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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Corporations (Aboriginal and Torres Strait Islander) Bill 2005

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Tuesday, 4 October 2005

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Chapman, Colbeck, Conroy, Eggleston, Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Hogg, Humphries, Lightfoot, Ludwig, Lundy, McGauran, McLucas, Milne, Nettle, Parry, Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Crossin, Evans, Mason, Scullion and Siewert

Terms of reference for the inquiry:

Corporations (Aboriginal and Torres Strait Islander) Bill 2005

WITNESSES

Committee met at 4.20 pm

PROWSE, Mr Michael, Senior Lawyer, Central Land Council

LEVY, Mr Ron, Principal Legal Officer, Northern Land Council

DORE, Mr Martin EE, Principal Legal Officer, North Queensland Land Council

Evidence from Mr Dore and Mr Prowse was taken via teleconference—

ACTING CHAIR (Senator Crossin)—I welcome members of the committee and representatives and witnesses to this hearing of the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005. This inquiry was referred to the committee by the Senate on 6 September 2005 for report by 12 October 2005. The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 replaces the Aboriginal Councils and Associations Act 1976. The bill aligns with modern corporate governance standards and Corporations Law while maintaining a special statute of incorporation for Aboriginal and Torres Strait Islander peoples.

The committee has received 15 submissions for this inquiry, 12 of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of these are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome our first witnesses: Mr Ron Levy, from the Northern Land Council; Mr Martin Dore, from the North Queensland Land Council; and Mr Michael Prowse, from the Central Land Council. The Central Land Council has lodged a submission with the committee, which the committee has numbered 9. The North Queensland Land Council has lodged submission No. 4 with the committee and the Northern Land Council has lodged submission No. 13 with the committee. Before I ask any of you to make a short opening statement, are there any amendments, additions or corrections that you need to make to those submissions?

Mr Prowse—No, we stand by the submission as originally submitted.

Mr Dore—No, I am happy with our submission.

Mr Levy—I do not expect to. There may be some typos and that sort of thing. I arranged with one of your officers to check it and provide it in final form later.

ACTING CHAIR—That will be fine. I now invite you to make short opening statements. At the conclusion of those, we will go to questions.

Mr Prowse—You will see at the front of our written submission that there is a brief summary which sets out eight points. Those eight points are drawn from the body of the submission. It might be useful if I quickly go through those eight points. The first point is basically that we support the outcome and recommendations of the review of the Aboriginal

Councils and Associations Act but we cannot support the bill in its current form. In general terms, the reason for that is that we think that the special incorporation needs of Indigenous people are not being met by the main provisions of this bill. We think that the bill is drafted as a piece of intense regulation, but the needs of the majority of the Aboriginal corporations, at least in our region here in Central Australia, are met not by the main provisions of the bill but, rather, by the provisions providing for exemptions from obligations under the bill.

The prescriptive nature of the bill may even go as far as to deter Aboriginal people from using the statute, thereby effectively defeating the purpose of having a separate and special Indigenous incorporations statute. There are hundreds of Aboriginal corporations operating in Central Australia. Many of those are struggling to comply with the provisions of the current act. What we say is required—and what we have submitted all along to the various reviews that have taken place in the past—is assistance to Aboriginal corporations and to Aboriginal people, not increased regulation and complexity.

Attached to our submission is a submission from our native title section. It is the Central Land Council's belief that the complex issues arising from prescribed body corporates under the Native Title Act should be the subject of a separate and specific review. The review into the Aboriginal Councils and Associations Act did not go in sufficient depth into looking at prescribed body corporates, how they have to work and how they are a form of incorporation which is different and separate from other corporations and requires different and separate treatment. The Central Land Council supports the view that the complex nature of prescribed body corporates justifies either a separate division of this bill or it being hived off completely and put into part of the Native Title Act.

Fundamentally, that is our submission in summary. We think that the review was a very useful process, but we think that, in the process of drafting the legislation, fundamental parts of the review have been bypassed and left out—to the extent that this bill, from the point of view of Central Australia, will be unworkable. Many Aboriginal corporations that operate in Central Australia will be unable to comply with the provisions of the bill. There are no agencies in Central Australia that are funded to assist people to run their corporations. With the increase in regulation brought about by this bill, it is quite possible that things will be more problematic than they were under the previous act.

Incorporation for Aboriginal people is quite often not a voluntary exercise; it is a requirement brought about by funding or by some other purpose. Many of the members of corporations in Central Australia are Aboriginal people for whom English is a second or third language, and many are Aboriginal people who do not read or write in English or in any other language. For that reason, those people often require assistance, and we at the Central Land Council are called upon to provide that assistance. From our view of this bill, it appears that our assistance will be required at an increased level, and we do not believe that we will have the capacity or the funding to be able to provide that service. We estimate that there are about 300 Aboriginal corporations in our region. If they are required to have an annual general meeting each year, we will have to assist one corporation per day for the whole year and perhaps we would not even get to the end of the list. It is our submission that the need for a simple incorporations statute, tailored to the special needs of the Indigenous population of Central Australia, is not provided by this bill.

ACTING CHAIR—Thank you. Mr Dore, do you want to provide us with some opening comments?

Mr Dore—Yes. My submission is pitched on a slightly different level. As a legal technician, I have taken a look at some of the provisions of the bill that are of concern. I am not so much focused on the overall impact, but I certainly support what Michael and Ron have indicated in their submissions. I certainly support the fact that we seem to have gone from a piece of legislation which is quite simple to something that is in excess of 500 pages and is quite complex. Whilst there is, within that, the attempt to create allowances—where we divide corporations up into small, medium and large according to their finances and assets, which is perhaps desirable—overall, we seem to end up with an act that is far more complex.

I support Michael's position that we will be requiring people to have a lot more assistance in order to cope with it. There are no special provisions dealing with native title representative bodies, which is rather surprising, and there is very little that assists PBCs, which Michael has mentioned. Prescribed body corporates, or registered native title bodies, are a requirement of the Native Title Act. When there is a determination that native title exists, you have to have a PBC, into whose hands that title is then said to repose, and they have obligations under the Native Title Act in terms of future act notices, developments on the land and so forth.

It seems to me that the drafter of the bill has not grasped the fact that there is enormous variation out there in terms of the financial wherewithal between different Aboriginal corporations to comply with statutory requirements. If you are an Aboriginal corporation with a lot of mining happening in your area, then it is likely that you have done a number of deals with mining companies and have an income stream. Contrast that with one of the groups that I represent: their country is entirely covered by national park, they have no corporate arm and no business ventures, and we hope to obtain their determination on native title in the next six months. They will require a PBC. They have absolutely no money with which to fund that PBC. They will be scratching for simple things like the money to send out notices. So it seems there has been no account taken of the costs of regulatory compliance that the bill will impose upon people, and it certainly seems that it will be much more complicated and, therefore, more costly.

The other thing that I would suggest is causing some degree of angst at the moment is the total lack of information about any transitional provisions. We are told, from the web site of the Registrar of Aboriginal Corporations, that the bill is intended to become law and be in place by 1 July next year but, apart from that, there is no information about how the different provisions are to be phased in or what period might be allowed. Whilst I certainly understand that the new default provisions were only going to apply to new corporations, I really cannot imagine that the situation of having two different types of corporations—one lot under the old scheme and one lot under the new scheme—will be allowed to continue indefinitely. One assumes that there will come a point in time when everyone is required to move to the new requirements. There is no information about that, and that is quite disturbing because, once again, you need a long lead-in period if you are going to adapt your constitution to fit the new requirements. In most cases, you will require a SGM to put amendments. Take the North Queensland Land Council for example: we have already looked at the bill, we have already started talking about whether it is desirable to look at amending our constitution to bring it

more in line with what is in the bill, even though some of these aspects will not apply immediately and we can get no information about the phase in and that sort of program.

There are other certain specific aspects of the bill that are worrying. I have indicated those in my submission, so I will not labour the point. However, in particular there appears to be no account taken of the unique position of native title representative bodies in things such as the ability for directors and ex-directors to have access to books. 'Books' are so broadly defined that the definition could include material that is arguably subject to legal professional privilege, and there is no assistance in the setting out of the proposed legislation that deals with how you resolve that conflict. Also, many of the provisions that at first brush appear to empower people potentially have a very heavy financial impact.

For example, directors' meetings can be called by any one director. You only have to have a board where there has been some factionalisation before several different little power groups have developed and everyone is calling another meeting trying to overturn the decision that was made last meeting when they decide that they do not like it. The potential financial impost is quite enormous, as is the financial impost of repeatedly having to mail out information about members' resolutions and so forth. It seems to me that the drafter of this bill had in their mind that we are talking small corporations with anywhere from 10 to 50 members. The North Queensland Land Council has over 900 members, and the cost of regulatory compliance is potentially quite huge, particularly given the extra burdens that the bill may introduce.

Mr Levy—I do not want to add to what has been said by the previous speakers but rather to be generally supportive of their concerns. The specific concern which I wish to raise, particularly in light of discussions I have had today with others here in the audience who are more on top of the bill than I am, is one where there may be methods whereby it can be resolved. It relates to the restrictions which have been put in to prevent maladministration, corruption, nepotism or whatever, which no doubt can happen from time to time in relation to both proprietary companies and Aboriginal corporations.

The particular practical concern that arises regarding at least some of those provisions in relation to the NLC is that, under the land rights act, the NLC is required to pay money to or for the benefit of traditional Aboriginal owners. That is done in two ways. Sometimes the money is handed out after a meeting in accordance with the instructions received from the Aboriginal group. Invariably a number of families will be involved, and usually the money goes to the senior people of the families, though sometimes they do not have an appropriate account so they might delegate a younger person to do it. However, it is pretty much run by the senior people, and that accords with what we understand to be the Aboriginal tradition.

On other occasions we use a different method. If there is an existing Aboriginal association which is representative of the traditional owners or if we can create one, we give the money to the association. The association is usually a charitable body and might function in a particular way. But it might not be a charitable body. Again, the association is going to be controlled on behalf of what is really an extended family group. It is a bit analogous to an extended family trust in Australian society generally. It is going to be controlled by the senior people. They will be the directors and decision makers, and they will be the people who decide how to allocate the money.

There are often not particularly large amounts of money. When the money is allocated, first the registrar has to be notified in writing and then there has to be a special general meeting to allow expenditures and payments to occur. It will rapidly become unworkable. The committee might say, 'Fair enough,' as there may be an understanding, particularly from records kept by the registrar, that there are complaints and so forth. I am not saying that there have not been complaints in the Northern Territory, but I am not sure that the complaints about Aboriginal associations that receive lease payments and so forth from community stores—or whatever the leases are in the NLC's and other land councils' regions—are usually made out regarding these sorts of issues.

The first port of call when there is a complaint about a payment by the Northern Land Council to an Aboriginal association or to traditional owners is the land council. We are the first ones to receive a complaint. We are the first ones to investigate and endeavour to fix it up. So, in contrast to some other parts of Australia, there is already a mechanism in place whereby there can be an on-the-ground review, the creation of a new association if necessary and a revisiting of things. We take that aspect of our work extraordinarily seriously. We do not hand out money without always meeting and documenting it beforehand. The bread and butter of land councils is consulting with Aboriginal groups, dealing with internal disputes, documenting payments so that they are watertight and me or other lawyers giving legal advice that those payments are legally correct. They then get implemented.

Our submission says that the provision in relation to payments to related parties, which has been taken from the Corporations Act, does not apply to proprietary companies. It may be that the parliament, through the registrar or others, says, 'We think there are problems with nepotism,' and that kind of thing. To that I would say that if that is the case it needs to be looked at more closely to see if it is across the board or only in certain areas. It may be that an exemption arrangement or an exemption for classes of bodies is needed. Certainly in the NLC's region, the Aboriginal associations we use to pay money to do not ordinarily lead to difficulties. When they do have difficulties they come to us. So there is a mechanism in place to deal with that. That is the main point I wish to make to the committee.

