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Policy Change and the Indigenous Land Corporation

Patrick Sullivan



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About the Author

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List of Abbreviations and Acronyms

ADC	Aboriginal Development Commission
ANAO	Australian National Audit Office
ARMC	Audit and Risk Management Committee
ATSIC	Aboriginal and Torres Strait Islander Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
CDEP	Community Development Employment Program
CPI	The Consumer Price Index
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
KIMSS	Kimberley Indigenous Management Support Service
NILS	National Indigenous Land Strategy
RILS	Regional Indigenous Land Studies

Abstract

The Indigenous Land Corporation (ILC) was established in 1995 by the Keating Government as one element of its three-part response to the Mabo judgment. The first part was the Native Title Act (1993), which validated past grants of land to settlers and set up a process for claiming and registering surviving rights of native title. The second part was the creation of an Indigenous Land Fund, established by successive appropriations over ten years, after which it was to be self-sustaining. The ILC was set up at the same time to receive part of the allocation each year to buy alienated land for Indigenous groups. The third part of the Keating response, a Social Justice Package, was never implemented. This discussion paper investigates changes in ILC policy from its inaugural period, when land was bought and divested to Indigenous groups rapidly, to the present day, when the ILC controls application procedures more tightly, divests under strict conditions, and augments its income from its own operations and investments. The paper suggests the ILC has shifted its focus from the direct benefit of land ownership towards joint programs with other government agencies for training, education and employment. The paper suggests this policy change has occurred without widespread consultation and communication, which has resulted in the dissatisfaction of Indigenous groups. The paper also discusses ILC finances, finding that it has faced considerable challenges since 2004 when it began funding itself entirely from the earnings of the Land Fund and its own investments. The paper concludes that it is time to review the purposes of the ILC and the Land Fund in the light of its original charter, and finds that its policies and strategies should be more inclusive and transparent.

Introduction

This study results from a request by the AIATSIS Council for information on the current policy and procedures of the Indigenous Land Corporation (ILC), particularly in relation to its Kimberley operations. The study relies on published information on the ILC as well as a field trip to the West Kimberley in April 2007. Some questions that concerned members of Council, or have arisen during the course of this research, are:

- the dearth of recent land purchases in the Kimberley;
- the ILC's apparent reluctance to divest properties purchased in the Kimberley;
- lack of support for regional production strategies that would integrate the activities of properties (the Kimberley Beef Strategy);
- insufficient support for land management, rehabilitation and environmental needs;
- insufficient training programs in modern stock management and business skills.

These concerns have been expressed during a period of considerable change in Commonwealth Indigenous affairs policy and in the operation of the ILC. Some changes that may have impacted on the perceptions of lack of progress in the Kimberley are:

- the ILC's increased concern with the commitment and capacity of applicants leading to tighter more targeted application procedures;
- the Coalition Government's emphasis on 'practical reconciliation', training and employment, based on a perceived 'land rich, dirt poor' outcome of previous policy;
- the ILC's and the Government's concern to share training and land management responsibilities with the states and territories;
- the challenges posed by the statutory end of ILC funding from general revenue appropriation in 2004, and the need to finance future operations from the ILC's own investments and the Indigenous Land Fund.

This report investigates and elaborates on these contrasting expectations and concerns. It starts with the context of the formation and purpose of the ILC, and contrasts these with the present direction of the organisation. The views of Kimberley groups and their representatives who feel they have not been fairly dealt with by the ILC are outlined, as are the contrasting views of the ILC's Western Division Manager. The paper then puts these problems in the context of development of ILC policies through successive changes in its Board membership and the concerns of the government of the day. The paper suggests that present policies of the ILC are so far removed from the intention of the Commonwealth Parliament in passing its enabling legislation that its future purpose requires public review. It concludes that the ILC should be more transparent in its policy decisions, consult more widely, have greater concern for its original charter unless this is changed in an open review process, and distance its Board from the executive and management processes of the organisation.

ILC origins and functions

The ILC was established by an amendment to the ATSIC Act in 1995. It was the second part of a three-part response by the Commonwealth Government to the Mabo decision, which recognised the existence of Indigenous customary title in Australian common law. The first step was the introduction of the Native Title Act 1993 which validated past grants of title to non-Indigenous interests, and set up a process for claiming and registering native title where it had not been extinguished. The second part was to establish a secure, substantial and highly specific investment fund, the Land Fund, and the Indigenous Land Corporation. After ten years the ILC would pay for its operations and land purchases from the Fund's earnings. The third part of the Government's response to Mabo was to be a Social Justice Package.¹ This package was not implemented by the succeeding Coalition Government. The ILC now appears to have re-ordered funding priorities towards redressing the social disadvantage which the original response to the Mabo decision would have dealt with in the Social Justice Package.²

With the abolition of ATSIC in 2005 the provisions of the amendment to the ATSIC Act that established the ILC were incorporated into the new Aboriginal and Torres Strait Islander (ATSI) Act. The ATSI Act also established another statutory body with commercial aims: Indigenous Business Australia (IBA). There is one significant difference between the ATSI Act 2005 and the ILC amendments to the ATSIC Act 1989 (1995). The new Act states: 'The Indigenous Land Corporation may make payments to Indigenous Business Australia to assist Indigenous Business Australia to carry out its functions'.³ This could indicate an important conceptual shift from the original intentions of the ILC away from land-based interests. While it does not allow IBA to access the Land Fund itself, the ILC had in the region of \$226 million of its own in 2007, as discussed below, not including its properties and livestock, which could be applied under this clause. Again, this possible reorientation of ILC resources, while passed through Parliament in legislation, has not received any wider public scrutiny.⁴

The original legislation was the 'subject of one of the longest debates ever conducted on the floor of the Senate'.⁵ 121 amendments were proposed with 67 finally agreed on by the Senate when it was returned to the House of Representatives for a second reading. The Government accepted 21 of these⁶. In the meantime it had been the subject of a Senate enquiry.⁷ Explicitly rejected by the Government was Senate amendment 25 which, according to Keating in his second reading speech:

¹ Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995, Hon. Paul Keating second reading speech, Australian Indigenous Law Reporter, 18 1996:5.

