The Senate

Standing Committee on Legal and Constitutional Affairs

Corporations (Aboriginal and Torres Strait Islander) Bill 2005 [Provisions]

and

Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 [Provisions]

Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006 [Provisions]

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ABBREVIATIONS

ACA Act	*Aboriginal Councils and Associations Act 1976*
ATSIC	Aboriginal and Torres Strait Islander Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ASIC	Australian Securities and Investments Commission
the 2005 Bill	Corporations (Aboriginal and Torres Strait Islander) Bill 2005
the Transitional Bill	Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006
the Amendment Bill	Corporations Amendment (Aboriginal and Torres Strait Islander) Bill 2006
CLC	Central Land Council
COALS	Coalition of Aboriginal Legal Services of NSW
CDEP	Community Development Employment Projects
Corporations Act	*Corporations Act 2001*
GLSC	Goldfields Land and Sea Council
KLC	Kimberley Land Council
Native Title Act	*Native Title Act 1993*
NQLC	North Queensland Land Council Native Title Representative Body Aboriginal Corporation
NTRB	Native Title Representative Bodies
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Bodies Corporate
Registrar	Registrar of Aboriginal Corporations

the 2002 review	Corrs Chambers Westgarth Lawyers with Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid (commissioned by the Office of the Registrar of Aboriginal Corporations), *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act: Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth)*, December 2002
RNTBC	Registered Native Title Bodies Corporate

RECOMMENDATIONS

Recommendation 1

5.5 The committee recommends that the government should monitor funding to assist corporations with the transition to the new regime and make provision in the 2007-08 budget to increase this funding if necessary.

Recommendation 2

5.6 The committee recommends the government consider restricting to voting members the right of members to request directors call a general meeting and amend sections 201-5 and 201-10 of the 2005 Bill accordingly.

Recommendation 3

5.7 The committee recommends the government monitor the practical interaction of the bills with other legislation, particularly the Native Title Act, and at the end of the two-year transition period report to the Parliament on this matter.

Recommendation 4

5.8 Subject to the preceding recommendations, the committee recommends that the Senate pass the bills.

CHAPTER 1

INTRODUCTION

1.1 This report examines the following three bills:

- the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (the 2005 Bill);
- the Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006 (the Transitional Bill); and
- the Corporations Amendment (Aboriginal and Torres Strait Islander) Bill 2006 (the Amendment Bill).

1.2 The three bills form an interrelated package. The 2005 Bill was introduced into the House of Representatives on 23 June 2005. It is intended to repeal and replace the *Aboriginal Councils and Associations Act 1976* (the ACA Act) and improve the governance and capacity of Indigenous corporations.

1.3 The two 2006 bills complement the 2005 Bill. As its title indicates, the Transitional Bill provides for measures to assist Indigenous corporations to adapt their operations from the requirements of the 1976 Act to the requirements of the 2005 Bill. The Amendment Bill amends the Corporations Act 2001 to ensure the 2005 Bill interacts appropriately with the Corporations Act.

1.4 In addition to the bills, the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough, provided the committee with draft Parliamentary Amendments to the 2005 Bill which will be introduced during the committee stages of the consideration of the bills. These amendments were originally provided confidentially and reflect, in part, issues that emerged during the committee's inquiry during 2005. Subsequently, the minister authorised their publication to help promote transparency about the proposed changes to the 2005 Bill.[1]

Background

1.5 On 6 September 2005, the Senate referred the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (the 2005 Bill) to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 12 October 2005. The committee held a public hearing in Canberra on 4 October 2005.

1.6 On 11 October 2005, the committee agreed to extend the reporting date to the first sitting day in 2006. On 8 December 2005, the committee agreed to seek leave to further extend the reporting date to 30 March 2006. On 7 February 2006, the reporting date was further extended to 14 September 2006.

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1 The minister authorised publication of the draft amendments on 5 October 2006.

1.7 The extensions of the reporting date were intended to allow the Bill to be considered in conjunction with an exposure draft of the Transitional Bill. The Transitional Bill was introduced into Parliament on 14 September 2006, along with the Amendment Bill.

1.8 On 14 September 2006, the Senate referred the provisions of the Transitional Bill and the Amendment Bill to the committee for inquiry and report by 9 October 2006.

