

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**LAND FUND AND INDIGENOUS LAND CORPORATION
(ATSIC AMENDMENT) BILL 1994**

EXPLANATORY MEMORANDUM

PART B

(Circulated by authority of the Prime Minister)

THIS MEMORANDUM TAKES ACCOUNT TO AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

LAND FUND AND INDIGENOUS LAND CORPORATION (ATSIC AMENDMENT) BILL 1994

OUTLINE

The purpose of this Bill is to establish a Land Fund and an Indigenous Land Corporation to enable Aboriginal and Torres Strait Islander people to acquire and manage land in a way that will provide them with social, cultural and economic benefits. The Fund is being established in recognition of the fact that most indigenous people will not benefit from the High Court's *Mabo (No. 2)* decision and the *Native Title Act 1993* because they were dispossessed of their land and cannot therefore demonstrate the continuous association necessary to prove native title.

The Bill inserts into the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Principal Act) a new Part 4A which establishes the Land Fund and an Indigenous Land Corporation (ILC) which will receive moneys from the Fund. Division 2 of Part 4A makes provision for the functions and powers of the ILC. The primary functions of the ILC are to acquire land for indigenous people and to undertake or make arrangements for the management of land held by indigenous people. The ILC will be able to establish subsidiaries to carry out functions corresponding to those of the ILC.

Division 3 of Part 4A requires the ILC to prepare national and regional strategies related to the acquisition of land and management and environmental issues relating to indigenous land. Division 4 places restrictions on dealings in land granted by the ILC. It also prevents the claiming of land purchased by the ILC, or with a grant provided by the ILC, under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Division 5 of Part 4A of the Act establishes a Board of Directors of the ILC to be appointed by the Minister. Directors are required to have experience in land or environmental management, experience in Aboriginal or Torres Strait Islander community life or business or financial management with at least two directors having experience in this latter category. Divisions 6 and 7 cover administrative and operational provisions related to the Board of the ILC; Divisions 8 and 9 provide for the appointment of a General Manager and staff of the ILC.

Division 10 of Part 4A establishes the Aboriginal and Torres Strait Islander Land Fund as a Trust Account within the Public Account. The Bill provides that for the first 10 years of the existence of the Fund it will be credited specified amounts drawn from consolidated revenue and that the ILC will be paid specified amounts drawn from the Fund. During a transitional period, ATSIC will also be paid amounts drawn down from the Fund. At the end of 10 years the ILC will receive from the Fund each year the realised real returns on investments made by the Fund. The Bill provides for a consultative forum, including members of the Board of the ILC, to discuss the investment policy of the Fund.

Division 11 of Part 4A includes provisions related to the finances of the ILC. A limit is placed on the borrowings and guarantees which may be incurred by the ILC. The ILC is exempted from general taxation laws, including income tax. Division 12 exempts the ILC from the payment of stamp duty in certain circumstances. Divisions 13 and 14 respectively make provision for secrecy and the delegation of the ILC's powers.

The Bill also makes consequential amendments to the Principal Act including the conferral of powers on the Office of Evaluation and Audit to evaluate or audit aspects of the operation of the ILC or its subsidiaries.

FINANCIAL IMPACT

From 1995-96, the Bill provides for the setting aside, within the Public Account, of \$121 million annually, indexed in terms of 1994-95 dollars for the purpose of establishing the Land Fund. This amount will include \$21 million currently included in the global allocation to the Aboriginal and Torres Strait Islander Commission. The Commission will continue to receive that \$21 million from the Land Fund in the 1995-96 and 1996-97 financial years, indexed in terms of 1994-95 dollars.

In the 1994-95 financial year the ILC will be paid \$25 million drawn from an interim fund established under the *Native Title Act 1993*. In the following two years, the ILC will be paid \$24 million annually from the Fund indexed in 1994-95 dollars. In the following seven years the ILC will receive \$45 million annually indexed in 1994-95 dollars. Thereafter, the ILC will be paid moneys earned from the investments made by the Fund. The draw downs to the ILC will be Commonwealth outlays.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 Short Title etc.

This clause provides that the legislation is to be called the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1994*. The clause also provides that when the term 'Principal Act' is used in the Bill, it means the *Aboriginal and Torres Strait Islander Commission Act 1989*.

Clause 2 Commencement

This clause states that the legislation will commence on a date fixed by the Governor-General by Proclamation. However, if there is no Proclamation within six months of the date of Royal Assent, the legislation commences the day after that six month period expires.

PART 2 - AMENDMENTS RELATING TO THE ESTABLISHMENT OF THE INDIGENOUS LAND CORPORATION AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

Division 1 - Establishment

Clause 3 Insertion of new Part

This clause allows for the insertion of Part 4A into the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Principal Act). Part 4A deals with the establishment of the Indigenous Land Corporation and the establishment of the Aboriginal and Torres Strait Islander Land Fund.

The following notes refer to proposed provisions to be inserted into the Principal Act by clause 3.

"PART 4A - INDIGENOUS LAND CORPORATION AND ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

Division 1 - Indigenous Land Corporation

Section 191A Indigenous Land Corporation

This section establishes the Indigenous Land Corporation (ILC) as a body corporate, with the normal attributes of a body corporate. These attributes are perpetual succession, a corporate seal, the power to acquire, hold and dispose of property and the ability to sue and be sued under the corporate name.

Section 191B Purposes of Indigenous Land Corporation

This section sets out that the ILC is established for the purposes of assisting Aboriginal people and Torres Strait Islanders both to acquire land and to manage land held by them. The objective of that assistance is to provide benefits for Aboriginal people and Torres Strait Islanders. The benefits may be economic, environmental, social or cultural in character.

Division 2 - Functions and powers of Indigenous Land Corporation

Section 191C Functions of Indigenous Land Corporation

This section sets out the general framework of the ILC's functions. These functions are:

- land acquisition functions which are described in section 191D;
- land management functions which are described in section 191E;
- other functions that are conferred on the ILC under this legislation such as the preparation of indigenous land strategies (sections 191N and 191P) or the utilisation of ILC subsidiaries (section 191G); and
- functions that are conducive or incidental to the performance of any of the above functions.

As an independent, commercially-oriented body it is intended that the ILC will be able to focus clearly on the land acquisition and land management needs of indigenous people and address these on a planned and strategic basis.

Section 191D Land acquisition functions of Indigenous Land Corporation

This section deals with the functions by means of which the ILC will acquire or facilitate the acquisition of land for the benefit of Aboriginal people or Torres Strait Islanders.

Under this section, grants of land and money may be made to Aboriginal or Torres Strait Islander corporations. Guarantees in respect of the acquisition of land by such corporations may also be given by the ILC.

Subsection (1) describes the ILC's land acquisition functions, which are:

- to grant land to Aboriginal or Torres Strait Islander corporations;
- to purchase interests in land for the purpose of making such grants;
- to make grants of money to Aboriginal or Torres Strait Islander corporations so that they can acquire interests in land; and
- to act as guarantor for loans made by third parties to Aboriginal or Torres Strait Islander corporations so that they can acquire interests in land.

The terms ' "interest" in relation to land' and 'Aboriginal or Torres Strait Islander corporation' have specific meanings which are set out in clause 5 of the Bill and will be inserted into section 4 of the Principal Act.

An interest in land encompasses an interest which derives from having a right, power or privilege over or in connection with land as well as either a freehold or leasehold interest.

