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A MODERN STATUTE FOR INDIGENOUS CORPORATIONS:

REFORMING THE *ABORIGINAL COUNCILS AND ASSOCIATIONS ACT*

Final Report
of the Review of the
Aboriginal Councils & Associations Act 1976 (Cth)

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REVIEW OF THE ABORIGINAL COUNCILS & ASSOCIATIONS ACT 1976

FINAL REPORT

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LIST OF ACRONYMS & ABBREVIATIONS

The following is a list of acronyms and abbreviations commonly used in this Report. Please also refer to the **Glossary**, which explains these acronyms and a number of other key terms and concepts used in this Report.

ACA Act	***A**boriginal **C**ouncils and **A**ssociations Act 1976* (Cth)
AGM	**A**nnual **G**eneral **M**eeting
ANAO	**A**ustralian **N**ational **A**udit **O**ffice
ASIC	**A**ustralian **S**ecurities and **I**nvestments **C**ommission
ATSIC	**A**boriginal and **T**orres **S**trait **I**slander **C**ommission
CAC Act	*Commonwealth Authorities and Companies Act 1999* (Cth)
CDEP	**C**ommunity **D**evelopment **E**mployment **P**rojects
Corporations Act	*Corporations Act 2001* (Cth)
DIMIA	The **D**epartment of **I**mmigration**, M**ulticultural and **I**ndigenous **A**ffairs (Commonwealth)
IC Act	**I**ndigenous **C**orporations Act – this is the proposed name for the revised Act which will replace the ACA Act.
MOU	**M**emorandum **o**f **U**nderstanding
Native Title Act	*Native Title Act 1993* (Cth)
NTRB	**N**ative **T**itle **R**epresentative **B**ody.
OATSIA	The **O**ffice **A**boriginal and **T**orres **S**trait **I**slander **A**ffairs (part of DIMIA)
ORAC	**O**ffice of the **R**egistrar of **A**boriginal **C**orporations
PBC	**P**rescribed **B**ody **C**orporate
PBC Regulations	*Native Title (Prescribed Body Corporate) Regulations* (Cth)
State Association Incorporation Acts	The *State Association Incorporation Acts* are the following Acts: • ACT: *Associations Incorporation Act 1991* • NSW: *Associations Incorporation Act 1984* • NT: *Associations Incorporation Act 1963* • Qld: *Associations Incorporation Act 1981* • SA: *Associations Incorporation Act 1985* • Tas: *Associations Incorporation Act 1964* • Vic: *Associations Incorporation Act 1981* • WA: *Associations Incorporation Act 1987*

EXECUTIVE SUMMARY

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1 BACKGROUND

1 Since its enactment, the *Aboriginal Councils and Associations Act 1976* (Cth) ("**the ACA Act**") has become the most significant vehicle for the incorporation of a broad range of Aboriginal and Torres Straight Islander associations. There are currently close to 3,000 associations incorporated under Part IV of the ACA Act. These corporations have also come to play a central role in the delivery of government services at both the Commonwealth and State and Territory level.

2 The ACA Act has been the source of much comment and criticism, particularly over the last 10 years. Since the last amendment of the ACA Act in 1992, there have been several significant reviews of the ACA Act. Two Bills to amend the Act were proposed in 1994 and 1995 and were discussed in Parliament, but lapsed and were not reintroduced. The various reviews of the Act have raised important issues of law reform, including many not addressed by the 1994 and 1995 Bills. These issues are yet to be addressed by Parliament.

3 In the period since the enactment of the ACA Act in 1976, there have been significant changes in the circumstances of Indigenous people in Australia, and in the uses which Indigenous people make of corporations. Government policy in the area of Indigenous affairs has also changed dramatically. Bureaucratic structures have been altered to give effect to greater Indigenous control over public policy. Government funding and service provision patterns have changed, often creating the need for more corporations tailored to the needs of Indigenous people. In the past decade, greater emphasis has been placed upon the need for greater "accountability" of Indigenous corporations for public monies.

4 In the period since 1976, there have also been substantial changes in the legal environment for corporate regulation and in the recognition and enforcement of Indigenous legal rights. The State Companies Codes upon which the ACA Act was based have been amended numerous times. The contemporary Corporations Act now reflects a regulatory philosophy which is more facilitative of the objectives of persons using corporations as a vehicle for commercial enterprises. In 1992, native title was recognised as part of Australian law. The **Native Title Act** enacted in the following year has created a need for further corporations to manage native title.[1]

5 In 2000, a new Acting Registrar of Aboriginal Corporations was appointed. The previous Registrar had held the position for 9 years. This change provided a timely opportunity to review the ACA Act and its administration. This document is the Final Report of the Review Team commissioned to undertake that review.

[1] The developments mentioned in this and the preceding paragraphs are considered in more details in Chapter 3 of this Report.

