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# Corporations (Aboriginal and Torres Strait Islander) Bill 2005

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# Corporations (Aboriginal and Torres Strait Islander) Bill 2005

**Date Introduced:** 23 June 2005

**House:** House of Representatives

**Portfolio:** Immigration and Multicultural and Indigenous Affairs

**Commencement:** The Act if passed would commence on 1 July 2006

## Purpose

The *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* ('the Bill') replaces the *Aboriginal Councils and Associations Act 1976* ('ACA Act') and is intended to improve governance and capacity in the indigenous corporate sector. The ACA Act was deemed to be inadequate to deal with the numbers of indigenous corporations and their diversity, especially given developments in corporate regulation and native title. The Bill is meant to provide a comprehensive, stand-alone regime that aligns many provisions with the *Corporations Act 2001* ('Corporations Act'), but also provides for special measures for indigenous people.

The Bills Digest seeks to highlight:

- any significant differences between the Corporations Act and the Bill
- any significant differences between the ACA and the Bill
- the impact of the review recommendations not implemented, and
- the relationship of the restructure to Native Title legislation.

## Background

### Basis of policy commitment

About 2800 Aboriginal and Torres Strait Islander corporations ('ATSI corporations') are currently registered under the ACA Act.

When introducing the Bill, The Hon. Warren Entsch MP (Parliamentary Secretary to the Minister for Industry, Tourism and Resources) stated that whilst this Bill 'largely replicates modern standards of duties for officers, directors and employees that exist in the Corporations Act', it also acknowledges the special circumstances of indigenous corporations.[1]

These circumstances include 'remoteness, capacity, culture' and the need to meet the requirements of special statutory regimes such as those that apply to native title.

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An independent review of the ACA Act was commissioned by the Registrar in 2001. The review was led by law firm Corrs Chambers Westgarth and team members included specialists Senatore Brennan Rashid, Professor Mick Dodson, Christos Mantziaris and Anthropos Consulting. The final report of the review was presented in December 2002.

The Bill generally reflects the recommendations of the review with several notable exceptions relating to:

- Membership not restricted to indigenous people and their dependants
- Corporate members allowed
- Registrar's power to appoint an administrator not scrapped, and
- Registrar still able to approve the constitution of proposed corporations.

The Corporations Act provisions which are imported into the Bill relate to directors' duties, external administration, the examination of the affairs of connected entities and technical matters such as the jurisdiction of courts and offences.

The terms of the Bill are subject to an inquiry by the Senate Legal and Constitutional Committee. It was referred by the Senate on 6 September 2005 for inquiry and report by 12 October 2005. On 11 October 2005 the Committee agreed to extend the reporting date to the first sitting day in 2006. On 8 December 2005, the Committee agreed to seek leave to further extend the reporting date to 30 March 2006.

The proposed extension of the reporting date to 30 March 2006 is intended to allow the Bill to be considered in conjunction with the *Corporations (Aboriginal and Torres Strait Islander) Miscellaneous and Transitionals Bill* (the Transitional Bill). An exposure draft of the Transitional Bill is expected to be publicly available by the beginning of March 2006.

## History of the Bill

The current Bill represents the culmination of a long process of review and consultation which began in the late 1960s about how indigenous corporate governance should be managed.

The need for a simple, inexpensive, culturally appropriate method for the legal recognition of Indigenous groups and communities and their decisions was identified in the late 1960s by the Council for Aboriginal Affairs which had been established by the Holt Government. In 1971 the Gibb Committee, in their report on the situation of Aboriginals on pastoral leases in the Northern Territory, recommended that special legislation be passed for the incorporation of Aboriginal communities. Prime Minister McMahon announced in January 1972 that the Federal Government proposed 'to investigate ways of finding a simple flexible form of incorporation of Aboriginal communities'[2]

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The issue was raised again in 1973 by Justice Woodward when making recommendations to the Whitlam Government on the subject of land rights policy. In his First Report (July 1993) and Second Report (April 1974) Mr Justice Woodward pointed to the need for special system of incorporation for Aboriginal groups. In his Second Report he set out the following 'important principles to be observed in formulating legislation for Aboriginal corporations':

> (a) the legislation must be simple, so that those who are working under it can readily understand it;
>
> (b) it must be flexible, so as to cover as wide a range of situations and requirements as possible;
>
> (c) it should, as far as possible, make provision for Aboriginal methods of decision-making by achieving consensus rather than by majority vote;
>
> (d) it must contain simple provisions for control of the situation if things go wrong within an organisation through corruption, inefficiency, outside influences or for other reasons; and
>
> (e) it should be so framed as to avoid taxation of any income that has to be devoted to community purposes[3]

A bill was introduced into the Federal Parliament in the latter half of 1975 but lapsed as a result of the double dissolution of Parliament in November 1975. The new parliament passed the Bill the next year – with the Minister for Aboriginal Affairs, the Hon. Ian Viner MP, stressing who the legislation would eliminate the need for communities to work through the complexities of State and Territory legislation. The Minister also made it clear that the new incorporation procedure would help Aboriginal bodies form an acceptable legal personality for the purpose of receiving Government grants.

The *Aboriginal Councils and Associations Act* (ACA) was assented to on 15 December 1976. It came into operation on 14 July 1978 following amendments assented to on 22 June 1978.

In 1989 Graham Neate examined the working of the ACA Act and the Registrar's Office and made some recommendations in his *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976*.

In 1992, in response to the Graham Neate's review and recommendations the Government made changes to the ACA Act in the *Aboriginal Councils and Associations Amendment Act 1992*. The changes were designed to tighten the regime of Indigenous incorporation with the aim of increasing accountability.

In 1994 the Government, as a second stage in their response to the Neate Report, tabled further amendments which would have established a new Australian Indigenous Corporations Commission which could prosecute people for contravening the Act and other laws relating to fraud and dishonesty. The Aboriginal and Torres Strait Islander Commissioners ('ATSIC')

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asked the Minister not to go ahead with these amendments and asked for a review instead. Consultation with Indigenous bodies had indeed revealed concerns over the proposed amendments and discontent with the operations of the Act in general.

In October 1995 the Minister for Aboriginal and Torres Strait Islander Affairs, The Hon. Robert Tickner, announced he was commissioning the Australian Institute of Aboriginal and Torres Strait Islander Studies to conduct a review of the Act (the web-site of the Office of the Registrar of Aboriginal Corporations ('ORAC') says it was ATSIC that did the commissioning). The review team was to be headed by Dr Jim Fingleton.

In 1996 Dr Fingleton produced the Final Report Review of the Aboriginal Councils and Associations Act 1976. He concluded:

> …the *Aboriginal Councils and Associations Act 1976* is too prescriptive to allow bodies to incorporate in a culturally appropriate way — in particular with respect to the key matters of a group's structure and decision making processes. Much of the Act's present inflexibility can be attributed to requirements aimed at making groups more accountable, but indigenous groups are usually faced with a range of different accountability requirements, not all necessarily compatible with each other. The approach currently taken under the Act confuses financial and procedural accountability with the achievement of program objectives, and this has led to undue emphasis on the enforcement of compliance with statutory requirements. Outcomes in delivery of essential services have not been improved under this approach, often leading to the 'proliferation' phenomenon, where communities respond to poor service delivery by setting up new corporations.

Fingleton's report made many other legislative and administrative recommendations, but no changes were made to the ACA Act or the basic administrative arrangements as a result of the Fingleton Report.

In November 2000 the Acting Registrar commissioned an internal review of the Act to:

> determine its capacity to meet the contemporary corporate governance needs of Aboriginal and Torres Strait Islander people; and
>
> identify areas for possible legislative reform and possible changes to the regulations to more adequately met these corporate governance needs.

In January 2002 the Review Team issued a Summary Consultation Paper and The full Consultation Paper outlining the major issues, suggesting changes to the Act and offering examples of possible new structural models. The Final Report and Recommendations was released in December 2002.

Following the tabling of the above report a process of drafting reforms to the Act began.

On 15 January 2003 Minister Vanstone announced in a media release:

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> The Government intends to introduce legislation to reform the ACA Act to improve the effectiveness of Indigenous organisations for the benefit of their communities.
>
> The legislation will reform the incorporation and supervisory powers of the Registrar of Aboriginal Corporations to ensure better governance and transparency.
>
> The proposed reforms have been developed after extensive consultations with people involved in running Indigenous corporations.
>
> The need for reform is clear. The ACA Act was enacted more than 25 years ago as a method of incorporating mostly not for profit Indigenous organisations. However, it has failed to keep pace with subsequent developments in company law and accountability requirements given the size and numbers of Indigenous corporations today.
>
> The reforms will deliver:
>
> Rationalisation of the number of corporations through a focus on pre-incorporation scrutiny and support for alternatives to incorporation;
>
> Conferencing opportunities to encourage agencies to resolve co-ordination issues;
>
> Accredited training for Directors of Corporations and members;
>
> Expanded dispute assistance in the form of an improved members' complaints service, information and opinion service and supported referrals for mediation;
>
> Improvements to existing information about Indigenous corporations and their 'health' to support better regulation, and also assist members and funding bodies; and
>
> A rolling program of 'healthy corporation' checks tailored to Indigenous corporations, coupled with more streamlined responses to critical problems, in order to fully protect critical assets and funds held by corporations.