An Aboriginal or Torres Strait Islander corporation means an Aboriginal association incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976*; a body corporate whose membership is limited to Aboriginal people and/or Torres Strait Islanders; or a body corporate where the controlling interest is held by Aboriginal people and/or Torres Strait Islanders.

Subsection (2) makes it clear that the ILC can grant money on terms and conditions that must relate to:

- the purposes for which the money may be spent;
- the period within which the money is to be spent;
- the acquittal of money spent; or
- the giving of information in relation to the grant.

This provision ensures that the ILC's power to make grants is flexible while maintaining proper accountability. The subsection also requires the ILC to take reasonable steps to recover grants where the conditions are infringed.

In relation to guarantees, subsection (2A) leaves at large the terms and conditions which may be imposed by the ILC so that the mechanism retains maximum flexibility.

Although the ILC is able to make grants of money to Aboriginal or Torres Strait Islander corporations on terms that would enable a corporation to acquire land without any further involvement by the ILC, subsection (3) requires the ILC to give priority to performing its land acquisition functions by acquiring land and granting it as soon as possible to an Aboriginal or Torres Strait Islander corporation. In instances where the ILC considers it appropriate to make a grant of money rather than of land to an Aboriginal or Torres Strait Islander corporation, the ILC would usually be involved in the purchase as the agent. Only when either of those courses is impracticable or inadvisable for commercial or other reasons would the ILC be expected to perform its land acquisition functions in a different manner.

Subsection (4) of section 191D requires the ILC to search the Registers of the National Native Title Tribunal to ascertain whether a claim has been made over land being considered for acquisition. Such searches are not confined to determinations of native title but must also be made in relation to claims which have been accepted and are awaiting mediation and/or determination, and claims which have been lodged but not yet accepted or rejected by the Tribunal. The Registers of the National Native Title Tribunal include claims and determinations made in recognised State and Territory bodies as well as claims and determinations made in the National Native Title Tribunal itself (see sections 186 and 193 of the Native Title Act 1993).

Section 191E Land management functions of Indigenous Land Corporation

Section 191E describes the ILC's land management functions which are designed to ensure that the ILC can play an active role in the sustainable development both of land acquired with the assistance of the ILC and of other indigenous-held land. These functions are:

- to undertake or arrange for the carrying out of land management activities on indigenous-held land or land held by the ILC;
- to carry on other land management activities in relation to indigenous-held land;
- to make grants of money for land management activities on indigenous-held land;
- to make loans so that land management activities can be carried out in relation to indigenous-held land or to guarantee loans made for this purpose.

Land management activities are defined in subsection (5). Broadly, they include any activity that is, or relates to, the managed use, care or improvement of land. Subsection (5) sets out examples of activities that will constitute land management activities, including:

carrying on a business that involves land use, land care or land improvement (such as a farm);

providing services (eg. management, clerical, financial administration, advisory, technical or professional services) in connection with such a business or to persons who carry on such a business;

providing environmental management skills related to land care, land use and land management;

providing training to facilitate the managed use, care and improvement of land or to facilitate the carrying on of businesses involving those matters; and

dissemination of information about land and environmental management. This will enable indigenous land holders to access the information they may need to use land in a sustainable and appropriate manner.

Definitions of the terms 'holder' and 'indigenous-held land' will be inserted into the Principal Act by clauses 5 and 6 respectively of the Bill.

The term 'indigenous-held land' means land in which an interest is held by an Aboriginal or Torres Strait Islander corporation or an Aboriginal person or Torres Strait Islander. It does not include an interest held as a tenant-in-common where the proportion of the tenancy held by Aboriginal or Torres Strait Islander corporations or persons is less than 50%; or a partnership where the proportion of the partnership held by Aboriginal or Torres Strait Islander corporations or persons is less than 50%. The term does not include land where the interest held by Aboriginal or Torres Strait Islander corporation or person is that of a mortgagee.

A 'holder' is a person or body who holds an interest in land and whose interest gives that land its status as indigenous-held land. Thus where a non-indigenous person or body has an interest in indigenous-held land, the term 'holder' will not apply to that person or body.

Subsection (1A) provides that the ILC may only carry on a land management activity relating to particular indigenous-held land with the agreement of the holder of the land. This provision derives from an amendment made in the Senate to the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994. It is intended to entrench ordinary good administrative practice by preventing the ILC from carrying on intrusive land management activities without the agreement of the land holder while leaving the ILC free to carry on general land management activities such as the dissemination of information and the provision of training and other services.

Subsection (2) permits the ILC to make grants for land management purposes on terms and conditions that must relate to:

- the purposes for which the money may be spent;
- the period within which the money is to be spent;
- the acquittal of money spent; or

the giving of information in relation to the grant.

The ILC will be able to use this power to ensure, for example, that holders of indigenous-held land who receive financial assistance from the ILC obtain the necessary technical and practical support to achieve the purposes for which the assistance is given.

Subsection (2A) relates specifically to loans for land management activities. In addition to terms and conditions specified in relation to grants, the ILC might also impose terms and conditions that relate to:

- the repayment of the loan;
- the payment of interest; or
- the loan security (where the loan is secured).

This provision allows the ILC to make loans on a commercial basis. As with grants for land acquisition purposes, the provision gives the ILC substantial flexibility while ensuring proper accountability.

In relation to guarantees, subsection (2A) leaves at large the terms and conditions which may be imposed by the ILC so that the mechanism retains maximum flexibility.

Subsection (3) is designed to encourage the ILC to perform its land management functions in a manner that achieves an appropriate balance among a number of outcomes to which it must give priority including sound land management, environmental protection, and increased economic self-sufficiency for indigenous land-holders. The subsection sets out certain considerations which are aimed at:

- using and promoting sound land and environmental management practices;
- increasing the accountability and efficiency of the performance by the ILC of its land management functions by encouraging it to enter into arrangements for the provision of management services and advice to indigenous land-owners rather than giving direct financial assistance;
- increasing opportunities for the holders of indigenous-held land to be directly involved in the land management activities whenever the ILC carries on, or gets others to carry on, land management activities under an agreement with those holders.

Subsection (4) makes it clear that an agreement between the ILC and the holder of indigenous-held land can include other parties. An example of an arrangement involving a third party is where the Aboriginal or Torres Strait Islander holder of the land is a partner, tenant-in-common or joint tenant and the agreement is with all those holding the relevant interest and not just with the indigenous holders.

Section 191F Performance of functions of Indigenous Land Corporation - general

This section makes provision for various matters related to the ILC's performance of its functions.

Subsection (1) requires the ILC to follow sound business principles when performing any of its functions on a commercial basis. It should be possible to ascertain from the nature of the activity and the presence or absence of a profit motive whether a function is being performed on a commercial basis. For example, where the ILC makes a loan in the course of its land management functions, the nature of the terms and conditions it imposes (in accordance with subsection 191E(2A)) will determine whether the loan is made on a commercial basis.

Subsection (2) is aimed at ensuring that, in the performance of its functions, the ILC gives priority to:

- ensuring that the ILC performs its functions efficiently by requiring it to make sure it has access to necessary skills and resources;

- ensuring that Aboriginal persons or Torres Strait Islanders derive social or cultural benefits;

- maximising indigenous employment and the use of goods and services provided by indigenous-owned businesses.

