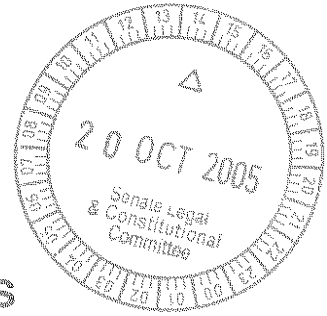


NEW SOUTH WALES

MINISTER FOR ABORIGINAL AFFAIRS



Our Ref: 05/PR/0367

EW 24/10/05
Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Mr Walsh

I refer to your request for a response to the Senate's *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*.

The NSW Government welcomes the Senate's inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005*. Attached is a considered response to the Inquiry.

In you require any further information please contact Cathy Eatock, Senior Policy Officer, in the Policy and Regulation Unit, at the Department of Aboriginal Affairs on 02 9219 0764 or email cathy.eatock@daa.nsw.gov.au.

Yours sincerely

Milton Orkopolus MP
Minister for Aboriginal Affairs and
Minister Assisting the Premier on Citizenship

14 OCT 2005

**NSW Department of Aboriginal Affairs
Submission to the Senate Legal and
Constitutional Legislation Committee:**

**Inquiry into the Corporations (Aboriginal and
Torres Strait Islander) Bill 2005.**

September 2005

NSW Department of Aboriginal Affairs Submission to the Senate Legal and
Constitutional Legislation Committee:

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

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(1) Introduction

The NSW Department of Aboriginal Affairs welcomes the Senate's inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* ("CATSI Bill"). The CATSI Bill proposes to repeal the *Aboriginal Councils and Associations Act 1976* (Cth), and enact a replacement regulatory regime for Aboriginal corporations that recognises that Aboriginal community organisations have specific needs. It acknowledges that issues such as remoteness, capacity and circumstances of community organisations require targeted support and flexible regulation. Aboriginal communities also have particular statutory needs in relation to native title corporations,

Aboriginal organisations play a critical role in providing essential human services and support functions within Aboriginal communities. Currently, of the 8000 Aboriginal and Torres Strait Islander Corporations nationally, 3000 are registered under the *Aboriginal Councils and Associations Act 1976*, including 348 in New South Wales. Most of these community organisations are benevolent bodies which focus on communal benefit. These organisations

play a significant role in addressing Aboriginal disadvantage and providing culturally appropriate services to their communities.

The CATSI Bill has addressed many of the concerns that have been raised by NSW Government agencies and Aboriginal communities previously, particularly concerning appropriate accountability measures for organisations and directors. It has also responded to concerns that the proposed Aboriginal Corporation Act needs to adopt a flexible approach with reporting obligations matched to the size and funding of the organisation. This approach supports smaller corporations in their capacity to fulfil their obligations.

The option to appoint a special administrator to assist Aboriginal organisations, provides an important safeguard against the consequences of corporate failure and a means of protecting assets and essential service provision to Aboriginal communities.

An effective Aboriginal Corporations Act must ensure compliance with corporate governance norms, community expectations, protect communal assets, and provide appropriate support to Aboriginal corporations, their members, and communities.

(2) Features of the Bill

The CATSI Bill will, if passed, create on 1 July 2006, the Corporations (Aboriginal and Torres Strait Islander) Act 2005 (CATSI Act). The CATSI Bill contains many features of the *Corporations Act 2001* (Cth) but incorporates some distinctions that allow for the diversity and unique nature of Aboriginal Corporations.

The CATSI Bill recognises the unique role, needs and distinctness of Aboriginal corporations, and the diversity of Aboriginal corporations. Under the Act, an Aboriginal corporation's model rules, constitution and reporting requirements can be tailored according to its funding allocation and size (small, medium or large).

The CATSI Bill provides for a separate regulator through the Office of the Registrar, Aboriginal and Torres Strait Islander Corporations. The Explanatory Memorandum describes the Registrar's role as " [administering the Act] in a way that contributes to the effectiveness and efficiency of corporations, and in a way that has regard to the particular traditions and circumstances of Aboriginal and Torres Strait Islander persons". Specific functions for the Registrar include: maintaining a publicly-accessible Register, making documentation, educational materials, research and information on governance and incorporation publicly available. The Registrar also retains the power to issue compliance directions, appoint administrators and investigators to Aboriginal corporations as required, and assist with dispute resolution. The establishment of a separate Registrar with particular roles and functions is supported.

