultancy that was not a continuation of previous work while a member of the Tribunal.<sup>18</sup>

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14 p 78

15 NNTT Annual Report 1998-99, p 17

16 pp 17-19

17 p 159

18 pp 179-181

2.30 The President of the Tribunal, Mr Graeme Neate, advised the Committee that there were three former members who were engaged as consultants. He stated:

In each case, the former member was retained in relation to some specific matters – certainly not all the matters that they had as a member, but some specific matters. Ordinarily, where that member was heavily involved in a matter which had reached an advance stage, it was highly preferable that that member or that person see that matter through, at least to the next stage. In some cases, it was two or three stages beyond that. This was also in the context of the declining membership basis of the Tribunal. So there were positive reasons in respect of each particular consultancy – that is, there was good reason for that consultant to be engaged for that particular matter or for those particular matters<sup>19</sup>

2.31 On 2 February 2000, the Commonwealth Attorney-General announced the appointment of six new members of the Tribunal – three full time and three part time. As noted in its Fourteenth Report, the Committee believes that the most appropriate response to an increase in members' workload is the appointment of additional members, rather than the engagement of consultants to undertake the work of members. The Committee accepts why this may have been necessary in the reporting period given the reduction in the number of members. However, it welcomes the appointment of six additional Tribunal members and expects that this will reduce the need to engage consultants in a mediation capacity in future.

2.32 This expectation was reflected by Mr Neate's evidence at the public hearing:

... in more recent contracts that have been entered into, in prospect of new members being appointed we have actually put in conditions that these contracts are subject to a staged handover to incoming members. Indeed – and this may well be reflected in next year's annual report – a number of these consultancies have in fact been terminated or have petered out because the level of activity which was anticipated did not occur because the negotiations were stalled for reasons unrelated to the consultant and so on. This is not a matter of just necessarily keeping a member on until the end of the matter; sometimes these are staged things to take them through to the next stage, which may include the appointment of a new member.<sup>20</sup>

#### *Public information and media*

2.33 Disseminating information to the public and key stakeholders in the native title process is critical to ensuring that all parties have access to accurate, timely and clear information about native title, and in particular the native title process.<sup>21</sup>

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19 Evidence, 14 March 2000, p NT 20

20 Evidence, 14 March 2000, p NT 20

21 pp 15-16, 31-32, 118-124

2.34 The Tribunal advised that most of its public information activities in 1998-99 were directed to assisting claimants, their representatives and other stakeholders in understanding the amendments to the Native Title Act and what they meant in practice. In the President's report, he observed:

There is still much misunderstanding about native title. Some people are fearful, apprehensive and even antagonistic because they believe that native title will adversely affect their interests. Others see native title as having much more promise for them than it can deliver.

A sound understanding of native title, and its interaction with the rights and interests of others, is an important precondition to successful mediation.<sup>22</sup>

2.35 The Committee has encountered a similar level of misunderstanding about native title in its consultations and public hearings across the country. This is a matter of some concern for the Committee and the Committee welcomes the President's recognition of the need for practical, straightforward information to achieve negotiated outcomes.<sup>23</sup>

2.36 The Committee acknowledges the Tribunal's limited resources and the impact on those resources of the necessity for it to undertake this public information role. The Committee commends the Tribunal for its dissemination of plain-English information about native title to applicants and other key stakeholders.

### **Effect of amendments to the Native Title Act on Tribunal operations**

2.37 The Tribunal annual report for 1998-99 devotes considerable effort to the issue of legislative and operational changes, and the effect of these changes on the Tribunal throughout the reporting period. The Tribunal President's report states that 'transition is the unifying component or theme in this annual report'.<sup>24</sup>

2.38 In particular, the Tribunal's annual report focuses on the amendments to the Act which have had a significant impact on the Tribunal's functions and resources. These include the:

- a) registration test;
- b) relationship between the Tribunal and the Federal Court; and
- c) new Indigenous Land Use Agreement (ILUA) provisions.

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22 NNTT, Annual Report 1998-99, p 16

23 NNTT, Annual Report, p 16

24 pp 8-9

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### *The Registration Test*

2.39 The impact of the new registration test on the Tribunal workload and resources is discussed above. The application of the new registration test also had a number of other impacts, both positive and negative, on the Tribunal's operations and the operation of the *Native Title Act 1993* generally.

2.40 The negative impact of the registration test included lack of resources to undertake mediation of claims, confusion, and the generation of some negative feelings in relation to mediation. The Tribunal's annual report noted that:

The Test has consumed many of the resources of the Tribunal and of the representative bodies for most of the year. The resources available to continue mediation of native title determinations have been severely limited. There has been widespread confusion among applicants, and even their representatives, about the relationship between the registration test and the determination process, with the demands of the registration test often generating bad feeling that has spilled over into the mediation. The registration test has also meant that parties other than the applicants have been to a large extent neglected, also creating difficulties for the resumption of mediation.<sup>25</sup>

2.41 However, it should be noted that one of the positive aspects of the new registration test is the role that test has played in reducing the number of overlapping native title claims. The problem of overlapping claims was more pronounced in some areas than others, for example the Goldfields in Western Australia. Since the commencement of most of the provisions of the *Native Title Amendment Act 1998* in September 1998, the Tribunal has reported that the new registration test, and in particular the criteria relating to group identity, authorisation and disputed overlaps, has required a reassessment by applicants of their claims. The main positive result of this has been the combination of overlapping claims.<sup>26</sup>

2.42 The Tribunal advised that during the reporting period 90 claimant applications were combined into 21, and 43 applications lodged under the original Native Title Act were discontinued. Notably, in the Western Australian Goldfields 33 existing applications were combined into five amended applications. Overall in WA, 81 applications reduced to 15 through the process of combination, in Queensland five reduced to three and in both SA and Victoria, two applications reduced to one.<sup>27</sup>

### *Relationship between the Tribunal and the Federal Court*

2.43 The amendments to the Native Title Act have significantly affected the respective roles of the Tribunal and the Federal Court. The main difference is that all

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25 NNTT, Annual Report, 1998-99, p 47

26 p 47

27 p 75

claims are now commenced in the Federal Court and are then referred to the Tribunal for assessment for registration and mediation. The Federal Court supervises the mediation process.

2.44 To some extent, the relationship between these two bodies is still evolving, although the Tribunal reports that the relationship is already proving to be a dynamic one.<sup>28</sup> Clarification of the relationship between the two bodies is seen as a priority for the Tribunal during the forthcoming year.

#### *Indigenous Land Use Agreements*

2.45 As a result of the amendments, the Tribunal has a new role in the agreement making process under the Act. The amended Act provides for three types of Indigenous Land Use Agreements. The Tribunal's function is to assist with the negotiation of these agreements, or to advise on the process of negotiation and the requirements for registration, when requested by any of the parties to the agreement.

