

about

THE ILC

Purpose

The ILC is an independent statutory authority established to provide economic, environmental, social and cultural benefits for Aboriginal people and Torres Strait Islanders, by assisting in the acquisition and management of Indigenous-held land. To assist in achieving this purpose, the ILC received an annual draw down from the Aboriginal and Torres Strait Islander Land Fund from 1995–1996 until 2003–2004. From 2004–2005, the ILC began receiving the annual realised real return from the investments of Land Fund to fund all of its activities.

Enabling Legislation

The establishment of the Land Fund was part of the Australian Parliament's response to the High Court's decision in the Mabo case. The first part of its response was the enactment of the *Native Title Act 1993* (NTA), while the establishment of the Land Fund, and subsequently the ILC, was the second part.

The ILC came into existence on 1 June 1995, following passage of the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. This repealed Part 10 of the NTA and amended the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) by adding a new Part 4A, establishing the ILC as a Commonwealth Authority¹ with land acquisition and land management functions².

The Aboriginal and Torres Strait Islander Commission Amendment Act 2005 had the principal aim of abolishing the *Aboriginal and Torres Strait Islander*

Commission (ATSIC). It also renamed the ATSIC Act as the *Aboriginal and Torres Strait Islander Act 2005* (the ATSI Act). The substance of Part 4A regarding the ILC was largely preserved, subject to some changes following ATSIC's abolition. In particular, the two ATSIC Commission positions on the ILC's Board were replaced by two positions appointed by the Minister.

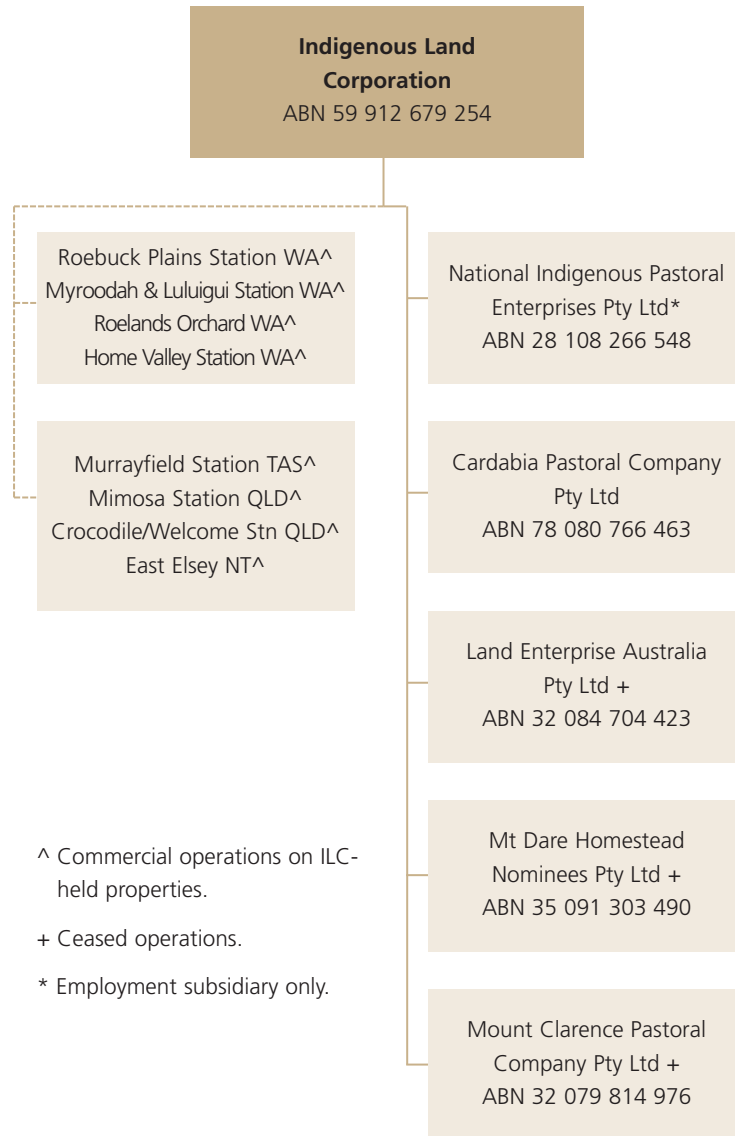
Some further provisions were inserted to both clarify and enhance the powers of the ILC (e.g.: s. 191D (1A) and s. 191EA ATSI Act). Money that formerly constituted ATSIC's Regional Land Fund and fifteen properties that were owned by ATSIC were vested in the ILC.

In 2005, the *Financial Framework Legislation Amendment Bill (No. 2) 2005* changed the name of the Aboriginal and Torres Strait Islander Land Fund to the Aboriginal and Torres Strait Islander Land Account.

