

Bills Digest  
No. 94 2000–01

Aboriginal and Torres Strait Islander  
Commission Amendment Bill 2000

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
No. 94 2000–01

Aboriginal and Torres Strait Islander Commission  
Amendment Bill 2000

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28 February 2001

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# Aboriginal and Torres Strait Islander Commission Amendment Bill 2000

**Date Introduced:** 29 November 2000

**House:** House of Representatives

**Portfolio:** Aboriginal and Torres Strait Islander Affairs

**Commencement:** 28 days after Royal Assent.<sup>1</sup>

## Purpose

To amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to:

- change the name of the Commercial Development Corporation to Indigenous Business Australia
- expressly allow the Aboriginal and Torres Strait Islander Commission to outsource its commercial functions, and
- provide the option of appointing a full-time Chairperson of Indigenous Business Australia.

## Background

### Context

### Environmental Scan

It is widely acknowledged that indigenous people face disadvantage across a range of indicia. This observation applies equally to the variables affecting indigenous business and, more generally, economic development. Indigenous people face difficulty in gaining access to finance, given the frequent absence of personal credit history or loan security. For example much of the land held by indigenous people is held in trust or as inalienable freehold title or native title which may not be capable of being used as security for loans. Indigenous people may also have limited formal education or business expertise and often face significant geographical barriers in terms of rural and remote locations.

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## The CDC

The Aboriginal and Torres Strait Islander Commercial Development Corporation (CDC) was established in 1990 following the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC). It is established under the auspices of the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act). Its functions are to engage in commercial activities, promote and encourage indigenous self-management and self-sufficiency, and to perform such other functions as are conferred by the ATSIC Act. It commenced operations with a capital base of around \$10 million (being property of the former Aboriginal Development Commission (ADC)) and was subsequently funded across its first four years at \$10 million per annum.

## Discussion Papers

In March 1998 the then Minister for Aboriginal and Torres Strait Islander Affairs released a discussion paper titled [\*Removing the Welfare Shackles\*](#). It reflected two fundamental, if not slightly contradictory, premises: the linkages between economic and social development and the conflicts between commercial and social development policies and programs. It focused on the need for a more concerted and coordinated approach to sustainable indigenous economic development.<sup>2</sup> It canvassed a proposal to establish a new statutory authority to replace the Commercial Development Corporation (CDC). The new organisation, Indigenous Business Australia (IBA), would have three broad roles:

- assume responsibility for the current functions of the CDC
- assume a merchant banker role in relation to key 'land rights' trust accounts, and
- provide advice and input for the formulation of commercial policies by ATSIC.

The paper argued that a separate statutory authority would improve effectiveness and efficiency by separating commercially and socially oriented programs, developing greater spread and depth of commercial expertise, achieving greater financial leverage in the commercial sector and achieving economies of scale.<sup>3</sup>

In response to *Removing the Welfare Shackles* ATSIC released a document titled [\*Getting on with Business\*](#).<sup>4</sup> Like the principal document, it emphasised the linkages between economic and social development and the need for greater coordination. However it rejected one of the premises, insisting that economic and social goals were inextricable but that program administration should separate decisions of a social and commercial nature.<sup>5</sup> Rather than canvass a new statutory authority, it recommended a 'New Approach' in which business loans and housing loans programs would be outsourced to the private sector and investment management services would be tendered among indigenous bodies.

The response argued that a new authority would create unnecessary bureaucracy. It argued that '[n]o compelling case for [IBA] has been advanced', that the recommendation to

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establish the IBA 'ignores advances made in the financial sector since deregulation' and that the paper provided 'little evidence that it could deliver any of the benefits claimed'.<sup>6</sup> It suggested that the public sector was unable to develop sufficient 'spread and depth of commercial expertise' to compete with the private sector and that there could be significant *diseconomies* of scale in merging programs and functions across a disparate sector. Above all, as indicated, it argued against splitting commercial and social considerations.

