CHAPTER 4

KEY ISSUES

4.1 This chapter canvasses the key issues and concerns raised in submissions and evidence. While several witnesses recognised the need to replace the outdated ACA Act, the 2005 Bill generated significant concern with several groups questioning its viability, particularly in regard to the Indigenous sector's capacity to adapt to a new regulatory regime. However, as the chapter shows, the 2006 Transitional and Amendment bills have addressed or overtaken much of this concern. The Parliamentary Amendments to the 2005 Bill, some of which respond directly to matters raised in evidence to the committee, also address a number of perceived problems with the legislation.

4.2 The chapter discusses the following issues in turn:

- whether the Bill is too large and complex;
- transitional issues;
- interaction with native title and other legislation;
- non-indigenous membership;
- size of corporations;
- officers and directors;
- members requesting meetings;
- provision of information to members;
- minimum membership age;
- absence of provisions for Aboriginal councils; and
- access to corporation books.

Is the Bill too large and complex?

4.3 As noted in Chapter 2, the ACA Act was originally envisaged as an incorporation statute to provide a simple and flexible means for incorporating associations of Indigenous people.[1] However, the 2002 review found that the Act had not kept pace with significant external developments, in addition to suffering from a large number of technical shortcomings.[2]

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1 See also 2005 Bill *Explanatory Memorandum*, p. 3.

2 See Chapter 2 of this report, para 2.4.

4.4 Several submissions acknowledged that the ACA Act is outdated and out of step with corporations law in Australia. For example, Professor Garth Nettheim submitted that:

> Generally, the Bill responds appropriately to key criticisms of the existing Act…the ACA Act is long overdue for replacement. The current Bill is based on the careful analysis provided by the 2002 Review, and addresses the major concerns in a flexible and imaginative manner. Coupled with the pro-active support provided to Indigenous peoples through ORAC, and its capacity-building programs, it should be a welcome and valuable improvement to the current regime.[3]

4.5 The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), while expressing some reservations about aspects of the Bill, observed:

> …in recent years many Indigenous organisations have sought incorporation under the *Corporations Act 1991* (Cth) to overcome the onerous and arguably discriminatory aspects of the current [ACA Act], as well as technical shortcomings, for example in relation to corporate membership, non-Indigenous membership and directors, and the like.[4]

4.6 In contrast, a number of land councils criticised the 2005 Bill for being too large and complex, for departing from the recommendations of the 2002 review and for imposing a new layer of administration and compliance. These bodies contended that the Bill would not meet the special incorporations needs of Indigenous people and, consequently, questioned whether the Bill would achieve its aims. The Central Land Council (CLC) represented this perspective. It stated:

> Instead of being a simple incorporation statute tailored to the special needs of the Indigenous population it is a complex statute designed to regulate large corporations. Large corporations require regulation, particularly if they are administering large amounts of Government funding. But instead of shifting such large corporations towards the Corporations Law the Bill is specifically designed to regulate them. But by so doing, the needs of the majority of Aboriginal corporations, at least in Central Australia, are not met by the main provisions of the Bill but rather by the provisions providing for exemption from obligations created by the Bill.[5]

4.7 The Goldfields Land and Sea Council (GLSC) also criticised the Bill as too complex, describing it as 'a mallet to crack a very small nut'.[6] The GLSC argued that attempting to replicate the Corporations Act regime was not appropriate. It pointed out that the Corporations Act regulates corporations designed for profit-making purposes in the commercial market place, whereas Indigenous corporations usually receive

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3 *Submission 1*, pp 1-2. See also AIATSIS, *Submission 10*, p. 1 and ASIC, *Submission 11*, p. 2.

4 *Submission 10*, p. 1.

5 *Submission 9*, p. 4.

6 *Submission 12*, p. 2.

funding to provide services to Aboriginal people and are often governed by volunteers. The GLSC argued that:

> In these circumstances, to impose a regime of such extreme complexity as the 500 page Bill on Aboriginal people, incorporating over 100 penalty provisions of strict liability, and discretionary wide range and compulsive bureaucratic investigative powers can only be regarded as punitive and oppressive.[7]

4.8 A major concern of these bodies was that the 2005 Bill may be self-defeating and deter Indigenous organisations from incorporating under it.[8] At best, Indigenous organisations would opt to remain or incorporate under State and Territory associations incorporation law rather than the new bill.[9] Or in some cases the Bill might result in a decline in Indigenous people assisting in service delivery through involvement in Aboriginal corporations.[10]

4.9 In response, ORAC explained the size of the Bill and its apparent complexity reflected significant changes in both corporations law and Indigenous affairs since the ACA Act was introduced in the 1970s. The Registrar conceded the 2005 Bill's size is of concern but maintained that it incorporated a 'huge amount of … case law', which the old Act failed to do.[11] In addition, the 2005 Bill incorporated rights of review of the Registrar's decisions which were absent in the ACA Act. In the Registrar's words, with the 2006 Bill 'we are leaping from a seventies concept of Corporations Law to one in 2005'.[12]