¹ s.191A ATSIC Act

² s. 191C ATSIC Act

Figure 1: Structure of the ILC and its Subsidiaries



Responsible Minister

The Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough, became the Portfolio Minister responsible for the ILC during the year. He is thus the primary parliamentary spokesperson on matters associated with the ILC.

The Minister is not empowered to direct the ILC in relation to any of its activities except as expressly provided for in the ATSI Act or under provisions of the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

The ILC is required by the CAC Act to inform the Minister of any events of significance³, such as its involvement in business ventures. The ILC is also required⁴ to keep the Minister informed of its operations and provide the Minister, and additionally the Minister for Finance and Administration, with reports, documents and information in relation to the operations of the ILC as from time to time required.

The ILC is required to provide the Minister with a copy of the National Indigenous Land Strategy (NILS) and a copy of any changes to the NILS⁵. The Minister is required to table these in Parliament⁶. The ILC is required to prepare Regional Indigenous Land Strategies (RILS) and provide the Minister with a copy of any RILS on request⁷.

In December 2004, the Prime Minister requested that the Minister for Finance and Administration assume joint oversight responsibilities for the ILC. A draft Joint Ministerial Oversight Arrangements document, which sets out legislative and protocol arrangements to facilitate joint Ministerial oversight of both the ILC and the Land Account, was developed. At 30 June 2006, draft arrangements were under consideration by the Department of Finance and Administration and the Department of Families, Community Services and Indigenous Affairs.

³ S.15

⁴ S. 16

⁵ S. 191N(6)

⁶ S. 191N(7)

⁷ S. 191P(8)

Functions and Powers

FUNCTIONS

The Aboriginal and Torres Strait Islander Act 2005 (191C) provides that: The ILC has the following functions:

- a) The land acquisition functions referred to in section 191D;
- b) The land management functions referred to in section 191E;
- c) Such other functions as are conferred on the ILC by this Act;
- d) To do anything incidental to, or conducive to, the performance of any of the preceding functions.

191D (1) – The land acquisition functions of the ILC are as follows:

- a) To grant interests in land to Aboriginal or Torres Strait Islander corporations;
- b) To acquire by agreement interests in land for the purpose of making grants under paragraph (a);
- c) To make grants of money to Aboriginal or Torres Strait Islander corporations for the acquisition of interests in land;
- d) To guarantee loans made to Aboriginal or Torres Strait Islander corporations for the acquisition of interests in land.

191E (1) – The land management functions of the ILC are as follows:

- a) To carry on, or arrange for the carrying on of, land management activities in relation to Indigenous-held land under the agreements with holders of the land;
- b) To carry on, or arrange for the carrying on of, land management activities in relation to land held by the ILC;
- c) To carry on other land management activities in relation to Indigenous-held land;
- d) To make grants of money for the carrying on of land management activities in relation to Indigenous-held land;
- e) To make loans of money (whether secured or unsecured) for the purpose of carrying on land management activities in relation to Indigenous-held land;
- f) To guarantee loans made for the purpose of carrying on land management activities in relation to Indigenous-held land.

Under section 191F (3), the functions of the ILC are additional to, and not instead of, any functions conferred on a body or person by or under:

- (a) Any other law of the Commonwealth, or
- (b) A law of a State or Territory.

POWERS

Section 191H (1) of the ATSI Act provides that the ILC has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

Section 191H (2) provides that the powers of the ILC under section 191H (1) include, but are not limited to, the following powers:

- a) To enter into contracts and agreements;
- b) To invest money of the ILC;
- c) To appoint agents and attorneys, and act as an agent for other persons;
- d) To form, and participate in the formation of, companies;
- e) To subscribe for and purchase shares in, and debentures and securities of, companies;
- f) To enter into partnerships;
- g) To participate in joint ventures and arrangements for the sharing of profits;
- h) To accept gifts, grants, bequests and devises made to it;
- i) To act as a trustee of money and other property vested in it on trust;
- j) To charge for the provision of services by it.

The ILC has the power to form subsidiaries to perform functions corresponding to the ILC's functions (s. 191G ATSI Act). Section 4 (2) of the ATSI Act defines a subsidiary in the same manner as subsidiary is determined under the Corporations Act 2001.

PRIORITY PROVISIONS

In undertaking its functions, the ILC is required (s. 191F (2)) to give priority to:

- Ensuring that as far as is practicable, Indigenous people derive social or cultural benefits as a result of the performance of the ILC's functions;
- Ensuring that it has access to necessary skills and resources required to perform its functions;
- Maximising the employment of Indigenous people;
- Maximising the use of goods and services by businesses owned and controlled by Indigenous people.