On a web page of the Office of the Registrar of Aboriginal Corporations ('ORAC' or the 'Registrar') last updated 15 March 2005, there is a Summary of Proposed Reforms.

In response to the question, 'Why reform the Act' the ORAC web-site reports the following at http://www.orac.gov.au/about_orac/legislation/reform_act.aspx :

> The reforms aim to promote good governance and management, and create opportunities for innovation and best practice to occur within Indigenous corporations. Important changes to the ACA Act will allow for modernised corporate governance practices and accountability standards, improve security for funding bodies, creditors and other parties doing business with Indigenous corporations, as well as provide flexibility for groups and communities to design the corporation's constitution.

The ORAC web-site also reports the following:

> 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. The review also concluded that the ACA Act was out-of-date and suffered from a large number of technical shortcomings to the point that the ACA Act itself had become a source of disadvantage for Indigenous people.

## Main Provisions

### Preamble

The preamble states that the law is intended to be a 'special law for the descendants of the original inhabitants of Australia'. This means it is enacted under the race power sections 51(xxvi) of the Constitution. The law is not settled on whether the race power has to be used beneficially.[4]

The law is also intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders under paragraph 4 of Article 1 of the *Convention for the Elimination of Racial Discrimination* ('CERD') and the *Racial Discrimination Act 1975* ('RDA'), which is the formulation required to bring the provisions under the external affairs power of the Constitution (section 51(xxix). To qualify as a 'special measure', however, the High Court found in *Gerhardy v Brown* that the legislative provisions must 'confer a benefit' on and 'secure adequate advancement' of the people to whom the special measures are directed and, in determining whether they do this, 'the wishes of the beneficiaries ..... are of great importance (perhaps essential)'.[5]

The Bill does not rely on the corporations head of power in the Constitution.

### Chapter 1 Introduction

Chapter 1 provides an overview of the Act for easy reference.

**Clause 1-25** – sets out the objects of the Act.

**Clause 1-30** – creates the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (the 'Registrar') within the Department administering the Act.

**Clause1-35** – notes that interpretative provisions are contained in Chapter 17.

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**Part 1.2** – provides an overview of the Act.

## Chapter 2 ATSI Corporations

**Chapter 2** deals with what an ATSI corporation is, the registration procedure and its effects, and decisions on applications to register. In particular it distinguishes between the new categories of a small, medium and large corporation.

### Registration Requirements

The procedural and documentary requirements for registration are mandatory and more onerous than under the ACA Act. The clear intent is to ensure that persons involved in the corporation, as under the Corporations Act, are willing participants who have given informed consent and are aware of their obligations. In enacting the principles of good corporate governance, much of the simplicity of the current registration procedures has been put aside.

**Clause 21-1** covers the specific registration requirements. In contrast to the ACA Act, there are mandatory requirements relating to the provision of:

- directors' details including all former given and family names and a written declaration from that person that s/he is eligible to be a director of a ATSI corporation (**clause 21-1(3)**)
- copies of written consents by all persons listed as members, directors, the contact person, and secretary (**clause 21-5**).

**Clause 21-10** gives the Registrar the right to seek other information which, if not forthcoming, may mean the application is treated as withdrawn.

**Clause 26-1** provides that an application for registration may be successful if the basic requirements for registration are met, and the Registrar is satisfied that it is more appropriate that the corporation be registered under this Bill than the Corporations Act, and that registration will not be contrary to the public interest. Registration may be more appropriate under the Corporations Act:

> …where a proposed corporation would operate as a very large trading corporation with complex subsidiary arrangements…[6]

Apart from providing the necessary documentation, **Division 29** sets out the basic requirements for registration:

- a minimum number of members set at five unless otherwise exempted by the Registrar (see **Chapter 3**, **clause 77-5**);
- the required percentage of Indigeneity to ensure a majority (**clause 29-5**); and

- members to be at least 15 years of age (**clause 29-10**); and
- compliance with the pre-incorporation requirements (**clause 29-15**) and internal governance rules (**clause 29-20**).

### Minimum age of members

This minimum age was chosen, according to the *Explanatory Memorandum*, for several reasons:

> Given that young people are a significant and growing demographic component of the Aboriginal and Torres Strait Islander population, this allows for membership of younger persons to support earlier access to participation in corporations, and leadership opportunities. The age of 15 was determined because this is when people are eligible to participate in the Community Development Employment Projects (CDEP) program, one of the Commonwealth's major funded programs for Indigenous people. In addition, corporations providing CDEP services form a significant class of current ACA Act corporations.[7]

While this may be the case, it is unclear whether these young people will be given adequate support in understanding their role as members, a role which may bring a range of obligations including liability for debts and liabilities of the corporation (see **Division 147**). Notably, there is provision in the Bill for corporations to provide that members be older than 15 years and also that the Registrar provide appropriate education and training (see Chapter 16, although there is no special mention of training or guidance for minors) In contrast, the Corporations Act does not set an age limit for members.

**Clause 29-15** details the pre-incorporation requirements which require that 75% of members must approve the application, the proposed constitution, the internal governance rules, the directors and secretary. In addition:

- the internal governance rules must meet the standards set out in **clause 66-1 (clause 29-20(1))**
- the constitution must be lodged with the Registrar before a decision on registration is made (**clause 29-20(2)**); and
- the name of the corporation must comply with **clause 85-1** (**clause 29-25**).

**Clause 26-5** gives leeway to the Registrar to register a corporation if the application is incomplete or contains errors.

**Clause 26-10(1)** provides that registration may also be approved even if the Registrar is not satisfied that the corporation has the minimum number of members, or not met the age or pre-incorporation requirements. This is despite the *Explanatory Memorandum's* commentary that the pre-incorporation requirement is meant to ensure 'readiness' for incorporation in order to avoid problems that:

> …can lead to corporate failure and communities at risk of being left without essential services.[8]

Presumably if the Registrar is not satisfied that the application suggests 'readiness', the Registrar can seek further information under **clause 21-10** as noted above.

**Clause 26-10(2),** in contrast, requires strict compliance with:

- the internal governance rules;
- name requirements; and
- most importantly, Indigeneity, as:

> Without the Indigeneity requirement, the Bill may not fulfil the requirement to come within the constitutional head of power.[9]

**Clause 32-5** provides that an unsuccessful applicant will be notified in writing and invited to make the necessary amendments to ensure registration.

### Small, medium or large corporation

Under **Clause 21-1(e),** an application must state whether it is expected that the corporation will be a small, medium or large corporation but it is the Registrar who will make the final determination as to size at the time of registration (**clause 37-1**) or thereafter (**clause 37-5**). The classification determines the corporation's reporting requirements and whether it must have a registered office and secretary: see Note to **clause 37-1(1).**

The *Explanatory Memorandum* details the background to this new set of criteria:

> This is consistent with recommendations of the review which highlighted the importance of reporting requirements better targeted to the corporation's circumstances, particularly size. The review used the following example: a small, passive land-holding body undertaking little or no activity is unlikely to have the capacity or the need to meet complex reporting requirements; however, a large, well funded corporation should be able to recruit appropriate qualified personnel to enable it to deal with more comprehensive reporting requirements. The Bill provides for corporations to be 'streamed' as small, medium or large. This is similar to provisions in the Corporations Act that allow for small and large proprietary companies to have differential reporting requirements.[10]

The criteria for each size is based on income, assets and the number of employees of the corporation and any entities it controls, all of which will be prescribed in the Regulations (**clause 37-10**). Notably, under **clause 37-10(4)**, native title rights and interests held by a registered native title body corporate are to be disregarded in determining the value of its assets. The *Explanatory Memorandum* states:

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> This section is designed to remove uncertainty as at the present time, there is no clear process for determining the value of native title rights and interests.[11]

It also avoids:

> …any possibility that a corporation only holding or managing native title rights and interests might be determined as large for reporting purposes.[12]

**Clause 37-5(5)** requires the Registrar to notify a corporation if its classification changes. There is provision in the Act, under **Chapter 15**, **Division 617,** for review of classification decisions by the Registrar and after such internal review, external review by the Administrative Appeals Tribunal.

**Part 2-5** covers the effects of registration. Once registered, those who have consented to be members and act as a director, secretary or contact person, take on those official roles (**Clause 42-10(1)**).

Where an application does not specify a contact person or the nominated person has not consented, specific provision is made for the applicant to become the contact person. (**Clause 42-10(2) and (3)).** According to the *Explanatory Memorandum*, these new sections have been introduced 'to overcome what has been a significant problem of non-compliance under the ACA Act where there is no contact person named in the application, and the corporation does not notify of a contact person at a later date.'[13]

## Chapter 3 Basic features of an ATSI corporation

**Clauses 60-1 and 60-5** provide for a system of replaceable rules. This is consistent with the Corporations Act, but an ATSI corporation must also have a constitution in English which must, at a minimum, contain the objects and name of the corporation and a dispute resolution process **(clause 66-1).** The corporation may include other matters in its constitution, including any replaceable rules which it has modified or replaced. The constitution must be lodged with the Registrar **(clause 69-1).**

**Clause 63-1** sets out the internal governance rule requirements an ATSI must follow – a conforming Constitution, replaceable rules and any other rules dealing with internal governance in the constitution.

