

2016-2017-2018

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ABORIGINAL AND TORRES STRAIT ISLANDER AMENDMENT
(INDIGENOUS LAND CORPORATION) BILL 2018**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for
Indigenous Affairs, Senator the Hon Nigel Scullion)

Table of abbreviations and common terms

Abbreviation or common term	Description
Acts Interpretation Act	means the <i>Acts Interpretation Act 1901</i>
ATSI Act	means the <i>Aboriginal and Torres Strait Islander Act 2005</i>
ATSIC Amendment Act	means the <i>Aboriginal and Torres Strait Islander Commission Amendment Act 2005</i>
ILC	means the Indigenous Land Corporation established by section 191A of the ATSI Act
Land Account	means the Aboriginal and Torres Strait Islander Land Account continued in existence by section 192W of the ATSI Act.
Native Title Act	means the <i>Native Title Act 1993</i>

Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018

Context

1. The ILC is established by subsection 191A(1) of the ATSI Act to assist Aboriginal and Torres Strait Islander people to acquire and manage land (see ATSI Act, section 191C). The ILC is a corporate Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.
2. The establishment of the ILC formed part of the Government's response to the High Court's decision in *Mabo (No 2) v Queensland* (1992) 175 CLR 1. Recognising that many dispossessed Indigenous people would be unable to regain control of land under the Native Title Act (either because of historical extinguishment or disconnection to traditional lands), the Government established the ILC to complement native title laws and assist dispossessed Aboriginal and Torres Strait Islander people to acquire and manage land.
3. Developments in native title case law following the passage of the Native Title Act and the establishment of the ILC clarified the common law was capable of recognising native title rights with respect to the use of water, and the taking of resources from waters, for any purpose (see, eg, *Akiba v Commonwealth* (2013) 250 CLR 209 and *Rrumburriya Borroloola Claim Group v Northern Territory (No 2)* [2016] FCA 908). These developments in the law acknowledged that the relationships of Aboriginal and Torres Strait Islander peoples to waterscapes and between land and water are inseparable. As Collings and Falk explain:

In Aboriginal culture in Australia, there is no clinical distinction between land and water, either of water that flows over the land, rests upon it or flows beneath it. Land and Water interface as equal components of country.¹
4. From July to September 2017, the ILC consulted Aboriginal and Torres Strait Islander people across Australia about including freshwater and sea country in the ILC's remit. A clear majority of participants supported expanding the ILC's functions to water.

Summary

5. The purpose of the Bill is to enable the ILC to assist Aboriginal and Torres Strait Islander peoples to obtain economic, environmental, social or cultural benefits from waters so far as the Commonwealth, or the States and Territories, have sovereign rights.

¹ Neva Collings and Virginia Falk, 'Aboriginal peoples in Australia and their spiritual relationship with waterscapes' in Elliot Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008), 131.

Expansion of the ILC's functions to water

6. The Bill amends the ATSI Act to give the ILC functions in relation to 'water-related rights' (an expression defined in the Bill). These additional functions are consistent with the ILC's functions in relation to land, and include:
 - a. the acquisition of water-related rights and divestment to Aboriginal or Torres Strait Islander Corporations;
 - b. the provision of assistance (grants, loans or loan guarantees) to Aboriginal or Torres Strait Islander Corporations to acquire water-related rights;
 - c. the carrying on of management activities in relation to 'indigenous waters' (an expression defined in the Bill); and
 - d. the provision of assistance (grants, loans or loan guarantees) for the purpose of carrying on management activities in relation to indigenous waters.
7. The Bill enables the ILC to perform functions in relation waters (including ground and surface water) where the Commonwealth, or the States and Territories, have sovereign rights (that is, in water or waters within the outer limits of the exclusive economic zone of Australia, including internal waters of Australia). The Bill does not create any new rights, and does not authorise the ILC to exercise its functions in a manner that is inconsistent with the rights and interests of other persons or international law (such as the UN Convention on the Law of the Sea).
8. The Bill requires the ILC to prepare a National Indigenous Land and Sea Strategy and Regional Indigenous Land and Sea Strategies. The Bill provides the ILC with a transition period of 6 months in which to prepare the strategies. The Minister must cause a copy of the National Indigenous Land and Sea Strategy to be presented to each House of Parliament.
9. The Bill also:
 - a. aligns rules for dealings in water-related rights granted by the ILC, or acquired with ILC assistance, with rules for dealings in land granted by, or acquired with, ILC assistance; and
 - b. includes experience in water management as a qualifying criteria for membership of the ILC Board.