Conduct of the inquiry

1.9 The committee advertised the inquiry for the 2005 Bill in *The Australian* newspaper on 14 September 2005, and invited submissions by 19 September 2005. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 30 organisations and individuals.

1.10 The committee received 17 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.11 The committee held a public hearing in Canberra on 4 October 2005. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

1.12 On 14 September 2006 the committee tabled an interim report on the 2005 Bill and stated it would present its final report to the Senate on 9 October 2006.

1.13 On 19 September 2006 the committee advertised the inquiry for the 2006 bills in *The Australian* newspaper and invited submissions by 25 September 2006. In addition to placing details of the inquiry on the committee's website, the committee wrote to all organisations and individuals that made submissions to the 2005 Bill. The committee also wrote to State premiers and Territory chief ministers inviting them to comment on the bills.

Structure of report

1.14 Chapter 2 of this report summarises the 2005 Bill, while chapter 3 summarises the 2006 bills and the draft Parliamentary Amendments.

1.15 In chapter 4 the committee discusses the key issues that arose during the inquiry, and in chapter 5 the committee presents its views on all three bills and the draft Parliamentary Amendments.

Note on references

1.16 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the

official Hansard: page numbers may vary between the proof and the official Hansard transcript.

Acknowledgement

1.17 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

CHAPTER 2

OVERVIEW OF THE 2005 BILL

2.1 This chapter summarises the background to the 2005 Bill, followed by a brief outline of the 2005 Bill.

Background to the 2005 Bill

2.2 As outlined in Chapter 1, the 2005 Bill would replace the ACA Act. The Bill's purpose is to improve governance and capacity in the Indigenous corporate sector. The Bill seeks to align with modern corporate governance standards and corporations law, while maintaining a special statute of incorporation for Aboriginal and Torres Strait Islander peoples to take account of the special risks and requirements of the Indigenous corporate sector.[1]

2.3 As the Explanatory Memorandum explains, the ACA Act was originally envisaged as an incorporation statute to provide a simple and flexible means for incorporating associations of Indigenous people.[2] According to the Office of the Registrar of Aboriginal Corporations (ORAC), there are approximately 2600 Aboriginal and Torres Strait Islander corporations currently registered under the ACA Act.[3]

2.4 There have been a number of significant external developments since the ACA Act was last amended in 1992. Some of the key external developments have included the introduction of the *Corporations Act 2001* (Corporations Act) and the enactment of the *Native Title Act 1993* (Native Title Act).

2.5 The 2005 Bill is the culmination of a number of reviews of the ACA Act. The final report of the most recent review, commissioned by the Registrar of Aboriginal Corporations (the Registrar), was released in December 2002 (the 2002 review).[4]

2.6 According to the Explanatory Memorandum, the 2002 review concluded that the ACA Act was out-of-date and suffered from a large number of technical shortcomings to the point that the ACA Act itself had become a source of disadvantage for Indigenous people. The major finding of the 2002 review was that

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1 *Explanatory Memorandum*, p. 1.

2 *Explanatory Memorandum*, p. 3.

3 *Submission 5*, p. 1.

4 Corrs Chambers Westgarth Lawyers with Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid (commissioned by the Office of the Registrar of Aboriginal Corporations), *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act: Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth)*, December 2002 (the 2002 review).

the special incorporation needs of Indigenous people should be met through a statute of incorporation tailored to the specific incorporation needs of Indigenous people. The 2002 review recommended a thorough reform of the ACA Act by enactment of a new Act. The 2002 review also recommended that the new Act provide Indigenous people with key facilities of a modern incorporation statute, such as the Corporations Act. The 2002 review further recommended that the new Act provide special forms of regulatory assistance to support contemporary standards of good corporate governance.[5]

2.7 The 2005 Bill implements the 2002 review by retaining a special incorporation statute to meet the needs of Indigenous people. According to the Explanatory Memorandum, the Bill introduces:

> …a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.[6]

Key differences between the 2002 review and the 2005 Bill

2.8 Some aspects of the 2002 review have not been implemented in the 2005 Bill.[7] The Explanatory Memorandum outlines some of the key differences and the reasons for not implementing those recommendations. In particular, the 2002 review recommended that:

- membership of corporations be restricted to Indigenous people. This has partly been implemented by providing that a majority of members (and directors) must be Indigenous. According to the Explanatory Memorandum, this will improve flexibility for corporations to permit non-Indigenous membership, and as some corporations are the only providers of essential services in some communities it also ensures that non-Indigenous members of such communities are not disadvantaged;[8]

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5 *Explanatory Memorandum*, pp 7-8.

