

THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2005 (CTH)

COMING SOON

TO A COMMUNITY ORGANISATION NEAR YOU

by Nicole Watson

In June 2005, the Minister for Indigenous Affairs, Amanda Vanstone, announced that the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth) ('CATSIB') would replace the *Aboriginal Councils and Associations Act 1976* (Cth) ('ACAA'). Senator Vanstone described the CATSIB as a response to Indigenous demands for greater scrutiny of community organisations:

Indigenous people expect their corporations to provide the best possible services and they are sick and tired of being the victims of unscrupulous or incompetent administrators. This Bill is an important part of the Government's reforms and will ensure that Aboriginal people get a better deal and better value for money.¹

This paper will argue that the CATSIB is more likely to frustrate Indigenous organisations than deliver 'a better deal'. Although the Bill has some positive features, it is a complex regime that has the potential to usurp Indigenous self-determination.

This paper will be divided into two parts. Part One will discuss the history of the ACAA and deficiencies identified by various reviews. Part Two will analyse key provisions of the CATSIB.

PART ONE: THE ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976 (CTH)

HISTORICAL CONTEXT

Historically, Indigenous organisations incorporated through a variety of mediums. It was not until the Woodward Aboriginal Land Rights Commission of 1974 that the concept of Indigenous-specific legislation emerged. Woodward argued for a regime based on the following principles:

- (i) the legislation must be simple, so that those who are working under it can readily understand it;
- (ii) it must be flexible, so as to cover as wide a range of situations and requirements as possible;
- (iii) it should, so far as possible, make provision for Aboriginal methods of decision-making by achieving consensus rather than by majority vote;

- (iv) it must contain simple provisions for control of the situation if things go wrong within an organisation through corruption, inefficiency, outside influences or for other reasons, and
- (v) it should be so framed as to avoid taxation of any income which has to be devoted to community purposes.²

In his second reading speech proposing the ACAA, Minister for Aboriginal Affairs, Ian Viner MP appeared to share Woodward's desire for simplicity:

Existing State and Territory legislation provides for a range of forms of incorporation for a variety of purposes – charitable, social, cultural and sporting organisations, companies, partnerships and other forms of business enterprise. The complexities of such matters are confusing enough to anyone but company lawyers; one can well imagine the bewilderment of Aboriginal elders in remote tradition-oriented communities, who simply want to get on with their own projects, when faced by the immense amount of documentation necessary to enable them to act as a legally recognised corporate body.³

What emerged were two species of corporation – Aboriginal Councils and Aboriginal Associations. Arguably, neither had a chance to facilitate the aspirations of communities who 'simply [wanted] to get on with their own projects'. Federalism stymied the former and the latter quickly gained complex machinery.

PART THREE – ABORIGINAL COUNCILS

Part Three of the ACAA provides for incorporation of Aboriginal Councils. Given that an Aboriginal Council has never been established, the utility of Part Three is a purely academic debate. The inertia of Part Three is largely due to State and Territory resistance. The Fraser Government's attempts to placate its coalition partners in States such as Queensland resulted in a two-year delay between assent and proclamation.⁴ By the time the legislation commenced, many within the Department of Aboriginal Affairs correctly predicted that Part Three would never be used.⁵

PART FOUR: ABORIGINAL ASSOCIATIONS

Part Four enables the committee of an Aboriginal association to apply to the Registrar of Aboriginal Corporations ('the Registrar') for incorporation.⁶ The Registrar shall issue a certificate of incorporation if satisfied that it is 'proper' to do so.⁷ A certificate cannot be issued if the Registrar believes that the association's rules are 'unreasonable or inequitable', or do not give members effective control.⁸

The association must have at least 25 members, or five where formed for the purposes of holding title to land or conducting a business.⁹ Eligibility for membership is confined to Indigenous people and their spouses.¹⁰ However, the rules may confer limited membership to others, excluding rights to vote and to stand for election to governing committees.¹¹

The governing committee must provide the following documents to the Registrar as soon as practicable after 30 June each year:

- A list of the names and addresses of members;¹²
- A statement of compliance with the Act and rules;¹³
- A balance sheet;¹⁴
- A statement of income and expenditure;¹⁵ and
- A report by an auditor concerning the committee's compliance with its statutory obligations and any irregularities detected in the above documents (the 'examiner's report').¹⁶

Some 2,800 associations are currently incorporated under Part Four.¹⁷ The majority are established in order to provide community services. Only one per cent of those incorporated were formed for commercial purposes.¹⁸

REVIEWS OF THE ACAA

Since its inception the Act has been subject to three reviews. Lawyer Graeme Neate conducted the first in 1989, in response to evidence of widespread failure to comply with the Act.¹⁹ As a result of the Neate Review the ACAA was amended to increase the reporting obligations of corporations and strengthen the Registrar's powers.

