INDIGENOUS AFFAIRS LEGISLATION
AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Families, Housing, Community Services and
Indigenous Affairs, the Hon Jenny Macklin MP)
OUTLINE

The Bill contains three non-Budget measures, as described below.

Scheduling of land

The Bill adds further parcels of land to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976*. This will enable the land to be granted to relevant Aboriginal Land Trusts.

Indigenous Land Corporation

The Bill amends the *Aboriginal and Torres Strait Islander Act 2005* to include a power for the Minister to make guidelines that the Indigenous Land Corporation must have regard to in deciding whether to perform its functions in support of a native title settlement and, if it decides to perform its functions in support of a native title settlement, in performing its functions in support of that settlement.

Torres Strait Regional Authority

The Bill amends the *Aboriginal and Torres Strait Islander Act 2005* to remove the connection between the election of members to the Torres Strait Regional Authority and the Queensland Local Government elections, and to allow for a wider range of options for the composition of the Torres Strait Regional Authority.

Financial impact statement

The Bill has no financial impact.
NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, as the Indigenous Affairs Legislation Amendment Act 2011.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and Schedules to, the Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

This explanatory memorandum uses the following abbreviation:

- ‘ATSI Act’ means the Aboriginal and Torres Strait Islander Act 2005.
Schedule 1 – Scheduling of land

Summary

This Schedule adds further parcels of land to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). This will enable the land to be granted to relevant Aboriginal Land Trusts.

Background

This Schedule adds further parcels of Northern Territory land near Borroloola, and also land comprising the Port Patterson Islands, to Schedule 1 to the Land Rights Act. This will allow the land in question to be granted to relevant Aboriginal Land Trusts under sections 10 and 12 of the Land Rights Act.

Agreement has been reached between the Commonwealth, the Northern Territory Government and the Northern Land Council that these parcels of land should be granted to relevant Aboriginal Land Trusts as Aboriginal land under the Land Rights Act.

The parcels of land near Borroloola are associated with the Borroloola Land Claim, which was the first land claim made under the Land Rights Act. The parcels of land include Batten Point, North Island and some small islands off the coast of Vanderlin Island. North Island has been held as Barranyi National Park and previously did not qualify to be granted as part of the land claim. The small islands, called Rarranggilawunyara, Niwawunala, Wanadjurara and Alolo, were part of the land claim, but were inadvertently omitted from the original recommendations in relation to this claim. Two related grants of land have previously been made to the claimants, and, once these particular parcels of land are granted, this land claim will be resolved.

The Port Patterson Islands also relate to a long-running land claim, the Kenbi Land Claim over the Cox Peninsula near Darwin. After a long and complex process, this land claim is also approaching resolution. The addition of the Port Patterson Islands to Schedule 1 to the Land Rights Act will enable this land to be included in a grant associated with the Kenbi Land Claim in the near future.

This measure was originally introduced in the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010, but was withdrawn during passage to allow one of the land area measurements, drawn from the survey plan for the land in question, to be clarified. That clarification is now reflected in this Schedule.

The amendments made by this Schedule commence on the day after Royal Assent.
**Explanation of the changes**

**Item 1** amends Part 4 of Schedule 1 to the Land Rights Act by inserting a reference to various portions of land near Borroloola in the Northern Territory as land to be granted as Aboriginal land.

**Item 2** also amends Part 4 of Schedule 1 to the Land Rights Act by inserting a reference to a portion of land in the Northern Territory known as the Port Patterson Islands as land to be granted as Aboriginal land.
Schedule 2 – Indigenous Land Corporation

Summary

This Schedule amends the ATSI Act to include a power for the Minister to make guidelines that the Indigenous Land Corporation must have regard to in deciding whether to perform its functions in support of a native title settlement and, if it decides to perform its functions in support of a native title settlement, in performing its functions in support of that settlement.

Background

The purpose of the Indigenous Land Corporation is to assist Aboriginal people and Torres Strait Islanders to acquire and manage Indigenous-held land so as to provide economic, environmental, social and cultural benefits.

The Indigenous Land Corporation’s functions are set out in sections 191C, 191D and 191E of the ATSI Act. Its main functions are land acquisition and land management. These functions can be exercised in support of native title settlements, whether or not the settlement includes a determination of native title.