Renaming ILC as 'Indigenous Land and Sea Corporation'

10. The Bill alters the name of the ILC to the 'Indigenous Land and Sea Corporation,' to reflect the expansion of the ILC's functions to water. This alteration does not affect the legal identity of the ILC.

Financial Impact Statement

11. The Bill has no financial impact.

Statement of Compatibility with Human Rights

12. The statement of compatibility with human rights appears at the end of this explanatory memorandum.

Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018

Notes on Clauses

Note: The clauses in the Bill will become sections of the Act on Royal Assent.

Clause 1 – Short Title

13. **Clause 1** provides for the Act to be cited as the *Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Act 2018*.

Clause 2 – Commencement

14. **Clause 2** deals with commencement of the provisions in the Bill. This clause has the effect of providing that:
- a. Sections 1 to 3 and anything in the Act not elsewhere covered by this table is to commence on the day the Act receives the Royal Assent.
 - b. Schedule 1 commences on the earlier of a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day the Act receives the Royal Assent, it commences on the day after the end of that period. Commencement by Proclamation is intended to provide a level of control over when the Act commences.
 - c. Part 1 of Schedule 2 will commence at the same time as Schedule 1 commences.
 - d. Part 2 of Schedule 2 will only commence if Schedule 1 to the *Aboriginal Land and Sea Future Fund (Consequential Amendments) Act 2018* has not commenced by the time this Bill commences. If this occurs, the amendments in Part 2 of Schedule 2 will not be necessary.

Clause 3 – Schedules

15. **Clause 3** provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the Schedule concerned.

Schedule 1 – Extending functions to water-related rights

Aboriginal and Torres Strait Islander Act 2005

16. **Item 1** inserts five new defined terms in subsection 4(1) of the ATSI Act. The five terms are *acquisition functions*, *indigenous waters*, *internal waters of Australia*, *management functions* and *national indigenous land and sea strategy*.
17. **Item 2** repeals the definition of ‘national indigenous land strategy’ in subsection 4(1) of the ATSI Act.
18. **Items 3 and 4** repeal the definition of ‘regional indigenous land strategy’ and inserts a new definition of *regional indigenous land and sea strategy* in subsection 4(1) of the ATSI Act.
19. **Item 5** inserts a definition of ‘water-related right’ in subsection 4(1) of the ATSI Act by reference to new section 4C of the ATSI Act.
20. **Item 6** inserts new section 4C of the ATSI Act.
21. New subsection 4C(1) provides a definition of *water-related right*. The broad drafting of this definition is deliberate, and is intended to capture a wide range of rights that may be acquired in, or in relation to, water or waters within the outer limits of the exclusive economic zone of Australia. The expression ‘exclusive economic zone’ used in this definition has the same meaning as in the *Seas and Submerged Lands Act 1973* (see section 2B of the Acts Interpretation Act). The expression ‘internal waters of Australia’ used in this definition is to be defined in subsection 4(1) of the ATSI Act (see Item 1 of the Bill).
22. New subsection 4C(2) includes examples of a water-related right. New paragraphs 4C(2)(a) and (b) refer to a right to take or receive water, or to retain or use water taken. This is intended to include any licence, concession, permit, access entitlement or allocation in relation to water that may be obtained under water management legislation in the States and Territories (eg, under the *Water Management Act 2000* (NSW)). New paragraph 4C(2)(c) refers to a right to take resources from waters. This is intended to include any legal authority to take any resource from waters for any purpose, and would include a fishing licence or permit (whether for a commercial purpose or otherwise). New paragraph 4C(2)(d) refers to a right to undertake an activity in or on waters, examples of which include:
 - a. aquaculture rights (to the extent aquaculture requires rights in addition to rights to take resources from waters, eg, a lease under the *Fisheries Management Act 1994* (NSW));
 - b. marine licences or certificates (eg, under the *Marine Safety (Domestic Commercial Vessel National Law Act 2012* (Cth) or State and Territory marine safety legislation);
 - c. tourism-related permits (eg, permissions in relation to marine parks or marine wildlife under various Commonwealth and State or Territory environment laws).