2.46 The Tribunal notes that:

The introduction of the statutory scheme for recognition of ILUAs through registration provides native title parties and other interest holders with more flexibility in relation to proposed developments (future acts) that may affect native title ... Using the registered ILUA vehicle, parties can agree to a 'whole of project' process, or a course of dealings over an extended period. When an ILUA is registered, all native title holders are bound in respect of the particular dealings covered by the agreement, irrespective of whether they are determined native title holders.<sup>29</sup>

2.47 However, the report also notes that similar problems to those resulting from the administration of the registration test were experienced in the negotiation of ILUAs:

The Tribunal's early experience of applications for the registration of ILUAs mirrors the experience in relation to the registration test; applicants were unfamiliar with the process and required assistance to meet the statutory requirements. It is useful for parties contemplating entering into ILUAs and applying for registration to seek guidance from the Registrar and the registration requirements before formulating an agreement and seeking registration.<sup>30</sup>

2.48 The Tribunal expects that the demand for assistance with the negotiation and registration of ILUAs will increase in the future. To assist parties wishing to negotiate and register an ILUA, the Tribunal foreshadowed the publication of a series of booklets. The Committee notes that these booklets have now been published.

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28 p 45

29 NNTT Annual Report 1998-99, p 83

30 NNTT Annual Report 1998-99, p 84

2.49 The Committee is particularly interested in the development of ILUAs as an effective and cost efficient mechanism for resolving native title issues: it is preferable for native title matters to be resolved through negotiation rather than litigation. The Committee sees the ILUA process as an important avenue for reaching agreement about a wide range of native title matters. The Committee is currently considering the ILUA process and the Tribunal's involvement in assisting parties with negotiation and registration and will report on this matter within the next few months.

### **Committee comment**

2.50 As noted in this Committee's 14th report, in the 1997-98 annual report of the Tribunal, the outgoing President, Justice Robert French advised that the amendments offered 'new tools for more flexible and, in some cases, more expeditious resolution of native title claims'.<sup>31</sup> The Committee also noted the comments of the then incoming President, Mr Graeme Neate who advised that:

... people are coming to grips with the new statutory regime and are actively engaging with it in a positive manner, and are reaching agreements ...<sup>32</sup>

2.51 In the public hearing on 14 March 2000, Mr Neate made some further observations in relation to the amendments to the Native Title Act, noting that review by the Federal Court of certain decisions of the Registrar in relation to technical or difficult areas were of assistance in the Tribunal's operations. Mr Neate advised the Committee that at this point he did not believe there were any areas of the Act that were in need of fundamental reform, although the Tribunal was monitoring these matters. He further noted:

I do make the broad observation when I make public utterances on the Act to industry groups that my impression from appearing before this Committee is that there is not any general enthusiasm for wide-ranging amendments to the Native Title Act. I encourage parties on that basis to make the Act work and to negotiate outcomes within the context of the Act rather than saying they wish the Act was worded differently.<sup>33</sup>

### **Conclusion**

2.52 As noted above, the annual report of the National Native Title Tribunal for 1998-99 complies with the statutory reporting requirements. The Committee congratulates the Tribunal for the high standard and professional nature of its report. The Committee will continue to monitor significant issues in relation to the Tribunal's operations, both through the future examination of annual reports under s 206(c) and also through its duties under s 206(d), which includes the obligation to inquire into and report on the effectiveness of the Tribunal.

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31 para 2.33

32 para 2.35

33 Evidence, 14 March 2000, pp 18-19.





## CHAPTER THREE

### THE LAND FUND ANNUAL REPORT 1998-99

#### Statutory reporting requirements

3.1 Statutory requirements in relation to the Land Fund's annual reports are set out in s 193I of the ATSIC Act. They include the requirement for the Minister to cause to be prepared as soon as practicable after the end of 30 June each year a report about the administration and operation of the Land Fund and its supporting legislation.

3.2 The following specific matters are required by s 193I(2) of the ATSIC Act to be included in each Land Fund report:

- a) particulars of amounts credited to the Land Fund during the financial year;
- b) particulars of amounts paid out of the Land Fund during the financial year;
- c) particulars of investments of the Land Fund;
- d) the realised real return on investments of the Land Fund in respect of the financial year;
- e) such other information (if any) as is specified in the regulations.

3.3 Further, copies of annual reports are to be laid before each House of Parliament within 15 sitting days after the completion of the report.<sup>1</sup>

#### Compliance

3.4 The Land Fund Report is included in ATSIC's annual report and part of the report is also reproduced as Appendix 2 to the ILC annual report. ATSIC's 1998-99 annual report was presented to the Minister for Aboriginal and Torres Strait Islander Affairs on 15 October 1999. The report was tabled in the Senate on 22 November 1999 and in the House of Representatives on 23 November 1999. The Land Fund report satisfied the tabling requirements.

#### *Value of the Fund and investment outcome*

3.5 The 1994-95 Budget committed \$200 million to the Land Fund as an interim measure and on 4 July that year \$123,178,000 was appropriated to the Fund. This amount represented the first of nine indexed annual allocations of \$121 million,

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1 Section 193I(3)

indexed to maintain value in 1994-95 dollar terms, from 1995-96 through to 2003-2004. The fourth special appropriation of \$133 686 000 took place on 2 July 1998.<sup>2</sup>

3.6 Two thirds, or 66 percent, of the appropriation is invested to build the Fund's capital base and the remaining 34% is allocated to the Indigenous Land Corporation to enable it to undertake its statutory responsibilities of land acquisition and management. In 1998-99, \$49,718,000 was provided to the ILC and \$83,968,000 was allocated for investment.

3.7 In 2004, Government allocations to the Fund will cease and the ILC will receive the realised real return on investments of the Fund in the previous year. By that time, it was originally envisaged that the capital base of the Fund would be sufficient to guarantee ongoing operational funding for the ILC. However, the last two annual reports of the Fund have suggested that the return on investment may not be sufficient to ensure the target balance envisaged in June 1994.

3.8 From 1 January 1998 the Aboriginal and Torres Strait Islander Land Fund became a Reserved Fund within the Commonwealth Public Account and is now called the Aboriginal and Torres Strait Islander Land Fund Reserve. From 1 January 1998, it is a requirement that monies in the Land Fund be invested in accordance with s 39(8) of the *Financial Management and Accountability Act 1997* (the FMA Act). Previously, monies in the Land Fund had to be invested to comply with the *Audit Act 1901*.<sup>3</sup>

3.9 In its report last year, the Committee noted the Land Fund comments warning that the future earning power of investment was likely to be diminished and that not all funds could be invested at a yield required to achieve the target balance at June 1994. Should this situation continue, the Land Fund report notes that the provision for top up funding<sup>4</sup> may need to be invoked.

#### *Amounts paid out of the Land Fund*

3.10 In the reporting period an amount of \$49,718,000 was drawn down to the ILC from the Land Fund.

#### *Investments and Realised Real Returns*

3.11 On 1 July 1998, the cash balance of the Land Fund stood at \$502,557,122, and with accrued interest it totalled \$506,415,212. The appropriation of \$83,968,000 on 2 July 1998, brought the total investment base to \$590,383,212.<sup>5</sup> The realised real return for the year 1998-99 was 3.00 %.

