



Australian Government

Indigenous Land and Sea Corporation



The ILSC GROUP

## BOARD BRIEFING PAPER

BOARD MEETING NO 246 – 11 DECEMBER 2019

### ITEM 9.2.4 NCIE DIVESTMENT PROGRESS

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#### PURPOSE

To provide the Board with an update on divestment activities for NCIE.

#### RECOMMENDATION

It is recommended that the ILSC Board:

1. **Note the contents of the paper.**

#### BACKGROUND

In October 2017, the ILSC received request from the NSW Aboriginal Land Council (NSWALC) seeking agreement to enter into discussions on the divestment of NCIE to NSWALC.

In May 2018, the ILSC received correspondence specifically requesting the ILSC consider divesting the NCIE property to NSWALC.

At its June 2018 meeting, the Board endorsed the ILSC to continue to work with NSWALC on the development of a plan based on the approved minimum divestment criteria and issues to be addressed towards divestment of NCIE.

Throughout 2018 the ILSC and NSWALC engaged in the divestment due diligence process on the basis that NSWALC would need to undertake its own due diligence on the property and whether it had the desire and capacity to own the property.

Throughout this period the ILSC has been direct with NSWALC on the following parameters and conditions:

1. The ILSC will not consider divestment to NSWALC to: (i) sell; (ii) reduce the Indigenous Benefits being derived; or (iii) reduce Indigenous service levels, visibility, presence or footprint.
2. While the ILSC would not dictate tenancy arrangements it is expected that NSWALC (if it were the future THB) would need to have tenancy arrangements that were economically sustainable; and the ILSC considered affordable (or subsidised) rent to Indigenous service providers critical to the service footprint and advantageous in terms of proof of Indigenous Benefits generated by a future THB.
3. NSWALC's proposal (that being both the operating model and any development proposed) must assure the above requirements.
4. The ILSC will hold a caveat over the property requiring its consent to future development, transfer, disposal of the property etc. Furthermore, the ILSC would not consent to development of the site for

- anything that would not compliment the NCIE environment; would be at odds with community aspirations.
5. The ILSC would not be drawn into governance or community tensions between NSWALC and its members (notably Metro and La Perouse LALCs) and that it would be NSWALC's responsibility to demonstrate in its proposal that it had the support of its member LALCs.
  6. The ILSC would not 'sell' NCIE to NSWALC to avert the *Deed of Grant of Land* terms and conditions.
  7. There is no guarantee of divestment: (i) it remains subject to due diligence including community consultations; (ii) it remains subject to the ILSC's final recommendation and Board decision; (iii) NSWALC continue to commit resources to their own due diligence and business case on this knowledge; and (iv) the ILSC does not give NSWALC exclusivity.

The ILSC's due diligence has largely been contingent upon NSWALC's proposal and the ability to assess the feasibility of their proposed ownership and operating model; and their capacity to sustain it. It has undertaken due diligence on NSWALC's capacity to receive the land, capability, governance and financial capacity.

NSWALC's due diligence at this stage included property inspections and analysis of NCIE's tenancies, business modelling, and financials.

In February 2019 the ILSC Board considered the implications for NCIE Ltd if it were to divest to NSWALC.

This was as a result of NSWALC's advice that:

- Its proposed model was centred on a tenancy management model, and it had no desire to be both the owner (LandCo) *and* operator (OpCo).
- It had no desire to take on NCIE Ltd as a subsidiary due to the financial burden (knowing that the ILSC subsidises NCIE Ltd operational budget).

The ILSC advised NSWALC that it would need to prove that this model was sustainable, that there was an alternate operator, and that it would not reduce the Indigenous service footprint (visibility and client benefits).

The ILSC put the matter of a potential wind-up of NCIE Ltd to the Board on the basis:

1. **Should** a divestment to NSWALC be recommended in the future, and on the basis their operating model could be proven to be sustainable, the ILSC would be faced with the decision on its subsidiary.
2. The ILSC was of the view that it would be unpalatable to impose an operating model on NSWALC which it knows requires subsidising (that is making divestment contingent upon taking on NCIE Ltd).
3. Internal Legal advice that it would be difficult to mount a strong argument as to why the ILSC would continue to operate a charitable enterprise such as NCIE Ltd on a divested property.

At this meeting the ILSC Board advised that it was not in a position to consider the future of NCIE Ltd (and its appetite to wind-up) until a time: (i) divestment to NSWALC was a real prospect; and (ii) that NSWALC could adequately demonstrate its operating model (without NCIE Ltd) was sustainable, viable and would yield the equivalent Indigenous Benefits (at a minimum).