The only other point I want to make is that it is a big bill. I do not claim to be an expert in it. If there are any errors or things that have been missed then, naturally, I apologise. I intend to have a closer look at it. If I come across any other point which might be of constructive use to the committee, I would appreciate being able to raise it in some fashion—it does not have to be a submission—if it looks like it is important to get that information through.

Senator CHRIS EVANS—In terms of the process of consultation and knowledge of the bill, when did people become aware of it? We have not had a huge number of submissions, but it obviously affects an awfully large number of corporations—2,600 is the quoted figure, I think. What sort of involvement with and consideration of the bill has occurred among Indigenous organisations?

Mr Levy—My assessment, insofar as I am aware, is that it would be fairly minimal. I do not make any criticism—it is up to the Senate to set its own guidelines and it is up to us to live with them. But there are practical effects. If there was further time I would have tried, in consultation with other representative bodies, to engage an experienced counsel to look closely at the sorts of general observations which we have made and to prepare some sort of

practical document which might be of greater assistance. If there is further time, that might be worth exploring; if there is not, there is not. But I do not think that a lot of bodies would have had a close look at it, I have to say. I was aware of the bill when it came out. I had a quick look at it. It looked very big, so I put it off. Last weekend was really my primary, initial attempt to look at it. I do not know about the two other witnesses here.

Mr Prowse—A lot of Aboriginal corporations, members of those corporations and members of the governing committees of those corporations would have had some role in participating in the various reviews of the Aboriginal Councils and Associations Act that have taken place. In relation to this bill, I cannot recall the date that it was introduced, but certainly not much time has passed since it was introduced and certainly very little time was permitted before it was sent to the committee for inquiry. The size of the bill makes it extremely difficult to attempt to run step-by-step through every provision of it. We have not had the opportunity to do that and our submission is a very general submission.

If there were more time we could, as Mr Levy says, seek some more expert advice and perhaps also look in depth at the various provisions of the bill. Perhaps we have been frightened by the size of it and we are overreacting. Perhaps the exemption provisions are going to be more effective than we think they are. Perhaps it is not as intimidating as it looks at the moment. I am not sure that that is the case. I have read through the bill a couple of times, and it appears to me that it does and will cause an enormous amount of extra work for us to do in assisting the corporations in Central Australia. If we had more time we would be able to analyse those particular provisions in greater depth. At the moment, we are limited to making what is a very general submission.

Mr Dore—I became aware of the bill almost by accident and a relatively short time ago. I would support the comments other speakers have made about the fact that, whilst the review of the old act was a lengthy process which most people had some input into, the end product, being the bill, seems to be very short on any form of public consultation. I am not convinced that the bill has really delivered the reforms that those who partook in the review process had hoped for. Most of the corporations affected will be small Aboriginal corporations, many without any funding, and I am quite sure most of those will never have heard of the bill, let alone be aware of its content. As native title representative bodies entirely reliant on funding through DIMIA under contract, our funding requirements do not allow us to assist incorporated bodies except for setting up PBCs where necessary. We are entitled only to go as far as helping set them up and to do $50 worth of work after that. Beyond that, strictly speaking, our grant terms forbid us to be involved.

Senator CHRIS EVANS—Unlike my colleagues, I have not read all 531 pages. I can assure you all my Senate colleagues have, but I have been a bit remiss; I just read the explanatory memorandum. Part of the defence, as I understand it, for the size of the bill is the contention that under the current arrangements you are required to read case law and parts of the Corporations Act. The upside of the new bill is that all of that material is included in the one document—hence the document that is the size of the tax act—and that it will be more simple for people in the sense that all the rules and governance are in the one stand-alone document. I would like you to comment on that but also, before I let somebody else have a go, on the question of transitional provisions. My understanding is that the government has

got a separate bill that will deal with transitional provisions—which I think we have not seen yet—which was I think to be considered at the same time as this bill. I am not sure if that is still the government's intention. Perhaps you would like to comment on both those issues.

Mr Prowse—I have read the Office of the Registrar of Aboriginal Corporations material about this. I think it is the intention of this bill to be a stand-alone document so that there is only one place that corporations need to go to find out what provisions apply to their incorporation. That still does not solve the problem of the complexity of it all. The bill does not provide a simple method of incorporation to meet the special needs of Aboriginal people. Yes, it may be easy for the legal advisers of Aboriginal corporations, if they can afford them or if they are funded to do that sort of work, to have all the provisions in one place. That may be convenient in that respect, but it still does not solve the problem that the bill does not achieve what the review has recommended.

Mr Dore—I think the fallacy of the argument that by putting everything in the one bill you do not need to go looking for case law and other things is a bit like saying: 'We have a comprehensive new tax law that has been put into one piece of legislation. You do not need to read case law about tax decisions.' It just does not work like that if you are looking at fine interpretations of the law. Instead of people reading a 72-page document, they now have 500 pages to struggle with, and they have to constantly try and keep separated out in their minds as to whether they are a small, medium or large corporation, because different rules apply to them. It presupposes, too, of course, that all of the Indigenous people involved in Aboriginal corporations have secondary schooling that would enable them to read through 570-odd pages of material. The point has already been made that that is not realistically addressing the needs of the vast majority.

The fact is that the bill makes things so complicated. I have made a number of presentations to some of our clientele on it, and I have already received inquires as to: 'Wouldn't it be simpler if we incorporated under state legislation as a social group?' The answer to that question may well be yes, which I think comes back to a point that the other speakers have made—that is, we are getting so complicated that people may abandon attempts to go under this act for a simpler solution. It may in fact be self-defeating.

Senator SCULLION—Mr Prowse, in your evidence you spoke about concerns with the transitional period. You indicated that the lead-in period was too short. Could you indicate how long you think that period should be?

Mr Prowse—Considering that we think the bill is unworkable in its current form, our main concern is not with the lead-in period or the transitional provisions—although we are unaware of what the transitional provisions are going to be at this stage. I understand that that is to be dealt with in a separate piece of legislation, which has not necessarily been drafted yet. We are not sure what those provisions will be, so it is a little difficult to answer your question about how much time should be provided for transition purposes. However, looking at the bill as it is and at the number of Aboriginal corporations operating in our region—which, as I understand it, is over 300; many of which have governing committees and members who do not read or write English—I imagine that, if there were some sort of process of having to amend constitutions for all those corporations, it would take a matter of years to achieve that.

Senator SCULLION—Mr Dore, in your submission you speak about some of the difficulties. I accept that there clearly appear to be some difficulties in meeting the requirements of the provisions. You have to circulate certain documents, including membership statements, resolutions and financial reports—all those sorts of things. That is clearly too expensive and time consuming. In a general context, I do not think there are many people who would not accept that it would be a director's duty and obligation to provide membership with principles like financial statements. I understand that across the board these are very different organisations and have a very large membership and that that is expensive. Have you thought about how you might meet the basic obligations of ensuring that the membership of this organisation get the information that they would in a mainstream organisation? The legislation in front of us indicates that that is going to be a provision. If it is too expensive currently, can you recommend any alternatives as to how you might communicate that to members? Is it a frequency issue? Perhaps you can come up with some suggestions.

Mr Dore—We just had our annual general meeting a week or so back. Our practice has always been to have our auditor attend the annual general meeting and provide a report to the members. The auditor does that by way of an oral presentation outlining whether the books are in a proper state of keeping and giving some basic information about the assets and moneys that we hold. Nobody at our recent meeting asked for a copy of the auditor's report. That seems to be pretty well the level of interest that is generated in terms of auditors' reports. It seems to me that a provision enabling anyone to request a copy to be posted out to them would be far more efficient than sending out 900 copies in the post, 899 of which are going to hit the rubbish bin.

The other difficulty is that some people say, 'Why don't you put it on the web?' But again it gets back to the fact that the vast majority of our clientele do not have the telephone, let alone access to the internet to get onto a web site. If they did, there might need to be things like pin numbers, as the world—as opposed to your membership—does not need to know your finances. It is very difficult to see a way of distributing the information more cheaply. To my way of thinking, the answer lies in having the information available to those who might request it, without having to distribute it in expensive mail-outs and so on.

The position of native title representative bodies such as the North Queensland Land Council is that they have no appreciable income other than the moneys under contract from DIMIA to carry out the functions of a native title representative body. They are not mainstream companies, where people are interested in how much profit has been made and who has been paid a dividend and who has not. It is not that sort of situation. People do not seem that interested. As I said, not one person at our recent AGM asked for a copy of the auditor's report or even, as far as I am aware, asked to come up and look at it during the tea break after the auditor had made his presentation.

It seems to me that what we are doing with this bill is introducing ideas from the mainstream corporate profit-making side of things and pushing them onto corporations where there is no real need to go to that extreme and that expense, when going to that expense robs us of money to get on with our core functions.

Senator SCULLION—Thank you. I am one of those people who fall asleep before I get over the first page of an auditor's report. I find them particularly uninteresting and frankly very difficult to understand at a glance. Down in Alice Springs, the Katherine West Health Board has looked at a company called Little Fish. They have put out a thing called the Money Story. Effectively, it looks at formatting and producing information, particularly numerical information, in a way that is easily understood. While it is perhaps not specifically about this legislation, do you think people would find it more interesting if we made an attempt to contextualise the information that we are providing?

Mr Dore—I really do not know if that would be so. We have not looked at that. But, again, the emphasis that our clientele seem interested in is that the auditor has given us a clean bill of health, that there has not been any funny business happening with the accounts and that money has not been going to places where it is not allowed to go and that sort of thing. Once the auditor indicates that we have a clean bill of health, the accounts are in proper form, proper records are being kept and everything is above board, that seems to be, by and large, the extent of the interest.

Senator SCULLION—Mr Levy, perhaps you would be able to take this on notice. I am very impressed by the extraordinary seriousness of the complaint recommendations, particularly to do with the complaints that are received by you. Clearly, that is pretty impressive. Would you be able to provide to me how many complaints, on average, you get a year. Obviously you take them seriously and deal with them. I do not expect you to have that information here, Mr Levy, but if you could take that on notice, I would appreciate that.

Mr Levy—I can give you an answer now: not many. There are some, but really not many. People might ring up and say, 'What happened?' Then you say, 'Blah, blah, blah,' and that sorts it out.

Senator SCULLION—They are not potential complaints but requests for information.

Mr Levy—But the real complaints, where somebody really has a gripe, usually end up also going to the minister. We then have to write a response to the minister. Obviously, we are not a perfect organisation. We can make mistakes. But I remember that a few years ago there was a matter in relation to a lease on a store in an Aboriginal community. We knew there was a dispute, and we put a lot of effort into it. We also knew that the dispute was not going to go away. Ultimately, we thought that legally we could go ahead, and we did go ahead; the complaint was made. I remember the minister's adviser rang up and said: 'We know there's a dispute—everyone knows there's a dispute in this area—but please give us something comprehensive in writing, like you ordinarily do. Obviously we can't provide guarantees, but we are likely to accept your advice because we know you put a lot of effort into that area.' I do not think we get many complaints. People might raise things and ring up and ask what happened, but there are not many actual complaints. It may be that the current annual report has some information about that. I will have a look and let you know.

Senator BARTLETT—From reading the submissions and listening to the comments here today—apologies for missing the first quarter-hour or so—it does not seem that the intent of the bill is a problem for most people. The aim of trying to improve the corporate governance arrangements is not necessarily opposed; it is just about whether what is put forward is

workable for the full range of Indigenous organisations. If someone thinks I have the wrong impression, feel free to correct me. Following that, I guess my question is: whilst each of you has pointed out potential problems for yourself, my assumption would be that the land councils would be amongst the more sizeable of Indigenous organisations and would have a reasonable amount of resources comparatively. Do your comments go more to the problems you see for an organisation like yours, or are they made more because of your knowledge of other Indigenous organisations that are perhaps smaller, less well resourced and in more remote areas? Is it about how they would be able to manage?

Mr Prowse—The Central Land Council is an incorporated body under the provisions of the land rights act. We are resourced pursuant to other provisions of the land rights act. In comparison to most Aboriginal corporations in Central Australia, we are well resourced. We have legislated functions that are defined under the land rights act and we have the funds to carry out those functions.

