Indigenous Affairs Legislation Amendment Bill 2011

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Contents

Purpose ........................................................................................................................................... 2
Background and issues .................................................................................................................. 2
  Schedule 1—Scheduling of land ................................................................................................. 2
  Schedule 2—Indigenous Land Corporation ............................................................................... 3
  Schedule 3—Torres Strait Regional Authority elections ......................................................... 6
Policy position of non-government parties/independents .......................................................... 7
Financial implications .................................................................................................................. 7
Main Provisions .......................................................................................................................... 7
  Schedule 1 ................................................................................................................................. 7
  Schedule 2 ................................................................................................................................. 7
  Schedule 3 ................................................................................................................................ 8
Comment ...................................................................................................................................... 8
Indigenous Affairs Legislation Amendment Bill 2011

Date introduced: 23 June 2011
House: House of Representatives
Portfolio: Families, Housing, Community Services and Indigenous Affairs
Commencement: Schedules 1 and 2 commence the day after Royal Assent. Schedule 3 commences on Proclamation or one day after 12 months from Royal Assent.
Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Indigenous Affairs Legislation Amendment Bill 2011 (the Bill) is to amend the Aboriginal Land Rights (Northern Territory) Act 1976 (the Land Rights Act) to insert Borroloola and Port Patterson Islands into Schedule 1 of that Act. This Bill will also amend the Aboriginal and Torres Strait Islander Act 2005 to allow the Minister to make guidelines to which the Indigenous Land Corporation (ILC) must have regard in certain circumstances, and to facilitate Torres Strait Regional Authority (TSRA) elections and local government elections in Queensland being held at the same time every 4 years.

Background and issues

Schedule 1—Scheduling of land

The amendments contained in Schedules 1 and 2 were initially contained in the Families, Community Services, Housing and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010 (the 2010 Bill) (as Schedules 3 and 4 to the 2010 Bill). They were dropped by the Government by agreement to enable other measures in that Bill to be progressed. The Minister, Ms Macklin, explained this at the time in the following way:

We will withdraw from the bill the two schedules relating to the Indigenous Land Corporation and the scheduling of land. The measure would have amended the Aboriginal and Torres Strait Islander Act 2005 to enable the Indigenous Land Corporation to support native title settlement. As the measure has been referred to the Senate Standing Committee on Legal and Constitutional Affairs, and that will not report until the 2011 autumn sittings, we need to defer this measure.

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from this bill to allow the other measures in the bill to proceed. There are issues around the scheduling of land measure. Once again, rather than holding up the more time critical measures in the bill, this measure is being withdrawn to allow the land area measurement in question to be clarified. Once it has been clarified, the scheduling of land measure will be introduced separately.  

Adding land to Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* will allow the land in question to be granted to the relevant Aboriginal Land Trusts under sections 10 and 12 of the Land Rights Act.

The parcels of land near Borroloola are related to the first land claim under the Land Rights Act being lodged in 1977, and the Port Patterson Islands relate to the Kenbi Land Claim which is also one of the very long running land claims under that Act. The Explanatory Memorandum states:

> The addition of the Port Patterson Islands to Schedule 1 of the Land Rights Act will enable this land to be included in a grant associated with the Kenbi Land Claim in the near future.  

**Schedule 2—Indigenous Land Corporation**

Schedule 4 of the 2010 Bill was considered by the Senate Legal and Constitutional Affairs Legislation Committee. That Schedule 4 is **Schedule 2** of this Bill and relates to the ILC. The Committee reported in February 2011, and the majority made recommendations as follows:

**Recommendation 1**

2.55 The committee recommends that the measure contained in Schedule 4 of the Bill be clarified by:

- re-wording proposed new subsection 191F (2A) to read 'to the extent that the Indigenous Land Corporation supports native title settlements when it performs its functions'; and

- adding a definition of the term 'native title settlements', or a reference to the *Native Title Act 1993*, to the *Aboriginal and Torres Strait Islander Act 2005*.

**Recommendation 2**

2.56 The committee recommends that the Australian Government consult more widely with stakeholders, and release any draft ministerial guidelines, before proceeding with the measure contained in Schedule 4 of the Bill.