## CURRENT STATUS

- **NSWALC Proposal:** In September 2019, NSWALC presented to the ILSC its draft future development proposal, including NSWALC's preferred operating model. NSWALC has indicated that they wish to develop the site to create better returns (social, cultural and economic) from the land asset. The future development models have been assessed by KPMG for short and long-term viability. NSWALC has sought an audience with the ILSC GCEO and DCEO to present this model. It has been deemed appropriate to await the NSWALC AGM before holding the meeting.

- **Community Consultations:** As has been assured to the Board, the ILSC's divestment due diligence (strategic considerations) will include community consultations. These consultations will provide an opportunity to:
  - Better understand the community's level of ownership/ buy-in to NCIE, and their aspirations for current and future land use.
  - Present the ILSC's divestment process including its divestment parameters and conditions (items 1, 2, 3, 4, and 6 which would be applicable to any party and not specific to NSWALC).
  - Present the requirements / threshold that any future THB would need to meet being the capital, capacity etc.

Cox Inall Ridgeway has been engaged to facilitate the community consultation process (refer consultations section in Key Issues and Risks section).

The consultations will be conducted by Cox Inall Ridgeway to ensure community stakeholders consulted are afforded an opportunity to express their views openly and without the perception of ILSC, NCIE or NSWALC influence. It is expected that the consultations will commence in late January 2020 and be completed by April 2020.

Pending the outcome of the first round of community consultations, and comfort that the ILSC's divestment model and the high level NSWALC proposal is acceptable, it is envisaged that a second round of consultations which are more explicitly linked to NSWALC (as a potential future THB) and their proposal should be undertaken.

- **Valuation:** In line with a request from the ILSC Chair, the ILSC is procuring an up to date independent valuation of the NCIE property.  
NSWALC's has procured a technical due diligence building report that identifies approximately \$1 million in urgent repairs and maintenance to NCIE facilities. NSWALC has made a commitment to funding and completing these repairs should the property be divested to them. A long term (10 years+) Asset Management Plan will be developed to identify ongoing repairs, maintenance and sinking fund requirements as a condition of divestment.
- **Divestment Plan:** Upon the completion of the community consultation and the subsequent finalisation of due diligence, it is expected a Divestment Plan will be developed for the ILSC Boards consideration by 30 June 2020, including whether the ILSC could recommend to the Board divestment to NSWALC.

## KEY ISSUES AND RISKS

- **Considering divestment to NSWALC:** The consideration of NSWALC as a future title holding body and the subsequent due diligence activities was precipitated by an application from NSWALC in May 2018. Until this point no group had expressed an interest in the future ownership of NCIE, nor had the ILSC identified a likely candidate. The consideration of NSWALC has been informed by:
  - A reasonable assumption that there is unlikely to be a local Indigenous organisation with the capital, capacity and standing to take on ownership of the NCIE (noting the maintenance obligations and the subsidised operating model).
  - ILSC Legal advice that the ILSC cannot divest NCIE to NCIE Ltd.
  - A belief that to **not** consider divestment to NSWALC would be difficult to defend (particularly based on their capital capacity, level of representation, proven landholding capability etc).

While NSWALC would not be a priority under the ILSC's *land need* test (a need for land and an inability to meet that need without ILSC assistance), it does have the capital and capacity to take on ownership

of NCIE. It is unlikely that a group that would have a greater land need than NSWALC would also have the capacity to own the property.

The ILSC legal team has advised that NSWALC has the legislative ability to receive the property and furthermore there is no legislative requirement for NSWALC to divest the property (eg. to a LALC). However, should NSWALC be required to/ seek to divest the property at a later time, it would require the ILSC's consent to do so (under the Deed of Grant of Land). Such consent would require the nominated group to demonstrate the same title holding capacities applied in any ILSC divestment due diligence (financial security, governance, capacity, ability to sustain Indigenous Benefits etc).

NSWALC recently sought an agreement of exclusivity, preventing the ILSC from working with any other group or considering other groups to divest NCIE to. The ILSC communicated to NSWALC that it was not in a position to give exclusivity but that NSWALC should trust that at this present stage the ILSC is in good faith exploring the potential of divesting NCIE to NSWALC; subject to rigorous due diligence; subject to ILSC Board's approval; and again with no guarantee of divestment.

- **Consideration of alternate bodies:** The ILSC has not undertaken an 'Expression of Interest' process seeking groups to divest NCIE to. This is not usual practice, with the ILSC having done this in only a few instances. This approach has been used where there is evidence of interest, capability and competition; and generally where the property is low value and easily divestible.