### Key Points of Divergence & Agreement

A dot-point comparison of the two papers appears below in Table 1. This shows the key functions of the IBA and possible alternatives based on proposals in *Removing the Welfare Shackles* and the responses to those proposals in *Getting on With Business*.

#### Economies of Scale

To some degree, both papers recognise the potential diseconomies of scale involved in a merger of programs and functions into one statutory authority. *Removing the Welfare Shackles* noted that '[w]hile some economies of scale seem inevitable if administration of all these programmes was done by a single entity, their extent could be limited given the degree of programme diversity'.<sup>7</sup> *Getting on with Business* acknowledged this point, adding an observation that financial institutions had noted 'significant diseconomies of scale in parts of their business' resulting in segmentation of their operations.<sup>8</sup>

#### Commercial v Social Goals

One of the key premises behind *Removing the Welfare Shackles* was a perceived conflict between commercial and social development policies and programs. It was expressed as a 'fundamental conflict, in the use of resources, between the requirement for the CDC to act commercially and also to assist Indigenous people in a variety of non-commercial ways'. The key areas of conflict identified were the high costs associated with program administration in rural and remote regions and with other 'community service obligations'.

Two studies of the CDC were cited as providing evidence of these conflicts.<sup>9</sup> One of these studies briefly examined the history, policies, operations and financial position of the CDC. Arguably, the studies did not suggest that commercial and social objectives, insofar as they were identified, could be effectively separated. Indeed, the studies highlighted the fact that the particular social objectives identified, and their mixture with commercial objectives, may be 'acceptable and unavoidable' given the geographic and socio-economic position of the indigenous client base.<sup>10</sup> Moreover, they pointed to the need either to 'factor-in' or subsidise the inevitable transaction costs associated with these social objectives. It was in the context of the need for subsidy that one author observed: 'it seems unreasonable that the CDC should have to pursue social goals, have to pay for doing this out of its own returns and, at the same time, have to generate further investment capital'.<sup>11</sup>

The response, *Getting on With Business*, stated that there was little evidence that a mixture of commercial and social objectives was the major obstacle to the success of indigenous

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commercial development programs. Moreover, it noted a lack of clarity in the argument on the meaning of 'social considerations', specifically a failure to distinguish conflicts between goals of commercial and social programs from conflicts between commercial objectives and measures to address obstacles in the social environment.<sup>12</sup> It suggested that the real issue was the danger of establishing policy and program settings which prioritised commercial projects with conflicting social objectives rather than the danger of taking specific measures to address obstacles to commercial projects in the social environment.

### Social Objectives v Social Obstacles

Significantly, both papers acknowledged the need to address obstacles in the social environment. *Removing the Welfare Shackles* suggested that separation of commercial and social objectives would be easy but acknowledged that special assistance would be required for indigenous businesses by way of 'aftercare services for business loans, support and advice for indigenous businesses and pursuing employment and training objectives'.<sup>13</sup> *Getting on with Business* envisaged ATSIC as a 'broker of opportunities, provider of aftercare, mentoring and training'.<sup>14</sup>

Both papers acknowledged the need to balance commercial and social objectives. Despite its clear preference for separating commercial and social objectives, *Removing the Welfare Shackles* suggested that commercial risk could be offset against social objectives. Thus, among a suite of *viable* investments, it suggested that the new organisation should have scope 'for entering higher risk ventures that offer higher returns or reasonable returns while meeting the needs of particular Indigenous groups'.<sup>15</sup> Moreover, while it stressed the need to separate commercial and social objectives, it recognised that there was a sound rationale for the existence of community service obligations (CSOs) in the CDC charter,<sup>16</sup> it acknowledged that some or all of the CSOs should continue under a public subsidy,<sup>17</sup> and it specifically recommended that 'equity gap funding support' should be provided.<sup>18</sup> Not surprisingly, *Getting on with Business* actually envisaged lending to *non-viable* businesses 'where social and wider economic benefits makes such action desirable'.<sup>19</sup> It acknowledged the need to publicly subsidise indigenous businesses, recommending that social objectives should be met by guarantees or other grant funding in the form of 'equity supplements', interest subsidies and emergency support for defaulting borrowers.<sup>20</sup>

