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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**ABORIGINAL AND TORRES STRAIT ISLANDER AMENDMENT (A STRONGER
LAND ACCOUNT) BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Siewert)

ABORIGINAL AND TORRES STRAIT ISLANDER AMENDMENT (A STRONGER LAND ACCOUNT) BILL 2014

Outline

The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 will amend the *Aboriginal and Torres Strait Islander Act 2005* to strengthen Indigenous control over the Aboriginal and Torres Strait Islander Land Account (the Land Account) and the Indigenous Land Corporation.

The Stronger Land Account Bill reinforces the principle that the Land Account is held, by the Commonwealth, for, and on behalf of, Aboriginal persons and Torres Strait Islanders. The Bill introduces new measures to protect the Land Account and to ensure it continues to be available to strengthen Aboriginal and Torres Strait Islander peoples' links to their land. The Bill also proposes new measures to ensure the Land Account grows over time so that it will continue to benefit future generations. The Bill also makes several amendments implementing stronger corporate governance measures for the Indigenous Land Corporation to ensure it continues to act in the interests of Aboriginal people and Torres Strait Islanders.

The Land Account and the Indigenous Land Corporation were originally designed specifically to meet the aspirations of Indigenous peoples and to be controlled by them. In recognition of this, the Indigenous Land Corporation was established to be uniquely independent of government.

The Stronger Land Account Bill more fully reflects this intent in the original Act, by introducing measures to strengthen Indigenous control over the Land Account and the Indigenous Land Corporation. It includes strong new requirements for the Government to consult with Aboriginal people and Torres Strait Islanders in relation to:

- appointments to the Indigenous Land Corporation Board;
- any proposed legislative change affecting the Land Account; and
- the investment policy of the Land Account.

In recognition of the intent in the original design of the Land Account and Indigenous Land Corporation, the Bill also reinforces provisions in the Act which make the Indigenous Land Corporation independent from government.

Almost 20 years on from the passage of the original legislation establishing the Land Account and the Indigenous Land Corporation, the Stronger Land Account Bill recognises there is an opportunity to strengthen the Act to ensure that the Land Account and Indigenous Land Corporation continue to provide land-related benefits for future generations of Aboriginal people and Torres Strait Islanders. The Bill includes a clearer explanation of the purposes of the Land Account, being:

- acknowledgment of the special relationship Aboriginal people and Torres Strait Islanders have with their lands including the economic, social, cultural and environmental value land has for Aboriginal people and Torres Strait Islanders;
- acknowledgment of past injustices arising from the dispossession of traditional lands;
- ensuring that Aboriginal people and Torres Strait Islanders receive the recognition within the Australian nation which their prior rights and interests in their traditional lands and their rich and diverse culture entitle them to aspire; and
- as a compensatory mechanism which addresses, at least in part, the ongoing land needs of Aboriginal people and Torres Strait Islanders.

The Stronger Land Account Bill also reinforces the provisions in the Act that ensure that payments may not be made out of the Land Account other than for the land-related benefit of Aboriginal people and Torres Strait Islanders in accordance with these purposes. The Bill reinforces the proposition that the Land Account is held by the Commonwealth for, and on behalf of, Aboriginal people and Torres Strait Islanders and should be managed by the Commonwealth for their sole benefit.

The key amendments made by the Stronger Land Account Bill will:

- introduce a clearer purpose for the Land Account in the Act, specifying that the Land Account is a compensatory mechanism in acknowledgement of past injustices and dispossession of traditional lands and acknowledging the special relationship Aboriginal people and Torres Strait Islanders have with their lands;
- prevent the Land Account from being utilized for any purpose other than the land-related benefit of Aboriginal people and Torres Strait Islanders;
- strengthen Indigenous control over the Land Account and Indigenous Land Corporation by:
 - introducing stronger appointment processes requiring the Minister to consult with a new Indigenous Nomination Committee before making an appointment to the Indigenous Land Corporation Board;
 - strengthening the provisions that allow the Indigenous-controlled Indigenous Land Corporation Board to give advice to Ministers as to how the Land Account should be managed;
 - introducing a mechanism that requires the Parliament to consult with Aboriginal people and Torres Strait Islanders before making any changes to the provisions in the Act that relate to the Land Account; and
 - introducing measures to strengthen the Indigenous Land Corporation's status as an independent, Indigenous-controlled entity;
- introduce strong new measures requiring the Indigenous Land Corporation to comply with the highest standards of corporate governance, transparency and accountability including:
 - introducing a more rigorous, consultative, merit-based and transparent appointments process for Indigenous Land Corporation Directors;
 - limiting tenure and reappointments of the Indigenous Land Corporation Chair and Directors;
 - introducing stronger disclosure requirements for the Indigenous Land Corporation Chair and Directors;
 - strengthening the Indigenous Land Corporation's Audit and Risk Management Committee, including by ensuring it is managed by a chair who is independent of the Indigenous Land Corporation; and
 - introducing provisions requiring a Code of Conduct for Indigenous Land Corporation Directors and staff; and
- introduce measures to ensure the Land Account grows over time, so that it continues to meet the land acquisition and management needs of future generations of Aboriginal people and Torres Strait Islanders.

