Australian Government
Indigenous Land and Sea Corporation

The ILSC GROUP

BOARD DECISION PAPER
BOARD MEETING NO 291 – 29 JUNE 2022

AGENDA ITEM: 2.1
TITLE: NCIE DIVESTMENT UPDATE
PREPARED BY: MR M SALMON, CHIEF OPERATING OFFICER

1. PURPOSE

To provide the Board with an update on the divestment of 160 George St, Redfern (**Property**) and the transition of the ILSC subsidiary, the National Centre of Indigenous Excellence Limited **(NCIE**) to New South Wales Aboriginal Land Council (**NSWALC**).

RECOMMENDATION:

That the ILSC Board:

1. Note the contents of the paper; and

2. Resolve to approve either:

(a) The option to accept the NSWALC request for a 2-week extension, plus an additional 2-week extension considered by ILSC management as necessary, extending ILSC "ownership" of NCIE to 29 July;

(b) Approve a payment incentive to staff to off-set the loss of PBI status for up to 4-week pay period; and

(c) Agree that the matter return to the Board in 2 weeks confirming whether wind down or transition is occurring.

OR

Wind-up of NCIE Ltd.

2. BACKGROUND

As Directors will recall, the issue of the completion of the ILSCs interest in the Redfern area has been a project with two main components: (1) the divestment of the Property and its assets; and (2) the transfer of NCIE Ltd and its programs and services.

On 9 December 2020, the ILSC Board approved the divestment of the Property to the NSWALC. Following that decision, the ILSC and NSWALC entered negotiations and ultimately, a conditional Deed of Grant for the divestment of the Property on 15 May 2021. The Deed of Grant included both pre- and post-transfer conditions. The Deed provided that these conditions were to be fulfilled or waived within 12 months of the date of execution.

Since entering the Grant Deed, the ILSC and NSWALC have been working together to complete the divestment of the Property, including agreeing the proposed date of transfer as 30 June 2022.

So far as the activities being undertaken by NCIE is concerned, and following receipt of the NCIE Current State Analysis, the ILSC Board at its meeting in June 2021, approved the preferred future state option for the NCIE and that of its services and programs. This included the determination that the ILSC would not be involved, either directly or indirectly in activities on the Property following its divestment to NSWALC.

Following a robust process, the *NCIE Ltd Transition Plan* was developed to guide the implementation of the ILSC Board's decision, with priority given to preserving NCIE staff employment where possible and ensuring continuity of service delivery for the local Indigenous community.

As identified in the Transition Plan, four of NCIE's then current program/services were identified to be transitioned or wound up relatively quickly, with the remainder to be considered for possible transition to a third-party operator. This was to be undertaken in consultation with NSWALC, noting their interest in the Property post 30 June 2022.

During consultation with NSWALC, NSWALC advised of its negotiations with a third-party operator being PCYC NSW, to potentially partner in the operations to be undertaken on the Property; particularly as regards to the Fitness and Aquatic activities. As such, in a departure from how the transition was being implemented to that time, the ILSC allowed NSWALC as the incoming landholder to take up a first-right-of-refusal option under the Transition Plan. In addition to aligning with considerations in the plan, this also aligned with the ILSC's mandate in that it does not enforce how that landowner chooses to deliver its objectives under the Deed of Grant.

Following discussions with NSWALC, it was agreed to undertake further consultations with NSWALC as to the future activities on the Property.

In March 2022, NSWALC advised that it did not require that the operation of **Job Ready**, **TATU** or **Catering and Conference** services to continue on the Property post the divestment. This has resulted in the approach to these services changing from transition to another operator, to a wind up which will occur at or before 30 June 2022. It is noted that these lines will be closed by 30 June 2022. To support staff who will be ceasing employment, career transition support options for fixed term/casual staff have been developed and are built into the respective service line wind-ups.

In April 2022, NSWALC advised that it had not been able to progress an agreement with PCYC NSW, leaving the future of the corporate services and Fitness & Aquatics staff and operations provided by NCIE unresolved. At this point ILSC and NSWALC Management continued negotiations on a suitable agreement.

