

# Review of Indigenous Land Corporation Issues

## Final Report

Prepared for the former Directors of the ILC  
and Voyages

January 2014



Public Policy - Economics - Government - Strategy

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## About Aegis Consulting Group

Aegis is an independent advisor to government, corporate and non-government organisations on:

- Public Policy
- Economics
- Government
- Strategy

Aegis was established in 2002 and has an international team of consultants in Sydney, Cairns, Singapore and London.

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## EXECUTIVE SUMMARY

### Purpose

Aegis Consulting Group has been commissioned by former Directors of the Indigenous Land Corporation (ILC) and Voyages to objectively and independently:

- Examine whether public criticisms by the current Chair of ILC, Dawn Casey, the Deputy Chair, Ian Trust, and CEO, Mike Dillon about the ILC purchase of the Ayers Rock Resort (ARR) are appropriate given the full range of facts and benefits associated with and previous independent reviews of the transaction;
- Consider the implications for the ARR of the public criticisms;
- Review and prepare a detailed history of the ARR transaction; and
- Consider any related ILC and Voyages governance issues.

The ILC is the owner of the ARR, and Voyages is the subsidiary company created by the ILC to manage the ARR and other tourism assets owned by the ILC.

### Methodology

In its preparation of this report Aegis has been given full remit by the former ILC and Voyages Directors to consider issues without interference or direction.

To prepare this report Aegis has examined public statements made about the ARR transaction, reviewed a wide range of documents in the possession of former ILC and Voyages Directors (including the correspondence between the ILC and Federal Government Ministers and departments in relation to the ARR purchase), reviewed the full range of previous independent reviews conducted of the ARR transaction and consulted with former ILC and Voyages Directors.

The independent reviews of the ILC considered by Aegis are:

- KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits, April 2011.
- Deloitte, Review of ILC Board Governance Arrangements, March 2013.
- Australian National Audit Office, ILC's Administration of the Land Acquisition Program, December 2013.
- McGrathNicol, Ayers Rock Resort Review Report, December 2013.
- Dransfield and Co, Review of McGrathNicol Report, December 2013.

Aegis has also drawn on its corporate knowledge of the ILC. In 2010, the ILC Board commissioned Aegis to conduct an *External Review of the Policies and Programs of the ILC*.

## Appropriateness of Public Criticism of ARR Transaction

Over a number of months ILC Directors Casey and Trust and CEO Dillon have made various public statements<sup>1</sup>:

- Criticising the former ILC Board's decision to purchase the ARR and governance in relation to the ARR transaction; and
- The performance of the former Voyages Board and its decision to write down the value of the ARR to \$250M.

Formal public criticism of organisations by their own Boards and management can have significant impacts, such as weakening public, commercial and market confidence in the organisation. In the case of the ILC, negative publicity may also discourage Indigenous people from seeking traineeships and employment at ARR, the primary purposes for which it was purchased by the ILC.

Given these potential impacts, it would be reasonable to expect that the formal deliberations of Boards and management would examine and ensure that any likely adverse reactions were outweighed by other strategic or commercial benefits essential to the future viability and operation of the organisation. It would also be reasonable to expect that Boards and management would only adopt public criticism of their own organisation after careful examination of all other options to achieve their objectives, and a documented conclusion that there was no alternative pathway to secure their aims in the short to long term.

These responsibilities would be especially relevant to the Boards and management of public companies, as well as government corporations or statutory authorities ultimately accountable to government and Parliament. In the case of the ILC, its directors and management are required by sections 22 to 26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to always act in the interests of the ILC and not damage its reputation.

In relation to the criticism of the ARR by members of the current Board and management, it is not completely clear what fundamental future strategic or commercial benefit the public comments are aiming to achieve, especially because:

- The former ILC Board undertook due diligence for two years between 2008 and 2010 before agreeing to purchase the ARR. During this time it engaged expert commercial, tourism, property and other consultants to advise it and obtained three independent valuations of the ARR. These valuations ranged from \$270M to \$292M which is consistent with the normal 10-15 percent variations in expert views that can occur about the value of assets<sup>2</sup> and the final net purchase price was \$292M.

<sup>1</sup> Statements have been attributed to them in numerous media articles from late October to late December 2013; statements have been made in an ILC media release of 18 November 2013 in which the ILC Chair called for a Parliamentary Inquiry by the Joint Committee on Public Accounts and Audit into the ARR and in an ILC media release of 24 October 2013 in relation to the Voyages Board; and in evidence given by the CEO to a Senate Estimates hearing on 22 November 2013

<sup>2</sup> Advice from Dransfield & Co, 24 December 2013

- An independent review in 2011 by KPMG of the ILC's borrowing powers and guarantee limits found that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*<sup>3</sup>. The report recommended some further legislative controls on ILC borrowings to align it with other government authorities. The previous Federal Government does not appear to have implemented these controls, which would have been an expected response if there were concerns within government about the ARR purchase.
- The vendor finance arrangements used by ILC to purchase the ARR were approved by the Australian National Audit Office (ANAO)<sup>4</sup> in its capacity as the ILC's external auditors.
- An independent review in 2013 by Deloitte of the ILC's Board governance arrangements found that the arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries<sup>5</sup>.
- In May 2013, the ILC Board asked former FaHCSIA Minister, the Hon Jenny Macklin MP, to request that the ANAO conduct a forensic audit of the ARR purchase, however the Minister declined this request and instead proposed that the ILC conduct an end to end review of the ILC including the ARR. If the previous Federal Government had significant concerns about the ARR purchase, an expected response may have been to support a forensic audit of the transaction by ANAO.
- An independent review in 2013 by McGrathNicol (MN) found that even though there were some gaps in the way the ILC kept records in relation to the decision to purchase the ARR, this did not mean the purchase was inappropriate. It also found, amongst other things, that the financial model relied on by the ILC Board when assessing the ARR purchase was conservative; the ILC was a motivated purchaser, but the process indicates it was not prepared to purchase at any price; the ARR transaction was consistent with ILC powers and obligations under *Aboriginal and Torres Strait Islander Act 2005* and *Commonwealth Authorities and Companies Act 1997* Acts; and vendor finance arrangements were reasonable and not disadvantageous to the ILC<sup>6</sup>.
- The fundamental purpose of the ARR purchase was to create an Indigenous tourism enterprise and national Indigenous tourism and hospitality training facility that had the commitment and economies of scale to significantly increase Indigenous employment and leadership opportunities at the ARR, and in the national tourism sector over the long term. The ILC purchase has so far delivered very positive outcomes. It has lifted Indigenous employment at ARR from 1 to 215 (283 across all

<sup>3</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits April 2011; p49. The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversighted by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

<sup>4</sup> The ANAO is the independent auditor of Federal Government activities and spending

<sup>5</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

<sup>6</sup> McGrathNicol, Ayers Rock Resort Review Final Report, 18 December 2013

Voyages businesses) and enabled 370 Indigenous people to commence tourism and hospitality training at the ARR. Indigenous employees now represent about 30 per cent of all employees at the ARR<sup>7</sup>.

- The decision of the ILC Board to invest in the ARR was a strategic one and always based on delivering results over the long term. Accordingly it is more appropriate to judge the value of this kind of asset over its life cycle, rather than at a specific point in time. For example, the employment of 283 people alone saves the Federal Government about \$21M annually in welfare payments and over 40 years of work the gross saving is about \$840M. Based on current rates of annual training, the ARR may train 7,400 Indigenous people over 40 years<sup>8</sup>.
- In 2013 the Voyages Board chose to write down the value of the ARR to \$250M because it was legally and financially bound to recognise the impact of difficult trading conditions, including the fact that ARR decreased by more than 30 per cent when air capacity was reduced primarily from Cairns and Perth by Qantas. The write down was agreed to and accepted by the ILC Board. Over the long life cycle of the ARR, its value is likely to fluctuate depending on external trading conditions in the tourism sector on which it relies.
- Examination of the correspondence between the ILC and Voyages Chairs during the latter half of 2013 indicates that the Voyages Board had agreed to a consultative pathway to respond to issues of concern raised by the ILC, and had proposed this pathway to the ILC prior to being terminated by the ILC Board. This included the creation of a Voyages Board sub-committee to focus on developing joint solutions with the ILC to address commercial issues.
- It is not clear why the existing ILC liabilities in relation to the ARR or the financial health of Voyages have been considered excessive burdens for the ILC to an extent that required public criticism of the ARR purchase given that:
  - It is estimated that in 2013 the remaining liabilities of the ILC in relation to the ARR are \$155M consisting of \$138M (vendor finance payment to General Property Trust due in 2016) and \$17M (valuation uplift payment to GPT due in 2016), plus its share of interest on the \$138M loan. This liability is less than the current valuation of the ARR (\$250M), and it is estimated that the ILC has about \$100M in cash in December 2013.
  - As the guarantor of the vendor finance agreement with GPT the ILC is primarily responsible for liabilities that may accrue, but it shares liabilities with Voyages in relation to the GPT loan. Over the two years since ARR was purchased the ILC has funded interest payments worth about \$19.5M, and Voyages has funded interest payments worth about \$9M.
  - Voyages returned a cash profit of \$12.4M EBITDA in 2012-13, and has a forecast profit of \$14.4M EBITDA in 2013-14.

<sup>7</sup> ILC submission to the Review of Indigenous Land Corporation and Indigenous Business Australia January 2014; p10

<sup>8</sup> Analysis by Aegis Consulting Group

- In its submission to the Federal Government's review of the ILC and Indigenous Business Australia, the ILC relies on the ARR as one clear example of what the ILC has been able to achieve to benefit Indigenous people. The ILC uses this example to support its argument that the ILC and IBA should remain separate organisations<sup>9</sup>.

## Potential Implications of Public Criticisms

It is possible that public criticisms of the ARR purchase by members of the ILC Board and management may have undermined confidence in the ARR amongst existing and potential firms wishing to enter business, investment and/or sponsorship arrangements with the ARR. Public statements may have also reduced consumer confidence in the ARR, leading to less visitors and events and associated revenue for the ARR. Existing and potential Indigenous employees and trainees may also become disillusioned about participating in the ARR.

If this is the case, statements may have commercially damaged a Federal Government asset. Actions that damage the commercial position and reputation of the ARR may be in breach of obligations contained in Sections 22 to 26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act). These sections require Directors and Officers of Commonwealth authorities to amongst other things:

- Exercise powers and discharge duties with a reasonable degree of care and diligence;
- Make judgements in good faith and on a rational basis in the best interests of the Commonwealth authority; and
- Not improperly use their position to cause detriment to the Commonwealth authority or to another person.

A Director or Officer commits an offence under the CAC Act if they are reckless or fail to exercise their powers and discharge their duties in the best interests of the Commonwealth authority.

The discussion in this report about the appropriateness of the public criticisms indicates that it is not completely clear what fundamental future strategic or commercial benefit the public comments by members of the ILC Board and management are aiming to achieve, and also not completely clear that any objectives the members of the Board and management had in mind could only be achieved by publicly criticising the ARR and the previous ILC and Voyages Boards.

Accordingly, it may be appropriate for the Federal Government to examine the impact of the public criticism of the ARR on the reputation of the ARR as a commercial employer and training facility. This is particularly because the ILC purchased the ARR to enable it to significantly increase Indigenous employment and training.

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<sup>9</sup> ILC submission to the Review of Indigenous Land Corporation and Indigenous Business Australia January 2014; p2



## Related ILC Governance Issues

In 2013 the ILC Board commissioned McGrathNicol (MN) to review the ARR purchase and the ARR commercial strategies going forward. MN acknowledged<sup>10</sup> that its report had three limitations, which were:

- Even though the terms of reference required a forensic audit of the ARR transaction, MN did not conduct an audit or verify any information provided by ILC;
- The ILC did not give MN access to the 2011 KPMG report, which had found the ARR purchase process to be consistent with sound business practices and ILC obligations; and
- While MN undertook a value for money assessment of the ARR purchase, it did not consider any of the benefits or non-financial outcomes that may have been taken into account by the Board at the time, already achieved or projected to be achieved.

These limitations are significant, particularly if the ILC was seeking to fully and transparently evaluate the costs, benefits and overall value of the ARR purchase and the strategies for ARR going forward.

At the end of 2013, the ILC Board sacked the former Voyages Board and appointed a new one on the basis that difficulties faced by the ARR required a refresh of the Board with more appropriate commercial skills and expertise. Three subsequent actions by the ILC seem incongruous with this decision:

- The ILC Board replaced the previous Voyages Board whose members included leading strategic tourism and investment market experts, with a new Board that appears to have more limited strategic tourism, resort and commercial investment experience<sup>11</sup>.
- One of the new Voyages Board members appears to have been convicted in the Northern Territory of the criminal offence of aggravated assault. Under liquor licensing laws this may prevent the Voyages Board from holding the liquor licences for the ARR<sup>12</sup>.
- Despite replacing the former Board on the basis that Voyages needed to improve its performance, in December 2013 the ILC Chair and the new Voyages Board Chair announced that they were very happy with the management of the ARR and what had been achieved since 2011 in relation to indigenous employment and training<sup>13</sup>.

<sup>10</sup> McGrathNicol, Ayers Rock Resort Review Final Report 18 December 2013

<sup>11</sup> Based on an assessment of public information about the experience of former and new Voyages Board members

<sup>12</sup> Judgement of Mr VM Luppino SM, Court of Summary Jurisdiction, Northern Territory, Judgement ID number (2008) NTMC 054

<sup>13</sup> Comments attributed to ILC Chair (Dawn Casey) and Voyages Chair (Lisa Gay) in The Australian, 'newly appointed Ayers Rock Resort board gives thumbs up on achievements', 6 December 2013

It also seems curious that the ILC decision to sack the Voyages Board was made before MN delivered its report in December 2013 but after:

- The ILC Board had approved in September 2013 the Voyages Board's proposed 2013-14 budget and recommendation to write down the value of the ARR to \$250M; and
- The Voyages Board had communicated to the ILC Board its decision to create a sub-committee to manage the commercial relationship between the ILC and Voyages Boards and suggested a process for consultation on joint issues, including its focus on revising its business strategy to improve the commercial position of the ARR and reduce the liability for the ILC.

# 1. EXAMINATION OF THE APPROPRIATENESS OF PUBLIC CRITICISMS OF THE ARR

## 1.1 Overview

The table below summarises the main public criticisms of the ARR purchase and related information identified in this review. When assessed against all the available information about the purchase of the ARR and subsequent oversight by the former Voyages Board, it is possible that the public criticisms of the ARR by members of the ILC Board and management are not fully appropriate, and potentially misleading.