² See, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, Indigenous Social Justice, volume 1, submission to the Parliament of Australia on the Social Justice Package, Human Rights and Equal Opportunity Commission, Sydney, 1995:1; Indigenous Land Corporation, Chairman's Report, Annual Report, Adelaide, 1996:3.

³ Aboriginal and Torres Strait Islander Act 2005, S191EA.

⁴ The ILC states that it did not seek this addition and has no policy provision to use it. Deputy Chair ILC to Chair AIATSIS 27/02/2009.

⁵ Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995, Hon. Paul Keating second reading speech, Australian Indigenous Law Reporter, 18 1996:3.

⁶ *ibid*

⁷ Land, Report of the Senate Select Committee on the Land Fund Bill, February 1995.

...would require the ILC to take into account, in a completely unspecified way, the educational, health and similar needs of indigenous communities when deciding where to acquire land. This amendment would shift the focus of the ILC's operations from the fundamental objective of building an indigenous land base...require the corporation to pursue objectives which are clearly the function of other agencies [and result in] confusion about the proper role of the ILC and about its responsibilities relative to those of agencies delivering service – not land – to indigenous communities.⁸

Yet, as this paper will discuss, these are precisely the policies currently adopted by the ILC.⁹ The legislation that established the ILC was not hasty or ill-considered, it endured the full light of scrutiny available in the Australian democratic process. The Prime Minister's second reading speech makes the primary intention clear, both in context and in implementation:

The purpose of the Government's Bill is unambiguous. It is to enable indigenous people to acquire land and to manage and maintain it in a sustainable way, to provide economic, social and cultural benefits for themselves and for future generations of their peoples...The Bill is not directed at anything else on the policy or program agenda...[it] is for the single purpose of building and sustaining an adequate stock of land in the hands of indigenous owners currently dispossessed.¹⁰

In the Act itself the functions of the ILC are in two parts - land acquisition and grant, and land management.

The Act outlines the land acquisition functions as:

- (1) The land acquisition functions of the Indigenous Land Corporation 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 purpose of the acquisition of interests in land.

Both this section and a subsequent section of the Act, on how the ILC is to perform this function, state that the purpose of land acquisition is to make a grant of the land to Aboriginal and Torres Strait Islander corporations, though, as described below, there is a 'get-out' clause.

⁸ Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995, Hon. Paul Keating second reading speech, Australian Indigenous Law Reporter, 18 1996:6-7.

⁹ Indigenous Land Corporation, Agency resources and planned performance, FaHCSIA portfolio budget statement 2008-09:173.

¹⁰ Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995, Hon. Paul Keating second reading speech, Australian Indigenous Law Reporter, 18 1996:5.

The legislature's intention that the ILC should primarily be a vehicle for Indigenous land ownership is clear in the description of how it is to perform its functions:

- (3) For the purpose of the performance of the Indigenous Land Corporation's land acquisition functions, the Indigenous Land Corporation must give priority to the following:
 - (a) pursuing a policy of:
 - (i) acquiring interests in land and granting the interests to Aboriginal or Torres Strait Islander corporations; or
 - (ii) in cases where the Indigenous Land Corporation grants money to Aboriginal or Torres Strait Islander corporations for the acquisition of interests in land—acting as the agent of the Aboriginal or Torres Strait Islander corporations in connection with those acquisitions;
except where the circumstances make the pursuit of such a policy impracticable or inadvisable;
 - (b) in a case where the Indigenous Land Corporation acquires an interest in land for the purpose of making a grant of the interest to an Aboriginal or Torres Strait Islander corporation—that grant being made within a reasonable time after that acquisition.

This section requires that the normal course of action of the ILC should be to divest properties within a reasonable period of time. The section requires the ILC to do four things:

- acquire interests in land;
- grant these interests;
- grant money to Indigenous corporations for land acquisition;
- act as an agent in this third case.

The Act then exempts the ILC from these requirements where they are impracticable or inadvisable, but nevertheless requires it to act within a reasonable period of time between the acquisition of land and divesting it to an Indigenous corporation. Each of these terms 'reasonable', 'impracticable' and 'inadvisable' could be subject to considerable variation in interpretation. During the Senate debate of the Bill an amendment was proposed that would 'emphasise the point that the ILC's essential function in acquiring land is to act *for* the indigenous peoples rather than to accumulate its own landholding'.¹¹ The subsequent Senate inquiry found that those who gave evidence 'overwhelmingly' agreed with the amendment, but it was rejected by the Government.¹² In 2000, the Bidjara Aboriginal Housing and Land Corporation sued the ILC for not divesting to it a property that was the subject of competing native title claims. In this case the ILC had not previously determined who the grantee should be and decided to wait for the outcome of the claims. The judge found for the ILC.¹³ Despite the possibility that this judgement allows the ILC to hold onto land if it wishes, whatever the intention of the framers of the Act, good administrative practice should persuade it otherwise.

¹¹ *Land*, Report of the Senate Select Committee on the Land Fund Bill, February 1995:31. Italics in original.

¹² *Ibid*

¹³ *Bidjara Aboriginal Housing & Land Corporation Ltd v Indigenous Land Corporation*. Federal Court of Australia (Kiefel J) 25 October 2000 FCA 1501.

The ILC should develop sound, consistent and transparent principles, firstly, for investigating whether it is reasonable, practical and advisable to divest, and secondly the circumstances that would allow it to do so. This would increase the transparency of ILC dealings with Indigenous applicants and give them concrete targets to work towards.

Taking the legislation as a whole, and interpreting it in the light of the second reading speech to Parliament, and the Explanatory Memorandum,¹⁴ it is clear that the ILC was never intended to hold and operate land based enterprises. However, the Annual Report for 2004-5 describes the ILC as the nation's '19th largest cattle producer'.¹⁵ The Annual Reports reflect a consistent drift in ILC strategic policy towards running its own commercial activities and emphasising employment and training, since the appointment of the three continuing members of the Board during the period of the Coalition Government.