The *Explanatory Memorandum* states:

> While the Corporations Act does not require a corporation to have a constitution, the Bill requires all corporations to have a constitution written in English because it has proven to be a critical tool in supporting transparent governance practices in corporations and providing clear guidance to the corporation and its members on the rules by which the corporation must operate. As the constitution has legal force as a contract it is a requirement for the constitution to be written in English to support

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> legal certainty. Consistent with the ACA Act, the Bill will provide that the corporation will be required to lodge the constitution with the Registrar, resulting in the constitution being a public document. This will allow funding bodies and other stakeholders access to the constitution, and supports transparency in internal governance.[14]

**Clause 69-5** provides an overview of how a registered constitution may be changed, by the corporation itself (which must then be lodged with the Registrar), a court, the Registrar or a special administrator. **Clause 69-35** provides that the Registrar may change an ATSI corporation constitution on its own initiative if an ATSI corporation is not meeting internal governance requirements or is engaging in oppressive conduct. This represents a key difference to the ACA Act. The *Explanatory Memorandum* states:

> Many corporations experience difficulty in holding meetings, getting sufficient attendance to meet quorum requirements, and therefore to make changes to their constitution.[15]

The 2002 Review recommended that the Registrar should no longer play a role in approving the constitution of proposed corporations to ensure that a flexible approach is taken to them. In particular, the review criticised the requirements in the ACA Act that rules must not be 'unreasonable or inequitable' and must make sufficient provision to give members effective control over the running of the corporation.[16]

In response, ORAC states:

> The Bill requires the Registrar to approve a corporation's rules to ensure that there is defined and determined set of rules that apply to a corporation.
>
> …The Register is very important since records keeping can be difficult for many corporations.
>
> Domestic and international research, such as the Harvard Project on American Indian Economic Development from Harvard University, shows that corporations that are designed to suit the particular circumstances of their members and communities, and that reflect local processes and decision-making, have a greater chance of success.[17]

**Part 3.3** deals with minimum numbers of members. **Clause 77-5** provides an ATSI corporation must have a minimum of 5 members subject to Registrar exemptions. The ACA Act requires that corporations have a minimum number of 25 members other than corporations established to hold land or to operate as businesses.[18] Notably **clause 29-10** sets out that a corporation meets the age of member requirement if each member of the corporation is at least 15 years of age. In contrast, the ACA Act restricts membership to persons over the age of 18 (note 'Minimum age of members' above).

**Part 3.4** deals with names and name changes of an ATSI corporation, which must specifically identify itself as such.

**Clause 96.1** sets out the legal capacities and powers of an ATSI corporation, mirroring sections 124, 126 and 127 of the Corporations Act.

**Clause 104-1** deals with assumptions third parties are entitled to make when dealing with an ATSI corporation, mirroring sections 128 and 129 of the Corporations Act.

**Clause 115-5** provides for a document access address, rather than a registered office, for small and medium corporations that may not have the resources to maintain a registered office. A large ATSI corporation is required to have a registered office, which is based on section 142 of the Corporations Act (**clause 112-5)**.

## Chapter 4 Members and Observers

This chapter deals with membership and observer eligibility. An ORAC fact sheet notes that there are significant differences between membership of an ATSI corporation and a corporation governed by the Corporations Act.[19] For example, some types of companies, a member may have a proprietary interest associated with being a member, that is, ownership of shares in the company. Members of an ATSI corporation will not have any proprietary interest in their corporation and are not shareholders. ATSI corporations will be similar to public companies limited by guarantee where the liability of members is limited to an agreed amount.[20]

Corporations will be able to distribute profits to members if permitted by the corporate constitution.

A member will normally be an Indigenous person aged over 15 (**clause 141-20**). The corporation may impose other restrictions on membership - e.g. being part of a particular Indigenous group.

Under proposed **clause 158-5**, an ATSI corporation can also have observers (akin to associate members in the ACA and Corporations Act).

### Effective Control

An important change is that under the Bill the Registrar no longer has the ability to refuse incorporation if the constitution does not allow members to have effective control of the corporation. The *Explanatory Memorandum* states the rationale for changes to the 'effective control' principle to be:

> The ACA Act provides very few bases on which members can protect their rights. One provision the ACA Act relies on is the principle of effective control by the members in general meetings. This requires the Registrar to refuse incorporation if satisfied that the constitution is unreasonable or inequitable or does not allow the members effective control in running the association. This provision has been

> problematic as it is unclear what effective control means and is not an obvious indicator of good governance for Aboriginal and Torres Strait Islander corporations. It also does not provide adequate protection of members' rights in all circumstances. Members' remedies under this Bill are therefore brought into line with the more extensive statutory provisions available under the Corporations Act.[21]

### Non-Indigenous Members

The 2002 review recommended that membership should be limited to Indigenous people and their dependants. This recommendation is not implemented in the Bill. Instead, a majority of members (and directors) must be Indigenous under the Bill (**clause 29-5**) but non-indigenous members are allowed as a minority. This is because the definition of an ATSI person in the Dictionary (**clause 700-1**) includes a 'body corporate prescribed by name in regulations'. Proposed clause **150-30** sets out how membership can be cancelled if a member is not an ATSI person if they were elected as such.

The Government explained why the recommendation was not adopted in the following manner:

> Permitting non-Indigenous membership improves flexibility for corporations which is often important to ensure that services can be provided to non-Indigenous people such as spouses and adopted and step children. In some places Indigenous corporations are the only providers of essential services so it also allows non-Indigenous residents who maybe served by the corporation to become members if the constitution allows it.[22]

### Corporate Members

The review also recommended not allowing corporate members, which was not incorporated into the Bill:

> ORAC has considered the issue further and concluded that maximising flexibility and providing Indigenous people with the key facilities of a modern incorporation statue was more important than the issues identified by the review.[23]

## Chapter 5 Meetings

**Chapter 5** of the Bill sets out the regime for meetings in ATSI corporations. Some of the rules relating to meetings are replaceable rules – they may be replaced by the corporation's constitution, whilst others cannot be replaced. Rules which can be replaced will have noted in their headings in the Bill that they are 'replaceable rules'.

**Clause 201-5** provides that directors must call and arrange to hold a general meeting where such a meeting is requested by 5 members or 10% of members (whichever number is the greatest).

**Clause 201-10** allows directors to apply to the Registrar for permission to deny a request for a meeting under clause 201-5 where the directors resolve that the request is frivolous or that it would not be in the interests of the members as a whole.

**Clause 201-40** provides that 5 members, or 10% of the members of a corporation (whichever is the greater) may move a motion at a general meeting.

**Clause 201-65** provides that a general meeting may be held at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. This provision stems from a recommendation by the Review. It takes account of the remoteness of many Aboriginal corporation members.

**Clause 201-145** requires that a general meeting be held within 3 months after a corporation is registered.

**Clause 201-150** of the Bill expressly requires the holding of an annual general meeting within 5 months of the end of a corporation's financial year. This accords with the recommendation of the Review to clarify a requirement for an annual meeting, such a requirement being not clear in the ACA Act. The time to hold an AGM can be extended on application to the Registrar: **Clause 201-155**.

**Clause 204-1** provides that some resolutions can be passed without a general meeting being held where all members sign a document stating that they are in favour of the motion put.

**Clause 212-1** provides that the Constitution of a corporation must specify how often directors' meetings are to be held.

**Part 5-4** provides for the keeping of minutes. A corporation is required to keep minutes of its general meetings and directors' meetings and the passing of any resolutions without a meeting.

**Part 5-5** provides for exemptions from the operation of **Chapter 5**. The Registrar may, on application or of his or her own motion, exempt a corporation from the operation of the chapter, or from particular provisions of it. Before making an exemption determination the Registrar must be satisfied of either of the criteria listed in **clause 225-20.** Specifically, the Registrar must be satisfied that the provisions of the Chapter would:

(a) be inappropriate in the circumstances, or

(b) impose unreasonable burdens.

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## Chapter 6 Officers

This chapter draws heavily on provisions of the Corporations Act.

**Clause 246-5** provides that a majority of directors of an ATSI corporation must:

- be Aboriginal and Torres Strait Islander persons
- ordinarily reside in Australia
- be members of the corporation,
- not be employees of the corporation.

**Division 249** provides for resignation, retirement or removal of directors. **Clause 249-10** provides that a corporation may, by resolution in general meeting, remove a director from office (despite any agreement or provision of the corporation's constitution to the contrary).

**Clause 249-10** provides that directors may remove a director, but only where the director has failed without reasonable excuse to attend 3 or more consecutive meetings.

**Division 252** provides for remuneration of directors. The basic rule, under **clause 252-1**, is that, unless the constitution of a corporation provides otherwise, the directors are not to be paid remuneration.

**Clause 252-5** provides for disclosure of directors' remuneration. Where 5 members, or 10% of members of the corporation (whichever is the greater), require disclosure, a corporation must disclose remuneration and expenses paid to each director.

**Part 6-3** provides for the appointment of secretaries and contact persons. An Aboriginal corporation that is registered as a large corporation must have at least one secretary (**clause 257-5(1)**). An Aboriginal corporation that is registered as a small or medium corporation must have a contact person (**clause 257-2(2)**).

**Clause 257-20** provides that secretaries or contact persons are to be appointed by the directors.

**Part 6-4** provides for the duties and powers of directors and other officers and employees of corporations. As well as outlining directors' duties and powers, this part provides for a number of civil and criminal consequences where directors fail to comply with those provisions.

