



## The Bill and the ACA Act —some differences

On 23 June 2005 the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 was introduced into the Australian Parliament. It is the result of a review of the *Aboriginal Councils and Associations Act 1976* (the ACA Act) completed in 2002 and largely reflects its recommendations.

If agreed to by the Australian Parliament, the Bill will start on 1 July 2006, replacing the ACA Act. Some parts of the Bill are likely to start after 1 July next year to make it easier for corporations to switch over to it. More information about this will be available soon.

Consistent with the key recommendation of the review, the Bill—like the ACA Act—is a special incorporation law designed to meet the needs of Indigenous people. However, the Bill differs from the ACA Act in a number of ways, namely how it aligns with the Corporations Act. It also addresses some deficiencies in the ACA Act. Some of the more important differences between the Bill and the ACA Act are discussed below.

### Registration requirements

- The requirements for applications to incorporate as an Aboriginal and Torres Strait Islander corporation have been strengthened. Applications will have to contain more details about the applicant and the proposed members and directors than was previously required under the ACA Act.
- Proposed corporations will have to indicate whether the corporation expects to be small, medium or large. The corporation's size will determine the level of reporting requirements under the new Act. The Registrar will also have to be satisfied that the proposed corporation satisfies a number of new requirements dealing with a corporation's proposed internal rules.

### Basic features

- Like the Corporations Act, the Bill has a system of replaceable rules that deal with membership, meetings and officers. A corporation will be able to rely on these rules or instead replace or modify them with provisions in their own constitution.
- The Registrar will have a new power to change a constitution if a corporation is not meeting these internal governance requirements or is engaging in oppressive conduct.

## Members

- The Bill will allow other corporations to become corporate members.
- It allows a corporation to have some non-Indigenous members and directors if the corporation chooses to do so through the constitution.
- The Bill extends the rights and remedies available to members in line with the Corporations Act. For example, a member will be able to seek a court order restraining a corporation from doing an oppressive act.

## Meetings

- The Bill contains more comprehensive rules, many based on the Corporations Act, dealing with the calling and conduct of directors' and general meetings. Many of these provisions are replaceable rules allowing corporations to tailor these rules to their special circumstances.
- The Registrar can exempt corporations from holding an annual general meeting each year if they have no need or no capacity to do so.
- Meetings can be held by video or teleconference and, subject to some translation requirements, in language.
- The Bill improves the Registrar's power to call a general meeting, including an AGM, when the corporation will not do so.
- The Registrar has a new power to call a non-compulsory meeting of interested people to deal with matters affecting one or more corporations.
- The Registrar will no longer have the power to arbitrate in disputes between members or a dispute between members and a corporation.

## Officers

- The Bill clarifies the duties of directors and other people who manage or work for a corporation. These duties are in line with the Corporations Act and include a duty to act in good faith or not to improperly use information.
- The Bill also has more detailed provisions dealing with disqualification from managing corporations which are also based on the Corporations Act.
- The Bill prevents a corporation from giving financial benefits to directors or related parties unless approved by its members.
- Small and medium corporations will only require a 'contact person' rather than a secretary. The contact person will essentially be a 'mailbox' for receiving and passing on information to the directors.

## Reporting requirements

- Reporting requirements under the Bill will not be 'one size fits all' but will be tailored to the size of a corporation: large, medium or small. For example, small corporations will only have to provide a minimum 'general' report and no audited financial statements. In contrast, large corporations will still have to submit audited financial statements.
- The provision for a 'general report' in the Bill is a new requirement and will contain the basic details of the corporation.
- The Bill will allow greater flexibility in the determination of reporting requirements through the use of regulations and provides for consolidated financial reports for corporate groups.
- The Bill gives the Registrar greater powers to require additional reports or to exempt a corporation, or individuals, from reporting requirements.
- New provisions, based on the Corporations Act, will regulate the operations of an auditor of a corporation.

## Civil penalties

- The Bill includes a new civil penalties regime, based on the Corporations Act, for serious contraventions of the Act, including breaches of directors' duties.
- This regime will be enforced by the Registrar but corporations may seek a compensation order against a person who has been found by a court to have contravened a civil penalty provision.

## Registers

Like the ACA Act, the Bill requires the Registrar to keep a register of corporations.

However:

- A new register to be maintained by the Registrar will record people who are disqualified from managing a corporation.
- The Registrar can establish other registers as considered necessary.
- People can inspect documents lodged with the Registrar and use information obtained from a register.

## Regulation and enforcement

Like the ACA Act, the Registrar still has the power to issue compliance notices to a corporation or its directors. As is the case now, no sanction applies if a corporation or director fails to comply with a notice but this may lead to other regulatory actions under the Act. Similarly, the Registrar retains the power to appoint a person to examine a corporation's books.

However:

- The Registrar's power to seek the production of books or to require a person to ask questions has been modernised and aligned with the ASIC Act and similar legislative regimes. This includes the requirement for the Registrar to seek a warrant from a magistrate to seize books that have not been produced by a corporation.
- People who report suspected breaches of the Act to the Registrar and certain other people are protected. These whistleblower provisions are based on the Corporations Act.

## External administration

Like the ACA Act, the Bill will apply relevant parts of the Corporations Act dealing with the administration, receivership and winding up of Aboriginal and Torres Strait Islander corporations.

However:

- The Bill removes uncertainty by specifying which provisions of the Corporations Act apply to a corporation in these circumstances and also allows regulations to be made to 'fine tune' their application.
- The Registrar can still appoint an administrator, but now this 'special administrator' is given priority over a Corporations Act administrator or receiver but cannot be appointed once a winding up has commenced or a liquidator is appointed.

## Deregistration and unclaimed property

- The Registrar's powers to deregister a corporation and deal with its unclaimed property have been modernised and are based on the Corporations Act. The Registrar will be able to initiate a deregistration when a corporation has failed to lodge any documents and the Registrar has no reason to believe that the corporation is carrying on business.
- An aggrieved person or a former liquidator will be able to apply to a court for a deregistered corporation to be reinstated.

## Courts

- The federal, state and territory courts which currently have civil and criminal jurisdiction under the Corporations Act will also have jurisdiction under the Bill.
- A cross-vesting scheme, based on the Corporations Act, allows for matters to be heard in the most appropriate federal, state or territory court.

## Protection of confidential information

- Confidential information received by the Registrar and other persons under this Act is protected from unauthorised use or disclosure.
- Confidential information can also be shared with other agencies and bodies in appropriate and controlled circumstances. These provisions are intended to operate in addition to the *Privacy Act 1988*.

## Review of decisions

- People affected by a decision made by the Registrar have the right to seek internal review of that decision. This decision can also be externally reviewed by the Administrative Appeals Tribunal.

## Registrar

- The Registrar must aim to administer the Bill in a way that contributes to the effectiveness and efficiency of corporations and with regard to the particular traditions and circumstances of Aboriginal and Torres Strait Islander persons. These provisions confirm the Bill as a special measure.

## Native title

- Tailored provisions remove the current uncertainty of how the *Native Title Act 1993* and regulations are to interact with the Bill with respect to registered native title bodies corporate (RNTBC).
- Specific provisions for regulations can be made about the operation of the Bill with respect to an RNTBC, including the external administration of these bodies (see also the 'Native Title' fact sheet).

## Offences

- There are a large number of new penalties, most of which are based on similar offences in the Corporations Act.
- Fines are expressed in terms of penalty units rather than specific dollar amounts. A single penalty unit is currently \$110.

## Further information

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