

2010—2011

The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

**Native Title Amendment (Reform) Bill
2011**

No. , 2011

(Senator Siewert)

**A Bill for an Act to amend the *Native Title Act 1993*
to further the interests of Aboriginal and Torres
Strait Islander Australians, and for related
purposes**

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1 **A Bill for an Act to amend the *Native Title Act 1993***
2 **to further the interests of Aboriginal and Torres**
3 **Strait Islander Australians, and for related**
4 **purposes**

5 The Parliament of Australia enacts:

6 **1 Short title**

7 This Act may be cited as the *Native Title Amendment (Reform) Act*
8 *2011*.

9 **2 Commencement**

10 This Act commences on the day after this Act receives Royal
11 Assent.

1 **3 Schedule(s)**

2 Each Act that is specified in a Schedule to this Act is amended or
3 repealed as set out in the applicable items in the Schedule
4 concerned, and any other item in a Schedule to this Act has effect
5 according to its terms.

6 **4 Objects**

7 The objects of this Act are:

- 8 (a) to refer to the United Nations Declaration on the Rights of
9 Indigenous Peoples and provide for principles of the
10 Declaration to be applied in decision-making under the
11 *Native Title Act 1993*; and
12 (b) to implement reforms to the *Native Title Act 1993* to improve
13 the effectiveness of the native title system for Aboriginal
14 peoples and Torres Strait Islanders.

1 **Schedule 1—Amendment of the Native Title**
2 **Act 1993**
3

4 **1 After section 3**

5 Insert:

6 **3A United Nations Declaration on the Rights of Indigenous Peoples**

- 7 (1) It is an additional object of this Act that governments in Australia
8 take all necessary steps to implement the following principles set
9 out in the United Nations Declaration on the Rights of Indigenous
10 Peoples:
11 (a) the rights of all peoples including Indigenous peoples to
12 self-determination;
13 (b) full and direct consultation and participation of the
14 Indigenous peoples concerned;
15 (c) free, prior and informed consent of Indigenous peoples in
16 matters affecting them;
17 (d) the right of Indigenous peoples to their traditional lands,
18 territories and natural resources;
19 (e) demonstrated respect for Indigenous cultural practices,
20 traditions, laws and institutions;
21 (f) reparation for injury to or loss of Indigenous interests;
22 (g) non-discrimination against the interests of Indigenous
23 peoples.
- 24 (2) The provisions of this Act are to be interpreted and applied in a
25 manner that is consistent with the Declaration.
- 26 (3) The principles in subsection (1) must, in every relevant case, be
27 applied by each person exercising a power or performing a
28 function under this Act.

29 **2 Paragraph 24MB(1)(c)**

30 Repeal the paragraph, substitute:

- 31 (c) a law of the Commonwealth, a State or a Territory:
32 (i) applies to the area to which the act relates; and
33 (ii) provides effective protection or preservation of areas, or
34 sites, that may be of particular significance to

1 Aboriginal peoples or Torres Strait Islanders in
2 accordance with their traditions.

3 **3 Paragraph 24MD(2)(c)**

4 Repeal the paragraph, substitute:

5 (bb) the non-extinguishment principle applies to the acquisition;
6 and

7 (c) nothing in this Act prevents any act that is done in giving
8 effect to the purpose of the acquisition from extinguishing the
9 native title rights and interests; and

10 **4 Subsection 26(3)**

11 Repeal the subsection (including the heading).

12 **5 Paragraph 31(1)(b)**

13 Repeal the paragraph, substitute:

14 (b) the negotiation parties must, for a period of at least 6 months,
15 negotiate in good faith using all reasonable efforts to come to
16 an agreement about:

17 (i) the doing of the act; or

18 (ii) the conditions under which each of the native title
19 parties might agree to the doing of the act.

20 **6 After subsection 31(1)**

21 Insert:

22 (1A) For the purposes of paragraph (1)(b), *negotiate in good faith using*
23 *all reasonable efforts* includes but is not limited to:

24 (a) attending, and actively participating in, meetings at
25 reasonable times including, where reasonably practicable, at
26 a location where most of the members of the native title
27 parties reside, if so requested by them;

28 (b) disclosing relevant information (other than confidential or
29 commercially sensitive information) in a timely manner;

30 (c) making reasonable offers and counter-offers;

31 (d) demonstrably giving genuine consideration to proposals
32 made by other negotiation parties;

- 1 (e) responding to proposals made by other negotiation parties in
2 a timely and detailed manner, including providing reasons for
3 the relevant response;
4 (f) refraining from capricious or unfair conduct that undermines
5 the beneficial nature of the right to negotiate.

6 **7 After subsection 31(2)**

7 Insert:

- 8 (2A) In any proceeding in which the application of paragraph (1)(b) is
9 raised, the party asserting good faith has the onus of proving that it
10 negotiated in good faith.

11 **8 Subsection 35(1)**

12 Omit “Any”, substitute “Subject to subsection (1A), any”.

13 **9 After subsection 35(1)**

14 Insert:

- 15 (1A) A negotiation party may not apply to the arbitral body under
16 subsection (1) unless the negotiation party has complied with
17 subsections 31(1), (1A) and (2A).