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### Civil obligations

**Subclause 265-1(1)** provides that directors or other officers must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if that reasonable person:

(a) were a director or officer of an Aboriginal and Torres Strait Islander corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

The main issue relating to this, according to the Review, was whether the Courts should be able to adjust the standard of care to take into account the cross-cultural problems and the disadvantages in terms of education, skill and experience which may be faced by Indigenous officers. Arguments to this effect had previously been considered by Christos Mantziaris (a member of the Review team) and David Martin in their book *Native Title Corporations: a legal and anthropological analysis*. The authors there speculated that it might be argued that, in legislating for duties of indigenous directors, the following factors should be taken into account:

- poor standards of education within Australian Indigenous society
- poor opportunities for the development of managerial skills and poor understanding of financial concepts
- that election to the board may reflect the judgment by the corporate membership as to the director's authority and position within the Indigenous polity rather than a judgement about the person's ability to perform the duties of the position
- that in corporations serving the needs of Indigenous groups dispersed in a wide geographical region, the ability of directors to convene board meetings and exercise oversight of the affairs of the corporation may be more limited, and
- that the corporation has been formed in response to the requirements of the *Native Title Act 1993* or funding body policy rather than on a truly voluntary basis, so that board members may have accepted appointments under conditions where to refuse would have occasioned hardship for the Indigenous group served by the corporation.[24]

The authors note, however, that such arguments have not been accepted in relation to 'passive' directors (such as spouses of business people who are made directors of family companies) or 'honorary' directors of non-profit organisations. The Review team took the view that the potential disadvantage of lowering the standard of the duty of care (by taking account of Indigenous issues) outweighed the benefits. The Review team suggested that a compromise could be to include a business judgement rule and this suggestion has been followed in the Bill.

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**Subclause 265-1(2)** applies the 'business judgement rule' to subclause (1), which has the result that subclause (1) is taken to be complied with if the director or officer makes a business judgement in good faith for a proper purpose, without having a 'material personal interest' in the outcome, is adequately informed and rationally believes the judgement to be in the best interests of the corporation.

**Clause 265-5** imposes a duty on directors or other officers to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

**Clause 265-10** imposes a prohibition on directors, other officers and employees of corporations improperly using their position to gain an advantage for themselves or to cause detriment to the corporation.

**Clause 215-15** prohibits directors, officers or employees who obtain information in that capacity, from using the information to gain an advantage for themselves or to cause detriment to the corporation.

Acts by directors, officers or employees, done in good faith and in the belief that doing or refraining to do the act is necessary to ensure that the corporation complies with a Native Title legislation obligation, do not contravene clauses 265-1, 265-5(1), 265-10(1) or 265-15(1), nor do they breach a person's equivalent duties at common law or in equity (**clause 265-20**).

### Criminal offences

**Subclause 265-25(1)** makes it an offence for a director or other officer to, recklessly, or intentionally dishonestly, fail to exercise their powers in good faith in the best interests of the corporation; or for a proper purpose. The penalty for breach of this provision is a fine of up to $2000 or imprisonment for up to 5 years, or both.

**Subclause 265-25(2)** applies the exemption for offences against 265-25(1) where the act or omission was done in good faith believing it necessary for compliance with Native Title legislation.

**Subclause 265-25(3)** makes it an offence for a director, officer or employee to use their position dishonestly with the intention of directly or indirectly gaining an advantage for themselves or someone else, or of causing detriment to the corporation (or recklessly as to whether such advantage might be gained, or such detriment caused). The penalty for breach of this provision is a fine of up to $2000 or imprisonment up to 5 years, or both.

**Subclause 265-25(4)** makes it an offence for a director, officer or employee to dishonestly use information obtained in that capacity with the intention of directly or indirectly gaining an advantage for themselves or someone else, or of causing detriment to the corporation (or recklessly as to whether such advantage might be gained, or such

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detriment caused). The penalty for breach of this provision is a fine of up to $2000 or imprisonment up to 5 years, or both.

### Other provisions

**Clause 265-35** provides that directors of wholly owned subsidiaries of bodies corporate are taken to act in good faith in the best interests of the subsidiary if the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding body corporate, and the director so acts, provided that the subsidiary is not insolvent at the time and does not become insolvent because of the act.

**Clause 265-45** provides that, where the reasonableness of a director's reliance on information, professional or expert advice arises in proceedings brought to determine whether a director has performed a duty, the director's reliance is taken to be reasonable if made in good faith and after making an independent assessment of the information or advice.

**Clause 265-50** makes directors liable for actions of their delegates (see clause 274-10) except where they believed on reasonable grounds that the delegate was reasonable and competent and would exercise the power in conformity with the Act and the corporation's constitution.

### Disclosure

**Clause 268-1** provides that directors who have a material interest in a matter relating to the affairs of the corporation must give the other directors notice of the interest unless an exemption applies. Failure to do so attracts a fine of up to 10 penalty units, 3 months imprisonment, or both. **Subclause 268-1(3)** and **clause 268-5** specify circumstances in which notice of an interest is not required to be given.

**Clause 268-20** prohibits a director who has a material interest in a matter that is being considered at a directors' meeting from being present at the meeting or voting on the matter. Breach of the provision attracts a fine of up to 5 penalty units. Clause 268-20 does not apply if the other directors have resolved to allow the relevant director to be present and vote, or if the Registrar has made a declaration under **clause 268-25** entitling the director to vote.

### Trust liabilities

**Clause 271-1** enacts the equivalent of section 197 of the Corporations Act. That section has been recently amended as a result of the decision in *Hanel v O'Neill* [2003] SASC 409. For an explanation of the operation of section 197 see Jerome Davidson, 'Corporations Amendment Bill (No. 1) 2005', *Bills Digest*, No. 189, Parliamentary Library, Canberra, 2004-05.

### Disqualification

**Clause 279-1** makes it an offence for a person who is disqualified from managing an ATSI Corporation, to participate in the making of decisions that affect the business of a corporation; exercise the capacity to significantly affect a corporation's financial standing or to instruct directors knowing that they are accustomed to act in accordance with those instructions or intending that they will do so. Contravention of the section attracts a fine of up to 50 penalty units or 12 months imprisonment or both.

**Subclause 279-1(3)** provides an exception to the offence in subclause (1) where an act is done or not done in good faith with the belief that it is necessary to comply with Native Title legislation.

**Subclause 279-1(4)** provides a defence where a person has permission to manage the corporation under 279-30 or 279-35 (granted by the Registrar or the Court respectively) and acts within the terms of that permission.

Under the ACA Act, a person is disqualified from holding office as a member of the governing committee of an incorporated Aboriginal association where they had been convicted and sentenced:

> (a) if the offence involved fraud or misappropriation of funds— to imprisonment for 3 months or longer; or
>
> (b) in any other case—to imprisonment for one year or longer.[25]

The disqualification does not apply if 5 years have passed since the date of conviction and the person is not in prison. The Review team recommended that the disqualification provisions in the ACA be replaced with the equivalent of Part 2D.6 of the Corporations Act. That recommendation has been followed in the Bill. It should be noted that the result is to make the disqualification provisions substantially harsher than those under the ACA Act.

**Clause 279-5** provides for automatic disqualification. Disqualifying criteria include convictions (on indictment) for offences that:

- concern the making of decisions that affect the business of a corporation; or
- concern an act that has the capacity to significantly affect the financial standing of a corporation; or,
- convictions (on indictment or otherwise) that:
  - contravene this Act (Bill) and are punishable by imprisonment for a period of greater than 12 months;
  - involve dishonesty and are punishable by imprisonment for at least 3 months; or

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- convictions against the law of a foreign country that are punishable for a period of imprisonment greater than 12 months.

The result of including as a disqualifying criterion, conviction of offences punishable by imprisonment for 3 months is that convictions for quite minor offences will give rise to an automatic 5 year disqualification. Whether this is appropriate in light of the fact, frequently noted by the Review team, that Indigenous persons' arrest and imprisonment rates are significantly higher than others, is a matter for debate.[26]

The attachment of the disqualification criterion to offences punishable by a given sentence, rather than, for instance, by reference to serving or having served a sentence of a given length, as well as making the criterion harsher, also poses administrative problems. This is because, rather than simply having to determine whether a person has served or been sentenced to a given period of imprisonment, the administrator must make an inquiry as to the applicable maximum sentence in respect of particular offences. This may not be straightforward – especially in cases of overseas convictions. Similar problems have influenced the change of criterion for disqualification of prisoners from voting to one based on sentence served, rather than on potential sentences.[27]

The period of automatic disqualification runs, in the case of someone whose conviction does not result in imprisonment, for five years from the date of conviction. Where a sentence of imprisonment is served as a result of the conviction, the period is 5 years from the time the person is released from prison.

Also disqualified are persons who are undischarged bankrupts, and persons who have executed personal insolvency agreements under the *Bankruptcy Act 1966* or similar laws and not fully complied with the terms of the agreement.

Disqualification under the Corporations Act also has the effect of disqualifying a person from managing an ATSI corporation.

Disqualifications can be extended by up to 15 years by the Court on the application of the Registrar: **Clause 279-10**.

The Court may, on application by the Registrar, disqualify a person from managing an ATSI corporation where that person has contravened a civil penalty provision of this Act (Bill) or of the Corporations Act: **Clause 279-15**.

