Central Land Council

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

September 2005

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Summary :

1. The Central Land Council supports the outcome and the recommendations of the Review but cannot support the Bill in its current form.
2. The "special incorporation needs of Indigenous people" are not being met by the main provisions of the Bill.
3. The draftsperson has created a 'default setting' of intense regulation.
4. The needs of the majority of Aboriginal corporations, at least in Central Australia, are not met by the main provisions of the Bill but rather by the provisions providing for exemption from obligations created by the Bill.
5. The proscriptive nature of the Bill may go so far as to deter Aboriginal groups from using the statute thereby defeating completely the purpose of having an Indigenous incorporation statute.
6. There are hundreds of Aboriginal corporations operating in Central Australia. struggling to comply with the requirements of the current *Aboriginal Councils and Associations Act*. What is required is assistance not increased regulation and complexity.
7. The Central Land Council believes that the complex issues associated with prescribed bodies corporate should be the subject of a separate and specific review.
8. The Central Land Council supports the view that the complex nature of prescribed bodies corporate justifies a separate Division in the Bill rather than as proposed, a situation where they are in no way distinguished from other bodies incorporated under the legislation.

The Central Land Council's interest in the Bill

Staff at the Central Land Council are frequently called upon to assist with issues arising from the management of Aboriginal corporations, not because it is a function under the *Aboriginal Land Rights (Northern Territory) Act* 1976 but because there is no one else to do the job.

We are at the front line, at the point where this Bill will directly impact on Aboriginal groups and on the people and organisations that assist with "corporation business".

The CLC has made submissions to the various reviews of the *Aboriginal Councils and Associations Act* over the years, and participated in the detailed processes of review and inquiry carried out by the Office of the Registrar of Aboriginal Corporations which has led to the drafting of this Bill.

It has been our constant submission that there is a need for a special statute to provide a simple and uncomplicated method of incorporation for groups of Aboriginal people.

The Review findings:

This is how the ORAC describes the process leading to the Bill:

> The Bill was developed after a process of independent review and broad consultation over a period of two years, as well as further research conducted by

> the Office of the Registrar of Aboriginal Corporations. The independent review report was released in December 2002…
>
> …The major finding of the review was that the special incorporation needs of Indigenous people should be met through a statute of incorporation tailored to the specific incorporation needs of Indigenous people. The review recommended a thorough reform of the ACA Act by enactment of a new Act. The review recommended that the new act provide Indigenous people with key facilities of a modern incorporation statute such as the Corporations Act. The review also recommended that the new Act provide special forms of regulatory assistance to support contemporary standards of good corporate governance… [1]

The Review clearly focussed on the "special incorporation needs of Indigenous people" [2] and made an argument for a "specific indigenous incorporation statute" [3] to meet those needs. The Bill adopts and implements a number of recommendations of the Review but it is our view that it does so without actually implementing the central focus of the Review. [4].

It's a big Bill

The Bill is large and complex. Our print is 531 pages long. The question of why it is so big is addressed in an ORAC pamphlet as follows:

> 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[5]

What this pamphlet does however not mention is the dramatic increase in the regulatory and penalty provisions of the Bill.

But there are other reasons why the Bill is so large and complex. A choice has been made to draft a statute that tries to provide a level of regulation for a wide range of corporate forms. But to do so does not permit simplicity.

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[1] http://www.orac.gov.au/about_orac/legislation/reform_act.aspx 19 September 2005
[2] See the Executive Summary of the Review at Part 3 and onwards
[3] Executive Summary of the Review at Part 5
[4] Some of the recommendations which are not implemented are discussed further below. And see the ORAC Fact Sheet "The Bill and the review- some differences" June 2005
[5] Pamphlet: "Meet the Bill a guide to the introduction of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005" ORAC June 2005

There are a variety of reasons that Aboriginal people need to participate in corporations. The need is not always voluntary, as recognised by the authors of the 2002 Review of the Act[6], but often is a requirement under statute or as a prerequisite to be eligible to receive funding or services.