23. Section 15AD of the Acts Interpretation Act provides that if an Act includes an example of the operation of a provision, the example is not exhaustive, and may extend the operation of the provision. New subsection 4C(2) is intended to attract the operation of section 15AD of the Acts Interpretation Act.
24. New subsection 4C(2) clarifies that a reference in new section 4C to water includes surface water and ground water. Surface water includes water in a watercourse, lake or wetland and any water flowing over or lying on the land after having precipitated naturally or having risen to the surface naturally from underground. Ground water is water occurring naturally below ground level (whether in an aquifer or otherwise).
25. As used in this provision, ‘water’ refers to water as a substance or resource, whereas ‘waters’ describes a geographical space in relation to water. This acknowledges a distinction made in the use of these terms in the native title context (see, eg, *Murray v Western Australia (No 5)* [2016] FCA 752).
26. **Items 7 and 8** amend section 191B of the ATSI Act to add as purposes of the ILC the provision of assistance to Aboriginal persons and Torres Strait Islanders to acquire water-related rights and to manage indigenous waters so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders.
27. **Items 9 and 10** replace reference to ‘land acquisition functions’ and ‘land management functions’ in section 191C of the ATSI Act with reference to ‘acquisition functions’ and ‘management functions’. Section 191C of the ATSI specifies the functions of the ILC.
28. **Items 11 to 14 and 16 to 22** amend section 191D of the ATSI Act. Section 191D of the ATSI Act provides for the land acquisition functions of the ILC. The amendments relabel these functions ***acquisition functions***, and provide for these functions to extend to water-related rights, in addition to land.
29. **Item 15** replaces Note 1 to subsection 191D(1) of the ATSI Act with the same Note 1 and new Note 1A. New Note 1A alerts the reader that water-related right is defined by new section 4C of the ATSI Act.
30. **Items 23 to 27, 30 to 31 and 33 to 37** amend section 191E of the ATSI Act. Section 191E of the ATSI Act provides for the land management functions of the ILC. The amendments relabel these functions ***management functions***, and provide for these functions to extend to the management of indigenous waters. The amendments also relabel the expression ‘land management activities’ in subsection 191E(5) of the ATSI Act as ***management activities*** and broaden the definition of this expression to encompass activities relating to water or waters, in addition to land.
31. The linkage of the water aspect of the management function to indigenous waters is consistent with the linkage of the land aspect of the management function to indigenous-held land.
32. **Item 28** replaces ‘land management’ with ‘management’ in Note 1 to subsection 191E of the ATSI Act. **Item 29** adds new Note 4 to subsection 191E of the ATSI Act to alert the reader that the expression ‘indigenous waters’ is defined in subsection 4(1) of the ATSI Act.