### Parliamentary Inquiry

In 1997 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs commenced an inquiry into indigenous business. The terms of reference broadly required it to report on the 'existing opportunities and arrangements for encouraging sound [Indigenous] economic initiatives at the small and medium business level'. Specifically the terms of reference required an assessment of the success of existing programs and any barriers to the establishment, acquisition or development of indigenous business, the development of possible future policy directions and administrative arrangements, and means of raising the profile of indigenous business.<sup>21</sup>

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The inquiry was not 're-referred' following the election in 1998.

#### Commercial v Social Goals

However, there has been an academic survey of the submissions and evidence given to the Committee.<sup>22</sup> It was conducted by the author of one of the studies cited by *Removing the Welfare Shackles*. Among the comments was an observation that the Indigenous Land Corporation (ILC) and the CDC:

indicated that they experienced problems when social and commercial goals are mixed within the indigenous businesses that they have dealings with and that, although both are important, they should be more clearly separated.<sup>23</sup>

However, while the CDC acknowledged that its primary aim was commercial viability, 'it was also conscious of furthering social goals, such as generating employment'.<sup>24</sup>

Significantly, given the connection between the author's previous work and *Removing the Welfare Shackles*, the author commented that the real issue was not the need to balance these objectives but to 'clarify and quantify each goal in every case'.<sup>25</sup> He suggested, citing his previous paper, that 'what is required is not the rejection of one goal for another but a system that clarifies and accounts for all goals whether they are commercial or social'.<sup>26</sup>

#### Structures

The survey observed that the inquiry 'elicited some qualified support' for the IBA. The author suggested that CDC supported the establishment of a business development agency with the qualification that its preference would be for an agency with a private persona.<sup>27</sup>

#### The CDC Submission

In fact, the CDC Submission essentially mirrored *Removing the Welfare Shackles* and this was reinforced in evidence given to the Committee by Mr Joseph Elu, the CDC Chairman. On the separation between commercial and social goals, he strongly endorsed the view taken in *Removing the Welfare Shackles*. He stated that, as far as possible, indigenous business programs should be separated from socially orientated programs 'so that program objects are not confused and programs outcomes consequently placed in jeopardy'.<sup>28</sup> On the issue of structures he stated that indigenous business programs 'should be administered by the one organisation to enable more effective and efficient program delivery'.<sup>29</sup>

However, the evidence was contradictory in relation to community service obligations. At one point the Chairman noted that '[i]n the CDC's own research we are finding that our community service obligation is eating into our profits' and stated that '[w]e cannot act commercially and have community service obligations thrown in as well'.<sup>30</sup> But he also stated 'indigenous commercial programs require strong mechanisms to meet community service obligations that are central to the rationale of having the programs at all'.<sup>31</sup>

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## The Bill

The recommendations in *Removing the Welfare Shackles* required various 'legislative and administrative changes'.<sup>32</sup> Key legislative changes were amendments to the ATSI Act to establish the statutory authority, and to the *Audit Act 1901* to permit more flexible use of the major indigenous land trusts.<sup>33</sup> Key administrative changes involved the transfer of existing programs, including the Business Development Program, incorporating the Business Funding Scheme and Indigenous Business Initiative Program, and the Indigenous Housing Fund, from ATSI to IBA.

At first glance, the Bill appears to effect the key legislative changes outlined above. It is unclear if and when the remaining legislative and administrative changes will follow. On 28 November 2000 the then Minister for Aboriginal and Torres Strait Islander Affairs announced plans for an 'independent review of indigenous business programmes' to 'identify mechanisms to generate opportunities and improve the delivery of services'.<sup>34</sup> At the time of writing the terms of reference for this review had not been announced.