Summary of general public criticisms of the ARR purchase and former Voyages Board <sup>14</sup>	Key facts and information about the ARR purchase and operation <sup>15</sup>
The ILC debt arising from the ARR is \$200M and this will undermine its capacity to fund its wider programs.	<ul style="list-style-type: none"> <li>It is estimated that the remaining ILC debt in 2013 is \$155M plus its share of interest on the vendor finance.</li> <li>It is estimated that in December 2013 the ILC had cash on hand of about \$100 million.</li> </ul>
Voyages is unprofitable.	<ul style="list-style-type: none"> <li>Voyages returned a cash profit of \$12.4M EBITDA in 2012-13 and has a forecast profit of \$14.4M EBITDA in 2013-14.</li> </ul>
The write down in the value of the ARR by the previous Voyages Board to \$250M indicates that ILC paid too much for the asset.	<ul style="list-style-type: none"> <li>The net purchase price (\$292M) was consistent with 3 independent valuations obtained by the ILC between 2008 and 2010. An additional independent valuation obtained by Voyages in 2011 determined that the asset value was higher than the price paid.</li> <li>Criticisms ignore the fact that (1) it is inappropriate to apply a point in time approach to value an asset delivering benefits over a long time and (2) valuing an asset like ARR is difficult and it is normal for views of experts to vary value by 10-15%<sup>16</sup>.</li> <li>Because of air capacity being reduced primarily from Cairns and Perth by Qantas, trading dropped off by more than 30% and the Directors were legally and financially bound to recognise that impact.</li> </ul>
There were poor processes and governance associated with the ARR purchase.	<ul style="list-style-type: none"> <li>Before making a decision, the former ILC Board undertook a due diligence process over two years during which key risks were considered and risk mitigation strategies developed.</li> </ul>

<sup>14</sup> Statements have been attributed to them in numerous media articles from late October to late December 2013; statements have been made in an ILC media release of 18 November 2013 in which the ILC Chair called for a Parliamentary Inquiry by the Joint Committee on Public Accounts and Audit into the ARR and in an ILC media release of 24 October 2013 in relation to the Voyages Board; and in evidence given by the CEO to a Senate Estimates hearing on 22 November 2013

<sup>15</sup> Information obtained and data assessed from documents in the possession of former ILC and Voyages Directors and consultations with them

<sup>16</sup> Evaluation by Dransfield & Co, 24 December 2013

Summary of general public criticisms of the ARR purchase and former Voyages board <sup>17</sup>	Key facts and information about the ARR purchase and operation <sup>18</sup>
	<ul style="list-style-type: none"> <li>▪ An independent report by KPMG in April 2011<sup>17</sup> found that the <i>"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"</i>.</li> <li>▪ The vendor finance arrangements used by ILC were approved by the Australian National Audit Office (ANAO) in its capacity as the ILC's external auditors.</li> <li>▪ The timing of the transaction enabled the ILC to obtain vendor finance on better than market terms at the bottom of the cycle and this was valuable<sup>18</sup>. The net present value of the payments to General Property Trust (GPT), which provided the vendor finance were significantly less than the face amount<sup>19</sup>.</li> </ul>
The former ILC Board was divided about the ARR purchase.	<ul style="list-style-type: none"> <li>▪ 5 of the 7 Directors voted in favour of the purchase and 2 abstained.</li> </ul>
The purchase of the ARR was a mistake.	<ul style="list-style-type: none"> <li>▪ The ILC purchase has lifted Indigenous employment at ARR from 1 to 215 (283 across all Voyages businesses) and enabled 370 Indigenous people to commence tourism and hospitality training at the ARR.</li> <li>▪ The employment of 283 people alone saves the Federal Government about \$21M annually in welfare payments and over 40 years of work the saving is about \$840M.</li> <li>▪ ARR could directly employ more Indigenous people and at current rates would train 7,400 over 40 years.</li> <li>▪ The purchase of ARR enabled the ILC to deliver its vision including:               <ul style="list-style-type: none"> <li>➢ Creating an Indigenous tourism enterprise that employs significant numbers of Indigenous staff.</li> <li>➢ Creating a National Indigenous Tourism and Hospitality Training Academy at Yulara that produces nationally accredited Indigenous graduates and transitions them to employment in ARR and mainstream tourism and hospitality industries, including development of an Indigenous tourism leadership capability.</li> <li>➢ Acquiring land of significant cultural value, that had a Native Title case rejected in the Federal Court, and granting that land to an appropriate indigenous title holding body, with arrangements that allow the continuing operation of ARR ( through a lease back arrangement until such time as the land owning corporation developed the full capacity to operate ARR).</li> <li>➢ Working in partnership with local Indigenous communities to train Indigenous youth and assist their transition into employment in ARR and the tourism industry.</li> </ul> </li> </ul>

<sup>17</sup> The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversighted by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

<sup>18</sup> Evaluation by Dransfield & Co, 24 December 2013

<sup>19</sup> Advice from Grant Samuel which conducted the due diligence for the ARR purchase

Summary of general public criticisms of the ARR purchase and former Voyage board	Key facts and information about the ARR purchase and operation <sup>20</sup>
The former Board did not consult with the former Federal Government about the ARR in an appropriate manner.	<ul style="list-style-type: none"> <li>From 2008-2010 the ILC regularly briefed Minister Macklin and Mr Dillon (an adviser to Minister Macklin) and FaHCSIA, and then, when requested, Minister Wong and her advisers in DoFD.</li> <li>The Prime Minister's Office, the Tourism Minister and the Employment Minister were also kept advised.</li> </ul>
Former Ministers Macklin and Wong warned the ILC against the ARR purchase.	<ul style="list-style-type: none"> <li>The Ministers raised reasonable issues and asked for further information which was fully provided by the ILC.</li> <li>At the end of the transaction Minister Wong formally thanked the ILC for its co-operation.</li> <li>The April 2011 KPMG report<sup>20</sup> recommended some further government controls on ILC borrowings to align it with other government authorities. Ministers Macklin and Wong did not implement these controls, which would have been expected as a response if there were concerns within government about the ARR purchase.</li> </ul>

## 1.2 General Responsibility of Boards and Management

It is always prudent for Boards and management to ensure that their activities and governance meets best practice. In certain circumstances a public airing of issues may be warranted if specific organisational problems are embedded and difficult to shift or address without a public debate. Boards and management may make this choice in relation to issues that are critical and fundamental to the future viability and operation of the organisation.

Before embarking on a public debate about organisational behaviour and activities and/or particular transactions, it would be reasonable to expect a Board and management to have carefully assessed the pros and cons of such an approach in their formal Board and management committee deliberations.

Given the impacts on organisations from being exposed to public criticism, particularly from within, it would also be reasonable to expect that the formal deliberations of Boards and management would ensure that any likely adverse public attention and weakening of public and commercial confidence in the organisation was outweighed by strategic or commercial benefits.

It would also be reasonable to expect that the Board and management of an organisation would only pursue public criticism of their organisation's activities and/or transactions after careful examination of all the options and reaching a formal conclusion that there was no alternative pathway to achieve their objectives in the short to long term.

<sup>20</sup> The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversight by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

In relation to the criticism of the ARR by members of the current Board and management<sup>21</sup>, it is not completely clear what fundamental strategic or commercial benefit the public comments are aiming to achieve, particularly given the fact that

- Various independent reviews have not identified any major lapses in ILC governance and decision making concerning the ARR purchase or generally<sup>22</sup>;
- The ILC investment in the ARR was to create a commercial operation that had the commitment and economies of scale to significantly increase Indigenous employment and training at the ARR and in the national tourism sector; and
- There is an established corporate relationship between the ILC and its subsidiary, Voyages, which includes shared decision making, shared liabilities and a shared purpose consistent with the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act).

The nature of the public criticism suggests that in the mind of the ILC Board and management the key problem was that the former Board had paid too much for the ARR asset and the ILC was now burdened with a liability it did not want. Examination of correspondence between the ILC and Voyages Chairs also suggests that the ILC may have had some issues with the corporate relationship it had with Voyages, and the focus of the Voyages Board in prioritising the interests of Voyages.

However it is not clear that these potential problems could not be solved in any other way than publicly criticising the former ILC and Voyages Boards culminating in the ILC Chair calling for the Prime Minister to commence a Parliamentary inquiry into the ARR transaction<sup>23</sup>. In traditional government administration, public policy and public affairs terms this is a very serious request, and one that suggests the presence of an embedded and irretrievable problem that has significant national policy consequences, and therefore justifies and can only be exposed and resolved by the public scrutiny of Parliament.

Examination of the correspondence between the ILC and Voyages Chairs during the latter half of 2013 suggest that there were other available pathways to resolve commercial issues. For example, in response to concerns about shared liabilities in relation to the ARR raised by the ILC Chair, the Voyages Board had agreed to create a specific sub-committee and consultative process to address these issues and had proposed this to the ILC prior to being terminated by the ILC Board. As the Voyages Board consisted of some of Australia's most experienced Directors who were members of the ILC Board at the time of the ARR purchase, it is reasonable to assume that their intention was to work constructively with the ILC Board to manage the ARR's commercial issues consistent with the objectives of the investment.

<sup>21</sup> Statements have been attributed to them in numerous media articles from late October to late December 2013; statements have been made in an ILC media release of 18 November 2013 in which the ILC Chair called for a Parliamentary Inquiry by the Joint Committee on Public Accounts and Audit into the ARR and in an ILC media release of 24 October 2013 in relation to the Voyages Board; and in evidence given by the CEO to a Senate Estimates hearing on 22 November 2013

<sup>22</sup> Reviews by KPMG (2011), Deloitte (2013), McGrathNicol (2013); Australian National Audit Office (2013)

<sup>23</sup> ILC media release of 18 November 2013

### 1.3 Key Public Criticisms of the ARR Purchase and Voyages Board

In a range of forums<sup>24</sup> ILC Chair, Dawn Casey, ILC Deputy Chair, Ian Trust, and ILC CEO, Mr Mike Dillon, have made public statements that have variously explicitly or impliedly suggested that:

- The former ILC Board did not properly inform former Ministers the Hon Jenny Macklin MP (Indigenous Affairs) and Senator the Hon Penny Wong (Finance) about the ARR purchase; and (2) the ILC Board purchased the ARR, despite being wamed by the two Ministers not to do so.
- The investment in the ARR was a mistake because (1) the book value of the ARR has been reduced by \$60M; (2) the ILC owes a debt of \$200M; (3) the ILC has been forced to pay interest payments of \$10M on a vendor finance loan that Voyages could not fund; and (4) the ILC will be forced to cover future liabilities of Voyages because it is unprofitable and this will reduce the funding available to the ILC for its wider programs for the next 15-20 years.
- The former Voyages Board had to be replaced because (1) the Deloitte Report commissioned by the ILC recommended improvements to governance; (2) the ILC has commissioned a serious review of the ARR purchase, valuation and strategies going forward; (3) the former Voyages Board wrote down the book value of the ARR; (4) the ARR is facing serious financial challenges because of long term structural decline in its operating environment and the scale of borrowings to fund the ARR purchase; and (5) there was a need to strengthen the financial sustainability of the Voyages businesses, reinvigorate marketing, attract more visitors and better align the strategies of the ILC and Voyages.
- The funding for the purchase could be better spent on other projects all around Australia, and better outcomes could have been achieved by spending \$20M in 20 places around Australia.

### 1.4 Due Diligence and Process for ARR Purchase

A chronology of events relating to the purchase of the ARR and the deliberations by the ILC Board is at Attachment A.

Based on the material and documentation made available during this review, including the correspondence between the ILC and former Ministers Macklin and Wong and their respective departments, it is reasonably clear that:

<sup>24</sup> Statements have been attributed to them in numerous media articles from late October to late December 2013; statements have been made in an ILC media release of 18 November 2013 in which the ILC Chair called for a Parliamentary Inquiry by the Joint Committee on Public Accounts and Audit into the ARR and in an ILC media release of 24 October 2013 in relation to the Voyages Board; and in evidence given by the CEO to a Senate Estimates hearing on 22 November 2013

- In 2008 the ILC began to consider acquiring ARR. This occurred after Mr Dillon (in his then capacity as an adviser to Minister Macklin) brought to the attention of the ILC that the Aboriginal Corporation called Wana Ungkunyja (WU) had a proposal to partner with the ILC to purchase ARR for the eventual divestment of the asset to an Indigenous Corporation consistent with the objectives of the ILC under the ATSI Act<sup>25</sup>.
- In September 2008 ILC commenced a due diligence process undertaken by independent commercial and legal experts. At this time, the ILC Board and CEO began regularly briefing Minister Macklin and her advisers.
- Originally WU and ILC sought the permission of Minister Macklin to use funds in the Land Account administered by the Department of Families and Housing, Community Services and Indigenous Affairs (FaHCSIA) to purchase the ARR (in June 2010 the Land Account held \$1.8 billion). In April 2009 Minister Macklin refused the use of the Land Account to purchase ARR on the primary basis that the investment would not meet the criteria for an investment of the Land Account under the *Financial Management and Accountability Act 1999*. The ILC indicated to her that it would pursue private finance options as it has the power to do under the ATSI Act.
- When it was unable to secure suitable private finance arrangements, the ILC suspended the due diligence on the ARR transaction in mid-2009, and advised Minister Macklin's advisers accordingly.
- When suitable finance arrangements became available in mid-2010, the ILC re-commenced the due diligence process and advised Minister Macklin accordingly.
- The ILC commissioned a comprehensive due diligence including independent commercial assessment, independent sensitivity analysis which identified risks; an independent SWOT analysis which identified that the benefits outweighed the risks; a contingency plan to manage risks; and a management plan to boost Indigenous employment at the ARR and develop the ARR as a national centre of excellence which has the scale, platforms and iconic presence to attract and retain Indigenous trainees across the country for the national tourism and hospitality industry<sup>26</sup>.

<sup>25</sup> Email correspondence 26 September 2008. WU, which represents business interests of the local Anangu communities surrounding Uluru, was granted first right of refusal over the ARR by the previous owners. Following the ILC purchase of the ARR, WU received two seats on Board of the ILC subsidiary (Voyages) created to manage the ARR and other ILC owned tourism assets, and 7% equity ownership in Voyages approximately in 10 years' time. As part of the ARR divestment strategy a process was to be developed by the ILC and Central Land Council to identify an appropriate Indigenous Corporation to which the ARR could be divested once it is free of any financial encumbrances. Under the ATSI Act, the ILC is only obliged to divest an asset in a reasonable time having regard to the availability of an appropriate Indigenous Corporation and other relevant issues in the circumstances, and the ILC may operate an asset until that time. This has been confirmed by the full bench of the Federal Court.

<sup>26</sup> The due diligence was led by Grant Samuel and included a range of other consultants.



- During the due diligence process:
  - Due diligence material was provided both proactively and in response to requests from former Ministers Macklin and Wong between June and October 2010. This included independent sensitivity analysis and contingency plans.
  - The ILC Board obtained external legal advice which confirmed that the transaction was within the legislative competence of the ILC under the ATSI Act.
- On no occasion did the Ministers formally or specifically warn the ILC against the purchase. The Ministers asked the ILC reasonable questions about the impact of the purchase on the ILC's wider program management and forward estimates, and whether the purchase was consistent with the obligations of ILC Directors under the CAC Act and ATSI Act. The Ministers asked the ILC Board to exercise proper care and diligence about the transaction given the size of the investment and associated risks. The Ministers accepted that ultimately the ILC Board had to satisfy itself that the purchase was consistent with its obligations under the respective Acts and that Directors had exercised all care and diligence.
- During the consultations between the ILC and Minister Macklin and FaHCSIA there were some differences of opinion about the interpretation of provisions under the CAC Act regarding the obligation of the ILC to inform the Minister. This had a bearing only on the form of information provision, but did not lead to the ILC withholding any of the information requested by the Minister and FaHCSIA. Nevertheless, this difference of opinion may have affected the Minister's view about the ILC and the transaction.
- During the due diligence process former Ministers, the Senator the Hon Mark Arbib (Employment) and the Hon Martin Ferguson MP (Tourism) were also regularly consulted by the ILC. These Ministers actively supported the ILC purchase of the ARR. During the recent public debate about the purchase of the ARR, former Minister Ferguson publicly confirmed his support for it now and when he was tourism Minister.
- At its meeting on 1 October 2010 where the ILC Board agreed to purchase ARR, 5 of the 7 Directors voted in favour of it. Two Directors, one of whom was Mr Trust, abstained. Mr Trust gave no reason for his abstention. The Australian National Audit Office states the ILC's, "*Minutes of the board meeting recorded that frank and interactive discussion occurred around the proposal and that following these discussions, the board ultimately agreed to proceed with the acquisition*"<sup>27</sup>.
- To keep the government fully informed of the ARR on an ongoing basis, the former ILC CEO proposed that the ILC meet regularly with suitably senior officers of DoFD and FaHCSIA. This was formally accepted and welcomed by Minister Wong.
- At the end of the transaction Minister Wong wrote to the former ILC Chair to thank her for the level of cooperation shown by the ILC during the transaction, including the provision of all requested information in a timely manner.

<sup>27</sup> ANAO, Indigenous Land Corporation's Administration of the Land Acquisition Program, 17 December 2013; p20

- In October 2010 FaHCSIA, commissioned KPMG to review the borrowing powers and guarantee limits of the ILC. The review was oversighted by DoFD and the ILC and a copy was provided to Treasury. The review examined the ARR purchase in detail as it was material to its assessment of borrowing and guarantee issues, and found that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*<sup>28</sup>.

#### 1.4.1 KPMG Report

In the KPMG report of April 2011 it was identified that:

- One of the issues for Minister Macklin and FaHCSIA was that the disproportionate value of the business assets relative to the underlying land with an Indigenous interest brought into question whether the ARR transaction was within the charter of the ILC, particularly as Indigenous Business Australia (IBA) was created to acquire businesses for the benefit of Indigenous people. However independent legal advice obtained by the ILC Board in August 2010 indicated that the ARR transaction was within the parameters of the legislation enabling the ILC, and that it fulfilled the objectives for which the ILC was created.
- It would be appropriate for the Minister for Finance to have the power to approve the ILC's borrowings and guarantees, as ILC debt and liabilities can have an impact on the Government's budget. It would also be appropriate to align the ILC's borrowing and guarantee powers with other bodies governed by the CAC Act. However these changes should not prevent the ILC from entering into borrowing and guarantee arrangements where necessary to support its commercial operations. Both of these outcomes would require the ATSJ Act to be amended and it was the preference of DoFD to do so.

The previous Federal Government does not appear to have introduced legislation to implement these recommendations. The introduction of legislation to implement the KPMG recommendations would have been an expected response if there were serious concerns within government about the ILC's purchase of the ARR.