18 **10 Subsection 38(2)**

19 Repeal the subsection (including the heading), substitute:

20 *Profit-sharing conditions may be determined*

- 21 (2) Without limiting the nature of conditions that may be imposed
22 under paragraph (1)(c), they may, if relevant, include a condition
23 that has the effect that native title parties are to be entitled to
24 payments worked out by reference to:
25 (a) the amount of profits made; or
26 (b) any income derived; or
27 (c) any things produced;
28 by any grantee party as a result of doing anything in relation to the
29 land or waters concerned after the act is done.

30 **11 After section 47B**

31 Insert:

1 **47C Agreements to disregard prior extinguishment**

2 *When section applies*

- 3 (1) This section applies if:
- 4 (a) an application under section 61 is made in relation to an area;
- 5 and
- 6 (b) any time prior to a determination, there is an agreement
- 7 between the applicant and the Government party that the
- 8 extinguishment of native title rights or interests by a prior act
- 9 affecting native title in relation to the area, or any part of the
- 10 area, covered by the application be disregarded.

11 *Prior extinguishment to be disregarded*

- 12 (2) For all purposes under this Act in relation to the application, any
- 13 extinguishment of the native title rights and interests by any of the
- 14 following acts must be disregarded:
- 15 (a) the prior act itself;
- 16 (b) the creation of any other interest in relation to the area as a
- 17 result of the prior act;
- 18 (c) the doing of any act by virtue of the holding of the interest.

19 *Effect of determination*

- 20 (3) If the determination on the application is that the native title claim
- 21 group holds the native title rights and interests claimed:
- 22 (a) the determination does not affect:
- 23 (i) the validity of the creation of any prior interest in
- 24 relation to the area; or
- 25 (ii) any interest of the Crown in any capacity, or of any
- 26 statutory authority, in any public works on the land or
- 27 waters concerned; and
- 28 (b) the non-extinguishment principle applies to the creation of
- 29 any prior interest in relation to the area.

30 **12 After section 61**

31 Insert:

1 **61AA Presumptions relating to applications**

2 (1) This section applies to an application for a native title
3 determination brought under section 61 if the following
4 circumstances exist:

5 (a) the native title claim group defined in the application applies
6 for a determination of native title rights and interests where
7 the rights and interests are asserted to be possessed under
8 laws acknowledged and customs observed by the native title
9 claim group;

10 (b) the members of the native title claim group reasonably
11 believe the laws so acknowledged and the customs so
12 observed to be traditional;

13 (c) the members of the native title claim group, by the laws
14 acknowledged and the customs observed, have a connection
15 with the land or waters the subject of the application;

16 (d) the members of the native title claim group reasonably
17 believe that persons, from whom one or more of them is
18 descended, acknowledged traditional laws and observed
19 traditional customs at sovereignty by which those persons
20 had a connection with the land or waters the subject of the
21 application.

22 (2) If this section applies to an application, it must be presumed, in the
23 absence of proof to the contrary:

24 (a) that the laws acknowledged and customs observed by the
25 native title claim group are traditional laws acknowledged
26 and traditional customs observed at sovereignty;

27 (b) that the native title claim group has a connection with the
28 land or waters by those traditional laws and traditional
29 customs;

30 (c) if the native title rights and interests asserted are capable of
31 recognition by the common law—that the facts necessary for
32 the recognition of those rights and interests by the common
33 law are established.

34 **61AB Continuing connection**

35 (1) A presumption under section 61AA that a native title claim group
36 has a connection with land or waters by traditional laws and
37 traditional customs, or a finding to that effect, may be set aside

1 only by evidence of a substantial interruption in the
2 acknowledgment of those traditional laws or the observation of
3 those traditional customs.

4 (2) In any proceeding relating to the application of subsection (1), the
5 court must treat as relevant:

6 (a) whether the primary reason for any demonstrated interruption
7 in the acknowledgment of traditional laws or the observance
8 of traditional customs is the action of a State or a Territory or
9 a person who is not an Aboriginal person or a Torres Strait
10 Islander; or

11 (b) whether the primary reason for any demonstrated significant
12 change to the traditional laws acknowledged or the traditional
13 customs observed by the Aboriginal peoples or Torres Strait
14 Islanders is the action of a State or a Territory or a person
15 who is not an Aboriginal person or a Torres Strait Islander.

16 **13 After subsection 223(1)**

17 Insert:

18 *Traditional laws and customs*

19 (1A) Without limiting subsection (1), ***traditional laws acknowledged*** in
20 that subsection includes such laws as remain identifiable through
21 time, regardless of whether there is a change in those laws or in the
22 manner in which they are acknowledged.

23 (1B) Without limiting subsection (1), ***traditional customs observed*** in
24 that subsection includes such customs as remain identifiable
25 through time, regardless of whether there is a change in those
26 customs or in the manner in which they are observed.

27 *Connection*

28 (1C) To avoid doubt, and without limiting subsection (1), it is not
29 necessary for a ***connection with the land or waters*** referred to in
30 paragraph (1)(c) to be a physical connection.

31 (1D) Nothing in subsection (1) is to be interpreted as requiring:

32 (a) in the case of traditional laws—the laws to be acknowledged
33 continuously;

- 1 (b) in the case of traditional customs—the customs to be
2 observed continuously;
3 (c) in the case of connection with the land or waters—the
4 connection to be maintained continuously.

5 **14 Subsection 223(2)**

6 Repeal the subsection, substitute:

- 7 (2) Without limiting subsection (1), *rights and interests* in that
8 subsection includes:
9 (a) hunting, gathering, or fishing, rights and interests; and
10 (b) the right to trade and other rights and interests of a
11 commercial nature.