Changes in the Board's composition have reflected changes in Government Indigenous affairs policy. In a submission to the House of Representatives Standing Committee on ATSI Affairs Inquiry into Indigenous Business (1997) the policy of the first ILC Board is clearly stated: 'the core business of the ILC is land...The ILC does not see its role as being a promoter of economic development as such, but primarily as a vehicle for addressing dispossession'.¹⁶ Successive Boards moved away from this position. The first Chair under the Coalition committed the ILC to, 'break the cycle of welfare dependency'.¹⁷ The current Board is sympathetic to complaints that previous ILC policy discriminated against urban projects,¹⁸ supports reform of the CDEP program with greater insistence that it lead to employment,¹⁹ and takes a firm view of the need for economic viability of purchases and demonstrations of commitment from the applicant group.²⁰ While the first Board acquired 151 properties, subsequent Boards since 2001 have acquired less than half this amount in an approximately equivalent period.²¹ Moving further still from the ILC's original charter, the ILC's 2008 budget statement says that it has, '...set the following priorities in performing its land acquisition and land management functions':

- creating training and sustainable employment for Indigenous people;
- increasing the capacity of Indigenous people to sustainably manage their land;
- engaging Indigenous people in viable, land-based enterprises, including tourism and agriculture;

¹⁴ The memorandum states: '...subsection (3) requires the ILC to give priority to performing its land acquisition functions by acquiring land and granting it as soon as possible...' In other cases it can make a grant of money. 'Only when either of these courses is impracticable or inadvisable for commercial or other reasons would the ILC be expected to perform its land management functions in a different manner'. Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1994 Explanatory Memorandum p.6.

¹⁵ Indigenous Land Corporation, Chairperson's Report, Annual Report, Adelaide, 2005:3.
<http://www.ilc.gov.au/webdata/resources/files/chairreport04-05.pdf> [Accessed 18/06/2009].

¹⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into Indigenous Business, submission of the Indigenous Land Corporation, 1997:7.

¹⁷ Indigenous Land Corporation, Annual Report, Adelaide, 2000:2.

¹⁸ Indigenous Land Corporation, Annual Report, Adelaide, 2004:1.

¹⁹ Indigenous Land Corporation, Annual Report, Adelaide, 2007:2.

²⁰ Indigenous Land Corporation, National Indigenous Land Strategy 2001 – 2006 (revised February 2006), 2006:1.

²¹ The 2003 report of ILC's survey of its properties indicates it had purchased 146 properties in the five years between 1996 and 2001, with a further five occurring during the two years between the survey's inception and its report. ILC, Improving Outcomes from Indigenous Land Purchases, Canberra 2003:5, 17. It currently reports 222 properties.
<http://www.ilc.gov.au/site/page.cfm?u=160>[accessed 18/07/2009].

- supporting the education of Indigenous youth, including provision of student hostels;
- collaborating with other agencies to produce effective outcomes.²²

The statement relates these priorities to the National Indigenous Land Strategy (NILS) 2007-2012, but it is difficult to find them reflected as headline priorities in the NILS document. It appears, also, that this NILS was produced without the benefit of Regional Indigenous Land Strategies (RILS), which are required by the original ATSI Act and found their way, in modified form, into the current ATSI Act.²³

These recent developments in ILC policy have caused particular concern in the Kimberley region of Western Australia.

The ILC and the Kimberley

There are about 100 pastoral leases in the Kimberley. 25 of these are owned by Aboriginal groups, all of which were acquired before the ILC came into existence. The ILC has acquired five Kimberley properties,²⁴ all of which were purchased late in the term of the first Board. None of these have been divested to an Aboriginal group. Kimberley Aboriginal groups consulted for this study list a range of disagreements with ILC processes and policy. The ILC's Western Division Manager was also consulted. His views are quite divergent from theirs. The views of the Aboriginal groups will be discussed first, followed by the views of the Western Division Manager.

The views of Kimberley Aboriginal groups consulted during the course of this research include:

- inadequate consultation and communication by the ILC;
- lack of progress towards divestment;
- no apparent benefit for applicant groups, local people or traditional owners;
- difficult application procedures;
- inadequate training and transfer of skills for land management and commerce;
- no recognition of traditional ownership.

The groups consulted believe that the ILC does not have good consultation procedures. Since the ILC decided to cease funding the Kimberley Aboriginal Pastoralists Association, and withdraw the ILC's one full-time staff member in the Kimberley, it is seen to be out of touch with the needs of local Aboriginal groups. Despite the ILC's commitment to regional consultations as one of its Key Principles,²⁵ if meetings are called, many people do not hear about them or receive

²² Indigenous Land Corporation, Agency resources and planned performance, FaHCSIA portfolio budget statement 2008-09:173.

²³ The ILC is required to produce both a National Indigenous Land Strategy and Regional Indigenous Land Strategies. Although timeframes are stipulated for these, there is no statutory requirement that they be related. The abolition of ATSI Regional Councils has produced an anomaly in the ATSI Act. The ILC is free to determine who it may consult in drawing up the RILS, it is required to consult Regional Councils, which no longer exist.

²⁴ Roebuck Plains, Myroodah/Lulugui, Durack River, Karunje, Home Valley. In addition Udialla, a relatively small property was also acquired, and the debts incurred by the abandoned Carranya were paid out and it was taken over by the ILC.

²⁵ ILC, National Indigenous Land Strategy 2007-2012:7.

assistance and logistical support to attend. In addition, they are unaware of decisions reached or any follow through from the meetings.

Several groups are unhappy about progress towards divestment of the ILC-owned properties. They say that they do not receive any benefit from their operation. They believe that, at a minimum, money earned from these properties should be held in trust for the Traditional Owners or original applicants and not used by the ILC for its own purposes. The last available information on the profitability of ILC-owned Kimberley properties prior to completion of this report is from 2004. The net operating profit for Roebuck Plains station in that year was \$3.8 million, though this was not cash in the bank as it included the increase in value of stock.²⁶ Net operating profit for Myroodah was \$1.27 million.²⁷ Home Valley was projected to begin earning well in 2005-6.²⁸ In 2002-03 the ILC received an insurance pay out from a flood damaged area, Jack's Waterhole, on neighbouring Durack River station. Money which, sources consulted for this study said, it absorbed without any local benefit. The reported figures of 14 Indigenous stockmen employed on Roebuck Plains and 21 on Myroodah is not encouraging since they were employed on a casual basis and there is no record of the number of full-time equivalent positions created. Employees on these stations are not all Indigenous and not always from the local area.