The Government promotes flexible native title settlements that can be sustained over the long term, instead of litigation, wherever possible. Settlements may provide for a range of practical benefits, including employment, training and business opportunities.

In introducing these amendments, the Government recognises that the Indigenous Land Corporation can assist with the resolution of native title settlements, particularly where connection to the land in question is at issue and native title may not be established.

The amendments provide a power for the Minister to make guidelines that the Indigenous Land Corporation must have regard to before deciding to perform its functions in support of a native title settlement, as well as when it decides to perform its functions in support of a native title settlement. In these instances, the Indigenous Land Corporation will be required to have regard to any guidelines made in the exercise of the Minister’s power.

This measure was originally introduced in the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010, but was withdrawn during passage to allow time for the Senate Standing Committee on Legal and Constitutional Affairs to inquire into the measure. The Committee reported on 9 February 2011. This Schedule reflects the recommendation made by the Committee to clarify the measure by rephrasing subsection 191F(2A) and adding a definition of the term ‘native title settlements’.
The amendments made by this Schedule commence on the day after Royal Assent.

**Explanation of the changes**

**Item 1** inserts new subsection 191F(2A) into the ATSI Act. New subsection 191F(2A) requires the Indigenous Land Corporation to have regard to guidelines made under new section 191HA in deciding whether to perform its functions in support of a native title settlement and, if it decides to perform its functions in support of a native title settlement, in performing its functions in support of that settlement.

**Item 1** also inserts a note to clarify that the *Native Title Act 1993* deals with making and resolving native title claims.

The Indigenous Land Corporation may perform its functions for any reason covered in its enabling legislation. The Indigenous Land Corporation must have regard to the guidelines before deciding to perform its functions in support of a native title settlement, as well as when it decides to perform its functions in support of a native title settlement. It will not be required to have regard to the guidelines when performing its functions in other contexts.

**Item 2** inserts new section 191HA, which provides that the Minister may make guidelines for the purposes of new subsection 191F(2A). Any guidelines made under this provision will be a legislative instrument.

**Item 3** amends the heading to section 191I by omitting the word ‘Guidelines’ and substituting ‘Indigenous Land Corporation guidelines’, to describe more accurately the content of the section.

Subsection 191I(1) applies if the Indigenous Land Corporation makes its own guidelines about the performance of a function referred to in paragraph 191D(1)(a), (c) or (d) or paragraph 191E(1)(d), (e) or (f) of the ATSI Act.

New subsection 191I(1A), inserted by **item 3**, makes it clear that any guidelines made by the Indigenous Land Corporation will have no effect, to the extent of any inconsistency, if they are inconsistent with any guidelines made by the Minister under new section 191HA.

**Item 4** makes an amendment to subsection 191I(2) required as a consequence of **item 3**.
Schedule 3 – Torres Strait Regional Authority

**Summary**

This Schedule amends the ATSI Act to remove the connection between the election of members to the Torres Strait Regional Authority (the TSRA) and the Queensland Local Government elections, and to allow for a wider range of options for the composition of the TSRA.

**Background**

Section 142Y of the ATSI Act currently provides that elections for the TSRA are to be held every three years. The timing of the election is linked to Local Government elections under the ‘Queensland Act’ (a defined term in the ATSI Act). Under previous Queensland law, Local Government elections were held every three years. However, under the present Queensland legislation, the *Local Government Act 2009* (Qld) (the Queensland Local Government Act), Local Government elections are held every *four* years. As a result, the timing set out in section 142Y is now inconsistent with the timing set out in the Queensland Local Government Act. This Schedule amends section 142Y to remove the connection between the two sets of elections.

This Schedule also amends section 142S of the ATSI Act. Under present section 142S, the only power that the Minister has to determine the constitution of the TSRA is to determine that it would best represent the Torres Strait area if it included people elected under the Queensland Local Government Act. This is another way in which the TSRA election process is connected to Queensland Local Government processes.

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.