Subsection (3) provides that the ILC's functions under this legislation are in addition to functions conferred on other bodies and persons under other Commonwealth laws, or under State or Territory laws. Thus, the conferral of land management functions on the ILC is not intended to imply that bodies vested with similar or overlapping functions may not continue to perform those functions.

Subsection (4) is designed to ensure that sacred or significant information or cultural material that is dealt with by the ILC is not disclosed contrary to the views or sensitivities of the Aboriginal or Torres Strait Islander group involved. However, it is not intended that this provision should prevent appropriate scrutiny for accountability purposes and subsection (5) requires the ILC to notify the Minister of any case where the operation of subsection (4) affects the performance of its functions.

Section 191G Subsidiaries of Indigenous Land Corporation may perform functions corresponding to the Indigenous Land Corporation's functions

This section deals with the means by which the ILC may perform its functions through subsidiaries. It is envisaged that subsidiaries of the ILC will be incorporated under the Corporations Law of a State or Territory and will provide an alternative means for the ILC to carry out its functions, at a regional level for example.

Subsection (1) allows the ILC to arrange to have its subsidiaries perform functions that correspond to one or more of the ILC's functions.

Subsection (2) provides that as part of an arrangement to have a subsidiary perform an ILC function, the ILC can guarantee loans made to the subsidiary, arrange for the transfer or loan of money to the subsidiary, or make ILC staff available to the subsidiary. Subsection (7) makes it clear that such financial arrangements are not to be regarded as constituting the performance of a land acquisition or land management function by the ILC.

Under subsection (3), a subsidiary which performs any of the ILC's functions is subject to the same restrictions and requirements that apply to the performance of those functions by the ILC. Subsection (5) ensures that the ILC can continue to perform a function that it has arranged for its subsidiary to perform, and subsection (6) makes it clear that a subsidiary is not to be regarded as performing an ILC function unless it is given that function under an arrangement made under this section.

Section 191H Powers of Indigenous Land Corporation

This provision ensures that the ILC has the power to do all things which are necessary or convenient for performing its functions.

For example the ILC has the power to make contracts, to invest its money, to appoint agents and be appointed as an agent, to set up companies, to invest in companies, to enter into partnerships, joint ventures and profit-sharing arrangements, to accept gifts, grants, bequests and devises, to act as trustee and to charge for its services. The power to invest money is not subject to the limitations imposed by section 63E of the *Audit Act 1901*. The power to form and participate in the formation of companies will enable the ILC to establish subsidiaries.

All of the ILC's powers can be exercised in Australia or overseas.

Section 191I Guidelines about certain land acquisition and land management functions

This section provides that if the ILC draws up written guidelines for the performance of certain of its land management and land acquisition functions, it must give a free copy of those guidelines to anyone who asks for a copy. The purpose of this section is to ensure that persons interested in receiving grants, guarantees or loans in connection with the performance by the ILC of its land acquisition or land management functions have access to any written criteria or guidelines that are used by the ILC in determining the basis on which such grants, guarantees or loans will be made.

Section 191J Disposal of surplus land

This section allows the ILC or a subsidiary to dispose of an interest in land in certain circumstances other than by granting it to an Aboriginal or Torres Strait Islander corporation. Such a disposal may be made only if the ILC considers that it is not

necessary to hold the interest for the purpose of granting it to an Aboriginal or Torres Strait Islander corporation. This section is included to provide for unusual circumstances, such as where an Aboriginal or Torres Strait Islander corporation surrenders land to the ILC and there is no other appropriate Aboriginal or Torres Strait Islander corporation to which the land might be granted. A disposal under this section would normally occur by way of sale.

Section 191K Commission may grant land to the Indigenous Land Corporation

The purpose of this section is to enable ATSIC to grant land to the ILC which ATSIC acquired for the purpose of making a grant for the benefit of Aboriginal persons or Torres Strait Islanders but which, following the establishment of the ILC, would be more appropriately handled by the ILC.

Section 191L Powers of Minister

This section makes it clear that the Minister does not have a general power to direct the ILC. Instead, the Minister's powers are expressly limited to those set out in the legislation.

Section 191M Minister may ask for information

This section makes it clear that the Minister can seek information from the ILC about its activities and the ILC must give the Minister any information sought.

Division 3 - National indigenous land strategy and regional indigenous land strategies

Section 191N National indigenous land strategy

This section requires the ILC to prepare, and regularly revise, a national indigenous land strategy for ILC activities. The strategy is to relate to a 3-5 year period. The strategy is to deal with matters such as the acquisition of land for granting to Aboriginal or Torres Strait Islander corporations, and land management and environmental issues affecting indigenous-held land. As the strategy is required, under section 191R, to be made available on request it is not intended that it will contain any information that could prejudice the ILC's commercial interests if the information was known to competitors, prospective vendors or other persons.

The ILC should always consider whether it is appropriate to consult ATSIC when developing, revising and reviewing the national strategy. The ILC may also consider whether it is appropriate to consult with other relevant bodies. It is envisaged that the ILC will normally consult with ATSIC when preparing the strategy and when making major revisions.

A copy of the national strategy and any changes made to it must be given to the Minister and tabled in each House of Parliament within specified time frames.

Section 191P Regional indigenous land strategies

This section is designed to ensure that the ILC develops a regional focus. The section requires the ILC to prepare, and to revise regularly, regional indigenous land strategies which relate to specified regional areas. The boundaries of regional areas are to be determined in writing by the ILC. The note to subsection 191P(2) makes it clear that the subsection does not limit the ways in which the ILC can exercise its power to set the boundaries for regional areas. For example, the ILC could designate that a regional area is to include a whole State or Territory, or parts of two or more States and/or Territories.

Each regional strategy is to relate to a 3-5 year period, and is to deal with matters such as the acquisition of land in the relevant regional area by the ILC, and land management and environmental issues affecting indigenous-held land in the regional area. As with the national strategy, it is not intended that a regional strategy will contain information that could prejudice the commercial interests of the ILC.

When developing, revising and reviewing a regional strategy, the ILC Board must consult with any ATSIC Regional Council for a region that is included in or overlaps the regional area to which the regional strategy relates. The ILC Board may also consult with any other bodies or persons that the members of the Board consider appropriate. For example, a Land Council established under land rights legislation that has land acquisition or land management responsibilities over land included in a regional area might be consulted by the ILC in relation to the strategy for that regional area.

The ILC Board must give the Minister a copy of a regional strategy when so requested.

Section 191Q Indigenous Land Corporation to have regard to strategies

This section makes it clear that the ILC is to take the national strategy and any relevant regional indigenous land strategies into account when performing its functions. Subsection 191G(3) ensures that where ILC functions are performed by a subsidiary the subsidiary must also have regard to the national strategy and any relevant regional strategy.

The requirement that the ILC develop regional and national strategies ensures that the ILC performs its land acquisition and land management functions in a considered, equitable and accountable manner without unduly prescribing the policies that the ILC should adopt in performing those functions.

Section 191R Indigenous Land Corporation to make strategies available

The ILC is to provide copies of the national indigenous land strategy or a regional indigenous land strategy to members of the public on request and can charge a fee for providing such copies to cover its costs.

