

# CHAPTER 2

## OVERVIEW OF THE 2005 BILL

2.1 This chapter summarises the background to the 2005 Bill, followed by a brief outline of the 2005 Bill.

### **Background to the 2005 Bill**

2.2 As outlined in Chapter 1, the 2005 Bill would replace the ACA Act. The Bill's purpose is to improve governance and capacity in the Indigenous corporate sector. The Bill seeks to align with modern corporate governance standards and corporations law, while maintaining a special statute of incorporation for Aboriginal and Torres Strait Islander peoples to take account of the special risks and requirements of the Indigenous corporate sector.<sup>1</sup>

2.3 As the Explanatory Memorandum explains, the ACA Act was originally envisaged as an incorporation statute to provide a simple and flexible means for incorporating associations of Indigenous people.<sup>2</sup> According to the Office of the Registrar of Aboriginal Corporations (ORAC), there are approximately 2600 Aboriginal and Torres Strait Islander corporations currently registered under the ACA Act.<sup>3</sup>

2.4 There have been a number of significant external developments since the ACA Act was last amended in 1992. Some of the key external developments have included the introduction of the *Corporations Act 2001* (Corporations Act) and the enactment of the *Native Title Act 1993* (Native Title Act).

2.5 The 2005 Bill is the culmination of a number of reviews of the ACA Act. The final report of the most recent review, commissioned by the Registrar of Aboriginal Corporations (the Registrar), was released in December 2002 (the 2002 review).<sup>4</sup>

2.6 According to the Explanatory Memorandum, the 2002 review concluded that the ACA Act was out-of-date and suffered from a large number of technical shortcomings to the point that the ACA Act itself had become a source of disadvantage for Indigenous people. The major finding of the 2002 review was that

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1 *Explanatory Memorandum*, p. 1.

2 *Explanatory Memorandum*, p. 3.

3 *Submission 5*, p. 1.

4 Corrs Chambers Westgarth Lawyers with Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid (commissioned by the Office of the Registrar of Aboriginal Corporations), *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)*, December 2002 (the 2002 review).

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 2002 review recommended a thorough reform of the ACA Act by enactment of a new Act. The 2002 review also recommended that the new Act provide Indigenous people with key facilities of a modern incorporation statute, such as the Corporations Act. The 2002 review further recommended that the new Act provide special forms of regulatory assistance to support contemporary standards of good corporate governance.<sup>5</sup>

2.7 The 2005 Bill implements the 2002 review by retaining a special incorporation statute to meet the needs of Indigenous people. According to the Explanatory Memorandum, the Bill introduces:

...a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.<sup>6</sup>

### ***Key differences between the 2002 review and the 2005 Bill***

2.8 Some aspects of the 2002 review have not been implemented in the 2005 Bill.<sup>7</sup> The Explanatory Memorandum outlines some of the key differences and the reasons for not implementing those recommendations. In particular, the 2002 review recommended that:

- membership of corporations be restricted to Indigenous people. This has partly been implemented by providing that a majority of members (and directors) must be Indigenous. According to the Explanatory Memorandum, this will improve flexibility for corporations to permit non-Indigenous membership, and as some corporations are the only providers of essential services in some communities it also ensures that non-Indigenous members of such communities are not disadvantaged;<sup>8</sup>

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5 *Explanatory Memorandum*, pp 7-8.

6 *Explanatory Memorandum*, p. 8.

7 See further *Explanatory Memorandum*, p. 10; and ORAC, *Fact Sheet: The Bill and the review – some differences*, June 2005. Available at: [http://www.orac.gov.au/publications/legislation/FactSheet\\_TheBillAndTheReview.pdf](http://www.orac.gov.au/publications/legislation/FactSheet_TheBillAndTheReview.pdf) (accessed 15 September 2005).

8 *Explanatory Memorandum*, p. 10.

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- corporate members should not be permitted. The Bill does permit corporate membership 'which improves the flexibility of corporate design to allow for resource agencies and peak bodies';<sup>9</sup>
  - particular regulatory powers under the current ACA Act should not be retained. For example, the 2002 review suggested that instead of the Registrar being able to appoint an administrator, the Registrar should apply to a court for appointment of a receiver under the court's equitable jurisdiction. This recommendation has not been implemented but the appointment of an administrator by the Registrar (called a 'special administrator') has been improved to address a number of the reasons why the 2002 review considered that Registrar-appointed administrators were problematic. A key improvement is that a decision to appoint a special administrator is a reviewable decision.<sup>10</sup>

2.9 The 2005 Bill has a commencement date of 1 July 2006. The committee has been advised that this date will be altered to 1 July 2007 by the draft Parliamentary Amendments to the 2005 Bill.