4.10 Contrary to arguments that the Bill is ill-suited for Indigenous bodies, the Registrar stated that it has been designed to take account of the diversity and fluidity of the Indigenous sector. This is another major reason for its size. The Registrar explained that the Bill is attempting to deal with a sector far more diverse than the corporate sector ASIC regulates, one with corporate entities that differ from typical corporations and possess complex features. In her view:

> We probably have a much more diverse range of corporations than you would find under ASIC because of the nature of Indigenous affairs. It would be very unlikely that you would find a lot of corporations with ASIC that are purely land-holding and get absolutely no money. Certainly they are not interfacing with the native title arena like we are. I am not sure if there are any that are trying to do municipal services under ASIC. Diversity

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7 *Submission 12*, p. 1.

8 CLC, *Submission 9*, p. 6.

9 Mr Dalrymple, *Submission 2*, p. 1.

10 GLSC, *Submission 12*, p. 2. See also Coalition of Aboriginal Legal Services, *Submission 3*, p. 2.

11 *Committee Hansard*, p. 24.

12 *Committee Hansard*, p. 26.

> under our legislation of corporations is much wider, so flexibility has to be much broader than you would find in other incorporating regimes.[13]

4.11 The statutory and regulatory flexibility needed to address a sector of this kind meant, the Registrar explained, a bill large in size. The rapid growth and change which marks the Indigenous sector had also influenced the Bill's design. It was another factor contributing to its size. The Registrar stated:

> …we have tried to draft a bill that does not set too many things in stone, because we know if you look forward another 20 or 30 years things might emerge—possibly even rights—that we are not even discussing in the mainstream in Indigenous affairs right now. Hence the need for flexibility, and flexibility requires drafting space in a piece of legislation.[14]

4.12 This flexibility has taken the form of exemption provisions, regulation making powers that also allow for exemptions and scope for determinations to be made to cater for different types of corporations or circumstances.[15] These are discussed in later sections of this chapter.

4.13 To allay concerns the Bill will impose a corporate regulatory model on the Indigenous sector, the Registrar stressed that the purpose of the Bill is to avoid a 'one size fits all' approach. In her view, this is one of the problems with the old Act which suffers from a lack of flexibility and imposes obligations regardless of the capacity of organisations to meet them.[16]

4.14 The other point the committee notes in this regard is that the 2005 Bill does not make it mandatory for corporations to incorporate under its terms. As ASIC observed, in addition to the 2005 Bill Indigenous corporations will have a number of incorporation options available to them under the *Corporations Act 2001* and the various State and Territory incorporations acts.[17]

Transitional Issues

4.15 With approximately 2600 Aboriginal and Torres Strait Islander corporations currently registered under the ACA Act, transitional arrangements for these corporations are essential. However, when the committee's inquiry started neither the Transitional Bill nor the Amendment Bill had been drafted, nor had the detail of any transitional arrangements been made public.

4.16 At the time, the absence of transitional arrangements and consequential amendments caused concern for several witnesses. Some found that this made it

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13 *Committee Hansard*, p. 25.

14 *Committee Hansard*, p. 25.

15 The Registrar, *Committee Hansard*, p. 25.

16 *Committee Hansard*, p. 26. See also ORAC, *Submission 5*, p. 2.

17 *Submission 11*, p. 2.

difficult to assess the 2005 Bill in its own right. With a commencement date at that stage of 1 July 2006 there was concern about the limited amount of time available for bodies to adjust to a new, seemingly more complex, regime.[18]

4.17 A key question related to how corporations incorporated under the ACA Act would move to and be covered by the new Bill once it became law.[19] The North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC) pointed out that some corporations may wish, or even need, to amend their constitutions in light of the 2005 Bill's provisions.[20]

4.18 The fear that the 2005 Bill would impose additional administrative and compliance burdens on a sector already subject to substantial reform also gave rise to a request for increased assistance, training and education for Indigenous people involved in the management of corporations, whether generally or in relation to the transitional arrangements.[21]

4.19 It is possible that uncertainty around the transitional arrangements compounded concerns or confusion about the 2005 Bill when it was introduced and contributed to the critical tenor of the evidence to the committee.

4.20 The introduction of the 2006 bills, particularly the Transitional Bill, has at least answered questions about transitional arrangements, if not gone a considerable way to meeting a number of concerns. Implementation of the 2005 Bill should be smoothed with the provision for a two year transitional period to allow corporations time to adjust to the new regime. As noted in chapter 3, a special provision will also exist for the Registrar to determine an extra six months in some circumstances.