The purposes for which Aboriginal corporations are formed are many and varied. Some are large corporations receiving considerable funding from government and other sources to provide services and community functions. Some are small, perhaps simply holding title to a small parcel of land and doing nothing else. Some are formed for purely commercial purposes, some for purely 'public beneficial' purposes.

By trying to cover the field, from the largest commercial corporation or service provider through to the smallest community corporation or small land owning corporation, the draftsperson has created a 'default setting' of intense regulation, followed by strict liability for failure to comply and subsequent penalty which may then be softened upon application to the Registrar for exemption.

A further cause for complexity is that the Bill is required to provide for 'prescribed bodies corporate' (PBCs) whose function is to hold or to manage native title rights. A separate comment upon the Bill from a Native Title perspective is attached to this submission. [7] It was our submission to the Review that the proper place for legislation for incorporation of PBCs is the *Native Title Act* as these corporations have such a unique nature and specific functions that they should be dealt with in context.

If the PBC functions were divested to the *Native Title Act* and the larger corporations were encouraged to transfer to a form of incorporation under the *Corporations Act* [8] it might then be possible to simplify the Bill.

<u>Special incorporation needs: Are they being met?</u>

The "special incorporation needs of Indigenous people" are not being met by the main provisions of the Bill. The Bill is drafted from a reverse perspective.

Instead of being a simple incorporation statute tailored to the special needs of the Indigenous population it is a complex statute designed to regulate large corporations. Large corporations require regulation, particularly if they are administering large amounts of Government funding. But instead of shifting such large corporations towards the *Corporations Law* the Bill is specifically designed to regulate them. But by so doing, the needs of the majority of Aboriginal corporations, at least in Central Australia, are not met by the main provisions of the Bill <u>but rather by the provisions providing for exemption from obligations created by the Bill</u>.

But to make an application for exemption will require a complete understanding of the provisions of the Bill and an understanding of the implications of non-compliance and the capacity to make an exemption application. Clearly in Central Australia many of

[6] See the Executive Summary of the Review at Part 3C.
[7] See Annexure 1 hereto.
[8] See the Executive Summary of the Review at Part 6C (paragraph 105)

the Aboriginal members of corporations are not, without assistance, going to be able to deal with the complexity of the Bill if it becomes law.

This begs the question of who will be called upon to provide the required assistance.

The Central Land Council is not funded to provide general assistance to Aboriginal corporations in its region. We are often asked to assist with initial incorporation and we give assistance with respect to the management of Aboriginal corporations as time and resources permit.

The kind of assistance that is going to be required by Central Australian Aboriginal corporations if this Bill becomes law will be beyond our resources.

Some of the key Review recommendations are not taken up in the Bill

The Review recommended that:

> "The ACA Act should continue to limit membership of ACA Act corporations and their boards to Indigenous natural persons. [9]

The Review suggested that:

> "… if full membership were to be extended to non-Indigenous people, it might be difficult to ensure that control of the corporation is retained by Indigenous members. It is possible that this could be achieved through a number of mechanisms, such as requiring Indigenous majorities at both the general membership and the board levels. But this would be very difficult to monitor or enforce in practice."[10]

In the CLC region we deal every day with Aboriginal people still coming to terms with colonisation, people who do not speak English, people who do not read or write in English or in any other language, people who are at times vulnerable to the influences of those who are more adept at using the rules, the techniques, the instruments of non-Aboriginal law.

It will not serve the interests or meet the 'special needs' of the Aboriginal people of Central Australia to permit non-Indigenous membership of Indigenous corporations or the boards of those corporations.

The measures in the Bill which place the question of non-indigenous membership into the realm of the constitution of individual corporations are weak [11]and they may not work in practice.

The provisions in the Bill of permitting minority membership of non-Aboriginal people will not be sufficient to ensure Aboriginal control.

We do not believe that compelling reasons have been given for permitting corporate membership of indigenous Corporations.