Division 4 - Dealings in Land granted by Indigenous Land Corporation

Section 191S Restriction on right to dispose of, or charge, property

This section imposes restrictions on selling or giving a charge over land held by a body corporate where that land was acquired by grant from the ILC or an ILC subsidiary or where the acquisition of the land was financially supported by a grant from the ILC or a subsidiary. A 'charge' is an interest in the land that is given to a person as a security, usually for money loaned or services provided; subsection (5) explains that 'charge' includes mortgages and agreements to give a mortgage.

Subsection (2) provides that a body corporate cannot dispose of its interest in the land or give a charge over the land as a security without the consent of the ILC. The provision for ILC consent anticipates that indigenous land will be held in perpetuity but also provides flexibility and allows special circumstances to be taken into account. If the body corporate disposes of its interest in land or gives a charge over it without the ILC's consent, subsections 191S(3) and (4) make it clear the transaction has no effect.

Section 191T Surrender of land to Indigenous Land Corporation

A body corporate can dispose of an interest in land held by the body corporate to the ILC where that interest in land was granted by, or where the acquisition of the interest was financially supported by a grant from, the ILC or an ILC subsidiary. Under subsection (2) the disposal can take place on the terms and conditions agreed between the body corporate and the ILC. The disposal would usually be on terms which recognise both the value of the benefit previously obtained from the ILC and the value of improvements made to the land by the disposing body corporate.

Subsection (3) provides that interests in land which are disposed of under this section are taken to have been acquired by the ILC under paragraph 191D(1)(b) (which allows the ILC to acquire interests in land by agreement for the purpose of making grants).

Section 191U Land granted by Indigenous Land Corporation must not be claimed under the *Aboriginal Land Rights (Northern Territory) Act 1976*

The purpose of this section is to prevent a claim under paragraph 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976* being made over land acquired by means of a grant from the ILC or a subsidiary. The section applies only where the interest in the land was acquired as a result of the performance by the ILC of a

function under paragraph 191D(1)(a) or (c) or by a subsidiary of the ILC performing a corresponding function.

Division 5 - Board of Directors of Indigenous Land Corporation

Section 191V Board of Directors of Indigenous Land Corporation

This section deals with the ILC's Board of Directors. The ILC Board is to comprise seven members made up of a Chairperson, a Deputy Chairperson, the ATSIC Chairperson and four other members.

Subsection (3) ensures that the ILC Board has full power to act even if there is a vacancy in its membership. However, the quorum requirements in subsection 192J(2) would still need to be satisfied.

Section 191W Responsibilities of Indigenous Land Corporation Board

This section makes the ILC Board responsible for the proper and efficient functioning of the ILC and for determining ILC policy.

Section 191X Appointment of Indigenous Land Corporation Directors

This section deals with the means by which ILC Directors are appointed and related matters. Subsections (1) and (3) provide that the Minister is to appoint six of the seven ILC Directors in writing after consulting ATSIC and the Minister for Finance. The Chairperson of ATSIC will be an ex-officio member. The ILC Chairperson and at least four other Directors must be Aboriginal persons or Torres Strait Islanders. The Directors appointed by the Minister will be required to possess experience in land or environmental management, business or financial management or Aboriginal or Torres Strait Islander community life. At least two Directors are required to have experience in business or financial management. It is envisaged that this provision will enable persons with a range of relevant experience and expertise to be appointed to the Board.

At least one appointed ILC Director must be an ATSIC Commissioner. If such a Director stops being an ATSIC Commissioner the Minister can terminate his or her appointment. This power of termination is in addition to the powers and duties relating to termination that are conferred on the Minister under section 192H.

Section 191Y Automatic re-appointment of incumbent pending appointment of successor

This section is intended to prevent a Director's position from becoming vacant when his or her term of appointment expires and the Minister has neither re-appointed that

Director nor appointed a new Director. The effect of this section is that the incumbent is regarded as having been automatically re-appointed. This automatic re-appointment is not subject to section 191X.

Subsection (3) ensures that the appointment of an incumbent Director under this section may be terminated only if an appointment of another person to that office will take effect immediately after that termination. This means that despite the 4 year limit on appointments imposed by section 191Z, a deemed re-appointment is not limited as to its term.

Division 6 - Administrative provisions

Section 191Z Period of appointment

This section states that ILC Directors can be appointed for up to 4 years and that the period of appointment is to be stated in the instrument of appointment.

Section 192 Basis on which Indigenous Land Corporation Directors hold office

This section provides that ILC Directors will normally hold office on a part-time basis with subsection (2) allowing the ILC Chairperson to hold office on a full-time basis. The purpose of subsection (2) is to provide scope for the appointment of a full-time Chairperson if it appears that the requirements of the position justify it. Other provisions in this Division cover the special situation of a full-time Chairperson.

Section 192A Remuneration and allowances

This section provides that the salary and allowances for appointed ILC Directors are those payable under section 194 of the Principal Act. That section will allow remuneration of ILC Directors to be determined by the Remuneration Tribunal and their allowances to be determined by the Minister.

Section 192B Outside employment - full-time Indigenous Land Corporation Chairperson

Section 192B provides that if there is a full-time ILC Chairperson then he or she is not to be otherwise employed without the ILC Board's approval.

Section 192C Leave of absence - part-time Indigenous Land Corporation Directors

This section confers power on the ILC Board to allow an ILC Director who holds office on a part-time basis to miss an ILC Board meeting. The ILC Board may delegate this power to the Chairperson.

Section 192D Leave of absence - full-time Indigenous Land Corporation Chairperson

This section provides that the recreational leave of a full-time ILC Chairperson will be determined by the Remuneration Tribunal, subject to section 87E of the *Public Service Act 1922* (which deals with the preservation of rights in respect of leave).

Section 192E Acting appointments

This section makes provision for acting appointments to and within the ILC Board in certain circumstances.

If the Chairperson of the ILC Board is outside Australia or otherwise unable to perform his or her duties, or if the position is vacant, the Deputy Chairperson is to act as Chairperson.

The Minister can temporarily fill the position of Deputy Chairperson by appointing one of the ILC Directors to act as Deputy Chairperson for a period not exceeding 6 months. The Minister can also appoint a person as a Director to fill a temporary vacancy for a period not exceeding 6 months. Any temporary appointees must meet the criteria for appointment that are set out in section 191X.

Section 192F Disclosure of interests

This section requires ILC Directors to disclose any relevant pecuniary interests to the ILC Board, and the ILC Board minutes are to record the disclosure. ILC Directors who have a potential conflict of interest in relation to a matter cannot participate in Board discussions or decisions in relation to that matter.

Section 192G Resignation

ILC Directors can resign by sending a written resignation to the Minister.

Section 192H Termination of appointment

This section regulates the termination of appointments of ILC Directors. Subsection (1) confers on the Minister a discretion to terminate the appointment of a Director because of misbehaviour or incapacity. Subsection (2) obliges the Minister to terminate the appointment of a Director in cases of bankruptcy, other specified financial circumstances, or failure to disclose a pecuniary interest under section 192F.

Subsection (3) applies to a full-time ILC Chairperson only and provides that the Minister must terminate the employment of a full-time Chairperson if he or she is absent without leave for 14 consecutive days or for 28 days in any 12 months period. The Minister must also terminate the employment of a full-time Chairperson if he or

she contravenes section 192B by engaging in other paid employment without the Minister's approval.

Subsection (4) applies to part-time Directors and provides that the Minister must terminate the appointment of any part-time Director who has missed 3 consecutive meetings without having secured leave under section 192C.