6 *Explanatory Memorandum*, p. 8.

7 See further *Explanatory Memorandum*, p. 10; and ORAC, *Fact Sheet: The Bill and the review – some differences*, June 2005. Available at: http://www.orac.gov.au/publications/legislation/FactSheet_TheBillAndTheReview.pdf (accessed 15 September 2005).

8 *Explanatory Memorandum*, p. 10.

- corporate members should not be permitted. The Bill does permit corporate membership 'which improves the flexibility of corporate design to allow for resource agencies and peak bodies';[9]
- particular regulatory powers under the current ACA Act should not be retained. For example, the 2002 review suggested that instead of the Registrar being able to appoint an administrator, the Registrar should apply to a court for appointment of a receiver under the court's equitable jurisdiction. This recommendation has not been implemented but the appointment of an administrator by the Registrar (called a 'special administrator') has been improved to address a number of the reasons why the 2002 review considered that Registrar-appointed administrators were problematic. A key improvement is that a decision to appoint a special administrator is a reviewable decision.[10]

2.9 The 2005 Bill has a commencement date of 1 July 2006. The committee has been advised that this date will be altered to 1 July 2007 by the draft Parliamentary Amendments to the 2005 Bill.

Other background issues

Interaction with native title legislation

2.10 One of the aims of the 2005 Bill is to ensure that there is appropriate interaction between this Bill and native title legislation. The Explanatory Memorandum states:

> The Bill removes the current uncertainty of how the Native Title Act and regulations are to interact with the ACA Act through tailored provisions for registered native title bodies corporate (RNTBCs) or in relation to an application made for the purposes of becoming an RNTBC where necessary.[11]

Other legislative matters

2.11 A number of other legislative matters are noted in the Explanatory Memorandum.[12] For example, there are a number of strict liability offences contained in the Bill. The Explanatory Memorandum states that:

> Many of these offences are based on equivalent offences in the Corporations Act which are also strict liability. Consistent with the objective of the reforms to align the Bill to modern corporations law, strict liability has been retained for these provisions to ensure that these offences

9 *Explanatory Memorandum*, p. 10.

10 *Explanatory Memorandum*, p. 10.

11 *Explanatory Memorandum*, p. 10.

12 *Explanatory Memorandum*, pp 11-19.

> in the Bill remain closely aligned with their counterpart offences in the Corporations Act. [13]

2.12 The Explanatory Memorandum also notes that:

> …a relatively small number of strict liability offences are unique to the Bill. In determining that these provisions should be strict liability, regard has been given to similar provisions contained in the Corporations Act, as well as to provide consistency with similar provisions in the Bill.[14]

2.13 Strict liability offences occur in the event of a corporation contravening the following requirements:

- A direction by the Registrar to change its document access address;
- Removal of a member's name from the register of members within 14 days of receiving a notice of resignation;
- Before cancelling the membership of a member the directors must give the member 14 days written notice to object to the cancellation;
- Directors must send a member a copy of a resolution as soon as practicable after the resolution has been passed where the member's membership has been cancelled on the basis that the person is not contactable or not an Aboriginal and Torres Strait Islander or has misbehaved;
- A corporation must make the register available for inspection by members at the AGM and ask each member attending to check the entry for that member and inform the corporation of any corrections that might need to be made to that entry; and
- The Registrar may at any time request the corporation to give him or her a copy of the register of members, and the corporation must comply within 14 days or such other period as the Registrar specifies.[15]

2.14 The sections that follow summarise the provisions in the 2005 Bill.

Outline of the 2005 Bill[16]

Chapter 1 — Introduction

2.15 Chapter 1 of the Bill provides for the preliminaries of the proposed Act including the preamble, the objects of the Act and an overview. The objects provide

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13 *Explanatory Memorandum*, p. 12.

14 *Explanatory Memorandum*, p. 15. The particular provisions in question and the justification for the application of strict liability are outlined in the Explanatory Memorandum: see pp 15-16.

15 *Explanatory Memorandum*, pp 15-17.