At an 'Out of Session' ILSC Board meeting on 5 May 2022, the ILSC Board and NSWALC Council separately resolved to approve the following proposal to effect both the divestment of the property and the transfer of NCIE Ltd:

1. **To vary the terms of the Deed of Grant dated on or about 15 May 2021 with New South Wales Aboriginal Land Council (NSWALC) to fix the transfer date of the property at 160 George Street Redfern (the Property), the subject of the Deed of Grant as 30 June 2022;**
2. **To approve the change in control of National Centre of Indigenous Excellence Limited (NCIE) from the ILSC to NSWALC and to authorise the ILSC Group Chief Executive Officer to undertake all steps and execute all documents as required to facilitate the change of control;**
3. **Subject to the completion of matters referred to in Resolutions 1 and 2, to approve the granting of moneys to NCIE under s191E of the *Aboriginal and Torres Strait Islander Act 2005 (*Cwth*)* to assist in meeting the costs of NCIE operating the Fitness and Aquatic activities from the Property for a period of 3 years commencing on 1 July 2022, capped at no more than $2 million for each 12 month period, upon such terms as the ILSC Group Chief Executive Officer shall approve and to enter into a Deed of Grant otherwise on the ILSC's standard terms and conditions of grant;**
4. **To authorise the affixing of the ILSC Common Seal to the Deed of Grant referred to in Resolution 3 in accordance with ILSC Board Decision 615.**

This was communicated to NSWALC. While agreeing in principle to the terms, NSWALC Council affixed two additional conditions (agreed by the ILSC) to its approval being:

a) The ILSC sufficiently excludes NSWALC from any pre-existing liabilities associated with NCIE Ltd including, but not limited to, any employment entitlements (existing leave and accumulated redundancy etc.), and any public liability issues; and
b) The ILSC will work with NSWALC to assess and finalise the most appropriate corporate structure for acquiring the Property and, separately, NCIE Ltd – noting this may deviate from Condition 2 in the proposal above.

As a result of this, it was understood NSWALC would "take over" NCIE and its remaining activities pending any further post transfer decisions concerning the future ownership of NCIE activities.

Subsequently, NSWALC has undertaken a process to assess the suitability of the remaining corporate services and Fitness and Aquatics functions post 30 June. As such, staffing profiles were settled in a revised corporate services structure that retained seven of the existing eleven NCIE corporate staff, excluding the CEO who has since departed. Following that, based on NSWALC's review, all 36 Fitness & Aquatics staff (FTE and casual) were offered contracts and ongoing permanent or causal employment. The decisions as to staff retention at NCIE were very much driven by NSWALC. ILSC Management has been working with NCIE Management to deal with the impact of this on any affected NCIE staff. As with the staff who will be ceasing employment at or before 30 June, career transition support options for fixed term/casual staff have been developed and implemented.

3. CURRENT SITUATION

On the 24 June 2022, NSWALC wrote to the ILSC **(Annexure A)** advising the following:

- The transfer of 160 George Steet is (dependent on third party dependencies) remains scheduled for transfer on June 30, 2022; and
- Delays to the transfer of NCIE and a request for additional time (31 July 2022) to allow for further work related to insurance and financial due diligence.

Property Transfer

Following discussions, it was agreed that several of the provisions of the Deed of Grant needed to be varied. On the 28th of June 2022 the ILSC and NSWALC agreed the terms of the variation and the ILSC executed a Deed of Variation and Deed of Assignment of the current leases to third parties at the Property. These documents give effect to the property transfer. At this stage, the ILSC anticipates that these documents will be executed by the appropriate NSWALC delegate on 29 June and that the property will proceed to transfer on 30 June as planned.

Directors should note however, that while, at this stage, it is expected settlement on the transfer of the Property will still proceed on 30 June, it is not an absolute certainty. There is still a risk that NSWALC do not or cannot proceed; particularly based on the decision the ILSC is being asked to consider concerning NCIE.

NCIE Transfer

As mentioned, NSWALC, have advised that it is not able to complete the "takeover" of control of NCIE Ltd on 1 July as previously agreed. Based on that, they have requested an extension of the time to complete the document. At this stage, NSWALC have indicated that it will take at least another 2 weeks for their "due diligence" to be completed.

In summary the following reasons have been cited for the delay.

(a) Outstanding insurance matters;
(b) The need to finalise assessment of operational risks including WHS;
(c) The completion of limited financial due diligence matters including tax compliance;
(d) Finalisation of advice on Human resources and transitioning of business systems and operations; and
(e) The management of the transition, including business continuity.

