



Australian Government

Registrar of Aboriginal Corporations

Meet

the Bill

a guide to the introduction of
the Corporations (Aboriginal and
Torres Strait Islander) Bill 2005

June 2005

What is it ?

The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 replaces the *Aboriginal Councils and Associations Act 1976* (the ACA Act). For most Aboriginal and Torres Strait Islander corporations it is an optional law to take account of their special needs and circumstances.

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.

Who does it affect?

All corporations incorporated under the ACA Act, and groups and corporations planning to incorporate under the ACA Act.

Why a new Bill?

About 2600 Aboriginal and Torres Strait Islander corporations are registered under the ACA Act. Many deliver essential services such as medical care, and infrastructure such as power stations, to remote Indigenous communities or they might hold land for Indigenous groups. Most native title corporations are registered under the ACA Act, as are most remote Indigenous arts centres.

Since 1976 there have been substantial changes in the legal environment for corporate regulation. The ACA Act is 30 years old and is out-of-date with modern corporate governance and accountability standards, such as exist in the *Corporations Act 2001*. Also it needed modernising to respond to contemporary risks and requirements of Indigenous corporations.

Therefore, in 2000 it was decided to review the ACA Act. The Bill has been developed as a result of this review.

The review

February 2001:

the Registrar commissioned a review of the ACA Act, led by law firm Corrs Chambers Westgarth. The review team included specialists Senatore Brennan Rashid, Mick Dodson, Christos Mantziaris and Anthropos Consulting.

Briefings:

to members of six ATSIC Regional Councils and the ATSIC Board.

Questionnaires:

sent to all associations incorporated under the ACA Act + to 345 other Indigenous organisations.

Information sheets:
on review

Advertisements:

placed in Indigenous publications and run on the National Indigenous Radio Service network during March and April 2002.

Consultation papers: sent to key stakeholders, seeking submissions.

Consultations:

April–May 2001/
March–June 2002: two rounds of consultations + 2 workshops in Alice Springs

ORAC website:

ran details of the review and copies of the consultation papers and the questionnaires for Indigenous corporations.

December 2002:
final report of the review was presented.

Why is it so big?

The new Bill creates more flexibility for corporations to design a set of rules that better suit their own culture and circumstances. While this creates more sections of the Bill, it will be of great benefit to the corporations themselves.

The Bill also reduces red tape by, for example, streamlining how corporations have to report. Small and medium sized corporations will have to provide much less in annual reporting than previously, whereas larger corporations will provide more. Setting out all these different reporting requirements again makes the Bill larger but to the benefit of most corporations.

It also includes new provisions such as the rights and obligations of directors and other managers, the rights of members and the support that is available.

The ACA Act was unclear about which parts of modern corporations law applied to Aboriginal and Torres Strait Islander corporations. To understand the ACA Act you needed to read case law and parts of the Corporations Act. The new Bill is a largely stand alone document. It is a comprehensive Bill that includes in the actual text key parts of the Corporations Act that are mirrored in the new Bill. Some parts of the Corporations Act are still referred to but it is much clearer how this works.

Impact on corporations

Rights

NEW

The Bill says it is a special measure intended to benefit Indigenous people, providing a safeguard for how it is interpreted and administered.

Registration

NEW

To register, corporations must have at least five members, although the Registrar can exempt small corporations from this requirement under certain circumstances.

NEW

People wanting to incorporate must give evidence that they are ready for it—for example, that 75 per cent of the group have agreed to apply for registration and that they have agreed to the internal governance rules. This encourages registration of corporations that will be sustainable.

Names

NEW

A corporation will be required to have the words 'Aboriginal corporation', 'Torres Strait Islander corporation', 'Indigenous corporation', 'Aboriginal and Torres Strait Islander corporation' or 'Torres Strait Islander and Aboriginal corporation' as part of its name. This replaces the requirement for all corporations registered under the ACA Act to use the words 'Aboriginal corporation' as part of its name.

NEW

A registered native title body corporate will have to use these words or the abbreviation 'RNTBC' as part of its name to signal to third parties that the corporation looks after native title rights and interests.