Our concern is for the hundreds of Aboriginal corporations in our region currently incorporated under the Aboriginal Councils and Associations Act, most of which have no funds at all or have a small amount of funding for a specified purpose which does not include any funds for the purposes of accounting, audits or compliance with the provisions of the incorporation legislation. So we at the Central Land Council do not have concerns for our own organisation. Our concerns are solely for all those Aboriginal corporations in our region. Where we do have a concern is that we are the organisation that is called upon to assist all of those corporations with compliance issues under the act and what we see with this bill is that the issues of compliance with the legislation are going to increase dramatically. Even if it is only a dramatic increase in the requirement to apply for exemption from the provisions of the bill, that will mean an increase in demand upon the Central Land Council to provide services.

It is not a function of a land council under the land rights act to provide general assistance to Aboriginal corporations. We are not funded to that. We do it, quite often, because nobody else is doing it and because it is the only way that communities and Aboriginal people in Central Australia are able to access services that require them to be incorporated. Our concern, in the main, is for the Aboriginal corporations themselves and for the members and governing committees of those corporations. But we do have a concern ourselves that, if this bill goes through, we are going to be asked to assist with compliance by virtually all of those corporations, and we are not funded to do that.

Senator BARTLETT—From your experience with the sorts of organisations that you are referring to, do you believe there is a need for, or that they would benefit from, some form of improved governance requirements?

Mr Prowse—There is most definitely a need for assistance to those people and those corporations. If one carefully reads the review from which this bill came, one sees the review does recommend a role for the Office of the Registrar of Aboriginal Corporations to provide 'special regulatory assistance', which is a term that comes up time and time again in the review. That great need for assistance is one of the special needs of Aboriginal people and the special needs of corporations for Indigenous people. This bill does not provide for that assistance to people. It provides an intense regulatory regime with the possibility of some application for relief from that registration if you make a complex application. It is our

submission that this bill is not going to assist Aboriginal people in Central Australia with the problems they have in dealing with corporate identity. It is going to increase those problems, not decrease them.

ACTING CHAIR—Chapter 3 of the bill requires the corporation to have a registered office or a document access address. During the Senate select committee's inquiry into the abolition of ATSIC last year the Arrernte people of Alice Springs, the Lhere Artepe people—who are a prescribed body corporate now, given that they have won the native title claim over the Larapinta area—put to us that they were struggling to even have an office, a phone or a fax machine because, once they became a prescribed body corporate, there was no means by which they could get funds to set up that body. The sale of the Larapinta land had not occurred, no money was therefore coming in and the Northern Territory government did not want to fund them because it was not a Territory responsibility. How realistic is it going to be for that group of people to operate under this act? If we take it down to the real grassroots level of how this is going to be applied, how will those people ever operate under this act? Why would that body not then seek to become just an incorporated association under the Territory's law?

Mr Prowse—There are two reasons. The first reason is that the Native Title Act says that prescribed bodies corporate must be incorporated currently under the Aboriginal Councils and Associations Act. Presumably that prescription will roll over into this act. So the Native Title Act will say that, if you form a prescribed body corporate, you must form it under this legislation. The second reason concerns the issue of resources. As is on page 9 of our submission, at present the Office of Indigenous Policy Coordination grant conditions to Aboriginal and Torres Strait Islander rep bodies prevent them from using funds to assist prescribed bodies corporate with governance issues. So, indeed, you are quite correct—there is absolutely no assistance whatsoever to prescribed bodies corporate. In a situation where those bodies corporate are required to be incorporated under this act but prevented from being assisted by the representative bodies, there are going to be no funds for them and they are going to find it extremely difficult to comply with the provisions of this act.

CHAIR—Mr Levy, do you want to make a comment about that?

Mr Levy—Yes. The whole issue of prescribed bodies corporate, in our view—and this has been our view for a long time—really needs to be looked at. We think it is a disaster waiting to happen. If native title is found to exist in the Darwin region—and bear in mind the Kenbi land claim nearby—I anticipate that the Larrakia are going to have a source of funds. They have structures in place. One assumes that they will need some assistance, but they will be able to have funding to look after themselves. The vast majority of bodies in remote Australia are not going to be able to.

In the same way that it has been suggested that some of the difficulties raised today in our initial consideration of this bill could be solved by exemptions and other things—and that may well be the case—prescribed bodies corporate should not be the only method whereby a rubber stamp can be got on the document so that development can quickly happen. That is their sole function. They have all of these other functions if you want to give them to them—to earn money and all of this sort of stuff—but, really, their primary, No. 1 function is that a

rubber stamp goes on a document so that development can quickly happen if the traditional owners agree. That is what they are for.

In the Northern Territory we have a system which does that. I am not saying that it would be the appropriate system in all respects. In the Darwin region we would like to see a stand-alone body looking after itself. But there is a land trust system which could easily be adapted so that you do not have all of these underresourced prescribed bodies corporate doing nothing. We could easily, for example, add the township of Urapunga native title claim, which is one square mile of native title surrounded by Arnhem Land, into the Arnhem Land land trust. The traditional owners would be quite happy for that to happen. They do not need a prescribed body corporate in any event, because the land is about to be granted as Aboriginal land. So all of the native title in the ghost township of Urapunga is going to be Aboriginal land.

If you are talking about the Central Land Council area, the town of Hatches Creek, where they won a native title claim recently—correct me if I am wrong, Mr Prowse—is going to be part of the parks deal whereby there will be a grant of Aboriginal land leased back for national park purposes. You do not need prescribed bodies corporate. There should be other options looked at. In other states or territories there might be other options. This needs to be looked at to get pragmatic and practical answers without taking away people's freedoms and getting them tied up in knots when they should not be. Maybe this is the wrong body to do it, but someone needs to look at it. That is our submission.

Mr Dore—I would like to make the comment that the sorts of failings we are talking about with prescribed bodies corporate in the future are already happening now with Aboriginal corporations. If you are a corporation whose area is not subject to some sort of development or mining where you have managed to do a commercial arrangement with the developer or miner and have some sort of income coming in there is no other viable income stream for many of them. They vary so much. We have the Djabugay people, who have the determination, have a well-run commercial arm focusing on tourism, run a tourist park and have dollars coming in. You can contrast that with other groups that we act for that have no commercial arm, no tourist ventures, no source of income and who are scratching to find the postage money to send out AGM letters. Unless there is some sort of funding made available for those who are not in a position to raise it for themselves, there will be failure to comply. There is already failure to comply with what is a much more simplistic act. It is happening now.

Senator SIEWERT—I came in late and I apologise if this has already been addressed. The bill provides for non-Indigenous membership and corporate membership of Indigenous corporations. Can I get a feel for people's comments on that?

Mr Prowse—We did address that in general terms in our submission. We say that in Central Australia particularly it will be a huge problem if non-Indigenous people are permitted to become members of Aboriginal corporations. The provisions in the bill, which provide that there will always be a majority of Aboriginal people, are insufficient and will not protect and will quite often not permit Aboriginal control over the corporation. Quite often people are not comfortable using the kind of processes that other people with corporations in other parts of Australia might use. Voting is quite often not used but a process of consensus decision making is used. We would suggest that to permit non-Indigenous membership of

Indigenous corporations would quite often lead to a chaotic situation with Aboriginal people being overwhelmed by non-Aboriginal people, who may have better capacities to read and write and to use techniques and instruments of non-Aboriginal law. We suggest that that provision is one that should be struck out of the bill.

The review suggested that as well. The review of the previous act suggested that the bill should continue to limit membership of Aboriginal corporations to Indigenous natural persons. The review also suggested that membership should be limited to natural persons not corporate persons. If there is a need for a corporation to have non-Indigenous or non-natural membership, then there is no reason probably why that corporation should not go under the general Corporations Law. Peak bodies and resource bodies that do perhaps require membership from other organisations would usually have sufficient resources to be able to incorporate under the Corporations Law perhaps as a company limited by guarantee or some other form of corporation. The special needs of Aboriginal people are not met by permitting non-Indigenous membership of Indigenous corporations. It defeats the whole purpose.

Mr Dore—It seems to me that there is a way that allows some non-Indigenous membership and that is indeed a method we used when we helped incorporate a particular association here. It is to have a provision in the rules that allows a form of associate membership for spouses, for example, of Indigenous members who may be non-Indigenous. They became associate members but lacked voting rights. It was a way whereby we could give some recognition to those who were spouses and so on without taking away the ultimate control from the Indigenous people. Whilst we had some trepidation at first as to whether the registrar would approve of such a rule, in the end he did. So we have a corporation operating here that has associate membership for spouses and that can include non-Indigenous spouses.

ACTING CHAIR—Mr Prowse, Mr Dore and Mr Levy, I thank you for your submission and for making yourselves available to give evidence before the committee this afternoon.

[5.20 pm]

DODSON, Professor Michael, Chairperson, Australian Institute of Aboriginal and Torres Strait Islander Studies

STRELEIN, Dr Lisa, Manager, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies

ACTING CHAIR—Welcome. You have lodged a submission with the committee, and for our purposes it is numbered 10. Before I invite you to make an opening statement, do you have any amendments, additions or supplementary submissions that you want to give us?

Prof. Dodson—No.

ACTING CHAIR—If you would like to make an opening statement, please do so, and then we will go to questions.

Prof. Dodson—I will cover some general matters first and then refer to some specific issues. The Australian Institute of Aboriginal and Torres Strait Islander Studies recognises the need for the Aboriginal Councils and Associations Act to be rewritten. The act is outdated and restrictive. We suggest that this problem has been recognised. I think it is accepted generally that it has been recognised for quite some time. It is almost 30 years old. Rather than saying 'the Australian Institute of Aboriginal and Torres Strait Islander Studies' each time, I will just refer to the 'institute'. We will know who we are talking about. In 1996, the institute conducted a comprehensive review of the Aboriginal Councils and Associations Act, including dozens of intensive case studies. In 1994 amendments were proposed to improve the accountability of organisations incorporated under the act, and those were deferred in light of the more broad-ranging criticism of the act and the significant funds that would be needed to implement the proposed amendments at that time.

The 1996 review considered the effectiveness of the act, including its cultural appropriateness in terms of forms of incorporation and whether there were more effective arrangements for the administration of the act, including particular issues surrounding the councils provisions of the act. The review found general dissatisfaction with the act and its administration, with incorporation under the act being driven largely by ATSIC funding arrangements. However, the review found that in large part the strict provisions of the act were unsuited to many of the purposes for which organisations were established and funded. The original purpose of the ACA Act was to provide a simple, cheap and flexible method for the legal recognition of Indigenous groups and communities and their decision-making practices based on their own cultural values and practices. Thus, a significant part of the original legislation provided for municipal style organisations under part III.

In my experience, there has been fierce opposition from state and territory governments to the recognition of Indigenous councils. The act became primarily a vehicle for the incorporation of organisations for more specific purposes. We note in our submission to this committee that the loss of the council provisions in the proposed bill is regrettable. Nevertheless, the 1996 review found, as the current review demonstrates, that the majority of the 2,800 Indigenous corporations are primarily funded to deliver government type services to

Indigenous communities. The primary findings of the 1996 review are mirrored in the most recent review, including the constraints of the model rules that do not allow for sufficient flexibility, the high cost of overregulation and the related costs of noncompliance. The recommendation of the review, in its most simple form, was that the act be rewritten and scaled back to its basic requirements. The need for simplicity was echoed in the recent review by the office of the registrar. The current bill seeks to align the incorporation of Indigenous organisations with modern Corporations Law standards—in particular, standards for accountability of directors.

Moving to some specific matters, our submission outlines key concerns in the implementation of this reform: firstly, the transitional arrangements. The information available to us on the current bill does not provide adequate guidance in relation to transitional arrangements and consequential amendments. We have read some of the other submissions, and concern has been expressed by some organisations about the time available for Indigenous organisations to absorb the implications of the huge bill currently before this committee. Also, the additional implementation issues are yet to be seen. If it is expected that this is to be finalised before November, obviously there will be no time for consultation with affected bodies on the technical implementation issues.