Subsection 142S(1) of the ATSI Act allows the Minister to appoint members to the TSRA to represent ‘particular communities’. The TSRA has commissioned a governance review of its structure and the method of appointment of its members. Without pre-empting outcome of the review, which may not be known before the amendments in this Schedule commence, it is expected that some more flexible outcomes for the composition of the TSRA will be considered. To allow this to happen, wording in the ATSI Act referring to ‘particular communities’ is amended by this Schedule.
The amendments made by this Schedule commence on a single day to be fixed by Proclamation. However, as a default, if the provisions do not commence within the period of 12 months beginning on the day this Bill receives Royal Assent, they commence on the day after the end of that period. A longer than usual default period has been included to ensure that the amendments contained in this Schedule can be proclaimed to commence at a time that will not interfere with the conduct of the next TSRA election process. Providing for commencement by Proclamation, or after a period of 12 months, will allow the amendments to commence either before the next election period or after that period (rather than part-way through the period).

Explanation of the changes

Item 1 repeals the definition of ‘Queensland Act’ in subsection 4(1). Because the connection between the ATSI Act and the Queensland Local Government Act is removed by item 7 of this Schedule, this definition is no longer required.

Items 2, 4 and 5 omit the word ‘notice’ and substitute ‘an instrument’ in subsections 142R(1) and 142TA(3) and paragraph 142TA(5)(b) respectively. This is a consequential change required because of the changes to section 142S made by item 3 of this Schedule. Similarly, item 8 omits the words ‘a notice under paragraph 142S(2)(a) or (b)’ and substitutes ‘an instrument under section 142S’ because of the changes to section 142S.

Item 3 repeals and replaces section 142S. Under new subsection 142S(1), the Minister may make a legislative instrument providing for and in relation to how the TSRA is to be constituted (rather than determining this by notice in the Gazette, as is current practice). Since the commencement of the Legislative Instruments Act 2003, a legislative instrument, rather than a notice in the Gazette, is the required method for making subordinate legislation which meets the definition of a ‘legislative instrument’ under that Act. Consequential to this change, current subsection (5), which provides that a notice in the Gazette made under section 142S is a disallowable instrument, is no longer required.

Under current subsection 142S(1), the Minister may determine that the TSRA would best be able to represent the Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area if it consisted of, or included, persons elected to represent particular communities in that area under the Queensland Act. In effect, people elected under Queensland Local Government elections also become members of the TSRA. This may have potential for conflicts of interest for people who hold positions both as councillors under Queensland Local Government law and on the TSRA.
Because the connection between the ATSI Act and the Queensland Local Government Act is being removed, new subsection 142S(1) does not refer to the ‘Queensland Act’. This change reduces the potential for conflict of interest of members elected to the TSRA, as they will be directly elected to the TSRA rather than being appointed as a result of the Queensland Local Government elections. A person may still be elected to both the Queensland Local Government and the TSRA, if the person is successful in both elections. New subsection 142S(1) allows the Minister greater flexibility in how the TSRA is to be constituted than is available under current subsection (1).

A review of the structure of the TSRA and the method of appointment is about to take place, and it is intended that the options available for the composition of the TSRA following that review be as wide as possible.

Accordingly, new paragraph 142S(2)(a) provides that the Minister may make an instrument for ‘some or all’ of the TSRA members ‘to be elected under this Act to be representatives of a specified kind’. This wording is intentionally flexible and broad, and could encompass a wide range of outcomes, depending on the outcome of the review.

New subsections (3), (4), (5) and (6) are similar in effect to the present subsections (3), (3A), (3B) and (4). However, some changes of wording have been made to simplify and clarify section 142S. For example, new subsection (3) does not refer to an instrument making other provisions in relation to the constitution of the TSRA, but only refers to provisions in relation to the operation of the TSRA. This is because matters relating to how the TSRA is constituted are now completely covered by subsection (1).

Item 6 omits from subsection 142Y(1) ‘Subject to this section, TSRA elections must be held every 3 years’ and substitutes ‘TSRA elections must be held every 4 years’. As a practical matter, to maximise efficiency and save money, TSRA elections will be held every four years, rather than every three years. Subsection 142Y(1) has been amended to reflect this.

Item 7 repeals subsection 142Y(3). Presently, subsection 142Y(3) provides 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.

By repealing subsection 142Y(3), the connection requiring the TSRA elections to be held at the same time as the Queensland Local Government elections is removed. The repeal of this subsection, in conjunction with the changes to subsection 142Y(1), provide that the date for TSRA elections is determined solely by the provisions of the ATSI Act.