people land opportunity

Australian Government
Indigenous Land Corporation

27 May 2015

Hon Tony Abbott MP
Prime Minister
Parliament House
CANBERRA ACT 2600

IN-CONFIDENCE

Dear Prime Minister

As advised in previous correspondence to you dated 23 March 2015 and 14 April 2015, the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, wrote to me on 17 February 2015 regarding the Indigenous Land Corporation (ILC) Board's consideration of legal action in relation to the former ILC Board's acquisition of Ayers Rock Resort (ARR). In that letter he requested the ILC Board provide him with '...any additional information not previously provided that would support the basis of any legal action the ILC proposes to take, including any relevant legal advice the Board may have obtained in this regard'.

Following receipt of the Minister's request, the ILC has undertaken a detailed review of our previous correspondence and briefings to Ministers on this matter against the extensive and complex records in our possession. On behalf of the ILC Board I now provide you with our advice.

I am writing directly to you as Minister Scullion appears to have a direct and unaddressed conflict of interest in these matters, as noted in my letter of 14 April 2015 and as further detailed below. The ILC asks again for your advice as to how this potential conflict of interest will be dealt with.

Background

In October 2010, the then ILC Board resolved[1] to purchase ARR for $317 million. This decision has left the ILC in very difficult financial circumstances, and continues to cause severe detriment to the performance of the ILC's core functions. This situation adversely impacts Indigenous interests across the country. In the absence of a sustained improvement in ARR revenue,

[1] The Board Minutes record the meeting was attended by S McPherson, S Jeffries, D Baffsky, K Driscoll, E Goolagong-Cawley, M Gorringe (by telephone), I Trust (by telephone). Staff in attendance included D Galvin (General Manager) and P Hayes (General Counsel). The Minutes also recorded the decision being moved by S Jeffries and seconded by E Goolagong-Cawley while Directors Trust and Driscoll abstained. We do not know how the remainder of the Board voted but understand Director Gorringe may have voted against the decision.

servicing the associated debt and principal potentially reduces the available funds for the ILC's core functions by over 40 per cent each year.

Upon appointment of a substantially new ILC Board in 2011, the new Board set about reviewing the ILC's corporate governance processes and making changes to strengthen them where appropriate. As part of this exercise, a review conducted by Deloitte uncovered numerous concerns.

Following this review, it became increasingly apparent that the processes surrounding the purchase of Ayers Rock Resort were flawed.[2] The ILC Board then commissioned a high-level review into the ARR transaction. This review, undertaken by McGrathNicol, identified numerous shortcomings in the processes underpinning the transaction.

As a consequence, the current Board has, over a period of more than 18 months, expressed its concern to the Government, and has consistently requested an independent inquiry into the transaction aimed at identifying what occurred, who was responsible, and how it was allowed to happen. Despite the serious public accountability issues and potential breaches of civil and perhaps even criminal law that have been raised, all requests for this focused investigation have to date been refused.

New Information

The ILC Board has already provided Ministers with extensive and detailed information supporting the case that a number of former Directors and the former General Manager of the ILC *prima facie* breached their duties under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) and the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act) as officers of the ILC in relation to the decision to acquire ARR. This information derives from both detailed investigation of the transaction by McGrathNicol and legal advice to the ILC by a Senior Counsel.

Following correspondence from the ILC dated 29 October 2014, the Minister for Finance (who has regulatory responsibilities—akin to the Australian Securities and Investments Commission—for public sector corporations) agreed that an investigation was warranted[3], but attempted to delegate this responsibility to the Minister for Indigenous Affairs. The Minister for Indigenous Affairs refused to initiate an investigation, claiming the matter had already been investigated numerous times.[4] Minister Cormann apparently acceded to Minister Scullion's decision.

As a consequence, to date the Minister for Finance and the Minister for Indigenous Affairs have declined to initiate an investigation.

The provision of new information in accordance with Minister Scullion's request is in no way an acknowledgment that the information already provided is in any way deficient or inadequate to

[2] Email from N Westbury (current ILC Director) to D Galvin (former ILC GM), 6 March 2012
[3] Letter from Minister for Finance to D Casey (ILC Chair), 19 December 2014
[4] Letter from Minister for Indigenous Affairs to D Casey (ILC Chair), 17 February 2015

justify further regulatory investigation and action, and we suggest that the information presented below is read in conjunction with our previous correspondence.[5]

The Board now provides the following new information:

Attachment One lists the key source documents not previously provided in our correspondence, as well as a table of findings from McGrathNicol's review of the transaction, which provide the context against which the new information must be read.

I note that the key justification put forward by Minister Scullion for not undertaking an investigation following recommendations by both the ILC and Minister Cormann is that there have purportedly been four independent investigations of the ARR transaction.[6] It is important to note that, of these four reviews, only the published McGrathNicol review had access to the source documents listed in this attachment. Moreover, the McGrathNicol review did not have the power to compel evidence from key persons involved in the transaction. Thus, the findings of this review, while of serious concern in themselves, were general in nature (focused on the overall transaction and not potential breaches of legislation), and are not necessarily framed in a way to underpin regulatory oversight and action.

Attachment Two outlines a particularly concerning element of the ARR purchase price negotiations. In spite of the strong concerns expressed by certain ILC Directors and due diligence advisers that the purchase price was already too high, the former ILC Board, without any explanation, agreed late in the process to a $30 million increase in the price. Given the difficulties the former Board was facing in financing the transaction, it seems that this sudden increase was linked to the provision of vendor financing to allow the transaction to proceed. As the ILC had already requested, and been denied, access to the Land Account and had been unable to raise commercial finance[7] due to the substantial risks and commercial unviability of the transaction[8], a decision to increase the purchase price by $30 million in exchange for short-term vendor financing, with seemingly no clear plan as to how this would eventually be repaid, would appear to comprise a potential breach of directors' duties and section 191F of the ATSI Act.

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[5] Refer to previous correspondence from D Casey, dated: 16 October 2013 (to Minister Scullion); 23 October 2013 (to Minister Scullion); 25 October 2013 (to Minister Scullion); 14 November 2013 (to the Prime Minister); 5 January 2014 (to Minister Scullion); 20 March 2014 (to Minister Scullion); 8 May 2014 (to Minister Scullion); 2 October 2014 (to Minister Scullion); 29 October 2014 (to Minister Cormann); 29 October 2014 (to the Prime Minister); 21 December 2014 (to the Prime Minister); 12 January 2015 (to the Prime Minister); 3 February 2015 (to Minister Cormann); 26 February 2015 (to the Prime Minister); 2 March 2015 (to the Prime Minister); 20 March 2015 (to Minister Scullion); 14 April 2015 (to the Prime Minister).

[6] Reviews have been conducted by McGrathNicol, Aegis Consulting (commissioned by former ILC Director David Baffsky, the key negotiator and driver of the transaction), and KPMG in relation to the ILC's borrowing powers, and the Australian National Audit Office into the ILC's Land Acquisition Program. Of these reports, only the McGrathNicol and ANAO reviews are publicly available. The ILC does have access to the KPMG report, but was not authorised to provide this to McGrathNicol by FaHCSIA. Former Director Baffsky tabled part of the Aegis Consulting report at Senate Estimates. The other half has not been made available to the ILC despite requests to Mr Baffsky and the Minister for Indigenous Affairs.

[7] Which of itself should have been sufficient for the Board to reconsider proceeding with the transaction.

[8] For example, refer to the letter from R Jenkins (Grant Samuel) to D Galvin (ILC GM), 5 August 2009.

Attachment Three raises significant concerns surrounding the engagement of Grant Samuel as lead due diligence adviser to the transaction. Not only did the fee structure incentivise Grant Samuel to act otherwise than in the ILC's best interests, other terms had the effect of almost completely shielding Grant Samuel from any adverse consequences of its actions. In this instance, the ILC's established competitive procurement and contract review processes were bypassed, and the former Board's decision was seemingly made without ever viewing the terms of the proposed agreement or having any information beyond the proposed fee structure. The behaviour of the former ILC Board and General Manager in relation to this engagement raises serious questions as to the propriety of the arrangement with Grant Samuel. It is possible that this arrangement was designed to facilitate the provision of highly optimistic revenue forecasts, and thus ensure that the ARR transaction appeared attractive and would proceed at any cost. At the very least, the actions of Directors in approving these terms of engagement potentially comprise a breach of directors' duties and the ATSI Act.

Attachment Four outlines a concern that there may have been an approach by the former ILC Directors to the then Shadow Minister for Indigenous Affairs, Senator Nigel Scullion, seeking his support to draw down funds from the Land Account in the event there was a change of government following the 2010 election. Given the strong grounds upon which former Minister Macklin had refused a similar request, and the former Board's knowledge of the significant financial risks the acquisition presented, such action would arguably comprise a breach of the Directors' duties to act in the best interests of the ILC or to act for a proper purpose. As raised in our previous correspondence with you, the absence of an assurance from Senator Scullion that he was not involved in discussing the transaction with former directors and staff adds to our concern. The ILC also believes that the existence of such an approach may explain Minister Scullion's intransigent refusal to support an investigation into the transaction.

Attachment Five outlines a number of undeclared material personal interests between former ILC Director (and principal negotiator and driver of the ARR transaction) David Baffsky and entities associated with the vendor, GPT, and its largest shareholder, the Government of Singapore Investment Corporation. These relationships are such that Mr Baffsky should have been aware that they represented potential conflicts of interest. More significantly, such behaviour would represent a serious breach of Director Baffsky's director's duties as he personally drove the negotiation of the purchase of ARR. The failure to declare these connections, and the potential effect that these may have had on the transaction, represents a potential breach of directors' and fiduciary duties that requires investigation.

Attachment Six outlines an apparent breach of the former ILC Directors' obligations under the CAC Act to keep the relevant Minister informed. This followed explicit requests from the then Minister, and it appears that the Minister may have been deliberately misled. This raises serious questions about the nature of the transaction and perhaps indicates knowledge that the Directors' conduct in relation to the transaction would not be condoned.

The need for an inquiry

As is clear from the substantial information already provided in earlier correspondence and the new information presented in this letter, this is a matter of great importance involving myriad

significant public interest issues, including public sector corporate governance standards and the stewardship of substantial public (Indigenous) moneys. It is incontrovertible that up to $150 million that should rightly be directed towards Indigenous land-related benefits will not flow to those interests as a result of a process that has been demonstrated to be seriously flawed. Despite this, there has to date been no action by the Minister for Finance, who has both the regulatory responsibility for public sector corporations and the broader democratic functions of protecting the public interest and anticipating potential future calls on the Commonwealth Budget.

