



Australian Government
Registrar of Aboriginal Corporations

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2005

OVERVIEW

The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to replace the *Aboriginal Councils and Associations Act 1976* (ACA Act) and to improve corporate governance in the Indigenous corporate sector.

There are currently approximately 2600 Aboriginal and Torres Strait Islander corporations registered under the ACA Act. The Act is administered by the Registrar of Aboriginal Corporations, a statutory office holder, who is supported by departmental staff engaged under the *Public Service Act 1999* (the Office of the Registrar of Aboriginal Corporations or ORAC).

The Bill is intended to strengthen the legislative framework for corporations in the Indigenous corporate sector. It is therefore aligned in many respects with the *Corporations Act 2001* (Corporations Act) to apply modern corporate governance standards and corporations law to Indigenous corporations. However it is also intended to operate as a special statute of incorporation for Aboriginal and Torres Strait Islander peoples to take account of the special risks and requirements of the sector.

SUMMARY OF KEY FEATURES OF THE BILL

Accountability

Consultations conducted during the independent review of the ACA Act and subsequent feedback indicate that Indigenous communities support managers and directors being more accountable, consistent with mainstream accountability standards. The Bill includes many measures to raise the accountability of Indigenous corporations. These include applying directors' duties to senior management, as occurs in the Corporations Act, and allowing for individuals to be automatically disqualified from managing Indigenous corporations if they have already been disqualified from managing corporations under the Corporations Act. The Bill also closes the existing regulatory gap between the Corporations Act and ACA Act by providing that the Registrar can examine the affairs of related bodies and subsidiaries. The Registrar's existing power to do this under the ACA Act is unclear.

Good corporate governance

Unlike most mainstream corporations, those registered under the Bill will be required to have an internal governance framework. This framework will be kept on a public register, maintained by the Registrar, to support greater transparency in corporate decision making and to ensure better record keeping in the sector. The internal governance framework includes, for example, guidance on processes for entry and exit of members which is a common cause of disputes.

Support

The Registrar is able to protect members' rights if they can not take action themselves. The Registrar can also assist with dispute prevention and resolution and provide education and advice to members and Boards.

Cultural alignment

Indigenous corporations will be able to design corporate structures and rules to suit their specific needs. For example, culturally appropriate practices can be built into the internal governance framework.

Removal of unnecessary red tape

The Bill reduces red tape for most existing corporations under the ACA Act by streaming corporations into large, medium and small for reporting purposes. Generally, medium and small corporations will have less rigorous reporting requirements, whereas large corporations will have to report in the same way as required by the Corporations Act.

Human rights

The Bill is a 'special measure' consistent with the *Racial Discrimination Act 1975*. The Registrar has special regulatory powers to respond quickly and preventatively where necessary, providing a safety net for essential remote funds, assets and services.

Merits review

The Bill implements the Commonwealth policy on merits review by providing for a number of decisions to be subject to merits review and confers jurisdiction on the Administrative Appeals Tribunal.

REVIEW OF THE ACA ACT

The ACA Act was envisaged as a simple and flexible means for incorporating associations of Indigenous people and was reserved for the use of Indigenous people. Since it began in 1976, the ACA Act has become a significant vehicle for incorporating a broad range of Aboriginal and Torres Strait Islander corporations. Many of these have been formed to hold land or deliver municipal services and 56 per cent are located in areas classified as remote or very remote according to Australian Bureau of Statistics (ABS).

The ACA Act was last amended in 1992. These amendments mainly increased the accountability of Indigenous corporations. Since 1992 there have been several reviews of the ACA Act culminating in two Bills proposing legislative reform which subsequently lapsed. There have also been significant external developments in that period. Most notably, corporations law in Australia has been fundamentally changed through the introduction of the Corporations Act in 2001. The ACA Act is now inconsistent with modern corporations law in Australia. This disadvantages Indigenous people using the ACA Act as a means of incorporating because the ACA Act provides inadequate protection for

members, a one-size-fits-all approach to corporations and insufficient third party protection which makes securing credit more difficult.

Another major development since 1992 has been the enactment of the *Native Title Act 1993* (Native Title Act). Once a determination that native title exists has been made under the Native Title Act, the Federal Court must determine a prescribed body corporate to hold or manage the native title and fulfil the functions required by the Native Title Act and regulations. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* require a prescribed body corporate to be incorporated under the ACA Act. As the ACA Act has been used as the compulsory incorporation regime for native title the deficiencies that exist in the ACA Act also affect this important sector. The interaction between functions and duties conferred on corporations by the Native Title Act and the ACA Act is also unclear producing some uncertainty in the native title sector.