The Traditional Owners of Myroodah/Lulugui and Udialla explained that they are unable to meet ILC divestment requirements because of lack of resources to produce business plans, lack of training, and inadequate communication of ILC benchmarks. For example, the ILC provided some funds to the applicants to carry out a business plan. They employed qualified consultants. The ILC was not satisfied with the resulting business plan, but the funds had been expended and it was not possible to do a revision. The applicants feel that the ILC should take an ongoing supportive role to develop their capacity to meet ILC requirements. They have proposed models that separate the operation of the cattle enterprise from the land ownership element and would distribute shares of profit from the operation, but feel that the ILC has been unresponsive.

Several people consulted felt that the ILC application procedures, both for purchase and for land management funding, are too complicated and time-consuming. The Board of one Aboriginal-owned station has declined ILC funding because of a perception of intrusive ILC oversight and difficult reporting requirements.

While the ILC does operate a tourism training scheme on Home Valley station, and is in partnership with the WA Government in a pastoral training program on other Kimberley properties, several people consulted believed this to be inadequate. There were suggestions that local communities in the Wyndham area did not have enough say about appropriate participants in training and how they could best benefit their communities when trained. The pastoral training program was criticised for not involving enough properties, nor enough workers, and not transferring high level skills in the operation of pastoral enterprise. Instead, it tends to concentrate on fencing, yard building and similar practical rather than commercial skills.

²⁶ ILC Annual Report 2004-2005:65.

²⁷ ILC Annual Report 2004-2005:66.

²⁸ ILC Annual Report 2004-2005:67.

The properties acquired by the ILC are either situated on land where there has been a successful determination of native title, or where there is a native title application in an advanced stage. This means that identification of Traditional Owners, and their incorporation in a Prescribed Body or a Registered Body under the Native Title Act, is complete. Yet the ILC does not deal with native title holders as a body of people with rights to negotiate land use, tending instead to deal with groups on a community or applicant basis.

The ILC's View

The Western Division Manager's point of view is quite different to the Aboriginal interests consulted. He does not feel that the application process is too difficult for people that aspire to run a pastoral station. He sees it as a means of indicating ability and commitment. He does feel that the ILC is available for mentoring applicant groups through the process, but suggests applications on social and environmental grounds may be easier to put together than economic proposals. Even these, however, need to demonstrate that they are at least cost-neutral. He felt that, nationally, ILC's preferred divestment strategy was working well. This strategy is for the ILC to normally retain ownership for a three-year period and to have a management contract with the grantee group. Divestment then proceeds if all is going well. In the Kimberley, he says, this strategy is difficult to apply. First, because it is difficult to get agreement among competing interest groups for benefit from the properties and it is difficult to get the Traditional Owners to agree to a sustainable economic management strategy. Second, he feels that the management capacity of the Aboriginal groups affected is not currently adequate and that, consequently, concentration on training is appropriate at this stage. Although he finds planning joint management and training programs with state agencies frustratingly slow and complex, current programs are successful. The ILC and the WA Department of Agriculture have each committed \$2.5 million to the Kimberley Indigenous Management Support Service (KIMSS) which involves training and practical management on six stations. The Kimberley TAFE is involved in the training component. The Department of Primary Industry and the Pastoral Lands Board are involved in a management program on Lamboo station. He feels that these initiatives provide positive role models as successful stations for other community-run properties. He would like to extend this partnership approach to environmental agencies and is also engaged in a joint strategy for the pastoral industry with the Kimberley Development Commission.

In addition to the Western Division Manager's views, the ILC Deputy Chair has also defended ILC's approach. He suggests that KIMSS has placed more than 18,500 km² of Indigenous land under, 'increasingly effective management', with an extra 18 full-time and 56 part-time jobs created in 2007/08. The ILC has also contributed \$2.5 million over five years to the Kimberley Rangers Initiative which aims to also provide jobs in managing and rehabilitating the Kimberley environment. While, he states, Roebuck Plains and Myroodah have made a cash surplus of \$7.9 million between 2000 and 2008, the ILC has spent \$11.6 million on infrastructure on these two stations. It aims to spend another \$6.9 million in the Kimberley, including the export cattle yards in Broome which will provide six full-time Indigenous training positions.²⁹

²⁹ Deputy Chair ILC to Chair AIATSIS 27/02/09.

To understand these developments it is useful to review the history and some significant activities of the ILC Board in the context of changing political climates.

The ILC Board

The Act establishing the ILC provided for a Board of seven members. They are appointed by the minister with responsibility for Aboriginal and Torres Strait Islander Affairs. Five are required to be of Aboriginal or Torres Strait Islander descent, one of whom must be the Chair. In the original amendment to the ATSIC Act, seats were reserved on the Board for the Chair of ATSIC and one other ATSIC Commissioner. On the abolition of ATSIC, substantially the same arrangements were retained except that the two ATSIC positions became general Indigenous positions. This provides that the Board has an Indigenous majority and is chaired by an Indigenous person. The Minister is not empowered to direct the Board. Nevertheless, the Board has broadly reflected the priorities of the Government of the day. This tendency has increased with the abolition of the ATSIC positions. The Board has always taken a ‘hands on’ approach to ILC administration and furthered its members’ own ideas about Indigenous advancement. The first Board tended towards the acquisition of land for cultural reasons and paid less attention to the productive capacity of both the land and the applicant group.³⁰ Boards appointed under the following Coalition Government tend to favour employment and training. They retain pastoral purchases for these purposes (as well as for provision of an income stream) and lean towards urban acquisitions and providing land to Indigenous people who may not be the Traditional Owners.³¹

The first Board was weighted towards those with a history of land rights activism. The first Chair was David Ross. He came from 14 years with the Central Land Council, the last five of those as Director. His Deputy was Peter Yu, Executive Director of the Kimberley Land Council at the time of his appointment. He had been associated with the KLC since its inception in 1978 and was a Kimberley representative of the National Aboriginal Conference. Also on the Board was Noel Pearson, Executive Director of the Cape York Land Council. The ATSIC appointees were Lois (Lowitja) O’Donoghue and Steve Gordon. Both were grounded in Aboriginal advancement movements, and also represented Indigenous peoples from the southern settled areas of Australia. The Board had two non-Indigenous appointees, Penny Morris and Lawrie Willett.