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2 ATSIIC Annual Report 1998-99, p 223; ILC annual report 1998-99, p 22

3 ILC Annual Report 1997-98, pp.15,16,98

4 Section 193AA ATSIIC Act

5 ATSIIC Annual Report 1998-99, p 224

3.12 ATSIIC advises that the main factor affecting the modest performance of the Fund was the susceptibility of the Land Fund portfolio to the prevailing real return on approved investments to 2004 in the order to 3.50% per annum. New funds are not able to be invested with a sufficient real return to achieve the target balance at June 2004.<sup>6</sup>

3.13 The most recent report advises that, at 30 June 1999, the required real return to reach the target amount had increased to 3.80 % per annum and that as a result, not all funds can be invested at a yield required to achieve the target balance at June 1994. The report advises that the situation will be exacerbated if rates continue to fall, but will improve if interest rates rise.<sup>7</sup>

### **Committee comment**

3.14 The financial statements of the Land Fund annual report for 1998-99 received an unqualified audit. The annual report for the Land Fund for 1998-99 complies with the legislative requirements.

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6 ATSIIC Annual Report 1998-99, p 224

7 ATSIIC Annual Report 1998-99, p 224



## CHAPTER FOUR

### INDIGENOUS LAND CORPORATION ANNUAL REPORT 1998-99

#### The Indigenous Land Corporation

4.1 The Indigenous Land Corporation (ILC) is an independent statutory authority established under s 191A of the ATSIC Act. Section 191B provides for the Council to assist indigenous Australians to acquire and manage land in a sustainable way to obtain economic, environmental, social and cultural benefits.

4.2 Funding for the operations of the ILC is provided from the Aboriginal and Torres Strait Islander Land Fund Reserve (the Land Fund) pursuant to Division 10 of the ATSIC Act. Responsibility for reporting on the Land Fund resides with ATSIC and Chapter Three of this report discusses ATSIC's Land Fund report for 1998-99.

#### Statutory Reporting Requirements

4.3 The statutory requirements in relation to the ILC's annual report are found in s 193K of the ATSIC Act, which applies the requirements found in s 9 of the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) to the ILC.

4.4 Pursuant to s 9 of the CAC Act, the ILC must present a report to the Minister by 15 October each year and the Minister must table the report in both Houses of Parliament as soon as practicable.

#### Other Reporting Requirements

4.5 As stated at p 19 of this Committee's Fifth Report, as a statutory authority, the ILC is required to comply with the *Guidelines for the Content, Preparation and Presentation of Annual Reports by Statutory Authorities* tabled in the Senate on 11 November 1982. In summary, the guidelines require that reports include the following information:

- (i) enabling legislation;
- (ii) responsible Minister;
- (iii) powers, functions and objects;
- (iv) membership and staff;
- (v) financial statements;
- (vi) activities and reports;
- (vii) operational problems; and
- (viii) subsidiaries.

## Compliance with reporting requirements

### *Tabling*

4.6 The report was presented to the Minister on 30 September 1999 and tabled in both the Senate and the House of Representatives on 19 October 1999. It accordingly satisfied the tabling requirements.

### *Enabling legislation*

4.7 At page 16 of its annual report, the ILC complied with the requirement to clearly state the legislation under which it operates.

### *Responsible Minister*

4.8 The ILC complied with the guidelines in respect of this item at page 16.

### *Powers, functions and objects*

4.9 The Council's report details the core powers and functions of the ILC.<sup>1</sup> It lists the priorities required under the ATSIC Act in relation to its land acquisition and land management functions. This discussion is enhanced by references to the relevant sections of the ATSIC Act.

4.10 In its Report on annual reports for 1995-96, the Committee recommended that a more complete treatment of the ILC's powers be outlined under the Functions and Powers section of the ILC report.<sup>2</sup> In particular the Committee recommended that it consider the specific constraints on the ILC's borrowing of capital pursuant to Division 11 of Part 4A of the ATSIC Act. The Committee is pleased to note that the ILC's 1998-99 annual report follows the format of the 1996-97 annual report and provides detailed information of its functions and powers, including limitations on the ILC's ability to borrow and enter into guarantees.<sup>3</sup>

### *Membership and Staff*

4.11 The ILC reported on membership and staff at pages 86-90 of the annual report under consideration. The report includes tables on staffing in divisional offices, salary range and staffing structure.<sup>4</sup>

4.12 At 30 June 1999, the ILC employed 52 staff, compared with 35 at the end of the previous reporting period. The ILC reported that this increase in staffing levels was necessary due to the significant increase in both land acquisition and land management activities in the reporting period. It attributes this increased workload to

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1 Indigenous Land Council Annual Report 1998-99, pp 16-18

2 Report on Annual Reports for 1995-1996 prepared pursuant to Part 4A of the ATSIC Act 1989, June 1997, p 9

3 pp 16-18

4 pp 88-90

the fact that the purposes and achievements of the ILC are becoming more widely understood. Most of the additional staff were employed in the Divisional offices and not the head office in Adelaide.

4.13 The Committee notes that the ILC has provided information on consultants<sup>5</sup> as recommended by the Committee in its Thirteenth Report.<sup>6</sup>

#### *Financial statements*

4.14 The Minister's delegate approved the form of the financial statements for the ILC on 8 June 1995, as advised at p 21 of the Committee's Fifth Report.

4.15 The ILC's financial statements were audited by the Australian National Audit Office and an independent audit report was issued on 9 September 1999 (reproduced at pp 95-97 of the ILC report). The Australian National Audit Office report confirmed that the financial statements of the ILC for 1998-99 gave a true and fair view of the financial position of the ILC in accordance with the applicable Accounting Standards, other mandatory professional reporting requirements and Schedule 2 of the Finance Minister's Orders.<sup>7</sup>

#### *Activities and Reports*

4.16 The primary functions of the ILC relate to land acquisition and land management pursuant to ss 191D and 191E respectively of the ATSIC Act. The ILC has reported<sup>8</sup> that when performing its land management and acquisition functions, the ATSIC Act requires it to give priority to:

- a) ensuring that, as far as practicable, indigenous peoples derive social, cultural and environmental benefits (s 191F(2)(aa));
- b) ensuring that it has access to the necessary skills and resources required for the performance of its functions (s 191F(2)(a)); and
- c) maximising the employment of indigenous peoples and the use of goods and services provided by Indigenous owned or controlled businesses (s 191F(2)(b) & (c)).

4.17 The ILC must also apply sound business principles when acting commercially (s 191F(1)).

4.18 The new Chair of the ILC, Ms Sharon Firebrace, advised the Committee that the composition of the seven-member ILC board had substantially changed since the

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5 pp 90-91 and Appendix 3

6 Report on Annual Reports 1996-97, p 20

7 p 97

8 p 16

end of the reporting period.<sup>9</sup> Five new members had been appointed. She further advised that:

From an administrative point of view, we are undergoing certain internal reviews and restructures in order to become more effective and more efficient so that we can address the needs of indigenous peoples within our sphere of operation.

We also need to look at how we are going to address the NILS and the RILS policies – that is, the National Indigenous Land Strategy and the Regional Indigenous Land Strategy. That too is currently under review with our current policies. We are looking towards a forum on 17 and 18 March this year to look at a process by which we are going to address, in particular, our policies ...<sup>10</sup>

4.19 The report of the outgoing Chair, Mr David Ross, in the 1998-99 annual report advised that it was not yet possible to tell whether the change in membership of the ILC board heralded a new strategic direction in terms of ILC policy.<sup>11</sup> Given that the new Chair has advised a review of ILC policy by the new board, the Committee will continue to take a close interest in any changes in policy direction by the ILC, in particular to ensure that it continues to fulfil its statutory functions in relation to land acquisition and land management.