The substantial amount of public money that is provided to ACA Act corporations has also highlighted the Act's deficiencies in its accountability framework. For example, entities that are connected to ACA Act corporations such as trusts and other associations to some extent fall into a 'regulatory gap' where scrutiny by the Registrar, the Australian Securities and Investments Commission (ASIC) or state regulators is limited and uncertain.

The ACA Act has also been criticised for the amount of red tape it imposes on Indigenous corporations and ORAC itself. For example, the reporting requirements for small corporations can be more onerous than if the same corporation were incorporated under the Corporations Act.

In February 2001 the Registrar commissioned the most recent independent review of the ACA Act. The review was led by law firm Corrs Chambers Westgarth and the review team included specialists Senatore Brennan Rashid, Mick Dodson, Christos Mantziaris and Anthropol Consulting. The final report of the review was presented in December 2002.

The review process included extensive consultations centring on two major rounds of consultations in April and May 2001 and in March and June 2002. A key workshop was held in Alice Springs on 3 and 4 May 2001 with a second workshop also in Alice Springs on 9 and 10 April 2002. Questionnaires were developed and sent to all ACA Act corporations as well as to 345 Indigenous organisations incorporated under other Commonwealth, state and territory legislation.

Advertisements were placed in Indigenous publications, including the *Koori Mail*, *National Indigenous Times*, *Yamatji News* and the *Torres Strait News*, noting the release of the consultation papers and calling for submissions and comments. Advertisements were also run on the National Indigenous Radio Service (NIRS) network during March and April 2002. NIRS can broadcast to over 120 Indigenous radio stations Australia-wide. Details of the review and copies of the consultation papers and the questionnaires for Indigenous corporations were available on the ORAC website. Information sheets on the review and a copy of a summary consultation paper were also distributed to all participants at the Indigenous Governance Conference held by Reconciliation Australia on 3 and 5 April 2002.

Consultation papers were sent to key stakeholders seeking submissions. Separate briefings were provided at the request of six ATSIC Regional Councils. The ATSIC Board was briefed at its Board meeting in February 2002. Board members were updated on the progress of the review and were given advance copies of the consultation papers.

RECOMMENDATIONS OF THE REVIEW

The major finding of the review was that the special incorporation needs of Indigenous people should be met through a tailored statute of incorporation. The review recommended a new Act to provide Indigenous people with the key facilities of a modern incorporation statute such as the Corporations Act, but at the same time providing special forms of regulatory assistance, to raise the standards of corporate governance among Indigenous corporations.

In making these recommendations the review observed that Indigenous people possess a range of socio-economic and cultural characteristics which may disadvantage them using statutes of general incorporation such as the Corporations Act or the state and territory associations incorporation legislation.

The review also 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 review also noted that, in the context of racial discrimination law, the new Act would be a 'special measure'. The Act would therefore be a temporary form of 'positive discrimination' based on race aimed at enabling Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities (and attendant socio-economic benefits) that incorporation can confer.

IMPLEMENTATION OF RECOMMENDATIONS

The Bill implements the key recommendation by retaining a special incorporation statute to meet the needs of Indigenous people. It introduces a strong but flexible legislative framework that maximises alignment with the Corporations Act, where practicable, but provides flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. To acknowledge the fact that most corporations are located in remote or very remote areas, and may provide municipal services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.

The review made a number of specific reform recommendations, that will be implemented through the Bill, as summarised below.

The review recommended enhancing the capacity of funding bodies and creditors to take a more proactive role in protecting their interests. This is implemented by aligning with the external administration provisions of Chapter 5 of the Corporations Act and through a number of transparency measures such as allowing observers and enabling consolidated reporting for groups of corporations.

The review recommended providing the means for the Registrar to help protect members' rights, if members are unable to or lack the capacity to take action themselves. This is implemented by aligning with the members' remedies of Part 2F of the Corporations Act and allowing the Registrar to seek these remedies on behalf of members. The Bill also has numerous provisions which strengthen the capacity of members to participate in managing their corporation, such as being able to request information about director remuneration and approving related party transactions. In many of these areas the Registrar can intervene to support members.

