2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

INDIGENOUS AFFAIRS LEGISLATION AMENDMENT BILL (No. 2) 2011

REVISED EXPLANATORY MEMORANDUM

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

This Bill amends the *Aboriginal and Torres Strait Islander Act* 2005 to make several minor governance and business changes, as set out below:

- change the title of a number of office-holders from ‘General Manager’ to ‘Chief Executive Officer’;

- ensure that information held by Indigenous Business Australia will be appropriately protected but capable of being disclosed by that organisation in carrying out its proper functions, consistent with similar Commonwealth arrangements; and

- remove references to the availability of review under the *Administrative Decisions (Judicial Review) Act* 1977 for two discontinued Aboriginal Hostels Limited schemes.

Financial impact statement

There is no financial impact from this Bill.
NOTES ON CLAUSES

Clause 1 sets out how the new Act is to be cited, that is, as the *Indigenous Affairs Legislation Amendment Act (No. 2) 2011*.

Clause 2 provides that the new Act commences on the day after the Act receives the Royal Assent.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.
Schedule 1 – Amendments relating to the Aboriginal and Torres Strait Islander Act 2005

This Schedule amends the *Aboriginal and Torres Strait Islander Act 2005* to:

- change the title of a number of office-holders from ‘General Manager’ to ‘Chief Executive Officer’;

- ensure that information held by Indigenous Business Australia will be appropriately protected but capable of being disclosed by that organisation in carrying out its proper functions, consistent with similar Commonwealth arrangements; and

- remove references to the availability of review under the *Administrative Decisions (Judicial Review) Act 1977* for two discontinued Aboriginal Hostels Limited schemes.

**Background**

**Chief Executive Officers**

Presently, a number of statutory positions created by the *Aboriginal and Torres Strait Islander Act 2005* are referred to by the term ‘General Manager’. This is so for the heads of Indigenous Business Australia, the Indigenous Land Corporation, Aboriginal Hostels Limited and the Torres Strait Regional Authority (TSRA).

However, since those positions were created, the nature of the roles undertaken has changed. The term ‘General Manager’ will be changed to ‘Chief Executive Officer’ to reflect better the responsibilities and expectations of the respective agency head positions. This change will 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. This includes, for example, the Australia Council for the Arts, Screen Australia, the Australian Film, Television and Radio School and the Australian Sports Commission.

The title ‘Chief Executive Officer’ is also appropriate for statutory authorities and companies that have a board of Directors, with an expectation that a Chief Executive Officer is usually more senior than a General Manager. Accordingly, this change will help the Boards of these agencies attract a higher calibre of candidate for agency head positions.

**Secrecy provision**

Section 191 relates to the handling of information by Indigenous Business Australia.
In its current form, because of the possibility of criminal sanctions, section 191 prevents any present or former Indigenous Business Australia staff from releasing any [emphasis added] information (see subsection 191(2)). Defences are set out in subsection 191(2A), but they are limited in scope. Section 191 has prevented the disclosure of information to agencies with responsibility for overseeing Commonwealth administrative practices, such as the Ombudsman and the Privacy Commissioner. It has also prevented disclosure of information to Commonwealth agencies working in joint initiatives with Indigenous Business Australia, and State and Territory agencies seeking to work more closely with Indigenous Business Australia to achieve better outcomes for Aboriginal and Torres Strait Islander people and communities.

Amendments are now being made to section 191 to assist Indigenous Business Australia in participating effectively in whole-of-government objectives in Indigenous affairs. The amendments will also help align Indigenous Business Australia’s secrecy provisions with the Australian Government’s determination for greater access to, and transparency of, information. However, transparency is balanced against the need to maintain the confidentiality of information provided by Aboriginal and Torres Strait Islander people, communities and businesses.

The amended provision will allow disclosure of information in limited circumstances to the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, and in public interest cases (such as in responding to the Ombudsman). Ministerial guidelines will include appropriate safeguards to protect personal and other sensitive information, consistent with legislative obligations such as in the Privacy Act 1988. The changes are consistent with similar Commonwealth arrangements for handling protected information, such as in the family assistance law and the Paid Parental Leave Act 2010.