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Recommendation 3

2.57 Subject to the preceding recommendations, the committee recommends that the Senate pass the measure contained in Schedule 4 of the Bill.  

Accordingly, the Government has taken up the first recommendation by rewording the provision, and by making a note to proposed section 191F(2A) which makes a cross-reference to the Native Title Act 1993 (Native Title Act). This is an attempt to clarify the meaning of the expression ‘native title settlements’. However, given that the term is not currently defined in either the Native Title Act or in the Aboriginal and Torres Strait Islanders Act 2005 (the ASTI Act), there remains uncertainty as to the precise definition of the term.

In relation to this, the Senate Committee devoted some discussion of this question in its report—quoting from the National Native Title Council’s (NNTC) submission which in part says the expression derives from Government papers and forums and:

has been used to refer to a settlement resulting in the resolution of one or more native title claims (which may or may not include the recognition of native title rights and Interests), along with non-native title benefits.  

One of the main purposes of Schedule 2 is to enable the Minister to issue ministerial guidelines to the ILC, and the ILC ‘must’ have regard to such guidelines in deciding whether to perform its functions in support of native title settlement, and if so, in performing such functions (proposed subsection 191F(2A), and proposed section 191HA).

The rationale for the amendment is explained in the Minister’s second reading speech as follows:

Given the complex context in which native title settlements are negotiated, the guidelines should help clarify the Indigenous Land Corporations role in supporting native title settlements by providing guidance in the exercise of its functions.  

The guidelines will be a legislative instrument, and as such will be disallowable by Parliament under the Legislative Instruments Act 2003.

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There is some controversy about the status of the guidelines. Although the guidelines are made by way of legislative instrument, it is only mandatory that the ILC has regard to the guidelines when making a decision under proposed subsection 191F(2A) of the ATSI Act.

In event of an inconsistency between the ILC’s own guidelines and the Minister’s guidelines, the Minister’s are to prevail to the extent of any inconsistency (proposed subsection 191(1A)). The ILC argued to the Committee that this was unnecessary if in fact the Minister’s guidelines are not binding.6

It seems to be accepted, at least by the ILC and the NNTC, that the guidelines will not be mandatory, and that existing section 191L of the ASTI Act which provides that the Minister is not empowered to direct the ILC in relation to any of its activities, is sufficient to preserve its independence.7 The ILC seems to accept the reasoning that the words ‘have regard to’ are sufficient to not detract from the primary presumption of statutory independence.8

Professor Mick Dodson, Director of the National Centre for Indigenous Studies at the Australian National University (ANU) and Professor of Law at the ANU College of Law, expressed the following view:

However, AIATSIS [the Australian Institute of Aboriginal and Torres Strait Islander Studies] is of the view that providing Ministers with powers to issue binding guidelines to the board of the ILC is inappropriate. Interference in the independence of a statutory authority, particularly an Indigenous body established in the way described, is problematic. Allowing ministerial control over the Indigenous Land Fund may lead to appropriation for other purposes, including subsidising compensation settlements for new acts of extinguishment. The Indigenous Land Fund in particular must be protected from the policy whims of successive ministers or governments, regardless of whether the current policy intention is sound.9

It was this aspect of the then Schedule 4 that caused Green’s Senator Siewert her gravest concerns and led to her minority report and eventual proposed amendments. After stating that the powers were neither necessary nor appropriate, in her dissenting Report she said:

In general terms, I do not think giving the Minister the power to direct an independent statutory authority is a good idea. On the one hand, this has the obvious potential to inappropriately diminish that independence. On the other hand, if, as the Department claimed in their

7. Ibid., p. 1; NNTC op. cit., p. 3.
8. Ibid.
9. M Dodson (AIATSIS), Submission to the Senate Committee on Legal and Constitutional Affairs Legislation Committee, Inquiry into the provisions of Schedule 4 of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010, 16 December 2010.