The Stronger Land Account Bill recognises the enormous symbolic and practical value for all Australians in the High Court's *Mabo* decision ((1992) 175 CLR 1) and respects the 'grand bargain' that was negotiated between the Australian Government and Indigenous leaders following that decision, of which the Land Account was a crucial part. The Bill reflects the enormous significance of the Land Account to Aboriginal people and Torres Strait Islanders and ensures that the Land Account will continue to provide land-related benefits for future generations.

Financial Impact

The amendments in this Bill have negligible financial implications.

NOTES ON CLAUSES

Clause 1 – Short title

1. This is a formal provision specifying the short title as the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Act 2014*.

Clause 2 – Commencement

2. This clause provides that the Bill commences on the day after the Bill receives the Royal Assent.

Clause 3 – Schedule

3. This clause is a formal provision specifying that amendments or repeals are made to the provisions set out in the sections in the schedule.

Schedule 1 – Amendments to the *Aboriginal and Torres Strait Islander Act 2005*

Part 1 – Land Account

Item 1

4. Item 1 outlines the object of Part 4A of the Act.

Item 2

5. Item 2 repeals existing section 192X of the Act, which sets out the purpose of the Land Account, and substitutes a new section 192X. New subsection 192X(1) replicates the existing section 192X. It provides that the purpose of the Land Account is the making of payments to the Indigenous Land Corporation under Division 10 of Part 4A of the Act.
6. Subsection 192X(2) explains where and how money held by the Indigenous Land Corporation that was paid from the Land Account must be applied.

Items 3 to 7

7. Items 3 to 7 provide that if, in a financial year beginning on or after 1 July 2014, the return, in real growth, from investment of the Land Account is greater than \$50 million, the amount in excess of \$50 million must be divided equally between the Land Account and Indigenous Land Corporation.
8. This allows the investment policy of the Land Account to grow beyond CPI. In order for future generations of Aboriginal people and Torres Strait Islanders to continue to benefit from the Land Account, this provision is intended to provide a mechanism to ensure the Land Account grows over time. This will also ensure that the increase in land management costs as a result of expanding the size of the Indigenous estate can continue to be met.

Item 8

9. Item 8 amends existing subsection 193G(1), by omitting the words “the investment policy”, and substituting “the projected financial requirements of the Indigenous Land Corporation and the investment policy”.

Item 9

10. Item 9 inserts after section 193G of the Act a new section 193GA that allows the Indigenous Land Corporation to give the Finance Minister advice about the projected financial requirements of the Indigenous Land Corporation (subsection 193GA(1)).
11. New subsection 193GA(2) provides that the Indigenous Land Corporation may give the Finance Minister advice as to how the Land Account should be managed, in order to meet the projected financial requirements of the Indigenous Land Corporation.
12. New subsection 193GA(3) provides that the Finance Minister must, in making a decision in relation to the investment policy of the Land Account, have regard to any advice given by the Indigenous Land Corporation under subsection (2).
13. This amendment is intended to give Aboriginal persons and Torres Strait Islanders a more direct mechanism to control the way that the Land Account is managed, on their behalf, by the Commonwealth. By giving Aboriginal people and Torres Strait Islanders a more direct role in appointments to the Indigenous Land Corporation Board through the new Nomination Committee process established by item 16, and by requiring the Minister to have regard to the advice of the Indigenous Land Corporation in relation to how the Land Account is managed, as required by the amendments in item 9, Aboriginal people and Torres Strait Islanders will have more direct and stronger control over the Indigenous Land Corporation and Land Account than is currently provided for in the Act.

Item 10

14. Item 10 addresses changes to purpose of Indigenous Land Corporation and Land account. It provides for scrutiny of any Bill that is introduced into the Parliament and would amend or otherwise affect section 193AB or 191B or Division 10, including having the Bill referred to a committee and the reporting process.