**Aboriginal Hostels Limited**

Section 200(6) provides that, if Aboriginal Hostels Limited makes a decision in relation to certain schemes, the decision is taken to be a decision of an administrative character made under an enactment for the purposes of the Administrative Decisions (Judicial Review) Act 1977. Paragraphs (b) and (c) refer to the Community Support Hostel Grant Scheme and the Student Rent Subsidy Scheme respectively. These Schemes have not existed for a number of years. Accordingly, these references are being removed.
Explanation of the changes

Part 1 – Chief Executive Officers

Aboriginal and Torres Strait Islander Act 2005

Items 1 to 6 insert into subsection 4(1) definitions of ‘Indigenous Business Australia Chief Executive Officer’, ‘Indigenous Land Corporation Chief Executive Officer’ and ‘TSRA Chief Executive Officer’, and repeal the definitions of General Manager of those organisations.

Items 7 to 16, items 18 to 19, and items 21 to 71 replace references to ‘General Manager’ with references to ‘Chief Executive Officer’ in relation to Indigenous Business Australia, the Indigenous Land Corporation and the Torres Strait Regional Authority wherever they occur, and make minor formatting changes, such as deleting subsection numbers when the section no longer contains any subsections. For example, see items 34 and 63.

Item 17 amends subsection 144G(3). Following the change set out in item 16, subsection 144(3) provides that the Minister must not appoint a person as the TSRA Chief Executive Officer unless the person agrees. Item 17 deletes words providing that this rule does not apply to the first TSRA General Manager.

Item 20 amends subsection 144H(2). Presently, subsection (2) provides that the term of office of the first TSRA General Manager is two years and, for every other General Manager, is up to five years. In these items, the change from ‘General Manager’ to ‘Chief Executive Officer’ is simply a change in nomenclature. The first Chief Executive Officer will not have the responsibility for establishing the Torres Strait Regional Authority as did the first General Manager. The first TSRA Chief Executive Officer will be continuing the role of the General Manager and not be a new position. Accordingly, it is not appropriate for the same limitations to be placed on the first Chief Executive Officer as were placed on the first General Manager. Section 25B of the Acts Interpretation Act 1901 provides that the office continues in existence under the new name so that its identity is not affected (this is also noted in relation to items 15, 33 and 52).

Item 72 sets out transitional arrangements in relation to secrecy provisions in the Aboriginal and Torres Strait Islander Act 2005. Each of the three secrecy provisions in that Act (sections 191, 193S and 200A) are stated to apply to people who are or have been the General Manager of Indigenous Business Australia, the Indigenous Land Corporation or the Torres Strait Regional Authority respectively. It is important that people who held the position of General Manager of those agencies in the past continue to be bound by the secrecy provisions, which will now apply to a Chief Executive Officer. Accordingly, item 72 provides that, on and after the item commences, a reference in the specified paragraphs of those sections to the Chief Executive Officer included a reference to the General Manager.
Item 73 sets out a consequential amendment to the *Aboriginal Land Rights (Northern Territory) Act 1976*. Paragraph 76(1A)(e) of that Act provides that the Minister may delegate certain powers to the General Manager of Indigenous Business Australia. **Item 73** changes that reference to a reference to the Chief Executive Officer of Indigenous Business Australia.

**Part 2 – Secrecy provision**

*Aboriginal and Torres Strait Islander Act 2005*

Items 74 to 77 amend section 191, the secrecy provision relating to Indigenous Business Australia.

**Item 74** inserts before subsection 191(2A) a new heading ‘*Exception – housing or business loans*’. This is for consistency with the fact that the new subsections inserted after subsection 191(2A) are framed as exceptions to subsection 191(2).

**Item 75** inserts a number of new subsections after subsection 191(2A).

New subsection 191(2B) provides that the Indigenous Business Australia Chief Executive Officer may divulge or communicate information, or produce a document, to the Secretary of the Department for the purposes of the Department. Presently, the Indigenous Business Australia Board may release information to the Minister, at the Minister’s request (see section 154), but there is no direct way for the Indigenous Business Australia Chief Executive Officer to communicate with the Secretary of the Department.

The changes will allow greater sharing of information to improve program delivery and facilitate greater transparency and accountability between Indigenous Business Australia and the Department, leading to improved policy and program outcomes.

To maintain appropriate protections over the release of information, the Minister may make guidelines for the Chief Executive Officer’s release of information (see new section 191AA). The Chief Executive Officer must act in accordance with any guidelines that have been made (see new subsection 191(2C)).