33. **Item 32** also amends section 191E of the ATSI Act. This item inserts new subsection 191E(1B) of the ATSI Act to make clear that the amendments in the Bill to extend the management functions of the ILC to water do not authorise the ILC to carry on a management activity in relation to water or waters in a manner that is inconsistent with the rights or interests of other persons. This provision reflects the non-exclusive nature of most water-related rights, and the potential for the ILC to perform the water aspect of its management functions in areas where other persons have rights and interests.
34. While not stated in the Bill, there is no intention for these amendments to authorise the ILC to carry on a management activity in relation to water or waters in a manner that is inconsistent with international law (such as to infringe the right to innocent passage as provided for in the UN Convention on the Law of the Sea).
35. **Item 38** amends subsection 191G(7) of the ATSI Act with the effect of replacing ‘land acquisition functions or land management functions’ with ‘acquisition functions or management functions.’ Subsection 191G(7) of the ATSI Act is a deeming provision. It provides that the ability of the ILC to enter into an arrangement under subsection 191G of the ATSI Act with a subsidiary of the ILC about the performance by the subsidiary of functions corresponding to the ILC’s functions, is a function that is independent of the ILC’s acquisition and management functions.
36. **Item 39** amends the heading to section 191I of the ATSI Act to replace ‘land acquisition and land management functions’ with ‘acquisition and management functions.’ Section 191I of the ATSI Act applies if the ILC makes written guidelines about the performance of its functions. If Section 191I applies, the ILC must make a free copy of guidelines available to any persons who asks for a copy.
37. **Items 40 to 44** amends section 191J of the ATSI Act. Section 191J of the ATSI Act allows the ILC or an ILC subsidiary to dispose of surplus interests in land the ILC or the subsidiary has acquired, or otherwise obtained, to a person or body. The amendments would enable the ILC or an ILC subsidiary to dispose of surplus water-related rights the ILC or the subsidiary has acquired, or otherwise obtained, to a person or body.
38. **Item 45** amends the heading to Division 3 of Part 4A of the ATSI Act to replace ‘National indigenous land strategy and regional indigenous land strategies’ with ‘National and regional strategies.’
39. **Items 46 to 57** amend section 191N of the ATSI Act to:
- a. replace references to ‘national indigenous land strategy’ with references to ‘national indigenous land and sea strategy’, and
 - b. require the national land and sea strategy to cover the acquisition of water-related rights, management issues in relation to indigenous waters, and environmental issues relating to indigenous waters, in addition to land matters.

40. The requirement in subsection 191N(7) of the ATSI Act for the Minister to cause a copy of the renamed national indigenous land and sea strategy, or any changes to the strategy, to be presented in each House of Parliament remains.
41. To provide the ILC with time to comply with these changes, **Item 99** provides that the changes do not apply until the day after the end of the period of 6 months beginning on the day Schedule 1 of the Bill commences.
42. **Items 58 to 60, 62 to 67 and 69 to 70** amend section 191P of the ATSI Act to:
- a. replace references to ‘regional indigenous land strategies’ with references to ‘regional indigenous land and sea strategies’; and
 - b. require regional indigenous land and sea strategies to cover the acquisition of water-related rights, management issues in relation to indigenous waters, and environmental issues relating to indigenous waters, in addition to land matters.
43. As for changes to the renamed national indigenous land and sea strategy, **Item 99** provides that changes to the renamed indigenous land and sea strategies do not apply until the day after the end of the period of 6 months beginning on the day Schedule 1 of the Bill commences.
44. **Item 61** also amends section 191P of the ATSI Act. This item removes the note to subsection 191P(2), which explains to the reader that a ‘regional area’ determined by the ILC need not correspond to a region under section 91 of the ATSI Act. Section 91 of the ATSI Act (then, the *Aboriginal and Torres Strait Islander Commission Act 1989*) was repealed by Item 1 of Schedule 3 to the ATSIC Amendment Act). Old section 91 of the ATSI Act provided for the division of Australia (other than the Torres Strait area) into regions.
45. **Item 68** also amends section 191P of the ATSI Act. This item removes the requirement in paragraph 191P(5)(a) for the ILC Board to consult Regional Councils on regional indigenous land strategies. Old section 92 of the ATSI Act established a Regional Council for each region provided for under old section 91 of the ATSI Act. Item 1 of Schedule 3 of the ATSIC Amendment Act abolished Regional Councils from 30 June 2005, following the abolition of the Aboriginal and Torres Strait Islander Commission.
46. Amended subsection 191P(5) of the ATSI Act will continue to enable the ILC Board to consult any persons or bodies on regional land and sea strategies as the Board considers appropriate.
47. **Item 71** amends section 191Q of the ATSI Act to refer to the national indigenous land and sea strategy and each regional indigenous land and sea strategy. Section 191Q of the ATSI Act requires the ILC to have regard to the strategies for the purpose of the performance of its functions.