The size of the Act is a significant concern, in terms of its physical volume and the number and complexity of provisions. If the legislation is too complex and unwieldy for small and medium Aboriginal organisations to understand, their ability to comply with it is compromised.. Substantial support will need to be provided to assist Aboriginal community organisations to

interpret and adhere to the proposed Act. This will require educational materials, training and support. A way the Registrar could provide training and support for Aboriginal Corporations could be through a partnership with other corporate regulators such as the Australian Security and Investment Commission (ASIC).

Recommendations

- (2.1) The Registrar should provide sufficient support, including education and training, to assist Aboriginal Corporations to understand the new legislation and their obligations.

(3) Administrative Requirements

While incorporation is generally voluntary, it can be a mandatory condition imposed by government funding bodies. An Aboriginal body seeking incorporation must prove that it is ready to incorporate. The Registrar will apply a registration test to be sure that the corporation is sustainable, particularly that internal governance rules are in place. The registration test should be applied to prevent the proliferation of small single-family corporations, which has the potential to create conflicts and leads to duplication of essential service provision. One way to achieve this might be by setting realistic minimum membership numbers (that is greater than the current minimum of five), according to circumstances and the purpose of the Aboriginal Corporation.

The 'tiered' approach to Aboriginal Corporations, with administrative requirements varying according to the Corporation's size and activity level (small, medium or large) is supported. This support extends to the Registrar's discretion to tailor procedural requirements, such as the need for an Annual General Meeting (AGM), according to a particular Corporation's circumstance. This discretion rightly extends to exempting some Aboriginal Corporations from procedural requirements, and allowing the use of communication technology according to a Corporation's needs.

Under the Act, small corporations will only have to meet general reporting requirements, and will not be required to submit audited financial statements. As with other benevolent organisations, Aboriginal corporations whose primary purpose is benevolent or charitable, should enjoy exemptions from financial reporting requirements. In applying his or her discretion to exempt an Aboriginal Corporation, the Registrar should consider the Corporation's primary or over-riding purpose, as well as its size.

Recommendations

- (3.1) The registration test should be applied to prevent the proliferation of small single-family corporations providing essential human services within discrete communities.
- (3.2) In applying the Registrar's discretion to exempt or modify the procedural obligations of an Aboriginal Corporation, consideration should be given to whether the Corporation's primary or over-riding purpose is benevolent or charitable, as well as the Corporation's size.

(4) Consistency across Jurisdictions

In the Review, NSW agencies argued for greater consistency across jurisdictions and improved communication with other regulators (such as the NSW Department of Commerce, Fair Trading).

Aboriginal Corporations should be encouraged and supported to incorporate under the legislative regime proposed by CATSI, rather than mainstream legislation (such as the *Associations Incorporation Act 1984* (NSW)). This means that all Aboriginal Corporations can be regulated under a single appropriate regime, which protects their members and assets.

(5) Regulation of Aboriginal Corporations

The Bill provides a flexible and responsive regulatory regime for Aboriginal Corporations. In addition to the functions listed above, the Registrar has broad intervention powers including appointing external administrators and investigators, and examining connected entities. These powers can be exercised in respect of an Aboriginal Corporation's financial management, dispute resolution and operational effectiveness. Financial resources and personnel will need to be dedicated to supporting the Registrar's functions, if they are to be exercised as flexibly and appropriately as suggested. The Registrar's initial task should be to undertake a risk assessment to identify those classes of Aboriginal Corporations that require additional support to achieve compliance with the Act and suggest intervention strategies to assist.

In NSW, the Minister for Aboriginal Affairs has similar powers under the *Aboriginal Land Rights Act 1983* to intervene in the management of Aboriginal Land Councils. The appointment of external administrators or investigators is a serious measure, and the appointee must be carefully managed in terms of performance and costs. The appointment of external investigators or administrators must have a sound justification and appointees monitored through regular reporting and clear contractual obligations. On the ground knowledge of the organisation is often critical to the success of an Administrator. In some cases practical support to the Corporation may alleviate the need to appoint an external administrator.