16 This section draws heavily on the *Explanatory Memorandum*, particularly pp 19-31.

for the Registrar as well as the functions and powers of the Registrar. They clarify that the Bill provides for:

- the incorporation, operation and regulation of bodies registered under the Bill and
- for duties of officers of Indigenous corporations and their regulation in the performance of those duties.

2.16 The Bill's objects also expressly provide for the incorporation of bodies incorporated for the purpose of becoming a RNTBC.

2.17 According to the Explanatory Memorandum, these objects are designed to recognise that Aboriginal and Torres Strait Islander peoples in some circumstances have special needs for incorporation, assistance, monitoring and regulation which the Corporations Act is unable to adequately meet as that Act exists primarily to provide uniform incorporation and regulation of trading corporations.[17]

Chapter 2 — Aboriginal and Torres Strait Islander corporations

2.18 Chapter 2 of the Bill provides for the registration of Aboriginal and Torres Strait Islander corporations, clarifies what is required to make an application, and provides the legislative basis for the Registrar to decide an application for registration.

2.19 Corporations can be registered as small, medium or large corporations (see Part 2-4). The classification determines, among other matters, the reporting requirements of the corporation – see Chapter 7 of the Bill.

Chapter 3 — Basic features of an Aboriginal and Torres Strait Islander corporation

2.20 This chapter provides for the basic features and powers of a corporation. Consistent with the Corporations Act, it provides for a system of 'replaceable rules'. Proposed section 60-25 sets out a table of the replaceable rules, which are also identified throughout the Bill. The Explanatory Memorandum explains that the replaceable rules:

> …provide a framework of internal governance rules to apply to a corporation. A corporation can adopt all the replaceable rules, or replace the replaceable rules with their own provisions, [or] adopt some of the replaceable and replace some. The replaceable rules will apply to a corporation whose constitution does not cover the matters provided for in the replaceable rules. The replaceable rules are intended to establish a minimum standard for corporate governance.[18]

17 *Explanatory Memorandum*, p. 8.

18 *Explanatory Memorandum*, p. 38.

2.21 Chapter 3 also provides for the matters that a corporation is required to cover in its constitution and other documents relevant to internal governance. Among other matters, this chapter establishes:

- requirements for changing a constitution;
- the requirement for a corporation to have a registered office or a document access address; and
- the assumptions third parties are entitled to make when dealing with the corporation.

Chapter 4 — Members and observers

2.22 This chapter sets out some rules for membership of an Aboriginal and Torres Strait Islander corporation and some rules about cancelling membership. This chapter deals with the register of members that the corporation is required to keep, and the protection of the rights and interests of members of the corporation.

Chapter 5 — Meetings

2.23 This chapter deals with the kinds of meetings that Aboriginal and Torres Strait Islander corporations may have and sets out requirements for how these meetings are to be conducted. There are two kinds of meetings held by corporations—directors' meetings and general meetings.

Chapter 6 — Officers

2.24 Chapter 6 deals with the duties of officers and their disqualification for breaches of those duties. In particular, proposed Chapter 6 implements the 2002 review findings that provisions of the Bill relating to directors and directors' duties in the ACA Act should be modernised and brought into line with the Corporations Act, with some modification for the special circumstances of Aboriginal and Torres Strait Islander corporations.

2.25 For example, the 2002 review recommended that the scope of relevant directors' duties under the ACA Act should be extended to include 'officers' as is the case under the Corporations Act. Proposed Chapter 6 achieves this, but does not extend the obligation to contact persons who have a more limited role than the ACA Act public officer.

2.26 Similarly, proposed Chapter 6 also implements the 2002 review's recommendation that statutory directors' duties under the ACA Act should generally be brought into line with the Corporations Act. These duties include the duty of care, the duty of honesty, the duties of disclosure and to avoid conflicts of interest, and a duty not to trade while insolvent. However, there are some modifications relating to the Native Title legislation obligations.[19]

19 See, for example, proposed sections 265-20, 265-25, 265-30 and 268-5.

2.27 In accordance with the 2002 review, Chapter 6 (in combination with other offences in the Bill[20]) also adopts a range of civil and criminal penalties, similar to the approach adopted in the Corporations Act, particularly regarding cases of dishonest or bad faith actions. The Explanatory Memorandum states that proposed section 658-5, aims of the Registrar, 'supports the flexible application of these provisions.'[21]

2.28 Finally, other provisions in Chapter 6 deal with matters such as internal governance aspects of the appointment, cessation and powers of directors.