In providing this new information, the ILC seeks to highlight many of the unanswered questions and unexplained actions surrounding the transaction. What is irrefutable is that the serious issues surrounding the ARR acquisition necessitate an independent inquiry with full powers to investigate and compel evidence. An investigation would also facilitate a determination of whether there is sufficient evidence to allow the Minister for Finance and/or the ILC itself to pursue compensation for damages resulting from contraventions of the CAC Act, including breaches of directors' duties.[9] Additionally, such evidence may allow the Minister for Finance to seek pecuniary penalty orders of up to $200,000, payable to the Commonwealth[10], and, if serious misconduct is exposed, criminal charges may be pursued against former Directors and officers.[11] Most importantly, an investigation would allow the Minister for Finance and his Department to identify any systemic and regulatory weaknesses. It would also facilitate remedial action to ensure that similar circumstances are never allowed to arise again.

I wish to be absolutely clear in stating that the ILC Board, comprising a majority of Indigenous Directors, is pursuing this issue solely because of our commitment to the highest standards of good corporate governance, and our commitment to see Commonwealth funds allocated with full and transparent accountability. As Attorney-General Brandis has noted, 'In a democracy, it is not character assassination to call a public official to account, nor to subject their performance to public scrutiny.'[12] To continue to turn a blind eye to the many concerns surrounding the ARR acquisition is untenable if strong standards of accountability in the public sector are to be upheld.

ILC's legal advice

As mentioned in my previous correspondence to you, the ILC Board has deferred a decision in response to Minister Scullion's request to be provided with the ILC's legal advice in relation to the former Directors. This request is extraordinary in itself, and **also requires advice from you on dealing with the potential conflict of interest involved.**

In relation to this issue, the ILC is preparing additional advice to you that evidences the persistent and public criticisms of the ILC Board and key staff by Minister Scullion which both predates his appointment as Minister, and continued after his appointment, albeit in a less direct fashion. The ILC Board strongly believes these actions are sufficient to warrant Minister

[9] CAC Act Sch 2 cl 4 and 6
[10] CAC Act Sch 2 cl 3
[11] CAC Act s 26
[12] Attorney-General George Brandis, quoted in *The Australian* 27 February 2015

Scullion's exclusion from involvement in any potential investigation and the decision to conduct such an investigation. Such an investigation should be independently overseen by Minister Cormann as the appropriate regulator. We will provide this further advice in due course.

The ILC Board asks that you carefully consider Minister Scullion's role in any future appointments decisions, including to the ILC Board, given the serious allegations which remain outstanding over members of the former Board and the former General Manager, and the apparent links between Minister Scullion and these individuals.[13]

Should you require any further advice or assistance in relation to this matter, please contact the ILC CEO Michael Dillon on (02) 6269 2500. A copy of this letter has been provided to the Minister for Finance given his responsibilities for public sector corporate governance and the regulatory oversight of public sector corporations.

Yours sincerely

Dr Dawn Casey, PSM, FAHA
Chairperson

[13] We note that Minister Scullion appointed the former chair of the ILC, Ms Shirley McPherson, to the board of Indigenous Business Australia in November 2014, and as a member of the Expert Indigenous Working Group for the COAG Investigation into Indigenous Land Administration and Use.

ATTACHMENT ONE

Ayers Rock Resort transaction: source documents and context

The ILC Board notes that we have already provided substantial information to the Minister for Indigenous Affairs and the Minister for Finance which clearly indicates that a thorough and independent review of the Ayers Rock Resort (ARR) transaction is required.

We note, however, that copies of the source documents have not been provided. Accordingly, the key source documents that underpin the ILC Board's concerns, and those relating to the new information outlined in Attachments Two to Six, are listed below and are available for your review should you wish to be provided with copies of them.

These source documents comprise new information not previously made available to the Government.

1. 20 October 2008: Letter from Ross Grant (Grant Samuel) to ILC Directors, 'Acquisition of Voyages Hotels and Resorts' (Grant Samuel Letter of Engagement)
2. December 2008: Horwath HTL Due Diligence Report
3. 1 December 2008: Colliers International Valuation Report
4. 16 December 2008: Board Paper for Meeting No 123
5. 9 April 2009: Grant Samuel Project Red Rock—ILC Board Update
6. 15 April 2009: Strategic Land Acquisition Proposal—Update
7. 30 April 2009: Grant Samuel Financial Model for Ayers Rock Resort and ILC
8. 26 May 2009: CBRE Hotels Valuation of Ayers Rock Resort
9. 25 May 2010: ILC Estimates of Cash Flow
10. August 2010: Horwath HTL Due Diligence Report
11. 11 August 2010: Letter from D Baffsky (ILC) to M Cameron (GPT CEO)
12. 12 August 2010: Letter from M Cameron (GPT CEO) to D Baffsky (ILC)
13. 8 September 2010: Letter from D Baffsky (ILC) to M Cameron (GPT CEO)
14. 1 October 2010: Board Paper for Meeting No 136
15. 6 March 2012: Email from Director Neil Westbury to General Manager David Galvin titled 'Due Diligence Queries re Acquisition of ARR'

16. 30 June 2013: Voyages Indigenous Tourism Australia Pty Ltd Directors' Report
17. 18 December 2013: McGrathNicol ARR Review—Final Report
18. 20 February 2014: McGrathNicol Valuation Report
19. ILC Board Meeting Minutes:
    1. 16–17 December 2008; Meeting No 123
    2. 19 January 2009; Meeting No 124
    3. 18 February 2009; Meeting No 125
    4. 15 April 2009; Meeting No 126
    5. 23 April 2009; Meeting No 127
    6. 26 August 2009; Meeting No 129
    7. 16 December 2009; Meeting No 131
    8. 18 February 2010; Meeting No 132
    9. 15 April 2010; Meeting No 133
    10. 16 June 2010; Meeting No 134
    11. 25 August 2010; Meeting No 135
    12. 1 October 2010; Meeting No 136.

McGrathNicol findings

Given serious concerns about the merits of the ARR transaction as a whole, the current Board engaged McGrathNicol to conduct a broad review. The table below extracts a number of McGrathNicol's key findings, highlighting only some of the many issues that were found. The table provides the context and foundation upon which to assess the new information advanced in Attachments Two to Six.

The McGrathNicol report is the primary basis for the ILC's longstanding view that an investigation is required into what transpired, and who was responsible. We reiterate that the McGrathNicol review did not have any powers to compel evidence, and was therefore constrained in its capacity to determine what occurred.

Given the serious issues relating to both process and outcomes raised by the McGrathNicol review, it is clear that a full investigation is both justified and necessary if full accountability for what transpired is to be determined, and appropriate lessons learned to inform any policy and legislative change that may be required. This conclusion is reinforced by the fact that the Department of Finance, which has regulatory responsibility for public sector corporations, has neither sought nor been provided with key source documents that underpin the McGrathNicol findings. Given the above, and the new information provided herein, the lack of investigation to date is incomprehensible.

Key Findings: McGrathNicol Review

1.	The CBRE valuation (relied upon by the former ILC Board) was 17 months old and not updated to reflect changes to trading performance. McGrathNicol calculated that, had they done so, the value of the resort would have been in the order of $250 million (p26).
2.	The price paid exceeded the key pre-sale valuation by CBRE by $22 million (p24). The Grant Samuel financial modelling presented to the Board was not a full speaking valuation (p27).
3.	The fee negotiated with Grant Samuel, the due diligence consultants, was 1 per cent of the total purchase price. There is no evidence of any tender process for the engagement, and the contract of engagement was not consistent with normal ILC practice, or normal good practice for a Commonwealth entity (pp58–59).
4.	A number of concerns raised by Ministers throughout the acquisition process were either not responded to in a timely manner or were addressed subsequent to the acquisition being finalised (pp54–55).
5.	The capex projections used in the modelling presented to the Board were limited to 'essential capital only'; yet occupancy levels were projected to grow notwithstanding a long-term decline in visitation and deteriorating capital facilities. McGrathNicol found these occupancy projections appeared to be 'overly optimistic' (p32).
6.	The due diligence consultants were requested to reduce their capex projections from $77 million over five years down to $53 million to cover only 'essential requirements' (p34).
7.	Although presented to the Board (and subsequently to Ministers) as conservative, the operating forecasts underlying the Grant Samuel financial model appear to be optimistic (pp29–30).
8.	Adjusting the Grant Samuel financial model to reflect stabilised occupancy at 63 per cent [down from 67 per cent] results in decreased net cash flows and reduces the calculated Net Present Value (NPV) of the Ayers Rock Resort from $292 million to $250 million (p32).
9.	Grant Samuel did not present the Board with sensitivity analyses of its financial modelling prior to the transaction (p37). McGrathNicol demonstrated that, had sensitivity analyses been presented to the Board, the NPV calculation would reduce to between $237 million and $274 million (p37).
10.	Key risks identified prior to the transaction that were not adequately or appropriately addressed included: Risk i. The purchase price for ARR is not consistent with its value (p50). Risk ii. The decision to acquire is not supported by the sector or by the Government (p50). Risk iii. The remoteness of ARR means visitor levels are heavily dependent upon external parties (including QANTAS and Virgin) (p50). Risk iv. Deferral of capital expenditure [by GPT] during recent years indicated that this [capex] expenditure will be required in the short/medium term to maintain standards at an appropriate level (p51). Risk v. Significant slump in visitor numbers as a result of further downturn in world economic conditions [adversely] affects earnings (p51).

ATTACHMENT TWO

Unjustified upward revision in the ARR purchase price: a potential breach of sections 23–25 of the *Commonwealth Authorities and Companies Act 1997* and section 191F of the *Aboriginal and Torres Strait Islander Act 2005*

Overview

The extent of the total financial disadvantage to the ILC and ultimately the Commonwealth arising from the Ayers Rock Resort (ARR) transaction could be as high as $150 million—this on its own makes the case for an investigation overwhelming. The Government's unwillingness to date to initiate such an investigation is, as the current ILC Board has stated before, both inexplicable and incomprehensible.[14]

In addition, it has come to the ILC Board's attention that there is a new and particular element of the purchase price negotiation which is of serious concern. The former ILC Board, without any sound reasoning documented in the minutes, agreed to an upward revision in the purchase price of $30 million, despite strong concerns from certain Directors and due diligence advisers indicating that the purchase price may not have been commensurate with the resort's value.

As the former Board had already sought and failed to secure funds from the Land Account, and failed to raise adequate bank finance for the acquisition, it appears that the agreement to pay this extra $30 million may have represented an inducement for GPT[15] to provide vendor financing designed to allow the transaction to proceed.[16] Notwithstanding the inability to attract commercial finance, if the increase is found to be without a commercial rationale, the ILC Board's agreement to this increase is at least a breach of the legislative requirement that the Board operate in accordance with sound business principles.[17] In the wider context—particularly considering the information in Attachments Three and Five—it raises the suspicion of a deliberate ploy to induce an unnecessary and unjustified extra payment of $30 million by the ILC. This can be investigated only through a proper and independent inquiry.