#### 1.5 Benefits of ARR Purchase

Based on the material and documentation made available during this review, and assessment of the purpose and benefits of the ARR acquisition, it is reasonably clear that:

- The purchase of the ARR enabled the ILC to deliver its vision at the time that included:
  - Creating an Indigenous tourism enterprise that employs significant numbers of Indigenous staff.

<sup>28</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits 2011; p49

- Creating a National Indigenous Tourism and Hospitality Training Academy at Yulara that produces nationally accredited Indigenous graduates and transitions them to employment in ARR and mainstream tourism and hospitality industries, including development of an Indigenous tourism leadership capability.
  - Acquiring land of significant cultural value, that had a Native Title case rejected in the Federal Court, and granting that land to an appropriate Indigenous title holding body, with arrangements that allow the continuing operation of ARR (through a lease back arrangement until such time as the land owning corporation developed the full capacity to operate ARR).
  - Working in partnership with local Indigenous communities to train Indigenous youth and assist their transition into employment in ARR and the tourism industry.
- Prior to the ILC purchase, one Indigenous person was employed at the ARR out of staff of 670. Over the 2 years since the ILC purchased the ARR, over 370 indigenous people have commenced training programs and 215 Indigenous people are employed at ARR (about 30% of total staff)<sup>29</sup>. Of the employees, 17% are from the local Anangu community in Uluru. A further 68 Indigenous people are employed at the other tourism assets managed by Voyages.
  - It is widely accepted that the greatest single pathway to achieving the Council of Australian Government's *Closing the Gap* objectives is scalable, effective and sustainable employment and training programs for Indigenous people that equip them to work in current and future export and other growth markets, and offer them real jobs. The ARR's focus on tourism employment and training is achieving this, and arguably provides Voyages with the most effective Indigenous training and employment program in Australia by volume, reach and success.
  - The ARR transaction is consistent with the legislative intention underpinning the creation of the ILC by the Keating Government. That intention was to create a fund separate from government that could be used to purchase aboriginal land as well as other strategic assets for indigenous economic, cultural, social and environmental purposes. Seven days after the ARR transaction was finalised Mr Keating confirmed this intention by stating that *"The ILC is now in an advantageous financial position such that it is able to spend funds on assets other than simply the purchase of land. The land fund and the land corporation initiative stand as another successful outcome of the 1993 Native Title Act negotiations."*<sup>30</sup>
  - The view expressed by Mr Keating is consistent with the independent review conducted by Aegis Consulting Group in 2010 of the ILC's performance. That review concluded that the ILC has wide discretion under the ATSI Act to determine how, where, and when it will acquire, manage, divest or otherwise treat with land to deliver one or more of its legislated purposes, and that this level of discretion properly underpins the capacity of the ILC to fulfil its legislated purpose. The review also concluded that while the ILC's focus on training and employment is not specifically referred to in the ATSI Act, its provision is consistent with the Act. This is because access to training and employment is a fundamental practical instrument that is partly necessary for the ILC to achieve its legislated purpose to deliver socio-economic benefits for Indigenous people<sup>31</sup>.

<sup>29</sup> ILC submission to the Review of ILC and IBA January 2014; p10

<sup>30</sup> The Hon PJ Keating, Lowitja O'Donoghue Oration, *"Lowitja O'Donoghue and Native Title; Leadership pointing the way to identity, inclusion and justice"*, 31 May 2011

<sup>31</sup> Aegis Consulting Group, External Review of the Policies and Programs of the ILC, 2010

- It is estimated that the cost to the Federal Government of supporting welfare dependent Indigenous people is an average of \$75,000 per person each year<sup>32</sup>. By this estimate the Voyages employment and training programs, deliverable because of the ARR economies of scale, are saving the Federal Government about \$21M (based on 283 people employed) in welfare payments each year. Over a 40 year period in which these people will continue to work, rather than collect welfare benefits, the Federal Government is potentially saving up to \$840M (2013 prices)<sup>33</sup>.
- If it is assumed that over the next 40 years the ARR trains for employment a further 7,400 Indigenous people (an average of 185 people per year based on throughput over the last 2 years), and those people gain employment at the ARR or in the broader tourism or other sectors, the Federal Government is saving up to a further \$555M in welfare payments. There would be further savings when taking into account the multiplier effect of each of these trainees working for the rest of their lives, instead of receiving welfare payments. These savings would be partially offset by any government subsidies that the ILC received for employing and training Indigenous people<sup>34</sup>.
- When considering the benefits it is relevant to consider that:
  - The funds made available by lenders for the purchase of the ARR would not have been made available to the ILC to purchase other projects all over Australia. The funding was provided because of the value of the ARR asset and its specific capacity to deliver rates of return expected by lenders.
  - Spreading \$20M across 20 tourism projects (as suggested in some of the public criticism of the ARR purchase) would be unlikely to enable those projects to deliver the same high quality tourism and hospitality training outcomes achievable through the economies of scale of the ARR. It is the quality of training in a shared experience environment that will equip Indigenous employees to secure and retain their competitiveness in the employment market in the tourism and other sectors. There is little evidence that spending for piece meal job creation leads to sustainable employment outcomes and the kind of inter-generational economic advancement that only skilled employment can deliver. The CDEP is one example of the limited success of a piecemeal approach.

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<sup>32</sup> H and M Hughes, Centre for Independent Studies 2011.

<sup>33</sup> Analysis by Aegis Consulting Group

<sup>34</sup> Ibid

## 1.6 Costs and Financial Impact of ARR Purchase

Based on the material and documentation made available during this review, and assessment of the costs and financial impact of the ARR acquisition, it is reasonably clear that:

- The ILC purchased ARR for \$317M. To reduce its up-front costs and immediate financial risk, ILC negotiated a transaction under which the ILC agreed to pay the vendors, General Property Trust (GPT) and Voyages Hotels and Resorts (VHR), the purchase price over 5 years. The payments were structured as follows:

ILC Payment \$M	Type of Payment and Due Date	Source of Funding
13.5	Deposit on exchange (15 October 2010)	ILC
67.5	Completion payment on settlement (23 May 2011)	ILC
81.0	Milestone payment 12 months after settlement (23 May 2012)	ILC (\$26M) Voyages (\$55M)
138.0	Milestone payment in year 5	Vendor finance from GPT
17.0	Minimum valuation uplift payment in year 5	ILC
317.0		

- Under the transaction GPT is required to fund \$25M worth of capital upgrades to the ARR over 5 years. This means that in effect the actual purchase price was \$292M. This price was consistent with the 3 valuations obtained by ILC between December 2008 and October 2010. These valuations were \$292M (Grant Samuel in October 2010); \$270M (CBRE Hotels in May 2009); and \$290M (Colliers International in December 2008). A further independent valuation commissioned by Voyages in August 2011 determined that the fair value of assets acquired was marginally more than the purchase price paid.
- Upon the contract completion date (May 2011) the ILC transferred the ARR to Voyages (the ILC subsidiary created to manage the ARR and other ILC tourism assets) and Voyages provided ILC with an intercompany (shareholder loan) for \$298M which represented the value of the assets less \$2M in equity shares issued to ILC.
- The total debt accumulated by the ILC in the ARR transaction over 5 years to 2016 is \$219M (the payments owed to GPT under the vendor finance arrangement) plus its share of the interest on the GPT loan. The vendor finance arrangements agreed to by ILC were approved by the Australian National Audit Office (ANAO) in its capacity as the ILC's external auditors.
- As the guarantor of the finance agreement the ILC is primarily responsible for liabilities that may accrue and it shares liabilities with Voyages in relation to the GPT loan. Over the two years since ARR was purchased the ILC has funded interest payments worth about \$19.5M and Voyages has funded interest payments worth about \$9M.

- The total borrowings by the ILC in the ARR transaction over 5 years to 2016 is \$236M (the \$219M debt + \$17M valuation uplift payment to GPT in year 5). This borrowing was within the ILC's permitted \$300M borrowing limit. It was made clear to GPT at the time that the ILC, not the Commonwealth Government, is the guarantor of liabilities.
- Under the shareholder loan between ILC and Voyages, ILC expects that Voyages will pay it \$157.6M over the 5 years (\$135.6M in year 5) plus a share of the interest on the GPT loan, to partly fund the debts to GPT.
- In 2013 the remaining liabilities of the ILC are \$155M consisting of \$138M (vendor finance payment to GPT due in 2016) and \$17M (valuation uplift payment to GPT due in 2016), plus its share of interest on the \$138M loan.
- In 2013 the value of the ARR was estimated to be \$250M, more than enough to cover the ILC's total liabilities (\$155M plus interest), even in the unlikely event that Voyages is unable to fully pay ILC the expected \$135.6M in 2016. This doesn't include the \$60M loan to Voyages from ANZ that Voyages is solely and directly responsible for servicing and is doing so in a timely fashion.

Years	Gross Liabilities of ILC \$M	Funding from Voyages to ILC \$M	Net Liabilities of ILC \$M	Asset Value of ARR in 2013 \$M	Number of Indigenous Employees/Trainees at ARR and Voyages Other Tourism Businesses	Gross Savings in Federal Government Welfare Payments to Indigenous Employees/Trainees
2011-2016	236.0 plus interest on GPT loan	157.6 plus interest on GPT loan (Based on assumed level of Voyages profitability at the time of purchase)	78.4 plus interest on GPT loan	250.0	<ul style="list-style-type: none"> <li>▪ 1 in 2010 prior to ILC purchase</li> <li>▪ 370 trainees since ILC purchase in 2011</li> <li>▪ 283 employees in 2013 (215 at ARR)</li> <li>▪ Higher future targets for trainees/employees</li> </ul>	<ul style="list-style-type: none"> <li>▪ 283 employees of Voyages save at least \$21M each year and up to \$840M over 40 years</li> <li>▪ At current uptake rates there may be 7,400 trainees over the next 40 years. If they all find sustainable employment it saves at least a further \$555M.</li> <li>▪ Net savings would be less when considering any government payments to Voyages for employing and training Indigenous people.</li> </ul>

- It is estimated that in December 2013 the ILC had cash on hand of about \$100 million.

## 1.7 Valuation of ARR and Profitability of Voyages

Based on the material and documentation made available during this review, it is reasonably clear that:

- In 2012-13 the Voyages Board reduced the value of the ARR from \$312M to \$250M. This was based on independent expert advice. The valuation was accepted and agreed to by the ILC Board (of which Voyages is a subsidiary company) at its meeting on 23 September 2013.
- The Voyages Directors were legally and financially bound to amend the value of the ARR in recognition of the impact of difficult trading conditions, including the reduction of air capacity from Cairns and Perth by Qantas, which lowered trading at ARR by more than 30%.
- The book value of assets can change up and down over the life cycle of an asset. Asset downgrades often reflect difficult trading environments, such as the one being experienced by the regional and remote tourism sector in Australia. Asset valuations can rebound when market conditions improve<sup>35</sup>. In a letter to the Chair of the Senate Finance and Public Administration Legislation Committee of the Australian Parliament, the former ILC Chair has made the point that the write down of the ARR is immaterial to the ILC because it is obliged to divest the asset to an Indigenous Corporation over time and during this time valuations will fluctuate<sup>36</sup>.
- In 2012-13 Voyages recorded a cash profit of \$12.4M EBITDA and is budgeting for a profit of \$14.4M EBITDA in 2013-14. The 2012-13 profit is about 50% below the projections pre-acquisition because of lower than forecast occupancy rates, average room rates, airport revenues and increased operating costs. The rural and remote tourism sector is experiencing difficulty and this is affecting ARR, but this is not the same set of conditions that would create a long term structural decline in the operating environment of ARR. Voyages 2012-13 profit and projected 2013-14 is not reflective of a structural decline.
- The former Voyages Board had a business strategy in place to increase revenue and lower costs without undermining the commitment to Indigenous employment and training.
- As part of the business strategy the former Voyages Board was developing options to restructure or refinance the loan with a view to reduce the future demand on ILC. The willingness of the Voyages Board to work with the ILC to resolve commercial issues and share liabilities was communicated by the Voyages Chair to the ILC Chair prior to the termination of the Voyages Board by the ILC Board.

<sup>35</sup> Advice from Dransfield & Co, 24 December 2013

<sup>36</sup> Ms Shirley McPherson, 9 December 2013

## 1.8 Management of ILC and Voyages Relationship

In 2013 the ILC commissioned Deloitte to review the board governance arrangements of the ILC. Deloitte found that on the whole the ILC governance arrangements were reasonable but recommended that<sup>37</sup>:

- The ILC develop a group wide strategy including all its subsidiary businesses;
- The ILC Board clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and
- The ILC develop consolidated financial reporting that includes its subsidiaries.

In the ILC Board meeting on 23 September 2013, the independent Chair of the ILC audit and risk management committee praised the financial reporting of Voyages and the alignment between the financial reporting of Voyages and needs of the ILC Board<sup>38</sup>.

Given this, it would not appear that the Deloitte report or the management of audit and risk issues by Voyages support the termination of the Voyages Board.

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<sup>37</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

<sup>38</sup> Minutes of the Board meeting



## 2. RELATED ILC GOVERNANCE ISSUES

A chronology of events relating to ILC governance after the ARR purchase is at Attachment B.

Two actions taken by the current ILC Board in 2013 in response to its concerns about the ARR purchase have been:

- To commission a review of the ARR purchase, which was conducted by McGrathNicol (MN); and
- Terminate and replace the former Voyages Board.

### 2.1 ILC Review of ARR

The MN review<sup>39</sup> was commissioned by the ILC Board even though the ARR purchase had been already examined by KPMG in 2011 and found to be consistent with sound business practices and ILC obligations.

In its report MN acknowledged that its review had three limitations. These were that:

- Even though the terms of reference required a forensic audit of the ARR transaction, MN did not conduct an audit or verify any information provided by ILC.
- The ILC did not give MN access to the 2011 KPMG report.
- As part of its value for money assessment of the ARR purchase, MN did not consider any of the benefits or non-financial outcomes that may have been taken into account by the Board at the time, already achieved or projected to be achieved.

These are significant limitations, particularly if the ILC was seeking to fully and transparently evaluate the costs, benefits and overall value of the ARR purchase.

The MN report identified that there were gaps in record keeping and documentation of decisions relating to the ARR purchase, and the implementation of agreed risk management activities. The report concluded that *"the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not mean that the acquisition itself was inappropriate"*<sup>40</sup>.

The finding by MN in relation to the purchase process appears opposite to the conclusions of KPMG in 2011 that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*<sup>41</sup> and the Australian National Audit Office in 2013 that

<sup>39</sup> McGrathNicol, Ayers Rock Resort Review Final Report 18 December 2013

<sup>40</sup> Ibid; p12

<sup>41</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits 2011; p49

the ILC's, *"Minutes of the board meeting recorded that frank and interactive discussion occurred around the proposal and that following these discussions, the board ultimately agreed to proceed with the acquisition"*<sup>42</sup>.

Other key findings of the MN review included that:

- The financial model relied on by the ILC Board when assessing the ARR purchase was conservative.
- The ILC was a motivated purchaser, but the process indicates it was not prepared to purchase at any price.
- The transaction was consistent with ILC powers and obligations under ATSI and CAC Acts.
- Vendor finance arrangements were reasonable and not disadvantageous to the ILC.
- A comprehensive risk management plan dealing with operational and transactional risks was prepared.
- The post purchase risk assessment and mitigation strategy in relation to occupancy was reasonable.
- The ILC Board decision was based on and followed the advice of consultants.

### 2.1.1 ILC Management of the Review

Some statements made by the ILC Chair raise questions about the ILC approach to the MN review of the ARR. For example:

- In a letter to the former ILC Board member and Voyages Chair, David Baffsky AO<sup>43</sup>, Director Casey says *"I and other ILC Board Directors do have a focus and commitment to good corporate governance, and we are determined to ensure that the poor processes and outcomes associated with that [ARR] acquisition are not swept under the carpet"*. These statements seem to pre-empt the outcome of the independent review by MN, which was still underway at the time the ILC Chair wrote to Mr Baffsky.
- It is curious that the ILC Chair made her statements to Mr Baffsky despite the fact that there is no independent evidence that (1) the ARR acquisition involved poor processes or outcomes or (2) the previous Board tried to 'sweep issues under the carpet' or (3) that previous Directors did not have a commitment to good governance. The findings of this current assessment and those of KPMG, ANAO and MN in their reviews are that the ARR acquisition involved legal and transparent processes consistent with the obligations of Directors under the CAC Act and ATSI Act. The KPMG examination of the ARR transaction in detail was material to its assessment and recommendations to the previous Federal Government about the ILC's borrowing and guarantee powers. KPMG found that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*<sup>44</sup>.