Chapter 7 — Record keeping, reporting requirements and books

2.29 Chapter 7 deals with the reporting requirements imposed on an Aboriginal and Torres Strait Islander corporation. Chapter 7 also includes a general requirement to keep proper financial records and provisions relating to the books kept by a corporation.

2.30 In particular, under section 59 of the ACA Act, all corporations are required to submit the same information. Chapter 7 implements the 2002 review recommendations by 'streaming' corporations into small, medium and large and developing size-specific reporting for the different sizes of corporations in the regulations. For example, the Explanatory Memorandum states that under Chapter 7 it is planned that small corporations will only have to meet the general reporting requirements which do not include audited financial statements.[22]

Chapter 8 — Civil consequences of contravening civil penalty provisions

2.31 Chapter 8 creates a civil penalty scheme with sanctions for serious contraventions of the Bill, including breaches of directors' duties.[23]

Chapter 9 — Lodgments and registers

2.32 Chapter 9 sets out provisions relating to the lodgement of information by Aboriginal and Torres Strait Islander corporations and the registers of information maintained by the Registrar.

Chapter 10 — Regulation and enforcement

2.33 Chapter 10 contains provisions dealing with regulation and enforcement powers that the Registrar may use in the regulation of Aboriginal and Torres Strait Islander corporations. Chapter 10 also deals with the protection of whistleblowers.

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20 See, for example, proposed provision 376-35 dealing with falsification of books; proposed Chapter 8 civil consequences of contravening civil penalty provisions; and proposed Chapter 13 general offences.

21 *Explanatory Memorandum*, p. 23.

22 *Explanatory Memorandum*, p. 24.

23 Chapter 6 deals with the criminal consequences.

Chapter 11 — External administration

2.34 Chapter 11 provides for the administration of an Aboriginal and Torres Strait Islander corporation by persons outside the corporation (for example, in a winding up). Importantly, the Registrar may appoint a 'special administrator' for an Aboriginal and Torres Strait Islander corporation in certain circumstances.

Other Chapters

2.35 Other chapters of the 2005 Bill deal with the following matters:

- the deregistration of an Aboriginal and Torres Strait Islander corporation and unclaimed property (Chapter 12);
- general offences against the Bill, for example, offences for providing false and misleading information (Chapter 13);
- the jurisdiction of courts to hear matters under the Bill, injunctions and court proceedings (Chapter 14);
- general administration of the Bill, including the protection of information and review of decisions (Chapter 15);
- the appointment of the Registrar and Deputy Registrars, who are charged with the administration of the regime proposed by the Bill (Chapter 16); and
- interpretation and definition provisions (Chapter 17).

CHAPTER 3

OVERVIEW OF THE 2006 TRANSITIONAL BILL AND 2006 AMENDMENT BILL

3.1 This chapter summarises the two 2006 bills referred to the committee. When introducing the Transitional Bill, the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough, said that some of the amendments included in the bill have resulted from the committee's inquiry into the 2005 Bill.[1] This chapter will focus on provisions that relate to a number of the issues that arose in relation to the 2005 Bill.

3.2 Chapter 4 discusses those issues and others in relation to the 2006 bills in more detail.

2006 Transitional Bill[2]

3.3 The purpose of this bill is essentially to support the transition to, and implementation of, the 2005 Bill. The bill consists of three schedules: amendments to the *Native Title Act 1993*, consequential amendments and transitional provisions.

3.4 Schedule 1 amends several provisions in the Native Title Act dealing with prescribed bodies corporate (PBCs). PBCs are established in accordance with the Native Title Act to manage native title rights and interests on behalf of common law native title holders. The Native Title (PBC) Regulations 1999 require PBCs to be incorporated under the ACA Act. Schedule 1 alters the Native Title Act to recognise PBCs will be incorporated under the 2005 Bill.

3.5 It also corrects a technical error in the definition of a registered native title body corporate.[3]

3.6 As discussed in earlier chapters, the 2005 Bill will replace the ACA Act. Schedule 2 in the Transitional Bill gives effect to this by repealing the ACA Act.

3.7 Schedule 2 also deals with consequential amendments resulting from the 2005 Bill replacing the ACA Act. For instance, it replaces references to the ACA Act in other Commonwealth Acts with references to the 2005 Bill. Similarly, references to incorporated Aboriginal associations in legislation will be replaced with references to corporations registered under the 2005 Bill. Since provisions relating to Aboriginal

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1 *House of Representatives Hansard*, 14 September 2006, pp 3-6.