Indigeneity

NEW

Corporations can choose whether to allow non-Indigenous people, for example, experts, spouses and step children, as members or directors through their constitution. Indigenous people will always be in the majority so even if a corporation chooses to allow non-Indigenous members the corporation will always be controlled by Indigenous people.

Native title

NEW

The new Bill makes sure that requirements imposed on a corporation or individual by native title legislation does not conflict with obligations under the Bill.

Internal governance framework

NEW

A sensible approach to internal governance is built into the Bill to set corporations up to succeed, with room to tailor rules to their own special circumstances.

NEW

All corporations will be required to have a constitution which sets out the corporation's aims, its name, a process for resolving disputes and any other matters the corporation wishes. An eligibility requirement, such as that a member must live in a particular region, is an example of a matter that the corporation may wish to include in its constitution.

NEW

Like the Corporations Act, the Bill provides a system of replaceable rules which operate to give guidance on critical matters related to internal governance. These rules can be modified or replaced by the corporation in its constitution. An example of a replaceable rule is the rule that directors appoint the chair of a general meeting. A corporation could replace this with a rule, for example, that the chair is appointed by members.

NEW

There are also provisions of the Bill related to internal governance that the corporation must apply. These provisions cannot be modified or replaced by the corporation unless the Registrar provides an exemption. An example of one of these provisions is the rule that a corporation must hold an annual general meeting every year. The Registrar could, for example, exempt small corporations from this requirement and instead require that they only have to hold an annual general meeting every second year.

NEW

The Registrar has the power to change the constitution in some circumstances, especially if the corporation acts against the interests of the members.

Registered office

NEW

Large corporations must have a registered office to make sure members and others can get hold of important documents such as the internal governance rules and to make sure that people who need to can contact the corporation.

NEW

Small and medium corporations must have a 'document access address' which is a place where people can inspect important documents. This can be a person's home and people wanting to inspect documents have to give seven days written notice.

Secretaries and contact persons

NEW

Large corporations will be required to have a corporation secretary who is responsible for making sure that the corporation meets certain responsibilities such as lodging documents with the Registrar.

Small and medium corporations will have a contact person which is essentially a 'mailbox' role for receiving and passing on information to the directors. This is a simpler mechanism than requiring a registered office or a corporation secretary.

Members' rights

NEW

Aboriginal and Torres Strait Islander corporations have members, not shareholders. The Bill brings members' rights into line with the Corporations Act—for example, members can apply to a court to inspect a corporation's books or to stop a corporation from acting in a way that is unfair to the members.

NEW

The Registrar can act for members in some circumstances, for example, when a corporation is acting unfairly towards members.

Reporting

NEW

Corporations will be streamed into small, medium and large for reporting purposes. Small and medium corporations won't have to provide as many reports as they did under the ACA Act. Large corporations will prepare a more comprehensive report.

NEW

Small corporations will only have to provide a minimum 'general' report and may only have to provide this every second year. Small corporations may also only have to hold an annual general meeting every second year and can hold these by video or teleconference.

NEW

The general report is also the key report that medium corporations will be required to prepare. Some additional minimum reporting may also be required.

NEW

This general report will contain the basic details of directors, current members, the contact person and the document access address. Keeping this information up to date and keeping proper financial records are the key compliance requirements for small and medium corporations.

This is much less than required under the ACA Act which, for example, required all corporations to submit audited financial statements. Large corporations will still have to submit audited financial statements.

Duties of directors and other managers

NEW

The Bill clarifies the duties of directors and includes duties for chief executive officers and other people who manage the corporation. Directors and these managers are called officers. These duties are in line with the Corporations Act and are designed to make sure that good corporate governance standards are applied to Aboriginal and Torres Strait Islander corporations.

NEW

These duties clearly include a duty of care, a duty of honesty, duties of disclosure and to avoid conflicts of interest, and a duty not to trade while insolvent.

Meetings

There are two kinds of meetings—directors and general meetings.

NEW

An annual general meeting must be held every year, although the Registrar can exempt corporations from having one if they have no need or no capacity to hold them. For example, the Registrar could allow a small corporation to hold an annual general meeting every second year.

NEW

Meetings can be held by video or teleconference—this is particularly important for very remote corporations or for those whose directors cannot easily read and write English. Meetings can also be held in language so long as some parts can be translated later if required.