Recommendations

- (5.1) The Registrar should be tasked with conducting a risk assessment to identify classes of Aboriginal Corporations that need additional support to achieve compliance with the Act, and suggest appropriate intervention strategies.
- (5.2) The Act should set out the terms for the appointment, management and release of administrators including a requirement that the Registrar (or Registrar's Office staff)

visit the Corporation (and community) before deciding on the most appropriate action/intervention for that Corporation.

- (5.3) Adequate justification, including an analysis of the likely costs and benefits, should be required to be made before the appointment of an external administrator or investigator.
- (5.4) The Registrar should be required, through the contract of appointment, to take an active role in managing the performance and costs of appointees, such as a monthly progress report from appointees.

(6) Membership

Aboriginal Corporations have 'members' and 'observers', the latter having the capacity to only attend Corporation meetings. The CATSI Bill describes eligibility rules, rights and responsibilities of members as follows.

In order to be eligible for registration as an Aboriginal Corporation only a majority of an organisation's members must be Indigenous. However, and seemingly in conflict, Corporations also have the power to cancel membership on the basis of non Aboriginality or not being a Torres Strait Islander. The Bill allows non-Aboriginal members and corporations to be members of Aboriginal corporations.

Opening membership of Aboriginal Corporation to non-Aboriginal people creates risks, for example, the potential for conflict with the eligibility rules of funding bodies (concerning the composition of the Aboriginal organisation). There is a serious concern that the move could disempower the Aboriginal members over time as non-Aboriginal people and Corporations impact on the Aboriginal Corporation's internal governance and decision-making. Another risk relates to the image of Aboriginal Corporations, where the inclusion of the term "Aboriginal", "Indigenous", and the like implies that the Corporation is made up of Indigenous persons. Governments, businesses and communities deal with Aboriginal Corporations on that basis, and the relationship could be compromised if the Corporation is no longer perceived to be governed or composed of Indigenous persons. The rules around the eligibility and capacities of non-Aboriginal persons and bodies within Aboriginal Corporations require clarification.

The Bill promotes good operational procedures, for example, by requiring that Corporations maintain a membership register, provide the register on request and at the AGM, and making it an offence not to remove member's name within 14 days of resignation or cancellation. However, the 14 day limit is too short. Twenty eight days seems more reasonable and would allow sufficient time for a member to be notified and take steps to respond to that notice

Recommendations

- (6.1) Membership of Aboriginal Corporations should be open only to Indigenous persons as a matter of principle. Expanding membership to include non-Indigenous persons or Corporations should not be pursued without a clear set of proposed rules around the entitlements and capacities of non-Aboriginal persons and bodies within Aboriginal Corporations
- (6.2) As with mainstream corporations, members of Aboriginal Corporations should enjoy limited liability.
- (6.3) In the case of cancelling membership or updating the membership register, 14 days is insufficient and should be extended to 28 days.

(7) Accountability of Directors

The accountability and duties of directors, officers and employees duties and disqualification provisions are mostly carried over from the *Corporations Act 2001* (Cth). These duties include a duty of care, duty of honesty, duty of disclosure and to avoid conflicts of interest. These duties and the processes for remunerating directors are clearly directed at deterring and punishing "rogue" directors.

The CATSI Act is intended to deter individuals and corporations from criminal conduct, maladministration and corruption. Deterrence and punishment for dishonest or bad faith conduct is provided for in the civil penalties and criminal offence provisions, which are comparable in construction and severity with the *Corporations Act*. All offences are a strict liability.

The strongly constructed offences suit serious fraud, corruption and other criminal activities. However, in the past, many of the breaches of incorporation laws by Aboriginal Corporations that have occurred have been due to a lack of understanding of their requirements and/or a lack of capacity to meet them. This demonstrates the need for support to achieve compliance as much as deterrence.

Penalties range from 5 to 50 penalty units, and up to two years gaol for the worst cases of dishonest or bad faith conduct. The Registrar can deal with breaches by way of an infringement notice, or through civil action against the individual or Aboriginal Corporation. Affected Aboriginal Corporations can seek a compensation order against individuals. However, civil penalties and compensation orders face significant enforcement difficulties where Aboriginal corporations and Aboriginal people do not have the capacity to meet the orders. Non-payment can result in imprisonment or other harsh criminal sanction. Therefore, discretion must be exercised by the Registrar, prosecutors and the courts, in punishing breaches and alternative forms to pecuniary penalties considered. Directors who are convicted of a serious offence under the CATSI Act should be banned from being a Director of an Aboriginal Corporation for a period specified by the Registrar.