New subsection 191(2D) provides that the Indigenous Business Australia Chief Executive Officer may, if he or she determines in writing that it is necessary in the public interest, divulge or communicate information, or produce a document, to specified persons for specified purposes. This formulation will not rule out decisions in relation to a class or classes of persons because of subsection 46(3) of the *Acts Interpretation Act 1901*. New subsection 191(2D) will allow Indigenous Business Australia to release information in a wider range of situations than is currently the case. For example, Indigenous Business Australia has generally been unable to respond to requests from the Ombudsman.
New subsection 191(2F) provides that a determination under subsection 191(2D) is not a legislative instrument. This subsection is merely declaratory and included to assist readers, as such a determination is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. As with subsection 191(2B), for appropriate protections over the release of information to be maintained, the Minister may make guidelines to guide the Chief Executive Officer’s release of information (see new section 191AA). The Indigenous Business Australia Chief Executive Officer must act in accordance with any guidelines in force (see new subsection 191(2E)).

New subsection 191(2G) provides that a person to whom the section applies may divulge or communicate information, or produce a document, to a person authorised in writing by the person to whom the information relates to receive the information. Subsection 191(2A) provides that it is a defence to provide information to a person who is authorised in writing by the person to whom the information relates. However, that defence is limited to situations where the information relates to a housing or business loan made, or taken to have been made, by Indigenous Business Australia. In recognition of the fact that Indigenous Business Australia’s business is wider than simply making loans, new subsection 191(2G) allows for information and documents, where there is consent, to be released in a wider range of situations than just those relating to housing or business loans.

New subsection 191(2H) provides that a person to whom the section applies may make a record of, divulge or communicate information or produce a document to a person if the information is already publicly available. Some information relating to Indigenous Business Australia is already publicly available, such as information about the Indigenous Business Australia Scholarships Program, the Indigenous Economic Development Trust and the administration of public bequests. However, presently subsection 191(2) makes disclosure of such public information an offence. On the basis that a person requesting it could find the information elsewhere, new subsection 191(2H) creates an exception to the offence set out in subsection 191(2).

New subsection 191(2J) provides that, despite subsection 191(2), a person may make a record of information in connection with the exercise of a power under new subsection (2B), (2D) or (2G). Without this provision, subsections (2B), (2D) and (2G) would only cover divulging or communicating information, without also allowing the person to make a record of the information. This will allow a person to whom section 191 applies to take such steps as recording in a file when and to whom information was released.
In subsections 191(2B), (2G), (2H) and (2J), the burden of proof in criminal proceedings is reversed to put the onus on the defendant. Subsection 13.3(3) of the *Criminal Code* provides that a standard ‘evidential burden’ defence is created by expressing a matter to be a defence or expressing it as an exception to the offence. The present cases are expressed as exceptions to the general offence set out in subsection 191(2). However, this is justified because the matters concerned are within the exclusive knowledge of the defendant or it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. This reverse onus is also justified given the relatively low level of the penalty for the offence set out in subsection 191(2), of 50 penalty units.

**Items 76 and 77** insert headings before subsections 191(3) and 191(4) respectively. This is a style change only, for consistency with Commonwealth drafting conventions.

**Item 78** inserts at the end of Division 9 of Part 4 a new section 191AA. New section 191AA provides that the Minister may, by legislative instrument, make guidelines for the Indigenous Business Australia Chief Executive Officer’s power to divulge or communicate information, or produce a document, to the Secretary (see subsection 191(2B)), or give public interest determinations (see subsection 191(2D)). The Indigenous Business Australia Chief Executive Officer must act in accordance with any guidelines in force (see subsections 191(2C) and (2E)).

**Part 3 – Aboriginal Hostels Limited**

*Aboriginal and Torres Strait Islander Act 2005*

**Item 79** repeals and substitutes subsection 200(6) of the *Aboriginal and Torres Strait Islander Act 2005*. The effect of this change is to remove from subsection 200(6) paragraphs (b) and (c). Those paragraphs provided that certain decisions made by Aboriginal Hostels Limited in relation to an application for a grant under the Community Support Hostel Grant Scheme, or decisions made by Aboriginal Hostels Limited in relation an application for a grant under the Student Rent Subsidy Scheme, were decisions of an administrative character for the purposes of the *Administrative Decisions (Judicial Review) Act 1977*.

Neither the Community Support Hostel Grant Scheme nor the Student Rent Subsidy Scheme has existed for many years. Accordingly, it is appropriate that references to them be removed from the *Aboriginal and Torres Strait Islander Act 2005*. However, to preserve the rights of people who were affected in the past by decisions made in relation to those schemes to seek review under the *Administrative Decisions (Judicial Review) Act 1977*, item 80 provides that the amendments made in Part 3 only apply to decisions made after the commencement of Part 3.