Submissions

On

Corporations (Aboriginal and Torres Strait Islander) Bill 2005

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TRANSITIONAL PROVISIONS AND FUNDING

It is noted that the Bill in its current form has no transitional provisions dealing with how corporations that are incorporated under the existing legislation will move to and be covered by the new Bill once it becomes law.

It is noted that the Registrar of Aboriginal Corporations' website indicates that it is the intention that the new Bill once passed will become effective on 1 July 2006. That is a relatively short period of time and yet there is still no indication of transitional arrangements.

The Bill provides for replaceable rules which effectively act as the default position if the rules of the corporation do not provide for the specific matter dealt with.

Whilst these rules will only apply to new corporations, some corporations would want to change their rules to either ensure they line up with the replaceable rules or to make it clear that particular rules do not apply.

Further, some of the new fixed rules set out in the Bill would require a number of corporations to change their rules in any event.

Of significant concern is that there is, at the present time, no indication of any source of funding to enable the necessary rule changes to be implemented by aboriginal corporations.

The process of changing rules can be quite expensive involving the calling of a SGM. It is noted that in most cases the proposed changes to rules must be advertised in the notice calling the SGM and in many cases, corporations may well need legal advice to prepare the appropriate notices and detailed suggested changes.

One of the problems facing many aboriginal corporations at the present time is their lack of finances. Some corporations do have considerable and steady incomes, however many do not.

For example, many aboriginal corporations are set up to be PBC's required under the Native Title Act. Unless the native title in question lies in any area where there is significant mining activity and the potential to receive an income from that, then many PBC's are bereft of any meaningful source of income and yet are required to continue to operate and deal with the matters required by the Native Title Act. They may now be required, in addition to reform their rules to bring them into line with the new Bill.

Even organisations which receive considerable funding, such as native title representative bodies, may find the process of amending their rules to comply with the requirements of the new Bill, quite time consuming and difficult.

Again, if native title representative bodies are reliant entirely on their funding from DIMIA to carry out native title work, they may find the expenditure of money on non-core native title work, ie, amendments to constitutions, are difficult to justify.

It is noted that the Bill makes provisions for dividing corporations into small, medium and large corporations 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.

The lack of clear indication as to the government's intentions in this matter is of considerable concern as there is a lack of any apparent funding source for the many corporations which will require alterations to their rules in order to comply with the new regime.

REPLACEABLE RULES

Note that at Clause 60-1 provides that replaceable rules apply to any new Aboriginal and Torres Strait Islander Corporation that comes into being after the commencement day of the new act to a previously registered corporation that repeals its constitution.

Clause 60-5 provides that a corporations constitution can modify a replaceable rule.

The act does not specify anything more and it is left up to a consideration of the content of the rules as to whether they have effectively replaced a replaceable rule. This could lead to expensive litigation.

Whilst the risk of litigation can never be ruled out entirely, I would suggest that it might be more appropriate to provide that replaceable rules can be displaced by a rule in the constitution of a corporation which commences with "This Rule is intended to replace the content of Rule …", this would at least make it clear the intention of the corporation in so far as it intended to replace a rule. Whilst this would not eliminate the risk of litigation over whether they had successfully covered the matter or not, it would, in the writer's opinion, cut down considerably on the risk.

MINIMUM AGE

It is noted that Clause 141-15 sets the minimum age of members at 15 years of age. 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.

USE OF INFORMATION ON THE REGISTER OF MEMBERS

It is noted that Clause 183-1 prohibits a person from using information about a member obtained from the Register of Members to contact or send material to that person and also prohibits them from disclosing the person's information knowing that that information is then likely to be used to contact or send material to the member.

These prohibitions do not apply if the information is relevant to the persons membership or is approved by the corporation.

This provision may prove difficult for native title representative bodies who have a statutory obligation under the Native Title Act to distribute various notices (such as use of future act notices).

In the case of North Queensland Land Council, one of our sources of information as to the contact details of traditional owners for the purposes of sending out notices comes from our membership database.

Whilst that is not the only database we maintain for the purposes of contacting traditional owners it is certainly an important source.

Given that native title holders have the same rights under the Native Title Act whether or not they are members of a native title representative body, it could not be said that native title business was relevant to the members membership of a native title representative body.

It follows that if taken literally this clause would prevent native title representative bodies using information from their members register to send

notices about native title matters to their members and place the organisations in conflict with their obligations under the Native Title Act.

Whilst this could be cured by having permission of the corporation, it is noted that the permission does in fact have to come from the corporation, meaning it would have to be voted on at a general meeting of members as opposed to, for example, being a decision of the Board of Directors.

Again, there are expense and time issues involved with that.

Many corporations like to pass on to their membership notices of matters topical to their members' interests. Notifications about mining seminars, native title information sessions and all sorts of material is often distributed to members. None of this strictly relates to the members membership of any particular organisation.

The obligations under the Native Title Act to send notices to members would also extend to Prescribed Body Corporate's under the Native Title Act who are obliged to advise members of developments or notices about developments which have the potential to impact upon their native title. It could also be said that these issues are not directly related to the persons membership.