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[9] Executive Summary of the Review at Part 6F at paragraph 124 and see Chapter 16 Part B(2) of the Review

[10] See Chapter 16 Part B(2) of the Review

[11] Bill section 141-10

The Review recommended that:

> "The ACA Act should continue to limit membership of ACA Act corporations and their boards to Indigenous natural persons. Other mechanisms are available for obtaining expert advice for boards. The Corporations Act and State Association Incorporation Acts should provide adequate alternatives for the creation of "umbrella" corporations…" [12]

The ORAC Fact Sheet "The Bill and the Review - some differences" argues that "Permitting corporate membership makes it easier to form resource agencies and peak bodies." This might be true but the fact sheet does not put forward any reason why these more complex entities cannot be formed under general Corporations Law. There is no need for a special statute for the incorporation of large resource agencies or peak bodies. The *Corporations Law* is perfectly adequate for that purpose.

<u>Aspects of the Bill which will make things harder for Aboriginal people in Central Australia:</u>

The application process in Chapter 2 of the Bill is more complicated than the process under the old Act. Not only is the consent of the original incorporating members required but written consents from proposed Directors are required prior to incorporation. This means that the applicants for a new incorporation will have to participate in more detailed pre-incorporation meetings to make decisions on a number of issues. Whilst it is expected that assistance will be provided by ORAC with models Rules and self explanatory application forms we envisage a more complicated incorporation process than that under the current Act.

We also envisage that members and in particular proposed Directors will require, prior to making an application for incorporation, some advice about their potential liability and responsibilities, obligations and duties under the Bill and on the penalties for breach of the many offences created by the Bill.

The CLC has an interest in asking the question …who Central Australia is going to attend to these pre-incorporation requirements?

Will we be comfortable in recommending to a group of Aboriginal people who may not read or write well in English and for whom English is a second or third spoken language that they become the Directors of an Aboriginal corporation under this Bill?

The proscriptive nature of the Bill may go so far as to deter Aboriginal groups from using the statute thereby defeating completely the purpose of having an Indigenous incorporation statute.

It is a moot point as to whether or not the powers vested in the Registrar will or will not make compliance, reporting and record keeping easier or more difficult for Aboriginal corporations in Central Australia. Considerable discretion is vested in the Registrar in relation to all sorts of matters under the Act, including in relation to exemption determinations. These decisions are reviewable but again that requires

[12] Executive Summary of the Review at Part 6F paragraph 124

active steps, legal skills and the financial resources to fund a review. History under the old Act has show that different Registrars have taken radically different approaches to regulation of Aboriginal corporations.

Considerable attention was given in the Review to the concept of Special Regulatory Assistance. This is the idea that for an incorporation statute to meet the special and unique needs of Aboriginal incorporators it should address and perhaps define a role for the Registrar and the Office of Aboriginal Corporations as an agency of assistance and help.

We can see in the Bill all the regulatory powers vested in the Registrar, the proscriptions, the offences, the penalties but, except for a very brief mention in Chapter 16 in section 658-1 setting out the Registrar's functions, the idea the Office of the Registrar of Aboriginal Corporations actually helping Aboriginal people with "needs not experienced by non-indigenous people"[13], other than by way of exemption from obligations, is conspicuously absent.

Back to the drafting board:

A huge amount of effort has gone in to the Review of the *Aboriginal Councils and Associations Act* and the drafting of this Bill.

The Central Land Council supports the outcome and the recommendations of the Review but cannot support the Bill in its current form.

We have tried to demonstrate above that the spirit of the recommendations of the Review have been missed by the Bill.

Unfortunately the problems in the Bill are fundamental. They cannot be cured by minor amendment.

There are hundreds of Aboriginal corporations operating in Central Australia. Most are small, community based organisations even now struggling to comply with the requirements of the current *Aboriginal Councils and Associations Act*. What is required is understanding of the difficulties faced by Aboriginal and Torres Strait Islander people and for assistance when struggling with 'corporation business' not for a regime of increased regulation and complexity.

