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Submission to Parliamentary Inquiry into the *Corporations (Aboriginal and Torres Strait Islander)* Bill 2005 by the Senate Legal and Constitutional Legislation Committee

The Kimberley Land Council (KLC) is pleased to make this submission to the Senate Legal and Constitutional Legislation Committee in its inquiry into the *Corporations (Aboriginal and Torres Strait Islander)* Bill 2005, in response to an invitation dated 9 September 2005.

1. Summary

The proposed *Corporations (Aboriginal and Torres Strait Islander)* Bill 2005 is a highly detailed and prescriptive legislative enactment which purports to improve governance and capacity in the Indigenous corporate sector by aligning the Bill with modern corporate governance standards and corporations law, whilst at the same time maintaining a special statute of incorporation for Aboriginal and Torres Strait Islander peoples.

It is submitted that in light of, inter alia:

- the current regulatory regime for recognised representative bodies, such as the KLC, contained in Part 11 of the *Native Title Act* (and, by incorporation, the *Commonwealth Authorities and Companies Act* 1997);
- the ability of the Minister not to grant recognition of a representative body (section 203AI of the *NTA*) or to withdraw recognition of a representative body (section 203AH of the *NTA*); and
- the requirement under sections 56 and 57 of the *NTA* for the establishment of prescribed bodies corporate and the registration of native title bodies corporate following a determination of native title and the application to those bodies corporate of the *Native Title (Prescribed Bodies Corporate) Regulations* 1999,

the proposed Bill, in its current form, is complex, has the capacity to duplicate reporting-related activities prescribed by the *NTA*, may be discriminatory (given involuntary registration and minimum Indigenous membership criteria), may give rise to obligations which are inconsistent with obligations imposed on Indigenous corporations under various funding and service agreements and may impact upon the ability of Indigenous corporations, including recognised representative bodies, to most efficiently utilize limited resources, contrary to OIPC policy and directives.

It is further submitted that the ability of the Minister under the *NTA* to revoke or withdraw recognition of a representative body, together with the prescribed functions, powers, obligations and responsibilities of representative bodies under Part 11 of the *NTA* are strong and workable mechanisms for ensuring that recognised representative bodies (such as the KLC) continue to comply with modern corporate governance standards.

2. Representative bodies under the *NTA*

It is submitted that the proposed Bill may be unnecessarily complex and overly prescriptive in light of the current regulatory regime for representative bodies under the *NTA*.

The Kimberley Land Council is a recognized representative body under section 203AD of the *Native Title Act*. Significantly, in assessing whether a body should be a recognised representative body, the Minister will consider whether the organizational structures and administrative processes are fair. This will include a consideration by the Minister of whether the body will satisfactorily represent or is not satisfactorily representing persons who hold or may hold native title in the area, whether the body will be able to consult effectively or is not consulting effectively with Aboriginal peoples and Torres Strait Islanders living in the area, and certain other matters, including:

- The opportunities for the Aboriginal peoples or Torres Strait Islanders for whom it might act to participate in the body's processes;
- The level of consultation with them involved in the body's processes;
- The body's procedures for making decisions and for reviewing the body's decisions;
- The body's rules and requirements relating to the conduct of the body's executive officers;
- The nature of body's management structures and management processes;
- The body's procedures for reporting back to persons who hold or may hold native title in the area, and to the Aboriginal peoples or Torres Strait Islanders living in the area.

Where the Minister is satisfied that the body does not adequately address these maters, the Minister may decide not to recognize the body or to revoke recognition.

Once recognised however, a recognized representative body, such as the KLC, must maintain fair organizational structures and administrative processes. At the same, a recognised representative body is also subject to a highly detailed regulatory regime covering accountability, governance and funding of representative bodies, as set out in Part 11 of the *NTA* (and by incorporation, the *Commonwealth Authorities and Companies Act* 1997).

In summary, Part 11 of the *NTA* covers:

- *Accountability* – the preparation of a strategic plan (including financial planning, objectives and general strategies and policies) to be approved by the Minister and to be consistent with funding grant conditions; preparation and maintenance of proper accounting records; preparation of annual reports and audited financial statements (to be tabled in Parliament); audits, inspections or investigations at the Minister's discretion.
- *Review regimes* – the establishment of a detailed review regime for Aboriginal and Torres Strait Islander people who are affected by a decision of a representative body not to provide assistance. In the first instance, representative bodies are obliged, under section 203BI of the *NTA*, to provide a process of review by the representative body of its decisions and actions, made or taken in the performance of its functions or the exercise of its powers, that affect them and to publicise that process. These structures must operate in a fair manner (section 203BA(2)).
- *Governance* – In accordance with section 203EA of the *NTA*, Part 3, Division 4 and Schedule 2 of the *Commonwealth Authorities and Companies Act*, which deals with the duties of directors and other officers and civil penalties, respectively, apply to the governing body of a representative body as if it were the board of a Commonwealth authority. Additional obligations are imposed on directors, executive officers, employees and agents of bodies corporate under the *NTA* (section 203FD – liability of executive officers; section 203FG – false statements; section 203FH – conduct by directors, employees, agents.
- *Funding* – Division 4 of Part 11 establishes a regime for monitoring the performance of representative bodies in accordance with certain grant conditions, and established functions. Details of under-performance or breaches of grant conditions by representative bodies will be brought to the attention of the Minister who, under section 203AH of the *NTA* has the power to revoke or withdraw recognition of a body as the representative body if that body is not satisfactorily performing its functions.
- *Specific statutory functions* - a representative body also has certain statutory functions (section 203B of the NTA) which it must discharge in its capacity as a recognised representative body. These include facilitation and assistance, dispute resolution, notification and internal review.

It is submitted that the ability of the Minister to revoke or withdraw recognition of a representative body, together with the prescribed functions, powers, obligations and responsibilities of representative bodies under Part 11 of the *NTA* are important mechanisms for ensuring that recognised representative bodies under the *NTA* continue to comply with modern corporate governance standards.

3. Chapter 6 - Directors' duties

Proposed chapter 6 of the Bill seeks to bring directors' duties under the *ACA Act* 'into line' with the *Corporations Act*.

Under the *NTA*, representative bodies are already subject to a highly detailed regulatory regime which contains appropriate safeguards for ensuring that directors of representative bodies comply with their duties as directors. It is submitted that the implementation of the proposed Bill may have the capacity to duplicate this regime.

Further, the requirement for the establishment and registration of prescribed bodies corporate in circumstances where a recognized State or Territory body has made an approved determination that native title exists, gives rise to a number of more specific issues which support the position that it is not appropriate to 'align' directors' duties under the ACA Act with the *Corporations Act*:

- Directors and officers of prescribed bodies corporate are already subject to common law fiduciary duties and trusts law, provisions of the *NTA* and the *Native Title (Prescribed Bodies Corporate) Regulations* 1999.
- Under the *NTA* it is a requirement that prescribed bodies corporate be established to hold certain rights and interests following native title determination or act as agent. The establishment of prescribed bodies corporate is therefore mandatory. It follows that the imposition of directors' duties (akin to directors' duties under the *Corporations* Act) on directors and officers of prescribed bodies corporate which are established for the purposes set out in the *NTA* may be punitive and discriminatory in these circumstances.
- Similarly, the duty not to trade whilst insolvent (incorporated by reference at proposed section 531-1), and the penalties to which directors and officers of prescribed bodies corporate are exposed for breaches of this duty may be discriminatory in circumstances where there is a statutory obligation under the *NTA* to establish prescribed bodies corporate.

Significantly, Indigenous Corporations and Councils receive funding from a number of external providers. Where funding agreements are in place, directors and officers of Indigenous corporations and councils will necessarily be subject to various statutory and contractual obligations, quite apart from their fiduciary duties as directors.

It is not clear how directors and (now officers) of Indigenous corporations and councils will be able to meet statutory and contractual obligations of funding bodies as well as fiduciary duties as directors under the proposed provisions in Chapter 6 of the Bill – particularly where those obligations are inconsistent. To the extent that obligations under Chapter 6 of the proposed Bill are inconsistent with grant conditions, compliance with the proposed Bill may result in the revocation of the recognition of a representative body, the withdrawal of funding and, ultimately, a

failure to meet the interests of the very people whom the representative body was established to represent on the grounds that the representative body has failed to comply with its statutory obligations under the *NTA*.

4. Chapter 7 – Record Keeping, reporting requirements and books

Proposed Chapter 7 of the Bill deals with record keeping, reporting and books.

As discussed above, representative bodies are already subject to detailed reporting and record keeping obligations under Part 11 of the *NTA* (including the tabling of audited reports before Parliament) and pursuant to various conditions of funding and grant arrangements. It is submitted that the reporting and record keeping requirements in Chapter 7 of the proposed Bill will unnecessarily duplicate these obligations, add a further administrative layer to the management and operational costs of recognised representative bodies and may be inconsistent with the efficient utilization of limited resources – contrary to relevant OIPC policy directives.