Actions of the former Board

In Board discussions on 16 and 17 December 2008[18], it was noted that GPT was offering the portfolio of properties then for sale (which included ARR) at a price of $282 million. ILC Director Kevin Driscoll stated that he considered this price to be excessive given the assets' location and

[14] ILC media release, 3 March 2015, http://www.ilc.gov.au/Home/Media/Media-Releases/Cormann-reversal-inexplicable-and-incomprehensible

[15] GPT were the owners of ARR, and the vendors in the transaction.

[16] Letter from M Cameron (GPT CEO and MD) to D Baffsky (ILC Director), 12 August 2010

[17] *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 191F ('ATSI Act')

[18] Minutes, ILC Board Meeting No 123, 16–17 December 2008

returns. Director Driscoll also raised concerns that the $80 million identified as required for building and infrastructure upgrades may have been underestimated. The Board agreed not to submit an offer for the entire portfolio of properties. Instead GPT would be advised that it could approach the ILC with its bottom line offer for the ARR and El Questro Resorts only, if GPT could not sell to another party.

At Board meeting No 124 on 19 January 2009, ILC General Manager David Galvin advised the Board that GPT had come back with a bottom line offer of $270 million for ARR only. The Chair stated that if the ILC was not able to access funding from the Land Account the acquisition would not proceed.[19]

At Board meeting No 125 on 18 February 2009, Mr Galvin advised that due diligence had confirmed a reduction in the ARR's required capex refurbishment costs to $59 million over five years[20] and advised that a paper canvassing an investment by the Land Account into the ILC to facilitate the purchase of the ARR had been provided to the then Prime Minister's Office.[21]

At Board Meeting No 127 on 23 April 2009, the Board was advised that Minister Macklin would not support the use of the Land Account to fund the purchase. A Board paper stated that a key risk was that the ILC would need to borrow $320 million in total to fund the purchase and necessary refurbishments.[22] The Board was advised that discussions with the National Australia Bank (NAB) had indicated the latter was prepared to lend up to $200 million on the condition that legislative amendments were enacted to guarantee the ILC's annual earnings of at least $45 million.[23] The Chair stated that it was unlikely such a provision would be enacted until 2010. Director Driscoll expressed concern that Grant Samuel's cash flow forecasts for ARR are a complete reversal of the past ten years. Director Baffsky noted that Indigenous employment outcomes rather than financial return should be the prime consideration.[24] Director Baffsky suggested that the chairman of the Investment Committee, Mr Ian Ferrier, be asked to work with the General Manager on putting a recommendation to the Board on the best way to

[19] Minutes, ILC Board Meeting No 124, 19 January 2009

[20] Note that this followed a request to forecast 'essential' capex only, where far greater expenditure would clearly be required to support Grant Samuel's optimistic revenue forecasts. In fact, McGrathNicol noted at p34 of their report that Planned Property Management (PPM, the capex due diligence advisers) indicated via email that the requested downward revisions were reaching such a level that [David Wylie of PPM] 'could not put his name to it'. In the four years since acquisition, $59 million capex has already been required. Voyages estimate that by Year Five, total capex expenditure will be $74 million, some $15 million above the Grant Samuel estimates.

[21] Minutes, ILC Board Meeting No 125, 18 February 2009; note that the ILC has not been able to locate a copy of the paper referred to.

[22] Strategic Land Acquisition Proposal—Update, ILC Board Meeting No 127, 23 April 2009

[23] We note that by August 2010, NAB had formed the view that the 'ILC has *imprudently sought to overextend itself* by pursuing this transaction' (Letter from R Jenkins [Grant Samuel] to D Galvin [ILC GM], 5 August 2010).

[24] Director Baffsky similarly expressed such a view at ILC Board Meeting No 23, 16–17 December 2008. This, in itself, raises questions about whether the then Board was acting in compliance with section 191F of the ATSI Act, which requires it to act in accordance with 'sound business principles', as it indicates that commercial viability was not being given the necessary primacy in the Board's decision processes.

proceed to secure the necessary funding. The Board agreed to offer GPT either a payment of $200 million now or a deferred payment of $220 million payable over 18 months. The Board agreed to attempt to acquire ARR on terms and conditions acceptable to the ILC.[25]

At Board meeting No 129 on 26 August 2009, the minutes indicated Director Driscoll again expressed his concern at the ILC's borrowing such a large amount of money. He said he did not support the proposed purchase, as the trend in visitors and revenue had continued to drop over the past few years and he believed the cost of repairs and restoration would be greater than anticipated. The Chair deferred further discussion of the transaction until all Directors were available.[26] For various reasons, discussion continued to be deferred until June 2010.[27]

At Board meeting No 134 on 16 June 2010 (notwithstanding all Directors were not present), the Board agreed to progress negotiations with GPT to purchase ARR subject to finance being secured, legislative change to the ILC's funding being passed, further due diligence being undertaken and acceptable legal documentation.[28] A Board paper[29] prepared by Grant Samuel and circulated to Directors for this meeting, indicated that GPT had advised[30] that, due to the recovery of the economy, GPT's recapitalisation and the introduction of a second airline to Yulara, GPT was no longer willing to sell the resort at a price of $270 million.[31]

The Board paper outlines an alternative vendor-financed proposal based around a purchase price of $300 million split into two phased parts, with the full acquisition to take effect after five years. The ILC would manage the resort, and would retain 100 per cent of profits, but would provide GPT with a fixed return of 6.5 per cent on their equity over the five years, with a minimum uplift payment of $17 million at year 5.[32] With *no recorded discussion of the purchase price* in the minutes of this or subsequent meetings, the Board nevertheless decides to acquire the resort at this price in October 2010.[33]

What is clear from this outcome is that members of the former Board who led the transaction and who voted in its favour did not give appropriate consideration to the justification and implications of the sudden increase of $30 million in the asking price. GPT's Summary Report for

[25] Minutes, ILC Board Meeting No 127, 23 April 2009
[26] Minutes, ILC Board Meeting No 129, 26 August 2009
[27] Minutes, ILC Board Meeting No 130, 28 October 2009; Minutes, ILC Board Meeting No 131, 16 December 2009; Minutes, ILC Board Meeting No 132, 18 February 2010; Minutes, ILC Board Meeting No 133, 15 April 2010
[28] Minutes, ILC Board Meeting No 134, 16 June 2010
[29] Grant Samuel, Project Red Rock—ILC Board Update, June 2010
[30] Note that the ILC has no record of the GPT advice referred to in the Board paper.
[31] We note that this advice is not reflected in the tenor of the correspondence between Mr Cameron (GPT CEO) and Mr Baffsky.
[32] Grant Samuel, Project Red Rock—ILC Board Update, June 2010
[33] Minutes, ILC Board Meeting No 136, 1 October 2010; Minutes, ILC Board Meeting No 134, 16 June 2010; Minutes, ILC Board Meeting No 135, 25 August 2010. Note that the structure of this arrangement as a phased purchase of equity from GPT changed to a pure vendor finance arrangement between June and August 2010.

2009 confirmed that GPT remained keen to dispose of their remaining non-core assets including ARR, while noting that the GPT's strengthened balance sheet enabled them to retain the non-core assets to be sold when market conditions improved.[34] The relevance of a general economic recovery to ARR's circumstances appears arguable. Virgin Blue had agreed to begin flying to Yulara, but it was not clear that this would bring immediate and substantial benefits in terms of increased occupancy and revenue. Moreover, there is no indication that there was an alternative buyer on the horizon[35], and the asset had been on the market for more than three years.

In retrospect, it is clear that the three factors purportedly relied upon by GPT to justify an increased price (the recovery of the economy, GPT's recapitalisation and the introduction of a second airline to Yulara) failed entirely to lead to an improved performance for the resort. This places a substantial question mark over the legitimacy of the rationale presented to the Board for the upward revision in the price. Figure One in Attachment Three indicates that not only had EBITDA for the resort been falling for each of the previous three years, it fell in each of the following three years, clearly not justifying an 11 percent increase in the purchase price.

A number of facts are irrefutable. One, the ILC was not in a position to raise commercial finance to purchase the asset, even at a price of $270 million (and just 14 months previously had offered GPT $220 million). Two, the $30 million increase in the purchase price came simultaneously with GPT's agreement to provide vendor finance to enable the transaction to proceed. Without vendor finance, the ILC would not have been in a position to proceed. With vendor finance, the transaction was feasible, at least for the period until it was required to be refinanced.

Notably, the ILC received clear advice from Horwath HTL in August 2010 that the decline in EBITDA in the first half of 2010 indicated a decline in the resort's value. While McGrathNicol was critical that the Board did not seek an updated valuation on this basis and continued to rely on a valuation that was 17 months old[36], correspondence between Director Baffsky and GPT indicates that Mr Baffsky did at least attempt to negotiate a reduction in price on this basis.[37] GPT's response (which refused to consider lowering the price) clearly states that 'the whole purpose of structuring the deal with, effectively, a large degree of very attractively priced

[34] GPT, Summary Report 2009, <http://www.gpt.com.au/getattachment/938fc32a-d2b3-4f47-812e-0c603a0cf16d/2009-Annual-Review.aspx>

[35] McGrathNicol, ARR Review—Final Report, 18 December 2013, p8

[36] McGrathNicol, ARR Review—Final Report, 18 December 2013, pp63–64. McGrathNicol criticised the Board for continuing to rely on the CBRE valuation and stated that the advice from Horwath made the need for an updated valuation clear as the resort's value would have decreased in light of its declining revenue. Mr Baffsky himself noted in his letter to GPT CEO Michael Cameron dated 11 August 2010, that he 'imagine[d] that if CBRE was to update its valuation [following receipt of Horwath's advice], its conclusions would be different'. Regardless, no updated valuation was sought, and the Board proceeded regardless.

[37] Letter from D Baffsky (ILC Director) to M Cameron (GPT CEO and MD), 11 August 2010

vendor financing was, as we understand it, to enable the ILC to acquire the asset...' .[38] In Director Baffsky's reply to Mr Cameron, dated 8 September 2010, he acquiesces to the increased price, accepting that 'the structure that we might enter into has moved as a result of some of the constraints that we operate under...".[39]

The facts suggest that GPT was effectively provided with a substantial inducement, totalling $30 million, to provide vendor finance to the ILC, and thus facilitate the transaction. Without commercial financing or the ability to draw from the Land Account, this option could never be more than a stop-gap arrangement. It has left the ILC holding a severely impaired asset, and having to allocate substantial internal funds to sustaining the enterprise. The final payment of $138 million to GPT falls due in 2016 (and a $60 million loan from ANZ in 2017). The ILC will likely be forced to refinance this amount at above bank interest rates as the amount of finance required is beyond normal bank loan valuation ratios.

The transactions ultimately approved by the ILC Board could not be justified commercially without vendor finance, and consequently lacked inherent commercial merit. The vendor finance merely operated to defer the day of reckoning (at best gambling on a financial recovery for ARR without appropriate due diligence). It was fundamentally to the commercial detriment of the ILC, saddling it with a substantial debt that will severely diminish its capacity to perform its other functions, potentially for years to come. The arrangement was not based on any specific cost–benefit analysis, and exacerbated the due diligence shortcomings identified in the McGrathNicol report.