Part 2 – Indigenous Land Corporation

Item 11

15. Item 11 inserts after subsection 191F(1) a new subsection (1A), that provides that, in performing its functions and exercising its powers, the Indigenous Land Corporation must ensure that its business and administration is conducted efficiently and in accordance with principles of good governance, transparency, financial accountability and ethical procurement.

Item 12

16. Item 12 replaces existing section 191L of the Act, which sets out the powers of the Minister. It provides that:
 - except as expressly provided in the Act or the *Public Governance, Performance and Accountability Act 2013*, the Minister is not empowered to direct the Indigenous Land Corporation in relation to any of its activities (subsection 191L(1)); and
 - if the Minister makes a request of the Indigenous Land Corporation, the Minister must have regard to the independence of the Indigenous Land Corporation.

Item 13

17. Item 13 replaces existing section 191W of the Act, which sets out the responsibilities of the

Indigenous Land Corporation Board.

18. New section 191W sets out an enhanced set of responsibilities for the Indigenous Land Corporation Board, which are to:
 - ensure the proper and efficient performance of the functions of the Indigenous Land Corporation; and
 - determine the policy of the Indigenous Land Corporation with respect to any matter; and
 - ensure that the Indigenous Land Corporation and its staff, including Indigenous Land Corporation Board members, comply with the highest standards of good governance, transparency, financial accountability and ethical procurement.

Item 14

19. Item 14 repeals existing subsection 191X(3) of the Act, which provides for consultation before the Minister appoints a person as an Indigenous Land Corporation Director, and replaces it with a new subsection, that requires the Minister to consult with the (new) Nomination Committee and the Finance Minister, before appointing a person as an Indigenous Land Corporation Director.

Item 15

20. Item 15 adds new subsection 191X(5). The Minister must, before appointing a person as an Indigenous Land Corporation Director, including in deciding the term of the person's appointment, consider whether the effect of the appointment would be that a majority of the appointments of the members of the Indigenous Land Corporation Board would expire at, or about, the same time. Subsection 191X(6) clarifies that subsection (5) does not affect the validity of any appointment.
21. Item 15 is intended to ensure continuity of corporate knowledge on the Indigenous Land Corporation Board.

Item 16

22. Item 16 inserts after section 191X two new sections that provide for the (new) Nomination Committee, to make recommendations to the Minister about persons appropriate for appointment to the Indigenous Land Corporation Board and for consultation with the Nomination Committee. The Nomination Committee is established by new subsection 191XA(1).
23. The purpose of these amendments is to increase Indigenous involvement and input in relation to appointments to the Indigenous Land Corporation Board. The amendments are intended to increase transparency and rigour in the appointments process and to ensure that appointments are made on merit and, to the extent possible, are non-partisan.
24. New subsection 191XA(2) provides that the Nomination Committee must consist of at least 3 members.
25. New subsection 191XA(3) provides that the Minister must ensure that persons appointed to the Nomination Committee must be Aboriginal persons or Torres Strait Islanders and must have skills and expertise relevant to the functions of the Indigenous Land Corporation.
26. New subsection 191XA(4) provides that, in appointing persons to the Nomination Committee, the Minister must have regard to the gender balance of the Nomination Committee.
27. New subsection 191XA(5) provides that the Minister must appoint a person as chair of the Nomination Committee.
28. New subsection 191XA(6) provides for consultation with the Parliament before the Minister

appoints a person as a member, or as the chair, of the Nomination Committee. The subsection requires that the Minister consult either:

- the joint parliamentary committee responsible for the scrutiny of issues relating to Aboriginal persons and Torres Strait Islanders, or
- if there is no joint parliamentary committee, both the House of Representatives and the Senate committee responsible for the scrutiny of issues related to Aboriginal persons and Torres Strait Islanders.

29. New section 191XB requires the Minister to consult with the Nomination Committee before making an appointment to the Indigenous Land Corporation Board. In particular, it requires that:

- if the Minister proposes to make an appointment to the Indigenous Land Corporation Board, the Minister request that the Nomination Committee prepare a report, proposing potential candidates for appointment (subsection 191XB(1));
- the Nomination Committee maintain a list of potential candidates for appointment to the Board of the Indigenous Land Corporation and must meet at least once in every 12 month period, for the purposes of discussing and updating the list (subsection 191XB(3));
- in preparing a report under subsection (1), or in maintaining the list under subsection (3), the Nomination Committee must have regard to the following:
 - the gender balance of the Indigenous Land Corporation Board;
 - the requirements of subsection 191X(4) (ie has the skills and expertise relevant to the functions of the Indigenous Land Corporation);
 - whether a person recommended for appointment is a fit and proper person to be a member of the Indigenous Land Corporation Board (subsection 191XB(4));
- a report under subsection (1), or a list under subsection (3):
 - must not contain more than 10 potential candidates for appointment; and
 - must not be disclosed, by a Director of the Indigenous Land Corporation or by a member of the staff of the Indigenous Land Corporation, other than for a purpose authorised by the Board of the Indigenous Land Corporation (subsection 191XB(5));
- if the Minister makes an appointment, the Minister must make a statement, in writing, indicating whether or not the person appointed was a candidate proposed by the Nomination Committee (subsection 191XB(6)); and
- a statement under subsection (6) must be published on the Indigenous Land Corporation's website or by any other means that the Board of the Indigenous Land Corporation considers appropriate (subsection 191XB(7)).

30. New subsection 191XB(2) provides that, subject to the requirements set out in (new) subsections 191XB(3), (4) and (5), the Nomination Committee must determine procedures for its operation.

Item 17

31. New section 191YA provides that, in carrying out its responsibilities, the Indigenous Land Corporation Board may establish such committees as it deems necessary.

32. New section 191YB provides for the establishment of an audit and risk management committee. Subsection 191YB(1) requires the Indigenous Land Corporation Board to establish an audit and risk management committee, to be known as the ***Audit and Risk Management Committee***. A note to subsection (1) makes it clear that this requirement is in

addition to the requirement in section 92 of the *Public Governance, Performance and Accountability Act 2013*.

33. New subsection 191YB(2) provides for the functions of the Audit and Risk Management Committee, which are to advise the Board of the Indigenous Land Corporation on:
 - the Indigenous Land Corporation’s governance framework and assurance mechanisms; and
 - the key risks to the Indigenous Land Corporation, including risks relating to carrying out its functions.
34. The new subsection allows the Indigenous Land Corporation Board to determine additional functions of the Audit and Risk Management Committee.
35. New subsection 191YB(3) requires the Indigenous Land Corporation Board to appoint the members of the Audit and Risk Management Committee, including the chair, for a period not exceeding 4 years.
36. New subsection 191YB(4) makes it clear that the members of the Audit and Risk Management Committee, other than the chair, must be members of the Indigenous Land Corporation Board and that they cease to hold office as members of the Audit and Risk Management Committee if they cease to be members of the Indigenous Land Corporation Board.
37. New subsection 191YB(5) provides that the chair of the Audit and Risk Management Committee must be a person who is independent of the Indigenous Land Corporation. This measure is to strengthen the corporate governance and accountability of the Audit and Risk Management Committee of the Indigenous Land Corporation.
38. New subsection 191YB(6) provides that the Indigenous Land Corporation Board must, before appointing a chair of the Audit and Risk Management Committee:
 - consult the Minister in relation to the proposed appointment; and
 - have regard to any views expressed by the Minister in relation to the appointment.

Items 18 and 19

39. Items 18 and 19 repeal existing section 191Z of the Act, which provides for the period of appointment of the Directors of the Indigenous Land Corporation, and substitute a new section 191Z, that provides that:
 - an Indigenous Land Corporation Director holds office for such period, not exceeding 3 years, as is specified in the instrument of appointment (subsection 191Z(1));
 - an Indigenous Land Corporation Director may be reappointed but cannot be reappointed more than once (subsection 191Z(2)); and
 - if the Minister decides to reappoint an Indigenous Land Corporation Director, the decision to reappoint must not be made more than 3 months before the end of the Director’s term of appointment (subsection 191Z(3)).
40. The intention of new subsection 191Z(3) is to ensure continuity of corporate knowledge among Indigenous Land Corporation Board members, while maximising the opportunity for appointments to the Board to be non-partisan.

Item 20

41. Item 20 repeals existing section 192F of the Act, which deals with disclosure of interests by the Chairperson of the Indigenous Land Corporation, and substitutes a new section, dealing with the disclosure of interests by the Chairperson and also by Directors of the Indigenous Land Corporation.

42. New subsection 192F(1) provides that the Chairperson of the Indigenous Land Corporation must give written notice to the Minister of all direct or indirect pecuniary interests that the Chairperson has or acquires in any business, or in any body corporate carrying on a business.
43. New subsection 192F(2) provides that, without limiting the requirements of section 29 of the *Public Governance, Performance and Accountability Act 2013* (which imposes on an official of a Commonwealth entity a duty to disclose material personal interests that relate to the affairs of the entity), a Director of the Indigenous Land Corporation must also disclose to the Indigenous Land Corporation Board all direct or indirect pecuniary interests that the Director has or acquires in any business, or in any body corporate carrying on a business.
44. New subsection 192F(3) requires the Indigenous Land Corporation Board to keep a register of the interests disclosed in accordance with subsections (1) and (2).
45. These amendments to section 192F are intended to ensure that the Indigenous Land Corporation operates in accordance with the highest standards of corporate governance, transparency and accountability.