## Outstanding Issues?

### Community Service Obligations and Public Subsidy

Ultimately, it seems that both papers agreed on the need to address obstacles in the social environment and, to some degree, the need to balance commercial and social objectives. Equally, both papers agreed on the need to separate commercial and social objectives in terms of decision making processes dealing with risk assessment and public subsidies.

Perhaps the real differences relate to the treatment of these processes: whereas *Removing the Welfare Shackles* was prepared to accept high risk viable businesses with equity support and *unarticulated* public subsidies, *Getting on with Business* was willing to accept non-viable businesses with equity support and *clearly identified* public subsidies. In this context *Removing the Welfare Shackles* recommended three options to resolve the conflict between the need to act commercially and the need to address social objectives. One involved an amendment to the ATSI Act to remove the CSO requirements. The others involved increasing the operational budget of IBA and/or providing additional capital to enable income generation by IBA so that it could meet its CSO requirements.

Thus, the real difference is expressed in the characterisation of CSOs. The papers and the subsequent submissions and evidence suggest that both 'sides' of the debate accept the need to link commercial and social objectives in relation to 'community service obligations'. However, just what constitutes a community service obligation as opposed to a public subsidy is unclear.

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### **Separation of Objectives v Clarification and Quantification**

The other outstanding issue, not fully canvassed in the papers or submissions, is the point made in one of the studies that formed the basis of *Removing the Welfare Shackles*. Do commercial and social objectives need to be rigidly separated or is it sufficient to 'clarify and quantify each goal in every case'? This seems to be a question as yet unanswered.

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Table 1: Functions of the IBA – Comparison Across Papers

Function	Description	<i>Removing The Welfare Shackles</i>	<i>Getting on with Business</i>
<i>providing advice</i>	ATSIC/CDC	managed by IBA via ATSIC	no comment
<i>developing a capital base</i>		managed by IBA	no need to establish a capital base
<i>engaging in commercial activities</i>	CDC	managed by IBA	no comment
<i>promoting and participating in joint ventures (equity investment)</i>	CDC	managed by IBA based on commercial considerations (?)	outsourced to a venture capital company which is oversighted by trustees to ensure a balance of commercial and social considerations
<i>providing grants, loans and guarantees (business lending)</i>	Indigenous Business Initiatives Program, and Business Funding Scheme (ATSIC)	managed by IBA to ensure an appropriate balance of low, medium and high risk <i>viable</i> ventures based on commercial considerations, <i>(with an allowance for high risk ventures with reasonable returns and social considerations)</i>	outsourced to a financial institution, managed by ATSIC with ATSIC subsidies to ensure a balance of <i>viable</i> and <i>non-viable</i> ventures based on commercial and social considerations
<i>operating the indigenous housing fund (private lending)</i>	Housing Loans Program (ATSIC)	managed by IBA based on commercial considerations.	outsourced to a financial institution with ATSIC subsidies to increase viability
<i>managing the indigenous land fund (investment management)</i>	Managing the fund established under the <i>Native Title Act 1993</i>	managed by IBA	no comment
<i>managing the Aboriginal Benefits Trust Account (investment management)</i>	Managing the royalty-equivalent fund established under the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	managed by IBA	outsourced to an investment management company which is oversighted by trustees  would include, by consent, any and all other funds held by indigenous bodies.

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## Main Provisions

### Name Change

**Items 1–12, 19–33, 36–50, 52<sup>35</sup>–57, 59–87, 89–92, 94, 96–101** effect a change of name from CDC to IBA and related matters.

### Outsourcing

**Item 13** seeks to expand the functions of ATSIC to include 'outsourcing' its programs. Section 7 of the Act defines ATSIC's functions. Paragraph 7(1)(a) includes the formulation and implementation of programs for indigenous people. **Proposed subsection 7(1A)** would permit the functions in paragraph 7(1)(a) to be exercised by 'other persons' either by delegation or under a contract or agreement entered into with ATSIC.