This element of the transaction is <u>at best</u> a breach of the legislative requirement that the ILC Board act in accordance with sound business principles[40], as well as a *prima facie* failure to exercise the required due care and diligence by the then Directors, given that no discussion of the increased price is recorded in the minutes.[41] If proven to be a deliberate ploy by those Directors driving the transaction to induce an unnecessary and unjustified extra payment of $30 million by the ILC, the legal consequences would be even more serious.

Despite then Minister Macklin's request to be kept informed, none of these issues were communicated to her until General Manager David Galvin wrote to her on 10 August 2010 (see Attachment Six, below). It is apparent that the then Directors (or at least those driving the transaction) were not prepared to expose the details of their decision making processes to broader scrutiny by the Minister and her Department.

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[38] Letter from M Cameron (GPT CEO and MD) to D Baffsky (ILC Director), 12 August 2010

[39] Letter from D Baffsky (ILC Director) to M Cameron (GPT CEO and MD), 8 September 2010; It is notable that this letter refers to a previous letter from Mr Cameron dated 1 September 2010. The ILC has no record of this document.

[40] ATSI Act s 191F

[41] *Commonwealth Authorities and Companies Act 1997* (Cth) s 22

Wana Ungkunytja

Simultaneously with the sudden increase in purchase price, the Board also inexplicably granted Wana Ungkunytja (WU)[42] a 7 per cent interest in the ARR, and two directorships on the Voyages Board (though only one vote). This interest crystallises upon the repayment of the debt, or at the expiry of ten years, whichever happens sooner. While WU had a right of first refusal in relation to the sale of ARR, the former ILC Board noted at Meeting No 135 on 25 August 2010 that this option held no monetary value and the Board had previously determined that WU was not an appropriate body to which to divest the property.[43] Regardless, the Board resolved to offer WU a 3 per cent interest and one directorship in August 2010.[44] With no recorded explanation to, or discussion by, the Board and in spite of the above considerations, this interest had increased to 7 per cent and two directorships by October 2010.[45] On current valuations and debt levels, this increase is probably worth around $1 million. It may increase considerably once the WU interest crystallises, depending on how the Voyages debt has been dealt with.

Summary

On the evidence currently available, Director Baffsky negotiated on behalf of the ILC an increase in the ARR purchase price of $30 million. This price increase was ultimately approved by the Board. Given the financing challenges facing the transaction, it seems likely that this increase was designed to secure vendor financing from GPT.[46] Without commercial financing or the ability to draw from the Land Account, this option could never be more than a stop-gap arrangement and has left the ILC in difficult financial circumstances. The final payment of $138 million to GPT falls due in 2016 and will likely force the ILC to refinance this amount at significant cost from a commercial lender. As previously noted, this will have significant consequences for the ILC's performance of its statutory functions, potentially for years to come,

[42] WU is the business arm of Nyabgatjatjara Aboriginal Corporation (NAC), a regional Aboriginal social development organisation. NAC's membership comprises the three Aboriginal communities closest to Uluru. WU was granted a first right of refusal over ARR assets in 1997.
[43] Minutes, ILC Board Meeting No 122, 22 October 2008
[44] Minutes, ILC Board Meeting No 135, 25 August 2010
[45] Minutes, ILC Board Meeting No 136, 1 October 2010; it is notable that the ILC entered an agreement with WU in 2008 under which WU was entitled to an eventual 20 per cent equity in ARR. The ILC's view was that this agreement lapsed following the Board's decision not to proceed in December 2008, and it had since been determined that WU's first right of refusal was worthless. Letters between the ILC and WU CEOs, dated 26 August 2010 and 1 September 2010, indicate that some negotiation was entered into with these considerations in mind, though the ILC cannot find a record of the negotiations in which the final agreement was reached, nor the reasons for the ILC's concessions. There is no record of this negotiation ever having been discussed or agreed to by the ILC Board.
[46] Letter, M Cameron (GPT CEO and MD) to D Baffsky (ILC Director), 12 August 2010

and will diminish the ILC's capacity to provide benefits to Indigenous interests across the country.[47]

This decision was made in spite of warnings from some Directors[48] and due diligence advisers that the purchase price may already have been too high. Given the highly detrimental and uncommercial nature of the arrangement for the ILC, this element of the transaction (if proven to be true) is at best a breach of the legislative requirement that the ILC Board operate in accordance with sound business principles and the Directors' duties under the CAC Act[49], and at worst a deliberate and potentially illegal ploy to induce an unnecessary and unjustified extra payment of $30 million by the Commonwealth. For this reason, a thorough independent investigation is necessary to determine the true motivations behind this decision.

[47] Notably Directors Trust and Gorringe expressed concern that other ILC projects would suffer (Minutes, ILC Board Meeting No 123, 16–17 December 2008; and Minutes, ILC Board Meeting 127, 23 April 2009)

[48] For example, Director Driscoll continuously raised concerns, including that the initial $282 million purchase price was too high and that capex projections were underestimated (Minutes, ILC Board Meeting 123, 16–17 December 2008); that he did not believe that the resort would be a commercial success (Minutes, ILC Board Meeting 124, 19 January 2009); that he questioned the validity of the cashflow projections as they were a complete reversal of the figures over the past 10 years (Minutes, ILC Board Meeting 127, 23 April 2009); that the ILC should not borrow such a large amount of money given the downward visitation trend, and that the cost of repairs would be greater than anticipated (Minutes, ILC Board Meeting 129, 26 August 2009). Directors Trust and Gorringe expressed concern that other ILC projects would suffer (Minutes, ILC Board Meeting 123, 16–17 December 2008; and Minutes, ILC Board Meeting 127, 23 April 2009). The Indigenous Directors expressed a belief that attracting Indigenous people Australia-wide to training and employment at ARR might be more difficult than predicted (Minutes, ILC Board Meeting 123, 16–17 December 2008); and Director Trust again raised this concern at Meeting 127 on 23 April 2009

[49] ATSI Act s 191F; CAC Act s 22

ATTACHMENT THREE

Unjustified restrictions in Grant Samuel terms of engagement: a potential breach of sections 22–25 of the *Commonwealth Authorities and Companies Act 1997* and section 191F of the *Aboriginal and Torres Strait Islander Act 2005*

Overview

The terms under which Grant Samuel was engaged to lead the due diligence for the Ayers Rock Resort (ARR) transaction were fundamentally disadvantageous to the ILC, arguably creating an incentive for Grant Samuel to act otherwise than in the ILC's best interests.[50]

Under the agreement, the ILC paid Grant Samuel a retainer fee of $70,000 per month, increasing to 1 per cent of the sale price should the transaction go ahead.[51] As noted by McGrathNicol, this creates no incentive for Grant Samuel to seek the lowest possible transaction price, nor to advise the ILC against proceeding with the transaction.[52]

In addition, the agreement contains restrictive terms in relation to potential legal proceedings that are profoundly disadvantageous to the ILC, and effectively shield Grant Samuel from the consequences of any deficient or improper performance. This is new information not identified by McGrathNicol. The negotiation and approval of these terms of engagement by Director Baffsky and General Manager Galvin, and their engagement by the Board, comprise potential breaches of both the CAC Act and the ATSI Act.

While the ILC is not bound by the Commonwealth Procurement Guidelines, the ILC's Procurement Policy strongly reflects these. The ILC Procurement Policy, though established and standard practice, was not followed in this instance.

Restrictive terms of Grant Samuel's engagement

Grant Samuel was the lead due diligence adviser to the ILC in relation to the acquisition of ARR and associated assets. These services were provided pursuant to a proposal dated 20 October 2008, approved (in principle) by the ILC Board on 22 October 2008 and signed by the ILC General Manager, David Galvin, on 28 October 2008.

The highly restrictive terms of the engagement, described below, have the effect of preventing the ILC from pursuing Grant Samuel to recover any losses in excess of Grant Samuel's fees.[53] The effect of such restrictions is particularly significant in light of the financial disadvantage actually

[50] McGrathNicol, ARR Review—Final Report, 18 December 2013, p9
[51] Letter from Ross Grant (Grant Samuel) to ILC Directors, 'Acquisition of Voyages Hotels and Resorts', 20 October 2008, cl 3 ('GS Letter of Engagement')
[52] McGrathNicol, ARR Review—Final Report, 18 December 2013, p9
[53] GS Letter of Engagement cl 4

suffered by the ILC (estimated at up to $150 million) as a result of the inflated purchase price paid and the level of debt incurred.

The terms of Grant Samuel's engagement are such that they allow the ILC only extremely limited recourse for any flaws in the services provided. These terms appear deliberately designed to deter the ILC from seeking recompense for poor contractual performance, and at the same time force the ILC to take steps to prevent others from pursuing or acting in any way that would impact Grant Samuel, for example by initiating proceedings or an inquiry into the transaction. This was achieved through the imposition of a number of draconian and highly unusual contractual provisions, namely that:

1. The ILC must pay Grant Samuel $750 per hour plus any out of pocket expenses on a full indemnity basis for any work that Grant Samuel does in answering any legal claim or any other form of inquiry in any way associated with the services provided under the proposal, including, but not limited to, a legal claim by the ILC. The ILC can recoup this money only if a court finally determines that Grant Samuel committed gross negligence or wilful misconduct.[54]
2. Unless a court holds, with all rights of appeal exhausted, that the costs were caused by Grant Samuel's gross negligence or wilful misconduct, the ILC :
   i. Indemnifies Grant Samuel for any costs, including an award of damages and/or legal costs, in any way associated with Grant Samuel's services under the proposal;[55] and
   ii. Limits the quantum of potential damages payable by Grant Samuel to the quantum of fees paid under the proposal (and not the quantum of the damages suffered by the ILC).[56] Note that the fees paid to Grant Samuel by the ILC were in the order of $6 million, while the financial disadvantage suffered by the ILC is estimated to be up to $150 million.

In the event of a dispute, the ILC has to overcome a very high legal threshold to recover any damages or costs incurred in indemnifying Grant Samuel. Ordinary negligence involves a breach of a legally imposed duty of care, but to prove gross negligence or wilful misconduct the ILC would likely have to prove that Grant Samuel failed to exercise any care, showed reckless disregard for an obvious risk, or acted in a way that it knew was wrong but it intentionally persisted in that act or persisted with disregard to its likely consequences.[57]

[54] GS Letter of Engagement cl 4(i)
[55] GS Letter of Engagement cl 4(ii)
[56] GS Letter of Engagement cl 4(iii)
[57] *Red Sea Tankers Ltd and Others v Papchristidis* [1997] 2 Lloyds Rep 547 at 584–5; *James Thane Pty Ltd v Conrad International Hotels Corp; Conrad International Hotels Corp v Workers' Compensation Board; Conrad International Hotels Corp v Jupiters Ltd* [1999] QCA 516; *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190; *Boral Resources (Qld) Pty Ltd v Pyke* [1992] 2 Qd R 25

In practical corporate terms this makes a commercially sensible claim against Grant Samuel for any deficiencies—which the ILC Board believes are numerous—in their advice or services almost impossible, even if the ILC were able to prove that Grant Samuel breached the terms of the proposal or was negligent in the provision of its services.