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In Indigenous Affairs Legislation Amendment Bill 2011

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submission to the inquiry, the ILC then remains free to ignore those directions, then it does not provide a meaningful or effective remedy to the problems identified by the inquiry.10

Schedule 3—Torres Strait Regional Authority elections

The amendments to the ASTI Act in this Schedule are two-fold. First, the ATSI Act is being amended to provide that Torres Strait Regional Authority (TSRA) elections will be held every four years, instead of the current requirement for every three years ‘in order to maximise efficiency and save money’ (item 6).11 This will also restore the connection that has previously existed between the timing of TSRA elections and Queensland local government elections. The timing of the latter was recently extended from three to four years through changes to the Queensland Local Government Act 2009 (Queensland Local Government Act). The link between the timing of TSRA elections and Queensland local government elections is established by existing subsection 142Y(3) of the ATSI Act, which specifies that:

The polling day or days for each TSRA election must be not later than the anniversary in the third calendar year, and each later third calendar year, of the day in 1994 on which the triennial election for an Island Council is held under the Queensland Act.12

This means that there is now a discrepancy between the timing set out in subsection 142Y(3) and that set out in the Queensland Local Government Act. Schedule 3 addresses this discrepancy by repealing subsection 142Y(3) (Item 7). The effect of this is that TSRA elections will be conducted solely in accordance with the provisions of the ATSI Act. Nevertheless, while the legislative link between the timing of TSRA and Queensland local government elections has been removed, the actual timing between the two will be restored by the amendment (outlined above) providing that TSRA elections will be held every four years.

The other key amendment relates to existing section 142S of the ASTI Act which currently allows the Minister to make notices about how TSRA is to be constituted, with provisions about persons who are elected representing particular communities and other matters. Proposed new section 142S removes any references to Queensland’s legislation and also provides that, instead of notice by way of gazette, the Minister’s powers to determine the manner of representation on TSRA will be by way of disallowable legislative instrument. Part of the rationale for the amendment is contained in the Explanatory Memorandum:

12. The Queensland Act is defined by the ATSI Act as ‘the Community Services (Torres Strait) Act 1984 of Queensland as amended and in force from time to time, and includes any law of Queensland that replaces that Act’.
Removing the connection between the ATSI Act and the Queensland Local Government Act will reduce the potential for conflicts of interest between the roles of people elected to both the TSRA and the Queensland Local Government Councils.\(^\text{13}\)

**New section 142S** also no longer makes reference to providing representation of particular communities in the Torres Strait area. This is to allow more flexibility in the future governance arrangements of the TSRA following a review currently being undertaken.\(^\text{14}\)

There is an aspiration in parts of the Torres Strait to have eventually a territory-form of Government which would entail just one self-governing level of Government, and abolishing the TSRA and local councils.\(^\text{15}\)

**Policy position of non-government parties/independents**

The Australian Greens have already proposed an amendment to the predecessor of Schedule 2 to the effect that the Minister will not be able to issue guidelines.

**Financial implications**

The Explanatory Memorandum says there is no financial impact.\(^\text{16}\)

**Main Provisions**

**Schedule 1**

**Items 1 and 2** insert Borroloola and Port Patterson Islands into Schedule 1 of the Land Rights Act.

**Schedule 2**

**Item 1** inserts **new subsection 191F(2)** into the ATSI Act to require the ILC to have regard to Ministerial guidelines when deciding whether to perform its functions and in performance of those functions in support of native title settlement.

\(^\text{13}\) Explanatory Memorandum, op. cit., p. 6.

\(^\text{14}\) Ibid.


\(^\text{16}\) Explanatory Memorandum, op. cit.

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Item 2 provides that the Minister may make guidelines by way of legislative instrument. The Minister’s guidelines will prevail if there is an inconsistency with any guidelines that have been made by the ILC (new subsection 191I(1A)).

Schedule 3

Item 1 repeals the definition of ‘Queensland Act’ in the ATSI Act from the definition section, section 4. This definition will no longer be required as a consequence to the amendment in item 7.

Item 7 repeals subsection 142Y(3) which links the polling days for TSRA elections to Queensland local government legislation and timing of elections under that legislation.

Item 6 amends subsection 142Y(1) to change the timing of TSRA elections from every 3 years to every 4 years. As noted above, this has the effect that the elections will be held at the same time as local government elections in Queensland.

Comment

It would be useful if the explanatory material to this Bill spelt out clearly that the guidelines are just that, guidelines, and therefore not mandatory as this would dispel any remaining uncertainty. Parliament might also consider whether the issue of the definition of ‘native title settlements’ is a matter deserving further consideration.
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