4.21 The administrative burden entailed in Indigenous corporations shifting from the old ACA Act to the new framework has also been eased with provisions giving automatic effect to registering transitional corporations, recognising existing corporation rules as constitutions for the purposes of the 2005 Bill and members and directors retaining their status.

4.22 The draft Parliamentary Amendments, among other things, change the commencement date of the 2005 Bill to 1 July 2007.

4.23 In view of the time that will have elapsed since the Bill was introduced in June 2005, and the scrutiny it has been subject to, the committee considers that most corporations should have had sufficient time to ready themselves for its commencement next year. When the two-year transitional period is also taken into

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18 See AIATSIS, *Submission 10*, p. 1. See also NQLC, *Submission 4*, p. 1.

19 NQLC *Submission 4*, pp 1-2.

20 *Submission 4*, p. 1.

21 See, for example, COALS, *Submission 3*, p. 3; GLSC, *Submission 12*, p. 2.

account, corporations will have had close to four years to prepare for the new framework.

4.24 To help corporations adjust to the new regime, ORAC has developed a range of tools including a new model constitution, a Guide to Good Constitutions, as well as a number of sector specific guides.[22] ORAC has also prepared fact sheets on transitional arrangements and directors duties relating to the new legislation.[23]

4.25 ORAC indicated that it envisages its entire budget will be dedicated to assisting bodies with the new legislation. In view of the scale of the Indigenous corporations sector and the potential complexity involved in the change to the new regime, the committee considers funding to assist corporations through this transition should be monitored and increased if necessary.

4.26 Specific concerns about the detail of the 2005 Bill's provisions, and the way in which the 2006 Bills address them, are discussed in the sections that follow.

Interaction with native title and other legislation

4.27 As explained in Chapter 2, a key aim of the 2005 Bill is to ensure that it interacts appropriately with native title legislation.[24] However, several submissions expressed concern about the likely interaction between the Bill and native title and other legislation, particularly in regard to reporting and other duties.

4.28 The Kimberly Land Council (KLC) argued that the Bill may be unnecessarily complex and overly prescriptive in light of the current regulatory regime for representative bodies under the *Native Title Act 1993*.[25] The KLC pointed out that recognised representative bodies under the Native Title Act are already subject to a highly detailed regulatory regime covering accountability, governance and reporting, as set out in Part 11 of the Native Title Act.[26] The KLC was concerned that the Bill may duplicate reporting and directors duties that exist under the Native Title Act.[27]

4.29 COALS expressed a similar concern, noting that Aboriginal organisations are largely government-funded. COALS pointed out that:

> Each government department responsible for the provision and management of such funding requires comprehensive performance and financial reports at 3- or 6-monthly intervals. Groundless checks would

22 *Submission 5*, p. 8.

23 Supplementary *Submission 5c*, see attachments.

24 See chapter 2, para 2.10 and also *Explanatory Memorandum*, p. 10.

25 *Submission 7*, p. 2.

26 *Submission 7*, pp 2 and 7; and see also CLC, *Submission 9*, pp 8-9 on the other obligations on prescribed bodies corporate.

27 *Submission 7*, p. 1. See also AIATSIS, *Submission 10*, p. 3.

> simply add another layer of compliance to an already onerous reporting scheme. In addition, staff in such government departments are expert in their particular field. For this reason, they are best placed to receive and assess information from Aboriginal community organisations.[28]

4.30 The Registrar acknowledged that there is duplication between requirements under the 2005 Bill and requirements under other legislative regimes such as the application of provisions of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to representative bodies by the Native Title Act. However, the Registrar emphasised the point that the 2005 Bill makes provision for recognising reporting under other regimes as reporting for the purposes of the Bill. She told the committee:

> …one of the things our bill does is it allows ORAC to recognise reporting for other purposes as reporting to us. It provides a statutory basis, if you like, to avoid duplicate reporting by allowing our office to recognise, for example, the reports that the native title rep bodies might provide under the CAC Act for our purposes.[29]

4.31 The 2006 Transitional Bill also makes provision for the Registrar to determine certain exemptions for corporations or directors, particularly in relation to matters which might cause an excessive burden.[30]

4.32 Two other issues of concern related to Registered Native Title Bodies Corporate (RNTBCs) and representative bodies.[31]

4.33 AIATSIS pointed out that the 2005 Bill contains specific provisions concerning RNTBCs to ensure that, in performing their obligations under the Native Title Act, directors and officers are not breaching duties owed to the corporation.[32] The 2005 Bill does not provide similar protection for the officers of representative bodies.[33] AIATSIS considered that some of the roles of representative bodies under the Native Title Act could be in conflict with directors' duties under the Bill. AIATSIS proposed that the 2005 Bill should provide the same protection for representative body directors and officers that it provides for directors and officers of an RNTBC. AIATSIS also suggested that representative bodies may need to be treated as a

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28 *Submission 3*, p. 2; see also Goldfields Land and Sea Council, *Submission 12*, p. 1.