In 1994 the Aboriginal Councils and Associations Legislation Amendment Bill (Cth) was introduced in another attempt to tighten the accountability of Indigenous organisations. Conscious of the expense of the proposed amendments, the Aboriginal and Torres Strait Islander Commission ('ATSIC') Board advised the Minister to initiate another review process. The result was the *Final Report of the Review of the Aboriginal Councils and Associations Act 1976*, known as the *Fingleton Review*.²⁰

The *Fingleton Review* unearthed widespread dissatisfaction, culminating in the finding that more than half of the organisations funded by ATSIC chose not to incorporate under the ACAA.²¹ A major cause of disenchantment was inflexibility on the part of those who administered the Act:

There is an ever-increasing gap between people's attempts to incorporate in a culturally appropriate way and the Registrar's pre-occupation with matters of statutory compliance.²²

This preoccupation was manifest in the Registrar's frequent refusal to depart from the model rules.

The *Fingleton Review* was also critical of the tools used to measure accountability. An emphasis on procedural compliance overlooked important factors such as representative membership and equitable service delivery.²³ Arguably, such factors would be more effectively measured by shifting the emphasis away from compliance with the ACAA to service agreements with funding bodies.²⁴

The *Fingleton Review's* insightful recommendations coincided with the election of the Howard Government. Despite its catchcry of accountability, the Government buried the report.

The appointment of a new Registrar in 2000 led to yet another review, headed by the law firm, Corrs Chambers Westgarth ('*Corrs Review*').²⁵

It is beyond the scope of this paper to analyse the voluminous *Corrs Review* in its entirety. Essentially, it envisaged a modern incorporation statute, but one tailored to the particular needs of Indigenous people. Those needs would be partly met by transforming the Registrar's role from one based on enforcement to that of 'special regulatory assistance'.²⁶ Not all aspects of the ACAA were to be abandoned. In particular, the limitation of board membership to Indigenous natural persons was to be maintained.²⁷

PART TWO – THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDERS) BILL 2005 (CTH) BENEFITS

One of the major benefits of the CATSIB is its potential to relieve small corporations of inappropriate and onerous reporting requirements. Gone will be the one-size-fits-all approach of the ACAA and in its place will be the division of corporations into small, medium and large.²⁸

The Registrar will be empowered to exempt individual corporations and specific classes of corporation from the

requirements of Chapter Seven pertaining to record-keeping and reporting.²⁹ In making a determination the Registrar must have regard to factors including the appropriateness of the reporting obligations and whether they would constitute an unreasonable burden.³⁰ The Explanatory Memorandum foreshadows that some small corporations will be the beneficiaries of exemptions, in particular those whose sole purpose is to hold title to communal land.³¹

Although a promising step, Indigenous corporations are still beholden to the Registrar's discretion. On the other hand, the Registrar's refusal to exempt an individual corporation from reporting requirements will now be reviewable by the Administrative Appeals Tribunal ('AAT').³² Given that few Indigenous people currently utilise the AAT however, the impacts of the new review rights are difficult to predict.

DISADVANTAGES

Rapid implementation without adequate consultation

When the Minister announced that the ACAA would be replaced, she claimed that the new legislation followed extensive consultation.³³ Her claim is inconsistent with the paucity of community participation in the recent Senate Inquiry into the CATSIB. Of the handful of individuals who gave evidence at the hearings, most were alarmed that the reforms were being rushed through in the absence of community consultation. As pointed out by Dr Lisa Strelein:

One of the reasons for very few submissions is the timing and complexity... I sent an email out to all of the representative bodies saying, 'I assume you are aware of this 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.³⁴

The lack of community awareness is concerning given that the Minister nominated 1 July 2006 as the date for implementation of the new legislation.³⁵

Complexity

Spanning over 500 pages, the CATSIB is likely to be an additional hurdle for corporations already struggling to comply with the comparatively succinct ACAA. It is not only the size of the CATSIB that is cause for concern, however. The Bill is also difficult to navigate. In particular, provisions relating to native title prescribed bodies corporate are scattered throughout the CATSIB, rather than contained in a single chapter.

