



AIATSIS

Australian Institute of Aboriginal
and Torres Strait Islander Studies

Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

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

The Australian Institute of Aboriginal and Torres Strait Islander Studies is not directly affected by the changes proposed by the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Bill* (the Bill). However, having been commissioned to review the *Aboriginal Corporations and Associations Act 1976* (Cth) (ACAA) in 1996, we have retained an interest in the progress of the most recent review and the proposed new legislation.

Replacing the ACAA

AIATSIS acknowledges that the provisions of the ACAA are now outdated and out of step with corporations law in Australia. Indeed, in recent years many Indigenous organisations have sought incorporation under the *Corporations Act 1991* (Cth) to overcome the onerous and arguably discriminatory aspects of the current ACAA, as well as technical shortcomings, for example in relation to corporate membership, non-Indigenous membership and directors, and the like.

Transitional provisions

The Bill and explanatory material does not provide sufficient guidance with regard to any transitional arrangements. The timing of the introduction of the Bill without the consequential amendments and transitional arrangements is unconventional and is a cause for concern. The Office of the Registrar of Aboriginal Corporations (ORAC) suggests that the second Bill will be debated and passed at the same time as the first, although no exposure draft of the second Bill has been available for comment or discussion by those affected by the legislation or by this Committee. Moreover, the passing of the first Bill does not appear to be dependent on the passing of the second.

The burden of organisational reform

As it is intended to repeal the ACAA, it is presumed that all corporations and associations currently registered under the ACAA will be transferred (i.e. deemed to be incorporated under the C(ATSI) Act) or be required to apply under the new Act (see for example clause 60-1). For many organisations this will require new constitutional provisions and changes that may have significant

impact on their organisational culture and business practices; for example, maximum board sizes (clause 243-5), possible establishment of new management committees, among other things. Where organisations also have a representative role, particularly over large regional areas, this may involve managing a sense of disenfranchisement (see, for example, comments from the North Queensland Land Council submission to this inquiry). These reforms are proposed at a time of immense change in Indigenous affairs, where the funding and functions of many organisations are in turmoil.

Supporting Indigenous Corporations

As noted on the ORAC website, many of the Corporations under the ACAA deliver essential services to remote communities where governments have failed to provide adequate, appropriate and/or effective public programs and services. It is important that the difficulties of delivering services in circumstances of extreme disadvantage and distance are not confused with what the Minister describes as incidences of ‘unscrupulous and incompetent administrators’. Corporate failure in Indigenous organisations, like any other sector, has diverse causes, and in the circumstances faced by Indigenous organisations it is perhaps understandable that the prioritisation of work that the organisation was established to complete can overwhelm the often extraordinary burden of administration of their funding.

Moreover, it is imperative that similar recognition and remedial effort are directed to reducing the compliance costs of dealing with government program funding and improving bureaucratic competency and capacity. Supporting effective governance and administration should be approached in a constructive manner that recognises the personal investment made by the overwhelming majority of Indigenous corporation’s Boards and office holders.

Native title

The Bill contains specific provisions concerning Registered Native Title Bodies Corporate (RNTBC) and the interaction with obligations under the *Native Title Act 1993* (Cth) (NTA), but there no similar consideration for Native Title Representative Bodies (NTRB). NTRBs also have specific roles and functions under the NTA that may potentially lead to a conflict with Directors’ duties, for example, in relation to resolving disputes and representing the interests of common law native title holders while also representing the interests of members as well as technical requirements of certification. The protection and clarification provided for Directors of RNTBCs by clauses such as clause 255-20 are not available to Directors and Officers of NTRBs (see also clauses 265-25(2), 271-1(3), 526-10, 66-1, 69-35, *inter alia*). The Bill should provide for regulations to modify any of the provisions as they apply to NTRBs in a similar manner to clause 633-5 re: RNTBCs.

Similarly, without technical amendments to the NTA, an NTRB should not be able to be wound up by Court order under cl.166-5(1) (see clauses 166-3; 546-15 re: RNTBCs), without a removal of recognition as an NTRB by the Minister under the NTA.

Under the NTA, bodies must be incorporated under the ACAA to be eligible for recognition as NTRBs (s 201(1)(a)). There may be an argument for the requirement for NTRBs to be incorporated under the ACAA to be removed as part of the consequential amendments rather than simply replaced by a requirement for incorporation under the C(ATSI) Act. The relationship between this Bill, the consequential amendments and any proposed technical amendments to the NTA should be considered carefully and in direct consultation with NTRBs. There is a significant risk that we will revisit the incapacitating reform program experienced after the passage of the *Native Title Amendment Bill* in 1998, which led to an almost complete halt to the progress of native title activities for two years while NTRBs were engaged in a process of organisational reform and re-recognition.

Apart from specific provisions for NTRBs that may be needed in the Bill to meet the obligations of NTRBs under the NTA, it may also be necessary for NTRBs to be dealt with in the regulations as a particular class of Aboriginal and Torres Strait Islander organisation, with appropriate determinations from the Registrar, particularly with respect to reporting requirements.

The comparison of compliance requirements through funding agreements under the Native Title Program and the *Commonwealth Authorities and Companies Act 1997 (Cth)* (CAC Act) with those proposed under the new Bill has been noted in the Kimberley Land Council submission to this committee. If the concerns with duplication of reporting cannot be dealt with in the legislation, they should be dealt with through a determination by the Registrar in accordance with a class of corporations that are NTRBs or are required to meet particular standards of reporting under the CAC Act.

Proposed rolling audits

The Minister notes in her press release of 23/06/05 that provision will be made for rolling audits. Coordination of accountability mechanisms is imperative. Indigenous organisations are arguably the most reviewed organisations in the country. Most receive some if not all of their funding from government programs and are thus subject to reviews by funding bodies, auditing of financial statements, Department of Finance program audits (among others) and now audits by the Registrar. Such reviews and audits are costly and time-consuming.

The Councils provisions

The failure to revise and reinvigorate the Councils provision of the ACAA is a disappointing outcome of the most recent review and proposed Bill. The rationale for not revisiting the provisions was based on an argument that they were unworkable and had therefore not been utilised. However, this is a lost opportunity to underpin a style of governance for Indigenous communities based on a more public institutional model. This would have facilitated current calls for greater regional autonomy in the post-ATSIC era and would have been a suitable tool for government in negotiating certain types of Shared Responsibility or Regional Partnership Agreements, such as the recent Murdi Paaki and Ngaanyatjarra Agreements where local government or regional governance style responsibilities have been adopted by the community. It would also have been appropriate for some RNTBCs, particularly in areas covered by exclusive possession native title under traditional laws and customs. The reversion to a singularly corporate model of Indigenous governance does not meet the full gamut of needs of Indigenous peoples in the long term.

While we regret the timeframe allowed for consideration of this Bill by the parliament has not allowed us to make a fuller submission, we thank the Committee for the opportunity to provide input to their deliberations. If you would like any further information on this submission please contact Dr Lisa Strelein, Manager, Native Title Research Unit on 6246 1155 or lisa.strelein@aiatsis.gov.au.

Yours Sincerely



Professor Michael Dodson

Chairperson