The Court may also disqualify, for up to 20 years, where a person has, within the last 7 years, been an officer of two or more corporations (either ATSI corporations or Corporations Act corporations) which have failed in circumstances specified in subclause 279-20(2), and the Court is satisfied that the management was wholly or partly responsible for the failure of the corporation: **clause 279-20**.

Repeated contraventions of this Act (Bill) or the Corporations Act can also give rise to disqualification by the Court, on application of the Registrar: **Clause 279-25**.

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The Registrar has power to disqualify for up to 5 years in the circumstances outlined in **clause 279-30**.

Under **clause 279-35**, the Court has power to grant leave to a disqualified person to manage an ATSI corporation, but not if the person was disqualified by the Registrar under clause 279-30 or 279-5(5), by reason of ASIC having disqualified the person from managing a corporation under section 206F of the Corporations Act.

### Related party benefits

**Part 6-6** contains a regime for related party benefits that is closely modelled on equivalent provisions in the Corporations Act. **Clause 284-1** provides that the approval of the corporation's members is required before the corporation gives a financial benefit to a related party. What constitutes a 'related party' is described in **clause 293-1**. Included are:

- entities that control an ATSI corporation (ie are related parties of that corporation)
- directors of the corporation and their spouses
- directors of entities that control the corporation
- relatives and children of the above

The giving of a financial benefit is given a broad meaning under clause 293-5. Examples are given in subclause 293-5(3):

- giving or providing the related party finance or property;
- buying an asset from or selling an asset to the related party;
- leasing an asset from or to the related party;
- supplying services to or receiving services from the related party;
- issuing securities or granting an option to the related party;
- taking up or releasing an obligation of the related party.

There are a number of complex steps that a corporation is required to comply with in obtaining member approval. These provisions are modelled on equivalent provisions in the Corporations Act which apply only to public companies. It can be assumed that the resources of the latter – in terms of their ability to engage professionals to assist them in compliance – generally would outweigh those available to indigenous corporations. Though recommending the issue of related party transactions be addressed, the Review team noted that 'the provisions relating to related party transactions in the Corporations Act may be more complex and comprehensive than is required under the ACA Act.'[28] The Review team suggested that a simplified statement of the duty might be adopted. This does not appear to have been done, with the provisions in the Bill closely following those in the Corporations Act. The necessity of including such a complex regime in this Bill is

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open to question. Another option might be to apply this regime only to 'large corporations', as defined in Chapter 7.

## Chapter 7 Record keeping, reporting requirements and books

The reporting regime under the ACA Act is based largely on external accountability – that is, accountability to funding bodies. The review team argued that this focus should shift to one of internal accountability – accountability of directors to the corporation and of directors and the corporation to the members.

The Review team also criticised the ACA Act for its failure to distinguish between small and large corporations – the reporting requirements being too complex for small corporations and not comprehensive enough for large corporations.[29] It is stated in the Explanatory Memorandum to the Bill that the intention is to distinguish, for the purposes of reporting requirements under this Bill, between small, medium and large corporations.[30] This is not specified in the Bill, however, and will presumably be achieved by regulation or by determination of the Registrar under **Part 7-4**.

**Part 7-2** outlines certain records and documents required to be kept by corporations. Corporations must keep, among other things:

- an up-to-date copy of their constitution and written records relating to names of their officers and its addresses (**clause 322-5**); and
- records that correctly explain their transactions and financial position and performance (**clause 322-10**).

**Clause 327-1** provides that corporations must prepare:

- a general report in relation to each financial year;
- any reports required by regulations (**Division 333** provides for the regulations to require additional reports);
- any reports required by the Registrar (**Division 336** provides for the Registrar to require additional reports).

These reports must be lodged with the Registrar.

**Division 339** provides for the auditing of ATSI corporation financial reports. A requirement for auditing of particular reports may arise from provisions of the Bill, regulations, or determinations by the Registrar (**clause 339-5**). The Division also sets out standards and procedures for auditors, including a requirement for independence (**subdivision 339B**).

**Clause 342-5** requires corporations to give copies of their annual financial reports or directors' report to each member.

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**Part 7-4** gives the Registrar power to exempt from record keeping and reporting requirements. There is a procedure for exemption on application by directors, corporations or auditors, for the Registrar to make specific exemption orders (**clause 353-1**). The Registrar also has power to make exemption orders in respect of particular classes of corporations (**clause 353-10**).

**Part 7-4** provides a list of criteria to inform the Registrar's decision in respect of exemption orders. **Clause 358-5** provides that the Registrar must have regard to:

- whether the current reporting obligations make a report misleading;
- whether the current reporting obligations are appropriate in the circumstances; and
- whether the current reporting obligations impose unreasonable burdens.

Further guidance is given, in **subclauses 358-5(2) and (3)**, on the questions of what is appropriate and unreasonable.

**Clause 363-1** makes it an offence to fail to take reasonable steps to comply with the record keeping and reporting requirements. If the contravention is dishonest, the offence is punishable by 2000 penalty units or imprisonment for up to 5 years or both.

**Part 7-8** provides for a regime for the inspection of a corporation's books, and for their protection and use in evidence.

## Chapter 8 Penalties

There are a range of new offences and penalties for serious contraventions of the Act. In general, these reforms aim to:

> Align penalties and fraud provisions with mainstream corporations law.[31]

As further outlined in the Second Reading Speech:

> The offences … have been developed on the principle that similar obligations should attract similar consequences.[32]

### Registrar's powers

The Registrar's greater enforcement powers means that the Registrar now appears to more closely resemble a regulator rather than a body whose primary purpose is to assist the capacity of ASTI corporations.

This appears at odds with what the Review hoped would be achieved: 'a flexible approach to the implementation and enforcement of legislative requirements that would take into

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account the special circumstances of Indigenous corporations'[33] and an emphasis on assistance.

> The Review team is of the view that the role of the Registrar as set out in the ACA Act should shift from its current focus on compliance and enforcement, to more of a focus on assisting Indigenous corporations achieve good corporate governance through special regulatory assistance.[34]

### New range of offences and penalties

The effect on those involved in Aboriginal and Torres Strait Islander corporations is that this increased power and the new range of offences exposes them to more and higher penalties.

It is unclear whether incorporation of many of the offences and penalties in the Corporations Act is a sufficiently flexible approach. There may be an issue as to whether steep monetary penalties and/or imprisonment are appropriate measures in an Act specifically designed for the administration of Aboriginal and Torres Strait Islander corporations.

Listed in **Chapter 8**, **clause 386-1,** new civil penalty provisions relate to officers' duties, related parties rules, record keeping and report requirements and insolvent trading. On finding there has been a breach of any of these provisions, a court must make a declaration of contravention setting out the exact nature of the contravention including the person responsible, the nature of the conduct and the corporation affected.

**Clause 386-10** enables a court to impose a pecuniary penalty order of up to $200,000 if on a declaration of contravention being made it has also materially prejudiced the interests of the corporation or its members, or the corporation's ability to pay its creditors, or is otherwise 'serious'.

**Clause 386-15** provides that a court may order that a person who has contravened a civil penalty provision compensate a corporation for damage resulting from that contravention. Such damage includes profits resulting from the contravention which were made by 'any person'.

**Clause 386-20** sets out who may make applications. The Registrar may apply for a declaration, a pecuniary penalty or a compensation order. The corporation affected by the contravention of a civil penalty provision may apply for a compensation order only, although it is entitled to intervene in applications initiated by the Registrar. Its intervention, however, will not entitle it to make submissions on whether the declaration or order should be made. This clause does not exclude the Director of Public Prosecutions from acting under its own powers.

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**Clause 386-55** provides that, subject to certain conditions, the Registrar can require a person to assist in civil and criminal proceedings and seek a Court order to this effect. (The Registrar's powers to demand assistance are further strengthened by **clause 566-20** of **Chapter 13** which requires certain persons such as an employee of a corporation to assist in a prosecution of that corporation.)

**Clause 386-60** sets out grounds for relief for a contravention or possible contravention of a civil penalty provision. If the contravention relates to insolvent trading, the circumstances to be taken into account include any actions the person took to appoint an administrator or appoint a special administrator.

## Chapter 9 Lodgments and Registers

**Chapter 9** covers the lodgment of documents with the Registrar and the maintenance of registers including the Register of Aboriginal and Torres Strait Islander Corporations and most significantly, the newly introduced Register of Disqualified Officers. Significantly, strict liability offences enforce the Registrar's right to demand relevant information for the purpose of maintaining registers.

**Clause 407-1** allows the Registrar to refuse to receive or register documents if considered contrary to law, false or misleading, incomplete or inaccurate or in contravention of the Act, and to request appropriate amendments.

**Clause 407-5** enables the Registrar to request additional information from the person seeking to lodge the document and a failure to provide this constitutes a strict liability offence attracting a penalty of 50 penalty units. One penalty unit is currently $110.

Similarly, **clause 407-10** provides that, once included on a register, on request by the Registrar a person must provide within a reasonable period 'specified information about the person if information is included on that register in relation to the person' thus allowing the Registrar to continually update information. A failure to comply is a strict liability offence attracting a 50 penalty unit fine and/or imprisonment for 12 months.

**Clause 410-1** reinforces the Registrar's powers in relation to the lodgment of documents. On application by the Registrar, a court may order compliance as well as costs to be borne by the person who or corporation which failed to comply. A contravention of a court order is a strict liability offence which will result in a penalty of 50 penalty units and/or 12 months imprisonment.