Strict Liability

In an attempt to achieve alignment with modern

corporations law, the CATSIB contains over 100 strict liability offences.³⁶ Although most are based on equivalent provisions in the *Corporations Act 2001* (Cth), some are unique to Indigenous corporations.³⁷

A punitive approach overlooks the circumstances of the vast majority of Indigenous corporations. As distinct from those formed for profit, many are incorporated in order to deliver essential services to Indigenous communities. Directors of such corporations are often elected on the basis of skills in community development as opposed to business acumen. Increased liability for non-compliance in the absence of a mass education campaign may result in Indigenous people carrying most of the burden of the Commonwealth's reforms.³⁸

Lack of Flexibility

Despite the Minister's spin the CATSIB still restricts the ability of communities to design their corporations to suit local circumstances. For example, s 243-5(a) provides that a corporation must not have more than 12 directors. This provision may conflict with a desire to strive for broad community representation. For example, in recent years some native title representative bodies increased the size of their boards in order to be representative of their constituencies. Some were forced to take this step as a part of the re-recognition process required by the 1998 amendments to the *Native Title Act 1993* (Cth).³⁹

Appointment of Non-Indigenous Directors

In a departure from the *Corrs Review*, the CATSIB allows non-Indigenous people to become directors of Indigenous corporations.⁴⁰ The Explanatory Memorandum claims that the reform

improves flexibility for corporations to permit non-Indigenous membership which is often important to ensure that services can be provided to non-Indigenous people or adopted children. As some corporations are the only providers of essential services in some communities it also ensures that non-Indigenous members of such communities are not disadvantaged.⁴¹

On the other hand, most of those representing Indigenous organisations who gave evidence at the Senate hearings argued that in spite of provisions requiring an Indigenous majority, the appointment of non-Indigenous directors would usurp Indigenous control. As stated by Michael Prowse of the Central Land Council:

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 the provision is one that should be struck out of the bill.⁴²

The reforms will apply to all Indigenous corporations, including those holding title to land. Hypothetically, non-Indigenous developers and mining companies will be able to seek appointment as directors. While one result could be successful partnerships between Indigenous communities and industry, the reforms may also lead to exploitation.

CONCLUSION

The writer does not dispute Senator Vanstone's⁴³ assertion that Indigenous people are entitled to expect the best possible services from their corporations. However, 30 years of the ACAA proves that the blunt instrument of external accountability is not an appropriate means to achieve that end. A more enlightened Commonwealth Government would not overwhelm community organisations with a regime mirroring legislation designed to regulate corporations driven by the profit motive. Rather, it would seize the lessons of the ACAA and ask the fundamental question thus far ignored: is the corporation really a culturally-appropriate vehicle for the delivery of essential services to Indigenous people?

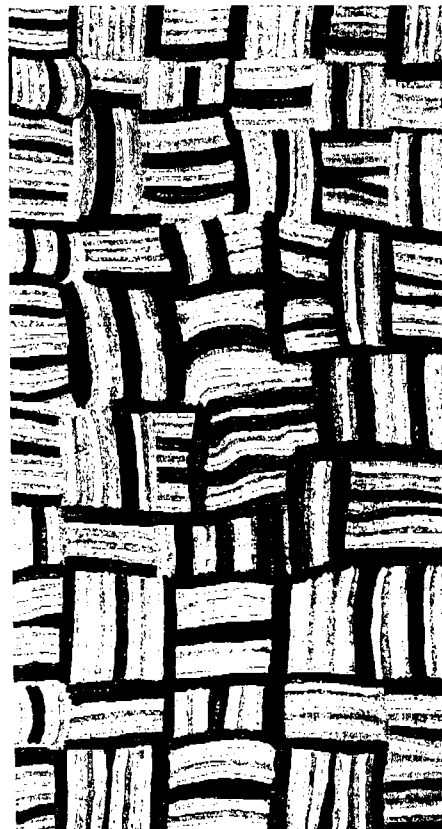
Nicole Watson is a member of the Birri Gubba People of Central Queensland. Nicole has a Bachelor of Laws from the University of Queensland and a Master of Laws from the Queensland University of Technology. Nicole is currently employed as a Research Fellow by the Jumbunna Indigenous House of Learning, UTS.

- 1 Senator Amanda Vanstone, 'New Bill to Benefit Thousands of Aboriginal Corporations' (Press Release, 23 June 2005).
- 2 A E Woodward, *Aboriginal Land Rights Commission, Second Report* (1974), [392].
- 3 The Hon Ian Viner MP cited in Australian Institute of Aboriginal and Torres Strait Islander Studies, *Final Report of the Review of the Aboriginal Councils and Associations Act 1976* (1996) Volume One, 33 ('Fingleton Review').
- 4 *Fingleton Review* above n 3, 94.
- 5 *Ibid* 97.
- 6 *Aboriginal Councils and Associations Act 1976* (Cth) (ACAA) s 43(1).
- 7 ACAA s 45(1)(e).
- 8 ACAA s 45(3).
- 9 ACAA s 45(3A).
- 10 ACAA s 49(1).
- 11 ACAA s 49A.
- 12 ACAA s 58(3).
- 13 ACAA s 59(2)(a).
- 14 ACAA s 59(2)(b).
- 15 ACAA s 59(2)(c).
- 16 ACAA s 59(4).
- 17 Explanatory Memorandum, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* (Cth) ('CATSIB'), 6.
- 18 Corrs Chambers Westgarth Lawyers, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations:*