**Item 14** and **15** seek to expand the powers of ATSIC to include entering into contracts and agreements independently of any agreements already provided for in the Act. Paragraphs 7(2)(b) and 7(2)(c) expressly allow ATSIC to enter into grant or loan agreements or broader agreements with a State or Territory or a State or Territory agency.

**Item 16** seeks to expand the powers of ATSIC to include the appointment of agents. **Item 18** seeks to permit ATSIC to delegate 'any commercial functions' under paragraph 7(1)(a). **Item 17** provides that agents and delegates may exercise any of ATSIC's powers for or in connection with the performance of a function with which they are charged.

### The IBA

#### Functions of IBA

**Items 34** and **35** deal with the functions of IBA. The functions mirror the current functions of the CDC, namely to engage in commercial activities, promote and encourage indigenous self-management and self-sufficiency, and to perform such other functions as are conferred by the ATSIC Act. **Proposed subsection 147(2)** expressly includes within 'commercial activities' any activities performed by IBA as the agent or delegate of ATSIC.

#### Vacancies on the IBA Board

**Item 51** repeals subsection 155(3). This subsection provides that the performance of functions or exercise of powers of the CDC is not affected by vacancies in the CDC Board. This subsection was inserted into the ATSIC Act in 1995.<sup>36</sup> Its purpose was to

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ensure consistency with a corresponding provision applying to the Indigenous Land Corporation (ILC).<sup>37</sup> That provision was intended to ensure that the ILC Board had 'full power to act even if there [was] a vacancy in membership', noting that 'the quorum requirements...would still need to be satisfied'.<sup>38</sup> It is unclear why this is being repealed.

### Option for Full Time Chairperson

**Item 53** provides an option for the appointment of a full-time Chairperson of IBA. Subsection 157(1) provides that the CDC Directors may only be appointed on a part-time basis. **Proposed subsection 157(1)** will permit the Chairperson to be appointed full-time. **Item 58** makes consequential amendments for leave of absence and recreational leave.

**Item 78** amends a provision defining the capital of the CDC. Section 179 provides that the capital of the CDC includes monies payable under section 208 (monies payable by ATSIC from the ADC Capital Fund on the establishment of the CDC) and amounts appropriated by parliament 'from time to time' as capital for the CDC. **Proposed section 179** includes these monies and expressly includes 'income derived [by IBA] from investments'. Note that, the CDC having been established, section 208 is redundant. It is repealed by **item 95**.

### Delegations to General Manager and Employees

**Item 88** expands the current delegation powers. Section 190 permits the CDC to delegate 'any or all of its functions and powers' to its General Manager or employees. **Proposed subsection 190(2)** permits the General Manager to sub-delegate functions and powers to employees by a written document signed by him or her. The standard provisions governing delegations in the *Acts Interpretation Act 1901* apply to these sub-delegations. Thus, for example, the employee may not sub-delegate the power or function and the General Manager may continue to exercise the delegated power or function at all times.

The drafting behind **proposed subsections 190(3) and (4)** is unclear. The subsections use similar language to achieve a similar effect: the application of the delegation provisions in the *Acts Interpretation Act 1901* to sub-delegations by the General Manager of IBA. It is unclear why the delegation provision references are distributed across two subsections. It might be to avoid any adverse consequences should the application of one or other set of the provisions to sub-delegations be held invalid (by permitting the offending subsection to be severed). However, it is not clear why invalidity would attach to one set of provisions and not the other. Nor would this explain why one reference is duplicated.<sup>39</sup>

### External Merits Review

**Item 93** amends provisions relating to merits review of decisions by staff of ATSIC. Section 196 provides that decisions by ATSIC regarding loans, housing loans and business loans are externally reviewable by the Administrative Appeals Tribunal (AAT). Subsection 196(4) provides that, in relation to review by the AAT, a decision made by ATSIC does *not* include a decision made by a delegate of ATSIC. (Section 195 provides

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that decisions of delegates regarding loans, housing loans and business loans are internally reviewable.) The restriction in subsection 196(4) was imposed to limit access to external merits review by the AAT where an avenue existed for internal merits review by ATSIC. The intended effect of subsection 196(4) was that 'there would be no appeal directly to the [AAT] from a decision of a delegate...which would first have to be reviewed by the Commission'.<sup>40</sup> Similar provisions apply to the TSRA.