#### *Land acquisition*

4.20 The ILC's land acquisition functions are outlined in s 191D in Part 4A of the *Aboriginal and Torres Strait Islander Commissioner Act 1989* (the ATSIC Act). In carrying out its land acquisition functions, pursuant to s 191D(3), the ILC is required to give priority to:

- a) acquiring and granting land to Aboriginal or Torres Strait Islander corporations;
- b) acting as an agent for these corporations where it makes grants for land acquisition; and
- c) divesting the land it acquires within a reasonable time.

4.21 ILC policy is to divest title, wherever possible, within 12 months of acquisition, to an Aboriginal or Torres Strait Islander corporation representing as far as possible the traditional owners of the land. This policy enables the Council to meet

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9 Evidence, 15 February 2000, p 1

10 Evidence, 15 February 2000, p 1

11 p 7



its statutory requirement to divest within a reasonable time. Divesting within 12 months of purchase also has the advantage of an exemption from stamp duty.<sup>12</sup>

4.22 In accordance with recommendations made by the Committee in its Eighth Report, the ILC has again provided a detailed account of its land purchases and divestments for 1998-99. A map at p 27 details ILC land purchases and divestments for 1998-99 and a table at p 28 shows the breakdown between properties approved for purchase, settled properties and divested properties for the period 1996-99. A pie chart records the total cost of properties settled on a regional basis. One deficiency here is the absence of a figure showing the total expenditure on land acquisition.

4.23 The ILC Board approved the purchase of 69 properties to 30 June 1999 compared with 77 in the 1997-98 reporting period. This is a decrease of more than 10%. However, the ILC purchased 54 properties in the reporting period compared with 30 in 1997-98. The total number of properties acquired by the ILC is 99.<sup>13</sup>

4.24 At the end of the reporting period negotiations were continuing for the purchase of 32 properties.<sup>14</sup> The ILC's report notes that the Board rescinded one approval that had been made in the previous reporting period although it gives no reason for this recision. Further, one approval that was conditional upon the unavailability of another property was rescinded following the successful acquisition of the alternative property.

4.25 The ILC was unsuccessful in its attempts to purchase 64 properties of the 197 approved for purchase. Reasons included the fact that negotiations ended or were suspended without agreement as to price or other conditions or the property was sold to another buyer.<sup>15</sup>

4.26 As it has advised in previous annual reports, the ILC maintains a strict policy of not paying more than the recommended valuation range for properties it wishes to purchase. In 1998-99, 37 of the 54 properties acquired by the ILC (approximately 68%) were purchased at or below market valuation, with the remainder being purchased within the range recommended by the valuer.<sup>16</sup> This is consistent with the experience of the ILC in the previous reporting period.

4.27 During the reporting period, the ILC divested 26 properties to Indigenous Corporations, with a total of 40 properties being divested by the ILC at 30 June 1999. The 1998-99 annual report advises that divestments almost doubled in the reporting

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12 Section 193P, ATSI Act

13 Table 2, p 28

14 p 30

15 p 30

16 p 27

period and that this represented the most significant increase in activity for the ILC and demand on resources.<sup>17</sup>

4.28 The 1997-98 annual report of the ILC reported that at 30 June 1998 the ILC held title to a further 31 properties that it expected to divest to indigenous groups in 1998-99.<sup>18</sup> The current report advises that 20 of these properties were divested during the reporting period. The balance remained undivested, primarily as a result of disputes about traditional land ownership or the membership of the title holding body.

#### *Land management*

4.29 The ILC's land management functions are outlined in s 191E of the ATSIC Act. Subsection 3 requires the ILC to give priority to:

- a) pursuing sound land and environmental management practices;
- b) only granting money or making loans where alternative approaches are impracticable; and
- c) directly involving indigenous land holders in activities where the ILC is involved in land management activities in agreement with the holders of indigenous-held land.

4.30 1998-99 is the second year that the ILC has had sole program responsibility for land management. Until 1 July 1997, land management functions were also exercised by ATSIC. These shared land management arrangements were considered by the Committee in its thirteenth and fourteenth reports and are further discussed below.

4.31 The ILC is responsible for land management on all Indigenous held land, not just that acquired and divested by the ILC. This means that the ILC is potentially responsible for land management of 15 per cent of the landmass of Australia.<sup>19</sup>

4.32 The Committee is interested in progress that has been made by the ILC in developing its long-term land management policy. The ILC's First Land Management Policy 1997-99 was due to expire in June 1999. The ILC report advises that, in June 1999, the ILC board decided to extend the Policy until 31 December 1999.<sup>20</sup> The ILC has advised the Committee orally that the First Land Management Policy has been further extended.<sup>21</sup>

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17 p 31

18 ILC 1997-98 Annual Report, p 28

19 p 39

20 p 40

21 On 1 August 2000

4.33 In its Fourteenth report, the Committee referred to the ILC's negotiation with the Northern Territory Government, the Northern Land Council and the White Eagle Aboriginal Corporation to address the eradication of the weed *Mimosa pigra*.<sup>22</sup> The ILC annual report for 1998-99 advises that this agreement was signed on 17 September 1998.<sup>23</sup> The committee notes that *M.pigra* was declared a weed of national significance on 1 June 1999.

#### *Operational challenges*

4.34 The ILC annual report for 1998-99 deals with two different sets of operational challenges:

- a) challenges in relation to land acquisition and divestment<sup>24</sup>;
- b) challenges in relation to land management.<sup>25</sup>

4.35 In addition, the ILC report outlines a number of policy challenges which it has faced in 1998-99 in relation to land acquisition and divestment and land management.<sup>26</sup>

#### Land acquisition and divestment

4.36 Significant issues that continue to require attention include:

- a) progress in relation to the Land Needs Planning Process;
- b) obstacles to the purchase of certain types of interests in land; and
- c) the unrealistic expectations of vendors.<sup>27</sup>

4.37 The ILC also reports on ongoing difficulties in meeting its requirement to divest title within a reasonable time, predominantly due to difficulties in establishing an acceptable and appropriate title holding body that includes all of the relevant interests in the land.<sup>28</sup>

4.38 The ILC again reports on some of the difficulties experienced in various states due to legislative restrictions, namely Queensland, Western Australia and Tasmania. These include the restriction in Queensland on corporations (including the ILC) acquiring Grazing Homestead Perpetual Leases and Grazing Homestead Freeholding

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22 para 4.27

23 p 45

24 pp 31-35

25 p 49

26 pp 36-37 and p 50 respectively

27 pp 32-35

28 pp 33-34

Leases, which account for 12 per cent of the land mass in that state. While the ILC has made some progress in relation to an interim solution to this problem, the restriction continues to cause some problems for the ILC in undertaking its land acquisition activities in Queensland.

4.39 The Committee notes that these various state restrictions place limitations on the ILC's ability to implement nationally consistent land acquisition and divestment policies. The Committee would welcome continuing advice from the ILC about its progress in resolving these issues.