48. **Item 72** amends section 191R of the ATSI Act to refer to the national indigenous land and sea strategy and a regional indigenous land and sea strategy. Section 191R of the ATSI Act requires the ILC to make a copy of the strategies available to any person who asks for a copy.
49. **Item 73** amends the heading to Division 4 of Part 4A of the ATSI Act to include reference to dealings in water-related rights.
50. **Items 74 to 78** amend section 191S of the ATSI Act. Section 191S of the ATSI Act prohibits a body corporate from disposing of an interest, or giving a charge with respect to an asset that consists of or includes the interest, without the consent of the ILC, if the interest was acquired from the ILC or an ILC subsidiary, or with ILC assistance or the assistance of an ILC subsidiary. The amendments will extend this prohibition to water-related rights acquired with ILC assistance or the assistance of an ILC subsidiary.
51. **Items 79 to 81** amend section 191SA of the ATSI Act. Subsection 191SA(1) of the ATSI Act provides that any liability or obligation of a body corporate to the ILC arising under the terms of assistance the ILC has provided to the body corporate to acquire land, or that arises under section 191S of the ATSI Act, is taken to be an interest of the ILC in the land to which the liability or obligation relates. Subsection 191SA(2) provides that the land is charged with the payment of all costs and expenses incurred by the ILC in respect of its enforcement of the liability or obligation. The amendments will provide the ILC equivalent protection in relation to assistance provided to bodies corporate to acquire water-related rights as for assistance provided to bodies corporate to acquire land.
52. **Items 82 to 84** amend section 191SB of the ATSI Act. Section 191B of the ATSI Act replicates the arrangements in section 191SA of the ATSI Act for ILC subsidiaries. The amendments will provide ILC subsidiaries equivalent protection in relation to assistance provided to bodies corporate to acquire water-related rights as for assistance provided to bodies corporate to acquire land.
53. Neither section 191SA nor section 191SB of the ATSI Act deal with the status or priority of a charge created under those provisions as against any other charge. This being the case, in a situation where there are competing legal and equitable charges over land or water-related rights, the priority of the ILC's charge (or the charge of an ILC subsidiary) would be determined under the laws that apply in relation to that land or water-related right, including any relevant general law principles.
54. Further, whether a charge created under section 191SA or section 191SB of the ATSI Act in respect of a water-related right has legal effect may depend on the particular laws that apply in relation to that water-related right. For example, a security interest over an access licence granted under section 63 of the *Water Management Act 2000* (NSW) has no effect until registered under that Act (see paragraph 71A(1)(e) and 71B of that Act).
55. **Items 85 to 92** amends section 191T of the ATSI Act. Section 191T of the ATSI Act provides for a body corporate that has acquired land from the ILC or an ILC subsidiary, or with the assistance of the ILC or an ILC subsidiary, to surrender the land to the ILC. The amendments will provide for equivalent arrangements for water-related rights.

56. **Item 93** amends paragraph 191X(4)(a) of the ATSI Act. Section 191X provides for the appointment of ILC Directors. Subsection 191X(4) of the ATSI Act stipulates the qualifications the Minister needs to be satisfied of to appoint a person as an ordinary member of the ILC Board under subsection 191X(1) of the ATSI Act. Item 94 amends paragraph 191X(4)(a) of the ATSI Act to include experience in water management as a qualification for appointment.
57. **Items 94 to 98** amend paragraph 193R of the ATSI Act. Section 193R of the ATSI Act exempts certain ILC transactions, and ILC subsidiary transactions, in relation to land from stamp duty or other tax. These amendments will exempt certain ILC transactions, and ILC subsidiary transactions, in relation to water-related rights from stamp duty or other tax.