**Item 93** removes this restriction in relation to decisions by a delegate of ATSIC.

The purpose of **item 93** would seem to be to address an unintended consequence of the power to outsource program functions (see **items 13** and **18** above). Given subsection 196(4), where a loans function is delegated, decisions made in respect of that program are not 'made' by ATSIC and are therefore not reviewable by the AAT. The intention of **item 93** is to presumably apply external merits review to outsourced decision makers.

However, **item 93** may have an unintended consequence. The key issue is that, if the Bill is enacted, the amended ATSIC Act will use the expression 'delegate' in two senses: a general sense, to mean staff within ATSIC to whom decision making power is delegated, and in a specific sense, to mean outsourced decision makers. While **item 93** is presumably directed at 'external delegates', it applies equally to 'internal delegates': it applies external merits review to ATSIC officers ('internal delegates') and outsourced decision makers ('external delegates') even where an avenue exists for internal merits review.

As a result of the amendment, while the avenues will still be available, a decision by a delegate to reject an application would not 'have to be reviewed by the Commission'. An applicant could simply 'appeal directly to the AAT', even in the case of a decision by an 'internal delegate', contrary to the Act's original intention.

It is recognised that this may be an unintended consequence, but it could be *perceived* as a lack confidence in ATSIC's ability to monitor the quality of its decision making processes. Moreover, given the fact that the similar provisions applying to the TSRA are untouched by the Bill, it could be interpreted *comparatively* as a sign of confidence in TSRA but not in ATSIC, at least in terms of internal review processes.

On both of these points, the *Explanatory Memorandum* does not assist.

## Savings

**Items 61, 74** and **77** are savings provisions relating to temporary appointments of Deputy Chairpersons or Directors; the office of the General Manager; and employees respectively. **Item 89** is a savings provision relating to delegations to staff.

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## Concluding Comments

### Commercial v Social Goals

#### What's in a Name?

Significantly, the Bill does not remove the CSO requirements from the ATSIIC Act. While the commentary surrounding the Bill clearly emphasises the need to delineate commercial and social considerations, there is little discussion of how this will be achieved except via the name change from CDC to IBA. Thus, the General Manager of the CDC stated of the proposed name change: '[w]e want to get away from the confusion as to whether we're a socially based organisation or whether we're a commercially based organisation, and we think the name change is critical to that'.<sup>41</sup> Similarly, in introducing the Bill, the Government has suggested that the establishment of a new organisation with a new name will 'provide an opportunity to re-focus business client expectations on commercial objectives' as opposed to the 'broad social and economic objectives of [ATSIIC]'.<sup>42</sup>

#### Funding?

As indicated, the *Removing the Welfare Shackles* alternatives involved increased funding.

One might reasonably expect an increase in the budget allocation to IBA and/or one off appropriations to IBA to increase its capital base to account for its CSO requirements. Alternatively, one might assume that ATSIIC will bear responsibility for the subsidies outlined in *Getting on with Business* and acknowledged in *Removing the Welfare Shackles*.

#### Outsourcing?

As indicated the *Getting on with Business* alternatives involved outsourcing to the private sector. While ATSIIC is permitted to pass powers and functions to agents and delegates and to outsource via contracts with the private sector, no such capacity exists in the IBA.