4.40 One of the main operational challenges identified by the ILC in its annual report are the aspirations by Indigenous people for future economic development.<sup>29</sup> Economic development for Indigenous communities is critical but does not always fit easily with the ILC's primary aims for acquiring land, one of which is its cultural significance. The ILC has recognised that 'economic aspirations [of Indigenous people] need to be identified and integrated with the community's cultural priorities as early as possible'.<sup>30</sup>

4.41 The ILC reports that it has taken steps to ensure that this happens, by committing more resources to its Land Needs Planning Process (LNPP), adopting a more integrated approach to its land acquisition and land management activities and involving Land Enterprises Australia (LEA) staff at the pre-acquisition stage wherever appropriate.<sup>31</sup>

4.42 The operational challenges facing the ILC in relation to its land acquisition and divestment functions and activities are familiar to the Committee and have been reported on in previous annual reports of the ILC. The Committee accepts that these are difficult issues and commends the ILC for the progress it has made in responding to these challenges and finding practical solutions to the problems it encounters.

### Policy challenges

4.43 The main policy challenges that the ILC has identified relate to divestment and to native title. The interrelationship between the ILC's activities and native title is discussed below under the ILC's response to the Committee's Fourteenth report.

4.44 In relation to its divestment policy, the ILC report states that the primary challenges are:

- a) to ensure that the ILC does not itself act as an agent of dispossession;
- b) to avoid causing or exacerbating conflict within communities over land issues; and

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29 pp 35, 36

30 p 35

31 p 35

- c) to ensure that its policy is flexible enough to properly accommodate the agreed and recognised interests in land in the title-holding arrangements.<sup>32</sup>

4.45 The ILC reports that its policy in this regard must ‘respect the right of indigenous peoples to determine land ownership issues and respect the dynamic processes of contemporary native title law’.<sup>33</sup>

#### Land management

4.46 The ILC reports that no additional operational challenges in relation to land management arose in the reporting period. It therefore outlines the operational challenges it has faced in relation to land management in much less detail than in previous reports, and in particular compared to its 1997-98 Annual Report.<sup>34</sup>

4.47 The continuing challenges reported on include:

- a) the magnitude of existing land management needs;
- b) the initial low rate of return to the ILC’s Land Use/Land Management surveys;
- c) resourcing issues relating to the implementation of the ILC’s First Land Management Policy; and
- d) the resources required to effectively manage and communicate the new direction of land management policy under the ILC.

4.48 The ILC also reports briefly on the progress it has made in responding to these issues. It reports that it has made significant progress in managing and communicating change, which it believes has led to a far greater response to its Land Use/Land Management survey.

4.49 As part of the response to these challenges, the ILC has commissioned research, which it argues is essential to the development of its new land management policy, the *National Land Management Response*.<sup>35</sup> As discussed above, the ILC Board decided to extend the operation of its First Land Management Policy, predominantly because more time was required for the development of its new land management policy.

4.50 Oral advice from the General Manager of the ILC on 1 August 2000, indicated that the revised land management policy was still being developed and the

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32 p 36

33 p 36

34 p 49

35 at p 49

First Land Management Policy would continue to operate until the revised policy was finalised.

### *Subsidiaries*

4.51 Section 191G of the *Aboriginal and Torres Strait Islander Commission Act 1989* provides that the ILC may enter into an arrangement with a subsidiary. Section 191G(5) provides for a subsidiary to perform functions corresponding to the ILC's land management function.

### Land Enterprises Australia

4.52 In 1998-99, the ILC established a wholly owned subsidiary, Land Enterprises Australia (LEA), foreshadowed in the ILC's annual report for 1997-98, to oversee or control its commercial land management operations and the management of land-based businesses purchased by the ILC.<sup>36</sup>

4.53 The ILC reports that the aim of LEA is to:

- a) assist in the development of commercially profitable, Indigenous-owned, managed, and operated, land-based enterprises through:
  - i) rigorous commercial assessment of land, labour and capital involved in existing enterprises on Aboriginal land or land that is to be acquired on behalf of Aboriginal peoples;
  - ii) extensive community consultations and assessment of the capacity of the community; and
  - iii) ongoing commercial development advice, which will include advice on human resource, land and infrastructure development.<sup>37</sup>

4.54 The ILC report advises that the board saw several advantages in incorporating a subsidiary to undertake the commercial land management functions of the ILC. In particular, the ILC advised that the incorporation of LEA created separate potential liabilities and provided security for the ILC's own assets.<sup>38</sup>

4.55 At the public hearing on 15 February 2000, the General Manager of both the ILC and LEA, Mr John Wilson, advised that the ILC board had taken the decision in June last year that LEA would be fully funded by the ILC and would not actually control any funds.<sup>39</sup> Mr Wilson further advised:

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36 p 53

37 p 55

38 p 54

39 Evidence, 15 February 2000, p 18

I cannot promise you its [LEA's] future only in the context that you heard my chairman talk about a policy review meeting in April. One of the issues that will be talked about there is what sort of policies this board is going to have with respect to land acquisition and management. Depending on the answer, that may well have an impact on the ongoing role for Land Enterprises Australia.<sup>40</sup>

4.56 The Committee is particularly interested in the ongoing role of LEA in land management and will continue to monitor this issue closely. In particular, the Committee questions whether it was necessary to establish the subsidiary, LEA, in the first place, given the ILC's primary statutory responsibilities for the acquisition and management of land.

4.57 The Committee is concerned at the justification for the establishment of the LEA. The Committee has written to the ILC, requesting information on the respective roles, liabilities and establishment of the ILC and the LEA. That letter is at Appendix Four.

#### Other subsidiaries

4.58 LEA has responsibility for the management of the ILC's other subsidiaries, Mogila Merino Stud Pty Ltd,<sup>41</sup> Mt Clarence Pastoral Company Pty Ltd,<sup>42</sup> and Cardabia Pastoral Company Pty Ltd.<sup>43</sup> These subsidiaries were established to manage sheep properties in NSW, Western Australia and South Australia respectively. The ILC Annual Report comments on these three subsidiaries in detail at pages 55-58. A list of the directors and meeting dates of the ILC subsidiaries, including LEA is contained at Appendix 5 of the ILC report.

4.59 The ILC 1998-99 report also outlines the other functions and activities of LEA which include responsibility for several long-term enterprise development projects on behalf of the ILC.<sup>44</sup> These include the Kimberley Aboriginal Beef Strategy and the Central Australian Aboriginal Horticultural Development Strategy.

#### *Consultation*

4.60 The ILC Annual Report lists its community consultations for the reporting period at Appendix 7.<sup>45</sup>

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40 Evidence, 15 February 2000, p NT 18.

41 ACN 078 466 761

42 ACN 079 814 976

43 ACN 080 766 463

44 p 59

45 pp 150-158

### *Publications*

4.61 A list of the ILC's publications for 1998-99 is contained at Appendix 6 of the Annual Report.<sup>46</sup> Of particular note amongst the ILC's publications for 1998-99 was a booklet to explain the Property Management Planning process.<sup>47</sup>

### *Summary*

4.62 The 1998-99 annual report of the Indigenous Land Corporation complies with the legislative and other requirements. However, the Committee is concerned that the revised land management policy is yet to be finalised.