29 *Committee Hansard*, p. 37.

30 Supplementary *Submission 5c*, Attachment A, p. 5. See also Transitional Bill, *Explanatory Memorandum*, pp 39-40.

31 Registered Native Title Bodies Corporate are known as 'Prescribed Bodies Corporate' (PBCs) prior to their registration. They hold native title on trust for the common law native title holders, or act as their agent, and are required to be incorporated under the ACA Act.

32 See clause 265-20 of the 2005 Bill.

33 As the 2002 review explains, representative bodies are responsible for running and assisting with native title claims and negotiations, and have a form of statutory monopoly in prioritising, funding and/or performing these functions within their regions. Many are incorporated under the ACA Act, p. 67.

'particular class' of Indigenous organisation under the 2005 Bill, particularly in relation to reporting.[34]

4.34 On the other hand, the Central Land Council (CLC) argued that the unique nature and specific functions of RNTBCs should not be covered by the 2005 Bill but instead be addressed within the Native Title Act, possibly as a separate division to that Act.[35] These bodies are already subject to a number of complex laws. The CLC expressed concern that the 2005 Bill could prove:

> …far too complicated for remote Aboriginal people to administer should they be successful in a Native Title determination application and incorporate as a prescribed body corporate.[36]

4.35 As noted already, the Transitional Bill provides for the Registrar to exempt a corporation or its directors from a provision of the 2005 Bill or the Transitional Bill. It also permits the Registrar to exempt a class of transitional corporation, and directors of those corporations, from these requirements.[37] In addition, the 2005 Bill provides some flexibility for the Registrar to make declarations exempting a class of corporations or directors from the requirements of the 2005 Bill.[38] The committee understands the draft Parliamentary Amendments will provide further flexibility in this regard. These exemptions should provide the flexibility and scope to adapt the regulatory framework to fit the capacity and requirements of different classes of corporations including RNTBCs and representative bodies.

4.36 As for the appropriate place for legislation for incorporation of PBCs, it is arguable that creating a separate division of law under a different Act to the 2005 Bill would reduce complexity, let alone the risk of confusion for corporations adjusting to new regulatory requirements.

4.37 The committee also notes the two year transitional period should provide sufficient time for Indigenous corporations and the Registrar to monitor the operation of the new regulatory regime, identify any problems that might arise and develop remedies if required.

Non-indigenous membership

4.38 As noted in Chapter 2, the 2002 review recommended restricting membership of corporations to Indigenous people. In contrast, the 2005 Bill provides that only a majority of members (and directors) must be Indigenous. The 2005 Bill also permits other corporations to be members of Indigenous corporations. This again differs from

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34 *Submission 10*, pp 2-3.

35 *Submission 9*, p. 4.

36 *Submission 9*, p. 10.

37 Clauses 108 to 111 of the Transitional Bill.

38 See for example sub-clause 268-25(5) and clauses 353-1 to 353-10 of the 2005 Bill.

the 2002 review, which recommended that corporate members should not be permitted.[39]

4.39 Professor Garth Nettheim welcomed the flexibility provided by the provisions extending membership to other corporations or a minority of non-Indigenous people.[40]

4.40 In contrast, the CLC did not support these provisions:

> The measures in the Bill which place the question of non-indigenous membership into the realm of the constitution of individual corporations are weak and they may not work in practice. The provisions in the Bill of permitting minority membership of non-Aboriginal people will not be sufficient to ensure Aboriginal control.[41]

4.41 Similarly, the CLC did not believe that compelling reasons have been given for permitting corporate membership of Indigenous corporations. The CLC argued that:

> …there is no need for a special statute for the incorporation of large resource agencies or peak bodies. The *Corporations Law* is perfectly adequate for that purpose.[42]

4.42 Mr David Dalrymple agreed that opening up the membership eligibility to non-Indigenous members would mean that there is no substantive difference between incorporation proposed under the 2005 Bill and incorporation under other laws.[43] Mr Dalrymple further elaborated on this:

> The one point of difference between [the ACA Act] and equivalent "mainstream" legislation was the restrictions on voting membership contained in the [the ACA Act] itself. It was possible under "mainstream" legislation to restrict membership to Aboriginal people by drafting the body's constitution in a particular way, but that constitution could always be changed and undone. The attraction to the Aboriginal clients I dealt with was always that the [the ACA Act] itself contained the restriction and therefore the protection and security. [The 2005 Bill] in its present form has abandoned that feature of [the ACA Act], which is going to engender grave concerns for the many bodies that incorporated as associations under [the ACA Act]...[44]

4.43 According to the Explanatory Memorandum to the 2005 Bill, these extended membership provisions are intended to provide corporations with the flexibility to

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39 *Explanatory Memorandum*, p. 10.