Role of the then ILC Board and General Manager

It is clear from the documentary record available to the ILC that:

1. the then Board did not properly consider or even make any attempts to properly or reasonably inform itself of the content of Grant Samuel's proposal;[58] and
2. the terms of engagement were not subjected to the usual and established ILC Procurement Policy and internal quality assurance processes normally applied by the ILC to commercial proposals.[59]

As a consequence, the ILC Board accepted a proposal that does not comply with the statutory requirement to operate on 'sound business principles'[60], and that was likely not in the 'best interests' of the ILC.[61]

The ILC Board's agreement to Grant Samuel's proposal represented a significant departure from the ILC's established contract review and approval procedure[62], and resulted in the ILC's agreeing to very onerous terms without any recorded legal or financial due diligence. The review process is standard practice whenever the ILC signs contracts, even where the contract has been approved in principle by the ILC's Board.[63]

In the ILC's records the first mention of this proposal is in the minutes to the ILC's Board meeting on 22 October 2008. In that meeting, Director Baffsky spoke to the Board about the proposed fee structure only, and appears not to have made any mention of the other restrictive terms. The minutes include statements from Director Baffsky that Grant Samuel had proposed a fee of $70,000 per month with a completion fee of 1.5 per cent of the total consideration payable, and that he had negotiated a reduction in the completion fee to 1 per cent of

[58] Minutes, ILC Board Meeting No 122, 22 October 2008
[59] See McGrathNicol, ARR Review—Final Report, 18 December 2013, pp57–59; Minutes, ILC Board Meeting No 122, 22 October 2008
[60] ATSI Act s 191F(1)
[61] CAC Act s 23
[62] See McGrathNicol, ARR Review - Final Report, 18 December 2013, pp 57-59
[63] As documented in the ILC *Contracts Practice Note*, the process involves an ILC staff member with appropriate delegate authority requesting the contract before a senior administrative officer sets up all necessary budgets and job identifications. The contract is then reviewed by an ILC lawyer who provides advice on the terms including any indemnities and/or limitation of liability clauses. Once the legal aspects are settled the contract is reviewed by an accountant for tax and financial issues. Only after this process is complete will an ILC lawyer recommend the contract for execution.

consideration payable.[64] There are no documentary records available to the ILC to establish the truth or otherwise of Director Baffsky's assertions. The ILC has no other records of any negotiation between the ILC and Grant Samuel regarding the content of the proposal, and the ILC has no records that it considered any alternative service providers.[65]

It seems that, based on Director Baffsky's explanation alone, the ILC Board resolved to authorise General Manager Galvin to sign the proposal. There is no record of the proposal or even a summary briefing being tabled at the ILC Board meeting, as would be normal practice—even more so given the significant expenditure to be incurred.[66]

By resolving to accept Grant Samuel's proposal without properly considering its content or an alternative service provider, ILC Board members may have breached their individual directors' duties to exercise their powers and discharge their duties with the care and diligence expected of a reasonable person in their position.[67] The Directors may not be able to rely on the business judgment rule[68] in this matter because they appear to have failed to inform themselves about the subject matter of their decision to an appropriate extent.[69]

In the event that Director Baffsky and General Manager Galvin were aware of the specific terms of the proposed engagement between Grant Samuel and the ILC (as it seems they were), and failed to inform the Board of the onerous and disadvantageous terms proposed (as it seems they did), then they clearly would bear a much greater share of responsibility for the ultimate outcome. Moreover, if that omission was intentional, then it raises serious concerns about their conduct, and perhaps more importantly, their motivations.

Following the ILC Board's resolution on 22 October 2008, Mr Galvin requested a signed copy of the proposal from Ms Jacoline Bekker of Grant Samuel on 27 October 2008. Ms Bekker provided a signed proposal to Mr Galvin on 28 October 2008. It was addressed to the Directors of the ILC, marked 'Attention Mr David Baffsky AO', and dated 20 October 2008. Within three hours of the receipt of the proposal from Grant Samuel via email on 28 October 2008, Mr Galvin signed and thus executed the contract.

The ILC has no record of its receipt in the ILC Adelaide Office in the days after 20 October 2008, and has no record of any prior correspondence between ILC Directors or staff and Grant Samuel regarding the content of the proposal. Further, our records do not indicate that the contract

[64] Minutes, ILC Board Meeting No 122, 22 October 2008, p 3
[65] McGrathNicol, ARR Review—Final Report, 18 December 2013, p 58
[66] Minutes, ILC Board Meeting No 122, 22 October 2008
[67] CAC Act s 22
[68] CAC Act s 22(2)
[69] If this were found to be the case, these Directors could potentially be ordered to pay damages to the ILC (CAC Act Sch 2 cl 4)

was ever made available to the Board before its execution. The absence of the usual legal and financial review was specifically raised with Mr Galvin by email dated 25 November 2008 by an officer responsible for arranging payment of Grant Samuel's invoices. Mr Galvin approved the payment.[70]

Adequacy of Grant Samuel's performance

While not the central point of this analysis, it needs to be stated that there are *prima facie* indications that the Grant Samuel due diligence, and particularly its revenue forecasts, were deficient, making a potential action for breach of contract or negligence more than hypothetical. McGrathNicol concluded that the Board's decision to proceed with the transaction based on 'overly optimistic' financial forecasts and valuations which were 17 months out of date was 'unsatisfactory' in addressing the known risk[71] that the ARR purchase price was not commensurate with the asset's value.[72] Despite this and other concerns, Grant Samuel recommended that the Board purchase ARR in their presentation to the ILC Board on 1 October 2010.

Set out below is a table comparing the Grant Samuel forecasts against both past performance of the ARR and actual EBITDA since acquisition. The table demonstrates that Grant Samuel forecast a sustained upturn in EBITDA, whereas the resort had undergone a period of prolonged and steady downturn in EBITDA.[73] No persuasive reason was offered by Grant Samuel for the dramatic change in performance which they forecast, and McGrathNicol concluded that the forecast was 'ambitious' and 'overly optimistic'.[74] The table also shows that since acquisition, on an accumulated basis, EBITDA has been $87 million less than Grant Samuel forecast. Both data sets suggest *prima facie* that Grant Samuel's due diligence was seriously deficient. Other high-level advice was provided to the ILC Board, particularly by both Horwath HTL and senior ILC staff[75], that warned the Board of the risks were they to proceed.[76] That advice appears to have been largely ignored by both Grant Samuel and the Board.[77]

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[70] Email from Hanne Damgaard (ILC) to D Galvin (ILC GM), 25 November 2008

[71] Horwath HTL Due Diligence Report, 10 August 2010, 'Key Issue 1'

[72] McGrathNicol Report, 18 December 2013, p50; and see also pp7, 22, 26, 29, 32, 36, 52, 64

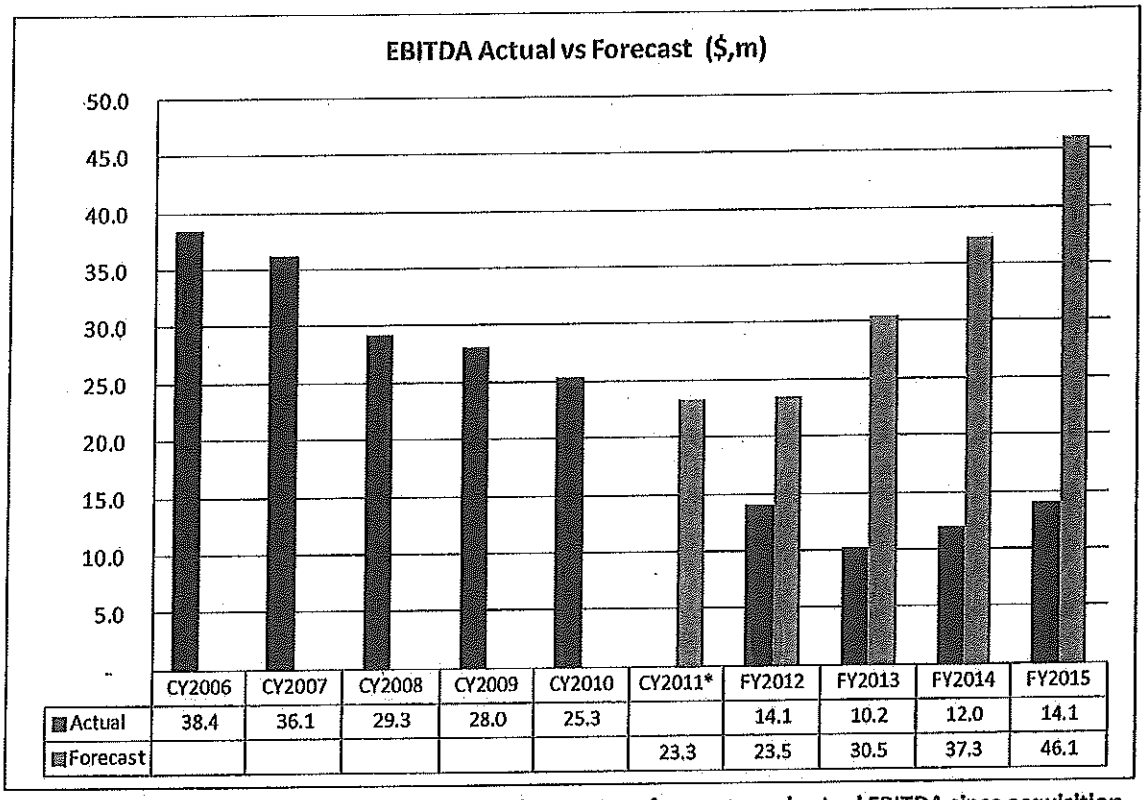
[73] We note that Director Driscoll had raised exactly these concerns on a number of occasions during the Board's early consideration of the transaction; see Minutes of ILC Board Meeting Nos 123, 124 and 127

[74] McGrathNicol Report, 18 December 2013, pp7, 30, 32

[75] The Board paper for Meeting 126, 15 April 2009, by D Galvin and J Lindsay identified the following:
'Key Risks

- The need for the ILC to borrow up to $320 million
- The restrictions on borrowings by the ILC
- The need to expend an estimated $71.3 million on capital expenditure for infrastructure/repairs of the resort asset
- The ongoing impact on inbound visitors to Australia and tourism as a result of the global financial crisis
- The size and complexity of the management of the asset and operations of ARR'

In section 5 of the paper it reproduced a table of risks that were provided as far back as the December 2008 meeting.