Our second specific concern relates to the burden of organisational reform. I am sure this would be acknowledged by the registrar. There is an overwhelming burden of reform and change currently being borne by Indigenous organisations and communities. Although the process by which organisations will be expected to transition to the new act is yet to be seen, the effort needed for a transition from the old regime to the new act can be implied. However, the bill proposes some significant changes to constitutional arrangements and accountability that will also require organisational change and training. One example we have drawn out is the maximum board size. While this in itself may be a wise organisational requirement—and we do not make any submission on that—there are numerous organisations with far greater representation on their boards. Perhaps I can digress briefly. A few weeks ago, the inaugural Indigenous Governance Awards were awarded in Melbourne. The three winning organisations all had boards in excess of 12 members. The winning organisation had a board of 27, I think. I should hastily add that it was not incorporated under Commonwealth law, but the two others were and they were from the Northern Territory, of course.

Often these organisations have a representative role. For example, one of the land councils that gave evidence to you earlier has a board constituted by ward representatives. Any change to its structure may require the management of feelings of disenfranchisement or the amalgamation of a representation of groups who culturally associate as separate communities of interest.

Our third specific concern is to do with supporting Indigenous corporations. There need to be significant resources provided to support Indigenous organisations in the transition to any new regime and an ongoing commitment to supporting the work of Indigenous organisations. This point was made earlier, but I will make it again: these corporations are, in most circumstances, not profit-making initiatives. They deliver essential services and programs that would otherwise fall to government. These efforts by community members should not, in our submission, be demonised in the labelling of the reforms as ‘overcoming poor administration

and management'. Just as importantly, the fault of government programs should also be acknowledged.

Our fourth concern is native title. We note the need for specific provisions to deal with conflicts arising in relation to duties under the Native Title Act and with responsibilities of directors in relation to registered native title bodies corporate or PBCs. It has always puzzled me that, although PBCs are a legal requirement imposed by the parliament, the parliament sees no responsibility, morally or otherwise, to fund them. Others have suggested that perhaps these unique organisations should have been dealt with separately from the current act, given their unique position. However, there are also concerns that similar conflicts might emerge for native title representative bodies who, in certain circumstances, such as when they are carrying out certification functions, must act in the interests or on behalf of all common-law native title holders. Finally, our last concern, in this list at least, is the rolling audits. We want to make the simple point that government must take responsibility to minimise and coordinate review and audit functions under various guises.

Senator CHRIS EVANS—Thank you for your submission. I want to pick up on a couple of things. Firstly, could you go through the concerns you have with regard to the interaction of native title bodies corporate with the Native Title Act. I understand your argument going to their funding et cetera, but you seem to have more general concerns about their interaction with native title. Could you flesh those out for the committee?

Dr Strelein—We only had a brief opportunity to review the bill, as did most of the submitters. We have not had an opportunity to talk in detail with the native title representative bodies about this. When I read the bill it hit me that there are an enormous number of provisions and exemptions for prescribed bodies corporate in terms of the possible conflicts between the duties of directors to their membership and the duties of prescribed bodies corporate to the common-law native title holders, which, as the bill notes, is an involuntary association in some respects.

The Native Title Act also places obligations on native title representative bodies, which have obligations under the Native Title Act to, in some circumstances, enter into agreements or authorise or certify certain activities as being representative of all the native title holders. In almost all circumstances, they will not be constituted by their membership. The directors, who are then required to have obligations under the Native Title Act, may be in conflict with the interests of their members, which is a much smaller group, and obviously may not be in line with the native title holding group. It occurs in fewer circumstances because their obligations are representative rather than directly being constituted by the native title holding group, but there are circumstances, as far as I can understand, where that may come into conflict. As far as I can understand, from talking with the office of the registrar, other circumstances in which the provisions of the bill might be overly onerous on native title representative bodies, such as dual reporting, are able to be taken into consideration under a registrar's notification process.

Senator CHRIS EVANS—I have one other question. Professor Dodson, I am interested in this concept of burden of organisational reform. It has been common in a lot of Commonwealth departments and other areas in recent years. I gather that what you are saying is that the impact of the changes that the government has made in relation to the organisation of Indigenous affairs and funding et cetera is already putting an enormous burden on

organisations and that this is going to add to it. Is that an argument for delay or for greater education? You support the general objectives. What is the solution, if you like? There is an objective of this process that I think most people support—I do not want to overgeneralise. The question that has been raised most commonly with us today is whether or not this achieves that objective, whether or not this is simplicity and provides ease of operation or whether in fact it is overcomplicated. You said that organisations are under disadvantage and have distance issues anyway and that organisational reform is occurring. What is the way forward in terms of meeting the objectives of the bill in this form or in an amended form, with that pressure that organisations are under already to deal with changed circumstances?

Prof. Dodson—At any first glance of a bill that is over 500 pages long, even if you are a lawyer like Dr Strelein and me, it sets off alarm bells saying, 'This ain't simple.' What happens is that most Indigenous organisations in this country, from any point of view, are massively overregulated and overburdened. Not only is it the requirements of their incorporation regimes; more often, it is compounded by the onerous reporting requirements of the funding arrangements that require inordinate amounts of reporting of acquitting government funds. Some organisations say that the burden is so great that they actually have to employ people full time to report back to the bureaucrats on how they are spending the money. This bill is going to compound these requirements. We seem to be obsessed in this country with bureaucratic process rather than real outcomes. If we could perhaps target the outcome—what do we really want out of this bill?—and concentrate our minds on that, we might do better than spending a lot of our taxes on answering to bureaucratic process.

A few years ago I was asked to give the ATSIC board some training—perhaps I failed. It astounded me that there were something like 57 pieces of legislation or regulation, including the ATSIC Act, that commissioners and regional councils had to answer to in some way. To me, that is just overregulation. The reviews of this act were meant to make things simpler and easier. On the face of it, it seems to make it more complex and difficult than it ought to be.

Dr Strelein—There is definitely a culture of reform in Indigenous affairs at the moment. I refer back to the native title process in 1998 when two processes of reform were introduced: one, the rerecognition process for native title representative bodies and, two, the reregistration process for all native title applications. They basically were only a small part of one sector and they really put a stop to a lot of native title activity for about two years because of the organisational reforms that had to be made. A lot of organisations in the native title rep body sector had to go through constitutional changes of the type that we have talked about and that will be required under this act—changing the structure of boards and all of those sorts of things. They take time and resources. They take more time when you have fewer resources.

A lot has been said about the lack of guidance over the transitional arrangements. The CLC mentioned the support they are going to be asked to provide to small organisations within their region. It is going to take years to reform all of those organisations. Even with the best intentions and the best support processes it would be an incredibly difficult process. That is not factoring in the fact that those same organisations are dealing with the mainstreaming of funding through the new arrangements and the lack of capacity within government. It is really important to put this back to a whole-of-government approach. The government is still not good at coordinating through ICCs. The skill development within the new arrangements is

still not up to the standard that it needs to be in order for the government to coordinate these reform processes and to provide good advice through government organisations and agencies about how people can work through these reforms and how they map together and interact with each other.

Prof. Dodson—I would like to add one more thing, prompted by what Dr Strelein said: if government requires these onerous reporting exercises then it needs to ensure that people have the capacity to meet those requirements. In the last two years the Office of the Registrar of Aboriginal Corporations has put 600 Aboriginal corporation directors through a three-day training course in Queensland. They have got 100 through a certificate IV program in Queensland. They have done 10 in a three-day workshop at Maningrida. They have done 20 in the APY lands in Central Australia and a further 20 in the Tjurabalan COAG area. That is a bit over 700.

There are 2,800 Indigenous organisations incorporated under the existing legislation. If their boards have on average 10 members, we have 28,000 directors. You do the maths. It is going to take at this rate about 4,000 years to acquaint them with the requirements under this act and other requirements, including understanding the money. If this is to work and these accountability requirements are to produce real accountability, people need to be given the capacity to properly report under the legislative and regulatory requirements. That means not just making the Office of the Registrar of Aboriginal Corporations sufficiently buoyant with funding but giving the organisations that are required to report the capacity to train their own people. There is an added burden here that does not apply under the existing legislation, and that is a broader application of these accountability provisions to the officers of the association, rather than just the directors. So there is an even greater need beyond the 28,000. It might be double that amount when you count the officers.

Senator MASON—You may have mentioned this in your opening remarks, so forgive me if I missed it. Did you say that you had been consulted in the drafting of the bill?

Prof. Dodson—No.

Senator MASON—You were not consulted?

Prof. Dodson—No.

Senator MASON—I will go to what I see as the core of the problem. I am not an expert in this area and I know very little about it. Professor, in your opening statement you said that the Aboriginal Councils and Associations Act 1976 was nearly 30 years old and really had to be replaced. I think you accepted that.

Prof. Dodson—We think the time has come.

Senator MASON—The bill is a lot bigger, and you think this is more onerous on Indigenous corporations and that it is therefore unworkable. Is that also correct?

Prof. Dodson—I did not use that term.

Senator MASON—What term did you use?

Prof. Dodson—I did not use any term. I just said it was more onerous.

Senator MASON—Of the two, what do you prefer?

Prof. Dodson—I would prefer that the extensive reviews that have been conducted, whose major recommendations included simplicity of incorporation and cultural appropriateness, were better taken up. They have not been.

Senator MASON—Between the act and this bill, what do you prefer? Out of the proposed bill—

Prof. Dodson—I would prefer that the review that was done—

Senator MASON—That is not answering my question. That is not my question.

Prof. Dodson—Let us stay with what we have, because the new bill is far too complex.

Senator MASON—That is fine. Professor, you have given as evidence that this was more onerous. We have also heard similar evidence before from the different land councils. Someone else said 'unworkable'—I think it was Mr Prowse. What confuses me is that that is the evidence we have heard and yet—and Senator Evans pointed to this before—some of the written documentation from the registrar says, for example:

The Bill also reduces red tape by, for example, streamlining how corporations have to report. Small and medium sized corporations will have to provide much less in annual reporting than previously, whereas larger corporations will provide more.

In another part, the written material—and in a sense this is a fall-back position—says:

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.

In other words, they can replace the model provisions.

What is confusing for someone like me who has no background in this is that there is a lot of evidence that on the one hand this is more onerous and on the other hand—and we have not heard from the registrar yet but we will next—in fact it is much simpler. You have mentioned cost, the burden of organisational reform, interaction with the native title legislation and rolling orders. Is it just the size of the act that concerns you? Does size matter or is it about how you use it, in this context?

Prof. Dodson—I go back to some of the points you made. Firstly, we did not say anything about cost. Secondly, the problem with the bill, when you talk about small, medium and large corporations, is that nothing is disclosed. What is the formula? How are we supposed to come here and properly assist when we are not told what the formula is going to be? We know that some of the submissions say that the replaceable rules could lead to extensive litigation. I do not know if that is correct. We did not address the question of replaceable rules, but I am happy to consider that in greater depth and get back to you. Why does something as relatively simple as incorporating groups or communities of Indigenous people to look after their affairs, which overwhelmingly are not all that complex for the majority of corporations, take 521 pages to regulate?

Senator MASON—That is banal, isn't it? The written evidence we have from the Office of Registrar of Aboriginal Corporations—we have not heard from them yet—is that, in fact, 521 pages will not apply to that; two pages will apply to that. I am not saying that you are wrong; I am saying that I do not know. I think that what is worrying the committee is that—

Prof. Dodson—This seems to be the problem for everybody: they do not know.

Senator MASON—Yes, the difference is so great between the—

Prof. Dodson—Perhaps we need some more time so that we can find out.

Senator MASON—Sure. I am not saying that you are wrong; I just do not know.

Prof. Dodson—Neither do I. We would like more time to find out, but the process is a bit rushed. I have no idea what some of those—

Senator MASON—I would like to ask one more question. I think we have hit an impasse on this. We will hear from the registrar next. One point that Mr Prowse made, and I think it was towards the end of his evidence this afternoon, is that he did not believe it would be in the interests of Indigenous people to have non-Indigenous members of corporations, and yet in your submission—I think I am right in saying this—you indicate that to you it would not be such a difficulty to have non-Indigenous members of corporations.