In order to ensure some procedural simplicity, **clause 407-15** grants the Registrar discretion to accept telephone or email notice of certain minor changes of detail such as typographical errors.

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### Registers

**Clause 418-1** sets out the registers that the Registrar is obliged to keep:

- the Register of Aboriginal and Torres Strait Islander Corporations;
- the Register of Disqualified Officers; and
- 'such other registers as the Registrar considers necessary.'

The Register of Disqualified Officers will include names of all persons disqualified from managing Aboriginal and Islander corporations under:

- **clause 279-15** (contravention of civil penalty provisions);
- **clause 279-20** (insolvency and non-payment of debts);
- **clause 279-25** (repeated contraventions of the Act); or
- **clause 279-30** (Registrar's power of disqualification),

and, where relevant, must contain all copies of notices, orders and permissions lodged under those clauses.

Of this register, Senator the Hon. Amanda Vanstone, Minister for Immigration and Multicultural Affairs and Indigenous Affairs, has noted:

> A new public register of disqualified directors will be established to prevent people that have committed offences from being recycled through other corporations.[35]

This register is similar to the requirement under section 1274AA of the Corporations Act that ASIC keep a record of persons disqualified from managing corporations. In effect, the registers are complementary as a person disqualified under the Corporations Act will also be disqualified from managing a corporation registered under this Bill.[36] As with the ASIC register which can be searched for prescribed information, **clause 421-1** of this Act provides for the inspection and copying of records contained in the Register of Disqualified Officers. Some documents are exempt from inspection and production including reports lodged under **Chapter 11** winding up provisions. A report by a special administrator or an examiner appointed by the Registrar to examine the corporation's books under **clause 453-1** may only be inspected with the consent of the corporation.

## Chapter 10 Regulation and Enforcement

**Chapter 10** covers regulation and enforcement and specifically deals with the Registrar's regulatory powers which have been extended to cover situations where a stalemate exists.

### Registrar's powers to intervene

Notably, **clause 439-5** allows the Registrar to convene meetings of interested persons to discuss matters that may affect a corporation. According to the *Explanatory Memorandum*:

> This power reflects the fact that many problems relating to the sustainability of Indigenous corporations require a coordinated approach involving numerous government agencies and funding bodies, at both Commonwealth and state levels, as well as other creditors and corporations.[37]

A power currently held by the Registrar, to call a general meeting for any purpose that the Registrar thinks relevant, is retained under **clause 439-10** subject to certain procedural requirements. Under the Bill, the Registrar under **clause 439-15** has the additional power to call a corporation's annual meeting if it has failed to do so. According to the *Explanatory Memorandum*:

> Both proposed sections 439-10 and 439-15 have been included in the CATSI Bill to address problems where Indigenous corporations have, for a variety of reasons, become incapacitated and unable to call general meetings of any kind.[38]

This is presumably linked to the concern raised in the Review that general meetings are often forums for the playing out of political struggles and are sometimes ineffective in producing binding outcomes as participants often go on to act in their own or their group's or family's interest.[39] It is also consistent with the Review's recommendations that there be provision for some capacity for regulatory intervention to protect members in situations where it was not possible for member to enforce their rights.[40]

### Special regulatory assistance – compliance notices

**Clause 439-20** maintains the Registrar's power to serve notice on directors of a corporation to undertake certain action within a specified time if there are 'reasonable grounds' for suspecting that the directors have failed to comply with the Act or there has been some 'irregularity' in the affairs of the corporation. The *Explanatory Memorandum* states:

> As noted by the review, compliance notices presently issued under this section [s 60A] are often used to provide directors information about their obligations under the ACA Act, as a means to ensure compliance with it. The review regarded this as a positive administrative process which is intended to achieve compliance with the Act through special regulatory assistance measures.[41]

In general, the Review noted that the Bill must provide 'special forms of regulatory assistance' as it must 'distinguish itself from the Corporations Act by providing something the Corporations Act cannot provide.'[42]

Under new **subclauses (3) and (5)**, this 'special regulatory assistance' is also extended to circumstances where the Registrar suspects on reasonable grounds that there may be grounds for placing a corporation under special administration either at that time or in the future.

As under the ACA Act, there are no penalty provisions relating to a failure to comply with such notice but the new provision specifically states that the issue of a notice does not preclude the Registrar from taking other action under the Act.

In order to ensure enforcement, under **clause 447-1** the Registrar may appoint an authorised officer to a corporation. The *Explanatory Memorandum* provides the following background:

> The very remote location of many CATSI corporations makes it necessary for the Registrar to be able to appoint as an authorised office [sic] a suitable qualified person who may not be a Commonwealth, state or territory employee or official, such as a police officer. In such cases, it is anticipated that the person will be a suitably qualified professional such as a special administrator, auditor or accountant who has been contracted to the Registrar to carry out functions under the Bill.[43]

**Clause 450-1** outlines the scope of the Registrar's enforcement powers which may be relied upon for the purposes of fulfilling the Registrar's duties; and to ensure compliance with the Act or 'an alleged or suspected' contravention of the Act.

### Power to examine books and persons

These powers extend to examining books and persons (**clause 453-1**). In explaining the scope of the Registrar's powers, the *Explanatory Memorandum* gives this detailed commentary:

> …proposed section 453-1 is based on the existing examination provision contained in section 60 of the ACA Act. The power was explained by the Federal Court in NAILSS v Registrar of Aboriginal Corporations (1998) 54 ALD 55. The Court stated that the purpose of section 60 is to obtain information to enable the Registrar to carry out their statutory functions, including prudential supervision of the operations and financial affairs of incorporated Aboriginal associations. There is nothing which requires that the Registrar have any particular concern before exercising the power under section 60 to inspect documents and obtain a report. Nor is there anything which requires that, if there is a matter of concern, the exercise of the power under section 60 be limited to that concern. As the Federal Court noted, the concern might be the catalyst for a wider investigation into the operations and financial affairs of the corporation as disclosed by its documents. Consistent with Government policy, this power is often used by the Registrar, with the consent of corporations, to undertake diagnostic examination of corporations in difficulty. This 'special regulatory assistance' is also important in the context of 'capacity building' for these corporations.[44]

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Whilst the Registrar need not have a particular concern before exercising the power as the *Explanatory Memorandum* notes, the new provision is broader in that the authorised officer inspecting the books is not limited to 'drawing attention to any irregularity in the operations or financial affairs of the Association' as under current section 60. **Clause 453-1** covers a wider range of matters that the authorised officer is to report including potential problems such as whether 'circumstances are likely to occur or develop…[which] may constitute grounds for appointing a special administrator…'(**paragraph 453-1(1)(e)**)

### Increased penalties

**Clause 453-1** attracts an $1 100 penalty whereas the penalty under the current section 60 is a fine not exceeding $200. It is an offence of strict liability. The ACA Act provides that this penalty does not apply if the person has a reasonable excuse but there is no such defence in the Bill.

**Clause 453-5** sets out the Registrar's powers to demand, subject to written notice and service conditions, the production of books or attendance to answer questions. This is similar to the current section 68 provision, but the Registrar will now have the power to require a person to give answers under oath. The previous penalty for failure to comply was $200 (section 69), whereas the new penalty is $3 300 and/or 6 months imprisonment. It is not an offence, however, if a person is not capable of complying (**subsection (7)**); a provision similar to but narrower than that provided in the current Act which allows that no offence has been committed if the person has a reasonable excuse (section 69(3)).

### Warrants

At the Registrar's disposal are powers under **clause 456-1** to apply for a warrant to seize books that have not been produced on request. In urgent cases where there is concern that books may be destroyed, **clause 456-15** allows for an application and grant of a warrant by telephone or electronic means.

The Registrar of Aboriginal Corporations has noted that under the Bill the Registrar's power to seek the production of books or to require a person to answer questions 'has been modernised and aligned with the ASIC Act and similar legislative regimes.'[45] In contrast with the current section 70 which entitles the Registrar to enter land or premises to examine, take possession of, and copy books, without a warrant, the new warrant provisions, whilst broadening the enforcement options available to the Registrar, effectively limits the Registrar's power by requiring the sanction of a magistrate be obtained before books can be seized.

The present penalty for a contravention of section 70 is $1 500. Under **clause 461-1**, the Registrar's new powers are backed by heftier penalties for:

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- obstructing or hindering an authorised officer or the execution of a warrant ($11 000 and/or imprisonment for 2 years)
- intentionally or recklessly failing to provide all reasonable facilities and assistance for the effective exercise of a warrant ($2 750 and/or imprisonment for 6 months), and
- obstructing or hindering the Registrar or disrupting a meeting called by the Registrar ($5 500 and/or 1 year imprisonment).

**Clause 461-5** makes it an offence to give false information to an authorised officer or in relation to information sought under a warrant. A penalty of $11 000 and/or 2 years imprisonment applies.

**Clause 461-10** makes it an offence to conceal, destroy or alter a book relevant to an investigation. A penalty of $22 000 and/or 5 years imprisonment applies.