- Reforming the Aboriginal Councils and Associations Act* (2002) 72 ('Corrs Review').
- 19 Graeme Neate, *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976* (1989) 5.
 - 20 *Fingleton Review* above n 3.
 - 21 *Ibid* 12.
 - 22 *Ibid* 60.
 - 23 *Ibid* 77.
 - 24 *Ibid* 89.
 - 25 *Corrs Review* above n 18.
 - 26 *Ibid* 9.
 - 27 *Ibid* 23.
 - 28 *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* (Cth) ('CATSIB') Part 2-4.
 - 29 CATSIB Part 7-4 Divis on 353.
 - 30 CATSIB s 358-5.
 - 31 Explanatory Memorandum, CATSIB [5.384].
 - 32 CATSIB Part 15-4 Division 623.
 - 33 Senator Amanda Vanstone, above n 1.
 - 34 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 4 October 2005, 20 (Dr Lisa Strelein).
 - 35 Senator Amanda Vanstone, above n 1.
 - 36 Explanatory Memorandum, CATSIB [3.39] - [3.49].
 - 37 For example, under s 180-35(1) a failure to provide a copy of the register of members to the Registrar within 14 days of the Registrar's request attracts strict liability.
 - 38 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 4 October 2005 18 (Professor Michael Dodson).
 - 39 Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, 2005, (North Queensland Land Council Native Title Representative Body).
 - 40 CATSIB s 246-1(3)(b).
 - 41 Explanatory Memorandum, CATSIB [3.27].
 - 42 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 4 October 2005, (Michael Prowse).
 - 43 Senator Vanstone's portfolio of Indigenous Affairs was moved to that of Mal Brough MP on 25 January 2006.

Untitled
Anne Dixon

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Indigenous Law Bulletin

Faculty of Law, University of New South Wales, Sydney 2052 Australia

Phone 61 2 9385 2256

Fax 61 2 9385 1266

Email editors ilb@unsw.edu.au

Subscriptions ilbsubscriptions@unsw.edu.au

Website www.ilb.unsw.edu.au

Editorial Board David Brown, Toni Bauman, Neva Collings, Mick Dodson, Garth Nettheim, Sarah Pritchard, Robynne Quiggin, Prue Vines, Kevin Williams

Editors Jacqui Houston, Catherine Hunter

Subscriptions Donna Daly

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Phone 61 2 9385 2252

Fax 61 2 9385 1266

Email ilc@unsw.edu.au

Website www.ilc.unsw.edu.au



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EDITORIAL

The first edition of the *Indigenous Law Bulletin* always puts its editors in something of a unique position where we are afforded the opportunity to look upon the significant events at the close of one year while also viewing the unfolding issues and themes of the new. Toward the end of 2006 we witnessed international and local events of enormous significance to Indigenous Australians. In November of 2006 the Third Committee of the United Nations General Assembly elected to defer consideration of the Draft Declaration on the Rights of Indigenous Peoples. It aims to conclude its consideration of the draft declaration by the end of the current session. The shock and disappointment of Indigenous leaders and advocates was summed up in one leader's statement on the importance of the draft declaration, devised and drafted over the past 24 years: it is 'the most important international instrument for the promotion and protection of the human rights of indigenous peoples.'

On a local level, we have seen the debate over 'political intervention' in judicial matters after the death of Mulrunji in police custody on Palm Island in 2004. The issue can be followed broadly through the regular 'Recent Happenings' section of the *Indigenous Law Bulletin* and specifically through an article in this edition by Geraldine Mackenzie, Nigel Stobbs and Mark Thomas. This article looks at the decision by Queensland's Director of Public Prosecutions ('DPP') to not recommend charges against Senior Sergeant Chris Hurley over the death of Mulrunji and examines the role of both the DPP and the Coroner in examining the pertinent issues in this and similar matters. This article was written before the independent review by Sir Laurence Street and the subsequent exercise by the State's Attorney-General of his First Law Officer powers to bring charges of manslaughter and assault.

The first edition for 2007 is kicked off by the Indigenous Law Centre's new Director, Megan Davis. Here Megan outlines her vision for the vibrant future of the Centre while also detailing her own background and goals. The Indigenous Law Centre is thrilled to welcome Megan.

Our November 2006 edition of the *Indigenous Law Bulletin* focusing on young Indigenous people drew a strong response from potential authors – so much so that we publish here another article. Terri Libesman from the University of Technology, Sydney writes about child welfare issues and calls for a new approach to Indigenous child welfare; one which truly recognises the importance