The limited due diligence item is of particular concern. NSWALC Management advise that depending on the outcome of this work, which is focused on a more detailed exploration of revenue and expenditure rates, that a request for additional funding support may be forthcoming. It is also possible that if the NSWALC Council is not satisfied with the outcomes of the work outlined above, they may withhold agreement to the NCIE transfer.

Even presuming that NSWALC finish this work within two weeks, ILSC Management note that there will be further time needed to complete all steps required to complete the transfer. Based on current estimates, it is the current view of ILSC Management that this will take a further 2 weeks.

4. OPTIONS

Presuming that the Board remains committed to exiting the operations of NCIE, ILSC Management have assessed and considered two possible responses to the transfer delay:

1. Agree to the requested extension
2. Wind Up NCIE Ltd.

Option 1:

Agree to the requested extension (to 29 July 2022)

If the ILSC agrees to the requested extension, we will need to retain ownership of NCIE for the next four weeks (on the assumption that is sufficient to have NSWALC complete the due diligence and for the transfer to be completed). Given that the ILSC has been in a process of 'wind down' and has not been anticipating operating NCIE post July 1, this raises a series of financial, operating, staffing and management risks.

Consequences and Risks

Timing

While it has been suggested by NSWALC Management that a further 2 weeks should be sufficient to allow NSWALC to complete its due diligence, there is no certainty at this time that this is a "hard date" Considering the issues to date, ILSC Management is not able to say with any certainty that NSWALC will be able to complete its due diligence within that time. Further, without knowing the extent of possible issues that may arise, it is also not possible for ILSC Management to say that a further 2 weeks will be sufficient to allow an orderly hand over to be completed.

Because of this, the risk to the ILSC is that the suggested period of 4 weeks may be longer and/or it may be that NSWALC complete the due diligence and advise that the take-over is not an option. Should this occur, the ILSC is left to make the difficult decision to "wind-up" NCIE at a later stage; merely deferring that decision today.

Staff Retention and Operations

As mentioned, based on NSWALC recommendations, offers of continued employment beyond 1 July 2022 were offered to a number of NCIE staff. At 28 June, post 1 July employment contracts (issued by NCIE but with NSWALC referred to as the parent company) had been issued to all staff planned for retention post transition. We are advised that 70% of staff have accepted and retuned contracts with the balance at the time of writing outstanding.

At the time of writing, ILSC Management has been advised by NCIE Management that there are sufficient Corporate and Fitness and Aquatics staff for NCIE to continue those activities and for the site to remain open for the current rostered period (2 weeks).

The current NCIE Acting CEO departs 30 June. NSWALC advise that they have recruited a new NCIE General Manager from within their own staff pool. It is proposed that this individual be "seconded" to NCIE and have (subject to NCIE board approval) relevant CEO delegations post 30 June. It is noted that neither ILSC Management nor NCIE Management have been involved in this decision. Furthermore, NCIE will need to ensure the relevant employment conditions are met by the seconded general manager prior to appointment (i.e. criminal and working with children checks).

The Board should note that if the option to continue operations is selected, NCIE will be operating with a NSWALC 'right sized' staffing structure, a structure that has not had either ILSC or NCIE Management involvement, with few built in redundancies in an uncertain environment. It is possible that key staff may depart in the next four weeks. Should this occur, operations could be affected to the extent that NCIE becomes inoperable. Given current uncertainties and the short timeframe proposed for continued ILSC "ownership", sourcing the replacement of key staff will be difficult. Further, it can be expected that, even though no commitment had been given for the completion, NSWALC Management will expect to be heavily involved in any future decisions on NCIE staffing.

Finally, the impact on delaying in the transition may have on staff morale and engagement at NCIE should not be underestimated.

PBI Status

As Directors may be aware, since its inception, NCIE has operated as a company limited by guarantee; a Public Benevolent Institution (PBI) registered as a charity with the Australian Charities and Not-for-Profit Commission. This has been very much based on the Job Ready and Conference and catering functions being undertaken.

The issue of NCIE's status as a PBI has been the subject of discussions with NSWALC Management throughout the transition discussions. To date, NSWALC Management have advised that advice has been received allowing a continuation of that status post transition.