The review recommended ensuring that Indigenous people are able to design corporate structures and rules which best suit their specific needs, whether by reference to cultural practices or otherwise. This is implemented by allowing, subject to some restrictions, rules to implement structures and processes which reflect the traditions and circumstances of Indigenous people. The Bill also adopts a framework of 'replaceable rules' similar to the Corporations Act which allows corporations to readily adopt good governance procedures or tailor their internal governance framework to their particular circumstances.

The review recommended ensuring that reporting requirements match the size and activity level of the corporation. This is implemented by streaming corporations into small, medium and large for reporting purposes. Maximum flexibility is built into the reporting requirements to ensure that reporting can be tailored to the circumstances of particular corporations or classes of corporations.

The review recommended enhancing the standard of management of Indigenous corporations by applying directors' duties to senior management and ensuring appropriate duties apply to both directors and senior management. This is implemented by aligning with the director, officer and employee duties in Part 2D.1 and the disqualification provisions of Part 2D.6 of the Corporations Act. The definition of 'officer' from the Corporations Act is also used so that managers who participate in decision making that affects a substantial part of the business of a corporation are also subject to these important duties.

The review recommended promoting the certainty of internal corporate processes and transactions with third parties (thereby enhancing the functionality of Indigenous corporations and removing commercial disincentives for dealing with them). This is implemented by adopting the provisions in Part 2B.2 of the Corporations Act which provide for the assumptions that people are entitled to make when dealing with corporations. A number of other provisions also ensure that transactions will not be void merely because particular procedural requirements have not been met.

The review recommended removing unnecessary technical barriers to the effective operation and regulation of Indigenous corporations. This is implemented by giving the Registrar maximum flexibility to exempt corporations from certain procedural requirements in the Bill, such as those relating to reporting or the conduct of meetings. The Bill also allows regulations to be made in a number of instances to tailor the operation of the Bill to particular corporations or classes of corporations.

The review recommended alignment with modern corporations law where equitable, appropriate and practical in the circumstances. This is implemented through significant alignment with the Corporations Act provisions related to directors' duties, external administration, the examination of the affairs of connected entities and on technical matters such as the jurisdiction of courts and offences.

The review recommended minimising incompatibility with requirements for corporations established under the Native Title Act. This is implemented by tailoring a number of provisions of the Bill to ensure that corporations that comply with the Native Title Act do not contravene the Bill. Regulations can also deal with specific inconsistencies that may not have been foreseen. Decision making by the Registrar can also take into account the need for consistency with the Native Title Act. Native title matters are specifically discussed further below.

PROPOSALS NOT IMPLEMENTED

While the Bill largely implements most of the review recommendations, it differs from the review in several respects on the basis of further research and consultation conducted by ORAC. The key differences are discussed below and are necessary to achieve practical and workable outcomes. A fact sheet has also been developed to provide publicly available and detailed information to explain why these proposals have not been implemented (see Attachment A).

The review recommended providing a transitional mechanism for appropriate corporations to move to the Corporations Act and enter mainstream corporate practice. This will be implemented in a further bill to be brought forward, the Corporations (Aboriginal and Torres Strait Islander) Miscellaneous and Transitions Bill.

The review recommended that membership of corporations be restricted to Indigenous people. This has partly been implemented by providing that corporations can choose to restrict membership to Indigenous people. However it also provides corporations with the flexibility to accept non-Indigenous members and directors providing that non-Indigenous people do not constitute the majority. This is often important to ensure that services can be provided to non-Indigenous people or adopted children. 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. It also provides corporations with the flexibility to elect or appoint non-Indigenous experts to their Boards as a capacity building or skills transfer measure.

The review recommended that corporate members should not be permitted. In the interests of greater flexibility of corporate design, the Bill permits corporate membership to allow for membership by resource agencies and peak bodies.

The review also recommended that particular regulatory powers under the current ACA Act should not be retained. For example, the 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 review's concerns, including the discretion for directors to be retained when a special administrator is appointed. Another key improvement is that a decision to appoint a special administrator is a reviewable decision.

Consultations during and after the review have also revealed widespread support for maintaining the ability of the Registrar to quickly intervene by appointing a special administrator in appropriate circumstances. This includes instances where there is a high risk of corporate failure especially for corporations providing essential services, municipal infrastructure or holding land.