Item 21

46. Item 21 inserts after section 192S a new section 192SA, which provides that:
 - the Board of the Indigenous Land Corporation must determine a code of conduct for the Indigenous Land Corporation (subsection 192SA(1));
 - in determining the code of conduct, the Board of the Indigenous Land Corporation must have regard to the content of the APS Code of Conduct, set out in section 13 of the *Public Service Act 1999* (subsection 192SA(2));
 - the code of conduct must be published on the Indigenous Land Corporation's website or by any other means that the Board of the Indigenous Land Corporation considers appropriate (subsection 192SA(3));
 - the Directors of the Indigenous Land Corporation and the staff of the Indigenous Land Corporation, engaged under section 192S, must comply with the code of conduct (subsection 192SA(4)); and
 - the code of conduct is not a legislative instrument (subsection 192SA(5)).

Part 3 - Other amendments

47. Item 22 inserts new definitions into subsection 4(1) of the Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

ABORIGINAL AND TORRES STRAIT ISLANDER AMENDMENT (A STRONGER LAND ACCOUNT) BILL 2014

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014 will amend the *Aboriginal and Torres Strait Islander Act 2005* to strengthen Indigenous control over the Aboriginal and Torres Strait Islander Land Account (the Land Account) and the Indigenous Land Corporation. The Stronger Land Account Bill reinforces the principle that the Land Account is held, by the Commonwealth, for, and on behalf of, Aboriginal persons and Torres Strait Islanders. The Bill introduces new measures to protect the Land Account and to ensure it continues to be available to strengthen Aboriginal and Torres Strait Islander peoples' links to their land. The Bill also proposes new measures to ensure the Land Account grows over time so that it will continue to benefit future generations. The Bill also makes several amendments implementing stronger corporate governance measures for the Indigenous Land Corporation to ensure it continues to act in the interests of Aboriginal people and Torres Strait Islanders.

Human rights implications

This Bill advances the human rights of Aboriginal and Torres Strait Islander People. Aside from promoting the land related rights outlined in the Declaration of the Rights of Indigenous Peoples (articles 25-29), it protects both cultural rights (ICCPR article 27 and ICESCR article 15.2) and the right to non-discrimination.

Section 192F of this Bill, that deals with declarations of interests, limits the right to privacy; this is appropriate given the need for transparency and good governance.

Cultural Rights

Article 27 of the International Covenant on Civil and Political Rights (ICCPR)

Article 27 asserts:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language

The Human Rights Committee, in General Comment 23, has interpreted this right to include "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples" and that "the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them". As such, protecting Aboriginal and Torres Strait Islander Peoples' land rights is also realising their right to their culture and religion.

Article 15.1a of the International Convention on Economic Social and Cultural Rights (ICESCR)

Cultural rights are also protected in Article 15.1a of ICESCR, which recognises the right of everyone to "take part in cultural life". The Committee on Economic Social and Cultural Rights, in General Comment 21, has interpreted this to include a right to traditional land, as it relates to Indigenous Peoples:

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories

This Bill promotes the cultural rights of Aboriginal and Torres Strait Islander Peoples, as outlined in the above articles, through strengthening protections of the land account.

The Right to Non-Discrimination

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic principle of human rights law.

Article 2.1 of the ICCPR and Article 2.2 of the ICESCR obligate each State party to respect and ensure to all persons the rights recognized in the Covenants without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to enjoyment of human rights without such distinction is also elaborated throughout the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Committee on the Elimination of Racial Discrimination draws particular attention to the need to protect the land related rights of Indigenous Peoples, in General Recommendation 23:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The obligation of the Australian Government in relation to the right to non-discrimination goes beyond simply prohibiting certain actions. As General Comment 18 of the Human Rights Committee explains:

... equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant ... However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

Certain "special measures" must be taken to ensure the "adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". This obligation is spelled out in article 1.4 of ICERD.

Conclusion

This Bill is compatible with human rights because it advances the cultural rights and right to non-discrimination of Aboriginal and Torres Strait Islander Peoples by improving mechanisms for protecting and strengthening the land account that is in part compensation for dispossessions of land.