### Outsourcing and the Law

#### Outsourcing and Public Accountability

While it is only possible to hint at this argument, the question may be asked whether administrative law remedies ought to apply to decisions made by the delegate/contractor. In 1995 the Administrative Review Council (ARC) suggested that Government Business Enterprises 'should be exempt from the operation of Commonwealth administrative law statutes in relation to their commercial activities undertaken in a market where there is real competition'.<sup>43</sup> Since then there has been a partial break down in the public v private distinction, at least among academics, which has encouraged some commentators to question whether decisions and conduct outsourced to a private sector agency in a competitive market should be wholly or partially subject to administrative law remedies.<sup>44</sup>

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Thus, in 1998 the ARC took a substantially broader approach in considering the application of various administrative law statutes to such decisions and conduct.<sup>45</sup>

### Judicial Review

It is worth noting that the application of administrative law statutes to the models discussed above is complex. For example, in determining the application of judicial review to private sector decisions, one approach is to characterise the decision making power as either public or private in nature. If a power is clearly public, then, arguably, judicial review ought to apply. Aronson and Dyer suggest that 'privately sourced power' will only be 'public' if it is exercised 'in partnership with Government'.<sup>46</sup> This raises some questions regarding the nature of the decisions made under the models discussed above. Arguably, in the area of business lending and investment, decisions based on commercial objectives are 'private' whereas decisions based on social objectives are 'public'. As indicated, in *Removing the Welfare Shackles*, as in the Bill, commercial and social objectives are separated as far as practicable but all decisions are made by a single body. Thus, the separation of these objectives in the decision making process is unclear. By contrast, in *Getting on with Business* these objectives are considered by discrete bodies.

### Constitutional Limitations

It is also worth noting that, as the ARC itself acknowledged, the scope of constitutional power to apply public administrative law remedies to the private sector is unclear.<sup>47</sup> Thus, while the ARC recommended that '[a]ll aspects of the Commonwealth administrative law package should apply to Commonwealth decisions to provide funding or services to individuals', it only recommended a 'watching brief' on the public v private issue.<sup>48</sup>

## Endnotes

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- 1 No commencement date is specified. In such a case, an Act commences 28 days after it receives Royal Assent: see subsection 5(1A) of the *Acts Interpretation Act 1901*.
- 2 Minister for Aboriginal and Torres Strait Islander Affairs, *Removing the Welfare Shackles: A Discussion Paper on a Reform Initiative for Indigenous Economic Development*, March 1998.
- 3 Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 15.
- 4 Aboriginal and Torres Strait Islander Commission, *Getting on with Business: Pursuing a partnership with the private sector*, July 1998.
- 5 Aboriginal and Torres Strait Islander Commission, op cit, p. 18.
- 6 Ibid, p v.
- 7 Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 13.
- 8 Aboriginal and Torres Strait Islander Commission, op cit, p. 20.

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- 9 William Arthur, 'The Aboriginal and Torres Strait Islander Commercial Development Corporation: a new approach to enterprise?', *CAEPR Discussion Paper No. 113/1996*, Centre for Aboriginal Economic Policy Research, ANU, Canberra; Office of Evaluation and Audit (OEA) 1995. *Report of the Evaluation of the Operations of the Commercial Development Corporation*, OEA, Canberra.
- 10 Arthur, op cit, p. 16.
- 11 Ibid.
- 12 'There is a great deal of difference between removing a conflict between socially and commercially oriented programme goals and addressing conflicts between the objectives of commercially-oriented programmes and aspects of the social environment in which indigenous commercial ventures must operate': Aboriginal and Torres Strait Islander Commission, op cit, p. 17.
- 13 Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 15.
- 14 Aboriginal and Torres Strait Islander Commission, op cit, p. 10.
- 15 Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 17.
- 16 Ibid, p. 21.
- 17 'Arguably, some or all of the CSO imposts should be funded by budget appropriations so that the commercial earnings are utilised for meeting commercial operational costs and some re-investment for growth (or to retain real value) of the CDC's capital asset': Minister for Aboriginal and Torres Strait Islander Affairs, op cit, Appendix 1, p. 21.
- 18 Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 15.
- 19 Aboriginal and Torres Strait Islander Commission, op cit, p. 9.
- 20 Ibid.
- 21 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, [Inquiry into Indigenous Businesses: Terms of Reference](#).
- 22 William Arthur, 'What's new? The 1997 Parliamentary Inquiry into Indigenous Business', *CAEPR Discussion Paper No. 177/1999*, Centre for Aboriginal Economic Policy Research, ANU, Canberra.
- 23 Ibid, p. 7.
- 24 Ibid.
- 25 Ibid, p. 8.
- 26 Ibid, p. 8, citing the original work cited in *Removing the Welfare Shackles (Discussion Paper No. 133/1996)*.
- 27 Ibid, p. 11.
- 28 Mr Joseph Elu, Chairman, Commercial Development Corporation, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Committee Hansard*, 11 March 1998, ATSI/A p. 28.