40 *Submission 1*, p. 1.

41 *Submission 9*, p. 5.

42 *Submission 9*, p. 6.

43 *Submission 2*, pp 1-2.

44 *Submission 2*, p. 2.

permit non-Indigenous membership. The Explanatory Memorandum says that, as some corporations are the only providers of essential services in some communities, these provisions also ensure that non-Indigenous members of such communities are not disadvantaged.[45]

4.44 At the time of the committee's hearing on the 2005 Bill, the Registrar explained that numerous bodies had lobbied for non-indigenous people to be eligible for membership of corporations. She said that some corporations had called for non-indigneous professionals such as doctors, trustees or key employees to be allowed membership and voting rights. She also said some communities had indicated they wanted non-indigenous people such as spouses, adopted children, step children and long-accepted members of communities to be permitted as members of corporations.[46]

4.45 However, the Registrar stressed the point that the 2005 Bill allows the membership of corporations to determine their own rules of membership and whether non-indigenous members, or certain defined types of non-indigenous member (that is, professionals, spouses and so on), are permitted.[47] This flexibility should enable individual corporations to determine for themselves the membership which best matches their communities and needs.

4.46 As a protection of Indigenous control over Indigenous corporations, the draft Parliamentary Amendments provide that, unless a corporation's constitution provides otherwise, a non-member or non-Indigenous person may not be appointed as a director of a corporation under the 2005 Bill.[48]

4.47 The Registrar explained that permitting corporate membership was intended to reflect the situation where a number of Indigenous corporations have corporate entities or 'support corporations' attached to them. She said it made more sense to have support corporations and parent corporations covered under the one regulatory framework, rather than divided across different frameworks.

4.48 The Registrar also said that corporate membership was occurring already in practice under the ACA Act. Again, she emphasised that the 2005 Bill allows for corporations to structure themselves to include corporate membership but does not make it mandatory.[49]

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45 2005 Bill, *Explanatory Memorandum*, p. 10.

46 The Registrar, *Committee Hansard*, p. 28. See also answer to question 2 on notice, ORAC, 19 October 2005.

47 *Committee Hansard*, p. 28.

48 ORAC, Supplementary *Submission 5c*, Attachment E.

49 *Committee Hansard*, pp 28-29.

Size of corporations

4.49 Emeritus Professor Garth Nettheim welcomed the reporting requirements and other provisions which differentiate between small, medium and large corporations.[50]

4.50 However, the NQLC expressed concern that the provisions for categorising corporations would be based 'on a formula as yet to be disclosed as it is to be set in regulations':

> It is therefore at this point in time unknown as to whether the application of some of the clauses in the Bill will vary depending on the size of the corporation or whether the transitional provisions will allow for example a greater period of time for small corporations to comply than the large ones.[51]

4.51 As noted in chapter 2, classifying corporations according to size is intended to match reporting to a corporation's size and purpose, thereby avoiding the 'one size fits all' approach of the ACA Act. Under the Transitional Bill, for the two-year transitional period all transitional corporations become medium corporations but the Registrar may reclassify a corporation as small or large.[52]

4.52 At the committee's hearing in 2005, the Registrar outlined her view on possible threshold levels. The Registrar told the committee:

> The review recommended that anything over half a million dollars should be medium and anything over $1 million should be large. My comment on that is that the review was probably too low, because to ask a $1 million corporation to put in an audit by a registered auditor is probably too heavy a burden. However, I think corporations that are getting less than $10 million should be putting in an audited financial statement. I think we should notionally look at a figure of somewhere between $2 million and $5 million. Most of our corporations, even if you just took the figure of $2 million, would be small or medium. So their reporting will drop under the new legislation and compliance will go up.[53]

4.53 In a supplementary submission received in October 2006, the Registrar provided more detail on the likely threshold levels and explained the reason for using regulations to define the levels rather than specifying them in the provisions of the 2005 Bill. The proposed 'size thresholds' for reporting under the 2005 Bill are expected to be as follows:

> A **small** corporation is likely to be one which satisfies at least two of the following:

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50 *Submission 1*, p. 1.

51 *Submission 4*, p. 2.

52 ORAC, Supplementary *Submission 5c*, Attachment A, p. 2.

53 *Committee Hansard*, p. 31.

- Total consolidated gross operating income is less than $100,000;
- Total consolidated gross assets is [sic] less than $100,000;
- Total employees less than 5.

A **medium** corporation is likely to be one which satisfies at least two of the following:

- Total consolidated gross operating income from $100,000;
- Total consolidated gross assets from $100,000;
- Total employees less from 5.