2 OVERVIEW OF CONCLUSIONS

6 The conclusions reached in this Report may be stated as follows:

- Indigenous people possess a range of socio–economic and cultural characteristics which differ from those of other Australians. These characteristics may disadvantage Indigenous people using statutes of general incorporation such as the Corporations Act or the State and Territory associations incorporation legislation.
- If these disadvantages are to be relieved, the special needs of Indigenous people in the context of incorporation and corporate regulation must be accommodated.
- The Commonwealth tried to achieve this through the enactment of the ACA Act in 1976. This was envisaged as a general statute of incorporation which would provide a simple and flexible means for the incorporation of associations of Indigenous people. The statute was reserved for the use of Indigenous people.
- The ACA Act is now out of date. It suffers from a large number of technical shortcomings. Successive amendments to the Act have caused it to drift from its initial legislative purpose.
- The initial legislative purpose is also under question. It reflects an outdated model of corporate regulation. It also reflects a conception of Indigenous culture and of the relationship between the government and Indigenous people, which have now been superseded through a variety of social, political and economic developments.
- The incorporation statute has now itself become a source of disadvantage for Indigenous people. The Act has been the subject of strong criticism, much of which is justified. Aspects of the Act's administration have also been criticised. Many of the administrative problems can be traced to the inadequacy of the legislation.
- The incorporation statute must be reformed. The Review Team has considered the abolition of the ACA Act. Yet it has come to the conclusion that the special incorporation needs of Indigenous people are still best met through a general statute of incorporation which is tailored to the specific incorporation needs of Indigenous people.
- This Report recommends a thorough reform of the ACA Act. A new 'Indigenous Corporations Act' ('the IC Act') should be enacted. This statute should provide Indigenous people seeking incorporation with key facilities of a modern incorporation statute such as the Corporations Act.
- However, the IC Act must also distinguish itself from the Corporations Act by providing something the Corporations Act cannot provide. It must provide Indigenous people with special forms of regulatory assistance that would enable them to use corporations more effectively and in accordance with contemporary standards of good corporate governance.
- In the context of racial discrimination law, the IC Act is conceived as a 'special measure'. In that spirit, it is a temporary form of 'positive discrimination' based on race which will enable Indigenous people to enjoy, on an equal basis with other

Australians, the same legal facilities (and attendant socio-economic benefits) that incorporation can confer.

- Most corporations now incorporated under the ACA Act could be accommodated under the new IC Act. However, certain corporations might be required to transfer to the Corporations Act. Others might find the Corporations Act more conducive to their particular needs, and voluntarily opt to transfer. The IC Act would include a transitional mechanism for the transfer of certain corporations to the Corporations Act, where appropriate.
- The operation of the IC Act should be reviewed within ten years of commencement to ascertain whether a 'special measure' of this kind is still required.

7 This Executive Summary will explain these conclusions. The research and reasoning behind the Executive Summary is set out in Parts 2 to 5 of the body of the Report. The methodology adopted by the Review Team in conducting the Review is set out in Part 1 of the Report. A detailed "model" suggesting how the conclusions reached in this Report could be implemented is set out in Part 6.

3 THE SPECIAL INCORPORATION NEEDS OF INDIGENOUS PEOPLE

8 As users of general statutes of incorporation, many Indigenous people have special needs which may not be shared with other users of corporations. These special needs may be discussed under four broad headings:

- the general socioeconomic characteristics of Indigenous people which may affect their participation in corporations;
- the impact of particular Indigenous cultural values and practices on corporate governance practices;
- the involuntary nature of many corporations formed to facilitate the provision of services to Indigenous people
- the functions that corporations facilitating the social, economic and political objectives of Indigenous people may be expected to fulfil.

9 Indigenous people may participate in corporations in a variety of ways – as members, directors and officers of the corporation, as creditors, clients and employees of the corporation, or as members of the 'community', 'polity', or 'society' in which the corporation operates. This Report discusses the incorporation needs of Indigenous people by focusing on *the roles of members and directors* of a corporation.

10 The special incorporation needs of Indigenous people might be experienced under any statute of general incorporation. However, the identification of these needs in this Report has been on the basis of the documented historical experience of ACA Act corporations. These corporations are an easily identifiable class of corporations in which Indigenous people participate as members and directors.

A. SOCIOECONOMIC STATUS OF INDIGENOUS PEOPLE

11 The socioeconomic characteristics of Indigenous Australians and the disadvantages they produce are generally well known.

12 Low education rates, low employment rates, lack of business experience, and language difficulties, mean that many of the skills needed by Indigenous people to engage in the management of corporations are often lacking.[2]

13 *Members* of corporations are also less likely than their non-Indigenous counterparts to have the skills to understand their rights and to be in a position to take action to protect those rights.

14 These disadvantages (for both members and directors) are likely to be even more significant in rural and remote areas.