### **Response to the Committee's Fourteenth Report**

4.63 In its Fourteenth Report, the Committee drew attention to certain specific matters about the ILC's 1997-98 annual report, including:

- a) the ILC's responsibility for and expenditure on land management for ILC held properties;
- b) ILC policy in relation to land over which there is a native title claim; and
- c) ILC comments in relation to the status of the Aboriginal and Torres Strait Islander Heritage Protection Bill.

### *Land Management*

4.64 The Committee's fourteenth report considered the issue of the ILC's responsibility for land management of Indigenous held land and particularly whether there was shared land management between the ILC and ATSIC before the ILC assumed full program responsibility for land management from 1 July 1997.

4.65 The Committee welcomed advice from the ILC that its 1998-99 annual report would deal in more detail than previous reports with the issue of land management and land holding costs incurred by the ILC in the reporting period.

4.66 The ILC annual report refers specifically to the Committee's concern about the detail of information provided in relation to land management expenditure in respect of land held by the ILC and the information that it subsequently provided to the Committee.<sup>48</sup>

4.67 Appendix four of the ILC's 1998-99 annual report details the ILC's land management expenditure for the financial year in the reporting period. The Committee is pleased to note that it contains details of the net income derived from ILC-held land

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46 p 149

47 p 67

48 pp 51, 52



as well as land holding and land management costs on ILC-held land for the financial year under consideration.

4.68 The recent report by the Australian National Audit Office (ANAO) on the operation of the ILC also drew attention to this matter. The ANAO report notes that the distinction between land management assistance on ILC held land (which may be regarded as a land-holding rather than a land management expense) and other land management expenditure is not clearly defined in the ATSIC Act. The ANAO noted that this had caused some confusion in the ILC and had affected the way in which the ILC had accounted for and reported expenditure on land management.<sup>49</sup>

### Native Title

4.69 When considering a land acquisition, the ILC is required to search the National Native Title Tribunal registers to ascertain whether there have been any claims lodged, accepted or determined in relation to the property in question.<sup>50</sup>

4.70 Further the ILC's National Strategy and its guidelines state that the ILC will give priority to acquiring land for indigenous people where no native title claim has been lodged or where such a claim is unlikely to be successful and where those peoples' land needs and aspirations cannot be recognised through other mechanisms.

4.71 In its Fourteenth Report, the Committee drew attention to the potential inconsistency between these policies and statements by the ILC, which suggested that the ILC would continue to acquire land even where a native title claim was pending. This is particularly so if it was believed that the chances of the claimed native title amounting to anything akin to full beneficial ownership was unlikely.<sup>51</sup>

4.72 The then General Manager of the ILC, Mr Murray Chapman, wrote to the Committee following the tabling of the Committee's Fourteenth Report. Mr Chapman rejected the suggestion that the ILC was potentially operating inconsistently with its policies and particularly those under the National Indigenous Land Strategy and the ILC Guidelines. He advised that:

There is clearly a sense in the relevant policy that native title claims may not be successful. In the ILC's view a native title claim over a pastoral lease which effectively delivers little more than limited hunting, foraging and/or certain access rights to a pastoral lease could hardly be described as "successful".

Bluntly, if there is a choice between standing by and watching protracted and divisive litigation over native title on a pastoral lease – litigation which

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49 *Indigenous Land Corporation – operations and performance*, The Auditor-General's Audit Report No.49 1999-2000, Australian National Audit Office Performance Audit, 29 June 2000, p 84.

50 Section 191D(4) ATSIC Act

51 para. 4.21 – 4.23

will almost inevitably consume obscene amounts of money; may or may not be successful; and, even if successful, may deliver little lasting benefit to the "successful" claimants – and buying a property on the open market, the latter will often be the best choice for all concerned.<sup>52</sup>

### Judicial decisions

4.73 The ILC reports in some detail on the effect of native title legislation and judicial development on its activities.<sup>53</sup> Following the High Court decision in *Wik*<sup>54</sup>, the ILC revised its policy and resolved that it would continue to consider proposals to purchase land held under pastoral leasehold. The 1998-99 report advises that the ILC considers proposals for acquisition of land not only in the context of other mechanisms available to meet indigenous land needs (including native title) but also the effectiveness of those mechanisms.<sup>55</sup> The ILC report argues that, given the lack of clarity in this area, it believes that its policy in this regard remains consistent with the intention of its enabling legislation. However, it advises that it will continue to monitor the issue and will review and amend its policy as required, as native title issues are further resolved.<sup>56</sup>

4.74 The Committee believes that the ILC should continue to give priority to acquiring land for indigenous people who are unable to have their land needs met through other means, including native title. The Committee will continue to monitor this issue and welcomes the ILC's advice that it will review its policy as native title issues are further resolved by the courts.

### Aboriginal and Torres Strait Islander Heritage Protection Act 1984

4.75 In its 1997-98 Annual Report, the ILC advised that it had made two written submissions to the Committee's inquiry into the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. In its report, the ILC expressed concern about the fact that the recommendations of the Committee were not taken into account as the legislation to amend the Act was introduced into Parliament on the same day that the Committee released its report on that inquiry.

4.76 The Committee's Fourteenth Report advised that the ILC's 1998-99 report should record that a revised bill, the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* which adopted several of the Committee's recommendations, was introduced into Parliament on 12 November 1998 and record the current status of the amendment Bill.

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52 Letter from Mr Murray Chapman, then General Manager of the ILC to Mr Peter Grundy, Secretary, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 3 September 1999.

53 pp 37, 38

54 *Wik Peoples v Queensland* [1996] 187 CLR 1

55 p 37

56 p 38

4.77 The 1998-99 annual report of the ILC refers to the status of the Heritage Protection Bill as at 30 June 1999.<sup>57</sup> It advises that the ILC made a submission to the inquiry into the Bill by the Senate Legal and Constitutional Committee in the reporting period. It also noted the changes to the bill, which were the result of this Committee's twelfth report. The ILC report also comments on a number of issues of ongoing concern in relation to the Heritage legislation and the effect of insufficient heritage controls in increasing the demand on ILC resources to purchase land.

## **Other Matters**

### *Australian National Audit Office Report*

4.78 The ILC 1998-99 Annual Report states that it is subject to external scrutiny of its activities in a number of ways, including by this Committee and by the formal examination of its activities by the Auditor-General.<sup>58</sup>

4.79 The Australian National Audit Office (ANAO) undertook a performance audit of the operations and performance of the ILC. The report was tabled in Federal Parliament on 29 June 2000. The Committee assisted the ANAO in its review by advising of its monitoring function in relation to the ILC, including the report on annual reports.

4.80 A number of issues that the ANAO report highlights are issues of concern to this Committee, and on which this Committee has made comment over a number of years. For example, the ANAO report draws attention to the confusion surrounding the ILC's reporting of its land management expenditure and activities, in particular in relation to land held by the ILC. This is an issue of particular interest to the Committee and was discussed in some detail in the Committee's consideration of the ILC's 1997-98 Annual Report.<sup>59</sup>

4.81 One issue that was considered at the public hearing on 15 February 2000 was the leaking of the draft ANAO report on the ILC to the media. A number of questions about this matter were asked of the ILC at the public hearing and in writing.