A **large** corporation is likely to be one which satisfies at least two of the following:

- Total consolidated gross operating income is $5 million or more;
- Total consolidated gross assets is [sic] $2.5 million or more;
- Total employees more than 25.[54]

4.54 The Registrar attached the caveat that as the regulations defining the thresholds have not yet been made, these figures are 'intended only as a guide to the criteria that are being proposed'.[55]

4.55 The reason for classifying thresholds in regulations rather than in statute is that it allows more flexibility to alter thresholds to match changes in the size and nature of the Indigenous corporate sector, which as noted earlier in this chapter is characterised by dynamic change. As the Registrar informed the committee, using regulations to determine the thresholds should 'enable the [2005] Bill to maintain relevance over time and give greater flexibility to alter these thresholds in the future'.[56]

Officers and directors

4.56 The North Queensland Land Council (NQLC) raised a number of concerns with the 2005 Bill relating to the stipulated number of directors, the term of appointments and provisions for calling meetings and removing directors.

Number of directors and term of appointments

4.57 The NQLC noted that there were some inconsistencies between the 2005 Bill's provisions and their current arrangements. For example, the maximum number of directors of a corporation is set at 12 by proposed section 243-5. The NQLC pointed out that its board consists of 17 persons, and that it was aware of other

54 ORAC, Supplementary Submission 5d, p. 2.

55 ORAC, Supplementary Submission 5d, p. 2.

56 ORAC, Supplementary Submission 5d, p. 1.

representative bodies with higher numbers of directors on their boards.[57] The NQLC observed that:

> …it must be recognised that prescribed body corporates are likely to be set up and incorporated under the new [A]ct once it is in power and again, the structure of their boards may well represent a careful mix designed to ensure that native title holders from various different sub-groups are ensured of a position on the board and it may be that to achieve this it is inappropriate to limit the number to 12.[58]

4.58 Similarly, clause 246-25 provides that the maximum term of appointment for directors is a period not exceeding two years. The NQLC argued this term was too short and restrictive. It pointed out that the NQLC directors are elected for a period of three years. The NQLC explained:

> The three year term was introduced to provide some stability in the corporate governance of the association and was in fact with the approval and consent of the then ATSIC office and those responsible for considering our application for renewal of our status of a native title representative body.[59]

4.59 The Registrar told the committee during the hearing that regulations would allow an exemption for boards with more than 12 directors but that a board of 12 directors was considered 'good practice' unless there were sound reasons to increase the size of a board.[60]

4.60 The Transitional Bill states that during the two-year transitional period the limit of 12 directors will not apply. It also provides for directors to serve the remainder of their current elected term.[61]

4.61 The draft Parliamentary Amendments also extend the Registrar's ability to exempt corporations or directors from these requirements.

Directors' meetings

4.62 Proposed section 212-5 provides that a directors' meeting may be called by a director giving reasonable notice to every other director. The NQLC acknowledged that this was a replaceable rule, but nevertheless suggested that this was undesirable. The NQLC submitted that:

> In the case of a Board that has divided into a number of competing factions there is the very real danger that if this rule was in place that you would

57 *Submission 4*, p. 7.

58 *Submission 4*, p. 8.

59 *Submission 4*, p. 8.

60 *Committee Hansard*, p. 38.

61 ORAC, Supplementary *Submission 5c*, Attachment A, p. 3.

> have a multiplicity of meetings being called because any individual director can initiate the same. This would be an unacceptable[,] unworkable situation and costly for the corporation.[62]

4.63 The NQLC suggested that an alternative might be to:

> …give the Registrar some power in directing that a meeting of the directors takes place after hearing submissions from any particular director who had been unsuccessful at persuading a Chairperson to call a meeting. Before the Registrar made any such direction one would expect the Registrar to invite submissions from all sides of the argument.[63]

Removal of directors by other directors

4.64 Proposed section 249-15 provides for the removal of directors by other directors on the grounds of failure to attend three consecutive directors' meetings without reasonable excuse. If a director objects to their removal under this provision, the director can only be removed by a resolution passed at a general meeting (proposed section 249-20).

4.65 The NQLC suggested that in practice this might prove difficult if the only ground of removal is failure to attend three meetings.[64] The NQLC argued that if there were a 'stubborn' and 'ineffective' director who objected to their removal, calling a general meeting for their removal could be prohibitively expensive in a large corporation.[65] The NQLC suggested that:

> …there should be a power in the Board to remove directors that bring the organisation into disrepute, who breach agreed codes of conduct or who become through one reason or another either incapable of acting efficiently [or] unwilling to do so.[66]

4.66 The committee understands that the draft Parliamentary Amendments address these concerns to the extent that they take the power to remove a director away from directors and limit it to a resolution of a general meeting.