<sup>42</sup> ANAO, the Indigenous Land Corporation's Administration of the Land Acquisition Program, 17 December 2013; p20

<sup>43</sup> 5 December 2013

<sup>44</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits 2011; p49

## 2.2 Replacement of Voyages Board

Based on the material and documentation made available during this review, it is reasonably clear that:

- In October 2013 the ILC Board sacked the former Voyages Board for a range of explicit and inferred reasons including that<sup>45</sup>:
  - The Deloitte review commissioned by the ILC recommended improvements to governance;
  - The ILC had commissioned the MN review of the ARR purchase, valuation and strategies going forward;
  - The former Voyages Board wrote down the book value of the ARR to \$250M;
  - The ARR was facing serious financial challenges because of long term structural decline in its operating environment and the scale of borrowings to fund the ARR purchase; and
  - There was a need to strengthen the financial sustainability of the Voyages businesses, reinvigorate marketing, attract more visitors and better align the strategies of the ILC and Voyages.
- The decision to sack the Voyages Board was made after:
  - The ILC Board had approved in September 2013 the Voyages Board's proposed 2013-14 budget and recommendation to write down the value of the ARR to \$250M; and
  - The Voyages Board had communicated to the ILC Board its decision to create a sub-committee to manage the commercial relationship between the ILC and Voyages Boards and suggested a process for consultation on joint issues, including its focus on revising its business strategy to improve the commercial position of the ARR and reduce the liability for the ILC.

### 2.2.1 Rationale for the Replacement

Some of the key rationale provided for the replacement of the Voyages Board seems incongruous. In particular:

- The Deloitte review primarily recommended that the ILC develop a group wide strategy including all its subsidiary businesses, clarify its own expectations about the reporting of subsidiaries and consolidate financial reporting of subsidiaries. These recommendations do not appear to support the sacking of the Voyages Board<sup>46</sup>.
- The MN review report was delivered in December 2013, about two months after the Voyages Board was sacked. It seems pre-emptive for the ILC Board to replace the Voyages Board before the completion of the independent review the ILC Board has commissioned to evaluate the ARR purchase and management strategies

<sup>45</sup> ILC media release of 24 October 2013 and numerous media comment attributed to the ILC Chair between 24 October and late December 2013

<sup>46</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

going forward. This is particularly because the MN report does not contain any significant recommendations concerning the capacity of the former Voyages Board to appropriately manage the ARR into the future<sup>47</sup>.

- The ILC Board considered it was essential to replace the Voyages Board with new skills and expertise to improve financial sustainability, reinvigorate marketing and attract more visitors<sup>48</sup>. Therefore it seems curious that:
  - While the former Voyages Board contained leading business figures with extensive strategic tourism and commercial investment experience, the new Voyages Board appears to have more limited strategic tourism industry and commercial investment experience<sup>49</sup>. The action by the ILC Board would suggest that it was seeking a new Voyages Board with vastly more experience than the previous one, and therefore it seems odd that this may not have clearly and definitively occurred. One of the new Board members appears to have been convicted in the Northern Territory in 2008 for aggravated assault<sup>50</sup>. Under liquor licensing laws this may prevent the Voyages Board from holding the liquor licences for the ARR.
  - Following the first meeting of the new Voyages Board on 6 December 2013, the ILC Chair joined the new Voyages Chair, in stating publicly that the ARR management "has achieved significant success over the last two years" including 'impressive achievements in relation to Indigenous employment and training and a stunning redevelopment of the Sails in the Desert Hotel' and that the ARR was "*recently honoured with three Brolgas – the highest award from Tourism Northern Territory*" and "*has become a symbol of optimism for the future of many Indigenous people*"<sup>51</sup>. In making these statements the ILC and Voyages Chairs seem to have indirectly confirmed the successful management of the ARR by the previous Voyages Board.

<sup>47</sup> McGrath Nicol, Ayers Rock Resort Review Final Report 18 December 2013

<sup>48</sup> ILC Media Release 24 October 2013

<sup>49</sup> Based on an assessment of public information about the experience of former and new Voyages Board members

<sup>50</sup> Judgement of Mr VM Luppino SM, Court of Summary Jurisdiction, Northern Territory, Judgement ID number (2008) NTMC 054

<sup>51</sup> Comments attributed to ILC Chair (Dawn Casey) and Voyages Chair (Lisa Gay) in *The Australian*, 'newly appointed Ayers Rock Resort board gives thumbs up on achievements', 6 December 2013

**ATTACHMENT A**

**CHRONOLOGY OF EVENTS – ILC GOVERNANCE OF ARR PURCHASE<sup>52</sup>**

Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
2008	Transaction	<ul style="list-style-type: none"> <li>In 2008, General Property Trust (GPT) is seeking to sell a number of its assets including ARR. The ARR and other tourism assets owned by GPT are managed through the Voyages Management Platform (Voyages) which has its own management team. The GFC has created the need for GPT to sell its assets at discounted value.</li> <li>ILC considers purchasing ARR because of opportunity to (1) obtain an iconic investment for Indigenous people at a below market rate (2) deliver a more significant Indigenous experience for visitors (3) create employment and training for Indigenous people at the ARR and within the tourism and hospitality industry generally. ILC also considers purchasing other tourism assets owned by GPT.</li> <li>ILC appoints commercial, legal and tourism advisers including Grant Samuel, Baker &amp; McKenzie, Howarth HTL, Corrs Chambers Westgarth to advise it on the transactions.</li> </ul>	<ul style="list-style-type: none"> <li>Mr Mike Dillon (an adviser in Minister Macklin's Office) and Doona Moody (senior officer in FaHCSIA) ask the ILC to work with Wana Ungkumytja (WU), an Aboriginal corporation representing communities that surround Uluru. WU proposes to Government and ILC that WU and ILC partner to purchase ARR for the benefit of the local Anangu people.</li> </ul>
	Government consultations	<ul style="list-style-type: none"> <li>ILC Chair and CEO brief Minister Macklin's and Prime Minister's Offices in September 2008.</li> </ul>	
2009	Government consultations	<ul style="list-style-type: none"> <li>ILC Chair meets with Minister Macklin and Secretary FaHCSIA on 23 March 2009.</li> <li>ILC requests use of Land Account (governed by the <i>Financial Management and Accountability Act 1999</i>) to fund ARR purchase. Loan from Land Account is proposed to be repaid over 10 years based on 6% interest annually and proceeds from the sale of Ayers Rock Airport.</li> <li>Following Minister Macklin's rejection of the use of the Land Account to purchase ARR, ILC decides to borrow funds, which the <i>Aboriginal and Torres</i></li> </ul>	<ul style="list-style-type: none"> <li>On 1 April 2009 Secretary FaHCSIA writes to ILC on behalf of Minister Macklin stating that the Minister will not approve use of Land Account for ARR purchase because FaHCSIA and Department of Finance consider: <ul style="list-style-type: none"> <li>The purchase does not meet investment criteria for Land Account.</li> <li>Purchase is high risk/low investment and complex.</li> <li>Size of investment would create high risk and financial exposure for ILC.</li> </ul> </li> <li>Minister Macklin writes to ILC on 19 August 2009 to:</li> </ul>

<sup>52</sup> This chronology is based on the contents of material, information and documentation made available during this review

Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
		<p><i>Strait Islander Act 2005 (ATSI Act)</i> permits. ILC Chair writes to Secretary FaHCSIA on 29 May 2009 advising this.</p>	<ul style="list-style-type: none"> <li>➤ Advise that under section 15 of the <i>Commonwealth Authorities and Companies Act 1997 (CAC Act)</i> ILC is obliged to provide her with details of the ARR transaction.</li> <li>➤ Seek details of the financial arrangements and implications of the ARR purchase for the ILC, and benefits of the purchase for Indigenous people.</li> <li>➤ Request notification when purchase has been finalised.</li> </ul>
	Transaction	<ul style="list-style-type: none"> <li>▪ ILC suspends work on ARR transaction in mid-2009, as it has difficulty borrowing funds.</li> <li>▪ Because it has suspended the transaction ILC does not respond to Minister Macklin's letter of 19 August 2009.</li> <li>▪ ILC CEO advises Minister Macklin's Office that it has suspended work on the ARR transaction.</li> </ul>	
June 2010	Transaction	<ul style="list-style-type: none"> <li>▪ In June 2010, the ILC and GPT recommence discussions about ARR.</li> <li>▪ ILC retains the same commercial and other advisers it had in 2009 and they recommence due diligence.</li> </ul>	
June-August 2010	Government consultations (some of which occurred during caretaker period prior to 2010 Federal election)	<ul style="list-style-type: none"> <li>▪ ILC CEO advises Minister Macklin's Office that the ILC has recommenced consideration and due diligence of ARR purchase.</li> <li>▪ ILC CEO writes to Minister Macklin on 10 August 2010 advising her that the ILC was undertaking due diligence on ARR and notifying her as required under section 15 of the CAC Act that the ILC was proposing to purchase ARR.</li> <li>▪ ILC CEO writes to Secretary FaHCSIA on 27 August 2010 advising that: <ul style="list-style-type: none"> <li>➤ ILC is happy to brief the Secretary on the ARR purchase.</li> <li>➤ The Board is happy to provide the requested detailed information on the purchase, but based on external legal advice considers that it is not obliged to do so by s.15 of the CAC Act.</li> <li>➤ The ARR purchase will have no negative impact on the ongoing operations of the ILC or its forward estimates.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Secretary FaHCSIA writes to ILC CEO in 13 August 2010 to: <ul style="list-style-type: none"> <li>➤ Remind ILC that the Minister had previously expressed some general concerns about the ARR purchase.</li> <li>➤ Advise that under s.15 of the CAC Act more detailed information about the ARR purchase is required as per the Minister's letter of 19 August 2009.</li> <li>➤ Recommend that the ILC provide the Minister with details of its borrowing particularly because the Minister's decision to provide guaranteed funding to the ILC included a review of ILC borrowing limits.</li> </ul> </li> <li>▪ FaHCSIA Group Manager, Program Performance writes to ILC CEO on 23 August 2010 to: <ul style="list-style-type: none"> <li>➤ Raise similar issues as Secretary FaHCSIA.</li> </ul> </li> </ul>

Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
		<ul style="list-style-type: none"> <li>➤ ILC is willing to participate in the review of its borrowing limits, but will <u>not</u> suspend its power or actions to borrow funds until after the completion of the review.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Request that the information be provided before a decision by ILC on the ARR purchase.</li> <li>➤ Remind ILC that that the review of ILC borrowing limits is due to commence in October 2010.</li> </ul>
September 2010	Government consultations	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Minister Macklin on 23 September 2010 attaching a detailed brief on the commercials of the ARR purchase and advising that:               <ul style="list-style-type: none"> <li>➤ The Board has undertaken careful due diligence.</li> <li>➤ The purchase will not reduce the capacity of the ILC to deliver its other normal programs within budget.</li> <li>➤ ILC borrowing for the ARR will be a maximum of \$98M, well within its borrowing limits of \$303M. The ILC will guarantee the balance of the purchase price through a deferred payment and its combined borrowing and guarantee will peak at \$260M.</li> <li>➤ The purchase is projected to increase net revenue to the ILC of over \$25M after 10 years.</li> <li>➤ The purchase will enable ARR to lift Indigenous employment (out of 670 employees) from 1 (at the time of purchase) to 250 in 2015 and 340 in 2018.</li> <li>➤ The purchase gives the ILC the scale and platform to create a tourism training academy at ARR that can create employment for indigenous people across Australia in the tourism industry.</li> <li>➤ The ILC will partner with WU to create additional employment and business opportunities for the local community.</li> <li>➤ Virgin Australia has committed to begin flying to Uluru if the ILC purchases ARR.</li> <li>➤ A separate company will be created under s.191G of the ATSI Act to manage the ARR and incorporate the existing Voyages platform operating ARR. That company will be chaired by David Baffsky AO (who has unparalleled experience in Asia-Pacific tourism) and a CEO with considerable tourism experience will be recruited. That company cannot act beyond ILC powers.</li> <li>➤ The divestment plan of the ARR is consistent with the leaseback model governing the Commonwealth Government's arrangement with traditional owners for Uluru-Kata Tjuta National Park.</li> <li>➤ Lenders understand that the ILC is the only guarantor of borrowings.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Minister Macklin writes to ILC Chair on 22 September 2010 seeking more information under s.16 of the CAC Act on the following issues at least 7 days before the ILC enters into any agreements to purchase the ARR:               <ul style="list-style-type: none"> <li>➤ The impact of the ARR purchase on the capacity of the ILC to deliver outcomes for Indigenous people across Australia.</li> <li>➤ How the ILC would divest the ARR as required under the ATSI Act.</li> <li>➤ Whether the ILC has made it clear to lenders that the Commonwealth Government would not guarantee the funds borrowed by the ILC.</li> </ul> </li> <li>▪ Minister for Finance, the Hon Senator Penny Wong, writes to Chair ILC on 29 September 2010 to:               <ul style="list-style-type: none"> <li>➤ Raise concerns about the financial model underpinning the ARR purchase and that the proposal may not comply with the duties of directors under the CAC Act and purpose of ILC.</li> <li>➤ Seek more information on capacity of ILC to create a subsidiary to manage the ARR, opinion of Directors and supporting material on the compliance of the purchase with ATSI Act given the length of time before the ARR will be unencumbered and able to be divested to an Aboriginal organisation, and due diligence and sensitivity analysis information.</li> <li>➤ Seek information before the purchase.</li> </ul> </li> </ul>

Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
		<ul style="list-style-type: none"> <li>&gt; Mike Dillon was advised in June 2010 that ILC had recommenced consideration of the ARR purchase and an offer was made in August 2010 to brief the Minister Macklin and the Secretary FaHCSIA which was never accepted.</li> <li>&gt; The ILC is likely to agree to the purchase on 1 October 2010.</li> </ul> <p>ILC Chair writes to Minister Wong on 30 September 2010 to:</p> <ul style="list-style-type: none"> <li>▪ Raise concerns that despite being briefed about the ARR purchase for 2 years the Government is only asking questions at the last minute.</li> <li>▪ Reiterate the same responses the Chair made to Minister Macklin on 23 September.</li> <li>▪ Provide due diligence and independent sensitivity analysis and legal opinions about the compliance of the Board with the ATSI and CAC Acts in relation to the ARR purchase and time for divestment of assets to Aboriginal assets.</li> <li>▪ Indicating that the ILC has a number of assets which it has held for over 10 years because there is no suitable Aboriginal organisation to which it can divest the assets.</li> <li>▪ The WU supports the ARR purchase.</li> <li>▪ Advise that the financial model for the purchase of the ARR has been accepted by three of Australia's largest banks which have agreed to provide vendor finance.</li> <li>▪ Advise that there are a range of options available to the Board if the financial projections are not met, including scaling back capital works at ARR, renegotiating the financial agreements with the vendor and selling the assets.</li> <li>▪ Offer quarterly meetings between ILC and Department of Finance on the ARR.</li> </ul>	
October 2010	Government consultations	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Minister Wong on 1 October 2010 to advise that the Board met on 1 October 2010 and resolved to: <ul style="list-style-type: none"> <li>&gt; Proceed with the acquisition of ARR.</li> <li>&gt; Delay implementation for 7 days in the event that the Minister wishes to raise any further appropriate substantial issues about director's duties under the CAC Act.</li> </ul> </li> <li>▪ The Board's decision to proceed with the purchase is informed by a SWOT analysis by Howarth HTL, advice from Grant Samuel and ILC business case</li> </ul>	<ul style="list-style-type: none"> <li>▪ Minister Wong writes to ILC Chair on 8 October 2010 to: <ul style="list-style-type: none"> <li>&gt; Indicate her continued concern about the financial viability of the ARR purchase and impact on ILC's broader programs and the need for an independent sensitivity analysis.</li> <li>&gt; Note that it is a matter for the Board to exercise care and diligence and that the Board has undertaken considerable work in reaching its decision to purchase ARR.</li> <li>&gt; Welcome the quarterly meetings between ILC and DoFD.</li> </ul> </li> </ul>



Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
		that identified the immediate risks associated with a tourism asset but also identified medium and long term benefits of asset ownership and use for ILC purposes that outweighed the risks. There is confidence that the risks are manageable because the purchase includes Voyages and its management team.	➤ Under s.16 of the CAC Act, request within 28 days of a decision to purchase the ARR an independent sensitivity analysis, detailed contingency plans under Board scenario planning for the ARR and quarterly information on performance of the ARR.
	Transaction	▪ ILC executes contract for purchase of ARR.	
November 2010	Government consultations	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Minister Wong on 5 November 2010 to:</li> <li>➤ Confirm that the Board has satisfied its duties under the CAC Act and agreed to purchase the ARR (of the 7 Directors of Board, 5 voted for the purchase and 2 abstained).</li> <li>➤ Attach again the independent sensitivity analysis previously provided and contingency plan as requested by Minister Wong.</li> <li>➤ Confirming that quarterly meetings would be held between ILC and DoFD.</li> </ul>	
December 2010	Government consultations	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Minister Macklin on 22 December 2010 to advise that:</li> <li>➤ The ILC has entered into a contract for sale for the ARR and is working on a range of pre-settlement issues.</li> <li>➤ Upon completion of the sale the ILC will become the sole member of a company called the Mutitjulu Foundation which has been in existence for many years and acts as the trustee of the Mutitjulu Foundation Trust. The Trust is a charitable organisation that makes grants of money for beneficial purposes for the communities surrounding Uluru.</li> </ul>	
February 2011	Government consultations	<ul style="list-style-type: none"> <li>▪ The ILC advises Minister Macklin that the ILC:</li> <li>➤ Will need to budget for an operating loss in 2010-11 of \$6.8M because of the expected timing of the settlement of the ARR purchase.</li> <li>➤ Has the cash reserves to fund the cash component of the loss.</li> <li>➤ Will be able to offset the loss from expected profits in 2011-12 and 2012-13.</li> <li>➤ Has been consulting with DoFD and it has expressed confidence in the ILC and comfort with the reasons for the loss.</li> <li>➤ Requests that its budget not be reduced because of the loss.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Minister Wong writes to ILC Chair on 1 February 2011 to:</li> <li>➤ Thank her for the information provided in November 2010 and willingness of the ILC to provide requested information and work co-operatively with DoFD and FaHCSIA on the ARR purchase.</li> <li>➤ Request that ILC continue to work closely with DoFD.</li> <li>▪ Minister Macklin writes to Minister Wong to request that the ILC budget not be reduced because of the loss explaining the reasons provided by the ILC.</li> <li>▪ Minister Macklin writes to the ILC Chair on 17 February 2011 to advise that she has asked Minister Wong not to reduce the</li> </ul>

Date	Issue	ILC Steps Towards ARR Purchase	Federal Government Views/Responses
April 2011	Government consultations	<ul style="list-style-type: none"> <li>ILC CEO advises Mike Dillon that the actual ILC operating loss will be \$4.96M, not \$6.8M.</li> </ul>	<ul style="list-style-type: none"> <li>ILC budget because she does not wish to reduce the ILC capacity to deliver programs.</li> <li>KPMG delivers its report to FaHCSIA, DoFD and Treasury on the review of ILC borrowing powers and guarantee limits (commenced in October 2010). The report includes consideration of the ARR.</li> </ul>
May 2011	Transaction	<ul style="list-style-type: none"> <li>ILC settles contract for purchase of ARR.</li> </ul>	

**ATTACHMENT B**

**CHRONOLOGY OF EVENTS – ILC GOVERNANCE POST ARR PURCHASE<sup>53</sup>**

Date	Issue	ILC Action	Federal Government/Voyages Action
July – October 2011	Reappointment of ILC CEO	<ul style="list-style-type: none"> <li>ILC Chair writes to Minister Macklin on 17 October 2011 indicating that the ILC Board has unanimously reappointed the CEO for 4 years after considering: <ul style="list-style-type: none"> <li>&gt; The Minister's views.</li> <li>&gt; The powers and duties of the Board in relation to the appointment of the CEO under the ATSI and CAC Acts.</li> <li>&gt; The performance and comprehensive performance review of the CEO.</li> <li>&gt; The best interests of the ILC, its employees and the organisations with which it works.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Minister Macklin and her adviser Mike Dillon indicate (including by letter on 22 August 2011) that the Minister does not support the reappointment of the CEO for a further 4 years. Minister Macklin indicates that if reappointed the CEO should not be appointed for more than 1 year.</li> </ul>
October 2011	Minister Macklin makes new Board appointments		<ul style="list-style-type: none"> <li>When director's tenure expires Minister Macklin: <ul style="list-style-type: none"> <li>&gt; Replaces former ILC Chair (Shirley Macpherson) with Director Casey.</li> <li>&gt; Replaces Directors Driscoll, Gorrington and Evonne Goolagong-Cawley with Directors Westbury, Havnen, and Atkinson.</li> <li>&gt; Retained Directors Baffsky, Trust and Jeffries.</li> </ul> </li> </ul>
March – April 2012	Minister Macklin raises concerns about ILC Board governance	<ul style="list-style-type: none"> <li>ILC General Counsel prepares a briefing paper for ILC Board meeting on 16 April 2012 addressing Minister's letter and advises that: <ul style="list-style-type: none"> <li>&gt; ILC had understood that the Australian National Audit Office (ANAO) had provided the Voyages 2010/11 audited statements directly to the Minister. The ANAO confirms that the statements were sent to the Minister on 27 October 2011 on behalf of the ILC. Following the Minister's letter the ILC has sent another copy of the statements to the Minister.</li> <li>&gt; The ILC provided all the information requested by Ministers Macklin and Wong prior to the purchase of the ARR during 2010 and 2011.</li> <li>&gt; Under the CAC Act the Minister is not required to be informed about changes to the tenure of the Directors of the Voyages Board. The ILC Board agreed to</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Minister Macklin writes to ILC Chair on 14 March 2012 with reference to discussions between herself and the Chair and indicates that she: <ul style="list-style-type: none"> <li>&gt; Is accountable to the Parliament for the ILC, under the CAC Act.</li> <li>&gt; Wants governance change at ILC and ILC to operate in a more accountable, transparent and best practice manner.</li> <li>&gt; Considers that she was provided limited financial, management and divestment information about the ARR purchase and limited assurance that the purchase would have no adverse impact on the ILC.</li> </ul> </li> </ul>

<sup>53</sup> This chronology is based on the contents of material, information and documentation made available during this review

Date	Issue	ILC Action	Federal Government/Voyages Action
		<p>appoint the Voyages Board Directors for a period of 5 years at the time Voyages was established and no change had occurred since then.</p> <ul style="list-style-type: none"> <li>➤ It is orthodox and good practice for Board Directors to have multiple roles as this ensures whole of company decision making and alignment between parent and subsidiary companies. The remuneration of the Directors of the Voyages Board was set using normal practice and based on independent external advice.</li> <li>➤ It is not clear from the Minister's letter whether she is concerned about the substance of the tenure of Voyages Board Directors and multiple roles or that she is concerned about not being specifically informed about these issues.</li> <li>➤ In March 2012, the ANAO commended the ILC for its <i>Corporate Governance Framework</i>, considering it one of the best it had seen. The ANAO expressed a desire to use parts of it as a template for other Commonwealth Government agencies.</li> </ul> <ul style="list-style-type: none"> <li>▪ ILC Board decides at its 16 April 2012 meeting to: <ul style="list-style-type: none"> <li>➤ Provide the Minister with an interim response indicating that the ILC meets regularly with DoFA and FaHCSIA about ARR and provide the Minister with the outcome of the proposed Board governance review.</li> <li>➤ Organise a meeting between the ILC Chair and CEO and FaHCSIA.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>➤ Has not received the Voyages audited financial statements provided to ASIC in October 2011, as required under the CAC Act.</li> <li>➤ Was advised by the Chair and looks forward to further information about Board Directors having multiple roles and the decision of the Voyages Board to extend tenure of its Directors.</li> </ul>
June-July 2012	Changes to ILC Audit and Risk Management Committee (ARMC)	<ul style="list-style-type: none"> <li>▪ ILC Chair makes public statements during her national press club address that the ILC ARMC (comprising ILC directors Baifsky, Jeffries and independent director Ian Ferrier) have questions to answer about the ARR purchase. The ARMC members respond by letter on 6 July 2012 rejecting the Chair's claims and indicating she may have defamed them.</li> <li>▪ ILC Board replaces membership of ARMC with new directors and an independent Chair.</li> </ul>	
December 2012	ILC Board asks Deloitte to review governance	<ul style="list-style-type: none"> <li>▪ ILC Board asks Deloitte to assess governance arrangements and identify strengths, potential gaps and make necessary recommendations.</li> </ul>	
March 2013	Deloitte delivers report to ILC	<ul style="list-style-type: none"> <li>▪ The Deloitte report key findings and recommendations are that:</li> </ul>	

Date	Issue	ILC Action	Federal Government/Voyages Action
		<ul style="list-style-type: none"> <li>➤ ILC should develop a group-wide business strategy to enable the Boards of ILC and subsidiary companies to align their individual strategies and plans with the group wide approach.</li> <li>➤ The ILC Board should set clear expectations about the alignment of strategy, budgeting and financial reporting across its subsidiaries and define its required degree of oversight of subsidiaries business decisions to the extent necessary to fulfil the statutory obligations of ILC Directors.</li> <li>➤ The meetings of the ILC and subsidiary Boards and sub-committees should be aligned to support the timely provision of information and decision making within a group-wide strategy.</li> <li>➤ The ILC should develop consolidated financial reporting to assist management of the group-wide strategy.</li> <li>➤ The Board structure, and risk governance and risk reporting are effective.</li> </ul>	
March-April 2013	ILC/Voyages Relationship	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Voyages Chair (ILC Director Baffsky) on 18 March 2013 indicating that the ILC Board:               <ul style="list-style-type: none"> <li>➤ Wants further information about the capital requirements of, risks and contingency plans associated with the ARR purchase.</li> <li>➤ Has decided that even though Voyages has promised a brief to the ILC Board on these issues, the ILC will commission an 'independent' review of the ARR purchase.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Voyages Chair writes to ILC Chair on 20 March 2013 indicating that the issues raised by the ILC Chair will be addressed in a brief being prepared by Voyages for the ILC Board and it would be prudent for the ILC Board to receive this briefing before commencing an independent review.</li> <li>▪ Voyages Chair writes to ILC Chair on 9 April 2013 indicating that the Voyages Board had met on 4 April and resolved that:               <ul style="list-style-type: none"> <li>➤ A close working relationship between ILC and Voyages was in the best interests of both companies.</li> <li>➤ To facilitate this relationship the Voyages Board would be creating a sub-committee to lead discussions with ILC.</li> </ul> </li> </ul>
May 2013	Review of ARR purchase	<ul style="list-style-type: none"> <li>▪ ILC Board asks Minister Macklin to request that the ANAO conduct a forensic audit of the ARR purchase.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Minister Macklin declines the request and asks instead that the ILC conduct an independent end to end review that includes the ARR purchase.</li> </ul>
June-July 2013	ILC/Voyages relationship	<ul style="list-style-type: none"> <li>▪ ILC Chair writes to Voyages Chair on 27 June 2013 advising that the ILC Board:               <ul style="list-style-type: none"> <li>➤ Has reviewed the draft Voyages Budget Overview for 2013-14.</li> <li>➤ Is concerned that the Voyages Budget expects ILC to cover GPT financing costs of \$9M.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ The Voyages Chair writes to the ILC Chair on 1 July 2013 advising that:               <ul style="list-style-type: none"> <li>➤ The Voyages Board is aware of the issues associated with ARR.</li> <li>➤ Has created a sub-committee to discuss these issues with ILC.</li> </ul> </li> </ul>

Date	Issue	ILC Action	Federal Government/Voyages Action
		<ul style="list-style-type: none"> <li>➤ Expects the Voyages Board to have strategies to deal with changes in the tourism outlook and negative impacts on ARR, especially when these issues were anticipated in the due diligence for the ARR purchase.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Is reviewing costs and priorities for spending.</li> <li>➤ Is examining options to refinance or restructure the GPT loan.</li> <li>➤ Is committed to manage the commercial issues in a difficult environment and maintain training and employment outcomes for Indigenous people.</li> </ul>
August 2013	Macklin appoints new Board members		<ul style="list-style-type: none"> <li>▪ Minister Macklin advises Directors Baffsky and Jeffries that they will not be re-appointed when their term expires on 19 October.</li> <li>▪ Minister Macklin appoints two new directors.</li> </ul>
September 2013	ILC/Voyages relationship	<ul style="list-style-type: none"> <li>▪ The ILC Chair writes to Voyages Chair on 2 September 2013 advising that:               <ul style="list-style-type: none"> <li>➤ The ILC CEO, does not agree with the financial projections underpinning the valuation of the ARR provided by the Voyages CEO as the projections appear too optimistic.</li> <li>➤ The ILC Chair is dismayed that Voyages is refusing to apply alternative assumptions to underpin the financial projections.</li> <li>➤ The ILC Chair believes that the stance taken by the Voyages CEO must have been supported by the Voyages Chair.</li> </ul> </li> <li>▪ The ILC Chair writes to Voyages Chair on 3 September 2013 advising that:               <ul style="list-style-type: none"> <li>➤ The ILC Board has approved the Voyages Budget for the other tourism assets it manages.</li> <li>➤ The ILC Board would like the revised budget for ARR being prepared by Voyages for consideration at the ILC Board meeting on 23 October.</li> <li>➤ The Minister has appointed two new directors to the ILC Board and this will affect ILC representation on the Voyages Board. The ILC Chair will contact the Voyages Chair to discuss Board members.</li> <li>➤ The ILC Board has appointed McGrathNicol to undertake an end to end review of ARR.</li> </ul> </li> <li>▪ On the advice of its new ARMC, the ILC Board agrees at its meeting on 23 September to accept as part of the ILC consolidated statements the independently assessed valuation of ARR provided by Voyages. The new independent Chair of the ARMC indicates that there has been better</li> </ul>	

Date	Issue	ILC Action	Federal Government/Voyages Action
		<p>alignment between the ILC and Voyages with the Voyages Board and Audit Committee having provided its financial statements in time for the ILC Board meeting.</p> <ul style="list-style-type: none"> <li>▪ ILC Chair writes to Voyages Chair on 27 September 2013 advising that: <ul style="list-style-type: none"> <li>➢ The ILC will provisionally agree to the Voyages request for the ILC to pay the due interest payment on the GPT vendor finance arrangements.</li> <li>➢ The inability of Voyages to meet its forecast targets (including interest repayments) is not consistent with the original undertaking to Ministers Macklin and Wong that the ARR purchase would not impact on ILC's broader programs.</li> <li>➢ The ILC understands that the ARR is not profitable and that is why ILC has initiated a review of operations.</li> <li>➢ The ILC is waiting for Voyages to provide it with a comprehensive revised Budget for 2013-14.</li> </ul> </li> </ul>	
October 2013	ILC/Voyages relationship	<ul style="list-style-type: none"> <li>▪ The ILC Chair writes to Voyages Chair on 11 October 2013 with reference to the advice she had received information about the 3 October Voyages Board meeting from the ILC CEO and indicating that: <ul style="list-style-type: none"> <li>➢ It is not appropriate for the Voyages Board to cite discussions with Ministers and senior government representatives without first advising the ILC Chair of those discussions.</li> <li>➢ The ILC Chair understands that the Voyages Board has concerns with the McGrathNicol review and this is concerning given that the voyages Chair had agreed to the review when he was an ILC Director.</li> <li>➢ The Voyages Board should not use its funds to seek legal advice about the review.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ The Voyages Chair writes to the ILC Chair on 11 October 2013 advising that: <ul style="list-style-type: none"> <li>➢ The ILC Chair has not received an accurate briefing of the Voyages Board meeting.</li> <li>➢ The ILC CEO was asked to clarify the extent to which Voyages was required to participate in the McGrathNicol review. There was no discussion about obtaining legal advice.</li> <li>➢ The Voyages Board resolved to maintain its commitment to operational best practice and Indigenous employment and training which has already delivered significant results, including excellent feedback from employees and trainees.</li> <li>➢ The Voyages Board resolved to reduce the intercompany debt between the ILC and Voyages when surplus funds become available.</li> <li>➢ If asked questions about Voyages by stakeholders including government, the Chair will respond to them.</li> </ul> </li> </ul>

Date	Issue	ILC Action	Federal Government/Voyages Action
			➤ After 7 weeks since her letter of 3 September, the ILC Chair has still not contacted the Voyages Chair about Board members.
October 2013	ILC Board changes Voyages Board	<ul style="list-style-type: none"> <li>ILC Chair announces replacement of the Voyages Board on the basis that:               <ul style="list-style-type: none"> <li>➤ The Voyages Board had written down the book value of the ARR from \$312M to \$250M in the financial statements of 2012-13.</li> <li>➤ There is a need to ensure stability and strengthen the strategic alignment of the ILC and Voyages.</li> <li>➤ There is a need to build on the efforts of the Voyages Board and strengthen the financial sustainability of the tourism businesses managed by Voyages and attract more visitors.</li> </ul> </li> </ul>	



# Review of Indigenous Land Corporation Issues

## Supplementary Report to January 2014 Aegis Report

Prepared for the former Directors of the ILC  
and Voyages

May 2014

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### About Aegis Consulting Group

Aegis is an independent advisor to government, corporate and non-government organisations on:

- Public Policy
- Economics
- Government
- Strategy

Aegis was established in 2002 and has an international team of consultants in Sydney, Cairns, Singapore and London.