2 This section draws heavily on the *Explanatory Memorandum* of the Transitional Bill.

3 *Explanatory Memorandum*, pp 2-3.

councils in the ACA Act are not being replaced with the 2005 Bill, references to these entities in other legislation will be removed.

Transitional provisions

3.8 Schedule 3 provides for transitional provisions. The major component is the provision for a transitional period of up to two years, with special provision for the Registrar to determine an extra six months in some circumstances, to allow corporations time to comply with the new framework.

3.9 The other important feature of the transitional provisions is that, according to the Bill, they have been 'tailored to reduce as much of the administrative burden on corporations as possible'.[4] Provision is made for transitional corporations to be registered automatically under the 2005 Bill. Similarly, existing members and directors automatically retain their membership and status under the 2005 Bill. The existing rules of transitional corporations are also recognised as constitutions under the 2005 Bill. The Transitional Bill states that this is designed to 'alleviate… the burden of transitional corporations immediately having to amend their rules and lodge them with the … Registrar'.[5]

3.10 The Transitional Bill is intended to also alleviate some of the restrictions or obligations imposed under the 2005 Bill. For example, the limit on the number of directors to 12 does not apply during the transitional period, nor does the obligation on a corporation to hold its first annual general meeting within three months of registration.

3.11 Financial reporting obligations under the 2005 Bill are also relaxed for the financial year ending 30 June 2007, with corporations able to report under the requirements of the old ACA Act. Corporations may also elect in writing to report under the old Act for the financial year 30 June 2008. Schedule 3 provides for a number of other reporting exemptions.

3.12 All transitional corporations become 'medium corporations' when the Transitional Bill commences. A corporation's size may be altered from medium to small or large if the Registrar is satisfied that it is likely to be small or large. The Transitional Bill does not define the thresholds or criteria that will be used to determine a corporation as 'small', 'medium' or 'large'. As discussed in chapter 4, it is the government's intention to specify the thresholds in regulations rather than legislation.

3.13 Many of the above provisions are also discussed further in chapter 4.

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4 *Explanatory Memorandum*, p. 16.

5 *Explanatory Memorandum*, p. 19.

2006 Amendment Bill[6]

3.14 The 2006 Amendment Bill amends the *Corporations Act 2001* as a consequence of the 2005 Bill. The amendments deal mainly with removing both duplications between the Corporations Act and the 2005 Bill, and areas of doubt and potential regulatory gaps that might arise once the bill comes into force. In other words, the Amendment Bill seeks to align the 2005 Bill and the Corporations Act.

3.15 The Amendment Bill confirms that a corporation under the 2005 Bill is a corporation for the purpose of the Corporations Act. According to the Explanatory Memorandum, this is necessary because '[w]ithout this amendment it may have been argued that the [2005] Bill, being a more recent Commonwealth enactment than the Corporations Act, would displace' the relevant section of the Corporations Act which defines the meaning of a corporation.[7]

3.16 The Amendment Bill removes duplication in relation to the duties of officers and employees, winding-up, receivers, courts, proceedings and offences. It also removes the possibility of confusion if there were dual regulators (the Registrar and the Australian Securities and Investments Commission) responsible for compliance, for example, in relation to the duties of officers and employees.[8]

3.17 The Amendment Bill complements the measures in the 2005 Bill for disqualifying persons from managing corporations. The 2005 Bill and the Corporations Act are intended to be mutually reinforcing in that disqualifications under one result in automatic disqualification under the other. The Amendment Bill amends the Corporations Act to ensure this happens.

3.18 The Amendment Bill also ensures that the current provisions which disqualify a person involved in two or more failed companies, one of which was an ACA Act corporation and the other a Corporations Act corporation, continue in the same fashion once the 2005 Bill comes into force.

3.19 The Registrar informed the committee that the amendments contained in the Amendment Bill have been considered and approved by the Ministerial Council of Corporations as required under the Corporations Agreement 2002.[9]

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6 This section draws heavily on the *Explanatory Memorandum* of the Amendment Bill.

7 The relevant section is 57A of the Corporations Act. See *Explanatory Memorandum*, p. 2. See also Attachment B to ORAC, *Supplementary Submission 5c*.