NEW

The Registrar has a power to call general meetings. Sometimes members are concerned if meetings are not called, so this power can be used to prevent or minimise disputes.

NEW

The Registrar can also call a meeting of other people that might be interested in a problem that is affecting a particular corporation or a number of corporations. For example, the Registrar could ask government funding bodies, creditors and other corporations to all meet to sort out a particular problem.

Anti-nepotism

NEW

Corporations will be prevented from giving financial benefits to directors or related parties (such as a spouse of a director) unless this is approved by members. These related party provisions will help prevent nepotism.

NEW

The Bill also strengthens members' capacity to participate in managing the corporation, such as being able to request information about director payments and approving related party transactions.

Penalties and offences

NEW

While there are more offences under the new Bill than previously existed under the ACA Act, most are based on those in the Corporations Act.

NEW

People are prohibited from providing false or misleading statements and information—either to the Registrar, or by an officer or employee of a corporation to its directors, auditors and members.

NEW

Also based on the Corporations Act is a new civil penalties scheme for serious contraventions of the Act and the option for a penalty notice scheme as an alternative to criminal prosecution.

Disqualification of directors and other managers

The Bill retains the ability to disqualify people from managing a corporation if they have been convicted of certain offences or who are bankrupt.

NEW

Individuals can be disqualified by a court if they have contravened a civil penalty provision of the Bill, have repeatedly contravened provisions of the Bill, or if they have been involved with two or more corporations that have experienced corporate failure. This is consistent with the Corporations Act.

Registers

Like the ACA Act, the Bill requires corporations to keep a register of members and former members. The register of members is lodged with the Registrar.

Other key information about corporations will be held on the Register of Aboriginal and Torres Strait Islander Corporations, including information about directors, the internal governance framework, reports such as financial statements etc.

This free public register will provide key information to members and others interested in the corporation.

NEW

The Bill establishes a register of people disqualified from managing any corporations.

Registrar's powers

The Registrar can appoint an expert to examine a corporation's affairs. This means 'healthy organisation checks' can be carried out to help prevent any problems arising or increasing.

The Registrar can appoint a special administrator—this power can be used to provide a safety net against the possibility of corporate failure, especially for corporations providing essential services, infrastructure or holding land.

NEW

The Registrar can examine a corporation's books and if they are not produced, seek a warrant from a magistrate to support the Registrar's other powers.

The Registrar can investigate matters where necessary.

Review of decisions

NEW

The Bill gives people affected by certain decisions made by the Registrar the right to seek an internal review of most decisions.

NEW

Most decisions made by the Registrar can also be reviewed by the Administrative Appeals Tribunal, which is an accessible review tribunal.

Capacity building

NEW

The Registrar can conduct research, training and education campaigns about good corporate governance for Aboriginal and Torres Strait Islander corporations.

NEW

The Registrar can help corporations resolve disputes but cannot mediate any disputes because it might prevent the Registrar using their other powers.

Complaints

The Registrar can assist with complaints about corporations.

NEW

Employees and officers can report suspected breaches of the new Act to the Registrar and certain other persons, for example, auditors. Employers are prohibited from victimising them when they do so.

Implementation

Information about the Bill is available on the website and from the Office of the Registrar of Aboriginal Corporations, such as:

- an overview of the Bill
- the Bill itself
- a detailed explanation of the Bill (called the explanatory memorandum)
- the Minister's speech when the Bill was introduced in Parliament
- this guide, *Meet the Bill*
- an animation featuring a bloke called Bill and others—*Say g'day to Bill*—also available on CD
- fact sheets, addressing issues of concern.

The Registrar's office is already delivering a range of capacity building programs for Indigenous corporations, such as training and information sessions. The requirements of the new Act will be built into these programs.

From mid 2006 onwards a program of information will be rolled out and will include:

- self-help tools to design the internal governance framework—to be available on the ORAC website for those corporations that want to start the process themselves
- a targeted support program including training and information
- redesigned information materials to support implementing the Bill.

Further information

website: <http://www.orac.gov.au>

hotline: 1800 622 431

email: info@orac.gov.au

The Office of the Registrar of Aboriginal Corporations (ORAC) supports and regulates about 2600 corporations incorporated under the *Aboriginal Councils and Associations Act 1976*.