NATIVE TITLE

A key aim of the Bill is to ensure that there is appropriate interaction between this Bill and native title legislation. The Bill removes the current uncertainty of how the Native Title Act and regulations interact with the ACA Act by introducing tailored provisions for registered native title bodies corporate (RNTBCs) and those applications made for the purposes of becoming an RNTBC.

Many of these provisions are intended to ensure that a duty conferred on a corporation or individual by native title legislation does not put the corporation or individual at risk of breaching provisions in the Bill. For example, if the Bill requires a director or officer of a corporation to meet statutory directors' duties that may place the individual in breach of the statutory requirements of the native title legislation, the Bill provides that the individual does not breach the Bill if they act in good faith believing that the action is necessary to ensure that the corporation complies with a native title legislation obligation.

The Bill defines 'native title legislation obligation' in a way that is consistent with the obligations prescribed by the PBC Regulations to consult with, act to give effect to the directions of, or obtain the consent of common law holders of native title.

The Bill also ensures that statutory members' rights provisions cannot be used to frustrate decisions of an RNTBC made in accordance with obligations under the native title legislation. This is achieved by clarifying that a court cannot grant orders on the grounds that the corporation is acting in a way that is oppressive to the members as a whole or oppressive to, or discriminatory against members if the action is done in good faith with the belief that it is necessary to ensure that the corporation complies with a native title legislation obligation.

The Bill also contains provisions designed to recognise the unique nature of native title rights and interests. For example, the Bill requires an RNTBC to use the term 'registered native title body corporate' or the abbreviation 'RNTBC' to signal to third parties that the corporation holds or manages native title rights and interests. It also clarifies that native title rights and interests are to be disregarded when determining the value of the assets of an RNTBC for reporting purposes under the Bill.

Specific provisions for regulations to be made about RNTBCs ensure that future modifications to the Bill made by regulations do not conflict with native title legislation and that specific guidance can be given in regulations to cater for

appropriate functions and duties of external administrators that may be appointed to an RNTBC.

A fact sheet on the native title related provisions of the Bill has been developed (see Attachment B).

IMPLEMENTATION ISSUES

The Bill is intended to commence on 1 July 2006, to coincide with the financial year 2006–07, with some elements of the Bill likely to start at a later date. For example, it is likely that there will be a significant period for corporations to bring their existing constitutions in line with the internal governance requirements of the Bill. While the Bill is very large, it is a comprehensive framework for Indigenous corporations. It incorporates many provisions from the Corporations Act, rather than just referring to them; it also includes provisions to introduce modern duties for directors and officers and gives statutory rights to members. It also brings the Bill into line with Australian Government policy on matters such as merits review and criminal penalties and offences.

ORAC's communication strategy has included a number of publications including a plain English guide called *Meet the Bill*, information fact sheets to address specific issues such as native title and an audio visual animation, *Say G'day to Bill*, which is available on CD and through the ORAC website. The animation was specifically developed to ensure information was accessible to the high proportion of Indigenous corporations located in remote areas where English is often a second or third language. These communication resources have been widely distributed to Aboriginal and Torres Strait Islander corporations and key stakeholders throughout Australia. All ORAC communication materials are available publicly through the ORAC website at www.orac.gov.au. Copies of these publications are at Attachment C.

Information on the Bill has also been publicised using the National Indigenous Radio Service and Broadcasting in Remote Area Community Services (BRACS) networks which transmit to remote Indigenous communities throughout Australia. These networks cover a wide communication path and have the capacity to translate information into the Indigenous language most commonly spoken within the region.

The Bill represents a significant change in the incorporation regime for Aboriginal and Torres Strait Islander corporations and ORAC has already begun planning for implementation. Transitional provisions will allow for parts of the Bill to apply after the commencement date giving time for Aboriginal and Torres Strait Islander corporations to make the transition, as well as systems changes to be implemented within ORAC.

To help corporations make the required transition, ORAC is developing a number of tools such as a new model constitution, a Guide to Good Constitutions, as well as sector specific guides to support corporations in key sectors such as native title, Community Development Employment Projects and municipal services.

ORAC is also working with funding bodies to ensure support for funded corporations.

Implementation of the Bill is being resourced from within the portfolio, and existing capacity building programs, such as ORAC's corporate governance training and pre-incorporation support programs, will be used to help Indigenous corporations understand the Act and new requirements.

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