Section 192I Other terms and conditions

This section provides that where this Act is silent the Minister may set additional terms and conditions for the appointment of ILC Directors by notification in the Gazette.

Division 7 - Operations of Indigenous Land Corporation Board

Section 192J Meetings of Indigenous Land Corporation Board

This section requires the ILC Chairperson to call Board meetings whenever he or she thinks it is appropriate. The meeting will be validly constituted if four Directors are present. However, if a Director cannot participate because of a disclosed pecuniary interest in the matter being dealt with by the meeting, and this absence would leave less than three Directors at the meeting, then the remaining Directors are able to form a quorum for that meeting.

Subsection (4) provides that the Chairperson is to preside at all ILC meetings which he or she attends. In the absence of the Chairperson, then the Deputy Chairperson presides. If the Deputy Chairperson is also unavailable, the remaining ILC Directors choose which of them is to preside.

Decisions at a meeting are to be made by a majority vote of the ILC Directors who are eligible to vote. The person chairing the meeting is able to vote and also has a casting vote. The Board must arrange for the taking of minutes of its meetings. Apart from these requirements, the ILC Board can set its own meeting procedures.

Division 8 - Indigenous Land Corporation General Manager

Section 192K Indigenous Land Corporation General Manager

This section creates the position of ILC General Manager who is to be appointed in writing by the ILC Board. The ILC General Manager is responsible for the day-to-day administration of the ILC and must act in accordance with the ILC Board's written policies and directions.

Section 192L Term of appointment

The ILC General Manager can be appointed for up to 4 years.

Section 192M Holding of office

The ILC General Manager holds office during the pleasure of the ILC Board. This enables the ILC Board to terminate the General Manager's appointment at any time.

Section 192N Remuneration and allowances of Indigenous Land Corporation General Manager

This section provides that the ILC Board is to determine, in writing, the ILC General Manager's salary and allowances.

Section 192P Acting Indigenous Land Corporation General Manager

The Board can fill a vacancy in the General Manager's position on an acting basis for up to six months. The Board can make a similar appointment if the General Manager is absent from duty, out of Australia, or unable to perform his or her duties for a period.

Subsection (2) will ensure that anything done by a person apparently appointed to act as the General Manager under this section will not be invalid merely because of a procedural defect in the appointment.

Section 192Q Resignation

The ILC General Manager can resign by sending a written resignation to the ILC Board.

Section 192R Other terms and conditions

Where this Act is silent, the ILC Board may determine in writing the terms and conditions on which the General Manager holds office.

Division 9 - Staff

Section 192S Staff

The ILC General Manager can engage staff for the ILC on terms and conditions determined by the ILC Board in writing.

Section 192T Arrangements for Commission staff or Commercial Development Corporation staff to perform duties on behalf of Indigenous Land Corporation

The ILC General Manager can make arrangements with ATSIC's Chief Executive Officer for ATSIC staff to carry out work on behalf of the ILC. The ILC General Manager can also make arrangements with the Commercial Development Corporation General Manager for that Corporation's staff to carry out work on behalf of the ILC.

Section 192U Arrangements relating to staff

The ILC General Manager can make arrangements for officers or employees of the Commonwealth, State or Territory Public Services or authorities, or of other bodies, to be made available to work for the ILC.

Section 192V Consultants

The ILC General Manager can engage appropriately qualified or experienced consultants on terms and conditions determined by the ILC Board.

Division 10 - Aboriginal and Torres Strait Islander Land Fund

Section 192W Aboriginal and Torres Strait Islander Land Fund

This section establishes an Aboriginal and Torres Strait Islander Land Fund (the Land Fund). The Land Fund is to be a trust account for the purposes of section 62A of the *Audit Act 1901*. This means that the account is within the Commonwealth Public Account to which Part IX of the Audit Act applies, supplemented by any special provisions of this legislation (see, for example, section 193F).

Subsection (3) makes it clear that money which is not required for making payments from the Land Fund is to be invested in accordance with section 62B of the *Audit Act 1901*. The note to subsection (3) explains that the income from trust fund moneys so invested is paid into the Consolidated Revenue Fund because of section 81 of the Constitution. To make sure that the income from Land Fund investments goes back into the Land Fund, subsection (4) provides that when investments from the Land

Fund produce income, an amount equal to that income is to be paid into the Land Fund from the Consolidated Revenue Fund. Subsection (5) appropriates money from the Consolidated Revenue Fund for the purpose of making payments into the Land Fund under subsection (4).

Section 192X Purpose of Land Fund

This section defines the purpose of the Land Fund for the purposes of section 62A(1) of the *Audit Act 1901*. The purpose is to make payments to the ILC and ATSIC. The Land Fund will thus provide the moneys that will enable the ILC to perform its functions as well as providing funding that will assist ATSIC to continue performing land acquisition and land management functions during the transitional period prior to 1 July 1997. The making of the payments to the ILC is regulated by sections 193A, 193C and 193E. The payments to ATSIC are regulated by section 193B.

Section 192Y Business day

This section explains that a 'business day' is a day which is not a Saturday, Sunday or a public holiday in Canberra. This definition will ensure that certain transactions related to the Land Fund will occur on a normal working day.

Section 192Z Transfer of money etc. from the fund established under repealed Part 10 of the *Native Title Act 1993*.

This section provides that the money and investments held by the fund set up by Part 10 of the *Native Title Act 1993* will belong to the Land Fund as soon as subsection 192Z(2) commences. It ensures that the moneys appropriated for the purposes of the fund that is the predecessor of the Land Fund will automatically vest in the Land Fund when section 201 of the *Native Title Act 1993* and the regulations made under it are repealed.

Section 193 Credits to Land Fund in category A years

This section explains how much money is to be paid to the Land Fund in category A years and ensures that the Land Fund is credited the same amount in real terms in all except the first of those years (for which a one-off larger appropriation is made by other legislation). The category A years span the period from the day on which the Bill commences up to and including 30 June 2004. Thus each of the nine financial years spanning the period from 1 July 1995 to 30 June 2004 is a category A year as is the first incomplete financial year that begins when the Bill comes into force and ends on 30 June 1995.

The reason for making a distinction between this first period and the years that follow it ('category B years') is that amounts will be paid into the Land Fund (or its predecessor) out of the Consolidated Revenue Fund in those first 10 years only, after

which time the Land Fund is intended to be self-sustaining. The terms 'category A year' and 'category B year' will be defined in section 4(1) of the Principal Act.

Subsection (1) provides that on the first business day of the second category A year (ie, the financial year commencing on 1 July 1995) the Land Fund is to be credited with an amount equal to \$121 million multiplied by the indexation factor. (Funds for the first category A year will be transferred from the previous fund under section 192Z). The term 'indexation factor' is defined in section 193D and is explained in the clause notes for that section. The indexation factor is employed to ensure that payments into the Land Fund are adjusted in accordance with price movements.

Subsection (2) applies to each of the later category A years, being the financial years spanning the period 1 July 1996 to 30 June 2004. In each of these years, the Land Fund is to be credited on the first business day with an amount that equals the previous year's amount adjusted by the indexation factor.

Subsection (3) provides that the amounts calculated under subsection (1) or (2) are to be rounded down to a whole dollar amount.

