Northern Land Council Submission to the Senate Legal and Constitutional Committee

Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005

4 October 2005

1. Summary

The Northern Land Council (NLC) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Committee inquiry into the provisions of the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005*.

This submission is in relatively general terms since, in the time available, it was not practicable to conduct a detailed analysis of all provisions of the Bill or to obtain senior counsel's considered advice regarding particular matters.

The NLC recognises that the Bill includes important accountability measures (including to ensure accountability by directors to a corporation's members), but considers that it is seriously deficient in important respects and cannot support the Bill in its current form.

Broadly, the NLC's concerns are outlined in the Central Land Council's submission (dated September 2005) to the Committee, including that:

- the special incorporation needs of Indigenous people have not been met, including because the Bill in this context is overly prescriptive such that many unfunded, under resourced or remote Indigenous corporations will be incapable of compliance (and at risk of being so found or penalised) and Indigenous groups will thus be deterred from utilising the statute;
- complex issues associated with native title prescribed bodies corporate should be the subject of separate consideration and a specific review.

The NLC is additionally concerned that particular provisions proposed to regulate and audit the operations of Indigenous corporations may be discriminatory and not justifiable as a special measure (at least in their present form), in that they impose requirements that apply only in relation to Indigenous corporations in circumstances where such requirements do not apply regarding other corporations.

The NLC notes and generally supports the specific concerns raised in submissions by other Aboriginal organisations. As stated above in the time available it has not been practicable to conduct a detailed analysis of all provisions of the Bill. The NLC would welcome the opportunity to conduct such analysis should that be feasible.

2. Accountability

The NLC's functions pursuant to the *Aboriginal Land Rights (Northern Territory) 1976* (Cth) include to conciliate disputes within or between Aboriginal groups[1] and, in relation to the identity of traditional owners and decisions made by a traditional owning group (pursuant to a traditional or otherwise applicable decision making process), to resolve such disputes.[2]

These conciliation and resolution functions may concern Aboriginal associations, corporations (established under the *Corporations Act*), trusts, and unincorporated groups (ie native title groups).

Depending upon the legal context the performance of these functions ordinarily requires careful attention, based upon anthropological advice and consultation, to the position applicable under Aboriginal tradition regarding competing positions.

Indeed in the general performance of its functions the NLC seeks to preclude or inhibit the creation of disputes by according considerable weight to the position pertaining under Aboriginal tradition (including, for example, in drafting the rules of an Aboriginal association). In the NLC's experience a principled and transparent approach regarding this issue is an important means whereby disputes may be minimised.

This fact is not surprising bearing in mind that, under the statute, benefits generated from leases of Aboriginal land must be distributed "to or for the benefit of traditional Aboriginal owners"[3] (which often involves forwarding funds to an Aboriginal association comprised of traditional owners) and in relation to mining royalty equivalents must be forwarded to an Aboriginal association comprised by traditional owners affected by the mining.[4] Similarly, in relation to native title, it is the native title holders (ie the traditional owners) who receive benefits from agreements regarding land.

On the basis of its experience the NLC considers that the Bill includes important accountability measures regarding Aboriginal corporations which would be of assistance regarding the conciliation and resolution of disputes, including for example improved accountability by directors to a corporation's members.

3. Regulatory and audit requirements

The preamble to the Bill states:

> "[The Bill] is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders."

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[1] Section 25 of the *Land Rights Act*.
[2] Section 23(3), 24 and 77A of the *Land Rights Act*. See *Alderson v Northern Land Council* 1982-83 20 NTR 1 (also 67 FLR 353) per Muirhead J; *Tapnguk v Northern Land Council* 1996 108 NTR 1 per Angel J.
[3] Section 35(4) of the *Land Rights Act*.
[4] Section 35(2) of the *Land Rights Act*.

It is implicit in the preamble that the Bill includes provisions which are discriminatory, and consequently an issue arises as to whether such provisions may be justified as a special measure which positively discriminates and benefits Indigenous people.

It may be accepted that many Indigenous groups, particularly in remote areas, suffer disadvantage particularly in relation to basic reading, writing and administrative skills such as are required to administer a corporation. Discriminatory provisions directed at resolving this disadvantage may be justified as a special measure.

It is evident, however, that the Bill is predicated on the additional proposition that Indigenous corporations are prone to maladministration or corruption. For example, the second reading speech explains that cl 284-1 (see below) is intended to "act as a strong deterrent to nepotistic behaviour" (para 5.308).

Similarly when announcing the Bill on 23 June 2005 the Minister for Indigenous Affairs, Amanda Vanstone, announced "a rolling program of "governance audits" and explained that the Bill included strengthened accountability provisions because Indigenous people "are sick and tired of being the victims of unscrupulous or incompetent administrators."

The NLC accepts that maladministration and corruption, whether or not in the Indigenous sector, is unacceptable. It has not been established, however, that this concern is endemic or widespread regarding Indigenous corporations.

Indeed a special audit conducted by the Commonwealth Government in 1996 established to the contrary. The then Minister appointed a special auditor to inquire regarding ATSIC and up to 3,000 Indigenous organisations which received funding from ATSIC (the appointment of the special auditor was subsequently found by the Federal Court to be invalid). The auditor did not find evidence of widespread maladministration or corruption, a fact which confirms the NLC's position.

It follows that provisions such as contained in Part 6.6 of the Bill (ie cl 284-1 to 296-1) may not be justifiable as a special measure, at least in their present form. Part 6.6 imposes constraints applicable only to public companies (but not to proprietary or other companies which might be regarded as more analogous to native title groups) such that directors may not distribute any benefit[5] to a related party without notifying the Registrar and obtaining member approval from a special general meeting. These constraints appear discriminatory, particularly where the funds concerned have been generated from native title (or Aboriginal land) and are privately owned by an Aboriginal group.

In practice these constraints will inappropriately restrict directors, who in a prescribed body corporate (ie native title) context will ordinarily be senior persons responsible under Aboriginal tradition to determine the distribution of the funds (ie private funds generated from native title interests), from properly performing their function. As well as being unnecessarily time

[5] Section 213 of the *Corporations Act* (Cth) enables a public company to make payments of under $2,000 to directors or their spouses without shareholder approval, however this exception is not replicated in the Bill in relation to Indigenous corporations.

consuming, a mandatory constraint of this nature may well provide a platform whereby ‘oxygen’ is given to resolved disputes which are then unfairly and further agitated by disgruntled persons (which may exist in any group) - so as to inhibit the proper performance of functions by the directors and the corporation.

Such constraints do not apply in relation to proprietary companies or family trusts, both of which are more analogous to a native title group than a public company. The NLC considers that part 6.6, and any other similarly unjustifiable provisions, should be removed from the Bill, or at least that mechanisms should be identified to ensure that such provisions do not onerously and unfairly apply to properly operating corporations.