Schedule 2 – Renaming body as Indigenous Land and Sea Corporation

Part 1 – Main Amendments

Aboriginal and Torres Strait Islander Act 2005

58. Schedule 2 to the Bill renames the ILC the *Indigenous Land and Sea Corporation*.
59. **Item 1** amends the long title of the ATSI Act to replace reference to the ILC with reference to the Indigenous Land and Sea Corporation, to reflect the change in the name of the entity.
60. **Items 2 and 3** replace expressions in subsection 4(1) of the ATSI Act that refer to the ILC with expressions that refer to the Indigenous Land and Sea Corporation. This includes replacing the definition of ILC with a definition of ‘Indigenous Land and Sea Corporation’ to reflect the change in the name of the entity.
61. **Items 4 to 7, 9 to 93, 98, and 103 to 105** amend provisions of the ATSI Act to replace reference to ILC with reference to ‘Indigenous Land and Sea Corporation’ the reflect the change in the name of the entity.
62. **Item 8** replaces subsection 191A(1) of the ATSI Act. Subsection 191A(1) of the ATSI provides the ILC is established. Replacement subsection 191A(1) does the substantive work of altering the name of the ILC. The note refers the reader to subsection 25B(1) of the Acts Interpretation Act, which provides that a body whose name is altered by an Act continues in existence under the new name so that its identity is not affected.
63. **Items 94 to 95, and 97 to 102** amend section 193S of the ATSI Act. Section 193S makes it an offence for an ILC officer to disclose certain information. These items replace the definition of ‘ILC officer’ in subsection 193S(1) of the ATSI Act with a definition of ‘ILSC officer’, and replace references in the section to ‘ILC officer’ with references to ‘ILSC officer.’ The replacement definition refers to ‘Indigenous Land and Sea Corporation,’ but is otherwise the same as the old definition.
64. **Item 96** also amends section 191S of the ATSI Act to insert new subsection 191S(1A). New subsection 191S(1A) makes clear that any person who was covered by the old definition of ‘ILC officer’ is covered by the replacement definition of ‘ILSC officer.’ The note explains that this provision is intended to make clear that any person who held an office, or undertook any other role, covered by the old definition before the name of the ILC was altered to ‘Indigenous Land and Sea Corporation’ is still an ILSC officer. The note also refers to subsection 25B(1) of the Acts Interpretation Act, which provides that a body whose name is altered by an Act continues in existence under the new name so that its identity is not affected.

Remuneration Tribunal Act 1973

65. **Item 106** amends paragraph 7(9)(aaaa) of the *Remuneration Tribunal Act 1973* to replace reference to ILC with reference to Indigenous Land and Sea Corporation to reflect the change in name of the entity.

Part 2 – Contingent Amendments

Aboriginal and Torres Strait Islander Act 2005

66. If the *Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Act 2018* does not commence, **Items 107 to 110** will amend sections 192X, 193 and 193G of the ATSI Act to replace reference to ILC with reference to Indigenous Land and Sea Corporation (other than the reference to ILC in subsection 193(1) of the ATSI Act).
67. Section 192X of the ATSI Act provides that the purpose of the Land Account is the making of payments to the ILC. The Land Account is continued in existence by subsection 192W(1) of the ATSI Act.
68. Section 193 of the ATSI Act provides for payments out of the Land Account to the ILC. Subsection 193(1) provides for payment in the financial year beginning on 1 July 2010, subsection 193(2) provides for payments in later financial years, and subsection 193(3) provides for additional payments. Because subsection 193(1) of the ATSI Act provides for a payment in the financial year beginning on 1 July 2010, the provision is spent and it is not necessary to replace the reference in this provision to ILC.
69. Section 193G of the ATSI Act provides for a consultative forum to be convened by the Minister on the investment policy of the Land Account.
70. Item 3 of Schedule 1 to the *Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Act 2018* will close the Land Account by repealing Division 10 of Part 4A of the ATSI Act (including sections 192X, 193 and 193G of the ATSI Act). The *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018* will establish a new financial asset fund to replace the Land Account. The new fund will enhance the ability of the Commonwealth to make payments to the ILC.