Prof. Dodson—I do not think you could say that we have come to a concluded view about that. We are tossing around some ideas.

Dr Strelein—We are silent on a lot of things, for that reason. There was just not enough time.

Senator MASON—Sure.

Prof. Dodson—This submission has not been considered by our council, but I am authorised to speak on their behalf.

Senator MASON—Okay. But your prima facie view is not to oppose it?

Prof. Dodson—No, my personal view is to oppose it, but that is not the view of my council, because I have not couched it with them. If you want Indigenous or non-Indigenous membership of corporations, go to the general Corporations Law. This is meant to be designed to meet Indigenous-specific circumstances.

ACTING CHAIR—Professor Dodson, you were involved in the review of 2002. Would it have been preferable for an exposure draft of this legislation to have gone out to all those involved in the review for comment—in other words, having a draft of the legislation made available as a follow-up to the review?

Prof. Dodson—That would have been very useful, particularly if it came out shortly after 2002 and we are dealing with it today. I do not know how I would go to a small community that has its own corporation under the existing legislation, where perhaps English language is No. 3 or 4 and many of the directors do not read or write English, and try to explain that bill to them. It would take some time.

ACTING CHAIR—That is the thing that is concerning me about this. We have waited three years now for this legislation to be realised following the review. This committee does not have enough time to even get out there and travel and ask people who are involved on a day-to-day basis what this is going to mean. In fact, I think the fact that it is so complicated is one of the reasons why we have had very few submissions.

Dr Strelein—One of the reasons for very few submissions is the timing and the complexity too. I sent an email out to all of the representative bodies saying, 'I assume you are aware of the inquiry.' Most of them were not. That has prompted a few of the submissions that you have received and it is one of the reasons why most of them are so short. But what is of even more concern is the implementation provisions. As I understand it, ORAC wants them ready for the spring sitting, which means it wants them finalised by November. I am not sure whether you are planning to have an inquiry to look at those as well. I would not have expected that you will have time. So I think there is a concern with the time available for this process.

ACTING CHAIR—Professor Dodson, the failure of the bill to revise and reinvigorate the provisions of the Aboriginal councils section of the act has also been raised in a number of other submissions. One submission says:

> There is still a need for the Commonwealth to develop a nationally available option for Aboriginal communities to seek legal recognition as quasi-local government bodies ...

You raised this in your submission. But I understand that that was not the outcome of the review. Where do you see that this aspect ought to go? Should we stick with the outcome of the review or try to resurrect a provision for the recognition of Aboriginal councils?

Prof. Dodson—It depends on where you are located these days—that is, which jurisdiction. The Northern Territory government introduced the community government councils legislation, which, by and large, is pretty good in my estimation. It does allow for a considerable amount of cultural match, particularly in terms of how members of those community government councils are chosen to represent their constituents. There are some very inventive and innovative ways in which that has been done. My most recent experience was on a visit to the Tiwi Islands, where I saw the way they have amalgamated four different councils into one local government. That has its teething problems, I must confess. They are the first to admit it. But some of the ways in which they have chosen their representation are, I think, innovative, and they try to accommodate the broad range of interests that simple popular elections may not always achieve.

In the Northern Territory and in other areas the associations part of the Councils and Associations Act has been used to set up organisations inappropriately, I think, and with some shortcomings to deliver municipal services that really the councils part of the existing act was meant to do. As I say, there is resistance to that because I think that originally there was probably envisaged by the parliament the idea of a fourth tier of government, a form of Indigenous local government that this act would provide for. I do not think that that need has disappeared. It might be less of a need in the Northern Territory, but it is nevertheless a need, with some exceptions, in Western Australia. In other parts of the country there are probably many locations where you can make out a case for that type of localised municipal arrangement.

Senator BARTLETT—There is another general aspect to this that I would like you to express an opinion on if you feel able. Would it assist Indigenous organisations to improve corporate governance requirements to update the legislation? You made a comment before about what many of the organisations and associations do is not that complex in terms of the tasks they perform for the communities. Do you believe that currently those organisations are

able to cope with the burden of the regulatory requirements? One of the concerns I have is that if this is too complex and difficult some of these organisations might fall over, and that would be totally counterproductive. I am just trying to get a sense of whether you feel that some of the smaller organisations have the capacity to meet what is necessary these days for basic corporate governance or whether it is just a reality that with what is required these days they are just not capable of doing that organisationally. I make the comparison with community groups in the wider Australian community, who have also over the last couple of decades had to increase their reporting requirements. A lot of the smaller groups have just not been able to make it to that next stage of what is required with all the different bits of red tape and reporting. I am just trying to get a sense of what you feel is the capacity of many of the organisations that would be affected by this act. Are they coping okay at the moment and is this the sort of change that might tip them over the edge? Are many of them struggling as it is with the regulatory requirements and reporting requirements?

Prof. Dodson—I cannot predict whether some will be pushed over the edge. Perhaps some of the smaller ones may be because the burden of reporting is so great and to have this added to it might cause them to burst, as it were. I think that some of the bigger, better resourced organisations are finding it difficult too, particularly with the funding reporting requirements. These seem to be getting more frequent and more complex and even a relatively well resourced organisation like the institute, particularly with our special programs that we deliver, find that the reporting requirements are very onerous. For now we have the capacity to deal with those, but it takes somebody's time. We should be concentrating on the outcome, but we are dealing with the process of reporting about the money being spent on the outcome or the ultimate objective.

What I should say is that my experience with the Indigenous governance research project and the Indigenous governance awards is that a lot of Indigenous organisations are very well governed. They are doing a great job with limited resources and have managed to secure resources to build their capacity and answer their accountability and reporting requirements, but they could do a lot better if some of those shackles were shed. It is remarkable that so many organisations are doing pretty well, considering the burden and the limits on their resources. It encourages me, at least, to see a lot of our people doing so very well under what, at times, can be very difficult administrative circumstances.

ACTING CHAIR—Thank you, Professor Dodson, for your submission and for making your time available to appear before the committee.

[6.08 pm]

BEACROFT, Ms Laura Elizabeth, Registrar, Registrar of Aboriginal Corporations

CLEE, Ms Hannah Mary, Senior Policy Officer, Legislative Reform, Registrar of Aboriginal Corporations

KIRK, Mr Adam David, Australian Government Solicitor Counsel, Registrar of Aboriginal Corporations

MATULICK, Ms Toni Myrise, Director, Legislative Reform, Registrar of Aboriginal Corporations

TOOHEY, Mr Justin Michael, Assistant Director, Legislative Reform, Registrar of Aboriginal Corporations

ACTING CHAIR—I welcome representatives from the Office of the Registrar of Aboriginal Corporations and representatives from the Department of Immigration and Multicultural and Indigenous Affairs. Do you have any comments to make on the capacity in which you appear?

Ms Beacroft—I also represent the Office of Indigenous Policy Coordination, to the extent that I can.

ACTING CHAIR—The Registrar of Aboriginal Corporations has lodged a submission with us, which we have numbered 5 for our purposes. Before you make a short opening statement, do you wish to make any amendments or alterations to your submission?

Ms Beacroft—Not at the moment. But after today we will go through all of the submissions that have been put to the committee and provide detailed responses to some of the practical queries that have been raised.

ACTING CHAIR—Thank you very much. Before we commence, I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy and, if necessary, they must be given the opportunity to refer those matters to the appropriate minister. I invite you to make a short opening statement and then we will proceed to questions.

Ms Beacroft—I will not speak to the submission we have put in. I have read all the submissions except the Northern Land Council's, which I will read tomorrow, so I will try to provide some additional comments, having taken on board some of the flavour, if you like, of what has been said in the submissions. I would like to start by talking about the present before coming to the bill, which is about the future. It is important to get the present, the status quo, into perspective so that we know what we are benchmarking the bill against. As has been said, the current act is very old and extremely outdated. I will come back to that in a moment. It is not just that being new is fashionable; there are a lot of serious issues that relate to having very old legislation in corporate law.

The evolution of the Indigenous corporate sector has created its own needs for the future. I have a few maps to hand out which are samples of some of the background information we have on who is incorporated with us, which should give the committee a bit of a feel for what

the modern Indigenous corporate sector looks like. Probably a minority of Indigenous corporations are incorporated under our legislation. I do not have exact figures, because state and territory and ASIC incorporating agencies do not necessarily record a corporation as Indigenous. We work closely with those agencies; we have had a look at their databases and done searches on keywords like 'Indigenous', 'Aboriginal' and 'Torres Strait Islander', and we know that there are thousands of Indigenous corporations—not necessarily all of them active, but they are still on someone's books. We have about 2,600 with us. If you look at the maps I have given you, you see that the majority of our corporations are in remote and very remote regions. That is possibly what distinguishes our role, and therefore our legislation, from what you might find with some of the other incorporating agencies; although, obviously, the Northern Territory and WA would also have quite a few remote corporations. That provides quite an important backdrop for what the bill is trying to do. We are working with that now under our current act, so we already know how it does or does not work with remote people.

A general point to make about the current act is that although it looks very dramatic when you hold up the two bits of legislation—and I am as concerned as anyone else about the size of our bill—it is in many ways not a realistic comparison. In our current act there is a huge amount of law which is in case law, hidden away in web sites. We have tried to bring that forward into the bill. People can argue about it, but we have done that because we have a great interest in transparency in what law applies. There are a lot of missing bits in our current act, just because it is so old. A lot of them are rights. For example, there are virtually no review rights for decisions that the registrar might make, which is a huge problem. That is missing entirely in the current act. I will not go into the whole list of rights, but it is not just about putting the case law into the bill. It is also about putting in new rights which have become part of modern life. Indigenous people who are subject to our legislation at the moment are missing out on those rights. It is very important to get those rights in as quickly as we can and have Indigenous people accessing them.

Another thing to clear up about what the Indigenous corporate sector that is with us looks like is that it is perhaps more complex than people necessarily understand. There is quite a significant growth not just in numbers but in the complexity of the business that they are doing. For example, we have one running a power plant. It may be that some people would say, 'They shouldn't be running a power plant.' I am not going to disagree with that, but the fact of the matter is that some of them are doing that today. The whole area of municipal services and the relationship between Indigenous corporations and municipal services is bigger than our legislation, but the fact that they are doing some of that now means that we have some corporations that are doing quite unusual business, given that they are private corporations. We have some that just hold land and do not have any funding. It is not just registered native title body corporates. There are a lot of land-holding corporations. That is quite an unusual corporate animal in Western law.

There is a lot of diversity and growth in numbers, and the diversity has a lot of complexity with it just because some of the organisations are subject to different legislative schemes, such as the native title scheme. So our legislation has to interact very well with that legislation. Also, some of the more commercially orientated corporations are complex just as

corporations. They have many subsidiaries that hang off them with complex interrelationships, even by Western standards. That has to be taken into account. Also, when we look at trends with our corporations, although most of our corporations at the moment are small and medium—if you count 'small and medium' as sitting under $5 million—there is a growth in their income. For example, some are getting $22 million. This is different to, say, in the seventies, when the legislation was first drafted. No-one really thought that corporations would get that big, because originally the current act was thought of as quite a simple land-holding piece of legislation.

That gives you a little background on the enormous diversity and evolution of corporations and, I suppose, puts it all in the context of the evolution of a lot of Western rights around review, freedom of information and Corporations Law itself. I was trying to create a bit of the status quo benchmark before we talked about the bill. Coming back to the size of the bill, it is pretty large. We have tried to explain in a lot of the materials we have put out where that largeness comes from. As I said before, it is partly about trying to make sure we are as transparent as we can be in a piece of legislation about what law does apply and making sure that some of the modern law is put into the act. One thing that was very important in the drafting of the legislation was to create a lot of flexibility. That is necessary in most legislation these days but particularly in the arena of Indigenous affairs. It is terribly important there. We probably have a much more diverse range of corporations than you would find under ASIC because of the nature of Indigenous affairs. It would be very unlikely that you would find a lot of corporations with ASIC that are purely land-holding and get absolutely no money. Certainly they are not interfacing with the native title arena like we are. I am not sure if there are any that are trying to do municipal services under ASIC. Diversity under our legislation of corporations is much wider, so flexibility has to be much broader than you would find in other incorporating regimes.