### *Other background issues*

#### *Interaction with native title legislation*

2.10 One of the aims of the 2005 Bill is to ensure that there is appropriate interaction between this Bill and native title legislation. The Explanatory Memorandum states:

The Bill removes the current uncertainty of how the Native Title Act and regulations are to interact with the ACA Act through tailored provisions for registered native title bodies corporate (RNTBCs) or in relation to an application made for the purposes of becoming an RNTBC where necessary.<sup>11</sup>

#### *Other legislative matters*

2.11 A number of other legislative matters are noted in the Explanatory Memorandum.<sup>12</sup> For example, there are a number of strict liability offences contained in the Bill. The Explanatory Memorandum states that:

Many of these offences are based on equivalent offences in the Corporations Act which are also strict liability. Consistent with the objective of the reforms to align the Bill to modern corporations law, strict liability has been retained for these provisions to ensure that these offences

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9 *Explanatory Memorandum*, p. 10.

10 *Explanatory Memorandum*, p. 10.

11 *Explanatory Memorandum*, p. 10.

12 *Explanatory Memorandum*, pp 11-19.

in the Bill remain closely aligned with their counterpart offences in the Corporations Act.<sup>13</sup>

2.12 The Explanatory Memorandum also notes that:

...a relatively small number of strict liability offences are unique to the Bill. In determining that these provisions should be strict liability, regard has been given to similar provisions contained in the Corporations Act, as well as to provide consistency with similar provisions in the Bill.<sup>14</sup>

2.13 Strict liability offences occur in the event of a corporation contravening the following requirements:

- A direction by the Registrar to change its document access address;
- Removal of a member's name from the register of members within 14 days of receiving a notice of resignation;
- Before cancelling the membership of a member the directors must give the member 14 days written notice to object to the cancellation;
- Directors must send a member a copy of a resolution as soon as practicable after the resolution has been passed where the member's membership has been cancelled on the basis that the person is not contactable or not an Aboriginal and Torres Strait Islander or has misbehaved;
- A corporation must make the register available for inspection by members at the AGM and ask each member attending to check the entry for that member and inform the corporation of any corrections that might need to be made to that entry; and
- The Registrar may at any time request the corporation to give him or her a copy of the register of members, and the corporation must comply within 14 days or such other period as the Registrar specifies.<sup>15</sup>

2.14 The sections that follow summarise the provisions in the 2005 Bill.

## **Outline of the 2005 Bill<sup>16</sup>**

### ***Chapter 1 — Introduction***

2.15 Chapter 1 of the Bill provides for the preliminaries of the proposed Act including the preamble, the objects of the Act and an overview. The objects provide

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13 *Explanatory Memorandum*, p. 12.

14 *Explanatory Memorandum*, p. 15. The particular provisions in question and the justification for the application of strict liability are outlined in the Explanatory Memorandum: see pp 15-16.

15 *Explanatory Memorandum*, pp 15-17.

16 This section draws heavily on the *Explanatory Memorandum*, particularly pp 19-31.

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for the Registrar as well as the functions and powers of the Registrar. They clarify that the Bill provides for:

- the incorporation, operation and regulation of bodies registered under the Bill and
- for duties of officers of Indigenous corporations and their regulation in the performance of those duties.

2.16 The Bill's objects also expressly provide for the incorporation of bodies incorporated for the purpose of becoming a RNTBC.

2.17 According to the Explanatory Memorandum, these objects are designed to recognise that Aboriginal and Torres Strait Islander peoples in some circumstances have special needs for incorporation, assistance, monitoring and regulation which the Corporations Act is unable to adequately meet as that Act exists primarily to provide uniform incorporation and regulation of trading corporations.<sup>17</sup>

### ***Chapter 2 — Aboriginal and Torres Strait Islander corporations***

2.18 Chapter 2 of the Bill provides for the registration of Aboriginal and Torres Strait Islander corporations, clarifies what is required to make an application, and provides the legislative basis for the Registrar to decide an application for registration.

2.19 Corporations can be registered as small, medium or large corporations (see Part 2-4). The classification determines, among other matters, the reporting requirements of the corporation – see Chapter 7 of the Bill.

### ***Chapter 3 — Basic features of an Aboriginal and Torres Strait Islander corporation***

2.20 This chapter provides for the basic features and powers of a corporation. Consistent with the Corporations Act, it provides for a system of 'replaceable rules'. Proposed section 60-25 sets out a table of the replaceable rules, which are also identified throughout the Bill. The Explanatory Memorandum explains that the replaceable rules:

...provide a framework of internal governance rules to apply to a corporation. A corporation can adopt all the replaceable rules, or replace the replaceable rules with their own provisions, [or] adopt some of the replaceable and replace some. The replaceable rules will apply to a corporation whose constitution does not cover the matters provided for in the replaceable rules. The replaceable rules are intended to establish a minimum standard for corporate governance.<sup>18</sup>

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17 *Explanatory Memorandum*, p. 8.

18 *Explanatory Memorandum*, p. 38.

2.21 Chapter 3 also provides for the matters that a corporation is required to cover in its constitution and other documents relevant to internal governance. Among other matters, this chapter establishes:

- requirements for changing a constitution;
- the requirement for a corporation to have a registered office or a document access address; and
- the assumptions third parties are entitled to make when dealing with the corporation.