Subsection (4) makes it clear that the amounts payable under this section will be paid from the Consolidated Revenue Fund, and subsection (5) formally appropriates money from the Consolidated Revenue Fund for that purpose. These provisions mean that it will not be necessary to make annual appropriations in Appropriation Acts.

Section 193AA Credit to Land Fund in first category B year

This provision is designed to ensure that the Land Fund will be able to provide the ILC with a certain and regular funding stream after the first ten years, even if investments of Land Fund moneys fail to perform as expected in the first ten years. To achieve the appropriate level of self-sustainability, a real return of 4% is required throughout the category A years. At this rate of return, the Land Fund should reach a value of \$1,106 million (in 1994-95 dollars) at the end of the tenth category A year.

If, on that date, the value of the Land Fund (calculated by adding together the uninvested money standing to the credit of the Land Fund and the market value of its investments as assessed by the Minister for Finance) is less than the target amount, then the shortfall is to be made up by a payment to the Land Fund from Consolidated Revenue on the first business day in October of the first category B year. This will allow 3 months from the end of the last category A year for the necessary evaluation and calculations to occur.

Subsection (4) debits the Consolidated Revenue Fund to the extent necessary for any top-up payment to be made to the Land Fund in accordance with this section. Subsection (5) provides for the appropriation of that sum.

Section 193A Payments out of Land Fund to Indigenous Land Corporation - category A years

This section sets out the amounts of the payments to be made from the Land Fund to the ILC in category A years and the timing and manner of those payments.

As the first category A year will not be a full year, separate provision is made for that year in subsection (1). That subsection provides that the ILC is to be paid \$25 million on a nominated business day within 30 days of the day on which clause 1 of this Bill commences.

The remainder of this section deals with the second and later category A years. On the second business day in July in each of those years, the ILC is to be paid the designated funding amount for that year. Thus the ILC will have a certain and regular funding stream, receiving annual instalments in each of the nine category A years commencing on 1 July 1995.

The 'designated funding amount' for category A years is worked out using the formulae in subsections (4), (5), (6) and (7) and rounded down in accordance with subsection (8). That amount starts from a base figure of \$24 million in 1994-95 dollars and is adjusted cumulatively each year by reference to the indexation factor. An additional adjustment is made for the fourth category A year to take into account that in that year and in following category A years the ILC will be paid an additional \$21 million (in 1994-95 dollars) that had been previously paid to ATSIC. The base figure for the fourth and succeeding category A years will thus be \$45 million (in 1994-95 dollars). Payments will be made under subsection (2) to the ILC on the second business day of July in each financial year in recognition of the fact that the Land Fund itself will be credited with funds on the first business day of each of the later category A years.

Section 193B Payments out of Land Fund to Commission - second and third category A years

The purpose of this section is to provide for payments to ATSIC from the Land Fund for a transitional period during which it will continue to be funded at the same level that applied before the enactment of this Bill. This will enable ATSIC to continue to perform its land acquisition and land management functions under the Principal Act. That purpose is reflected in subsection (6).

No provision is made for a payment to ATSIC in the first category A year as it will receive moneys for its land acquisition and land management functions under other legislation for this year. Thus this section makes provision for the second and third category A years only. On the second business day in July in each of those years, ATSIC is to be paid the eligible funding amount for that year. Thus ATSIC will have a certain and regular funding stream, receiving annual instalments in each of the two category A years during which it will receive funding from the Land Fund.

The 'eligible funding amount' for the second and third category A years are worked out using the formulae in subsections (3) and (4) and are rounded down in accordance with subsection (5). The eligible funding amount starts from a base figure of \$21 million in

1994-95 dollars and is adjusted cumulatively in each of the two applicable years by reference to the indexation factor worked out under section 193D.

Section 193C Payments out of Land Fund to Indigenous Land Corporation - category B years

This section sets out the amounts, timing and manner of payments to the ILC from the Land Fund in category B years, that is, the years in which the Land Fund is no longer being credited with amounts from the Consolidated Revenue Fund. In each of these years, the ILC is to be paid the designated funding amount for that year on the last business day of the year. The designated funding amount for a category B year is worked out in accordance with subsections (3) and (4) and is equal to the realised real return on the investments of the Land Fund in respect of the previous year. This requires the return on investments to be adjusted in accordance with usual accounting practice to take account of both inflation, calculated using the indexation factor set out in section 193D, and the degree to which returns actually accrue to the Land Fund.

Where the amount of the realised real return is negative, this section has the consequence that no amount is payable to the ILC out of the Land Fund and advances may need to be made under section 193E.

Section 193D Indexation factor

This section sets out the method by which the indexation factor referred to in sections 193, 193A, 193AA, 193B, 193C, 193I, 193L and 193N is worked out. The use of this factor ensures that price movements are taken into account in working out the amounts to be paid into the Land Fund in category A years, the amounts paid out of the Land Fund in both category A and category B years and the borrowing and guarantee limits of the ILC.

For both category A and category B years the indexation factor is worked out by reference to the implicit price deflator for gross non-farm product that is published by the Australian Statistician in respect of each quarter. These figures are used as index numbers for the purpose of the formulae that determine the indexation factor.

Subsection (1) provides that the indexation factor for a category A year is worked out by dividing the sum of the index numbers for the four quarters ending on 31 March immediately preceding that year, by the sum of the index numbers for the four quarters ending on 31 March in the year before that. For example, in the category A year that commences on 1 July 1996 and ends on 30 June 1997, the sum of the index numbers for the June, September and December 1995 quarters and the March 1996 quarter will be divided by the sum of the index numbers for the June, September and December 1994 quarters and the March 1995 quarter.

An April to March year has been chosen for the purpose of working out the indexation factor for category A years so that the indexation factor can be known well before the beginning of each category A year (other than the first such year). This will enable payments of the correct amount to be made into the Land Fund on the days specified in section 193.

Subsection (2) provides that the indexation factor for a category B year is worked out by dividing the sum of the index numbers for the four quarters ending on 30 June immediately preceding that year by the sum of the index numbers for the four quarters ending on 30 June in the year before that. For example, in the first Category B year commencing on 1 July 2004, the sum of the index numbers for the September and December 2003 quarters and the March and June 2004 quarters will be divided by the sum of the index numbers for the September and December 2002 quarters and the March and June 2003 quarters.

For category B years the normal July to June financial year has been chosen for working out the indexation factor to ensure that the amount payable to the ILC out of the Land Fund in category B years reflects the performance of the Fund in the immediately preceding financial year in real terms. As the preceding June quarter index number is not available at the commencement of a financial year, the amount payable to the ILC in a category B year may not be known until some time in August. Consequently, provision is made in section 193C for the first instalment of payments in category B years to be made at the end of August.

Subsection (3) requires the indexation factor obtained by applying the formula in subsection (1) or (2) to be rounded up or down to three decimal points.

Subsection (4) ensures that the index number will remain ascertainable if the Australian Statistician changes the reference base for the implicit price deflator for gross non-farm product.

Section 193E Advances on account of payments

This section allows advances to be made to the ILC out of the Land Fund on account of payments that may become payable to the ILC during a specified later financial year.

Under subsection (1), advances may be made only if the Minister is satisfied that it is appropriate to do so because of special circumstances. An example of special circumstances could occur in a category B year where no amounts are payable to the ILC from the Land Fund because of a negative real return on investments. In such circumstances the Minister may think it appropriate for the ILC to be funded by advances made in respect of a future year for which economic forecasts indicate real returns would be realised by the Fund.