It is desirable that a certain degree of privacy be maintained and I would agree the use of members' addresses is inappropriate for mass advertising mailouts. This section as currently drafted would seem to cause conflict in respect of what might be seen as ordinary, routine and desirable (and indeed mandatory) communications between an organisation and its membership.

MEMBERS ABILITY TO REQUEST GENERAL MEETING

Clause 201-5 and 201-10 set out that the directors of a corporation call a general meeting if a request to do so is received by the greater of five (5) members or 10% of the members of the corporation.

It is noted that there are 21 days for the Board of Directors to respond to a request and if they resolve that the request is frivolous or unreasonable they have to within that time apply to the Registrar for permission to deny the request.

The difficulty is that the time limit is too short. It is not always easy to arrange unscheduled directors meetings to deal with a request that has just been received, further the question is whether it is fair to place the burden on the corporation to seek approval to oppose the demand for a meeting.

In the writer's opinion, it would fairer to have a system whereby the directors could decide whether to call a general meeting in response to a request signed by five people or 10% and if the decision was in the negative for there to be some right for the aggrieved parties to apply to the Registrar who will then hear submissions from both the aggrieved parties and the corporation.

It is of course quite possible that there is a situation where a small sub-group (or possibly more than two sub-groups) just large enough to constitute 10% of the membership, could, by a series of requests for general meetings place an unfair and undue financial burden on a corporation.

It goes without saying that the cost of holding a general meeting can be quite substantial and with many aboriginal corporations lacking in funds the holding of more than their annual general meeting could represent quite an adverse financial burden upon them.

Further, the rule refers to 10% of the members and makes no distinction between voting and non-voting members. With the possibility of minors aged 15 and upwards being admitted to membership of a corporation or there being different classes of membership it may well be that the rules are structured in such a way as to have voting members and non-voting members. The rule needs to be clearer to whether the measure is 10% of the total membership or 10% of the voting members.

It is submitted that it would be appropriate for the test as to the number of members necessary to make a request that it should be 10% of the members entitled to vote rather than 10% of the membership overall.

MEMBERS RESOLUTIONS AND STATEMENTS

Clause 201-40 provides that if the requisite number of members provides to the corporation a notice in writing setting out the words of a proposed resolution, the resolution must be considered at the next general meeting carried out more than 28 days after notice is given.

The burden on distributing the notices to all members is placed on the corporation and the only exclusion from the rule requiring distribution is that the corporation need not give notice if the resolution is defamatory.

There is no provision for the Board of Directors to refer the matter to the Registrar or to independent legal advise. Nor is there any provision to allow the entering into of discussions with the proponents about the suitability of the proposed changes.

It is possible to imagine a situation whereby a resolution is put forward which is nonsensicle, unworkable, in conflict of other parts of the rules or otherwise totally lacking merit but not defamatory.

In such cases the corporation is put to the expense of having to copy and distribute the notice at the next general meeting and there should be a provision whereby the resolution can be forwarded to the Registrar's office and the Registrar should perform some function in deciding whether the resolution can be put or not.

It is unfair to place the burden on the corporation for the distribution of the notice, particularly if the notice is out of a resolution which is patently unworkable or ludicrous in all the circumstances.

It should be born in mind that the membership of some aboriginal corporations such as native title representative bodies is quite large. In the case of the North Queensland Land Council we have in excess of 900 members.

The costs of copying and distributing notices can be significant.

The same arguments apply to the distribution of members statements as provided for in Clause 201-50.

THE AUDITORS RIGHT TO BE NOTIFIED OF AND ATTEND GENERAL MEETINGS

It is noted that Clause 201-30 requires that the auditor be given notice of any general meetings. That in itself is not of difficulty. However, Clause 201-80 provides that the auditor is entitled to attend the general meeting and is entitled to be heard on any matter concerning the auditor in the auditors capacity as auditor.

Whilst it is understandable that the auditor may wish to be heard on the question of concerning his position as auditor, the provision that the auditor is entitled to attend the general meeting (and not just that part of the meeting that deals with the appointment of the auditor) is strange. It would appear that on the face of it to give the auditor a right to be in attendance at the whole of the general meeting even if his right of audience is restricted to those matters concerning his position.

It may well be that the members and directors of a corporation would not necessarily want to discuss all of their business in front of the auditors.

It is of course always possible that the auditor could be asked by consent to stay on if the meeting wished to have advice that may be within the auditors expertise. However to provide that the auditor has absolute right to remain at the meeting when other business being discussed is strange and in the writer's submission should be changed.

DIRECTORS MEETINGS

Clause 12-5 provides as a replaceable rule that a directors meeting may be called by the director giving reasonable notice to every other director.

Whilst noting that this is a replaceable rule and could be replaced by rules to the contrary in any given constitution the writer submits that this in fact is a undesirable rule and should not remain as a replaceable rule.

Experience tells us that replaceable rules which are in effect the default position are likely to come into play on a substantial number of corporations simply because matters were not covered in their constitution when incorporating.