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 (Indigenous Land Corporation) Bill 2018

71. The Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018 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

72. The Bill broadens the purposes of the ILC to include the provision of assistance in relation to the acquisition of water-related rights and the management of indigenous waters. The Bill also renames the ILC the ‘Indigenous Land and Sea Corporation’ to reflect the broadening of the entity’s functions.

73. The ILC is corporate Commonwealth entity established by section 191A of the ATSI Act to assist Aboriginal persons and Torres Strait Islanders to acquire land and manage land.

74. The establishment of the ILC formed part of the Government’s response to the High Court’s decision in *Mabo (No 2) v Queensland* (1992) 175 CLR 1. Recognising that many dispossessed Aboriginal and Torres Strait Islander people would be unable to regain control of land under the Native Title Act (either because of historical extinguishment or disconnection to traditional lands), the Government established the ILC to complement native title laws and assist dispossessed Aboriginal and Torres Strait Islander people to acquire and manage land.

75. Developments in native title case law following the passage of the Native Title Act and the establishment of the ILC clarified the common law was capable of recognising native title rights with respect to the use of water, and the taking of resources from waters, for any purpose. The Bill responds to these developments, enabling the ILC to assist Aboriginal persons and Torres Strait Islanders who are unable to demonstrate native title rights in water. The Bill also acknowledges that the relationships of Aboriginal persons and Torres Strait Islanders to waterscapes and between land and water are inseparable.

Human rights implications

76. The Bill expands the functions of a corporate Commonwealth entity, and does not directly advance or limit a relevant human right or freedom. However, by enabling the ILC to provide assistance to Aboriginal or Torres Strait Islander corporations to acquire water-related rights (in addition to land), or to persons to manage Indigenous waters (in addition to Indigenous-held land), the Bill indirectly engages the right to self-determination, rights to equality and non-discrimination, and the right to enjoy and benefit from culture.

Right to self-determination

77. The right to self-determination is contained in article 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right is also contained in Article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP does not create legally binding obligations, but informs the way governments engage with and protect the rights of Indigenous people.
78. The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.'² The right is understood widely to be exercisable in a manner that preserves territorial integrity, political unity and sovereignty of a country.
79. Section 3 of the ATSI Act states that the objects of the ATSI Act includes to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders. The ILC is a vehicle for facilitating the achievement of this objective, by enabling Aboriginal persons and Torres Strait Islanders to increase their economic status, promote their social-wellbeing, and maintain their culture.
80. By enabling the ILC to assist Aboriginal persons and Torres Strait Islanders to realise economic, environmental, social and cultural benefits from waters as well as land, the Bill indirectly advances the right of Aboriginal and Torres Strait Islander peoples to self-determination.

Rights of equality and non-discrimination

81. The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the ICCPR, article 2 of the ICESCR and article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These rights recognise that all human beings have the right to be treated equally and to not be discriminated against.
82. Of particular relevance in the context of the Bill, CERD establishes a general prohibition on racial discrimination. The *Racial Discrimination Act 1975* implements this prohibition in Australian domestic law.
83. In expanding the purposes and functions of the ILC, the Bill makes a clear distinction based on race. In accordance with its expanded functions in section 191D of the ATSI Act, the ILC acquires land and water-related rights and divests that land or those rights to Aboriginal or Torres Strait Islander corporations, or provides assistance to Aboriginal or Torres Strait Islander corporations to acquire land or water-related rights. This enables the Aboriginal and Torres Strait Islander membership of these corporations to realise benefits from the land or rights acquired. This arrangement may mean persons other than Aboriginal persons and Torres Strait Islanders are provided with a different level of assistance to acquire real and personal property, and to obtain the benefits of that ownership.