The Bill grants broad Regulation-making powers to alter the financial reporting and audit requirements for certain classes of Corporations. The Regulation-making power is fettered, in

that a Regulation cannot be used to increase the maximum penalties or impose penalties greater than 50 penalty units. As an additional safeguard, regulations under the CATSI Act should be made only after broad consultation with Aboriginal Corporations and other stakeholders, including the States and Territories.

Recommendations

- (7.1) Previous Directors convicted of a serious offence under the CATSI Act should be banned from being a Director of an Aboriginal Corporation for a period specified by the Registrar.
- (7.2) The offence provisions and penalties must be applied by regulators and prosecutors flexibly and according to the intention of the Act. Maximum penalties should be reserved for the worst cases of dishonesty, bad faith or criminality.
- (7.3) The offence provision and penalties have potential to create additional harshness for Aboriginal defendants. Aboriginal defendants may lack the capacity to properly represent themselves. Non-pecuniary penalties should also be considered in cases where the individual or Corporation has limited capacity to pay.
- (7.4) Before Regulations under the CATSI Act are made, there should be wide consultation with Aboriginal Corporations and other stakeholders (including NSW).

(8) Protecting Members' Interests

The Bill strongly encourages members to participate in the governing their Corporation. This includes controlling high-risk transactions, such as director's remuneration and related party transactions.

The central protection for an Aboriginal Corporation's members provided by the CATSI Bill is the extensive discretionary powers of intervention granted to the Registrar. The Registrar can modify the Corporation's constitution if members cannot access statutory remedies and if the modification is not oppressive or against the interests of members as a whole. The Registrar also has the power to compel access to documents. Furthermore, the Registrar must be satisfied that an Aboriginal Corporation has adequate rules for dispute resolution and that members and directors are sufficiently aware of their rights and obligations, prior to registration. A number of Courts have jurisdiction to adjudicate on CATSI Act matters

The measures proposed in the Bill to protect the interests of an Aboriginal Corporation's members are supported.

(9) Safeguarding Assets

Safeguarding a Corporation's assets from corporate failure falls under the Registrar's extensive discretionary powers. The Registrar has the power to call special meetings of 'interested persons' including funding bodies and creditors and general meetings, where the Corporation cannot or will not do so. The Registrar can examine and intervene in a Corporation's affairs or appoint an external investigator or administrator. The Bill also makes special provisions for deregistering Corporations and dealing with unclaimed property.

However, the assets held by Aboriginal Corporations are frequently communal – that is to be held and used for the benefits of its members (or the members of an Aboriginal community). Communal ownership means that disposal of assets to meet financial liabilities, particularly by external appointees (for example administrators and receivers) could deprive an entire community from expected benefits and opportunities. This would be particularly harsh in the case of communal housing assets.

Recommendation

- (9.1) Communal assets held by Aboriginal Corporations should not be subject to disposal by receivers, liquidators, or administrators in order to meet the Corporation's financial liabilities.

(10) Business efficacy of Aboriginal Corporations

Assumptions about regular Corporations will apply to Aboriginal Corporations, so that third parties' interests are protected and their transactions with the Aboriginal Corporation are not void because of procedural defects. This position is supported.

(11) Native Title

Native title law, including under the *Native Title Act 1993* (Cth), requires special provisions for Aboriginal Corporations involved in native title. These entities will be called Registered Native Title Bodies Corporate (RNTBC). The CATSI Bill allows RNTBC to be managed and regulated in a manner reflective of the sui generis nature of native title rights and interests, and the requirements of the *Native Title Act 1993* (Cth). This approach is supported.

(12) Conclusion

The proposals contained in the CATSI Bill are broadly supported. The Bill finds a balance between creating tighter rules governing Aboriginal Corporations and recognising that Aboriginal Corporations have specific regulatory needs. Many Aboriginal Corporations play

significance roles in Aboriginal communities, including providing essential services and managing cultural heritage and native title issues. The operation, resourcing and practice of the Office of the Registrar in administering the Act will be critical in supporting these Corporations to achieve compliance.