Indigenous Affairs Legislation Amendment Bill (No. 2) 2011

Dr John Gardiner-Garden
Social Policy Section

Kirsty Magarey
Law and Bills Digest Section

Contents

Purpose ..................................................................................................................2
Background ........................................................................................................2
    Main Issues ....................................................................................................2
Financial implications .....................................................................................6
Key provisions ..................................................................................................6
Concluding comments .....................................................................................6
Indigenous Affairs Legislation Amendment Bill (No. 2) 2011

Date introduced: 17 August 2011
House: House of Representatives
Portfolio: Families, Housing, Community Services and Indigenous Affairs
Commencement: The day after 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

To amend the Aboriginal and Torres Strait Islander Act 2005 (ATSIA) and other acts so that:

- the title ‘General Manager’ is changed to ‘Chief Executive Officer’ in the case of four indigenous agencies
- the secrecy provisions of the ATSIA are modified to allow exceptions for information where it is in the public interest to divulge the information, or a relevant consent has been given or the information is already publicly available. There are also provisions for the creation of guidelines to govern these matters
- there is an adjustment of some provisions which refer to entities which no longer operate
- the Minister has the power to delegate his or her authority to appoint an acting Executive Director of township leasing under the Aboriginal Land Rights (Northern Territory) Act 1976 or an acting Coordinator-General for Remote Indigenous Services under the Coordinator-General for Remote Indigenous Services Act 2009.

Background

Main Issues

The Bill originally contained two schedules. The provisions in schedule 1 seem largely uncontroversial. The provisions in Schedule 2, which proposed a possible delegation of Ministerial power to appoint an acting Executive Director of Township Leasing or a Coordinator-General of Remote Indigenous Services (discussed below), have been seen as possibly contentious. The Government itself moved an amendment to remove Schedule 2.¹ This amendment, along with the Bill as amended, was agreed to by the House of Representatives on 13 September 2011.

¹ The text of the Government’s amendment can be found in the Parliament of the Commonwealth of Australia, House of Representatives, Indigenous Affairs Legislation Amendment Bill (No. 2) 2011, sheet BM253, Government

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Schedule 1 relates mostly to the *Aboriginal and Torres Strait Islander Act 2005* and offers three changes to indigenous governance arrangement.

Provisions in Part 1 of the Bill’s first schedule change the title ‘General Manager’ to the title ‘Chief Executive Officer’ in the case of four entities. These four entities are:

- Indigenous Business Australia, the successor body to the Aboriginal and Torres Strait Islander Commercial Development Corporation (CDC). The CDC was established as a statutory authority in March 1990 to enhance Indigenous self management and economic self sufficiency through a strong Indigenous presence in mainstream economic activities. In 2001, following a number of reviews and inquiries, the CDC’s enabling legislation was amended and the title of the body was changed to Indigenous Business Australia
- the Indigenous Land Corporation, established as a statutory authority in 1995 to assist Indigenous people with land acquisition and land management to achieve economic, environmental, social and cultural benefits. It receives an annual payment derived from investment returns of the Aboriginal and Torres Strait Islander Land Account, develops National Indigenous Land Strategies and Regional Indigenous Land Strategies, and accepts applications from Indigenous groups for Land Acquisition and Land Management projects
- the Aboriginal Hostels Limited, a government-owned company within the Families, Housing, Community Services and Indigenous Affairs portfolio. It has provided temporary accommodation services to Aboriginal and Torres Strait Islander people since 1973 and since 1990 has been structured as a company wholly-owned by the Australian Government. It operates its own hostels as well as supporting community organisations to operate theirs
- the Torres Strait Regional Authority, established as a statutory authority in July 1994 to formulate, coordinate and implement programs for Torres Strait Islander and Aboriginal people living within the region, monitor the effectiveness of these programs and programs conducted by other bodies, advise the Minister for Indigenous Affairs on relevant matters and assist in the recognition and maintenance of ‘Ailan Kastom’ in the Torres Strait.²

The Government says in its Explanatory Memorandum that the proposed new title for the head of these bodies will better reflect responsibilities and expectations:


2. Section 4 of the *Aboriginal and Torres Strait Islander Act 2005* defines Ailan Kastom as ‘the body of customs, traditions, observances and beliefs of some or all of the Torres Strait Islanders living in the Torres Strait area, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.’

*Warning:* All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
[these changes bring] these agencies into line with the majority of other Commonwealth statutory authorities and companies, whose agency heads have the title of Chief Executive Officer.  

and suggests

The chief executive officer title is a more appropriate term for agencies that have a board of directors ... and meets the general expectation that a chief executive officer is more senior than a general manager.

Finally she concludes with the hope that the change ‘will help the boards of these agencies to attract a higher calibre of candidate for [these] positions’.

The arguments in favour of these legislative changes do not seem particularly weighty but, commensurately, the import of the change is minor.