An indication of the first Board’s priorities is given by the controversy over the purchase of pastoral properties in the Northern Territory. The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 prohibits ILC grantees from claiming the same land under the Aboriginal Land Rights Act (NT) 1976. For the second and third years of the operation of the Land Fund some of the appropriation was directed to ATSIC as well as to the ILC. ATSIC acquisitions with this money were not subject to the same restriction. The ILC Board entered into an agreement with ATSIC not to acquire land in the Northern Territory, while the ATSIC Board at the same time made a policy decision to direct the entirety of its allocation from the Land Fund to the Northern Territory. This agreement would have circumvented the restriction on

³⁰ Indigenous Land Corporation, *Improving Outcomes From Indigenous Land Purchases*, Adelaide, 2003:2, 23.

³¹ Indigenous Land Corporation, *National Indigenous Land Strategy 2001 – 2006* (revised October 2002), 2002:1, 7.

land claims on newly acquired pastoral land, and was challenged in the Federal Court by the New South Wales Land Council. Both ATSIC and the ILC were found to be at fault and the arrangement did not go ahead.³² Justice Hill found that The ILC had ignored the express intent of the Prime Minister in an undertaking to the Chief Minister of the Northern Territory made in the second reading speech of the Land Fund Bill. Unfortunately, this kind of activity in the early years of the ILC set the precedent for a hands-on Board taking a flexible approach to the intent of the legislation.

The second Chair of the ILC, Sharon Firebrace, occupied the position for only two years and her tenure was coloured by a controversy that erupted over two late purchases approved by the first Board. In particular, the purchase of Roebuck Plains station in the West Kimberley led to allegations of impropriety. Two inquiries were launched, one by Minister Herron into the behaviour of the directors, the other by the ILC itself specifically concerning the purchase of Roebuck Plains and Cardabia stations in WA. Neither of these found any wrongdoing on the part of any member of the Board. Roebuck Plains was a strategic economic purchase. One of the most fertile and productive stations in the Kimberley, situated a short distance from the livestock loading jetty at Broome, it was intended to agist cattle from the Aboriginal properties of the Fitzroy Valley. While there, they were to be streamed into large lots of cattle of similar types to provide better marketing opportunities. Settled and fattened after the stress of mustering they would also command a greater return per head. This was the ILC's Kimberley Beef Strategy.³³ Following the change of Government and ILC Board members, and during the controversy over the purchase of Roebuck Plains, the Kimberley Beef Strategy was reviewed and then dropped.³⁴ Instead, the ILC continues to operate the property, augmenting its own income from sales and benefiting from an increase in the asset's value over its purchase price. While this purchase reflects no discredit on the Board, it again indicates how sound policy may be undermined by the political environment in which the Board operates. The purchase was shrouded in secrecy because of fears of obstruction from the conservative Western Australian State Government of the time. Under the new Board, appointed by the Commonwealth Coalition Government, a strategy that would have aided the economic position of the Aboriginal pastoralists of the Fitzroy Valley was dropped in favour of one that benefits the ILC itself. It is arguable that in neither case should the Board have been so directly involved in local policy decisions.³⁵

The term of the second Chair was short, and she was followed by Shirley McPherson in 2001. McPherson had previously been the Chair of the Aboriginal Development Commission (ADC) which had responsibility for purchasing land prior to the creation of ATSIC. In 1988, under a Labor Government, eight of the ten ADC Commissioners were dismissed.³⁶ According to a

³² Aboriginal Law Bulletin case note Simon Taylor. August 1995.

³³ Hassall and Associates Pty Ltd, Kimberley Aboriginal Beef Strategy: Co-operative Pre Feasibility Study, unpublished report, 2001.

³⁴ The ILC General Manager states that the review indicated the ILC would have to bear too much risk between receipt of cattle at Roebuck Plains and negotiating successful contracts for sale, and that Kimberley Aboriginal pastoralists demonstrated lack of capacity to commit to the strategy. The ILC Board had doubts about the carrying capacity of Roebuck Plains but approved a market trial. It could not agree on a process for the trial with the Kimberley Aboriginal Pastoralists Association. General Manager ILC to Chair AIATSIS 16/06/2009.

³⁵ See Recommendation 10, The Kimberley Sub-regional Overview of Land Needs Study, report to the ILC by the Kimberley Land Council, Volume One, 2001:53. The present author was the author of this study for the KLC.

³⁶ Eight Commissioners had been re-appointed on an acting basis in November 1987, presumably at the expiry of their terms. The Minister terminated these acting appointments in May 1988 and appointed eight new acting Commissioners.

Senate Select Committee report, this was ‘presumably due to their opposition’ to the proposal to establish ATSIC which would absorb the functions of the ADC.³⁷ McPherson could not be dismissed because of the formal circumstances of her appointment, but she resigned in the following year.³⁸ Early in the term of the Liberal/National Coalition Government, two other long standing appointments to the ILC Board were made: Kevin Driscoll in 1998; and David Baffsky in 1999, both of whom are non-Indigenous. Baffsky contributes to the investment policy of the Fund. Driscoll has interests in pastoral stations in Queensland and contributes to pastoral land policy. These three formed the core of the Board under the Coalition Government. Noel Pearson had resigned shortly after the change of government, while David Ross and Peter Yu were not reappointed. Geoff Clark replaced Lowitja O’Donoghue as ATSIC chair and Steve Gordon remained as ATSIC appointee, both until the abolition of ATSIC in 2005. The remainder of the current Board, Sam Jeffries, Max Gorringer and Ian Trust are more recent appointees, and Evonne Goolagong Cawley replaced Norma Ingram in September 2007. Also in September 2007, two months before the General Election that removed the Howard Government from office, the other Board members were reappointed for a further four years. Before the expiry of their current terms, and after some fifteen years of operation of the ILC, it would be advisable to review the policies of the Corporation, their alignment with the original intentions of the Act, and with current needs. It would be opportune, also, to review whether the Board has taken too interventionist a role in ILC business and whether a more balanced structure, with a senior management team making practical decisions under broad oversight of the Board and in consultation with Indigenous groups, would serve the Corporation better.