The other thing is that the evolution of the Indigenous corporate sector is much faster. If you think back to the seventies—I am old enough to remember a lot about the seventies—native title was not even on most peoples' horizons, hence the legislation did not contemplate it. So we have tried to draft a bill that does not set too many things in stone, because we know if you look forward another 20 or 30 years things might emerge—possibly even rights—that we are not even discussing in the mainstream in Indigenous affairs right now. Hence the need for flexibility, and flexibility requires drafting space in a piece of legislation.

Once again, people can say: 'Well, that was the wrong way to go. I wish you would have done it this way.' I take on board that there are many ways to tackle the situation presented by Indigenous corporations, but we have created a fairly strong and clear backbone in the legislation that is very much aligned with modern Corporations Law, which is not just about Australian Corporations Law; it is international corporations law. Then we have tried to create a lot of flexibility in various ways, through exemption provisions, regulation making power that allows exemptions to be made or various determinations that can be made within the legislation, which allow different courses to be taken for different sorts of corporate classes or different individual corporations. In a nutshell, that is what the legislation does.

I think the flavour of a lot of the submissions you have received is that people can see that that is what it has done. I am not sure that there is anything hidden in the legislation about

that. What I am hearing is that people are concerned that the framework in there will somehow be imposed as a one size fits all and that the flexibility will not be administratively harnessed. The whole point of putting it in there is so that it will administratively harnessed and be available. Once again, going back to the benchmark of the status quo, yes, our current legislation is quite small. One of the reasons it is small is that it has virtually no flexibility, it is very rigid and it is one size fits all. For example, every corporation with us at the moment is supposed to give us a fully audited financial statement, which is just not in the capacity of many of them. So that is a difficulty for us. We have to, under our current legislation, turn our minds to every exemption that we make, which is not efficient from anyone's point of view and makes our exemption process very slow.

I have picked up the flavour of some of the other submissions that have been put in. I know there is a concern about how the bill is going to be implemented—the transitionals, as they are called. Those transitionals are being drafted now. I understand, from the Office of Parliamentary Counsel, that it is not unprecedented for the transitionals bill to follow the main bill. The drafting of the main bill has been slow and the drafting of the transitionals bill has been slow because we are going very carefully. It is a very complex area and we are trying to get it right.

Senator CHRIS EVANS—You and the government briefed me that they were intended to be done together. Are you now saying that that is not the intention?

Ms Beacroft—Both bills are set down for cognate debate in the last week of November. The transitionals bills is in the process of being drafted now, so it is a question of how quickly it gets drafted and also, I guess, the space in the parliamentary timetable. In the end, that is a matter for the minister, as you would appreciate—but the transitionals bill is also very complex drafting because of the sorts of issues that are being raised here today.

I have not got a lot to say on the transitionals, just because I am not in a position to. However, if we take on board that we are dealing with very old legislation and an Indigenous corporate sector that has moved a long way since the seventies, there is no completely seamless way to move into a modern corporations statute. The transitionals are going to try to make the transition as easy as possible by, for example, having staggered starts for some elements of the bill. Take the financial reporting: there are opportunities, as you would appreciate happens in other legislation, where there can even be a period of years for corporations to make the transition. But there is no getting around the fact that we are leaping from a seventies concept of Corporations Law to one in 2005.

I will respond to a few things that have been raised about some of the practicalities of the bill. I emphasise that flexibility is there in the bill. It is probably one of the most flexible pieces of legislation I have ever seen. We have purposely done that. We are already administering the current act in a very flexible way, to the extent we can, given that it is quite a rigid piece of legislation. To give you an example, we work quite closely with Indigenous corporations that are resource agencies to get lists of corporations that are with them and that are essentially unable to meet our requirements and we try to proactively do exemptions now. A lot of what you see in the bill reflects practices we have evolved over a long period of time and that seem to work for the client.

It is the same with a lot of our capacity building. We do have a training program. It is a very specialised kind of training program. We do not pretend to train every person that needs training in Australia. There are lots of TAFEs, universities, professional bodies and other providers but we try to work in the areas where there seems to be the least effective training happening and we try to synchronise our training with some of our organisational redesign work to try to build more successful constitutions, for example, and more successful practices for corporations.

There are a number of important provisions in the bill that might get lost in the emphasis on the regulatory and accountability end, and that has come through in the submissions. I hope they do not get lost. There is a lot of what I call 'front end work' built into the bill, which once again is partly reflecting what we try to do now. For example, the bill provides a statutory basis for our training program. It has a provision for conferencing where there seems to be a systemic problem that is not being addressed, and that includes bringing government agencies to the table so we can talk through some repetitive problems that people are not necessarily giving proper attention to. There are quite a few provisions in the bill that will support our service in dispute resolution, including a statutory basis to the complaints we receive from members. We have a hotline and some whistleblower protection, which we currently do not have, for those members who feel they are vulnerable to getting sacked or victimised. The bill provides a statutory basis for the advisory opinions we offer when a dispute is happening and there needs to be some clarification of matters of fact or law. A lot of transparency provisions are built into the bill—everything from freedom of information and members having more rights to gain information and the way minutes and meetings proceed. I will end there. Thank you for the opportunity to speak.

ACTING CHAIR—If nobody wants to add anything we will go to questions.

Senator SIEWERT—A question has been asked of all the people making submissions—it is a bit different for you, I must admit—about the issue of non-Indigenous representation in corporate representation. Why did you put those provisions in when, I understand, the review did not think they should be included?

Ms Beacroft—There are separate issues there so I will deal with them separately. I appreciate that allowing non-Indigenous membership of corporations is a sensitive issue. The review recommended only Indigenous membership. It has been three years since that review and since then we have had a lot of lobbying, you might call it, to allow non-Indigenous membership and also non-Indigenous people on boards. This is one of those areas where there are quite strong views both ways. For example, medical services have approached us and said, 'We would like a doctor on the board and we would like them to be a member so they have full voting rights.' You can be an associate member—under the bill they are called 'observers'—but they do not usually have voting rights. There are a lot of issues about having, say, a doctor on a board who is an observer. Without getting too technical, they would be considered shadow directors in law and they would be liable for the decisions of the board. They would probably exercise a fair amount of influence but they might feel that they have not been able to exercise that influence because they have not had voting rights. There are legal reasons why a non-Indigenous doctor would probably be reluctant to be on a board as if they were a board member when they are really not a board member.

So there was that issue, and the other issue about non-Indigenous membership was in relation to the list of non-Indigenous people that many communities want to have embraced within a corporation because they may be spouses, adopted children, stepchildren or just people who have lived there a long time and have become accepted by the community. It became impossible for us to define, as a finite list, that group of people without maybe adding another 50 pages on to the bill. Just defining 'spouse' in this day and age, given the sorts of cultural issues around 'spouse' in some of the communities, became in itself a very difficult issue. I know that 'spouse' is already in our current act, but that is a seventies piece of legislation and, if that were to be tested, it is not clear who exactly would be a spouse and who would not. It was very difficult for us to finitely list for Australia wide precisely who might be acceptable as a member if they are non-Indigenous. 'Spouse' is a very common example, but we were also given a whole lot of other examples like, as I indicated to you, adopted children, stepchildren and, 'This person who has lived with us for ages.'

We thought it was best to let it reside with the membership, so the membership now can decide this matter. They can have rules that say, 'Only Indigenous people are allowed to be members here,' or they can have rules that say, 'We'll let spouses, if they are non-Indigenous, be members.' Their rules can define who a spouse is. Or they can say, 'We'll have any non-Indigenous people, provided they stay in the minority.' What we have tried to do is to allow the membership to decide this matter. There is no requirement in the bill to have non-Indigenous people as members or on the board. We have tried to open up an opportunity. Certainly, with the lobbying we have had, a significant number of corporations are interested in having this opportunity available to them.

On the corporate membership, my recollection is that the review said that, basically, if a corporation is that complex, it should go over to Corporations Law. Complexity really comes from subsidiaries, not corporate membership. They were not being precluded from being with us. We have plenty of corporations where there is a parent corporation with a whole string of subsidiaries, and no-one is suggesting that, just because you have a subsidiary, you have to go over to Corporations Law. The argument that complexity alone should make a corporation go to Corporations Law rather than with us did not work practically when we looked at all the scenarios that were facing us.

As we went along, we realised that corporate membership does not necessarily have to be complex at all. It can be as simple as a corporation that has individual members. There is no complexity that comes with corporate membership necessarily. We already have quite a few corporations with us who have, in practice, corporate membership. The way they do it now is that they just nominate their chair, who is an individual person, to be the representative of that corporation for the purpose of membership. We actually have corporations with us now which have workarounds, because our current legislation does not allow corporate membership. In the spirit of trying to offer a practical opportunity where a corporation wants to choose it, we have allowed corporate membership. Once again, that is not to say that necessarily we are going to get a flood of this. It is just an opportunity. There is nothing in there to require it or demand it.

The third issue for us was that we do have a number of resource agencies whose single purpose is to support other corporations that are with us. Where we find it can get difficult is

if that corporation was forced to incorporate under the Corporations Law and become totally familiar with one regime, when their single purpose is to support the corporations that are with us. It is much more sensible if that corporation, which is like the support corporation, was totally familiar with the way we work. Also, the corporation might, say, be doing all their financial reporting, if it was incorporated with the same regime as all the corporations it is supporting.

Once again, it is an option. No-one is saying that that support corporation would absolutely have to be incorporated with us, but that was put to us by some of the resource agencies that are currently with us: to use the chairs to overcome the restrictions in our current legislation. Why would they go and familiarise themselves with another regime entirely when the regime they are really interested in is the one that all the corporations they are supporting are with? They were the sort of practical issues that came to light as we proceeded with the drafting of the bill.

Senator CHRIS EVANS—When was the bill first made publicly available?

Ms Beacroft—At the end of June—

Ms Matulick—The 23 June, when it was introduced.

Senator CHRIS EVANS—And what process have you undertaken to consult following the release of the bill?

Ms Beacroft—We simultaneously put out quite a bit of material both on the web and through giant mailouts. We generally tried to put that material out as best we could. We have received a lot of calls, emails and letters and we have been trying to respond to those as we have gone along. We try to take on board as best we can issues that are raised.

Senator CHRIS EVANS—The overwhelming impression that I get is the lack of engagement between those bodies that will be affected by the bill and yourselves as drafters. It seems we have not had a great deal of focus on the points of difference or points of concern. We have been dealing with the fact that people do not understand it, have not had time to digest it, have not been engaged in a process which allows them to understand. When you say small, medium and large, they do not know whether they are going to be small, medium or large. You say that it is flexible; they say it is complex. You may both the right but you do not seem to have engaged in a dialogue. That is partly why we have legislative inquiries—to allow people to do that. But we seem to be struggling with the fact that, firstly, this is a large piece of legislation. This is not a criticism itself, but I think that any group of organisations faced with a new piece of legislation of 530 pages would worry. It is a complaint that we get from small business and other organisations all the time.

Secondly, you cannot tell us anything about the transitional provisions, which I think is of concern. You say there would be different time frames for phasing in but you cannot tell us what provisions are going to have those time frames and how long they are going to be. It seems reasonable for organisations to say, 'Hang on, I do not understand how this is going to affect me.' I guess that what I am struggling with is that everyone seems to support the need for a new bill and everyone supports the agreed objectives, it seems, but you do not seem to connect when it comes to what we are talking about and people do not understand what you propose and how it is going to impact on them. It seems to me that we have been asked to tick

off on it without you having had that dialogue with your clients and without us seeing the transitional provisions, and that makes me very uneasy. I would like to hear your response to what seems to be a lack of engagement with client groups about the bill. We have had this elongated process about consultation about the drafts et cetera. It has gone on for decades it seems with various reviews. We now have the 2002 review which, except for a couple of key provisions—which Senator Siewert referred to—seems to reflect some of that review, but this lack of engagement and lack of understanding seems to be a major cause of concern. Do you accept that?