	CY2006	CY2007	CY2008	CY2009	CY2010	CY2011*	FY2012	FY2013	FY2014	FY2015
Actual	38.4	36.1	29.3	28.0	25.3		14.1	10.2	12.0	14.1
Forecast						23.3	23.5	30.5	37.3	46.1

Fig 1. Comparison of Grant Samuel's forecasts against past performance and actual EBITDA since acquisition

Summary

The above-mentioned factors, including:

- Director Baffsky's unrecorded negotiations with Grant Samuel;
- Director Baffsky's and Mr Galvin's apparent failure to inform the Board of the engagement's restrictive terms;
- the failure to follow the ILC's standard competitive procurement and contract review procedures; and
- the Board's approval of a significant contract (worth millions of dollars) apparently sight unseen and on Director Baffsky's word alone;

when viewed in the context of an agreement that puts Grant Samuel's interests at odds with the ILC's and prevents the ILC from seeking redress for deficient performance, raise the worrying

[76] Horwath HTL Ayers Rock Resort Due Diligence Report, August 2010

[77] Note that Director Baffsky noted the Horwath concerns in his 11 August 2010 letter to M Cameron of GPT, and noted that, were the CBRE valuation to be updated in light of this, 'its conclusions would be different'. Despite Director Baffsky's advertence to this issue, no updated valuation was sought by the ILC Board or Grant Samuel, and the transaction proceeded at a price of $300 million. The McGrathNicol report concluded that, had an updated review been sought, the resort's value would have been in the order of $250 million (McGrathNicol Report, 18 December 2013, p26).

possibility that there was in place either a tacit or an explicit arrangement or understanding for Grant Samuel to inflate its forecasts to ensure that the transaction would go ahead.

Such a hypothesis would explain why Director Baffsky—a person with high level commercial skills and acumen—would propose, and why the ILC Board, without questioning, approved an agreement that incentivised Grant Samuel to encourage the transaction to proceed, regardless of risk and at the highest possible price, while shielding Grant Samuel from incurring any liability as a result of its actions.

The possible motivations for such behaviour remain unclear. However, if it occurred (and the facts outlined above are consistent with such an interpretation), then it would have amounted to at least a failure by the former Directors to exercise reasonable care and diligence under sections 22 to 25 of the CAC Act, as they failed to inform themselves of the content of the agreement despite knowing that the fees payable under the contract would be substantial. It also represents a clear failure to act in accordance with 'sound business principles'[78], and in the best interests of the ILC.[79]

More significantly, such behaviour would represent a serious breach of Director Baffsky's director's duties and Mr Galvin's duties as ILC General Manager, as Director Baffsky and Mr Galvin were directly involved in negotiating and executing the arrangement, and appear not to have informed the other Directors of its content.

The issues raised here are new information and, given the significance of the concerns raised and the seriousness of the potential consequences, justify on their own the need for a thorough and independent investigation into the whole transaction.

[78] ATSI Act s 191F
[79] CAC Act s 23(1)

ATTACHMENT FOUR

Funding the acquisition of ARR: a plan to access the Land Account in breach of sections 23, 24 and 25 of the *Commonwealth Authorities and Companies Act 1997*

Overview

When the current ILC Board began a careful review of the Ayers Rock Resort (ARR) acquisition it discovered a number of deficiencies in the associated due diligence and in the way the transaction was conducted. When these issues were raised by the Board, Directors Baffsky and Jeffries were extremely antagonistic to any oversight of the transaction, and to any internal changes within the ILC that would facilitate greater transparency over what occurred. Simultaneously, Senator Scullion adopted a highly adversarial approach to the ILC involving targeted personal criticism of Board members and staff in the Parliament.

If the ILC Board, in full knowledge of the high financial risks that the acquisition presented, decided to acquire the ARR with the belief and intention that the Land Account could be used to fund any resultant financial problems and approached the then Opposition Shadow Minister for Indigenous Affairs, Senator Scullion, seeking a commitment to facilitate such a draw down in the event of a change of government in 2010, then it could be concluded that the previous ILC Board did not act in the best interests of the ILC or for a proper purpose. This would potentially amount to a breach of sections 23, 24 and 25 of the CAC Act.

Only an independent review of the matter can conclusively determine whether such an approach to Senator Scullion occurred, and, if so, whether there has been a breach of the CAC Act.

Risks associated with the ARR acquisition and a plan to use the Land Account to fund the acquisition

The previous ILC Board's acquisition of the ARR has created long-term financial difficulties for the ILC. The final payment of $138 million to GPT falls due in 2016 and will force the ILC to refinance this amount, plus a $60 million loan from ANZ which falls due in 2017, at significant cost from a commercial lender. This will have consequences for the ILC's performance of its statutory functions for years to come and will significantly diminish the ILC's capacity to deliver Indigenous benefits across the country. In the absence of a sustained improvement in ARR revenue, servicingthe associated debt and principal potentially reduces the available funds for the ILC's core functions by over 40 per cent each year, as its current credit risk exposure is to repay $23 million per year out of a total annual budget of only $50 million. Unless the resort's financial performance improves dramatically over a sustained period, this situation is likely to continue for a considerable period into the future.

These financial challenges are all the more concerning considering the way the previous ILC Board went about the acquisition, including:

- the determination of former ILC Directors to push ahead with the ARR transaction notwithstanding due diligence advice that outlined a wide array of fundamental risks;[80]
- the decision to complete the transaction despite advice that the commercial risks potentially outweighed the benefits;[81]
- the largely undocumented negotiations with GPT and Wana Ungkunytja;
- the highly unusual terms of engagement of the ILC's due diligence advisers Grant Samuel which protect Grant Samuel from any adverse consequences of their actions;[82]
- the adoption of short-term vendor finance without a clear guarantee that its refinancing after five years could be achieved on a sound commercial basis;
- ignoring sustained and ultimately accurate warnings by Director Driscoll regarding the consequences of proceeding;[83]
- the failure to keep the then Minister for Indigenous Affairs fully apprised of significant events;[84] and
- the indifference to the warnings and concerns expressed by the then Minister for Finance and the then Minister for Indigenous Affairs along with the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, Dr Jeff Harmer, in the period immediately before the decision to acquire.[85]

The significant risks inherent in the transaction were acknowledged by the former ILC Board in a letter to then Minister for Finance, Penny Wong, dated 5 November 2010. The letter attached a 'Contingency Plan', which conceded:

> 'The ILC is acutely aware that the performance at ARR has deteriorated over a ten-year period. This has been due to the following:
>
> - Occupancy has fallen from 81 per cent in 2000 to 51 per cent in 2009
> - Qantas airfares have been high, if not prohibitive, since competition was eliminated with the collapse of Ansett in 2001
> - Airline capacity into ARR is fundamental to visitation and this has declined substantially over recent years
> - ARR has had limited access to capital and, consequently, facilities have become tired and require refurbishment—new facilities are required
> - The visitor experience is limited—there is little exposure to Indigenous culture and activities

[80] See for example: Horwath HTL Ayers Rock Resort Due Diligence Report August 2010.
[81] See Attachment Two.
[82] For further information see Attachment Three.
[83] See for example Minutes, ILC Board Meeting No 122, 22 October 2008; Minutes, ILC Board Meeting No 124, 19 January 2009.
[84] See Attachment Six.
[85] See Attachment Six.

- Average stay at the resort is only 1.8 days
- ARR has been on the market for two years
- Tourism activities were not core business for the owner'

In the face of such admissions, the former Board's 'contingency plan' was inadequate and ineffective. The three options presented to the then Minister for Finance were to:

1. Renegotiate external finance amounts at the end of Year 5. This failed to acknowledge that the loan-to-valuation ratio would be well outside commercial banking standards.
2. Renegotiate the final payment terms with the vendor to try to avoid having the vendor call upon the security.
3. Sell the airport, despite the fact that this was recognised as the most critical and integral asset underwriting the resort's viability.
4. Sell the resort, despite the knowledge that in the two years that GPT had the property on the market, there were no other interested purchasers.[86]

As noted above, the decision to proceed with the ARR transaction using the vendor finance arrangement has left the ILC severely financially exposed. The ATSI Act limits the amount of borrowings and guarantees that may be entered into by the ILC. As at June 2010, this limit was $300,936,439. In the absence of established and standard terms and conditions for borrowings or specific restrictions on the types of borrowings that can be obtained by the ILC under the ATSI Act, it would have been prudent for the then ILC Board to ensure it was protected from credit risk exposure by introducing a maximum limit on the loan-to-value ratio and types of borrowings. The credit risk exposure created by the ARR transaction should have been considered by the ILC's Audit and Risk Management Committee; however, there is no evidence of adequate oversight by this committee. This may be attributable to the clear conflict of interest created by Director Baffsky's chairmanship of this committee, and his self-assumed role as the key driver and negotiator of the transaction.

It is readily apparent from these circumstances that the previous ILC Board appears to have disregarded the high risks associated with the ARR acquisition and in effect adopted a 'proceed at any cost' approach to the transaction. Director Baffsky is on record noting the challenges facing the transaction. In a letter to the GPT CEO, he stated, *inter alia*:

> *Since signing the Heads of Agreement, the ILC and its consultants have largely completed the due diligence update with only one major issue arising. This very fundamental issue results from the further deterioration in operating performance, which I am sure you will appreciate leads us to conclude that the magnitude of the consideration agreed cannot be justified based on that performance.*

[86] Letter, S McPherson (ILC Chair) to Minister for Finance Penny Wong, 5 November 2010, Attachment B: *Key Performance Drivers and Contigency Plan Purchase of Ayers Rock Resort (ARR)*

...This view has been forcefully presented in a report by Horwath, which we cannot ignore. Consequently, the ILC is forced with two choices—to withdraw or put forward an alternative proposal.

In our previous analysis we had been working off the Voyages 2009 actual EBITDA of $28 million and 2010 budget EBITDA of $26.6 million. In fact, at the time of the original board approval in early 2009, our analysis was on the basis of an ARR EBITDA of $30.1 million. Clearly these are very different earnings figures than the current figures. Nevertheless, when we focus on current year's earnings of $22.9 million, it is evident that the terms set out in the Heads of Agreement would not now be accepted by the ILC board.

... I should also mention that the CBRE valuation of ARR for the NAB dated May 2009 showed a value of $270 million with the CBRE financial analysis showing EBITDA in 2010 of $28.1 million. I imagine if CBRE was to update its valuation, its conclusions would be different.

The following day, GPT rejected Mr Baffsky's approach for a price of around $270 million (even though he admits a valuation would have taken the value lower), and insisted on a price of $300 million (plus an uplift factor of $17 million).