Perhaps the architects of the Bill should come to Central Australia and sit down in the shade of a mulga tree at a general meeting of an Aboriginal corporation with a copy of the Bill in their hands and ask themselves the question … How is this Bill going to work on the ground?

Central Land Council
September 2005

[13] Executive Summary of the Review at Part 4A paragraphs 33-48

Annexure 1
to the Central Land Council Submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations(Aboriginal and Torres Strait Islander) Bill 2005

Incorporation of Prescribed Bodies Corporate pursuant to the requirements of the Native Title Act

Some comments with respect to the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005*

Following the making of a determination of native title by the Federal Court under the *Native Title Act*, the Court is required to determine if native title is to be held in trust by a prescribed body corporate, or if such a body is to act as agent or representative of the native title holders. The Court is then required to determine which prescribed body corporate is to carry out the functions of a registered native title body corporate.

Currently, the *Native Title PBC Regulations* in addition to setting out the statutory functions of a prescribed body corporate also provide that the Federal Court may only determine that a body corporate is to carry out these functions if it is incorporated under the *Aboriginal Councils and Associations Act.*

The *Native Title PBC Regulations* prescribe statutory functions for prescribed bodies corporate. They also specify in detail how a prescribed body corporate is required to consult and obtain the consent of native title holders (who may not be members of the corporation) prior to it making certain decisions.

As a result, the relationship between a prescribed body corporate, its members and native title holders, is not simply regulated by the legislation that governs its incorporation, but also by a number of other complex and sometimes conflicting sources of law, including:

- the Native Title Act;
- the Native Title PBC Regulations;
- the law of trusts and agency;
- the Federal Court's determination; and
- aspects of traditional law and custom law recognised by the Federal Court.

The profound significance of the role of prescribed bodies corporate in holding or managing the native title rights and interests of native title holders for generations to come needs to be clearly understood to appreciate the critical and dynamic role these corporations are likely to perform in the lives of Aboriginal people in the future.

Determinations of Native Title by the Federal Court outside the Torres Strait have largely been in respect of land in remote locations. In the Northern Territory the Native Title owners have typically been Aboriginal people whose first language is not English and who do not have ready access to many services.

At present the Office of Indigenous Policy Co-ordination grant conditions specifically prevent Aboriginal and Torres Strait Islander Representative Bodies from committing their existing funding to assisting prescribed bodies corporate with governance issues.

In the absence of such assistance the Central Land Council is extremely concerned that the regulatory and proscriptive nature of the current Bill will prove far too complicated for remote Aboriginal people to administer should they be successful in a Native Title determination application and incorporate a prescribed body corporate. Having subjected themselves to the arduous processes of the Native Title Act and the Federal Court to achieve a positive determination it would be extremely disappointing if their legal rights were in someway then made vulnerable to the administrative arrangements under which they are held.

While the appropriateness of incorporating prescribed bodies corporate under the *Aboriginal Councils and Associations Act* has not been adequately dealt with in any previous review of the Act it is the Central Land Council's view that such an enquiry is now more than ever justified given that it is proposed to introduce a new Act to make it more regulatory and proscriptive.

Further it is the Central Land Council's view that the complex issues relating to prescribed bodies corporate should not be part of an overall review of the Act. This complexity has been identified by Christos Mantziaris and David Martin for the National Native Title Tribunal.[14] The Central Land Council believes that the complex issues associated with prescribed bodies corporate should be the subject of a separate and specific review. There is now sufficient data from the existing Federal Court determinations to arrive at properly researched conclusions regarding the appropriateness of incorporating prescribed bodies corporate under particular legislation.

At the very least the Central Land Council supports the view that the complex nature of prescribed bodies corporate justifies a separate Division in the Act rather than as proposed, a situation where they are in no way distinguished from other bodies incorporated under the legislation.

Central Land Council
Native Title Section

September 2005

[14] Guide to the design of native title corporations, C Mantziaris and D Martin, National Native Title Tribunal 1999 at Chapter 3