Changes in ILC policy may reflect the professional views of the Board members, as well as the previous Government’s policy priorities, but to some degree they also arise from important failures in the original purchase-oriented regime, which will be discussed below. Without taking a stand on the relative merits of any of these positions, it is questionable whether the Board serves the ILC well in taking such a close interest in the implementation of programs, and whether any of the Boards have furthered the original aim of the ILC, which was to restore land to those who could not achieve it through land rights and native title regimes. Improved performance might be achieved if the Board paid closer attention to the intention of Parliament in passing the ILC (ATSIC amendment) Act, limited itself to setting broad policy parameters, and allowed for greater involvement of managerial and project staff in decision-making in the organisation, in consultation with affected communities. The perceived interference of the ATSIC Board of Commissioners in the distribution of grants was one of the factors in ATSIC’s downfall, and they, at least, were elected by the members of the communities they served. If, indeed, the aims of the Keating Government in introducing the ILC need to be re-assessed in the light of experience, this should be undertaken by Parliament and not solely by changes in ILC Board policy.

Australian Audit Office 1989, Special Audit Report, *The Aboriginal Development Commission and the Department of Aboriginal Affairs*, AGPS, Canberra:8. One of the newly appointed acting Commissioners, Peter Yu, was later inaugural Deputy Chair of the ILC.

³⁷ Report of the Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC – Life in the Mainstream ?*, 2005:19.

³⁸ Horton, D. *The Encyclopaedia of Aboriginal Australia*, Volume II, Aboriginal Studies Press, 1994:681. Horton states that nine Commissioners were dismissed.

Changes in the National Indigenous Land Strategy

In 2002, the ILC completed an assessment of the state of the properties it had acquired. The ILC inspected 146 of the 151 properties it had purchased since 1995. Of the properties inspected, 108 had been divested and 38 were still owned and managed by the ILC.³⁹ The results were not encouraging. The report found that most of the properties had been acquired for social or cultural reasons, but there was sometimes a discrepancy between the group's aspirations for the land and the capacity of the land to fulfil these, or the group's own capacity to use the land. In many cases the group lacked commitment and there was a lack of land management skills and knowledge.⁴⁰

The inspection assessed the benefits of the land purchases. The report distinguished between 'direct benefit' which was commercial or as a result of residency or employment, and 'indirect benefit' which was spiritual or cultural. When the purchases were planned it was estimated that 60,000 people would derive a benefit. In fact, the survey found that those receiving a direct benefit numbered only 1014. Of these, 474 gained a benefit simply by being residents, only 157 were employees and the remaining 383 were part-time CDEP workers. 38% of the properties inspected had no Indigenous occupants at all, nearly three-quarters had no employees and no access to CDEP while 80% of the properties were not being used to their full potential. There were, however, some indirect social and cultural benefits. 91 of the 146 properties showed some evidence of cultural use and 52 had active social programs, though the report does not say how this was demonstrated.⁴¹

The survey of the status of land purchased by the ILC overlapped with the conduct of the Regional Indigenous Land Studies (RILS), which are required by the ILC's legislation. These were running behind schedule, but nevertheless the ILC went ahead with the National Indigenous Land Strategy (NILS) 2001 to 2006, which is also required by legislation. Though the survey of properties was not completed until July 2002, and not delivered to the ILC Chair until March 2003, its essential content must have been already clear, since there was a significant revision of the NILS in October 2002.

The new NILS provided for four types of land acquisition:

- the Cultural Acquisition Program;
- the Social Acquisition Program;
- the Environmental Acquisition Program;
- the Economic Acquisition Program.

In 2002, the ILC also introduced a remediation program to address the shortcomings of some of the properties that it believed could be salvaged. This program was due to be wound up at the end of June 2008.⁴²

³⁹ The ILC aims to divest 30 properties in 2009 and a further 20 in 2010, Deputy Chair ILC to Chair AIATSIS 27/02/09.

⁴⁰ Indigenous Land Corporation, *Improving Outcomes From Indigenous Land Purchases*, Adelaide, 2003:5-6, 18.

⁴¹ *Ibid* 5-6.

⁴² Indigenous Land Corporation, *National Indigenous Land Strategy 2007 – 2012:9*.

Tighter application provisions were introduced for each of these programs, with a greater emphasis on long term economic viability. According to ILC public documents, ‘Each program aims to acquire land to support an activity or enterprise that is viable and sustainable over the long term. This high assessment threshold helps ensure that Indigenous people receive ongoing benefits from land ownership and are not set up to fail.’⁴³ With the 2007–2012 NILS this commitment was strengthened, ‘The ILC maintains that achieving sustainable benefits through land ownership and management is a challenging and complex task, involving an array of technical, business and management skills, which in turn must be underpinned by capacity and commitment’ and will not support applications that it believes are not sustainable in the long term.⁴⁴ The 2007-2012 NILS affirmed the ILC’s strategic acquisitions policy. These acquisitions would focus on employment, education, and training, the ILC would remain an active partner, and divestment would take place over a longer period.⁴⁵ It does not refer to ILC’s move into student hostels, though the Chair’s media release on tabling of the NILS in Parliament did announce a joint program with Aboriginal Hostels Ltd and the Department of Families, Community Services and Indigenous Affairs.

While the ILC’s intention in retaining properties under its own control is clearly to provide sound management, training and employment opportunities, the policy also bolsters the ILC’s finances. This was particularly significant when Commonwealth appropriations ceased and the ILC received a disappointing return from the Land Fund. The ILC’s financial situation requires some explanation in order to fully understand its current policies.