² CERD, General Recommendation 21, *The right to self-determination* (Forty-eighth session, 1996), UN Doc A/51/18, annex VIII (1996), [125]

84. The Bill may be characterised as a component of a broader ‘special measure’, being the ATSI Act in its establishment of the ILC. ‘Special measures’ are provided for in article 1(4) of the CERD and subsection 8(1) of the *Racial Discrimination Act 1975*. They are an exception to the general prohibition on racial discrimination, and are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.’ For a measure to be characterised as a ‘special measure’ it must:

- be for a particular group or individuals;
- be taken for the sole purpose of securing the adequate advancement of that group or those individuals;
- be ‘necessary’; and
- not continue after its objectives have been achieved.

85. The ILC is established for Aboriginal persons and Torres Strait Islanders. The measures in the Bill are for the sole purpose of expanding the assistance that the ILC may provide to Aboriginal persons and Torres Strait Islanders (either individually or as members of an Aboriginal and Torres Strait Islander corporation). The ongoing need for the ILC is evident in the continuing levels of disadvantage confronting Aboriginal persons and Torres Strait Islanders compared to other Australians, including in relation to economic self-sufficiency, positive cultural identity, and social and emotional well-being. The measures in the Bill are necessary to enable the ILC to provide broader support to Aboriginal persons and Torres Strait Islanders to address this continuing disadvantage.

86. The arrangements for the ILC and the measures in the Bill are appropriate, adapted and proportionate, as they promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders with minimal impact on the broader community.

87. The ATSI Act in its establishment of the ILC, and the measures in the Bill, may also be regarded as legitimate differential treatment. The principle of legitimate differential treatment allows countries to treat particular groups differently, provided particular criteria are met. The justification for differentiation must be reasonable and objective. There must also be a clear and reasonable relationship of proportionality between the aim sought and the measure and its effects.³

88. The rationale for the establishment of the ILC is to establish an institutional arrangement to address historical dispossession in circumstances where native title is unable to be recognised. This rationale is applicable equally to expanding the functions of the ILC to waters. This role is proportionate to the aim of addressing historical dispossession and promoting self-management and self-sufficiency, with minimal impact on other persons.

³ CESCR, General Comment No 20, *Non-discrimination in economic, social and cultural rights* (art 2, para 2), UN Doc E/C.12/GC/20, 2 July 2009, [13].

89. The Bill indirectly engages rights to equality and non-discrimination, by incorporating an additional component in the ILC special measure, and broadening the scope of arrangements that may be regarded as legitimate differential treatment.

Right to enjoy and benefit from culture

90. The right to enjoy and benefit from culture is contained in article 27 of the ICCPR and article 15 of the ICESCR.

91. Article 27 of the ICCPR protects the rights of individuals belonging to ethnic, religious and linguistic minorities in a country to enjoy their own culture, practice their own religion and use their own language. The UN Human Rights Committee has noted that one or other aspect of the rights of individuals protected under article 27 may consist in a way of life that is closely associated with territory (land and water) and use of its resources.⁴ The Committee has also stated 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.’⁵

92. Article 15 of the ICESCR protects the right of all persons to take part in cultural life and to enjoy the benefits of scientific progress and its applications. The UN Committee on Economic Social and Cultural Rights has interpreted this right to include a right to traditional land, territories and resources, as it relates to Indigenous Peoples.⁶

93. The Bill indirectly advances this right by enabling the ILC to assist Aboriginal persons and Torres Strait Islanders to acquire water-related rights, and in so doing facilitates Aboriginal persons and Torres Strait Islanders to practice their own cultures as they relate to waterscapes.

Conclusion

94. The Bill is compatible with human rights because it indirectly advances the right to self-determination and the right to enjoy and benefit from culture. The Bill also indirectly engages rights to equality and non-discrimination by incorporating an additional component in the ILC special measure, and broadening the scope of arrangements that may be regarded as legitimate differential treatment.

⁴ HRC, General Comment 23, *Article 27*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994), [3.2].

⁵ *Ibid.*, [7]

⁶ ICESCR, General Comment 21, *Right of everyone to take part in cultural life* (art 15, para 1a), UN Doc E/C.12/GC/21 (21 December 2009, [36].