The Bill also acknowledges the need to tailor reporting requirements to the size of the corporations. In this regard, Chapter 7 'streams' corporations into small, medium and large and proposes size specific reporting for different sized corporations.

Corporations are categorized as either small, medium or large based on certain criteria: consolidated gross operating income for the financial year, consolidated gross assets held by the corporation and the number of employees at year's end.

It is not clear to what extent recognised representative bodies and prescribed bodies corporate, established for the purposes of the *NTA*, will be categorized as 'large' for reporting requirements based solely on their consolidated gross assets. Further, it is noted that the categorization criteria, to be used for assessing the size of Indigenous corporations is the substantially the same as the criteria applied to proprietary companies under the *Corporations Act*. In marked contrast to Indigenous corporations these companies are typically established for profit and do not necessarily rely on funding grants for operation.

5. External Administration

The Bill introduces chapter 11 – external administration. The explanatory memorandum notes that the introduction of external administration provisions will align the capacity of funding bodies and creditors to take a more proactive role in protecting their interests with the external administration provisions of chapter 5 of the *Corporations Act*.

It is submitted that the introduction of chapter 11, external administration procedures, is unnecessary and unwarranted – leading to greater inflexibility, uncertainty of process and additional expenses. Protection and the capacity of

funding bodies to take a proactive role in protecting their interests already exists under the *NTA* (in particular, Divisions 4 and 5 of the *NTA*) and via the process of negotiating terms and conditions of various funding and grant agreements. It is submitted that the regime under the *NTA* actually gives funding bodies and creditors a greater capacity to maintain a proactive role in protecting their interests than is otherwise provided

In accordance with Division 4 of the *NTA* certain conditions, including the representative body's continuing obligation to perform its functions satisfactorily and to comply with the NTA, may attach to funding and grant agreements. Under Division 5, these obligations extend to the representative bodies' compliance with the rigorous reporting and accountability regime. On occasion, the Minister may subject representative bodies to external audits or performance investigations.

Most significantly, the Minister has the discretion to withdraw the recognition of a body as the representative body. In deciding whether to withdraw recognition the Minister may consider any number of factors, including information given to the Minister from the relevant funding body.

It is this ability of the Minister to withdraw recognition status of representative bodies that, ultimately, provides the greatest capacity for funding bodies and creditors to engage proactively in protecting their interests and, it is submitted, deems unnecessary any recourse to external administration provisions, like those in Chapter 5 of the *Corporations Act.*

6. Members' remedies

Chapter 4 of the proposed Bill purports to bring members' remedies into line with the more extensive statutory provisions available under the *Corporations Act* . The suggestion is that there is not adequate protection of members' rights in all circumstances.

It is submitted that, for representative bodies, members' remedies and rights are adequately and suitably protected under provisions of the *NTA*. It is possible that the introduction of additional protections, as proposed in Chapter 4 of the Bill, could add a layer of complexity that is not warranted in the circumstances and may not, in any event, afford any greater protection for members than the protections afforded to them under the *NTA*.

In summary, the decision making process and powers of representative bodies are circumscribed and prescribed by relevant provisions and protections contained in Part 11 of the *NTA*.

The functions of representative bodies and the manner in which those functions are to be performed are set out in sections 203B and 203BA of the *NTA*. These include dispute resolution functions, internal review functions, organizational structures and administrative processes. Aggrieved members of representative

bodies may utilize internal dispute resolution processes, internal review mechanisms and external review procedures.

It is submitted that these mechanisms provide the same if not a greater level of protection for members of representative bodies than might otherwise be available to them under proposed Chapter 4.

7. Conclusion

It is submitted that representative bodies are subject to highly detailed, thorough and robust governance, reporting and accountability regimes under the *NTA*. The proposed *Corporations (Aboriginal and Torres Strait Islander) Bill* 2005 sets out some additional safeguards for improving governance and capacity in the Indigenous corporate sector.

However, there are instances where the Bill establishes regimes which either duplicate provisions already contained in the *NTA* or create an additional layer of administrative and procedural activities which may not be warranted in the circumstances, given the special nature of recognised representative bodies.

It may be appropriate to consider subjecting NTRBs to an alternative incorporation regime for NTRBs (and making minor amendments to the *NTA* to achieve this) or granting to NTRBs certain exemptions under the proposed Bill, given their obligations under the *NTA* and other conditions of grant.

8. Transitional

Further submissions may be made following invitation to comment on the proposed *CATSI Miscellaneous Transitional Bill*.

9. Contact

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