8 *Explanatory Memorandum*, p. 3. See also Attachment B to ORAC, *Supplementary Submission 5c*.

9 ORAC, *Supplementary Submission 5c*, Attachment B, p. 1.

Draft Parliamentary Amendments

3.20 In addition to the two 2006 bills discussed above, Parliamentary Amendments to the 2005 Bill have been drafted and will be introduced during the committee stages of the consideration of the bills. As mentioned in chapter 1, Minister Brough provided the amendments to the committee to consider as confidential information as they include measures responding to concerns raised during the inquiry in 2005. As also noted in chapter 1, the minister subsequently authorised the publication of the amendments.

3.21 The Registrar also provided the committee with a summary of the draft Parliamentary Amendments. The Registrar indicated that the amendments relate to provisions in the 2005 Bill dealing with transfer and amalgamation of corporations. The amendments also extend the Registrar's ability to exempt corporations and directors, or a class of corporations and directors, from provisions in the 2005 Bill to do with internal governance and provide more flexibility for a corporation's particular circumstance to be considered.[10]

3.22 In the next chapter, the committee discusses some of the draft Parliamentary Amendments and provisions of the 2006 bills in conjunction with issues that arose in relation to the 2005 Bill.

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

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.

CHAPTER 5

COMMITTEE VIEW

5.1 The committee considers the three bills examined in this inquiry will make a significant contribution to improving the governance and accountability of Indigenous corporations. It is clear, however, that many Indigenous corporations are poorly resourced and will require significant support in order to make this transition. The committee is concerned that the existing budget allocation of the Office of the Registrar for Aboriginal Corporations for education and training may not be sufficient to meet the needs of the 2,600 existing Indigenous corporations.

5.2 The parties who made submissions to the inquiry raised a number of well-founded concerns about the provisions of the 2005 Bill. The committee is of the view that the Transitional Bill and the draft Parliamentary Amendments will address many of the concerns raised during the course of its inquiry.

5.3 The committee considers the two-year transitional period to bed down the new regulatory regime under the bills will allow all parties involved to monitor the impact of the new measures and identify matters that might require refinement. The committee draws attention to the concern that requests for directors to call a general meeting should be limited to voting members and not left open to non-voting members. While the committee notes that the relevant provision will not apply during the transition period, it considers there is a case for linking the right of members to request general meetings to voting rights.

5.4 The committee has formed the view that the bills provide sufficient flexibility to enable the Registrar to address any conflict between directors' and reporting duties applicable to representative bodies incorporated under the 2005 Bill and the duties of representative bodies under the Native Title Act. However, the committee considers that the government should closely monitor the interaction of the bills with other legislation, particularly the Native Title Act. In view of its sensitivity, the committee considers the government should at the end of the two-year transition period report to the Parliament on the practical interaction of the bills with other legislation.

Recommendation 1

5.5 The committee recommends that the government should monitor funding to assist corporations with the transition to the new regime and make provision in the 2007-08 budget to increase this funding if necessary.

Recommendation 2

5.6 The committee recommends the government consider restricting to voting members the right of members to request directors call a general meeting and amend sections 201-5 and 201-10 of the 2005 Bill accordingly.

Recommendation 3

5.7 The committee recommends the government monitor the practical interaction of the bills with other legislation, particularly the Native Title Act, and at the end of the two-year transition period report to the Parliament on this matter.

Recommendation 4

5.8 Subject to the preceding recommendations, the committee recommends that the Senate pass the bills.

Senator Marise Payne

Chair

ADDITIONAL COMMENTS BY THE AUSTRALIAN LABOR PARTY

1.1 Labor Senators support the findings of the majority report and the recommendations regarding:

- ensuring ORAC has adequate funds to assist corporations with the transition to the new incorporation regime;
- monitoring the interaction between the bills and other legislation, particularly the Native Title Act; and
- amending sections 201-5 and 201-10 of the 2005 Bill to restrict the right of members to request directors call a general meeting to *voting* members.