Subsection (3) provides for the case where the amount advanced to the ILC by reference to a specified year turns out to be greater than the amount payable to the ILC under section 193A or 193C for that year. When this occurs, the ILC is liable to repay to the Commonwealth the amount of the excess.

Subsections (4) and (5) are consequential on the constitutional requirement that amounts received by the Commonwealth must be paid into the Consolidated Revenue Fund. These subsections ensure that where an amount is paid to the Commonwealth under subsection (3), an equal amount is credited to the Land Fund and that amount is appropriated from the Consolidated Revenue Fund.

Subsection (6) allows an advance in excess of entitlements to be recovered as a debt due to the Commonwealth by court action or to be deducted from amounts payable to the ILC.

Section 193F Delegation of investment powers by Minister for Finance

The purpose of this section is to enable the Minister for Finance to delegate to a member of staff of ATSIC the Minister's powers under section 62B of the *Audit Act 1901* to make investments of the Land Fund.

Section 193G Consultative forum on investment policy of the Land Fund

The purpose of this section is to provide a forum through which the ILC Board may express its views about the investment policy of the Land Fund to the person responsible for making investments of moneys standing to the credit of the Fund and to other relevant persons.

Subsection (1) provides for the mechanisms by which that purpose is achieved. A meeting is to be convened by the Minister at least twice each financial year between nominated ILC Directors, any other persons considered by the Minister to be appropriate, and the delegate of the Minister for Finance who makes investments of the Land Fund. Examples of the other persons whom the Minister may wish to have in attendance at the meeting are Commonwealth employees or other persons with expertise in investment planning and related matters. Each such person may request information which relates to the management and/or performance of investments of the Land Fund and the Minister must provide such information. Although the ILC Directors may express their views at a meeting convened under this section it is not the intention that they may direct the delegate as to how Land Fund moneys should be invested.

Subsection (2) makes it clear that the Minister may attend a meeting convened by him or her under this section but is not obliged to do so.

Section 193H Accounts and financial statements

The purpose of this section is to impose on ATSIC an obligation to keep accounts and prepare financial statements in respect of the Land Fund. It is intended that these accounts and statements will be used in the preparation of the report required under the next section.

Section 193I Annual report about Land Fund

This section deals with annual reports on the performance of the Land Fund. The Minister is responsible under this section for making sure that annual reports are prepared, and are tabled in Parliament within 15 sitting days after preparation.

Subsection (1) requires an annual report on the Land Fund's activities during a financial year to be prepared as soon as possible after the end of that financial year. Under subsection (2) the annual report must give details of:

- amounts credited to and paid out of the Land Fund during that financial year
- Land Fund investments
- the realised real return on those investments.

The Report must also provide any other information that is required by the regulations.

Division 11 - Finances

Section 193J Application of money held by Indigenous Land Corporation

This section limits the ways in which the ILC can spend its money. The ILC can use its money for:

- costs, expenses and other debts related to its functions and powers
- salaries and allowances of staff and consultants
- other payments which are authorised or required by law.

Payments which the ILC may be required to make include fees and charges arising from transactions and contracts that it enters. An example of a payment that the ILC will be authorised to make is a payment by way of making an investment.

Section 193K Application of the *Audit Act 1901* to the Indigenous Land Corporation

This section makes it clear that Division 2 of Part XI of the *Audit Act 1901* applies to the ILC, with certain modifications. One of these modifications is that section 63E of that Act (which deals with investment) is not to apply. This means that the ILC may invest any moneys not immediately required for the performance of its functions in any manner which is legally open to it and is not confined by the limitations in section 63E.

The second modification is to add to the reporting requirements contained in section 63H of that Act the requirement to report on any matters specified in regulations. The report under section 63H requires details of the ILC's operations to be given together

with financial statements, but there may be specific matters on which it may be considered desirable that more detailed information be given and regulations can be made for this purpose.

The third modification is that the first category A year (which will not be a full financial year) is to be treated as if it were a financial year.

No provision is made in this legislation for the application of the *Audit Act 1901* to the ILC's subsidiaries as this will occur under section 70BB of that Act without the need for further provision.

Section 193L Borrowing

This section permits the ILC to borrow money and places limitations on that power by imposing a borrowing limit. It operates in conjunction with section 193N (which imposes a guarantee limit) to impose a single ceiling on the level of the ILC's liabilities. The borrowing limit has been set at a level that both recognises the commercial nature of much of the ILC's operations and aims at responsible financial management.

The borrowing limit for the first three category A years is designed to ensure that the total liabilities of the ILC and its subsidiaries do not at any time in that period exceed \$100 million in 1994-95 dollars. The borrowing limit for the fourth category A year and all later years is designed to ensure that the total liabilities of the ILC and its subsidiaries do not at any time in that period exceed \$200 million in 1997-98 dollars.

The indexation factor worked out under subsection 193D(1) or (2) (depending on whether the year is a category A or category B year) is used to adjust the borrowing limit in each year except the first and fourth category A years (which are used as base years).

The sum of the liabilities brought into account under subsection (2) include not only the current borrowings and actual liabilities of the ILC and its subsidiaries but also the amount of any proposed borrowing, and contingent liabilities in respect of guarantees. The inclusion of subsidiaries' liabilities in the borrowing limit provides an incentive for the ILC to control and monitor the activities of its subsidiaries.

If the ILC does exceed its borrowing limit, any borrowing arrangements in excess of that limit are still valid. This protects the interests of bona fide third parties. The ILC can only raise money by borrowing. It cannot, for example, raise money by issuing shares.

Section 193M Giving of security over assets

The ILC can use its assets as security for money borrowed under section 193L and in connection with guarantees given by it. It cannot otherwise give security over its assets.

Section 193N Limit on guarantees

This section complements section 193L by placing a guarantee limit on the giving of guarantees. The limit is worked out by reference to the same factors that apply to establishing the borrowing limit. The amount of the guarantee limit is identical to the borrowing limit. The combined effect of sections 193L and 193N is that the ILC is unable to assume liabilities either by borrowing or by giving guarantees that would push the combined liabilities of itself and its subsidiaries above \$100 million (in 1994-95 dollars) in the first three category A years; or above \$200 million (in 1997-98 dollars) in any later year.

Subsection (8) ensures that if the ILC does give a guarantee that puts the sum of its liabilities over the guarantee limit, the guarantee is still valid. This protects the interests of bona fide third parties.

Section 193P Exemption from taxation

This section makes it clear that the ILC is not subject to taxation imposed by a law of the Commonwealth, a State or a Territory.

Section 193Q Foreign subsidiaries

This section requires the ILC to take steps to ensure that foreign companies do not become ILC subsidiaries. However, the Minister can give permission for a foreign company to become an ILC subsidiary.

Division 12 - Exemptions from stamp duty etc.

Section 193R Exemption from stamp duty etc.