Ms Beacroft—I think that it is a very hard sector to engage with about highly technical legal points. More than half of our corporations are not compliant with our current reporting, and that is partly because they are required to put in audited reports. Even simple correspondence is not necessarily getting through to the right person. This is not criticism of those corporations. What we are talking about is, if you like, diversity that includes a lot of corporations, as has been pointed out, that are not necessarily funded and are essentially landholding.

In terms of almost any reform or change that we make, even if it is a very positive one, it is very hard to communicate that directly and go into, so to speak, the living room of every corporation because of that. The bill has been around since the end of June. We have actively tried to communicate with every corporation with us and so those that were able to be communicated with would have received our package. Some of it is not reading material; some of it is more verbal. I think it comes back to the point I made before, that it is hard to see how we can move from the seventies to 2005 in a completely seamless way. On the one hand, many of the submissions that you have received are saying, 'Slow down.' On the other hand, possibly the people who are not here today lobby us and say: 'Why are you taking so much time? Can you please hurry up.' There seem to be very strong views on both sides about the right way forward on this.

We have a hotline for members complaints and they are very concerned. Most members' complaints that come in are about alleged nepotism, so we have targeted that in the bill. People seem very anxious to make that happen quickly, but to precisely describe the law on that to every single person who wants to ring us up on the hotline is very hard to do. Many of the people we are speaking to are more concerned about dealing with the situation before them and making sure that someone will apply those laws to that situation rather than understanding all the ins and outs of exactly how the law works. Yes, I know there has not been a lot of time since the end of June, but given that the bill is largely implementing major recommendations in the review, I guess we did not think that there were huge surprises in it. The question of how the review was going to be recommended was always a question mark because it depends on how the drafting progresses.

Senator CHRIS EVANS—My fundamental concern is that, in comparison to most of the 2,600 organisations, the key land councils are hugely resourced and well provided with expensively paid lawyers who are able to get the bottom of these things, but we have had three of them front up today saying that they have not come to grips with it. Clearly, the land councils which are more likely to have some expertise and have access to some legal counsel have so far found it difficult to engage and come to terms with what it means. Clearly, the

small organisation out the back of the Northern Territory run by volunteers in a small community has no chance of doing that. As you say, that is not necessarily a criticism; that is the reality of complex legislation. They probably do not have a very good understanding of the current legislation either. It just seems to me that there is a lack of understanding, even by the key leading organisations, of how this is going to work and what it means. You cannot tell us today which parts of these provisions will come in when, so how do we know what we are signing up for?

Ms Beacroft—I am not at liberty to discuss that. That is right. That is not to say that we have not done quite a bit of work on that, but the bill has not been introduced yet, so I cannot speak about that.

Senator CHRIS EVANS—I am not trying to be unfair to you, but that is part of the problem, though, because you say that half of your organisations now are not complying with the current set of obligations. What would you say the compliance would be with the new bill in the first year of operation? The government is saying to us that it has to come in by 1 July 2006. What sort of compliance would we expect, when this bill is implemented from 1 July 2006, in the first year?

Ms Beacroft—It will improve. At the moment all corporations with us have to put in a fully audited account unless we exempt them. Under the bill we will be able to exempt all small corporations from all financial reporting, for example.

Senator CHRIS EVANS—What is a small corporation?

Ms Beacroft—That will be in the transitional, but we will be guided by the Corporations Act, which has a $10 million threshold. They only really have two categories. The review recommended that anything over half a million dollars should be medium and anything over $1 million should be large. My comment on that is that the review was probably too low, because to ask a $1 million corporation to put in an audit by a registered auditor is probably too heavy a burden. However, I think corporations that are getting less than $10 million should be putting in an audited financial statement. I think we should notionally look at a figure of somewhere between $2 million and $5 million. Most of our corporations, even if you just took the figure of $2 million, would be small or medium. So their reporting will drop under the new legislation and compliance will go up.

However, compliance is not the be all and end all. In my view, the main thing about compliance is that we get material from the corporation which we then make accessible to the membership. Most of the people who access the material with us are with corporations that want to know about themselves, because they have lost their records or did not keep them, which is a capacity issue, because membership want to know more about what is going on in the corporation or because there has been some kind of concern from a third party. It is not about compliance for its own sake so that we can have good stats; it is about the documents that need to come in to allow a whole lot of people out there to look at those documents. Compliance will go up because one of the main objectives of the bill is to get those documents if we can, and you would expect corporations that are getting a pretty reasonable income—$2 million and up—to be able to have some sort of financial reporting. But the smaller ones obviously need to have a breather on this, because at the moment the burden is

very heavy on them, and, as I said, that puts a lot of burden on us as well, because we have a whole lot of processes that we have to go through to make sure that they can get an exemption.

Senator CHRIS EVANS—I will finish here, because I think the central point I was concerned about has been exposed. However, none of the submissions imply bad motive on your part or the government's part. What they effectively say is that they do not understand what you are trying to do and they do not have answers to key questions. Your explanation there would probably reassure some of them, but without the transitional provisions, without an understanding of how it is going to work, they are not in a position to agree or disagree. Our role traditionally is to look at the points of disagreement and make a policy decision about whether you are right about whether non-Indigenous people should be allowed in, but what we have here is a whole group of uncertainties because people do not know what the whole package means for them, how it affects them, what the transitional provisions are or when it will be required. You say that they will actually be required to do less. None of the Aboriginal organisations are convinced about that. You may well be right. I am not saying that you are not, but they do not know that, and they have a right to be wary. I am a bit wary to sign up to it, because I do not know whether that is right either. This is obviously not a decision for you, but without the transitional provisions, more investment and people understanding how it affects them I am not in a position to feel comfortable about what has been proposed. However, in the end you may not be that far away. There are obviously some key issues which have been identified, and part of that really comes back to the resourcing of implementation, because one of the key concerns that all of the groups have raised is around training, resourcing and the capacity to respond to the changes. What is your resourcing for implementation of the new legislation?

Ms Beacroft—We have a budget of just under $7 million, but at the moment we are hosted by a parent agency, DIMIA, so we have to apply quite a bit of that to our statutory duties. As you have heard, we have a training program which we tend to target fairly carefully at those areas where, for whatever reason, mainstream training does not seem to be very effective. We work a lot with other training organisations to build their capacity so that they can be better at remote work.

Senator CHRIS EVANS—How much of the $7 million budget will you be able to dedicate to educating people about the provisions of the new bill and how it impacts on organisations?

Ms Beacroft—Our training program is $1½ million per year at the moment.

ACTING CHAIR—But that does not mean you will be spending your $1½ million on educating people about the new bill, does it? There will be a range of training programs incorporated in that money.

Ms Beacroft—That is right.

ACTING CHAIR—Can you tell us the figure you will nominally be allocating to information, education and training about the new bill out of that $1.5 million?

Ms Beacroft—I could take that on notice to give you a more detailed answer, but in general terms the answer is that we are not going to have a separate arm that does just the new

bill. The new bill totally changes everything we do, so all our training—everything—will, in a sense, need to be redone. It is in the process of being redone. To some extent we have already started that with the training. Our processes will change internally. So, in a sense, the whole budget gets applied to the new legislative regime. It is a big change for us as well.

ACTING CHAIR—You said before, in answer to Senator Evans's questions, that a number of organisations were saying to you, 'Hurry up, we want this bill put in place.' Who is saying that?

Ms Beacroft—I would have to take on notice the question of who specifically said that, but the one that springs to my mind was a medical service. I will give you a type: people are attracted by the support we offer—not just the training but all the processes of incorporation, dispute resolution support and that sort of thing. It attracts groups that feel they need that support, but if they want to have non-Indigenous people on the board, for example—and the medical service is the one that most recently comes to mind—they cannot at the moment; they simply cannot incorporate under us.

ACTING CHAIR—So there are a couple who are saying, 'Hurry up and get this done'?

Ms Beacroft—Yes. I can take that question away and come back to the committee.

Senator SCULLION—I have a question which is probably on the same theme as questions asked by my colleague Senator Evans. I am surprised that you come before this committee with the capacity to answer only half of our questions. What I do not understand is the time frame. Had you come here when we had seen the transitional information as well—and the transitional legislation would also have been seen by the remainder of people who put submissions in—frankly we would not all have blank stares at the moment. Perhaps you could help me understand why it is so critical that this is brought in independently from the transitional arrangements. Why does this committee have to look at this and, potentially, is not able to look at the transitional arrangements? We are going through a situation of: 'Trust me, it's going to be okay.' As a member of government, it is not that I do not trust anybody; it is just that I have what I think is a fair dinkum concern.

Ms Beacroft—There has been no agenda with regard to having the transitionals delayed; it is an accident of timing, if you like. It just happens that, while the main bill has been introduced, the transitional bill was not ready for the same sitting and is being prepared now. It was not planned that there would be a gap. The drafting of the main bill took quite a bit of time; it was very complex. So there was not a lot of spare time, given the drafting resources we had available to us, to do the second bill. The drafting of the main bill has been a lot more complex than, for example, it was contemplated when the review was done. There are a whole lot of extra issues that the review had not contemplated, and when we started drilling in we realised it was much more complex than anyone had imagined. So I emphasise that it was not planned that this would happen; it has just happened in terms of the sequencing of the drafting. I am not sure if that fully answers your question.

Senator SCULLION—It does for the moment. As you would be aware, many of the submissions reflected a genuine concern—and not only in the absence of the transitional material—about their capacity to comply. You have spoken about training regimes and about financial reports. You might be able to give examples. But we are going down to the basic

notification of members. We are talking about a place with 900 members, their existing budgets and their capacity to comply. You have also spoken about the flexibility of this legislation. Whilst you have spoken about the training provisions and the capacity in that sense, there is clearly a resource capacity issue. Many of the submissions indicated they may not be able to meet the requirements. Would you be able to give them and me some relief on that matter?

Ms Beacroft—I think it does come down to a misunderstanding about the bill, because the bill will provide relief to most of the corporations with us now. Therefore, if there is a corporation that is supporting a whole range of corporations, it provides them with relief. As I said, most corporations with us today are not compliant with the current reporting requirements because of a whole lot of capacity issues. Therefore, the bill has absolutely tried to respond to that by allowing those that really do not have the capacity and should not be expected to do audited reports—or, in many cases, provide any financial reports because in fact they would be getting nothing—to just look after what they have to look after, which may be the land. That would allow the compliance regime to really on focus on those that should be accountable. So we have some large corporations—when I say large I mean over $2 million—who are not providing what they should. We would rather concentrate on those. Indeed, that is often where we get the members' complaints: where there is significant funding and there has not been sufficient accountability.

If we take annual general meetings, I know the issue was raised in an earlier piece of evidence that having an annual general meeting every year is a heavy burden. That is what our current act requires. The fact that some corporations do not have them makes them not compliant, but we appreciate that there is a burden there which not all corporations really need to meet. The bill, for example, allows general meetings to be held less frequently. At one stage it was proposed that the default, if you like, be general meetings held every second year, but that was criticised because it was felt that that would disenfranchise members. So the default is an annual general meeting, but the bill, in an example of its flexibility, allows for those general meetings to be every two years. I could give you lots of examples of how the financial reporting allows for that.

Senator SCULLION—Perhaps the example you could use in your answer is the one that I gave you.

Ms Beacroft—Yes, sorry.

Senator SCULLION—There are issues such as membership notification, which is not the communication between the organisation and you but the communication between the organisation and its membership—the director's obligation to provide the membership with certain statutory information. There are questions about the capacity to do that in an organisation such as a land council with 900 members—that is 900 stamps, letters et cetera. It is about the capacity to simply comply, and their concern is that when this legislation comes down—it may be because we do not understand it for the previous reasons we have discussed—they may not have the capacity to get to that point before July next year. I think you have to see that that is a pretty reasonable concern.