4.82 The ILC responded to the Committee's questions about the ANAO report, and subsequent correspondence from the Committee in writing on 2 August 2000. A copy of the Chair's letter is included in this report as Appendix 3. The Chair of the ILC advised that the ILC board had ultimately decided that this was a matter appropriately dealt with through ILC internal review mechanisms and that the matter would not be referred to the Federal police.

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57 p 52

58 p 20

59 Report on Annual Reports 1997-98, [Fourteenth Report of the Committee]

### **Committee comment**

4.83 The Committee remains dissatisfied with the response from the ILC and intends to pursue the matter in writing with the Chair of the ILC.

#### *Committee's duty to report on ILC Annual Reports*

4.84 As noted in Chapter One, the Committee has had an ongoing concern about its continued duty to report on the annual reports of the ILC as a result of the repeal of the Audit Act and s 193K of Part 4A of the ATSIC Act and the enactment of the CAC Act.

4.85 Following comment in its fourteenth report and ongoing correspondence with regard to this matter, the Committee is pleased that the Minister for Aboriginal and Torres Strait Islander Affairs has directed ATSIC to prepare an amendment to s 206(c) of the *Native Title Act 1993* to ensure the Committee's continuing statutory duty to report on ILC annual reports. This amendment, along with several amendments to Part 4A of the ATSIC Act is due to be introduced into Parliament later this year.

#### *Land acquisition in urban areas*

4.86 The ILC's role in acquiring land in urban areas for dispossessed Indigenous people is not an issue on which the ILC annual report for 1998-99 specifically reports. However, it was considered at the public hearing on 15 February 2000. It is also a matter of considerable ongoing interest for members of the Committee.

4.87 Since its commencement in 1995, the ILC has purchased a number of properties in urban areas which were of significant cultural or historical significance for Indigenous people. These include the Cyprus-Hellene Club in Sydney, which was the site of the first Aboriginal 'Day of Mourning and Protest' during Australia's sesqui-centenary celebrations in 1938.<sup>60</sup> It should be noted that these purchases have not been for housing or accommodation for Aboriginal or Torres Strait Islander people in urban areas.

4.88 At the 15 February public hearing, the Chair of the ILC advised that the need to address the land needs and aspirations of urban dispossessed Indigenous people was an issue that was being considered by the ILC Board. Ms Firebrace advised the Committee that:

People such as you, as well as a number of other people, have presented to our board the need to look at the urban needs of indigenous Australians. If we look at the population, there is something like 70 per cent – I am talking in round figures here – of indigenous people that fit within the urban and large country regional centres. I think Madam Chair, your issue is spot on. It is very direct and very correct in terms of how we should focus.<sup>61</sup>

4.89 While the provision of Indigenous housing is not a specific function of the ILC, it is an issue which requires serious consideration. Arguably, a coordinated response by relevant government departments and agencies, including ATSIC and the ILC, is required. The Committee will continue to monitor ILC activity in urban areas and in particular ILC policies designed to meet the land needs of urban Indigenous people.

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61 Evidence 15 February 2000, p NT 3



## **CHAPTER 5**

### **CONCLUSION**

5.1 The Committee has examined the annual reports for 1998-99 prepared pursuant to Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* and s.133 of the *Native Title Act 1993*. On its examination, the Committee finds them to be satisfactory in terms of fulfilling the annual reporting requirements for government departments.

5.2 However, the Committee will continue to monitor the following two matters in the course of the next reporting period:

- a) Clarification of the Committee's role in relation to the examination of the ILC's Annual Report; and
- b) The establishment of Land Enterprises Australia.

Senator Jeannie Ferris  
**Committee Chair**





## **APPENDIX 1**

### **LIST OF WITNESSES**

**CANBERRA, Tuesday, 15 February 2000**

#### **Indigenous Land Corporation**

Ms Sharon Firebrace, Chairman

Mr Stuart Phillpot, Manager Operations

Mr John Wilson, General Manager, Indigenous Land Corporation and Managing Director, Land Enterprise Australia

**CANBERRA, Tuesday, 14 March 2000**

#### **National Native Title Tribunal**

Mr Graeme Neate, President

Mr Christopher Doepel, Native Title Registrar



## **APPENDIX 2**

### **MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS**

#### **CORRESPONDENCE TO THE COMMITTEE**





**Office of the  
Minister for Aboriginal and Torres Strait Islander Affairs**

PARLIAMENT HOUSE  
CANBERRA, A.C.T. 2600

Mr Peter Grundy  
Committee Secretary  
Parliamentary Joint Committee on  
Native Title and the Aboriginal and  
Torres Strait Islander Land Fund  
Parliament House  
CANBERRA ACT 2600

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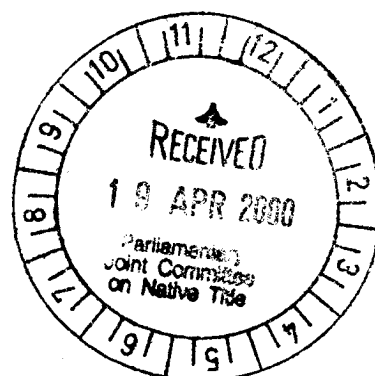
Dear Mr Grundy

Thank you for your letter of 24 February 2000 drawing my attention to the need for an amendment to section 206(c) of the *Native Title Act 1993* (NTA) to ensure that the Parliamentary Joint Committee (PJC) retains a duty to examine and report on the annual reports of the Indigenous Land Corporation (ILC).

The Minister for Aboriginal and Torres Strait Islander Affairs has written to the Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission asking him to arrange for the drafting of the relevant amendment to section 206(c). The amendment is expected to be included with other ILC amendments in the bill to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* that is currently being drafted. The NTA amendment would make specific reference to the PJC's duty to examine the ILC's annual reports, and thereby solve the current problem.

Yours sincerely

Helen McLaughlin  
Chief of Staff





*Minister for Aboriginal and Torres Strait Islander Affairs*

PARLIAMENT HOUSE  
CANBERRA. A.C.T. 2600

Mr Mark Sullivan  
Chief Executive Officer  
Aboriginal and Torres Strait Islander Commission  
PO Box 17  
WODEN ACT 2606

27 MAR 2006

Dear Mr Sullivan

I am writing to ask you to include an additional amendment with the other Indigenous Land Corporation (ILC) amendments in the bill to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act) that is currently being drafted. The need for the additional amendment has been drawn to my attention by the Secretary to the Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund (the PJC).

Under section 206(c) of the *Native Title Act 1993* (the NTA) the PJC is required to examine and report on "each annual report that is prepared ... under Part 4A of the ATSIC Act". In the past the PJC has reviewed the Indigenous Land Corporation's annual reports prepared under section 63H of the *Audit Act 1901* (the Audit Act) as applied by section 193K of Part 4A of the ATSIC Act. Now, however, the Audit Act has been repealed and is replaced by the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). As part of the consequential amendments to the enactment of the CAC Act, section 193K of the ATSIC Act was repealed and replaced with a new section 193K. Under that new section, ILC annual reports are now prepared pursuant to section 9 of the CAC Act, and are no longer prepared pursuant to Part 4A of the ATSIC Act. Consequently the PJC no longer has a specific duty to consider the ILC's annual reports.