**Clause 461-15** grants limited immunity for self-incrimination, the background of which is set out in the *Explanatory Memorandum*:

> Proposed section 461-15 is based on section 68 of the ASIC Act, which also restricts the provision of derivative use immunity and provides use immunity for answers to questions, not for documents produced. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties of corporate regulation…It was accepted that a full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences. In light of the Registrar's similar role as a corporate regulator, a limited immunity is also justified here.[46]

Disclosures of any breaches of the Act are encouraged by the inclusion of specific whistleblower provisions under **Part 10-5**. Victimisation of a whistleblower is prohibited under **clause 469-5** with penalties of $2 750 and/or 6 months imprisonment attaching to such conduct, as well as provision for compensation under **clause 469-10**.

## Chapter 11 External Administration

This chapter sets out a regime for external administration which is quite different to the Corporations Act, as the Registrar sets out to give 'proactive regulatory assistance'.

Under **clauses 487-1** and **490-1,** the Registrar can appoint a special administrator with comprehensive powers (**clause 499-5**) to deal with corporate failure. This power can be used to provide a safety net against the possibility of corporate failure, especially for corporations providing essential services, infrastructure or holding land.

The review recommended scrapping the Registrar's power to appoint an administrator, and instead felt that the Registrar should apply to a court for the appointment of a receiver under the court's equitable jurisdiction. The Bill rejects this recommendation but notes

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that a 'key improvement is that when a corporation is put into special administration it is a reviewable decision under the Bill'.[47]

> The grounds for placing a corporation under special administration are also much broader than the grounds for appointing a receiver. This allows early intervention once certain risk factors are present. For example, a common risk factor is a dispute between members and the board which has escalated to the point that it is interfering with the operations of the corporation. This is one of the grounds for placing a corporation under special administration and is an important special measure.[48]

**Clause 526-5** sets out the grounds on which an ATSI corporation may be wound up, similar to section 461(1) of the Corporations Act. **Clause 526-10** ensures that a corporation will not be wound up on the basis of acts or omissions done to comply with Native Title legislation.

## Chapter 12 Deregistration and unclaimed money

The ACA Act relies on the deregistration process set out in chapter 5A of the Corporations Act. This is achieved by virtue of section 67 of the ACA Act which incorporates relevant provisions of the Corporations Act by reference.

In contrast the Bill contains its own set of deregistration provisions **(clauses 546-1 to 546-40)** which essentially mirror the provisions in chapter 5A of the Corporations Act. The proposed clauses set out the grounds and procedures for voluntary and Registrar-initiated deregistration and for deregistration following amalgamation or winding up. The *Explanatory Memorandum* at paras 5.524 – 5.532 summarises these provisions and makes direct reference to the comparative provisions in the Corporations Act.

**Clauses 551-1 to 551-40** provide arrangements for the handling of unclaimed property and correspond to sections 1339-1343A of the Corporations Act.

## Chapter 13 Offences

The Registrar's powers to ensure compliance are further strengthened by **Chapter 13** which details the nature and penalties for offences relating to the making of false or misleading statements.

**Clause 561-1** provides for penalties of 200 penalty units and/or 5 years imprisonment for providing false or misleading statements to the Registrar.

Under **Clause 561-5**, the same penalties apply to an officer or employee of a corporation who knowingly provides false information about the corporation to a director, auditor or member of the corporation or the parent corporation (**subclause (1)**). Lesser penalties of 100 penalty units and/or 2 years imprisonment apply if the officer or employee provided

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such information without taking reasonable steps to ensure that it was correct (**subclause (2)**).

### Corporate multiplier

**Clause 566-1** provides scope for increased penalties to apply to corporations. If a body corporate is convicted of an offence against the Act, a court may impose a fine 'not exceeding 5 times the maximum amount' that could otherwise be imposed as a pecuniary penalty for that offence. The *Explanatory Memorandum* notes that this is based on section 1312 of the Corporations Act:

> As, like the Corporations Act, most of the offences in the Bill are only capable of being committed by a corporation the broader corporate multiplier in proposed section 566-1 is required…Penalty levels, which are not multiplied by the operation of proposed section 566-1, will still be relevant with respect to natural persons – for example, in some cases, a natural person who may be convicted of aiding and abetting a corporation to commit a primary offence.[49]

### Penalty notices

**Clause 566-5** sets out the nature of penalty notices. Penalty notices allow the Registrar to notify an alleged offender, in writing, that an offence has been committed. If the person fails to act to prevent the continuance of the offence or fails to pay the prescribed penalty, proceedings may be instituted.

> The proposed penalty notice scheme, like other infringement notice schemes, is intended to provide an efficient and cost-effective alternative to pursuing criminal sanctions against a potential defendant…A penalty notice scheme is also an appropriate non-criminal alternative in the context of regulating Indigenous corporations.[50]

## Chapter 14 Courts and Proceedings

**Chapter 14** is based on the current civil and criminal jurisdictions and cross-vesting scheme in place under the Corporations Act.

**Clause 576-1** allows for both lower and superior courts to grant relief in civil proceedings for charges relating to negligence, default, breach of trust or duty, by an ATSI corporation officer or employee, auditor, expert, receiver or special administrator. A superior court also has the power to grant relief, even if charges have not yet been brought.

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### Protection for members, creditors and employees

**Clause 576-10** allows for appeals from decisions by special administrators or other external administrators, such as receivers. As the *Explanatory Memorandum* notes:

> This is an important protection for creditors, members, directors, employees and ATSI corporations generally.[51]

A court can also intervene to prevent procedural irregularities (**clause 576-15)** and to prevent financial and property transactions (**clause 576-20)** further protecting creditors and members.

**Clause 576-25** is far broader than the current section 61 which provides only that the Registrar may apply for an injunction if in his or her opinion the Governing Committee of an Association is not complying with the Act. Under the new provision, '[i]f a person has engaged, is engaging or is proposing to engage in conduct' that is or would contravene or attempt to contravene the Act or aids, abets, counsels, procures, induces or attempts to induce a person to contravene the Act, or directly or indirectly is knowingly concerned in or party to such contravention, the Registrar or a person whose interests have been or would be affected, may apply for an injunction'. This explicitly encourages members, creditors and employees to take legal action rather than relying on the Registrar.

**Clause 581-1** entitles the Registrar to intervene in any proceedings relating to matters under the Act.

**Part 14-2** relates to the conduct of proceedings and mirrors the Corporations Act. Amongst other matters, it covers standard of proof (**clause 581-10**) and security for costs (**clause 581-20**).

Similarly, **Part 14-3** mirrors provisions in the Corporations Act relating to courts and procedures. **Clause 586-5** covers the jurisdiction of the Federal Court and State and Territory Supreme Courts; **clause 586-20** covers the jurisdiction of lower courts; and **subdivision 586-C** provides for the transfer of proceedings from one jurisdiction to another. These provisions should enhance the ability of an ATSI corporation to access Federal Court jurisdiction. As the *Explanatory Memorandum* notes:

> Under the ACA Act, the Federal Court had jurisdiction which was comparably inaccessible for many ACA Act associations and members.[52]

## Chapter 15 Administration

**Chapter 15** provides for protection of certain information, protection of the Registrar and other persons from liability, review of the Registrar's decisions, fees, the power to make regulations and forms for use under the Act.

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### Protected information

**Clause 604-5** defines 'protected information' to include information given to the Registrar or another person in confidence in connection with the performance of a function of the Registrar or the exercise of a power of the Registrar.

**Clause 604-10** requires the Registrar to take all reasonable steps to protect protected information from unauthorised use or disclosure. This is consistent with the Information Privacy Principles under the *Privacy Act 1988*.

**Clause 604-15** makes it an offence for a special administrator for an ATSI corporation to use or disclose protected information unless authorised. The penalty for contravention is up to 2 years imprisonment.

### Protection from liability

**Clause 609-1** protects the Minister, the Registrar, a special administrator or a person acting under the Registrar's authority from any civil liability for loss, damage or injury as a result of the performance or exercise, in good faith, of functions, powers or duties arising under the Bill.

### Review of decisions

**Clause 617-1** lists 44 'reviewable decisions'.

Where a person makes a reviewable decision, notice of the making of the decision must be given to each person whose interests are affected by the decision, together with advice of the person's right to have the decision reviewed (**clause 617-10**). **Subclause 617-10(3)**, however, releases the decision maker from the requirement to give notice where the decision maker 'determines that giving notice to the person or persons is not warranted' having regard to the cost of giving notice and 'the way in which the person or persons are affected by the decision'. This is a very broad exemption requirement that essentially gives the decision maker an unfettered right to decide not to give an affected person or persons notice of the decision and the right to have it reviewed. The appropriateness of this is open to question.

Division 620 provides for a system of internal review. Essentially this means that the Registrar can reconsider his or her decision, by their own motion or on the application of an affected person. Where the review arises as the result of an application by an affected person, the Registrar must delegate the review function to someone who was not involved in making the initial decision (**subclause 620-5(4)**).

**Clause 623-1** provides that an application may be made to the Administrative Appeals Tribunal for review of a decision that has been affirmed, varied or set aside upon internal review by the Registrar.

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## Chapter 16 Registrar and Deputy Registrars

Chapter 16 provides for the appointment of the Registrar and Deputy Registrars and sets out the Registrar's functions and powers.

Similar to the ACA Act, the Registrar is to be appointed by the Minister for a period of up to 5 years (**proposed clause 653-1**), however in contrast, the Registrar's pay and conditions will be determined by the Remuneration Tribunal **(proposed clause 663-1)** rather than under the *Public Service Act 1999*.