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## SUMMARY OF KEY FINDINGS

These findings relate to claims about the Ayers Rock Resort (ARR transaction), former Directors of the ILC and Voyages, advisors to the ILC, and the governance of the ARR transaction by the former ILC Board made in:

- A letter dated 5 January 2014 from the Chair of the ILC, Ms Dawn Casey, to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) and copied to the Hon Tony Abbott MP, Prime Minister (the ILC letter). The letter has been published on the ILC website.
- Evidence given by the ILC CEO, Mr Mike Dillon, to the Senate Finance and Public Administration Legislation Committee (Senate Committee) on 28 February 2014<sup>1</sup> (ILC Senate Committee evidence).
- Statements by the Chair of the ILC, Ms Dawn Casey, on 17 April 2014 made in a radio interview on the ABC Sunday Profile program (the radio interview)<sup>2</sup>.

The ILC letter and ILC Senate Committee evidence explicitly suggest that the claims made are supported by the findings, conclusions or recommended actions in the McGrathNicol (MN) report (December 2013), commissioned by the ILC. The radio interview suggests that claims made are supported by the MN report and the Deloitte report (March 2013) which examined ILC governance arrangements.

### ILC Actions and the Application of the Commonwealth Authorities and Companies Act 1997 (CAC Act)

#### Key Finding 1 - Claims in the ILC letter, ILC Senate Committee evidence and radio interview may breach CAC Act

The ILC letter makes claims that potentially cause detriment and damage to the reputations of former Directors of the ILC, advisors to the ILC, the ILC and the Minister. The ILC Senate Committee evidence makes claims that potentially cause detriment and damage to the reputations of former Directors of the ILC, advisors to the ILC and the ILC. The ILC letter and ILC Senate Committee evidence indicate that the claims are made on the basis of alleged evidence in the MN report.

This Aegis supplementary report has found that the claims made are not supported by any findings, conclusions or recommendations in the MN report, or are based on the selective use of information in the MN report which does not reflect the overall conclusions in the MN report. Accordingly it is a misleading or false statement to claim that the MN report provides evidence for the claims, particularly in relation to claims about one or more Directors.

The radio interview makes claims that potentially cause detriment and damage to the reputation of the former Directors of the ILC and Voyages Boards and advisors to the ILC. The interview includes statements that indicate the claims are based on alleged findings in the MN report and Deloitte report.

<sup>1</sup> Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

<sup>2</sup> Sunday Profile, ABC Radio, 17 April 2014

This Aegis supplementary report has found that the claims made are not supported by any findings, conclusions or recommendations in the MN report or the Deloitte report. Accordingly it is a misleading or false statement to claim that the MN and Deloitte report provides evidence for the claims.

Asserting misleading or false statements may mean that the Chair and CEO of the ILC may have improperly used their positions or information available to them, in their capacities as Commonwealth officials for the purposes of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), to cause detriment to the former Directors of the ILC and Voyages, the ILC, advisors to the ILC, and the Minister. This is prohibited under sections 24 and 25 of the CAC Act.

## ILC use of the MN Report

### Key Finding 2 - Assessment of MN report support for claims in ILC letter, ILC Senate Committee evidence and radio interview

The tone, words and fabric of argument contained in the ILC letter, ILC Senate Committee evidence and radio interview seem to suggest that the claimants are attempting to use findings in the MN report to allege that there was at worst impropriety, and at least incompetence, at Board level in relation to the ARR transaction and that the purchase was flawed. This interpretation of the MN report findings is not consistent with the overall conclusions of the MN report.

The overall conclusion of the MN report (page 12) is that, in their opinion, when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that *“the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk”*.

However it should be noted that this conclusion is not consistent with the findings of KPMG in 2011. In its consideration of the ILC borrowing limits and guarantee powers KPMG examined the ARR transaction and related Board governance in detail and concluded that the *“comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles”*<sup>3</sup>.

<sup>3</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits April 2011; p49. The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversight by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

## Claims about a particular former ILC Director

### Key Finding 3 - Procurement of ARR transaction consultancies

The ILC letter and radio interview claim that the MN report found that a Director was responsible for the procurement of consultants in ways that did not comply with ILC procurement policies and that this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

### Key Finding 4 - Audit and risk management committee: length of Chair's term

The ILC letter claims that the MN report found that the length of time that one Director had been Chair of the ARMC and his simultaneous involvement in the ARR transaction created an inherent conflict of interest. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

### Key Finding 5 - Audit and risk management committee: oversight of ARR transaction

The ILC letter and ILC Senate Committee evidence claim that the ARMC did not oversight the ARR transaction because one Director had been the ARMC Chair for a long time and was also involved in the transaction, and that this was raised in the MN report as a key corporate governance issue. However, the MN report:

- Does not discuss in any way the role of the ARMC Chair and his involvement in the ARR transaction.
- Does not include any findings, conclusions or recommendations that one Director's chairmanship of the ARMC and involvement in the ARR transaction was a possible reason defining the ARMC role in the transaction or that the ARMC role was affected by any conflict of interest.
- Does not include any findings, conclusions or recommendations that the ARMC role, operation and membership, was a key corporate governance issue that the ILC should address.

Accordingly, any statements that explicitly or impliedly seek to create an impression to the contrary are false and misleading.

### Key Finding 6 - Director's authority

The ILC letter and ILC Senate Committee evidence assert that one Director, rather than the Board as a whole, was instrumental in the ARR transaction and purchase and that the MN report found this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this assertion, and it would be a false or misleading statement to suggest otherwise.

### Key Finding 7 - Conflict of interest

The ILC letter claims that a Director involved in the transaction had undeclared conflicts of interest arising from a connection with a major shareholder in the vendor of the ARR and that the MN report found this requires further investigation. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

### Key Finding 8 - Reappointment of a Director to Voyages Board

The ILC letter claims that the MN report provides ample evidence to support the ILC Board's decision not to reappoint a particular Director to the Voyages Board. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

### Claims about former ILC Board governance

#### Key Finding 9 - Selective use of information

The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues. Selective use of some findings and not others can easily be misleading and lead to inaccurate conclusions about the ARR transaction.

The claims focus on findings in the MN report relating to ARR transaction issues that could have been better managed. However there are also a series of findings in the MN report relating to the good management of the ARR transaction that are not referred to in the communications by the ILC. Selective use of MN report findings can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the context of the full report.

To achieve a balanced view of the MN report and the implications for the ARR transaction it is critical to take account of all the findings together.

When discussing the Board's consideration of the purchase price and related revenue and commercial issues the MN report does not find or conclude that the Board failed to consider up to date revenue and commercial issues put before them as asserted in the radio interview.

### Key Finding 10 - ARR purchase price and risk management

Given the nature of the findings in the MN report, it is not reasonable to selectively use some findings to criticise the ARR purchase, but ignore other findings that present a more positive picture of the transaction. This approach increases the risk that the ARR will be viewed negatively when this view is not entirely accurate. This outcome may have a negative impact on the capacity of the ARR to conduct and drive business with partners and suppliers.

### Key Finding 11: Grant Samuel fees

The ILC Senate Committee evidence suggests that the MN report found that the success fee paid to Grant Samuel (GS) was based on the value of the ARR transaction, and that this may have improperly led GS to advise the ILC to accept a higher purchase for the ARR. The MN report does not find that GS acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.

### Key finding 12 - Findings of Deloitte report

Contrary to assertions in the radio interview, the Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report found that the ILC governance arrangements were reasonable and that minor improvements were needed. The report did not find that these improvements were required because of the performance of the Voyages Board.



## EXECUTIVE SUMMARY

### Background

In December 2013 Aegis Consulting Group (Aegis) was commissioned by former Directors of the Indigenous Land Corporation (ILC) and Voyages to objectively and independently examine public criticism by the current ILC Board and management of the ILC purchase of Ayers Rock Resort (ARR) in October 2010. Former ILC and Voyages Directors were greatly concerned about the potential risks and damage to the ILC, ARR and its benefits arising from this criticism. They were equally concerned about the damage caused to their individual and collective reputations.

Aegis delivered its report in January 2014 and concluded that there is no irrefutable evidence contained in the independent reviews of the ARR or ILC/Voyages governance by KPMG (2011), Australian National Audit Office (ANAO) (2013), Deloitte (2013) and McGrathNicol (MN) (2013) to support the substance of, or rationale for, the public criticism of the ARR or termination of the Voyages Board. In fact KPMG and ANAO found that the purchase and board deliberations were consistent with good business principles and ILC obligations and MN concluded that it was not inappropriate. The MN report (2013) considered by Aegis was commissioned by the current ILC Board and tasked with reviewing the ARR purchase.

On 5 January 2014 the Chair of the ILC, Ms Dawn Casey, wrote (the ILC letter) to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) making a number of claims about a former Director of the ILC, and the governance by the former ILC Board in relation to the purchase of ARR. The ILC letter suggests that the MN report provides evidence to support the claims. The letter was copied to the Hon Tony Abbott MP, Prime Minister, and has been published on the ILC website.

On 28 February 2014, the ILC CEO, Mr Mike Dillon, gave evidence to the Senate Finance and Public Administration Legislation Committee (ILC Senate Committee evidence) that<sup>4</sup>:

- The MN report contains 25 headline findings of concern about the ARR transaction and related ILC Board governance.
- Commented on some of the findings in the MN report.
- Suggested the MN report raised concerns about the membership and role of the ILC Audit and Risk Management Committee.
- Suggested that the MN report raised concerns about the independence of due diligence advisers (Grant Samuel) to the ILC.

<sup>4</sup> Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

On 17 April 2014, the ILC Chair, Ms Dawn Casey, claimed in a radio interview that<sup>5</sup>:

- The MN report found that the ILC Board did not consider the latest figures put before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report<sup>6</sup> found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

## Purpose

Aegis has been commissioned by former ILC and Voyages Directors to prepare a supplementary report to its January 2014 report. Aegis has been asked to review the MN report again to:

- Assess whether its findings, conclusions or recommendations substantiate the claims made in the ILC letter, ILC Senate Committee evidence and radio interview;
- Assess whether, when taking into account all of its findings, the claims made about the former ILC Board's governance of the ARR transaction in the ILC letter, ILC Senate Committee evidence and radio interview are reasonable and accurate; and
- Assess whether the claims in the ILC letter, ILC Senate Committee evidence and radio interview that are not substantiated by the MN report are misleading or false and could cause detriment or damage to the former Directors of the ILC and Voyages, the ILC and advisors to the ILC.

Aegis has also been asked to examine the Deloitte report again to assess whether its findings, conclusions or recommendations substantiate the claims made in the radio interview.

## Claims about a particular former ILC Director

The MN report does not include any findings, conclusions or recommendations that support the claims about a particular former Director, and it would be a false or misleading statement to suggest otherwise. The claims and related MN report discussion are discussed below.

<sup>5</sup> Sunday Profile, ABC Radio, 17 April 2014

<sup>6</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

- The ILC letter and radio interview claims that the MN report concludes that a particular Director failed to comply with ILC **procurement policies** in relation to the engagement of consultants on the ARR transaction. However, at no point during the discussion of procurement issues does the MN report refer to the role of individual ILC directors in the procurement of consultants. It is assumed in the MN discussion that procurement decisions were made by the Board as a whole.
- The ILC letter claims that the MN report considered that a particular Director's lengthy membership of the **Audit and Risk Management Committee (ARMC)** and simultaneous involvement in the ARR transaction created an inherent conflict of interest. The ILC letter is crafted in a way that infers a link between these issues and the MN report finding that the ARMC had a minimal role in overseeing the transaction. The ILC Senate Committee evidence also infers this link and states that *"the review found that that was a key corporate governance issue the ILC should address".*<sup>7</sup> However the MN report (page 64): (1) considers the role of the ARMC briefly and acknowledges that reviewing the ARMC was not within the scope of its project brief from the ILC; (2) does not discuss any other Director's membership of the ARMC at all; (3) does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction; and (4) does not make any findings that the membership of the ARMC or any other matter relating to the ARMC is a key corporate governance issue needing attention.
- The ILC Senate Committee evidence asserts that a particular Director, Mr David Baffsky, **'drove' the ARR transaction**. This statement suggests that one Director was acting in a single capacity without the full remit or authority of the Board and therefore was able to make decisions about the transaction alone. However there are no suggestions, findings or conclusions in the MN report which in any way indicate that any one Director was instrumental to the transaction in ways that enabled him to make decisions without Board scrutiny and agreement. The MN report focuses on Board decision making in relation to the ARR transaction and concludes that, while Board decisions could have been better documented, the Board was responsible for decisions to undertake the due diligence on the ARR transaction and purchase the ARR.
- The ILC letter claims that the MN report considered that a serious issue requiring to be addressed is a particular Director's undeclared **potential conflict of interest** arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it. However the MN report (page 69) concluded that it *"has no further knowledge regarding this connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be remote"*.
- The ILC letter refers to the Minister's request to ILC in October 2013 that a particular Director be reappointed as Chair of the Voyages Board. The ILC letter claims that in part the ILC decision not to reappoint him was correct because the MN report delivered in December 2013 provides "ample evidence" to support that decision. However that decision is not supported by any findings, conclusions or recommendations in the MN report.

<sup>7</sup> Hansard, Australian Senate Finance and Public Administration Committee, 28 February 2014, p28

## Claims about former ILC Board governance

- The ILC letter, ILC Senate Committee evidence and radio interview make a number of claims about the governance of the ARR transaction by the former ILC Board, and rely on the MN report to support these claims. The Aegis January 2014 report makes a detailed assessment of the public criticism of the ARR transaction by the ILC Board and management. Many of the issues raised in the ILC letter, ILC Senate Committee and radio interview evidence were considered as part of this assessment. The analysis in the Aegis January 2014 report shows that the claims made about the ARR transaction by the ILC in a range of public forums are potentially misleading, when taking into account all of the information contained in the MN report (2013), Deloitte report concerning ILC governance (2013), KPMG report concerning ILC borrowing powers (2011), Dransfield advice on tourism asset valuation (2013), and the ILC's own submission to the review of the ILC and Indigenous Business Australia (2014).
- The MN report focuses on the documentation of the ILC Board's consideration of ARR transaction issues and makes a number of positive and negative findings about this. To achieve a balanced view of the MN report, and the implications for the ARR transaction, it is critical to take account of all the findings together. Selective use of some findings and not others can easily be misleading. The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues, such as purchase price and risk management. This can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the content of the full report.
- Contrary to the suggestions made in the ILC Senate Committee evidence, the MN report does not find that Grant Samuel acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.
- Contrary to the claims in the radio interview, the Deloitte report found that the ILC governance arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries<sup>8</sup>. These findings related to actions that the ILC needed to undertake and did not suggest in any way that the actions were necessary because of the performance of the Voyages Board. The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail.

<sup>8</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013, pp7-9

## 1. BACKGROUND TO THIS REPORT

In December 2013 Aegis Consulting Group (Aegis) was commissioned by former Directors of the Indigenous Land Corporation (ILC) and Voyages to objectively and independently:

- Examine whether public criticisms by the current Chair of ILC, Dawn Casey, the Deputy Chair, Ian Trust, and CEO, Mike Dillon about the ILC purchase of the Ayers Rock Resort (ARR) are appropriate given the full range of facts and benefits associated with and previous independent reviews of the transaction;
- Consider the implications for the ARR of the public criticisms;
- Review and prepare a detailed history of the ARR transaction; and
- Consider any related ILC and Voyages governance issues.

Former ILC and Voyages Directors engaged Aegis because they were greatly concerned about the potential risks to the ILC, ARR and its benefits arising from the apparent public campaign being conducted by the current Board and management against the ARR purchase. Aegis was commissioned because of its public policy and program evaluation experience, which included being engaged by the ILC in 2010 to review its performance against its legislative objectives.

Aegis delivered its report in January 2014.

### Summary of January 2014 Aegis report findings

The report found that:

- In 2011 the ILC purchased the ARR for a net price of \$292M to create an iconic asset with the commitment and economies of scale to significantly increase Indigenous training, employment and leadership opportunities at the ARR and in the national tourism sector.
- The purchase has enabled the ILC to lift Indigenous employment from 1 to 215 at ARR and 283 across all Voyages businesses.
- This employment reduces Federal Government welfare spending by about \$21M annually and \$840M over 40 years. At current rates the ARR could train another 7,400 Indigenous people over 40 years for the benefit of tourism around Australia, particularly in the towns and cities in which they and their families live. These benefits cannot be replicated by other tourism assets.