The usual position is that the Board of Directors itself sets dates for the next meeting and/or the Chairperson has the power to call Directors Meetings.

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 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.

It is suggested that the alternative might be again 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.

MAXIMUM NUMBER OF DIRECTORS

Clause 243-5 provides that unless the regulations say otherwise the maximum number of directors is 12.

It is submitted that this number is too low and whilst there is of course always the possibility that the regulations may prescribe a different number it is in the writers submission inappropriate to start with what amounts to a presumption that 12 is the appropriate maximum number.

In the case of North Queensland Land Council, our current Board consists of 17 persons.

Our constitution which was amended in 2001 to set up a Ward system was deliberately designed that way so as to ensure representation across a broad geographic region.

When North Queensland Land Council applied for re-recognition of its status as a native title representative body it was made clear to us that we needed to have a system which guaranteed a broader representation on the board and this led to the implementation of the Ward system.

Our previous system based on the Registrar's standard rules of simply electing a board by nominations from the floor of the AGM was found by the people given the job of assessing our application on behalf of the Minister to be undesirable.

The result is a Board of Directors of 17 people.

Whilst we appreciate that the larger the number on a board the more unweildy and awkward it becomes it seems to us that 12 is too lower setting. We are aware of

other representative bodies that have even greater number of directors on their board.

Again, it must be recognised that prescribed body corporates are likely to be set up and incorporated under the new act 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.

TERM OF APPOINTMENTS

Clause 246-25 provides that the maximum term of appointment is a period not exceeding two (2) years.

In the case of North Queensland Land Council, our board is elected for a period of three (3) years.

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.

Just as governments in the wider community are generally elected on the basis of three year terms, we feel that a three year term is appropriate especially in relation to such corporations which require some stability in their corporate governance from year to year in order to make appropriate policy provisions and to implement those decisions.

It is our submission that a two year period is in some circumstances too short and that the act should not restrict the term to two years.

REMOVAL OF DIRECTORS BY OTHER DIRECTORS

It is noted that Clause 249-15 provides the one and only grounds for removal is failure to attend three consecutive directors meetings without reasonable excuse.

Whilst the provisions allowing minimum periods of notice and so forth to any person who is to be subject to a motion by directors to be removed is appropriate and complies with the requirements of natural justice it is noted that there will be difficulty with the only ground being failure to attend three meetings.

I note that if the impuned director is given notice and objects to it then there is no power to make a decision to remove that director.

Therefore, it seems that if one had a stubborn director on the board who despite being in a position where they were not effective declined to resign all they have to do is to respond to the notice indicating that the board was to consider their

removal and they are safe and cannot be touched, saved and accept by a general meeting.

In a large corporation it is highly unlikely that removal of a director would warrant the expense of calling a general meeting just to do that.

Further, there is difficulty with setting the one and only criteria as being that of missing three meetings without reasonable excuse.

For example, a person who might have the misfortune to be in a motor vehicle and severely injured might miss three consecutive meetings with the very reasonable excuse that they remained in hospital when those meetings were being held.

If however, their recovery from their injuries was long and slow it would be a situation where they were in a position where they could no longer be an effective member of the board of directors. However, given their excuse for not attending meetings was reasonable the clause could never to brought into play to seek their removal.

It is submitted 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 to unwilling to do so.

Small corporations may well be able to call a general meeting quite easily, a general meeting for example might involve no more than 15 people in a small corporation, for example, however the calling a general meeting for a corporation with a large number of members becomes prohibitively expensive to deal with such issues.

RIGHT OF ACCESS TO CORPORATION BOOKS

Clause 274-15 provides a director or ex-director (within seven (7) years) has access to the books of the corporation other than its financial records.

The difficulty with this in native title representative body context is that books is defined extremely broadly (see the dictionary definition in the schedule) and includes a register or any record or information or any document.

The right of the director to access the material is dependent upon a legal proceeding to which the director is a party or which the director proposes in good faith to bring.

The difficulty is that native title determination applications in the Federal Court of Australia are legal proceedings. Thus, on the face of it, this provisions conflicts with the work of native title representative bodies who conduct research and run claims with in-house legal professionals.

It is unclear what the interaction between legal professional privilege, the law of confidentiality, and this provision is.

For example, if Group A, represented by in-house legal staff of a native title representative body has a native title claim and Person B who is a director or ex-director belonging to a competing group files to be a Respondent to Group A's claim the director is then involved in legal proceedings. On the face of it the clause then gives them the right to inspect the books (meaning any document) held by the native title representative body including all documents relating to the other parties native title claim.

The potential for conflict here is patently obvious.

The clause needs refining to ensure that it does not apply in these circumstances.

PROVISION OF AUDITORS REPORT TO MEMBERS

Clause 342-5 provides that a corporation required to have audited financial reports must present each member of the corporation a copy of that report.

We believe that particularly in native title representative bodies where the membership is likely to be high such as in North Queensland Land Council's case of in excess of 900 members the copying and distribution of the auditors 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.

We have no difficulty with a requirement that the financial report be available at the AGM nor do we have a difficulty with members specifically requesting the same.

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