LIMITS ON BORROWING

The ILC has the power to borrow money but section 193L (2) limits the amount of borrowings. The ILC made no borrowings during the reporting period.

LIMITS ON GUARANTEEING

Section 193N places limits on the amount of funds the ILC may guarantee in a financial year. The ILC made no new guarantees in the reporting period.

BUSINESS PRINCIPLES

When acting commercially, the ILC must act according to sound business principles (s. 191F (1)).

Aboriginal and Torres Strait Islander Land Account (Land Account)

The Aboriginal and Torres Strait Islander Land Account⁸ (Land Account)⁹ was established in 1995 to provide a secure stream of income to the ILC in perpetuity.

The Land Account is a Special Account, as provided for by section 20 (1) of the *Financial Management and Accountability Act 1997* (FMA Act). The FMA Act restricts the Land Account to investing in authorised investments¹⁰, which are:

- Securities of the Commonwealth or of a State or Territory;
- Securities guaranteed by the Commonwealth, a State or Territory;
- A deposit with a bank, including a deposit evidenced by a certificate of deposit; and
- Any other form of investment prescribed by the regulation.

The Land Account and its investments are administered by the Department of Families, Community Services and Indigenous Affairs under delegation from the Minister for Finance and Administration.

The Minister for Families, Community Services and Indigenous Affairs appoints a Consultative Forum to determine the investment policy of the Land Account. Two ILC Directors, as nominated by the ILC's Board, are members of the Consultative Forum (refer Chapter 2 Corporate Governance).

Between 1995-1996 and 2003-2004, the Australian Government made an annual appropriation of \$121 million (indexed to 1994 values) to the Land Account. Approximately 63% of the annual appropriation was retained in the Land Account. The remaining 37% was directed to the ILC for the performance of its statutory functions. The Land Account was built up to become a self-sustaining capital fund by 30 June 2004. The Land Account's total on 30 June 2004 was \$1.438 billion.

At the beginning of 2004-2005, government appropriations to the Land Account concluded, and the ILC began receiving the realised real return on investments of the Land Account. This is the only source of recurrent funding to the ILC.

⁸ Division 10 of ATSI Act.

⁹ Formerly known as the Aboriginal and Torres Strait Islander Land Fund.

¹⁰ S.39

Table 1: Funding received to date from the Land Account is as follows:

| Financial Year | Method | Amount (\$m) |
|----------------|------------------------------------------------------------|--------------|
| 1994–1995 | Percentage of annual appropriation to the Land Account | 25.0 |
| 1995–1996 | Percentage of annual appropriation to the Land Account | 24.4 |
| 1996–1997 | Percentage of annual appropriation to the Land Account | 25.1 |
| 1997–1998 | Percentage of annual appropriation to the Land Account | 48.3 |
| 1998–1999 | Percentage of annual appropriation to the Land Account | 49.7 |
| 1999–2000 | Percentage of annual appropriation to the Land Account | 50.7 |
| 2000–2001 | Percentage of annual appropriation to the Land Account | 51.8 |
| 2001–2002 | Percentage of annual appropriation to the Land Account | 52.6 |
| 2002–2003 | Percentage of annual appropriation to the Land Account | 53.6 |
| 2003–2004 | Percentage of annual appropriation to the Land Account | 54.7 |
| 2004–2005 | Realised real return on the investment of the Land Account | 4.0 |
| 2005–2006 | Realised real return on the investment of the Land Account | 23.8 |

When the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* was written in 1995, it was envisaged that the realised real return would provide the ILC ‘with a certain and regular funding stream after the first ten years’¹¹.

However, the ILC’s experience is that the realised real return is not certain, specifically due to the following:

1. The term ‘realised real return’ is not defined in the Act and, as a consequence, various interpretations can be applied that result in different levels of funding to the ILC.
2. The Act requires, when determining the realised real return, that the implicit price deflator for gross non-farm product (trend) index is to be used as the measure of inflation. Unfortunately, there is no explanation why this index factor was chosen in 1995. This index factor is significantly different from year to year, as compared to the Consumer Price Index, which would seem to be the most logical index, and this has significantly affected the level of funding to the ILC in the past two years.
3. The clarification by the Department of Finance and Administration as to what constitutes an ‘allowable investment’ under the FMA Act, which has taken a narrow interpretation of ‘deposit with a bank’, and consequently has restricted the Land Account’s earnings.

The ILC has discussed these matters with the Secretary of the Department of Families, Community Services and Indigenous Affairs, Dr Jeff Harmer, and the Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold. Further, the Department of Families, Community Services and Indigenous Affairs has made an undertaking that the issues will be reviewed in early 2006-2007.

¹¹ Page 21 Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1994 Explanatory Memorandum Part B.