- ARR is profitable and that any future financial liability to ILC arising from the ARR purchase can be covered by ILC if need be, which had approximately \$65M in cash on 31 December 2013.
- Public criticism may have (1) undermined the appeal of business, investment and/or sponsorship arrangements with the ARR; (2) reduced consumer confidence in the ARR, leading to less visitors and events and associated revenue; and (3) disillusioned existing and potential Indigenous employees and trainees about participating in the ARR.
- If public criticism has damaged the reputation and commercial position of the ARR, Directors and management may be in breach of sections 22-26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) requiring them to always act in the interest of the ILC.
- Before a Board or management publicly criticise their own organisation or activities they should formally consider and ensure that the strategic and commercial benefits outweigh any negative public attention and response.
- It is not clear what strategic or commercial benefit the criticism levelled at the ARR is intended to achieve, or that the ILC Board formally considered all the non-public alternatives to achieve its objectives.
- There is no irrefutable evidence contained in the independent reviews of the ARR or ILC/Voyages governance by KPMG (2011), Australian National Audit Office (ANAO) (2013), Deloitte (2013) and McGrathNicol (MN) (2013) to support the substance of, or rationale for, the public criticism of the ARR or termination of the Voyages Board. In fact KPMG and ANAO found that the purchase and board deliberations were consistent with good business principles and ILC obligations and MN concluded that it was not inappropriate.
- Despite publicly criticising the ARR purchase, in its submission to the ILC/IBA review (January 2014), the ILC relied on the ARR and its benefits to demonstrate why the ILC should remain a distinct organisation.
- Accordingly, the public statements of the current Chair, CEO and other Directors regarding the ARR and its governance by the former ILC Board and Voyages may be potentially misleading.

## 2. PURPOSE OF THIS REPORT

### Reasons for this report

On 5 January 2014 the Chair of the ILC, Ms Dawn Casey, wrote (the ILC letter) to the Hon Senator Nigel Scullion, Minister for Indigenous Affairs, (the Minister) making a number of claims about a former particular Director of the ILC, and the governance by the former ILC Board in relation to the purchase of ARR. The ILC letter suggests that the MN report provides evidence to support the claims. The letter was copied to the Hon Tony Abbott MP, Prime Minister, and has been published on the ILC website.

On 28 February 2014, the ILC CEO, Mr Mike Dillon, gave evidence to the Senate Finance and Public Administration Legislation Committee (ILC Senate Committee evidence) that<sup>9</sup>:

- The MN report contains 25 headline findings of concern about the ARR transaction and related ILC Board governance.
- Commented on some of the findings in the MN report.
- Suggested the MN report raised concerns about the membership and role of the ILC Audit and Risk Management Committee.
- Suggested that the MN report raised concerns about the independence of due diligence advisers (Grant Samuel) to the ILC.

On 17 April 2014, the ILC Chair, Ms Dawn Casey, claimed in a radio interview that<sup>10</sup>:

- The MN report found that the ILC Board did not consider the latest figures put before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report<sup>11</sup> found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

### Scope of this report

Aegis has been commissioned by former ILC and Voyages Directors to prepare a supplementary report to its January 2014 report. Aegis has been asked to review the MN report again to:

<sup>9</sup> Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

<sup>10</sup> Sunday Profile, ABC Radio, 17 April 2014

<sup>11</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

- Assess whether its findings, conclusions or recommendations substantiate the claims made in the ILC letter, ILC Senate Committee evidence and radio interview;
- Assess whether, when taking into account all of its findings, the claims made about the former ILC Board's governance of the ARR transaction in the ILC letter, ILC Senate Committee evidence and radio interview are reasonable and accurate; and
- Assess whether the claims in the ILC letter, ILC Senate Committee evidence and radio interview that are not substantiated by the MN report are misleading or false and could cause detriment or damage to the former Directors of the ILC and Voyages, the ILC and advisors to the ILC.

Aegis has also been asked to examine the Deloitte report again to assess whether its findings, conclusions or recommendations substantiate the claims made in the radio interview.

### 3. ILC ACTIONS AND THE CAC ACT

The Aegis January 2014 report concluded that in their public criticism of the ARR transaction the ILC Chair and CEO may have breached sections 22 to 26 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

Sections 24 and 25 of the CAC Act require that a person must not improperly use their position or information that becomes available to them as an official of a Commonwealth entity to cause detriment to a Commonwealth entity, the Commonwealth or any other person.

The publication of the ILC letter has the potential to cause detriment to the reputations of former ILC Board members, the ILC (a Commonwealth entity), advisors to the ILC and possibly the Minister. This is because the ILC letter either claims, asserts and/or infers that:

- A particular Director may have acted improperly in relation to the ARR transaction.
- The former ILC Board may have been negligent in its governance of the ARR transaction.
- There are questions to answer regarding the engagement of and motivations for the advice provided by advisors to the ILC.
- The Minister may have been seeking to influence the MN report by seeking a draft copy before its finalisation.

The ILC Senate Committee evidence, which echoes many of the issues raised in the ILC letter may similarly have the potential to cause detriment to the reputations of former ILC Board members, the ILC (a Commonwealth entity) and advisors to the ILC.

The radio interview which echoes some of the issues raised in the ILC letter and ILC Senate Committee evidence and also suggests that the Voyages Board performance was responsible for 'shortcomings' in ILC governance may also potentially damage the reputations of Voyages Board directors.



It seems incongruous that officials of a statutory corporation created by the Australian Government would act in a way that could potentially publicly embarrass or cause other damage to the reputations of former members of its Board, the Commonwealth entity in which they hold positions, and its portfolio Minister.

The issue of a Commonwealth official's improper use of their position, or information that is made available to them as a result of their position, arises in relation to the claims in the ILC letter, ILC Senate Estimates evidence and radio interview if it is found that the claims are misleading or false. As the claims are made on the basis of alleged evidence in the MN report and Deloitte report, they may become misleading or false if they are not supported by evidence in the MN report and Deloitte report.

**Key Finding 1:** The analysis in sections 5, 6 and 7 of this report indicate that the claims made in the ILC letter, ILC Senate Estimates evidence and radio interview are not supported by any findings, conclusions or recommendations in the MN report or Deloitte report, or are based on the selective use of information in the MN report which does not reflect the overall conclusions in the MN report. Asserting misleading or false statements may mean that the Chair and CEO of the ILC may have improperly used their positions or information available to them, in their capacities as Commonwealth officials, to cause detriment to the former Directors of the ILC and Voyages, the ILC, advisors to the ILC, and the Minister. There is no definition of the term improperly in the CAC Act and therefore its ordinary meaning may apply.

## 4. LIMITATIONS ON MN REPORT FINDINGS

The terms of reference for the MN report required a forensic audit of the ARR transaction. However in its report (page 2) MN state that:

*"We have not carried out an audit, nor have we verified any of the information given to us by ILC. We have relied upon assurances from management as to the accuracy of the information provided. As the achievement of any prediction as to the results of subsequent trading is dependent upon future events, the outcome of which cannot be assured, the actual results achieved may vary materially from the projections included in this report. In all circumstances, whilst we believe that the statements made by us in this report are accurate, no warranty of accuracy or reliability is given".*

Accordingly it is not clear that MN had access to all relevant information necessary to reach a fully balanced set of conclusions. In its report (page 14) MN states that it was not provided the opportunity to consider the KPMG report (April 2011) on the borrowing limits and guarantee powers of the ILC.

Aegis had the opportunity to review the KPMG report during the preparation of its January 2014 report.

In its consideration of the ILC borrowing limits and guarantee powers KPMG examined the ARR transaction and related Board governance in detail and concluded that the *"comprehensive and timely due diligence process surrounding the ARR acquisition characterises the ILC performing its functions using sound business principles"*<sup>12</sup>.

The KPMG report recommended some further legislative controls on ILC borrowings to align it with other government authorities. The previous Federal Government does not appear to have implemented these controls, which would have been an expected response if there were concerns within government about the ARR purchase.

Furthermore, an independent review in 2013 by Deloitte of the ILC's Board governance arrangements found that the arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries<sup>13</sup>.

Thus, as indicated in the Aegis January 2014 report, the findings in the MN report appear to be in significant conflict with the KPMG report about the way in which the ARR transaction was managed, and in conflict with the Deloitte report about general Board governance of ILC and Voyages.

The Aegis January 2014 report also raised concerns that the MN report included a value for money assessment of the ARR purchase, without considering any of the benefits or outcomes that may have been taken into account by the Board at the time or achieved since. A value for money assessment cannot occur without proper consideration of benefits/outcomes. In its report, MN admits (page 8) that *"the scope of our review does not include any consideration of non-financial factors that may impact on value for money and which may have been considered by the ILC (e.g. Indigenous employment)"*.

One of the purposes of the Aegis January 2014 report was to examine the benefits of the ARR transaction. It found that the ARR transaction has delivered significant benefits for the ILC, Federal Government and Indigenous people and would continue to deliver benefits into the future.

## 5. ASSESSMENT OF ILC USE OF MN REPORT

The ILC letter appears to claim that the MN report has concluded there are serious questions to answer arising from its findings.

<sup>12</sup> KPMG, Review of the ILCs Borrowing Powers and Guarantee Limits April 2011; p49. The KPMG report was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and oversighted by Department of Finance and Deregulation (DoFD) and the ILC and copied to Treasury

<sup>13</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

It is important to note that the MN report draws no conclusions nor makes any recommendations about actions that should be taken in response to its findings. The decisions of the ILC Board to pursue the actions (such as the publication of the ILC letter) or suggest that the MN report findings raise serious questions to be answered through public forums are entirely those of the ILC.

The overall conclusion of the MN report (page 12) is that, in their opinion, when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that *“the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk”*.

By its own words this conclusion indicates that the ILC may have needed to apply more appropriate process and record management measures during the ARR transaction. However, this conclusion cannot be used to support claims that the ARR transaction was subject to any impropriety on the part of Directors or that the purchase was misguided.

**Key Finding 2:** The tone, words and fabric of argument contained in the ILC letter, ILC Senate Estimates evidence and radio interview seem to suggest that the ILC is attempting to use findings in the MN report to claim that there was at worst impropriety, and at least incompetence, at Board level in relation to the ARR transaction and that the purchase was flawed. This interpretation by the ILC of the MN report findings is not consistent with the overall actual conclusions of the MN report.

## 6. ASSESSMENT OF ILC CLAIMS ABOUT A PARTICULAR FORMER ILC DIRECTOR

### Summary of ILC claims

In summary it is claimed that the MN report provides evidence that:

- A particular Director failed to comply with ILC procurement policies in relation to the engagement of consultants during the ARR transaction, and this raises questions which should be answered (claim made in ILC letter and radio interview).
- The ILC Audit and Risk Management Committee (ARMC) (1) was conflicted because its Chair of twelve years was also involved in the ARR transaction and (2) failed to perform appropriate oversight of the ARR transaction, and accordingly there are questions to answer (claims made in ILC letter and ILC Senate Committee evidence).

- One particular Director 'drove' the transaction (claim made in ILC Senate Committee evidence).
- During his involvement in the ARR transaction a particular Director did not declare potential conflicts of interest arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it, and accordingly there are questions to answer (claim made in ILC letter).
- The ILC was correct in terminating a particular Director as Chair of Voyages and refusing to reappoint him to this position as subsequently requested by the Minister (claim made in ILC letter).

#### **Claim 1: Procurement of ARR transaction consultancies**

The ILC letter and radio interview claim that the MN report concludes that a particular Director failed to comply with ILC procurement policies in relation to the engagement of consultants on the ARR transaction.

The MN report considers the engagement of consultants on the ARR transaction in section 6.2 (page 59). The MN report concludes that:

*"In respect of the engagement of consultants advising on the purchase of the ARR, we have found no evidence that competitive tender or quotation processes were used by the ILC in making procurement decisions. Furthermore, the ILC is unable to demonstrate that its procurement processes were conducted in accordance with the ILC purchasing guidelines and generally accepted procurement principles".*

At no point during the discussion of procurement issues does the MN report refer to the role of individual ILC directors in the procurement of consultants. It is assumed during the discussion in the MN report that the decisions to engage consultants was made collectively by the management and/or Board of the ILC.

**Key Finding 3:** There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

#### **Claim 2: Audit and risk management committee (ARMC)**

##### **Claims in ILC letter**

The ILC letter suggests that the Chair of the ILC Audit and Risk Management Committee (ARMC) at the time of the ARR transaction had been in that position for twelve years. In fact he was a member of the ARMC for a total of fourteen years, of which he spent nine years as Chair.

The MN report briefly considers the role of the ARMC in section 6.3 (page 64), even though it acknowledges that it was not within its scope to do so. It is not clear why MN reviewed the role of the ARMC if it was not within the scope provided by the ILC.

The ILC letter claims that the MN report considered that the Director's lengthy membership of the ARMC and involvement in the ARR transaction created an inherent conflict of interest. However the MN report:

- Does not discuss his or any other Director's membership of the ARMC at all; and
- Does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction.

The ILC letter also claims that the MN report concluded that the ARMC failed to oversight the ARR acquisition process appropriately.

In preparing its report MN reviewed the minutes of the ARMC meetings between June 2008 and March 2011 and found that the only meeting where the minutes recorded a discussion about the ARR transaction was 22 March 2011. Based on this review the MN report concludes that:

- The ARMC had almost no role in the oversight of consideration of the ARR transaction.
- It was unusual for the ARMC to have no oversight given that the transaction occurred over two years.
- Given the potential impact of the ARR investment on the financial position of the ILC, the minimal involvement of the ARMC was a deficiency in the then ILC governance process.
- The ARMC should have considered the ILC's risk management practices for the ARR transaction.

The MN report does not examine any possible reasons why the ARMC seemed to have a minimal role. For example, the discussion about the ARMC role does not include any information about other formal or informal measures (such as sub-committees) used by the ILC Board at the time to manage the ARR transaction and its risks. Examination of these issues may have concluded that the ARMC had a limited role because the ILC Board instituted other mechanisms to manage the transaction.

The MN report also does not consider or discuss why the limited involvement of the ARMC is unusual in the context of other examples of similar transactions undertaken by comparative organisations.

The ILC letter is crafted in a way that conjoins in one paragraph the claims that a particular Director's chairmanship of the ARMC and involvement in the ARR transaction represented a conflict of interest, and that the ARMC failed to oversight the transaction properly. Whether intentionally or otherwise, by conjoining these quite separate issues, the ILC letter creates an inference that the particular Director may have had conflicts of interest that influenced the minimal role of the ARMC.

#### **Claims in ILC Senate Committee evidence**

In his evidence to the Senate Committee on 28 February 2014, the ILC CEO, Mr Dillon, states that: *"The audit risk committee should have had a key role in overseeing the transaction. The transaction was driven by Director Baffsky. Director Baffsky chaired the Audit and Risk Management Committee. The review notes that the audit and risk committee did not give due attention to the transaction. Director Baffsky had been on the audit and risk committee – I do not have the exact figure – for somewhere in excess of 10 years. The Audit Office guidelines say two terms, five years or thereabouts, and another member of the audit and risk committee, Director Jeffries, had been on the audit and risk committee for nine years. So the committee had been locked in place for too long and the review found that that was a key corporate governance issue the ILC should address. Of course when the new board was appointed in October 2011, they immediately took action to renew the audit committee. That was when, suddenly, conflict emerged within the board"*<sup>14</sup>.

Like the ILC letter, this statement also seeks to conjoin separate issues which can create the impression that a particular Director's chairmanship of the ARMC and involvement in the ARR transaction represented a conflict of interest which somehow influenced the minimal role of the ARMC in overseeing the ARR transaction. As discussed above the MN report does not discuss any Director's membership of the ARMC and does not suggest in any way that the ARMC was conflicted during its consideration of the ARR transaction.

While Mr Dillon suggests that the MN report reached a conclusion that the length of time Mr Baffsky and Mr Jeffries had been on the ARMC was a key corporate governance issue the ILC should address, the MN report does not in any way:

- Discuss the make-up of the AMRC or the length of time Directors served on it.
- Discuss any of the Directors on the AMRC and the roles they played in the ARR transaction.
- Suggest, find or conclude that the AMRC was conflicted.
- Suggest, find or conclude that there was any reason why the AMRC had a minimal role in the ARR transaction.
- Suggest, find or conclude that the AMRC, its role, operation or membership was a "key corporate governance issue the ILC should address".

**Key Finding 4: Audit and risk management committee: length of Chair's term:** The ILC letter claims that the MN report found that the length of time that one Director had been Chair of the ARMC and his simultaneous involvement in the ARR transaction created an inherent conflict of interest. There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

**Key Finding 5: Audit and risk management committee: oversight of ARR transaction:** The ILC letter and ILC Senate Committee evidence claim that the ARMC did not oversight the ARR transaction because one Director had been the ARMC Chair for a long time and was also involved in the transaction, and that this was raised in the MN report as a key corporate governance issue. However, the MN report:

- Does not discuss in any way the role of the ARMC Chair and his involvement in the ARR transaction.