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- 29 Ibid.
- 30 Ibid, p. 34.
- 31 Ibid, p. 28.
- 32 The discussion paper also noted that these changes would need to be supplemented by 'an assessment of resources needed to fulfill [sic.] the functions, and resource reallocation implications for existing organisations': Minister for Aboriginal and Torres Strait Islander Affairs, op cit, p. 5.
- 33 That is, the Aboriginal Benefits Reserve under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the Aboriginal and Torres Strait Islander Land Fund established as part of the Commonwealth Government response to the Mabo decision.
- 34 Minister for Aboriginal and Torres Strait Islander Affairs, ['Investing in the Future of Indigenous Australians'](#), *Media Release*, 28/11/00.
- 35 **Item 53** does make one substantive as indicated under the heading Option for Full Time Chairperson.
- 36 *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*, section 9.
- 37 Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1994, *Explanatory Memorandum*, p. 31.
- 38 The purpose of that corresponding provision was as described above: Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1994, *Explanatory Memorandum*, p. 14.
- 39 Both **proposed subsections** refer to paragraph 34AB(d) of the *Acts Interpretation Act 1901*.
- 40 Aboriginal and Torres Strait Islander Commission Bill 1989, *Explanatory Memorandum*, p. 113.
- 41 Ron Morony, General Manager of the CDC, quoted by Kirsten Lawson, 'Review of Aboriginal business programs', *The Canberra Times*, 30/11/00.
- 42 The Hon. Philip Ruddock, Aboriginal and Torres Strait Islander Commission Amendment Bill 2000, Second Reading Speech, House of Representatives, *Debates*, 29 November 2000, p. 22937.
- 43 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, February 1995.
- 44 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*, 2<sup>nd</sup> Edition, Law Book Company, Sydney, 2000, p. 150.
- 45 The ARC recommended that: Acts such as the *Freedom of Information Act 1982*, *Archives Act 1983* and *Privacy Act 1988* should apply to information held in relation to clients of outsourced government programs; there should be mechanisms to ensure accountability to the executive and parliament; the jurisdiction and powers of the ombudsman should extend to the service provider; there should be agreed limits to the application of commercial-in-confidence restrictions; there should be an equivalent application of judicial review (*Administrative Decisions (Judicial Review) Act 1977*) and merits review (*Administrative Appeals Tribunal*

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- Act 1975*); a requirement for the outsourcing agency maintaining connection with the client base to ensure effective monitoring and evaluation of the service provider: Administrative Review Council, *The Contracting Out of Government Services: Report to the Attorney-General*, Report No. 42, August 1998.
- 46 Aronson and Dyer, *op cit*, p. 100.
- 47 Administrative Review Council, *Administrative Review and Funding Programs (A case study of community services programs): Report to the Minister for Justice*, Report No. 37, July 1994, p. 71.
- 48 Administrative Review Council, *Administrative Review and Funding Programs (A case study of community services programs): Report to the Minister for Justice*, Report No. 37, July 1994, p. 71.

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