#### ***Chapter 4 — Members and observers***

2.22 This chapter sets out some rules for membership of an Aboriginal and Torres Strait Islander corporation and some rules about cancelling membership. This chapter deals with the register of members that the corporation is required to keep, and the protection of the rights and interests of members of the corporation.

#### ***Chapter 5 — Meetings***

2.23 This chapter deals with the kinds of meetings that Aboriginal and Torres Strait Islander corporations may have and sets out requirements for how these meetings are to be conducted. There are two kinds of meetings held by corporations—directors' meetings and general meetings.

#### ***Chapter 6 — Officers***

2.24 Chapter 6 deals with the duties of officers and their disqualification for breaches of those duties. In particular, proposed Chapter 6 implements the 2002 review findings that provisions of the Bill relating to directors and directors' duties in the ACA Act should be modernised and brought into line with the Corporations Act, with some modification for the special circumstances of Aboriginal and Torres Strait Islander corporations.

2.25 For example, the 2002 review recommended that the scope of relevant directors' duties under the ACA Act should be extended to include 'officers' as is the case under the Corporations Act. Proposed Chapter 6 achieves this, but does not extend the obligation to contact persons who have a more limited role than the ACA Act public officer.

2.26 Similarly, proposed Chapter 6 also implements the 2002 review's recommendation that statutory directors' duties under the ACA Act should generally be brought into line with the Corporations Act. These duties include the duty of care, the duty of honesty, the duties of disclosure and to avoid conflicts of interest, and a duty not to trade while insolvent. However, there are some modifications relating to the Native Title legislation obligations.<sup>19</sup>

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19 See, for example, proposed sections 265-20, 265-25, 265-30 and 268-5.

2.27 In accordance with the 2002 review, Chapter 6 (in combination with other offences in the Bill<sup>20</sup>) also adopts a range of civil and criminal penalties, similar to the approach adopted in the Corporations Act, particularly regarding cases of dishonest or bad faith actions. The Explanatory Memorandum states that proposed section 658-5, aims of the Registrar, 'supports the flexible application of these provisions.'<sup>21</sup>

2.28 Finally, other provisions in Chapter 6 deal with matters such as internal governance aspects of the appointment, cessation and powers of directors.

### ***Chapter 7 — Record keeping, reporting requirements and books***

2.29 Chapter 7 deals with the reporting requirements imposed on an Aboriginal and Torres Strait Islander corporation. Chapter 7 also includes a general requirement to keep proper financial records and provisions relating to the books kept by a corporation.

2.30 In particular, under section 59 of the ACA Act, all corporations are required to submit the same information. Chapter 7 implements the 2002 review recommendations by 'streaming' corporations into small, medium and large and developing size-specific reporting for the different sizes of corporations in the regulations. For example, the Explanatory Memorandum states that under Chapter 7 it is planned that small corporations will only have to meet the general reporting requirements which do not include audited financial statements.<sup>22</sup>

### ***Chapter 8 — Civil consequences of contravening civil penalty provisions***

2.31 Chapter 8 creates a civil penalty scheme with sanctions for serious contraventions of the Bill, including breaches of directors' duties.<sup>23</sup>

### ***Chapter 9 — Lodgments and registers***

2.32 Chapter 9 sets out provisions relating to the lodgement of information by Aboriginal and Torres Strait Islander corporations and the registers of information maintained by the Registrar.

### ***Chapter 10 — Regulation and enforcement***

2.33 Chapter 10 contains provisions dealing with regulation and enforcement powers that the Registrar may use in the regulation of Aboriginal and Torres Strait Islander corporations. Chapter 10 also deals with the protection of whistleblowers.

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20 See, for example, proposed provision 376-35 dealing with falsification of books; proposed Chapter 8 civil consequences of contravening civil penalty provisions; and proposed Chapter 13 general offences.

21 *Explanatory Memorandum*, p. 23.

22 *Explanatory Memorandum*, p. 24.

23 Chapter 6 deals with the criminal consequences.

### ***Chapter 11 — External administration***

2.34 Chapter 11 provides for the administration of an Aboriginal and Torres Strait Islander corporation by persons outside the corporation (for example, in a winding up). Importantly, the Registrar may appoint a 'special administrator' for an Aboriginal and Torres Strait Islander corporation in certain circumstances.

### ***Other Chapters***

2.35 Other chapters of the 2005 Bill deal with the following matters:

- the deregistration of an Aboriginal and Torres Strait Islander corporation and unclaimed property (Chapter 12);
- general offences against the Bill, for example, offences for providing false and misleading information (Chapter 13);
- the jurisdiction of courts to hear matters under the Bill, injunctions and court proceedings (Chapter 14);
- general administration of the Bill, including the protection of information and review of decisions (Chapter 15);
- the appointment of the Registrar and Deputy Registrars, who are charged with the administration of the regime proposed by the Bill (Chapter 16); and
- interpretation and definition provisions (Chapter 17).