In order to rectify this anomaly an amendment to section 206(c) of the NTA needs to be included with other ILC and Indigenous Land Fund amendments in the bill that ATSIC is currently having drafted. These additional amendments are of a minor and technical nature, and do not require further policy approval.

Yours sincerely

SENATOR JOHN HERRON

**APPENDIX 3**

**ILC CORRESPONDENCE ON UNAUTHORISED RELEASE OF ANAO  
REPORT**



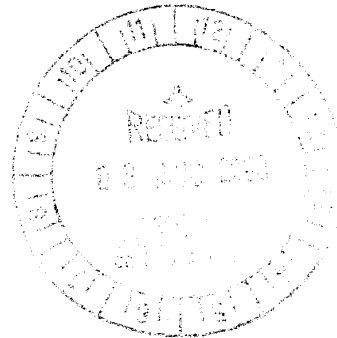




**INDIGENOUS LAND CORPORATION**

2 August, 2000

Ms Robina Jaffray  
A/g Secretary  
Parliamentary Joint Committee on Native Title and  
the Aboriginal and Torres Strait Islander Land Fund  
Parliament House  
CANBERRA ACT 2600



Dear Ms Jaffray,

**DRAFT AUDIT REPORT - UNAUTHORISED RELEASE**

I refer to your letters of 10 April and 24 July, 2000, regarding this matter, and apologise for not responding to the earlier correspondence. I was under the impression that this matter had been dealt with.

My letter of 29 February, 2000 to the Auditor General was forwarded after consulting Mr Bill Miller, Director Evaluation and Audit ATSIC whom I met on 14 February, 2000 to discuss concerns with newspaper articles relating to Roebuck Plains Station, and the findings of the draft audit report.

I am enclosing a copy of the Auditor General's response to my letter. You will note that the Auditor General believes "it is highly unlikely that the report referred to in the Sydney Morning Herald was leaked from this (ANAO) office". The Auditor General noted my intention to approach ATSIC's Office of Evaluation and Audit to conduct an investigation into this matter.

I subsequently discussed this case with Mr Bill Miller, Director Evaluation and Audit who felt it was preferable to review the adequacy of ILC's internal control systems to ensure the safeguarding of current and future sensitive and confidential material. He felt this would be a more positive response to the matter, than seeking a Federal Police investigation. I briefed the Chief Executive Officer (CEO) of the ILC to act accordingly. I also formally referred the Audit Issues Papers and Mr Miller's report and recommendations to the CEO requesting him to brief me, and the Board, on actions taken or proposed to be taken to address the matters raised.

The CEO initiated the preparation of a report but this was not finalised before the ILC Board met on 8 May, 2000. At that meeting the Board discussed the Audit Report and Mr Miller's report and was briefed by Mr Miller and Dr Paul Nicholl of the ANAO on

**HEAD OFFICE**  
GPO Box 652  
Adelaide SA 5001  
Ph: (08) 8407 5900  
Fax: (08) 8212 7264  
Email: [ilc@ilc.gov.au](mailto:ilc@ilc.gov.au)

**CENTRAL**  
(SA, VIC, TAS, NT)  
GPO Box 652  
Adelaide SA 5001  
Ph: (08) 8407 5900  
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**EASTERN**  
(QLD, NSW, ACT)  
PO Box 217, Albert St  
Brisbane Qld 4002  
Ph: (07) 3270 3750  
PRINT TIME 22:02'77

**WESTERN**  
(WA)  
PO Box 7502, Cloisters Sq.  
Perth WA 6850  
Ph: (08) 9360 4300  
2.AUG. 22:04'00 (08) 9324 2225

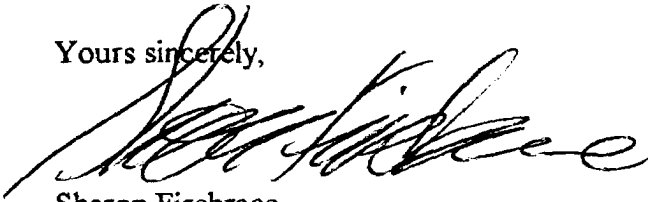
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their respective reports. I was not present at this stage of the Board meeting but Minutes of Meeting record that the Board agreed to initiate a response to the 10 recommendations of the Performance Audit and "is taking what it considers to be appropriate responses to the issues raised by both Dr Nicholl and Mr Miller". The Board did not resolve to refer any matter to the Federal Police.

I trust this will assist the Committee's deliberations.

I have forwarded a copy of this letter to the Auditor General for his information.

Yours sincerely,



Sharon Firebrace  
Chairman

## **APPENDIX 4**

### **CORRESPONDENCE FROM COMMITTEE TO ILC ON ESTABLISHMENT OF LAND ENTERPRISES AUSTRALIA**





PARLIAMENT OF AUSTRALIA

PARLIAMENTARY JOINT COMMITTEE ON  
NATIVE TITLE AND THE ABORIGINAL AND  
TORRES STRAIT ISLANDER LAND FUND  
PARLIAMENT HOUSE, CANBERRA ACT 2600

TELEPHONE: (02) 6277 3598

FACSIMILE: (02) 6277 5706

EMAIL: [nativetitle.joint@aph.gov.au](mailto:nativetitle.joint@aph.gov.au)

INTERNET: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/index.htm)

Mr John Wilson  
General Manager  
Indigenous Land Corporation  
GPO Box 652  
Adelaide SA 5001

Dear Mr Wilson

**ANNUAL REPORT 1998/99 - OPERATIONS OF LAND ENTERPRISES  
AUSTRALIA**

The Committee is currently considering the Indigenous Land Corporation's (ILC's) Annual Report of 1998/99. In that report the ILC advises on the establishment of Land Enterprises Australia (LEA).

The Committee has a number of questions for the ILC on this matter and these are attached.

Please do not hesitate to contact me on (02) 6277 3598, if you have any questions in relation to this matter.

Yours sincerely

**Robina Jaffray**  
Acting Secretary

24 August 2000

Attachment: Questions relating to Land Enterprises Australia

**Parliamentary Joint Committee on Native Title and the Aboriginal and  
Torres  
Strait Islander Land Fund**

**QUESTIONS RELATING TO LAND ENTERPRISES AUSTRALIA**

1. What was the legal and financial rationale for the establishment of LEA?
2. What actual advantage was envisaged in the establishment of LEA?
  - 2.1. Please provide legal and financial advice received in relation to the establishment of LEA. You should also provide the Minutes of any Board meetings at which this issue was considered.
3. How is LEA established? What are its Articles of Association?
4. What are the roles and responsibilities of LEA as opposed to that of the ILC?
  - 4.1. What accountability requirements does LEA fulfil to the ILC?
  - 4.2. How is any liability accruing to LEA prevented from attaching to the ILC?
5. Please provide the following details for Directors of the Boards of ILC and LEA:
  - 5.1. Name and position
  - 5.2. Remuneration, including details of remuneration for chairing sub-committees etc.

24 August 2000