However, due to the wind down of Job Ready and Conference and Catering functions (which will complete on 30 June), it is the opinion of ILSC Management that, subject to specific advice that it was understood NSWALC Management were receiving, NCIE will not be able to maintain PBI status.

ILSC Management has now had the opportunity of receiving and considering the advice, but do not accept the premise and assumptions upon which that advice is based. While that would not have been an issue if NSWALC had acquired control of NCIE post 30 June, if, as proposed, NCIE remains under the control of the ILSC, the issue of the status is of significant relevance.

Should NCIE remain in ILSC control post 30 June, it is the opinion of ILSC Management that it would be difficult to justify the NCIE's ongoing status as a PBI. Further, noting the obligations on the ILSC under the Commonwealth's Legal Services Directions 2017, the ILSC would have difficulties maintaining the PBI status for NCIE post 30 June.

If that status were lost, salary sacrifice options currently available to 15 NCIE staff would terminate. This will affect some key F&A and corporate roles. It is likely that this will affect NCIE's ability to retain affected staff and may have operational consequences as mentioned above.

A payment incentive for affected staff may be necessary to offset retention risks related to the loss of this benefit.

Tax Consequences

The loss of PBI status will also have tax consequences. NCIE will need to transition from its current position as a company limited by guarantee to a Pty. Ltd structure and will become liable for payroll and income tax. This will also have potential impact on the structuring of any

eventual transfer to NSWALC. It should be noted, for example, that the process of conversion may take longer than 4 weeks and thus impact on any transfer.

In addition, NCIE will need to suspend its DGR status, rescind regular donation payments and develop a plan for the appropriate deployment of the existing gift fund.

Payroll and Finance Functions

The ILSC provides NCIE payroll and finance function. The ILSC will need to revive this function which has been in wind down. This is determined as work intensive, especially given the loss of PBI status, but possible. Finance support currently in place will continue. As it is currently not able to be quantified, it is difficult to say the extent of any financial contribution to the operations of NCIE for this period.

Worker Compensation and Insurance

If the decision is made to continue control of NCIE beyond 30 June, there will be a need to reinstate workers compensation cover and property insurance with Comcover.

Lease / Licence

Post 30 June (if the property transfer completes as expected) NSWALC and NICE will be required to reach and agreement on the ongoing NCIE Ltd. occupancy of the site. At this stage no material progress has been made on this matter.

Adverse comment and Communications

Delays in the transition may attract public attention. Much has been made to date of the proposed transfer of control of both the property and NCIE to NSWALC effective from the close of this Financial Year. Delays in the transition of NCIE will inevitably lead to comment and probable criticism.

ILSC staff have prepared media holding statements and internal communications for staff to cover this, but the significant community feeling concerning NCIE and the Property cannot be underestimated.

The OCEO have also sent briefs to the Minister for Indigenous Australians and NIAA about the divestment.

Option 2:

Wind up of NCIE Ltd

Given the late notice of the projected NSWALC delays and the operational, financial and other risks which attend the extension option as mentioned above, the Board may wish to consider the wind up of NCIE.

It is possible that given no definitive timetable, staff retention risks associated with ongoing operational uncertainty, the potential financial commitment and revocation of PBI status, the ILSC Board may take the view that it is better (or the lesser of what is clearly a risk filled decision)

to simply determine that if NSWALC is not in a position to take control of NCIE, it should be shut down at June 30, 2022.

As noted above, even if the Board is minded to continue the ILSC's involvement with NCIE, a decision to wind up NCIE may be needed at some time in the next two weeks. If NSWALC Council is not satisfied with the results of the due diligence, it may determine not to proceed.

If this were the case, and decision to continue support may just be deferring a decision. ILSC Management cannot provide the Board with any assurance that NSWALC will proceed at all with the transfer of NCIE, let alone that it will occur within the suggested 4 week timeframe.

As advised earlier it is also likely that NSWALC may at some time in the next two weeks seek to revisit the previously agreed financial support package. If this is not deemed palatable by the ILSC, NSWALC Council may withhold transfer consent.

Consequences and Risks

- Actions to instigate the windup process are considered possible by 30 June. This would have the practical effect of ceasing the employment of all NCIE staff and would entail the closure of all Fitness and Aquatics activities as well as the disposal of NCIE assets.

- Given the recent issuing of new contracts this would entail the payment of redundancies to contract staff and the cessation of casuals (quantum to be determined).