Provisions in Part 2 of the Bill’s first schedule ensure that information held by Indigenous Business Australia (IBA) will be capable of being disclosed by that organisation in carrying out its proper functions. Although the existing provision of the Aboriginal and Torres Strait Islander Act 2005 is fairly standard, it has been observed that if interpreted narrowly such provisions can be quite restrictive. For example, the Australian Law Reform Commission, in its March 2010 report, Secrecy Laws and Open Government in Australia (ALRC Report 112), noted that the IBA and the Commonwealth Ombudsman in submissions to the ALRC’s 2009 inquiry (Submission SR 64, 13 August 2009 and Submission SR 20, 19 February 2009 respectively) raised concerns that secrecy provisions prevented the provision of information to integrity and oversight agencies, such as the Ombudsman and the Auditor-General.

10.149 IBA noted that transparency and accountability were important to maintain stakeholders’ confidence in government. In this context, the IBA was concerned that:

> Section 191 of the ATSI Act currently severely restricts the capacity of IBA to provide information, including to its portfolio Minister, agencies with responsibility for over-sighting Commonwealth administrative practices, such as the Ombudsman and Privacy Commissioner, Commonwealth agencies working in joint initiatives with IBA (such as FaHCSIA). IBA considers that the provisions are unduly restrictive and do not represent an appropriate balance between the need to protect confidential information and competing public interests.

10.150 The Commonwealth Ombudsman described a situation in which secrecy provisions prevented an agency providing information to it for the purposes of an investigation:

---

4.  Ibid.
5.  Ibid.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
As part of our investigation, we sought information from the agency that was the subject of the complaint … The agency refused to provide us with the information sought on the basis that it had obtained legal advice to the effect that the secrecy provisions of its enabling legislation overrode the Ombudsman Act. The legal advice included consideration of statutory interpretation principles as to whether a later Act repeals earlier inconsistent Acts and a commentary about resulting uncertainty in scenarios where some provisions of the Ombudsman Act providing for access to information might override the secrecy provisions of the other legislation but other provisions might not.

10.151. The Ombudsman concluded that:

Operating in an environment of uncertainty as to whether the access provisions of the Ombudsman Act might or might not override specific secrecy provisions in other Acts, is not conducive to this office fulfilling its statutory role of promoting good and accountable public administration. For this reason we would prefer a solution that makes it abundantly clear that our powers of access take precedence, unless the other Act specifically says that it overrides the Ombudsman Act.6

Returning specifically to the existing confidentiality provision of the Aboriginal and Torres Strait Islander Act 2005, Minister Macklin in her second reading speech of 17 August 2011 suggested:

The narrow focus of this provision has, in the past, prevented information from being disclosed to agencies with responsibility for overseeing Commonwealth administrative practices — such as the Ombudsman and the Privacy Commissioner.

...

The amended provision aims to overcome these difficulties — but only with the continued appropriate protection of sensitive information. The relationship of confidence between Aboriginal and Torres Strait Islander people and the agencies established for their benefit is an important public interest that we need to preserve.

The new provision is also consistent with established information-handling arrangements, such as in the family assistance law and the Paid Parental Leave Act 2010, that protect information while still permitting the proper work of the Commonwealth and its agencies.7

The provisions in the Paid Parental Leave Act 2010, referred to above, do indeed seem to be comparable with those proposed by the Bill, for instance the Secretary ‘must act in accordance with

---


7. Second reading speech, op. cit., p. 3.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
guidelines’ but may disclose information in the public interest and/or to an agency head or someone authorised by the person about whom the information deals.\(^8\)

Finally provisions in Part 3 of the Bill’s first schedule remove references to the availability of review under the *Administrative Decisions (Judicial Review) Act 1977* for two Aboriginal Hostels Limited (AHL) schemes which the Explanatory Memorandum explains ‘have not existed for a number of years’. The two schemes are the Community Support Hostel Grant Scheme, which was run by the AHL from about 1988/89 to 1999/2000 (then replaced by the still active ‘Community Hostel Grant Program’) and the Student Rent Subsidy Scheme which was run by the AHL between 1987 and December 1996 (then discontinued).

**Financial implications**

There are no financial implications consequent on this Bill’s passage.

**Key provisions**

The Bill’s provisions are adequately dealt with by the Explanatory Memorandum and the second reading speech. The Bill makes the four changes which have been discussed in the ‘purpose’ and ‘main issues’ sections above.

**Concluding comments**

While seemingly uncontroversial it is interesting to note that the Government has, nevertheless, introduced the amendments which seek to delete the fourth element of the changes, that is the power of the Minister to delegate the appointment of an ‘acting’ Coordinator-General for Remote Indigenous Services or Executive Director of Township Leasing.

---

8. Section 128 of the *Paid Parental Leave Act 2010* (Cth).

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2680.