Yet, instead of withdrawing, the ILC went forward, agreeing to the higher price.[87]

The idea of drawing down funds from the Land Account was first put to both then Prime Minister Rudd and Minister Macklin by the previous ILC Board.[88] Significantly, the proposal was rejected on the basis that:

- 'the purchase would not meet the criteria for an investment of the Land Account under the *Financial Management and Accountability Act 1999* (Cth);
- the purchase was a high risk/low return investment with added concerns around the complexity of the transaction, management risks and the downturn in the economy;
- financial information available provided that, relative to ILC's net assets, its borrowing capacity under the ATSI Act was unlikely to be equal to or more than the amount required to fund the proposal; and,
- the size of the investment and high level of risk and financial exposure it would create for the ILC.'[89]

[87] Refer Attachment Two.
[88] Minutes, ILC Board Meeting No 125, 18 February 2009; Letter from Dr Jeff Harmer, Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, 30 March 2009.
[89] Letter from Dr Jeff Harmer (FaHCSIA Secretary) to S McPherson (ILC Chair), 30 March 2009.

After Minister Macklin rejected the idea of using the Land Account to acquire the resort, the ILC sought finance from third-party commercial sources. One such funder was the NAB, which expressed a view that the ILC 'had imprudently sought to overextend itself' and did not understand the implications of the acquisition.[90] This is indicative of the extremely high risk the acquisition presented. In response to NAB's position, Grant Samuel advised that it was inconceivable that the ILC could actually default on a loan considering the Land Account represented $1.6 billion.[91]

It is apparent from the circumstances set out above that, despite the obvious risks involved in the ARR acquisition, the then ILC Board completed the acquisition in a belief that any resulting financial difficulties could ultimately be covered by a draw down from the Land Account. This belief apparently persisted even after then Minister Macklin had refused to allow a draw down of the Land Account to fund the acquisition.

In these circumstances it seems unlikely that Senator Scullion, who was then Shadow Minister for Indigenous Affairs, and Senator for the Northern Territory, was not approached by key ILC Directors and staff involved in the transaction seeking a draw down from the Land Account to retire the outstanding debt in the event there was a change of government following the 2010 general election.

The prospect of a legislative and ultimately political fix to the financing challenges involved in the transaction explains much of what has transpired including the secrecy and timing of the purchase (virtually simultaneously with the 2010 election[92]) and the then ILC Board's pursuit at any cost of the acquisition in full knowledge that it posed an extraordinarily high risk to the ILC's financial position.

If it is established that Senator Scullion was approached by members of the previous ILC Board to draw down funds from the Land Account were he to become Minister, the legal and political ramifications are serious and may also explain his intransigent refusal to consider an investigation. The existence of such an approach may explain the adversarial approach that Senator Scullion appears to have shown towards the current ILC Directors who have attempted to shed light on the true nature of the ARR acquisition. Moreover, he promulgated the development of a policy framework aimed at amalgamating the ILC with Indigenous Business Australia.[93] A merger of the two organisations would have expedited the turnover of the current

[90] Letter from R Jenkins (Grant Samuel) to D Galvin (ILC GM), 5 August 2010
[91] Letter from R Jenkins (Grant Samuel) to D Galvin (ILC General Manager), 5 August 2009
[92] Refer Attachments 5 and 6
[93] See for example 15 February 2013, Senate Estimates: Community Affairs–Cross Portfolio Indigenous Affairs (Hansard); 16 April 2013, *Australian* (Patricia Karvelas), 'Liberals signal revamp of Indigenous land agencies'; 7 June 2013, Senate Estimates: Community Affairs–Cross Portfolio Indigenous Affairs (Hansard); 24 June 2013, Senator Scullion speech to the Senate (Adjournment) (Hansard).

ILC Board and the legislative change would have provided the opportunity to revise the provisions governing the use of the Land Account, perhaps allowing it to be used to repay the ILC's debt for the ARR acquisition.

The ILC Board wrote to the Prime Minister on 2 March 2015 and raised a concern that Minister Scullion may have had links to the previous Directors and been privy to elements of the transaction, and recommended that the Prime Minister obtain an assurance this was not the case. We have had no response to date to this correspondence.

In the absence of any assurance that this is not the case, the current ILC Board considers that the possibility of an approach to Senator Scullion to draw down the Land Account requires investigation. If confirmed, it would suggest that the former ILC Directors were acting otherwise than in the best interests of the ILC and sought to commit Land Account funds to serve interests outside those for which it was established. If this is so, it would indicate *prima facie* breaches by the former Directors of their duties under CAC Act sections 23, 24 and 25.

Summary

The previous ILC Board was aware of the high financial risk associated with the ARR acquisition. They sought to raise commercial finance, and failed. They sought a drawdown from the Land Account, and were refused. Ultimately they funded the transaction at an excessive price through vendor finance. This was inherently a stop-gap solution.

In these circumstances, the question arises whether the former Directors approached Senator Scullion seeking his agreement to draw down funds from the Land Account in the event there was a change of government in 2010.

If the former ILC Board pursued the acquisition of ARR with the intention that any financial problems associated with the acquisition could be solved through a draw down from the Land Account, and with the knowledge of the significant financial risks that the acquisition presented, then the former ILC Board did not act in the best interest of the ILC or for a proper purpose. This would potentially comprise a breach of sections 23, 24 and 25 of the CAC Act.

The possibility of such an approach by the former Directors may explain Senator Scullion's reluctance to support an independent inquiry into the matter.

An independent inquiry should be conducted to establish whether the former Board (or some Directors and officers) approached Senator Scullion to fund the ARR acquisition from the Land Account and whether this amounts to a breach of sections 23, 24 and 25 of the CAC Act.

ATTACHMENT FIVE

Undeclared material personal interest: a potential breach of sections 27F and 27J of the *Commonwealth Authorities and Companies Act 1997*

Overview

The relationships that existed between Director Baffsky and various entities associated with the ARR vendors, GPT and the Government of Singapore Investment Corporation, raise a possibility that Director Baffsky had additional undisclosed conflicts of interest[94] regarding the ILC's acquisition of the ARR. Without an independent inquiry into the matter, it is difficult to assess the depth of these relationships and whether they amount to a material personal interest.

Possible material personal interests of Director Baffsky in the ARR acquisition

At all times during the negotiation and completion of the ARR transaction, the Directors of the ILC, including Director Baffsky, had duties under the CAC Act. Section 27F of the CAC Act requires that '[a] director of a Commonwealth authority who has a material personal interest in a matter that relates to the affairs of the authority must give the other directors notice of the interest...'. Further, section 27J of the CAC Act provides that a director who has a material personal interest in a matter that is being considered in a directors' meeting must not be present for consideration of the matter or vote on the matter.

It was incumbent on Director Baffsky to be aware of these obligations and to consider carefully whether his relationships with anyone directly or indirectly associated with GPT could appear to influence Director Baffsky's decisions on the matter and amount to a material personal interest.

Director Baffsky was aware of these obligations, as is apparent by his declaration of an interest related to his past role as Chairman of Accor Asia Pacific from 1993 to 2008 and then Honorary Chairman of Accor Asia Pacific from 2008 to the present. Accor continues to play an important and very effective partnership role in the management of ARR. Further, Director Baffsky also declared an interest in relation to the ILC Board's discussions (subsequent to the purchase of the ARR) relating to a company involving then ILC Director Jeffries and established with the assistance of Ariadne Australia Limited, a company for which Mr Baffsky is chairman.[95]

In contrast to his declaration in relation these material personal interests, Director Baffsky failed to declare any material personal interest on the ILC's acquisition of ARR from GPT. However, the McGrathNicol report into the matter uncovered what it classified as a 'remote' connection. The

[94] Additional to the potential conflict found by McGrathNicol in the review of the ARR transaction. See below.
[95] Ariadne Australia Limited, *Annual Report 2009*, p4; Ariadne Australia website, 'Board of Directors', http://www.ariadne.com.au/board-of-directors/

Singapore Government is the largest shareholder in GPT, holding some 11 per cent of the shares through GIC Private Limited which is wholly owned by the Singapore Government. Mr Baffsky is a board member on SATS, a Singapore-listed company which is 43 per cent owned by Temasek Holdings. Temasek Holdings is itself wholly owned by the Singapore Government.

Mr Baffsky, in documents tabled to the Senate, alleged that the current ILC CEO, Mr Michael Dillon, had sought to mislead the committee in relation to Mr Baffsky's personal interests and commented as follows:

> *The McGrathNicol Report concluded that it 'has no further knowledge regarding the connection, and therefore cannot conclude whether or not it represents a conflict of interest. However, the connection appears to be "remote".'*
>
> *Mr Dillon has misrepresented McGrathNicol's findings on this issue and has sought to mislead your Committee.*
>
> *The Committee might also wish to note that McGrathNicol also considered my role as Honorary Chairman of Accor Asia Pacific, which was awarded the hotel services contract for the ARR by Voyages after a competitive process. It found that I properly declared my conflict of interest and took no part in considerations and decisions by the Voyages Board about the hotel services contract.*
>
> *It is curious that Mr Dillon ignores McGrathNicol's findings about the propriety with which I have managed an immediate conflict of interest, but seeks to infer that I may have behaved improperly in relation to a connection considered to be remote. So remote in fact that I myself did not know about it.*[96]

Mr Baffsky's connections to GPT and associated entities appear to be more complex than the above statement suggests, and less remote than McGrathNicol were able to ascertain in their review of the transaction. In particular, two other potential material personal interests exist between Mr Baffsky and GPT and associated entities.

First, GPT's board includes Mr Lim Swe Guan as a director acting as a private nominee of GIC Private Limited. From 1 February 2004 to 23 October 2012 Mr Guan was a director of the Australian-listed company Thakral Holdings Limited, which has now changed its name to Wynyard Properties Holdings Limited.

[96] Letter from D Baffsky (former ILC Director) to Senator Z Seselja, 5 March 2015

In July 2009, Ariadne Australia Limited, chaired by Mr Baffsky, made a loan of $9.1 million on commercial terms, which was secured over a strategic parcel of shares in the Singapore-listed entity Thakral Corporation Limited. According to Ariadne Australia Limited's 2010 Directors Report this transaction 'represented an investment of a material portion of Ariadne's shareholders funds'.

Thakral Holdings' 2010 Annual Report indicates that Thakral Investments Pty Ltd and Associates own 42 per cent of Thakral Holdings, and the Government of Singapore Investment Corporation owns 13.9 percent.[97] In 1996 Thakral Corporation Limited and Thakral Holdings Limited each took a 50 per cent interest in two Australian hotels through a jointly controlled trust.

The 2010 KPMG Audit Report for Thakral Holdings noted that Thakral Holdings Group 'does not comply with ASX Recommendation 2.1 which recommends that the Board have a majority of independent directors. Messrs Kartar Singh Thakral, Rikhipal Singh Thakral and Inderbethal Singh Thakral are assessed as non-independent as a result of being associated with various Thakral family and other related entities which together are substantial security holders. Also Mr Lim Swe Guan was until 18 February 2011 a senior executive of the Government of Singapore Investment Corporation Pty Ltd, which is also a substantial security holder'.[98]

Each of the three current executive directors of Thakral Corporation Limited—Mr Kartar Singh Thakral, Mr Jaginder Singh Pasricha and Mr Inderbethal Singh Thakral—have been or were directors of Thakral Holdings Limited. Mr Kartar Singh Thakral is chairman of both corporations. Mr Kartar Singh Thakral and Mr Inderbethel Singh Thakral are also current directors of Thakral Investments Pty Ltd.