Members ability to request general meeting

4.67 The NQLC also drew attention to proposed sections 201-5 and 201-10 of the 2005 Bill, which require the directors to call a general meeting if requested by the greater of either five (5) members or 10% of the members of the corporation. The NQLC was concerned that these provisions make no distinction between voting and

62 *Submission 4*, p. 7.

63 *Submission 4*, p. 7.

64 *Submission 4*, p. 8.

65 *Submission 4*, p. 9.

66 *Submission 4*, p. 9.

non-voting members. The NQLC suggested that the test should be '10% of the members entitled to vote rather than 10% of the membership overall'.[67]

4.68 The committee notes that under the Transitional Bill some meeting provisions, including sections 201-5 and 201-10, of the 2005 Bill will not apply during the transitional period. While this should allay concerns during the transitional period, the committee considers that the question of whether the ability to request a meeting should be limited to voting members should be revisited. The committee considers there is a case for linking the right of members to request general meetings to voting rights.

Provision of information to members

4.69 Several proposed sections in the 2005 Bill require certain notices and information to be copied and distributed to members. For example, proposed sections 201-40 and 201-45 require a corporate to give all its members notice of proposed members resolutions at the same time and in the same way as it gives notice of a general meeting.[68]

4.70 The NQLC observed that, in its case, the cost of copying and distributing notices to over 900 members would be significant. The NQLC pointed out that the only exclusion to this rule was where the resolution is defamatory.[69] The NQLC suggested that this burden was unfair, particularly in situations where a resolution is put forward that is 'nonsensical, unworkable, in conflict with other parts of the rules or otherwise totally lacking merit but not defamatory.'[70]

4.71 Similarly, proposed section 342-5 provides that a corporation required to have audited financial reports must present each member of the corporation a copy of that report.[71] Again, the NQLC observed that in corporations with large numbers of members:

> …the copying and distribution of the auditor's report to each member is an unnecessary and costly process. It has been our experience that most members are not particularly interested in the financial report and certainly the production of 900 odd copies for the very few interested, seems to be unwarranted.[72]

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67 *Submission 4*, p. 5.

68 NQLC pointed out that the same arguments would apply to the distribution of members' statements as provided for in proposed section 201-50: *Submission 4*, p. 6.

69 *Submission 4*, p. 5.

70 *Submission 4*, p. 5.

71 The Explanatory Memorandum states that this is consistent with section 314 of the Corporations Act and improves internal accountability: see p. 72.

72 *Submission 4*, p. 10.

4.72 The NQLC suggested that this provision could be amended to require the financial report be made available at the Annual General Meeting and to members who have specifically requested the report.[73]

4.73 The Registrar informed the committee that reports would only have to be given on request and in many cases where corporations no longer have to report this matter will not arise. The Registrar told the committee:

> The financial reports would only have to be given to members where they are required, and many of the corporations that are with us now would no longer be required to do financial reports because their income would be too low. So it does not apply to all corporations. Also, there are exemption provisions that would allow us to exempt classes of corporations or sectors from meeting that requirement. … we do not envisage all corporations having to give every single one of their members a financial report.[74]

4.74 The committee notes the draft Parliamentary Amendments provide that a corporation that is required to prepare a financial report, a directors' report and an auditor's report is only required to provide these reports to a member on request. This measure is intended to reduce the potential administrative burden on corporations.[75]

Minimum membership age

4.75 The NQLC noted that Clause 141-15 of the 2005 Bill sets the minimum age of members at 15 years of age. The NQLC observed:

> There appears to be no particular rationale for picking this age. Whilst it may be a matter for each corporation to consider whether they wish to have the ability to admit minors as members, there appears to be no reason why minors of a lesser age could not be members especially given the fact that one can create different classes of membership and minors could be a non-voting class.[76]

4.76 However, the Explanatory Memorandum to the 2005 Bill points out that proposed section 29-10 sets out that each member of the corporation must be at least 15 years of age. The current ACA Act restricts membership to persons over the age of 18.

4.77 The Explanatory Memorandum explains the rationale for lowering the membership age is to allow younger Indigenous persons access to participation in corporations and leadership opportunities. The age of 15 is also when people are eligible to participate in the Community Development Employment Projects (CDEP)

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73 *Submission 4*, p. 10.

74 *Committee Hansard*, p. 35.

75 ORAC, Supplementary *Submission 5c*, Attachment E.

76 *Submission 4*, p. 3.

program. The Explanatory Memorandum notes that corporations providing CDEP services comprise a large part of ACA Act corporations.[77]

4.78 The committee considers that the promotion of leadership opportunities for younger Indigenous persons has much merit and should be supported.