This section is designed to ensure that stamp duty and other similar taxes are not payable twice in a year in respect of both the acquisition and the grant of an interest in land by the ILC or a subsidiary. To achieve this purpose, the section provides for certain matters to be exempt from the payment of stamp duty or similar taxes. Subsection (1) explains that an exempt matter can be:

the grant of land by the ILC and any agreements relating to such a grant if that grant takes place less than 12 months after the ILC acquired the land;

where an ILC subsidiary has been given land acquisition functions, the grant of land by an ILC subsidiary and any agreements relating to such a grant if the grant takes place less than 12 months after the subsidiary acquired the land;

the grant of land to the ILC by ATSIC under section 191K or an agreement relating to such a grant;

the disposal of land back to the ILC under section 191T or an agreement relating to such a disposal, or the receipt of money by a body corporate or its agent for such a disposal.

Division 13 - Secrecy

Section 193S Secrecy

This section prohibits the disclosure of certain information and creates offences for contravention of the prohibition, subject to certain qualifications. The section is designed to protect the secrecy of commercially confidential information and of information that is secret according to the beliefs of an indigenous group.

Subsection (1) explains the terms that are used in this section. The definition of ILC officer encompasses past and present ILC Directors, General Managers, and staff and consultants who have worked for the ILC under Division 9, as well as the directors and employees of ILC subsidiaries.

Subsection (2) describes the type of information and documents that are covered by the secrecy obligation imposed on ILC officers by subsection (3). That obligation is to not divulge, either directly or indirectly, any information or document:

- which concerns the affairs of another person that the ILC officer has learned about or obtained through his or her work with the ILC and where disclosure or production might be commercially damaging for the person it concerns;

which the ILC officer knows is sacred or otherwise significant for Aboriginal people or Torres Strait Islanders and where disclosure or production would be contrary to the views or sensitivities of those persons.

Subsection (4) imposes a penalty of up to 12 months imprisonment for breaches of subsection (3).

Subsection (5) provides that an ILC officer cannot be made to disclose certain information or produce certain documents to a court, if it is information or a document:

concerning the affairs of another person that the ILC officer has learned through his or her work with the ILC where divulging the information might be commercially damaging to the person it concerns; or

where the information is considered secret or sacred by a particular group of Aboriginal people or Torres Strait Islanders and where disclosure or production would be contrary to the views or sensitivities of those persons.

There are exceptions to the prohibition. Subsection (6) makes it clear that an ILC officer is not prevented from disclosing information because of subsection (3) or (5) if the disclosure occurs in relation to the performance by the ILC or its subsidiaries of a function or power of the ILC. Also, subsection (7) makes it clear that the provisions of subsections (3) and (5) that are not concerned with sacred information do not apply if disclosure is for the purposes of criminal proceedings. However, the protection that is provided under this section to information that is considered sacred or otherwise significant by a particular group of Aboriginal people or Torres Strait Islanders continues to operate in the context of criminal proceedings.

Division 14 - Delegation

Section 193T Delegation to Indigenous Land Corporation General Manager or member of staff

This section gives the ILC the power to delegate any of its powers or functions to the ILC General Manager or to ILC staff members."

[Note: section 193T is the last of the provisions inserted by Clause 3 of the Bill].

Division 2 - Consequential amendments

Clause 4 Title

This clause amends the long title of the Principal Act by inserting the words 'an Indigenous Land Corporation' after the word 'Authority'. The purpose of this amendment is to ensure that the long title will reflect the new content of the Principal Act.

Clause 5 Interpretation

This clause amends section 4 of the Principal Act, which contains definitions of important words and terms used in that Act, by inserting new definitions and amending others to take account of new Part 4A. Of particular importance to new Part 4A are the definitions of the terms 'Aboriginal or Torres Strait Islander corporation' and 'holder' which are explained in the clause notes to clause 3 (section 191E).

Many amendments are consequential upon the establishment of a new Corporation and a new Land Fund under the Principal Act which has necessitated changes to the references to Aboriginal and Torres Strait Islander Commercial Development Corporation and the Regional Land Fund already established under the Act.

Clause 6 Insertion of new section

This clause inserts new section 4B into the Principal Act. This section defines the term 'indigenous-held land' which is explained in the notes to clause 3 (section 191E).

Clause 7 Functions of Office

This clause makes amendments to section 76 of the Principal Act, which deals with the functions of the Office of Evaluation and Audit (referred to here as the Office). The amendments make sure that the Office can evaluate and/or audit particular aspects of the ILC's operations or the operations of its subsidiaries, at the request of either the Minister or the ILC.

The Office is also given the power to evaluate or audit individuals, bodies corporate or unincorporated bodies to whom the ILC or one its subsidiaries has given grants or loans, or for whom the ILC or one its subsidiaries has acted as guarantor. This power is limited to matters concerning those grants, loans or guarantees, and is to be exercised on the request of the Minister or the ILC.

The Office is to report to the Minister and the ILC about its auditing or evaluating at least every 3 months, and to tell them about any problems with the operations of the ILC or its subsidiaries.

Clause 8 Examination of documents etc.

This clause amends section 78A of the Principal Act, which deals with the power of the Office of Evaluation and Audit to examine documents. The purpose of this amendment is to ensure that the Office can examine documents so that it can perform the functions given to it by clause 7 of this Bill.

Clause 9 Board of Directors of Commercial Development Corporation

This clause amends section 155 of the Principal Act by inserting a new subsection 155(3). This subsection provides that the operations of the Commercial Development Corporation Board are not affected by a vacancy or vacancies on that Board. This is to ensure consistency with the corresponding provision in relation to the ILC Board.

Clause 10 Re-numbering of sections 192 and 193 of the Principal Act

This is a technical clause to renumber two existing sections of the Principal Act consequential upon the insertion of Part 4A.

Clause 11 Regional Land Fund

This clause amends various sections in the Principal Act to replace references to 'Land Fund' with 'Regional Land Fund' whenever occurring, and to distinguish the Regional Land Fund from the Fund established by this Bill.

Clause 12 Aboriginal and Torres Strait Islander Commercial Development Corporation

Prior to this Bill, the only Corporation dealt with by the Principal Act was the Aboriginal and Torres Strait Islander Commercial Development Corporation. For this reason, references in the Principal Act to 'the Corporation' were references to the Aboriginal and Torres Strait Islander Commercial Development Corporation. This clause replaces all references to the 'Corporation' with 'Commercial Development Corporation' to remove any confusion between it and the new Indigenous Land Corporation.

Clause 13 Commercial Development Corporation General Manager

This clause has a similar purpose to clause 10, and amends references in the Principal Act to 'General Manager' to read 'Commercial Development Corporation General Manager'.

Clause 14 Commercial Development Corporation Directors

This clause has a similar purpose to clauses 10 and 11, and amends existing references in the Principal Act to 'Director' to read 'Commercial Development Corporation Director'.

PART 3 - AMENDMENT OF OTHER ACTS

Clause 15 Amendment of other Acts

This clause explains that the details about amendments to other Commonwealth Acts are set out in the Schedule.

SCHEDULE

) This schedule describes the amendments to be made to other Acts.

Native Title Act 1993

These amendments:

-) remove Part 10 (which deals with the National Aboriginal and Torres Strait Islander Land Fund) and references to Part 10 from the *Native Title Act 1993*;
- amend sections 204 and 206, which deal with the duties of the Parliamentary Joint Committee on Native Title, to include within its terms of reference the ILC and the Land Fund established by this legislation.

Remuneration Tribunal Act 1973

This amendment to subsection 7(9) inserts a new paragraph in that subsection to make it clear that the remuneration and allowances payable to persons appointed or holding office under new Part 4A of the Principal Act are to be paid from ILC funds.



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