

## Summary of the Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006

The corporations amendments contained in the Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 ensure that the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) interacts appropriately with the *Corporations Act 2001*. The Bill removes any areas of doubt, closes potential regulatory gaps and removes the confusion that would arise if there were dual regulation by both the Australian Securities and Investment Commission and the Registrar of Aboriginal and Torres Strait Islander Corporations.

The amendments have been considered and approved by members of the Ministerial Council for Corporations as required under the Corporations Agreement 2002.

### Explanation of provisions altering the effect, scope or operation of the Corporations Act 2001

#### a) Section 57A of the Corporations Act: meaning of *corporation*

Section 57A of the Corporations Act provides that the term *corporation* includes any body corporate. This means that provisions in the Corporations Act applying to a corporation currently apply to a body corporate incorporated under the *Aboriginal Councils and Associations Act 1976* (ACA Act). The interaction between the Corporations Act and the ACA Act creates uncertainty where ACA Act provisions are inconsistent with the Corporations Act.

Proposed amendment 2<sup>1</sup> makes it clear that an Aboriginal and Torres Strait Islander corporation is a *corporation* for the purpose of the Corporations Act. Without this proposed amendment it is arguable that the CATSI Bill, as a later Commonwealth enactment, would take precedence over the Corporations Act to the extent of any inconsistency.

#### b) Winding-up and receivers

Proposed amendment 1 specifically excludes CATSI corporations from the definition of a *Part 5.7 body* in Subsection 9(1) of the Corporations Act. Part 5.7 of the Corporations Act provides for the winding-up of bodies *other than companies*. The CATSI Bill aligns with the Corporations Act approach to winding-up *companies*. Proposed amendment 1 therefore excludes CATSI corporations from the definition of a Part 5.7 body.

Part 11-5 of the CATSI Bill provides for the winding-up of CATSI corporations. Section 526-35 of the CATSI Bill applies Parts 5.4, 5.4B, 5.5, 5.6, 5.7B, 5.8, 5.8A

---

<sup>1</sup> Refers to amendment numbers in the Corporations Amendment (Aboriginal and Torres Strait Islander) Bill 2006

and 5.9 of the Corporations Act with modifications. Without the proposed amendment the conflicting provisions of Part 5.7 would also apply to CATSI corporations.

Similarly, proposed amendments 23 and 24 ensure that Part 5.2 of the Corporations Act dealing with receivers and other controllers does not apply of its own force to CATSI corporations. This is necessary to remove doubt as Part 5.2 is applied with modification by section 516-1 of the CATSI Bill.

### **c) Duties of officers and employees**

Division 265 of the CATSI Bill specifically deals with the duties of officers and employees. The duties generally mirror the duties set out in Division 1 of Part 2D.1 of the Corporations Act. Proposed amendment 3 makes it clear that Division 1 of Part 2D.1 of the Corporations Act *does not apply* to CATSI corporations. Without this exclusion there would be duplicate legislative schemes and dual regulators responsible for enforcing compliance with the duties.

The duties in the CATSI Bill also differ from those in the Corporations Act in one important respect with regard to the interaction with the *Native Title Act 1993* (the Native Title Act). In some circumstances requirements under the Native Title Act could be in conflict with the general duties of officers and employees. The CATSI Bill preserves the certainty of decisions made and agreements entered into in good faith by native title corporations registered under the CATSI Bill by ensuring that the duties in the CATSI Bill cannot be used to void native title transactions. The proposed amendment ensures that the Corporations Act does not inadvertently provide a separate pathway for challenging the validity of native title transactions.

Similarly, section 271-1 of the CATSI Bill mirrors the duty to discharge trust liabilities in section 197 of the Corporations Act but includes specific provisions for dealing with native title which is held on trust.

### **d) Disqualification of a persons from managing corporations**

The CATSI Bill sets up one side of a mutual recognition scheme for disqualifying persons from managing corporations. Subsection 279-5 (5) of the CATSI Bill provides that disqualifications under the Corporations Act result in automatic disqualification under the CATSI Bill. Proposed amendments 5 to 22 complete the scheme so that disqualification under the CATSI Bill results in automatic disqualification under the Corporations Act.

A number of the amendments are also necessary for ensuring that the introduction of the CATSI Bill disqualification provisions do not create any regulatory gaps. For example, section 206D currently enables ASIC to apply to the Court to disqualify a person from managing corporations if they have been involved in two or more corporations that have failed. This provision can currently be used to disqualify a person who had been involved in two failed corporations, one of which was an ACA Act corporation and the other a Corporations Act corporation, through operation of section 57A of the Corporations Act.

Without proposed amendment 9 the commencement of the CATSI Bill would change the status quo so that the Court could no longer disqualify a person from managing corporations based on their involvement with two failed corporations where one is a CATSI corporation and the other a Corporations Act corporation. This is particularly important given that corporate groups can comprise both CATSI corporations and Corporations Act corporations.

**e) Companies Transferring from the Corporations Act and the CATSI Bill**

Parliamentary amendments to the CATSI Bill will be introduced to enable transfers of bodies to and from the CATSI Bill. Proposed amendments 25 to 29 enable the transfer of companies from the Corporations Act to the CATSI Bill. No consequential amendments are necessary to enable the transfer of a CATSI corporation into the Corporations Act.

**f) Courts, proceedings and offences**

Proposed amendments 30 to 35 avoid duplication in a number of miscellaneous provisions in Chapter 9 of the Corporations Act. These provisions are mirrored in the CATSI Bill. The specific provisions proposed for amendment are:

1. The offence in section 1309 for giving false or misleading information.
2. The power of a court to grant relief under section 1318.
3. Appeal from decision of receivers or managers in subsection 1321 (b).
4. Orders a Court may make in relation to procedural irregularities under subsections 1322 (4) (a) or (d).
5. Direction a court can make in relation to costs under section 1335.