The Financial Situation of the ILC⁴⁶

For the first ten years of its operation the ILC was funded on a formula based on the value of the amount allocated to the Land Fund. After an initial payment of \$200 million in the first year of operation, in each subsequent year \$121 million was appropriated to the Land Fund from consolidated revenue.⁴⁷ The ILC could draw on approximately 34% of this for its operations and acquisitions. The appropriation to the Land Fund was increased each year by an inflationary index pegged to its initial 1994 value. Because of this indexing, the annual appropriation increased from \$123.20 million at the end of 1996 to \$145.7 million by the end of 2004. By this time the value of the Fund stood at \$1.42 billion. In line with increases in the appropriation to the Fund the annual amount transferred to the ILC increased from \$24.4 million in 1996 to \$54.7 million at the end of 2004. From 2004 the ILC has been funded from the ‘realised real return’ of the Land Fund. The realised real return is calculated after the Fund has retained an increment equivalent to annual inflation. While this is required by the ILC’s legislation, the meaning of the term ‘realised real return’ is subject to some dispute.⁴⁸ On 30th June 2005 the ILC received only

⁴³ Indigenous Land Corporation Media Release, nd.

⁴⁴ Ibid:1.

⁴⁵ Ibid:9.

⁴⁶ I am grateful to Tony Boxall, Business Manager of the Research Program at AIATSIS, for assistance with interpreting ILC financial reports.

⁴⁷ The Land Fund is referred to as the Land Account in the ATSI Act 2005, apparently as a result of the *Financial Management Legislation Amendment Act 1999*. For consistency it will continue to be referred to as the Land Fund here, there have been no substantive changes to the original legislation.

⁴⁸ Senate Community Affairs Committee May 30th 2006.

\$4.0 million as the realised real return of the Fund, a substantial reduction in annual income. This reduction was largely due to a mistake made in assessing the inflationary factor in previous years. This mistake appears to pre-date administration of the Fund by FaHCSIA. Although the Fund is not directly under ILC control, it is remarkable that ILC financial staff were not aware of this looming risk in the fundamental source of the organisation's income.

The nature of the error is explained in an Australian National Audit Office (ANAO) report. In 2005, the ILC reported to a Senate Estimates Committee that it had been subject to two recent ANAO reports. One questioned whether some of the Land Fund's investments strictly complied with the law governing the fund, some investments were changed and there was no real loss to either the Fund or the ILC.⁴⁹ The other had more serious consequences. It found that the amount allocated by Government to the Land Fund, and therefore the proportion of this that went to the ILC, had been miscalculated for ten years because of the wrong measure of inflation had been used. The Consumer Price Index (CPI) had been used to calculate inflation when in fact the legislation required a more complex measure, the gross non-farm product deflator. Consequently the increase in appropriation had been exaggerated and the ILC, the Land Fund and ATSI (which had received some of the appropriation in the second and third years of the fund) had to pay money back to the Commonwealth, with interest. The respective amounts were: \$10.4 million from the fund, \$6.2 million from the ILC, \$191,000 from ATSI and \$3.9 million in interest - over \$20 million in total.⁵⁰ While this may have been a bit of a blow to the ILC, the effect of using the wrong inflationary index was more severe when the ILC began to fund itself from the 'realised real return' of the Land Fund. The 'real return' is the amount earned on its investments less compensation to the Fund for inflation. In the years prior to 2004 the amount received by the ILC had been in the region of \$55 million. After the changeover in 2004 it fell to \$4 million. As Lindsay (ILC Chief Financial Officer) put it at the Senate Estimates hearing:

It was a bit of a surprise. We did expect, from our calculations from the balance of the land fund, that we would get approximately \$45 million to \$50 million per annum. That was based on a set of assumptions using current interest rates and current CPI and performance for the fund over history.⁵¹

The Government and the ILC have been discussing revision of the formula for inflation. The ILC engaged the financial consultants Ernst and Young to advise on the correct interpretation of the 'realised real return' of the fund. The ILC negotiated a revised calculation of the formula which resulted in an annual appropriation for 2007-8 of \$71.8m and a retrospective compensation for the two previous years of \$24.5 million. However, in 2004 it was a completely unexpected shortfall and the ILC dealt with it largely from drawing down its own investments and profits from its operations.

As discussed, the ILC funds itself under a formula established by legislation. This is not related to actual costs or projected expenses. Over the years the ILC has underspent its allocation. It has invested these savings on behalf of the Corporation and these investments are not subject to Department of Finance rules that generally ensure that investments are conservative. The Land

⁴⁹ Senate Legal and Constitutional Committee Feb 18th 2005.

⁵⁰ Senate Legal and Constitutional Committee February 18th 2005.

⁵¹ Senate Community Affairs Committee May 30th 2006

Fund is subject to these rules. By the end of June 2007, ILC held close to \$307 million in investments, not including its livestock and land interests.⁵² This figure includes some operating money, including the draw down from the Fund that year of just over \$96 million. Nevertheless, 'non current' managed investments were worth over \$226 million.⁵³ In addition, the ILC earned about \$2.5 million in income from properties.⁵⁴ It estimated that the increase in market value of its livestock was about \$5.5 million.⁵⁵ Clearly, by retaining control of properties acquired for grant, and failing to spend its allocation which it instead invested on its own behalf, the ILC became a wealthy organisation quite apart from the value of the Land Fund. This wealth originates from public money allocated for Indigenous benefit, so clearly it has a duty of both probity and efficiency in its administration. It has not clearly explained to its Indigenous clients why it found it necessary to accumulate this substantial investment account, the risks and benefits associated with the way it has done this, and its eventual plans for these savings.