The Registrar may appoint Deputy Registrars (rather than the Minister making appointments as under the ACA Act). Deputy Registrars are to be appointed under the Public Service Act for up to 5 years **(proposed clause 653-5)**.

The Minister may terminate the Registrar's appointment for reasons of misbehaviour or physical or mental incapacity but must terminate the appointment in certain circumstances including bankruptcy or failure to disclose relevant interests without reasonable excuse **(proposed clause 663-10).** Termination of a Deputy Registrar's appointment occurs if he or she is no longer employed under the Public Service Act or if the Registrar terminates it **(proposed clause 663-15).**

**Proposed clause 658-1** sets out the Registrar's functions. These functions include:

- administering the Act
- maintaining appropriate registers
- providing advice about registration, and internal governance of corporations
- conducting public education programs, publicising information and conducting research about registration and administration of corporations
- assisting with the resolution of disputes and complaints involving corporations
- developing policy, and
- any other functions as conferred by another law or as prescribed by the regulations.

The Registrar must apply certain principles when performing his or her functions or exercising his or her powers **(clause 658-5).** For example the Registrar must aim to administer the Act in a way that facilitates and improves the effectiveness, efficiency, sustainability and accountability of Aboriginal and Torres Strait Islander corporations, and in a way that takes into account Aboriginal and Torres Strait Islander tradition and circumstances.

**Clause 658-10** establishes the Registrar's powers in broad terms. The Registrar has the power to do all things necessary or convenient for the performance of the functions of the office of the Registrar. More specific powers are set out in other parts of the Bill.

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**Clause 68-1** specifies that the Registrar may delegate in writing his or her powers or functions to a Deputy Registrar, an SES employee in DIMIA, or suitably experienced APS employees within the Registrar's Office. A Deputy Registrar may sub-delegate powers in writing to SES employees within DIMIA or appropriate APS employees within the Registrar's Office **(clause 668-5).**

## Concluding Comments

It is difficult to determine from the legislation itself whether the indigenous community will benefit from the changes to the legal regime overall. There may be no simple trade-off between simplicity and good governance outcomes.

Peter McKerrow has commented in the *Indigenous Law Bulletin* that the Bill:

> …assumes a high degree of literacy and legal and financial sophistication.
>
> While large companies can afford professional advice and insure their directors from legal risks, Indigenous corporations in rural and remote Australia have limited access to this support. Without that support, the Bill may effectively deter the participation and involvement of Indigenous people in local corporations.[53]

Submissions by Land Councils to the Senate Inquiry voice concerns over the time and cost of the transitional arrangements[54] and general concerns that the Bill will add to the over-regulation ATSI bodies already face.[55] Concerns are also raised about compatibility of the Bill's obligations with the special requirements already faced by Native Title bodies.[56]

Constitutional questions may also arise over whether provisions which are stricter on indigenous persons involved with an ATSI corporation than a non-indigenous person regulated by the Corporations Act could still be held to be a beneficial 'special measure'.

The Northern Land Council raised this as an issue in their submission to the Senate Legal and Constitutional Committee Inquiry:

> 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 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

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> 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.[57]

A pressing question is whether the new bill will offer the simplicity which has repeatedly been recommended in reports over the last 30 years, and which offered the initial justification for special legislation. At 531 pages the Bill is a large, potentially intimidating document. It is also a well organised stand-alone document which does not require the user to constantly refer to the Corporations Act as the ACA Act did. Smaller corporations will have less reporting requirements.

In Chapter 2, it is clear that the procedural and documentary requirements for registration are mandatory and more onerous than under the current Act. Some areas of the Bill dealing with issues such as related third party benefits in Chapter 6 seem to be unnecessarily complicated for small to medium ATSI corporations. The intent is to ensure that persons involved in the corporation, as under the Corporations Act, are willing participants who have given informed consent and are aware of their obligations. In enacting the principles of good corporate governance, much of the simplicity of the current registration procedures has been put aside.

Generally a theme of the Bill is greater responsibility and accountability mechanisms applying to directors and managers. There are more onerous reporting requirements for larger corporations. A public register of disqualified directors will be created. Offences and penalties have generally been brought into line with the Corporations Act and are significantly greater than under the ACA Act.

The Bill significantly increases the powers of the Registrar for Aboriginal Corporations. The Registrar will provide 'governance audits', provide training and dispute resolution, and can check subsidiaries and trusts. The Registrar may change an ATSI corporation constitution on his or her own initiative if an ATSI corporation is not meeting internal governance requirements or is engaging in oppressive conduct. The Registrar can appoint a special administrator with special power to deal with corporate failure, especially where it could threaten essential services of a remote community. However, persons affected by key decisions of the Registrar can now have decisions reviewed by the AAT.

One aspect of the Bill which might be of concern is that the minimum membership age has been set at 15, without any further guidance as to whether these minors will receive special training by the Registrar or special consideration with regard to the offences provisions.

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# Endnotes

1 Mr Warren Entsch, House of Representatives, *Debates* 23 June 2005, p. 12

2 Quote from p. 9 of Graham Neate's *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976.*

3 Aboriginal Land Rights Commission, Second Report, para. 332.

4 In *Kartinyeri v Commonwealth* (1998) 152 ALR 540 ('the *Hindmarsh Island Bridge case*') the High Court found that the passing of the *Bridge Act* which amended the *Heritage Protection Act* was a valid exercise of power. The Court discussed but did not decide whether the race power could only be used beneficially. See further G. Triggs, 'Australia's Indigenous Peoples and International Law', *Melbourne University Law Review*, Vol. 16 [1999] and N. Pengelly, 'Before the High Court', *Sydney Law Review*, Vol. 20, No. 1, 1998.

5 (1989-90) 159 CLR 70 per Justice Brennan, at p. 135.

6 *Explanatory Memorandum*, p. 34, para 5.36.

7 ibid., p. 35, para 5.42.

8 ibid., p. 36, para 5.43.

9 ibid., p. 35, para 5.38.

10 ibid., p. 20, para 4.5.

11 *Explanatory Memorandum*, p. 36, para 5.50.

12 Registrar of Aboriginal Corporations, Fact Sheet: Native Title.

13 *Explanatory Memorandum*, p. 37, para 5.56.

14 ibid., at pp. 38-39.

15 ibid., p. 40.

16 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the Review — some differences', 2005.

17 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the Corporations Act — some differences', 2005.

18 See **clause 29-5** regarding indigenous membership requirements on p. 8 of the *Digest*.

19 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the Corporations Act — some differences', 2005.

20 ibid.

21 *Explanatory Memorandum*, at p. 21.

22 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the Review — some differences', 2005.

23 op. cit.

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24 Christos Mantziaris and David Martin, *Native Title Corporations: a legal and anthropological analysis*, The Federation Press, Sydney 2000, Part 2, p. 104.

25 ACA Act, s. 49B.

26 See, for instance, Part 3 of the Review Final Report, p. 61.

27 The Commonwealth Electoral Act 1918 was so amended, partly to 'make administratively workable the reporting requirements imposed on prison authorities': Explanatory Memorandum, Electoral and referendum Amendment Bill (No. 2) 1995, p. 3.

28 Review Final Report, p. 189.

29 ibid,. p. 218.

30 ibid., p. 24.

31 Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs (12 August 2005) http://www.atsia.gov.au/media/ruddock_media02/r02078_a.htm

32 Second Reading Speech, the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

33 A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth), Dec 2002, http://www.orac.gov.au/publications/legislation/final_report.pdf, p. 13, para 57.

34 ibid., p. 121. para 594.

35 Senator the Hon Amanda Vanstone, *Media Release*, 'New bill to benefit thousands of Aboriginal corporations', 23 June 2005

36 *Explanatory Memorandum*, p. 63, para 5.301. See Clause 279-5(5).

37 ibid., p. 26, para 4.42.

38 ibid., pp 80-81, para 5.438.

39 A Modern Statute for Indigenous Corporations, op cit, p. 5, paras 18, 20.

40 ibid., pp. 10–11, para 47, 48.

41 *Explanatory Memorandum*, p. 81, para 5.439.

42 A Modern Statute for Indigenous Corporations, op cit, p. 2.

43 *Explanatory Memorandum*, p. 81, papa 5.443.

44 ibid., p. 82, para 5.447.

45 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the ACA Act – some differences', 2005.

46 *Explanatory Memorandum*, p. 86, para. 5.468

47 ibid., p. 86, para. 5.468

48 Registrar of Aboriginal Corporations, Fact Sheet: 'The Bill and the Review — some differences', 2005.

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49 *Explanatory Memorandum*, p. 97 para 5.544

50 ibid., p. 97, para 5.545.

51 ibid., p. 98, para 5.552.

52 ibid., p. 29, para 4.60.

53 Peter McKerrow, 'A Note on the Corporations (Aboriginal and Torres Strait Islander) Bill 2005', *Indigenous Law Bulletin*, Vol. 6, Issue 15, November 2005, pp. 12.-14 at p. 13.

54 North Queensland Land Council Native Title Representative Body Aboriginal Corporation Submission No. 4 to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 26 September 2005.

55 Coalition of Aboriginal Legal Services of NSW (COALS) Submission No. 3 to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 26 September 2005; AIATSIS Submission No. 10 to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 26 September 2005.

56 AIATSIS Submission No. 10 to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 26 September 2005.

57 Northern Land Council Submission No. 13 to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005, 4 October 2005.

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