Ms Beacroft—Yes. If I could just check, that example of the financial reports being given to all members was given earlier in evidence.

Senator SCULLION—That is right, but we have also heard in evidence about things like members' notification—just general communication with members. It is now a requirement.

Ms Beacroft—The financial reports would only have to be given to members where they are required, and many of the corporations that are with us now would no longer be required to do financial reports because their income would be too low. So it does not apply to all corporations. Also, there are exemption provisions that would allow us to exempt classes of corporations or sectors from meeting that requirement. I think this goes back to the way that the bill has been drafted. There is the default framework and then there is enormous space for flexibility. No, we do not envisage all corporations having to give every single one of their members a financial report.

Senator CHRIS EVANS—Where does it say that, though? When you say you do not envisage that, where does it say that? I accept the default things are in there, but that is an interpretation. With all due respect to your office, how do we know that? How do the organisations know that?

Mr Toohey—My observation, as a general point, in drafting it was to put the flexibility in place you needed to take the position that a default was something and then move from that. It would be difficult to put in legislatively that the flexibility would be implemented in a particular way. That has to be up to the administration of the flexible legislation. It would defeat the purpose of having built in this flexibility to then try and hard-code it into the bill itself. So it will depend on how it is implemented and administered. There is some guidance in the bill about the aims of the registrar and the application of the bill as a special measure, and now corporations will also be able to challenge those decisions. Some of those will be merit-reviewable decisions and those sort of things. That is as much as we can say about what can be written into the legislation about how it will be implemented.

Senator SCULLION—Ms Beacroft, of all the current corporations and land councils around the place that are going to be affected by this, how confident are you that we can have them all on board before this legislation is enacted and have a feeling that this is an improvement and it is going to make a real difference on the ground and we are not going to fight it all the way? I guess you are saying 'Trust me' and I am saying 'Okay'. What confidence do you have that you are actually going to be able to provide that in the time frame?

Ms Beacroft—Up until now there has been a lot of support for the general direction of the reforms. The issues that are being raised now are really about the 'how' and so I take some comfort from that, that we are travelling in the right direction. Since June, when the bill was introduced, yes, people have been shocked at the size of it. Many of the corporations are concerned about the size of the bill. Because they are already dealing with a lot on the ground, it seems that the main issue coming to us through the phone calls we are getting is, 'How are we going to implement this? Can you tell us what you are going to do to help us? We want as much information as we can get.' Obviously we are trying to work on that on a one-on-one basis. We are gearing up all of our services now, and even before we have been doing that.

I am not sure that every single corporation with us is going to be over the moon about every single change. That is just a reality of change. The directors' duties may be unwelcome to some and, on the other hand, they seem to be very welcome to others. There are some people who were falling through the gaps because they were not subject to any corporate regulatory scheme and our bill fills those gaps up. So not everyone is going to be absolutely delighted. We are a very service oriented organisation, so we are as concerned as anyone about corporations worrying about the implementation—corporations that are genuinely wanting to do the right thing.

We have already geared up and we are trying to provide as many services as we can. We have tried to make our whole communications strategy around this bill exemplary in getting information out there and so far we have found corporations very appreciative of that. But yes, people are anxious to see the transitional bill. That will be a very important bill for people to understand and, just as we have done with this bill, we will be working really hard to make sure the communication that we do around that is as wide as we can possibly make it. That is probably all I can say at this point. To some extent I am saying we stand on our past track record of trying to be very transparent at every step and trying to make sure that our publications are very accessible; but yes, it is a big step. We are going 35 years in a reasonably short period of time.

Senator BARTLETT—It is in your submission to some extent, but just to make it crystal clear and to reassure people to some extent could I get a clearer indication from you that for the majority of existing corporations—predominantly the smaller ones—this will mean a reduction in the red tape compliance burden?

Ms Beacroft—That is correct, for small and medium. I appreciate that the transitionals will set the actual limit for smaller ones.

Mr Kirk—And the regulations.

Ms Beacroft—Yes. But, if we could notionally say small-medium is less than two, that would be the majority of our corporations and it would mean that they would not have to provide us with a general purpose audit or, indeed for small, no audited financial reports at all.

Senator BARTLETT—Are the regulations going to appear in draft form before the bills go through or are they another phase after the transitional bill?

Ms Beacroft—That will be another phase. We are working on those at the moment, but the sequence is that we would normally wait for the transitional bill to certainly be introduced before we would start seriously working on the regulations.

Senator BARTLETT—In a logistical sense, this bill in itself is not able to be made functional without the transitional bill being passed as well—is that right?

Ms Beacroft—That is correct.

Senator BARTLETT—A couple of the submissions in various ways have expressed some concerns. There is one here from COALS, the Coalition of Aboriginal Legal Services. I do not know if you have read it. They talked about section 453 where the registrar can appoint a suitably qualified person to examine the corporation's affairs. The concern is that it might

mean time-consuming rolling audits or continual checking and that sort of stuff. Can you respond to that concern?

Ms Beacroft—Most of the regulatory powers, including that one—it is called an examination; it is like a good governance audit—are really what we have now, with some modernisation around the criteria. I understand COALS's concern is that if we appoint an examiner—and indeed we do now all the time; we have a rolling program of examinations now—would the examiner be looking at client files which might attract legal professional privilege? Medical services raised the same issue about medical files. The answer is no, the examiner does not go into those files. The examiner is mainly there to look at good governance. They are not there to stray into private files. To the best of my knowledge, there has never been any difficulty in that regard. I appreciate that COALS has that concern, but I just want to be really clear about that.

Senator BARTLETT—Another concern was mentioned in the Kimberley Land Council submission that this may duplicate reporting related activities currently required under the Native Title Act. Can you respond to that concern?

Ms Beacroft—I know that there is some duplication in the sense that there are some crossovers, for example, with the CAC Act, and the native title rep bodies are subject to the CAC Act. But one of the things our bill does is it allows ORAC to recognise reporting for other purposes as reporting to us. It provides a statutory basis, if you like, to avoid duplicate reporting by allowing our office to recognise, for example, the reports that the native title rep bodies might provide under the CAC Act for our purposes.

Senator CHRIS EVANS—For the purposes of Hansard, could you give the full title of the CAC Act?

Ms Beacroft—Someone told me the full title. Now you have got me!

Mr Kirk—It is the Commonwealth Authorities and Companies Act 1997.

Ms Beacroft—Thank you very much. I am sorry about that. In practice, we do that already. The arrangement we have is that, if a native title rep body produces its annual report as it is supposed to under that other legislation, if we can obtain a copy we accept that as reporting under our act. But we do not have a statutory basis to do that. That is an administrative decision. That is an example of flexibility. Once we have a statutory basis, we would like to look at a whole sector and say, 'If a corporation, for example, is compliant with the funding requirements under your regime, is there a way that we could get access to those reports, possibly even electronically, and recognise them as reports for the purposes of our legislation?' This can be quite tricky because many of our corporations are multifunded. The beauty of the annual reports that the native title rep body produces is that they report on their whole budget whereas many corporations are reporting just on a slice of their budget to all the different funding bodies. So it can make it difficult for us to administratively recognise them now. But the statutory basis once again provides an opportunity for us in the future to try to streamline reporting from the point of view of the corporation.

Senator BARTLETT—Professor Dodson mentioned a concern about restrictions on the size of boards.

Ms Beacroft—Yes, that is right. The size of the board in the bill is 12—

Ms Matulick—There is a regulation-making power to change that number.

Ms Beacroft—To a larger number. We are certainly aware that some corporations function very well with a higher number on their board, but 12 is, if you like, the default number. We certainly encourage organisations that it is good practice, unless there is a special reason, to stay at 12 and under.

Senator BARTLETT—I do not know the details of the organisations—other senators may well know the ones you have pointed to which have a larger number than that and which, since they are getting awards for governance, are presumably doing fairly well—but how would that work with groups that would have to undertake some sort of transition, which could include reducing the number on their board down to 12? The initial regulations, I assume, are not likely to vary from that; otherwise, you may as well have it in the primary act.

Ms Beacroft—No. The regulations will allow an exemption so that the number on the board can be higher. To take an obvious example, it is very possible that we could have in the future a registered native title body corporate—indeed, we may have one now; I do not know for sure—that is legislatively required to have a number higher than 12.

Senator BARTLETT—I have two questions on the issue of non-Indigenous membership. I have not been able to find in the act that there is an indigeneity requirement. It talks about a percentage prescribed in regulations, whereas I have heard people talk about a 'non-majority' or whatever.

Ms Beacroft—Yes.

Mr Kirk—That requirement would be prescribed in the regulations; they will prescribe a majority.

Senator BARTLETT—And that will say 'less than 50 per cent'?

Ms Beacroft—Yes.

Mr Kirk—Yes, something along those lines.

Senator BARTLETT—But in theory the legislation allows the regulations to say 95 per cent?

Mr Kirk—Yes.

Ms Beacroft—Yes.

Senator BARTLETT—I am aware, through another committee I am on, that concerns have been expressed about inconsistency across a range of legislative instruments in the definition of 'Aboriginal and Torres Strait Islander person'. I have looked at the definition you have in the bill; maybe I am looking at the wrong part, but it does not enlighten me a great deal. Maybe I am just repeating the words 'Aboriginal and Torres Strait Islander' a lot. I realise it is a contentious and difficult issue, but what I am concerned about more than anything else is that there is inconsistency. Are you able to give me an indication of the actual

working definition of 'Indigenous person'? I imagine that could be an area of dispute in itself, and it certainly has been in the past.

Ms Matulick—As you have acknowledged, it can obviously be a very difficult and contentious issue. We have used the definition that was in the ATSIC Act. As we understand it, there is a Commonwealth test, which is the three-pronged test. We are also concerned to leave enough flexibility in the provisions of the bill for corporations to be able to manage this themselves.

Ms Beacroft—I can give an example of where it mainly crops up in our work. At the moment everyone has to be Indigenous but under the bill the majority will decide, depending on the rules of the corporation. The main area we get involved with is where there is a members' dispute. Members may complain about someone else who wants to be a member, or who is already a member, around their indigeneity. It is in the dispute area that we find this question becomes most relevant to our work. So we have built into the bill the process whereby if a person is already a member and they were regarded as an Indigenous member then to terminate the membership it has to go back to the membership at a general meeting. It is such a fraught question and, as you can appreciate, it is very difficult for us to sit in an office and make this determination. In the end it is the membership, we thought, that is the best body to make such a tricky decision. One of the elements of the Commonwealth test is whether the person is accepted by the community as an Indigenous person, and the membership has some capacity to make that decision. So the process of terminating membership on the basis of non-indigeneity has been dealt with in the bill to try to address what are, in our experience, very tricky disputes. They are very hard to assist.

Senator BARTLETT—Are you aware of any concern or action on the wider level to deal with inconsistencies in how the definition is applied across different—

Ms Beacroft—Yes. We have certainly followed all of the case law. This was an area where we did really look very closely at it and our bill is consistent with any case law that exists on it. But the case law is not very definitive apart from acceptance of the administrative test, what is often called the 'Commonwealth test'.

Senator BARTLETT—Finally, an issue that has been raised a number of times, apart from just whether this is going to be complex or not, is the cost of making the transition for any organisation. I appreciate what you have said about training and other assistance but what is the potential there for some degree of other assistance, like money—though maybe not just money—for groups that do require special meetings or extra activities while changing the rules, something that obviously many of them are going to need to do?

Ms Beacroft—We are not a grant funding agency ourselves but we have been working a lot with all the main funding agencies to make them very aware of the bill and the advantages of the bill and therefore the advantages of making sure that all the opportunities in it get properly harnessed. We can provide a reasonable amount of direct support as well around meetings, and we already do that. We do a lot of meeting support. But the big funding agencies and the Mining Council and organisations like that also have a big interest in making sure that the bill gets fully harnessed. It is not just public money; it is private money as well in this sector.

ACTING CHAIR—Thank you very much for your time this evening. I publicly thank other witnesses who appeared this evening.

Committee adjourned at 7.18 pm