<sup>14</sup> Hansard, Australian Senate Finance and Public Administration Committee, 28 February 2014, p28

- Does not include any findings, conclusions or recommendations that one Director's chairmanship of the ARMC and involvement in the ARR transaction was a possible reason defining the ARMC role in the transaction or that the ARMC role was affected by any conflict of interest.
- Does not include any findings, conclusions or recommendations that the ARMC role, operation and membership, was a key corporate governance issue that the ILC should address.

Accordingly, any statements that explicitly or impliedly seek to create an impression to the contrary are false and misleading.

### Claim 3: Director's authority

The ILC Senate Committee evidence asserts that a particular Director 'drove' the transaction, and names this Director as Mr David Baffsky. The ILC letter claims that the Chair of the ARMC was "directly involved in driving the acquisition" and the MN report considered this serious issues needing to be addressed.

These statements seem intended to suggest that a particular Director was acting in some single capacity without the full remit or authority of the Board and therefore was able to make decisions about the transaction alone.

There are no suggestions, findings or conclusions in the MN report which in any way indicate that one Director was instrumental to the transaction in ways that enabled him/her to make decisions without Board scrutiny and agreement. The MN report focuses on Board decision making in relation to the ARR transaction and concludes that while Board decisions could have been better documented, the Board was responsible for decisions to undertake the due diligence on the ARR transaction and purchase the ARR.

In relation to Board decision making, the MN report states that (page 61):

*"Our main focus has been on the quality of board minutes and decision making in relation to the 1 October 2010 decision to acquire the ARR. However, based on our review of all board meeting minutes for the period 27 August 2008 to 20 June 2011, we make the following general observations:*

- *The ILC has a dedicated board secretariat function. Board packs appear to have been prepared and made available to directors in advance of each meeting;*
- *For each of the board meetings reviewed, the secretariat would personally attend, draft the minutes, and finalise the minutes after implementing any required changes. McGrathNicol was able to locate minutes for each of the board meetings held over the relevant period; and*
- *The Board meeting minutes appear to record the key decisions of the board, important discussions, and the resolutions passed".*

The MN report also concludes that (page 61):

*"From our review of the Board minutes and the Board Land Acquisition Decision dated 1 October 2010, we note that whilst the Board Land Acquisition Decision provides a summary of the due diligence work undertaken, it does not clearly set out the findings of the due diligence activities and the relevance to the decision to pursue the acquisition. The ILC Board resolved that the transaction was in the ILC's best interests and for its benefit. It is considered prudent to support an overarching comment such as this with a summary of the reasons why the transaction was considered to be in the best interests of the ILC".*

The Aegis January 2014 report included consideration of the evidence of the former ILC Chair, Ms Shirley McPherson, to the Senate Committee. Her written evidence makes clear that 5 of the 7 Directors of the ILC voted in favour of the ARR purchase and 2 Directors abstained<sup>15</sup>. This evidence of the former ILC Chair who presided over the purchase of the ARR is a powerful counter point to the assertion that one Director was responsible for directing the ARR towards the purchase.

**Key Finding 6:** There are no findings, conclusions or recommendations in the MN report that support this assertion, and it would be a false or misleading statement to suggest otherwise.

#### **Claim 4: Conflict of interest**

The ILC letter claims that the MN report considered that a serious issue requiring to be addressed is a particular Director's undeclared potential conflict of interest arising from his connection with a major shareholder in the vendor of the ARR (General Property Trust) at the time the ILC purchased it.

The MN report considers conflict of interest issues in section 6.5 (page 69).

In relation to the connection referred to in the ILC letter, the MN report identified this as a Directorship held by Mr David Bafsky of Singapore Airport Terminal Services, which is 43% owned by Temasek Holdings. Temasek Holdings is 100% owned by the Singapore Government. The Singapore Government is also the 100% owner of GIC Private Limited which has an 11.65% shareholding in General Property Trust, the vendor of ARR.

The MN report concluded that it "has no further knowledge regarding this connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be remote".

**Key Finding 7:** There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

<sup>15</sup> Ms Shirley McPherson, letter to the Chair of the Senate Finance and Public Administration Committee, 9 December 2013



The MN also considers Mr Baffsky's role as Honorary Chairman of Accor Asia Pacific, which was awarded the hotel service contract for the ARR by Voyages after a competitive process. The MN found that he properly declared his conflict of interest and took no part in considerations and decisions by the Voyages Board about the hotel services contract.

It is curious that the ILC letter ignores the MN findings about the propriety with which Mr Baffsky managed an immediate conflict of interest, but seeks to infer that he may have behaved improperly in relation to a connection that the MN report considers is remote.

#### **Claim 5: Reappointment of a Director to Voyages Board**

The ILC letter refers to the Minister's request to ILC in October 2013 that a particular Director be reappointed as Chair of the Voyages Board. The ILC letter claims that in part the ILC decision not to reappoint him was correct because the MN report delivered in December 2013 provides "ample evidence" to support that decision.

Based on the reviews of the MN report as part of the Aegis January 2014 report, and now as part of this assessment, it is clear that there are no findings, conclusions or recommendations in the MN report which could in any way be regarded as evidence to support the initial removal of the Chair of the Voyages Board, or the refusal of the ILC to reappoint him as apparently requested by the Minister.

**Key Finding 8:** There are no findings, conclusions or recommendations in the MN report that support this claim, and it would be a false or misleading statement to suggest otherwise.

## 7. ASSESSMENT OF ILC CLAIMS ABOUT FORMER ILC BOARD GOVERNANCE

### Summary of ILC claims

The ILC letter claims that the MN report suggests questions need to be answered because:

- The Board failed to consider the most recent financial performance of the ARR and relied on a valuation that was 17 months old.
- The Board failed to adequately mitigate risks identified in the due diligence.
- The Board relied on financial projections that were not conservative.
- The Board did not adequately record the voting intentions of all Directors.

The ILC Senate Committee evidence claims that<sup>16</sup>:

- The MN report includes 25 headline findings of concern.
- The ILC Board paid too much for the ARR.
- Grant Samuel was paid partly via a success fee (percentage of the purchase price) which would have incentivised them to recommend a higher purchase price.

The radio interview claims that<sup>17</sup>:

- The MN report found that the ILC Board did not consider the latest figures before them about revenue returns and other commercial issues, but relied on figures that were 17 months old.
- The Deloitte report<sup>18</sup> found a range of shortcomings in ILC governance; recommended that the ARR transaction be examined in more detail; and found that the ILC should have a good relationship with its Voyages subsidiary, which did not exist.
- The Voyages Board was terminated because its members included persons who were responsible for the shortcomings identified in the Deloitte and MN reports.

<sup>16</sup> Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp25-29

<sup>17</sup> Sunday Profile, ABC Radio, 17 April 2014

<sup>18</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013

## Aegis January 2014 report

The Aegis January 2014 report makes a detailed assessment of the public criticism of the ARR transaction by the ILC Board and management. Many of the issues raised in the ILC letter and ILC Senate Committee evidence were considered as part of this assessment. This is particularly in relation to:

- The valuations used by the ILC Board when considering the ARR purchase, and the ARR purchase price.
- The risk management undertaken by the Board.

The analysis in the Aegis January 2014 report shows that the claims made about the ARR transaction by the ILC in a range of public forums are potentially misleading, when taking into account all of the information contained in the MN report (2013), Deloitte report concerning ILC governance (2013), KPMG report concerning ILC borrowing powers (2011), Dransfield advice on tourism asset valuation (2013), and the ILC's own submission to the review of the ILC and Indigenous Business Australia (2014).

## Assessment of claims

As discussed in this current report, and the Aegis January 2014 report, the overall conclusion of the MN report (page 12) is that when considering (1) the cautions of previous Ministers about the ARR purchase, (2) the insufficient progress of the ILC in carrying out risk treatments to an acceptable level and (3) the scale of the transaction – MN considers that *"the ILC was deficient in documenting the appropriate deliberation and assessment required to demonstrate sound business principles. This does not itself mean that the acquisition was inappropriate. However a transaction of this scale, requiring such significant borrowings, opens the ILC up to the charge that it did not adequately protect itself against downside risk"*.

The Aegis January 2014 report also identified that, while the MN report made a number of findings to support this conclusion, it also made a number of positive findings about the governance of the ARR transaction. These included that (pages 5-12):

- The financial model relied on by the ILC Board when assessing the ARR purchase was conservative.
- The ILC was a motivated purchaser, but the process indicates it was not prepared to purchase at any price.
- The transaction was consistent with ILC powers and obligations under ATSI and CAC Acts.
- Vendor finance arrangements were reasonable and not disadvantageous to the ILC.
- A comprehensive risk management plan dealing with operational and transactional risks was prepared.
- The post purchase risk assessment and mitigation strategy in relation to occupancy was reasonable.
- The ILC Board decision was based on and followed the advice of consultants.

**Key Finding 9: Selective use of information:** The ILC letter, ILC Senate Committee evidence and radio interview selectively use some findings and not others about important issues. Selective use of some findings and not others can easily be misleading and lead to inaccurate conclusions about the ARR transaction.

The claims focus on findings in the MN report relating to ARR transaction issues that could have been better managed. However there are also a series of findings in the MN report relating to the good management of the ARR transaction that are not referred to in the communication by the ILC. Selective use of MN report findings can present a very negative picture of the ARR transaction which would not be possible if all the findings are considered in the context of the full report.

To achieve a balanced view of the MN report and the implications for the ARR transaction it is critical to take account of all the findings together.

When discussing the Board's consideration of the purchase price and related revenue and commercial issues the MN report does not find or conclude that the Board failed to consider up-to-date revenue and commercial issues put before them as asserted in the radio interview.

### Purchase price

A good example of the need to consider all the findings in the MN report arises in relation to the issue of the ARR purchase price.

On the one hand the MN report found that (pages 19-46):

- The Grant Samuel (GS) financial model was influential on the Board. The GS model is standard practice in mergers and acquisitions.
- The price was consistent with the NPV suggested in the GS model.
- GS model assumptions about NPV of cash flows was conservative and more conservative than comparable assessments by Colliers and CBRE in their valuations.
- GS model consideration of forecast capex was higher than CBRE and Colliers.
- Ultimately value is subjective and it is possible that the Board had good reason to assess the price as appropriate.
- The ILC was a motivated purchaser, but the length of time for purchase and negotiations indicate it was not prepared to purchase at any price.
- Vendor finance arrangements were reasonable, based on competitive interest rates and not disadvantageous to the ILC.

On the other hand the MN report found that (pages 19-46):

- GS model was arguably ambitious on forecast revenue, given findings by other consultants such as Howarth HTL. This may have inflated NPV.
- GS model capex forecast consisted of essential capex only and may not have been at levels needed to support the forecast growth in operating projections in the GS model. Higher capex projections may have lowered NPV.

- The GS model did not include any sensitivity analysis on the NPV prior to the Board decision in October 2010.
- The GS sensitivity analysis provided to the Board in November 2010 would have reduced the NPV to between \$237M (\$55 below price paid) and \$274M (\$18M below price paid).
- The price was \$22M higher than the value suggested by CBRE (\$270M).
- An updated full speaking valuation should have been undertaken, rather than the CBRE one being relied on as it was 17 months old.

Considering all of these findings offers a fuller understanding of the Board's decision to purchase the ARR and related governance than the view being promoted in the ILC letter, ILC Senate Committee evidence and radio interview.

### **Risk management**

Another good example of the need to consider all findings together arises in relation to risk management.

On the one hand the MN report found that (pages 48-52):

- A comprehensive risk management plan dealing with operational and transactional risks was prepared with assistance of consultants and presented to the Board. Risk management strategies for extreme, high and moderate risks were prepared and documented.
- Of the 9 key risks identified in the ARR transaction risk management plan MN considered that 5 had reasonable risk treatments and post risk ratings. This included the satisfactory development of a sensitised 10 year financial forecast based on conservative occupancy, reflecting a downturn in world economic conditions.

On the other hand, the MN report found that (pages 48-52):

- While the due diligence included 10 year financial forecasts, the risk treatment for the purchase price should have included a full speaking valuation.
- The post purchase risk treatment of government support should have been high, not moderate.
- The post purchase risk treatment of remoteness of ARR and reliance on airlines should have been high, not moderate.
- While the financial analysis of the ARR projected capex in the first 5 years is consistent with the independent expert assessment, these capex forecasts were based on "essential capex" only, to maintain the standard of the ARR and this appears inconsistent with the optimistic operating forecasts.

Considering all of these findings offers a fuller understanding of the Board's decision to purchase the ARR and related governance than the view being promoted in the ILC letter, ILC Senate Committee evidence and radio interview.

**Key Finding 10: ARR purchase price and risk management:** Given the nature of the findings in the MN report, it is not reasonable to selectively use some findings to criticise the ARR purchase, but ignore other findings that present a more positive picture of the transaction. This approach increases the risk that the ARR will be viewed negatively when this view is not entirely accurate. This outcome may have a negative impact on the capacity of the ARR to conduct and drive business with partners and suppliers.

### Grant Samuel fees

The ILC Senate Committee evidence suggests that the MN report found that the success fee paid to Grant Samuel (GS) was based on the value of the ARR transaction, and that this may have improperly led GS to advise the ILC to accept a higher purchase for the ARR. The relevant section in the evidence is as follows.

**Mr Dillon:** The first point to note from McGrathNicol was that the CBRE valuation that the board had available to it when it made the acquisition was 17 months old. McGrathNicol did some calculations. They indicated that had they had an up to date valuation the value of the resort would have been in the order of \$250 million-not \$300 million. That goes to the point of paying too much. A further key finding was that the due diligence, which cost \$6 million was on a success-fee basis. There was no appropriate selection process around the selection of due diligence consultants. Grant Samuel received one per cent of the purchase price which –

**Senator Seselja:** So the higher the purchase price the more the person would receive?

**Mr Dillon:** Absolutely.

**Senator Siewert:** Is that usual? I am not an expert on due diligence but –

**Mr Dillon:** We understand there are precedents in the industry about this but –

**Senator McKenzie:** Which industry?

**Mr Dillon:** The due diligence for the real estate industry – hotel acquisitions.

**Senator Seselja:** It was effectively an incentive for the individual or company to value it at a higher rate because they would get more of a success fee.

**Mr Dillon:** Exactly. That is the concern that McGrathNicol raised<sup>19</sup>.

The MN report does not find that there was any improper conduct on the part of GS. The MN report found that (page 9):

*“GS’s advisory fee was based on a percentage of the purchase price of the ARR. Whilst commonplace in the financial services sector, a fee arrangement of this nature does not incentivise an advisor to seek the lowest possible transaction price or advise against the transaction. We make no finding that GS acted improperly in this respect. However we consider that it may have been prudent for ILC to consider alternative fee structures”.*

The nature of the ILC Senate Committee evidence may be damaging to the reputation of GS, even though the MN report found GS did not act improperly.

<sup>19</sup> Hansard, Australian Senate Finance and Public Administration Legislation Committee, 28 February 2014, pp27

**Key Finding 11: Grant Samuel fees:** The MN report does not find that GS acted improperly in relation to the advice it provided to the ILC about an appropriate purchase price for the ARR.

### Deloitte report findings

In the radio interview it is claimed that the Voyages Board needed to be terminated because its members were responsible for the shortcomings identified in the Deloitte report which included a poor relationship between the ILC and Voyages. It is also claimed that the Deloitte report recommended that the ARR transaction be examined further.

The Aegis January 2014 report examined the Deloitte report in detail. The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report considered the ARR purchase as one case study for its governance review, in addition to other case studies. The Deloitte report considered that the ARR transaction provided examples of where the ILC could formalise its protocols for communicating with government; ensure its procurement policies are adhered to; conduct appropriate communication with stakeholders and formalise its conflict of interest declaration policies<sup>20</sup>.

With respect to the ILC Board governance in general the Deloitte report found that the arrangements were reasonable except for the fact that the ILC should develop a group wide strategy including all its subsidiary businesses; the ILC Board should clarify its own expectations about the reporting obligations of its subsidiaries and align meetings of the ILC and subsidiary Boards and sub-committees; and the ILC should develop consolidated financial reporting that includes its subsidiaries<sup>21</sup>. These findings related to actions that the ILC needed to undertake, and did not suggest in any way that the actions were necessary because of the performance of the Voyages Board.

**Key Finding 12: Deloitte report findings:** The Deloitte report does not find, conclude or recommend that the ARR transaction be examined in more detail. The Deloitte report found that the ILC governance arrangements were reasonable and that minor improvements were needed. The report did not find that these improvements were required because of the performance of the Voyages Board.

<sup>20</sup> Deloitte, Review of ILC Board Governance Arrangements, March 2013, p57

<sup>21</sup> Ibid, pp7-9