Fact sheet

Australian Government
Registrar of Aboriginal Corporations

The Bill and the review—some differences

The review

In 2000 an independent review was announced of the *Aboriginal Councils and Associations Act 1976* (the ACA Act). The review, which began in February 2001, was led by law firm Corrs Chambers Westgarth. The review team included specialists Senatore Brennan Rashid, Mick Dodson, Christos Mantziaris and Anthropos Consulting. After extensive consultation, the review presented its final report in December 2002.

The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 has been developed as a result of this review. It was introduced into the Australian Parliament on 23 June 2005, and if passed, will replace the ACA Act. It will commence on 1 July 2006, although some parts are likely to start later.

While the Bill largely reflects the review's recommendations, it differs in some aspects. These are discussed in more detail below.

The review recommended that membership should be limited to Indigenous people and their dependants— why wasn't this implemented?

The review recommended that membership of corporations should be restricted to Indigenous people and their dependants. This has partly been implemented in the Bill by providing that a majority of members (and directors) must be Indigenous. Permitting non-Indigenous membership improves flexibility for corporations which is often important to ensure that services can be provided to non-Indigenous people such as spouses and adopted and step children. In some places Indigenous corporations are the only providers of essential services so it also allows non-Indigenous residents who may be served by the corporation to become members if the constitution allows it.

The Bill gives corporations the option to accept a minority of non-Indigenous members, and also to appoint or elect a minority of non-Indigenous people to the board. This is a choice for members to make when they develop their constitutions.

The review was also concerned that any majority Indigenous requirements would be difficult to monitor. The Bill addresses this through the members' register, which is required to be kept by the corporation, recording whether members are non-Indigenous. This is a simple way of confirming the majority Indigenous requirement.

The review recommended not allowing corporate members— why wasn't this implemented?

The review concluded that the arguments against allowing corporate membership of Indigenous corporations probably outweigh the arguments for it. The review noted that this issue should be the subject of further internal investigation by the Registrar.

The Registrar considered the issue further and concluded that maximising flexibility and providing Indigenous people with the key benefits of modern corporations law was more important than the issues identified by the review. Also, some of the arguments against corporate membership are no longer relevant to the Bill. For example, the review noted the argument that allowing for corporate members was inconsistent with the 'associational' model which formed the basis of the ACA Act. This is no longer the model which forms the basis of the legislation and corporate membership is entirely consistent with the new corporations based model.

Permitting corporate membership makes it easier to form resource agencies and peak bodies. Resource agencies are important because they provide remote corporations with support for more technical areas such as finances, human resources and technology. These agencies can offer significant economies of scale and improvement in support for remote corporations. Also, if these resource agencies are incorporated under the same legislation as the corporations they serve, they are then aware of the corporate governance standards that apply and can support them better in this regard.

The review recommended removing the Registrar's power to appoint an administrator— why wasn't this implemented?

The review recommended that some regulatory powers under the 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 the appointment of a receiver.

This recommendation has not been implemented but a number of the concerns raised by the review have been addressed. A key improvement is that when a corporation is put into special administration this is a reviewable decision under the Bill.

One of the problems raised by the review was that when the Registrar appointed an administrator the offices of the governing committee were automatically vacated. The Bill addressed this problem by introducing a discretion for the directors to be retained when a special administrator is appointed. This offers the directors and the special administrator the opportunity to work cooperatively to improve the sustainability of the corporation.

The grounds for placing a corporation under special administration are also much clearer than the grounds for appointing a receiver. This allows early intervention once certain risk factors are present. For example, a common risk factor is a dispute between members and the board which has escalated to the point that it is interfering with the operations of the corporation. This is one of the grounds for placing a corporation under special administration and is an important special measure.

Consultations during the review revealed widespread support, including among Indigenous corporations, for maintaining the ability of the Registrar to intervene in appropriate circumstances. The Registrar can appoint a special administrator to provide a safety net against the possibility of corporate failure, especially for corporations providing essential services, infrastructure or holding land.

The review recommended that the Registrar should no longer play a role in approving the constitution of corporations— why wasn't this implemented?

The review recommended that the Registrar should no longer have any role in approving corporation rules (in the constitution) to ensure that a flexible approach is taken to them. In particular, the review criticised the requirements in the ACA Act that rules must not be 'unreasonable or inequitable' and must make sufficient provision to give members effective control over the running of the corporation. These provisions have caused significant problems for Indigenous corporations attempting to design rules which fit their particular needs and circumstances.

The Bill addresses this issue by encouraging the tailoring of rules. The Bill provides flexibility for corporations to tailor their rules to their particular needs and circumstances.

The Registrar's office will develop a range of tools to help corporations develop rules that meet their particular circumstances.

Domestic and international research, such as the Harvard Project on American Indian Economic Development from Harvard University, shows that corporations that are designed to suit the particular circumstances of their members and communities, and that reflect local processes and decision-making, have a greater chance of success.

The Bill requires the Registrar to approve a corporation's rules to ensure that there is a clearly defined set of rules that apply to a corporation. Once approved by the Registrar the internal governance rules will be registered and appear on the public Register of Aboriginal and Torres Strait Islander Corporations. This public register is designed to provide a service to corporations, members and third parties to give reliable and easy access to records that the corporation is required to lodge with the Registrar.

The register is very important since record keeping can be difficult for some corporations.

When will it start?

The Bill has been introduced into the Australian Parliament. If it is passed by Parliament, it will start on 1 July 2006 to coincide with the start of the financial year 2006–07. Some parts of the Bill are likely to start after 1 July next year to make it easier for corporations to switch over to it. More information about this will be available soon.

Further information

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