1.2 Labor Senators remain concerned, however, about the level of regulation and the extent of the Registrar's powers contained in the 2005 Bill. The Indigenous sector – those directly affected by this legislation – shares our concerns. For example, the KLC described the 2005 Bill as 'a highly detailed and prescriptive legislative enactment'.[1] Similarly, the CLC noted that:

> By trying to cover the field, from the largest commercial corporation or service provider through to the smallest community corporation or small land owning corporation, the draftsperson has created a 'default setting' of intense regulation, followed by strict liability for failure to comply and subsequent penalty which may then be softened upon application to the Registrar for exemption.[2]

1.3 When asked if he preferred the existing framework under the ACA Act or the new model the 2005 Bill proposes, Professor Mick Dodson told the committee:

> Let us stay with what we have, because the new bill is far too complex.[3]

1.4 Labor Senators note the Registrar's evidence regarding the flexibility and protections contained in the Bill.[4] Labor Senators also note that the recently introduced Transitional Bill extends that flexibility in appropriate ways.

1.5 Nevertheless, there can be no certainty that these Bills reflect an appropriate level of regulation which is workable for the *specific* conditions of the Indigenous corporate sector until they come into operation and have been tested in practice. The impact of the legislation on the Indigenous corporate sector needs to be tracked closely. Labor Senators therefore recommend that for the next three years ORAC

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1 *Submission* 7, p.1.

2 *Submission 9*, p.4.

3 *Committee Hansard*, p. 19.

4 *Committee Hansard*, pp 25-26.

should monitor and report on the operation of the new legislation and stakeholder satisfaction with the new regime.

1.6 The transitional period of 2 years provides some reassurance that Indigenous corporations will have time to adapt to the new regime. However, it is notable that the Indigenous corporate sector was given less than a week to raise any concerns about the Transitional Bill and the Amendment Bill. This limited timeframe explains the absence of submissions in relation to those bills.

1.7 The Parliamentary Amendments to be introduced during cognate debate resolve some of the concerns raised during the inquiry. However, the Parliamentary Amendments were initially provided to the committee in confidence and only made public when the committee was finalising its report. As a result, the Indigenous corporate sector and other interested parties were not given a genuine opportunity to examine and comment on them.

Recommendation 1

1.8 To ensure that the impact of the legislation is closely monitored and with appropriate transparency, the Labor Senators of the committee recommend that for the next three financial years ORAC include in its annual report a review of the operation of the new legislation and results of a statistical survey of stakeholder satisfaction.

Senator Patricia Crossin **Senator Joseph Ludwig**

Deputy Chair

Senator Linda Kirk

APPENDIX 1

SUBMISSIONS RECEIVED

1	Emeritus Professor Garth Nettheim AO
2	Mr David Dalrymple
3	COALS – Coalition of Aboriginal Legal Services
4	North Queensland Land Council Native Title Representative Body Aboriginal Corporation
5	Registrar of Aboriginal Corporations
5A	Registrar of Aboriginal Corporations
5B	Registrar of Aboriginal Corporations
5C	Registrar of Aboriginal Corporations
5D	Registrar of Aboriginal Corporations
6	Confidential
7	Kimberley Land Council
8	Queensland Government
9	Central Land Council
10	AIATSIS
11	Australian Securities & Investments Commission
12	Goldfields Land and Sea Council
13	Northern Land Council
14	Confidential
15	NSW Department of Aboriginal Affairs
16	Ms Kathleen Clothier
17	Office of the Minister for Families, Community Services and Indigenous Affairs

TABLED DOCUMENTS

Documents tabled at public hearings

4 October 2005 – Registrar of Aboriginal Corporations

- Indigenous Corporations sorted by remoteness

4 October 2005 – Registrar of Aboriginal Corporations

- Indigenous Corporations sorted by ICC

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Tuesday 4 October 2005

North Queensland Land Council

Mr Martin Dore', Principal Legal Officer

Central Land Council

Mr Michael Prowse, Senior Lawyer

Northern Land Council

Mr Ron Levy, Principal Legal Officer

AIATSIS

Professor Michael Dodson, Chairperson

Dr Lisa Strelein, Manager, Native Title Research Unit

Registrar of Aboriginal Corporations

Ms Laura Beacroft, Registrar

Ms Toni Matulick, Director, Legislative Reform

Mr Justin Toohey, Assistant Director, Legislative Reform

Mr Adam Kirk, AGS Counsel

Ms Hannah Clee, Senior Policy Officer

Office of Indigenous Policy Coordination, Department of Immigration and Multicultural and Indigenous Affairs

Ms Laura, Beacroft, Registrar