The ILC works in a complex financial environment where FaHCSIA is responsible for managing the statutory Indigenous Land Fund and the Department of Finance applies rules for its investment, but the accumulated funds within the ILC are the responsibility of its own Audit and Risk Management Committee (ARMC) and the Investment Subcommittee. The non-Indigenous Board member David Baffsky chairs the ARMC and its independent member, Ian Ferrier, chairs the Investment Subcommittee.⁵⁶ The other member of the ARMC is Sam Jeffries. This committee reviews the internal governance of the ILC. The ILC employs KPMG to conduct its internal audit program, but this does not involve its financial dealings and strategies.⁵⁷ In the past the ILC's foresight and planning has failed it. As discussed above, its Chief Financial Officer was taken by surprise by the reduction of income from the Land Fund from the expected annual \$45–50 million to only \$4 million in 2000 and its investments were found to be non-compliant by the ANAO. Questions were raised at Senate Estimates hearings about the employment of Westpac as both advisor to the Fund on investment strategy and the recipient of the funds investments, which provided only about 6% annual return.⁵⁸ In contrast, the ILC's own investments returned on average 11.7% over the three years to June 2007.⁵⁹ While some of these problems have been fixed, the fix itself is not transparent. The amount drawn down from the Fund increased from the low of \$4 million in 2004-5 to \$23.8 million in 2005-6 then to \$96.4 million in 2006-7. This last figure includes compensation for underpayment in the preceding two years of \$24.5 million.⁶⁰ Even so, this brings the actual 2007 allocation to nearly \$72 million, the highest ever. Some explanation about how a formula which in 2004 yielded \$4m has been adjusted to yield \$72 million three years later should be forthcoming. Bearing in mind that the ILC has been consistently investing its underspend on its own behalf, that it holds profitable operations rather than immediately divesting them or placing the profits in trust for the

⁵² The 2007 Annual Report was the latest available during the period of research for this Discussion Paper.

⁵³ Indigenous Land Corporation Annual Report 2007:142.

⁵⁴ Indigenous Land Corporation Annual Report 2007:136.

⁵⁵ Indigenous Land Corporation Annual Report 2007:137

⁵⁶ Indigenous Land Corporation Annual Report 2007:7, 17, 23.

⁵⁷ Indigenous Land Corporation Annual Report 2007:24

⁵⁸ Senate Community Affairs Committee May 28th 2007.

⁵⁹ Indigenous Land Corporation Annual Report 2006-7:105.

⁶⁰ Indigenous Land Corporation Annual Report 2007:15

traditional owners, and that it has the power under its Act to transfer money to Indigenous Business Australia, these financial activities should be subject to greater public scrutiny.

There is a looming problem for the ILC that may explain some of these fluctuations. Its legislation requires the Land Fund managers to calculate the return from the Fund available in any given year on the return on the Fund over the previous two years.⁶¹ Put more simply, Fund earnings for the previous two years are pooled and the annual return calculated on this amount. Since it is now drawing directly from the Fund, taking the entire realised real return in one year reduces the calculation for the next two-year period, and therefore the permitted funding for the next year. In 2006-7, when the ILC received \$96.4 million, the Fund's earnings were \$97.7 million, causing a projected negative return for 2007-8, after adjustment for inflation.⁶² This accounts for a projected 'see-saw' in ILC revenue from the Fund from 2007-8 to 2010-11. From nil in 2007-8 FaHCSIA expected the ILC to receive \$26.3 million from the Fund in 2008-9, \$1.8 million in 2009-10, and \$28.6 million in 2010-11. This was to be topped up with earnings from interest of about \$1 million in each of these years and an item simply listed as 'other gains' in the budget statement which diminished each year from \$19.8 million in 2007-8 to a projected \$15.6 million in 2010-11.⁶³ Putting together these unspecified 'gains' with the income from the Fund, after its 2006-7 windfall the ILC expected to receive about \$45.5 million each alternate year and about half this amount in the other year.⁶⁴ This is quite a step down from its previous funding of about \$55 million per year. It is also a long way off its estimates just one year previously, when FaHCSIA reported the ILC would be receiving amounts ranging from \$40.5 million to \$46.4 million in each year of the next four-year period. This estimate, made for the budget of 2006-7, made no projection of 'gains' from other sources.⁶⁵ The extreme volatility in global investment markets which began in September 2008 will inevitably produce great challenges for the ILC business model. While the Land Fund may be expected to suffer somewhat through the reduction in levels of earned interest across-the-board in Australia, the ILC's own investments, which have not been as conservative, may have suffered more. Clearly, all is not well with ILC finances and financial projections and some explanation is required.

Conclusion

Over the years, particularly since 2001, the ILC has moved significantly from its original charter, which was to acquire land and grant land for the social and economic benefit of Indigenous people who cannot claim their traditional lands under native title. It is controlled by a small appointed Board, often with continuity of tenure and on which there are influential non-Indigenous businessmen. The deliberations of the Board are not transparent, and the internal operations and financial strategies of the ILC itself are not easily understood from its Annual Reports. It is subject to a peculiar funding regime that allows for the intrusion of public servants

⁶¹ Senate Community Affairs Committee May 28th 2007.

⁶² Ibid.

⁶³ FaHCSIA Portfolio Budget Statements 2007-8, Budget related paper No. 1.8:260. Figures for the 2008-09 financial year and projections to 2012 are now available, but could not be incorporated into this paper in time. They do not alter the 'see-saw' effect, which is even more pronounced, and do show that the ILC will run down its investment holdings from \$210.8 million in 2007-8 to a projected \$81.5 million in 2012.

⁶⁴ Ibid.

⁶⁵ FaHCSIA Portfolio Budget Statements 2006-7, Budget related paper No. 1.8:264.

in a way that is also resistant to scrutiny and public debate. The ILC nevertheless benefits from the Indigenous Land Fund, established with public money, that stood at slightly more than \$1.5 billion in 2007.⁶⁶ It has considerable internal resources accumulated from allocations from the Fund that it appears to use or invest at the Board's discretion. The Act's requirement of negotiated Regional Indigenous Land Strategies and a National Indigenous Land Strategy of finite duration does not work to incorporate Indigenous people's, or indeed the wider public's, perception of priorities. Instead, the Board appears to make its own decisions on Indigenous needs, possibly in consultation with public servants and ministerial advisers, without wide public scrutiny. This is not a robust way of ensuring the maximum benefit for Indigenous people from the considerable resources that the Government has invested. The ILC was established, not by the Government of the day alone, but by considerable involvement of the entire Parliament involving wide-spread consultation with Indigenous people. It would be timely for Parliament to reconsider the aims of the ILC nearly 15 years after the passage of its enabling legislation, and to reconsider both its internal governance and its external relations with Indigenous clients, Indigenous public sector agencies, and the private sector.

⁶⁶ FaHCSIA Annual Report 2006-07:488.

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