- This action would mean that the agreed support payments to NSWALC ($2m annually for 3 years) to operate NCIE would no longer be necessary.

- It is possible that NSWALC Council may react adversely and seek to prevent property transfer at the point of conveyancing (scheduled for Thursday 30 June).

- Selection of this option will inevitably create reputational risks and likely adverse publicity. While that may be "shared risk" with NSWALC, it will invariably be noted that the decision to close operations and wind down NCIE was an ILSC decision.

5. ASSESSMENT

(a) Risk Analysis

Enterprise Risk Management Pillar [Our overall risk appetite is moderate, which aligns to our strategic vision of being able to engage with risk to pursue opportunity when engaging with our partners. However, our risk appetite is low in relation to the health, safety and wellbeing of our employees; of the unauthorised disclosure of official information; and fraudulent conduct]	**Risk** Explain the risk/s of the proposal to this Pillar – e.g. meets, tests, exceeds appetite	**Opportunity** Outline or highlight how the proposal pursues or extends operational/strategic objectives (include here if additional funding, resources etc could achieve the objective earlier or mitigate against realising a risk)
Meet our statutory obligations, including ATSI / PGPA Act	There are significant risks, including	While not fully removing the risks as identified, a fully

	reputational and financial risks to the ILSC should the transfer of the Property transfer not proceed, or not proceed on the terms set put above. Should NSWALC refuse to complete the acquisition, the Property will remain with ILSC and it is anticipated that the ability to divest the Property in accordance with the ILSC's statutory mandate may be more complex and difficult.	understood and agreed strategy to manage the risks may allow for a significant mitigation of them.
Attract, develop and maintain a safe, healthy and engaged workforce and workplace	Loss of PBI status affects NCIE's ability to retain affected staff, which will in turn have the potential to adversely impact operations. Option 1 to extend engagement for up to 1 month, with potential for wind up within that timeframe, has increased potential in reducing staff morale and engagement at NCIE.	Developing and delivering a clear communication strategy, with a one-off retention incentive for PBI status effective staff may lead to increased engagement and continuity of employment for the required period
Be a valued and trusted partner to the Indigenous Estate	The issue surrounding the holding off and delays in the divestment of the Property have been caused significant issues within the indigenous community around Redfern. The continued uncertainty of the divestment of the Property would only increase those issues	While it is noted there is and will continue to be some parts of the community that will have an issue with the Property being transferred to NSWALC. When the transfer is completed, it is expected they will reduce.
Maintain data integrity and cyber security	The risk of lack of data control is being managed by the NCIE Transition Project Team with KPMG, which continue to maintain the necessary	The network system access at NCIE will continue as required by operations

	documentation and reporting required to support this work.	

(b) Strategic Realisation

The ILSC strives to deliver its mandate with the highest level of cultural integrity and in a responsive and flexible manner with maximum impact on the Indigenous Estate. While the ILSC has a very low appetite for risks that could adversely impact our strategic outcomes, ILSC management have managed the issues as they have arisen. With the minimum fulfilment of transferring the property, the strategy can be satisfied.

(c) Financial Implications

Budget Position	Assessment
Is spend budgeted?	No
Impact on current approved budget	Not applicable
Impact on forecast budget	Not applicable

6. PRIOR BOARD RESOLUTIONS

Title	Decision No.	Meeting Date
NCIE Divestment	758	5 May 2022
NCIE Ltd – Transition Plan	731	18 Aug 2021
NCIE Ltd Review	719	16 Jun 2021
NCIE Divestment Deed	708 – CR	25 Apr 2021
NCIE Review	688	17 Feb 2021
NCIE Divestment Strategy	677	09 Dec 2020
NCIE – Divestment Plan Progress Update	665	21 Oct 2020
NCIE Funding	623	27 May 2020
Common Seal	615	26 Mar 2020

7. ENDORSEMENT

In making this recommendation, I confirm there are no, and I am not aware of any, conflicts of interest:

☒ Prepared: Matt Salmon, Chief Operating Officer
☒ Endorsed: David Silcock, Executive Director Corporate
☒ Endorsed: Trevor Edmond, General Counsel
☒ Endorsed: Joe Morrison, Group CEO

ANNEXURES:
A: NSWLAC Letter Regarding delays