While it has been suggested the ILSC could undertake community consultations and ask community to nominate a future title holding body, this strategy creates increased community expectations. This risk is increased in an environment where there is no immediate evidence of likely and competing candidates. The ILSC would not wish to find itself in a situation where community nominated groups are in reality not viable options.

- **Role of NCIE Ltd:** The divestment of an ILSC-held property with a subsidiary company operating on it is common practice for the ILSC. In doing this the ILSC takes a position of separating the land from the operations (LandCo and OpCo models).

In this instance, NCIE Ltd is the ILSC's operating entity, in place to ensure the property is cared for, protected for future divestment, and used for the purpose of generating Indigenous Benefits. Similar to AIA it does so in a caretaker arrangement, knowing it does so until the ILSC can divest the property.

Similar to ILSC pastoral holdings (eg Myroodah) the ILSC's divestment function is:

- Carried out in a manner independent of the subsidiary and the operations; but
- Mindful of the operating future that supports divestment, whether it be: transferred to the new THB; transferred to another operator which the new THB can generate an income from (Myroodah and KAPCO); or leased back to the ILSC subsidiary to operate (eg Roebuck).

This approach is critical to protecting the integrity of the ILSC (and its subsidiary), and ensuring it cannot be criticised for hanging on to properties for its own gains (avoiding divestment or divesting to itself so as to continue to benefit/ generate income from the property).

As such it has been a cautious but deliberate strategy of the ILSC to ensure NCIE Ltd is not visible in divestment deliberations with NSWALC (apart from facilitating information and site inspections); nor can be seen to be influencing the ILSC's consideration of NSWALC's proposal.

This strategy can be seen in divestments such as Myroodah, serve to ensure the ILSC's due diligence is not (intentional or not) influenced by its own interests (that is the interests of its subsidiary).

- **Community Consultations:** While the ILSC does not plan to conduct broad community consultations into ‘who it should divest NCIE to’, it will undertake community consultations to test:
  - Community engagement, sense of ownership/ buy-in of NCIE, views on its use, and future aspirations for NCIE (refer round 1 consultations in Current Status);
  - Community reception to NSWALC’s proposed development, use and future of NCIE (should it be granted the property) (refer proposed second round consultations in Current Status).

While not the explicit purpose of the round 2 community consultations, the consultations will by default test the community’s receptiveness of NSWALC as a future owner of NCIE.

It is recognised that second round of community consultations which cite NSWALC as a potential future THB carries risks for the ILSC, but more so with NSWALC. Doing so sends a significant signal to community that the ILSC is actively considering divestment to NSWALC. While NSWALC’s visibility in the scope of the consultations presents risks to them, it is imperative that their proposal (development, use, operating model, future) for NCIE is tested with community stakeholders in order for the ILSC to make an informed decision on divestment respectful of community’s aspirations for the property.

This is particularly important given the NCIE Board does not formally have community representation on its board, notwithstanding NCIE’s strong community engagement and relationships.

- **Time taken and liabilities:** It is recognised that this process has taken considerable time and has caused additional uncertainty for NCIE Ltd in terms of its operations, financial modelling and future in the context of the Board’s *Subsidiary Transition Project* and *Structural and Efficiency Review* work. The ILSC is also conscious of obligations to NSWALC and the resources (time, money, reputational) it has committed to this process.

It is however confident that:

1. Timelines have been subject to NSWALC’s process and the time it has required to fully develop its proposal to enable: (i) community consultations; and (ii) the ILSC to fully consider the proposal and undertake its own due diligence on the merits of the proposal and whether it could consider divestment on that model. The ILSC could rightfully argue that it’s divestment processes have been delayed to afford NSWALC time to undertake its due diligence, present a compelling business case.
2. NSWALC has committed these resources and participated in this process without any expectations and with no potential that the ILSC can be held liable for these resources (refer point 7 in background).

**RECOMMENDATION**

**It is recommended that the ILSC Board:**

1. **Note the contents of the paper.**

| Endorsements  |   |
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| <p><b>Prepared by:</b><br/>Tricia Stroud<br/>Deputy CEO<br/>28 November 2019</p> <p><i>In preparing this recommendation, I declare I have no conflict of interest</i></p> | <p><b>Endorsed by:</b><br/>Leo Bator<br/>Acting Group CEO<br/>28 November 2019</p> <p><i>In endorsing this recommendation, I declare I have no conflict of interest</i></p> |