Moreover, since 1999, there has been an established relationship between Accor Asia Pacific (through the period when Mr Baffsky was Chairman) and Thakral Holdings Limited, as Accor managed a significant proportion of Thakral Holdings' hotel assets.[99]

This means that, when the ILC acquired ARR, a director of GPT was also a director of Thakral Holdings Limited, which held assets through a jointly controlled trust with Thakral Corporation Limited (a 'related entity'), and shared three directors with Thakral Corporation Limited, and, around the time of the ILC acquisition, Ariadne Australia Limited, chaired by Mr Baffsky, lent $9.1 million to Thakral Corporation Limited. In addition, Accor Asia Pacific(of which Mr Baffsky was Honorary Chairman) managed Thakral Holdings' hotel assets.

[97] Thakral Holdings Group, *2010 Annual Report*, p 59
[98] Thakral Holdings Group, *2011 Annual Report*, 'Audit Opinion', p 33
[99] Thakral Holdings Group, *2011 Annual Report*, p 7; Thakral Holdings Group, *2010 Annual Report*, p 2

Second, another material personal interest may exist in that Mr Baffsky was appointed a director of the Sydney Olympic Park Authority in 2009, which had been charged with managing the economic development of Sydney Olympic Park. GPT holds significant interests in Sydney Olympic Park, and listed it as one of its prime development opportunities for its Industrial/Business Park portfolio.

Mr Baffsky has told the Senate he was unaware of the connections between him and GPT raised in the McGrathNicol report. However, it should be noted that Mr Baffsky has been awarded the French Government's Chevalier de la Legion d'Honneur for his work in expanding Accor's hotel interests into Asia. Further, Mr Baffsky has recently been appointed chair of SATS subsidiary Food & Allied Support Services Corp. Pte Ltd (FASSCO). The FASSCO website notes that:

> SATS, originally a Singapore Airlines subsidiary, is one of the largest food and gateway solutions companies in Asia and enjoys the stability of being linked to Temasek Group, a Singapore government-linked company.

Given Mr Baffsky's clear and deep involvement in Singapore Government owned businesses, the possibility exists for Mr Baffsky to have had a potential material personal interest in his role in directly and personally negotiating key elements of the purchase of ARR with GPT, whose largest shareholder is a Singapore Government owned investment corporation, at a time when a company he chairs had negotiated a significant loan secured over a strategic share parcel in a Singapore-listed company with significant shareholding and director links to a related entity which itself had significant shareholder and director links to the Singapore Government Investment Corporation.

The available documents show that Mr Baffsky personally led key elements of the negotiations with both GPT and the ILC's due diligence advisers on the transaction. This was a highly unusual approach to ILC business operations, which are normally developed, negotiated and undertaken by ILC staff with Board involvement limited to strategic oversight.

In relation to these negotiations, the ILC holds very limited records of the discussions, or of the offers that were made, considered, amended and accepted. Apart from being extremely poor practice and leaving the ILC seriously disadvantaged in relation to protecting its commercial interests, this situation leaves open the possibility that issues extraneous to ILC interests were driving the shape and structure of the transaction, and, indeed, may have been driving the very rationale for the transaction itself.

Summary

It is clear that there existed relationships between Director Baffsky and entities associated with GPT, Thakral Corporation and its related entities, and the Singapore Government, and that Director Baffsky ought to have been aware of these relationships at the time that he led negotiations on the ILC's acquisition of the ARR. **Mr Baffsky's possible material personal interest is all the more relevant because the key elements of the transaction were driven and personally guided by him.** Only a full independent inquiry into the matter, with powers to compel the giving of evidence, can determine whether the nature of these relationships amounts to a material personal interest in favour of Director Baffsky. If proven to be so, Director Baffsky's conduct could amount to a breach of sections 27F and 27J of the CAC Act.

ATTACHMENT SIX

Failure to inform the Minister: a potential breach of sections 15 and 16 of the *Commonwealth Authorities and Companies Act 1997*

Overview

At the time the ILC negotiated and ultimately acquired the ARR the ILC Board had various responsibilities under the CAC Act including the obligation to immediately give the Minister notice of a proposal to acquire a significant business interest and to provide information on the request of the Minister.

On 19 August 2009 then Minister Macklin wrote to the then chair of the ILC, Ms Shirley McPherson, and asked for information relating to the financial arrangements for the ARR purchase, the impact this would have on the ILC's operations and the Indigenous benefits that would be derived from the acquisition. Ms McPherson responded over a year later in a letter dated 23 September 2010, which included the statement '... it is noted that when you wrote to me on 19 August 2009, the ILC had suspended all negotiations on the purchase of ARR. Consequently, there was no advice that I could provide to you at that time'.

The fact that Ms McPherson answered the Minister's request over a year later is in itself a concern. Furthermore, the ILC's Board Minutes show that the ILC was still actively pursuing the ARR acquisition throughout the period that Ms McPherson claimed negotiations were suspended.[100]

An investigation into the ILC's acquisition of ARR can uncover why the ILC Board showed such reluctance to keep the Minister appropriately informed of its ambition to acquire the resort and whether this was a breach of the CAC Act.[101]

Responsibility to keep Minister informed

The ILC has responsibilities under section 15 of the CAC Act to immediately give the Minister written notice of <u>any proposal</u> to acquire a significant business interest or commence a significant business activity. The ILC's acquisition of the ARR was a business acquisition of a scale unprecedented in the ILC's history and would certainly qualify as a significant business activity. As such, when the ILC proposed to acquire ARR, the then ILC Board had a legislative obligation to immediately inform the Minister of the full nature of the proposal.

[100] See for example Minutes, ILC Board Meetings Nos 131, 132, 133
[101] CAC Act ss 15–16

Section 16 of the CAC Act requires the ILC to give the Minister such reports and information as the Minister requires and this information must be provided within the time limits set by the Minister. This means that, if the Minister responsible for the ILC makes a request for specific information, the ILC has a legislative obligation to provide that information in full and in a timely manner.

These legislative obligations are fundamental to ensuring that the Minister responsible for a statutory corporation such as the ILC has access to all necessary information to properly oversight the corporation.

During the period that the ILC first proposed, negotiated and ultimately acquired ARR the Minister responsible for the ILC was Minister Macklin. The Minister wrote to the ILC on 19 August 2009 noting the ILC's obligations under section 15 of the CAC Act. The Minister specifically requested details of the proposed financial arrangements for the purchase of ARR, the impact on the ILC's operations and the Indigenous benefits that would be achieved through the acquisition of ARR. While no time limit was set in that letter, the ILC was obliged under section 16 of the CAC Act to provide all available information in response to the Minister's inquiry in a reasonable time.

On 10 August 2010, almost a year after the Minister's request and eleven days prior to the 2010 general election and while the Government was in caretaker mode, ILC General Manager David Galvin wrote to formally advise the Minister that the ILC proposed to purchase ARR and intended to establish a subsidiary to hold and operate ARR. The letter stated negotiations were proceeding, that there was a non-binding Heads of Agreement[102] between the parties and invited the Minister to request further information. Mr Galvin's letter provided no information on the proposed financial arrangements nor on the potential impact on the ILC's operations and debt levels as had been requested by the Minister a year earlier.

On 23 September 2010, the then Chair of the ILC, Ms Shirley McPherson, wrote to the Minister and advised as follows:

> *...It is noted that when you wrote to me on 19 August 2009, the ILC had suspended all negotiations on the purchase of ARR. Consequently, there was no advice that I could provide to you at that time, and the ILC's General Manager, Mr David Galvin, informed Mr Dillon of this.[103] On 25 June 2010, Mr Galvin met with Mr Dillon and advised him that the ILC had recently reopened negotiations on the purchase of ARR and provided him with an overview of the purchase.*

[102] Heads of Agreement dated 13 July 2010.
[103] Note that Mr Dillon was Senior Adviser to Minister Macklin at this time.

Ms McPherson's assurance that all negotiations on the purchase of ARR had ceased in the period between when the Minister sent the letter dated 19 August 2009 and when Mr Galvin met with Mr Dillon on 25 June 2010 is not accurate. The ILC's Board Minutes throughout that period show that the ILC was actively pursuing the acquisition by attempting to secure finance for the acquisition[104] and by receiving and considering updated financial statements from ARR.[105]

Furthermore, the Board Minutes show that the ILC's Directors actually visited ARR in that period to inspect the facilities.[106]

While it may be that the ILC had suspended direct negotiations with GPT between 19 August 2009 and just prior to 25 June 2010, when the content of the ILC's Board Minutes in that period are considered against Ms McPherson's statement that '... the ILC had suspended *all* negotiations on the purchase of ARR', Ms McPherson's statement can at best be considered misleading.

Moreover, in breach of section 16 of the CAC Act, the then Directors of the ILC failed to provide information that was specifically requested by the Minister on 19 August 2009 in a timely manner. This information related to the financial arrangements for the purchase of ARR, the impact this would have on the ILC's operations and the Indigenous benefits that would be derived from the acquisition. This was the subject of ongoing discussions among the then Directors of the ILC throughout the period when, according to Ms McPherson, negotiations had ceased and no information could be provided.

Summary

At the time it negotiated and acquired ARR, the ILC Board had obligations under sections 15 and 16 of the CAC to immediately inform the Minister of any proposal to acquire a significant business interest and to provide any information requested by the Minister in a timely manner.

In a letter dated 19 August 2009 the Minister wrote to Ms McPherson and asked for information relating to the financial arrangements for the purchase of ARR, the impact this would have on the ILC's operations and the Indigenous benefits that would be derived from the acquisition. Ms McPherson responded to the Minister over a year later on 23 September 2010 and stated that during the period between the date of the Minister's letter, 19 August 2010, and 25 June 2010 the ILC had suspended all negotiations on the acquisition and that there was no advice that could be provided at that time. While the then ILC Directors may have suspended direct

[104] Minutes, ILC Board Meeting No 132, 18 February 2010.
[105] Minutes, ILC Board Meeting No 131, 16 December 2009 and ILC Board Meeting No 133, 15 April 2010.
[106] Minutes, ILC Board Meeting No 133, 15 April 2010

negotiations with GPT, the ILC's Board Minutes for that period show that the ILC was still actively pursuing the acquisition, which makes Ms McPherson's letter misleading.

Perhaps of more significance than this potential breach of the CAC Act is the substantive issue of why the then Board and Chair went to the effort of hiding the negotiations being undertaken (particularly around financing the transaction) and then misleading the then Minister in relation to these events. On its face, the Board, and particularly the Chair, appear to have breached sections 15 and 16 of the CAC Act. An investigation is warranted to examine the issue and determine whether there was a breach of the CAC Act and why it occurred.