



Australian Government

Department of Families, Housing,  
Community Services and Indigenous Affairs

## SUBMISSION TO THE SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS

### **FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS (BUDGET AND OTHER MEASURES) BILL 2010 – SCHEDULE 4**

On 28 October 2010 the Senate referred the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010* (the Bill) for inquiry and report. The Senate Legal and Constitutional Affairs Legislation Committee is inquiring into Schedule 4 of the Bill. Schedule 4 seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* (the ATSI Act) to include a power for the Minister to make guidelines for the Indigenous Land Corporation (ILC) to support native title settlements when it performs its functions.

While Schedule 4 has now been removed from the Bill, it is intended that the measure contained in Schedule 4 will be introduced in the same form in a separate Bill in 2011. For the purposes of this submission, the amendments will continue to be referred to as “Schedule 4”.

#### **Policy context**

The Government considers that native title settlements can assist in closing the gap on Indigenous disadvantage. The Government has initiated a range of reforms to address blockages in the native title system. Native title enhances the ability of Indigenous communities to leverage economic development opportunities. Practical benefits can include training, employment and business opportunities for enterprises on land, freehold or other title to land, a revenue stream to build up capital and employment in national parks and other conservation areas.

The Government considers that there is scope for the ILC to increase its involvement in native title and broader land settlements, particularly where proof of connection is difficult due to historical dispossession such that native title is unlikely to be established or is expected to be limited in geographical area or extent. ILC assistance can provide for claimants to have access to land including land which is of importance to them culturally even though native title cannot be easily demonstrated. Land outcomes in these circumstances can provide an incentive for claimants to settle claims particularly where claims have remained in the system for years because of problems with establishing the requisite levels of connection. As of 1 December 2010, there were 480 native title applications nationally, and as of 28 September 2010, 139 claims had been determined. ILC involvement could create incentives to settle by providing land acquisition and land management assistance to claimants.

The criteria governing existing application-based programs administered by the ILC are currently not suited to meeting the needs of claimants and governments in developing settlement

proposals. For example, the ILC only provides program funding and resources for land management projects on Indigenous-held land. However, in most cases claimant groups will only be granted land at the conclusion of settlement negotiations. Claimant groups can experience difficulty demonstrating sufficient capacity, or would not be appropriately incorporated as a commercial entity until after their native title claim has been resolved and a Prescribed Body Corporate established, to manage any benefits and interests arising from the claim. Appropriate engagement by the ILC in supporting native title settlements would assist in developing settlement options and assist the claimant group with implementing and managing practical benefits in the settlement.

### **The Legislation**

While the current legislative framework does not prevent the ILC from contributing to native title settlements, express legislative provision will clarify ILC's role in native title settlements and remind stakeholders in an already complex process that it is useful to explore the potential of the ILC to assist in settlements. The original rationale for the ILC (and the Indigenous Land Account which funds its acquisition and operations) drew from recognition of the fact that many Indigenous people would be unable to obtain native title determinations because of past dispossession. However, this does not mean that ILC involvement should be precluded until after a negative determination, which can be at the end of a very protracted process. Schedule 4 will serve to clarify and confirm that supporting native title settlements is an appropriate and routine function of the ILC and that its support can be sought at the outset, or at any stage during the settlement process. The potential practical benefits that might be offered to claimant groups, both during negotiations, and as part of broader land settlements through the ILC's existing programs include: land acquisition; capacity-building for sustainable land management; training and employment opportunities; and commercial advice.

To support the ILC's role, Schedule 4 empowers the Minister to make guidelines on performance of its functions in supporting native title settlements, and to which the ILC must have regard. The ILC has indicated its acceptance of the proposed Ministerial power. The Schedule clarifies that in the unlikely event of an inconsistency between the ILC guidelines under s191I(1) and Ministerial guidelines under proposed s191HA, the ILC guidelines will have no effect to the extent of the inconsistency. Ministerial guidelines, which would be subject to Parliamentary disallowance, would deal with the manner in which the ILC could support native title groups with the resolution or settlement of native title claims. They are expected to include the circumstances under which the ILC could assist, the processes for providing that assistance and what types of assistance could be made available. There has been some initial discussion with the ILC on the potential content of the guidelines. As the legislative process proceeds, there will be more detailed consultation with the ILC and other stakeholders.

### **ILC - Background**

The ILC is a statutory authority established under the ATSI Act. The ILC was established on 1 June 1995 as part of the Government's response to the High Court's Mabo decision. The ILC assists Aboriginal and Torres Strait Islander persons to acquire and manage Indigenous-held land so as to provide economic, environmental, social and cultural benefits.

In performing its land acquisition and land management functions, the ILC's key priority areas for 2007-2012 are:

- creating training and sustainable employment for Indigenous people;
- increasing the capacity of Indigenous people to sustainably manage their land;
- engaging Indigenous people in viable, land-based enterprises including tourism and agriculture;
- supporting the education of Indigenous youth; including provision of student hostels; and
- collaboration with other agencies to produce effective outcomes.

The ILC has had extensive experience in land acquisition and land management activities, which include significant training and employment outcomes. As at 30 June 2010, the ILC had transferred 149 properties to Indigenous organisations and was managing 164 land management projects.

### **Funding Arrangements**

The ILC is not budget-funded and its main source of funding is the annual payment made to it from the Aboriginal and Torres Strait Islander Land Account (Land Account) under section 193 of the ATSI Act.

The Land Account is a self-sustaining capital fund worth over \$1.8 billion and is administered by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). The purpose of the Land Account is to provide a secure stream of income to the ILC in perpetuity. Annual payments made to the ILC from the Land Account ensure a reliable income stream for the ILC, and provide for a minimum guaranteed annual payment of \$45 million.

The annual payment for later years will be \$45 million indexed to the Consumer Price Index. If the investment returns are less than the annual payment, the balance of the payment will be made from the capital base of the Land Account.

Additional payments may be made to the ILC where, after the annual payment has been made, the balance of the Land Account exceeds the real capital value of the Land Account based on 30 June 2010. The amount to be paid is the excess between the actual balance and the real capital value of the Land Account at 30 June. Additional payments are to be used in accordance with the National Indigenous Land Strategy and reported to the Minister. The real capital value of the Land Account will be maintained over the long term.

An independent review of the effectiveness of the new funding arrangements will be conducted at pre-determined intervals initially every three years. The content, frequency and purpose of the review will be prescribed in Regulations made under the ATSI Act and a report will be provided to the Minister.