Councils, associations and corporations

4.79 Two submissions noted that the provisions in Part III of the ACA Act, which provide for establishment of Aboriginal Council areas and Aboriginal Councils, appear to have no equivalent under the 2005 Bill.[78]

4.80 The committee notes that the 2002 review considered this issue and concluded Part III of the ACA Act should be repealed. Stakeholders consulted during that review also supported the repeal of Part III.[79]

4.81 However, AIATSIS expressed its disappointment at the failure of the 2002 review and the Bill to 'revise and reinvigorate' Part III of the ACA Act:

> The rationale for not revisiting the provisions was based on an argument that they were unworkable and had therefore not been utilised. However, this is a lost opportunity to underpin a style of governance for Indigenous communities based on a more public institutional model. This would have facilitated current calls for greater regional autonomy in the post-ATSIC era and would have been a suitable tool for government in negotiating certain types of Shared Responsibility or Regional Partnership Agreements…It would also have been appropriate for some RNTBCs, particularly in areas covered by exclusive possession native title under traditional laws and customs. The reversion to a singularly corporate model of Indigenous governance does not meet the full gamut of needs of Indigenous peoples in the long term.[80]

4.82 Similarly, Mr David Dalrymple argued that there was still a need for the Commonwealth to retain an option for Aboriginal communities to seek legal recognition as quasi-local government bodies:

> The absence from [the Bill] of a statutory option of establishing an Indigenous self-governing body at the local level with features more akin to a local government council than to an incorporated association deprives Aboriginal communities of a choice which should have been retained in legislation.[81]

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77 2005 Bill, *Explanatory Memorandum*, p. 35.

78 Mr David Dalrymple, *Submission 2*; AIATSIS, *Submission 10.*

79 See 2002 review, Chapter 18, pp 242-244.

80 *Submission 10*, p. 3.

81 *Submission 2*, p. 1 and see also p. 2.

4.83 The Transitional Bill explains that the 'creation of councils under the ACA Act has been superseded since 1976 by other means of delivering community services'. The Transitional Bill also notes that State and Territory legislation provides for local government services, including the capacity to make community by-laws.[82]

Access to and examination of a corporation's books

4.84 COALS raised an issue of concern relating to the power of the Registrar under proposed Division 453 of the 2005 Bill to appoint a suitably qualified person to examine the 'books' of an Aboriginal and Torres Strait Islander corporation. COALS noted that proposed section 453-1 of the new Bill is in similar terms to section 60 of the ACA Act, which does not require the Registrar to have any particular concern before exercising the power.[83] COALS argued that:

> …it is inappropriate for the Registrar to conduct reviews of 'healthy organisations' or of organisations generally in the absence of appropriate grounds. Groundless checks are time-consuming and stressful for even the healthiest of organisations. Such checks are also costly to the ORAC...[84]

4.85 COALS concluded that rather than maintaining this power, ORAC should:

> …focus on providing extensive training and education for Aboriginal people involved in the management of corporations to ensure good governance practices and compliance with the requirements imposed...[85]

4.86 COALS was also concerned that the power under proposed Division 453 of the 2005 Bill is not limited to financial records and could potentially result in interference in solicitor-client relations.[86] Indeed, the Committee notes that 'books' is broadly defined to include a register, any other record of information, financial reports or financial reports and a document.[87]

4.87 The NQLC raised a similar concern in relation to proposed section 274-15, which provides that a director or ex-director (within seven years) has access to the books of the corporation other than its financial records. The NQLC pointed out that the interaction between legal professional privilege, the law of confidentiality, and this provision is unclear.[88]

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82 Transitional Bill, *Explanatory Memorandum*, p. 4.

83 *Submission 3*, p. 1; see also 2005 Bill, *Explanatory Memorandum*, p. 82 and *NAILSS v Registrar of Aboriginal Corporations* (1998) 54 ALD 55.

84 *Submission 3*, p. 2.

85 *Submission 3*, p. 3.

86 *Submission 3*, p. 3.

87 Proposed section 700-1.

88 *Submission 4*, p. 10.

4.88 The Committee notes the Explanatory Memorandum to the 2005 Bill states that the provisions in this regard reflect equivalent provisions in the *Australian Securities and Investments Commission Act 2001*.[89] The Explanatory Memorandum further states that the current power under section 60 is:

> …often used by the Registrar, with the consent of corporations, to undertake diagnostic examination of corporations in difficulty. This 'special regulatory assistance' is also important in the context of 'capacity building' for these corporations.[90]

4.89 The Registrar's staff told the committee at its hearing that most of the examination powers under the new Bill are contained in the ACA Act but have been modernised. The Registrar's staff also assured the committee that the power to access books would not result in the examination of documents covered by legal privilege or other privacy rules, such as medical files for instance. The committee heard that the purpose of these provisions is to assist with 'good governance'.[91]

89 2005 Bill, *Explanatory Memorandum*, p. 17.

90 2005 Bill, *Explanatory Memorandum*, p. 82.

91 *Committee Hansard*, p. 37.