[2] see Chapter 4

15 The corporate governance problems resulting from the lack of skills are further exacerbated by some of the other characteristics discussed below – in particular the potential inconsistency of some deeply held cultural values and practices with what would be regarded as "good corporate governance".[3]

B. VALUES AND PRACTICES OF INDIGENOUS MEMBERS AND DIRECTORS

16 Members and directors of existing ACA Act corporations typically bring to their corporations distinctive understandings and practices regarding such matters as the undertaking of responsibilities, the exercise of authority, the conduct of disputes, and the making of decisions.[4] Formal legal requirements such as the directors' duty to act in "the best interests of the corporation as a whole" may have little meaning within some Indigenous societies.

17 There is a general emphasis within Indigenous societies on the autonomy of individuals, and of locally based groups. There is often a high degree of suspicion or distrust between different groups and subgroups.

18 Because of the significance of community meetings within the Indigenous polity, general meetings provide a ready forum for the playing out of such political struggles. This in turn has the potential to destabilise corporate governance.

19 Political struggles between groups or sub–groups, may be exacerbated by intense competition between groups and sub-groups to ensure that they have access to or control over the resources of a corporation – particularly where a corporation receives significant resources from funding bodies or other sources such as mining royalties. The competition for these resources typically manifests itself in groups or subgroups trying to appoint their own representatives to the board of the corporation, or even to control it, since those from other groups may not be trusted to "represent" their interests. Thus, directors may not be appointed because of their qualifications or managerial skills, but because of their position in a group, subgroup or family.[5]

20 Further, the general emphasis within Indigenous societies on the autonomy of individuals, and of locally based groups, can hinder the use of meetings as effective means for producing resolutions that participants consider to be binding on them, even if a meeting apparently arrives at a mutually agreed outcome. Participants will typically reserve the right to subsequently act in accordance with their own interests or those of their particular group or family.

21 It would be incorrect to portray ACA Act corporations as 'dysfunctional' because of the presence of such factors. However, these factors may make ACA Act corporations very vulnerable to bad corporate governance practices.

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[3] see Chapter 5

[4] see Chapter 5

[5] see Chapter 5 and Chapter 6

C. INVOLUNTARY NATURE OF MANY ACA ACT CORPORATIONS

22 The vast majority of Corporations Act and State Association Incorporation Acts are formed on a voluntary basis. This is as true of large public companies listed on the stock exchange as for social tennis clubs incorporated under an associations incorporation statute.

23 By contrast many ACA Act corporations have been formed pursuant to a legislative requirement or as a result of government policy.[6] For example:

- In certain circumstances, indigenous groups are required to incorporate under the ACA Act by the *Aboriginal Land Rights (Northern Territory)* Act *1976* (Cth) ("**the NT Land Rights Act**") and the *Native Title Act 1993* (Cth) ("**the Native Title Act**").
- Commonwealth and State Governments have adopted policies of "self-management", which give the responsibility for the delivery of a wide range of essential services (such as housing, health, employment/CDEP) to Indigenous communities themselves. Government funding bodies often require the communities to form corporations before they are eligible to receive the funding to perform these services.

24 The consequences of these "involuntary" incorporation requirements include the following:[7]

- People who would not otherwise have formed a corporation, and who may not understand the consequences or technical requirements of incorporation, are required to do so.
- The requirement for incorporation can force together Indigenous groups which would not otherwise have joined together, and which might not share the same views or goals, making the corporation vulnerable to destabilising competition between groups.
- The requirement for the establishment of community-based corporations to perform community services can result in confusion between the membership of the community or group and the membership of the corporation itself.

D. DIVERSE FUNCTIONS OF ACA ACT CORPORATIONS

25 Although it is difficult to obtain reliable information on ACA Act corporations, the available information indicates that the overwhelming majority are non-profit organisations. Many provide important publicly-funded community services, such as housing, health, employment and legal services.[8] Other corporations hold land or other assets.

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6 see Chapter 6(A)

7 see Chapter 5

8 see Chapter 6(B)

26 ACA Act corporations range in size from very small (with negligible turnover and no employees) to reasonably large (turnovers of millions of dollars with hundreds of employees).[9] The majority appear to be small, and with few resources. There also appear to be a significant number of small to medium sized corporations, but only relatively few larger corporations.

27 Given the diverse and important functions fulfilled by many existing ACA Act corporations, the formation and regulation of corporations is a very prominent feature of Indigenous social and economic life. Whole Indigenous communities may be dependent on the services provided by a corporation. When such corporations fail, there may be no alternative service providers.

28 The diversity of existing ACA Act corporations also creates a difficulty in accommodating the special incorporation needs of Indigenous people. These needs will be experienced across the spectrum of functions fulfilled by corporations. But measures designed to accommodate needs in the context of one function (eg relaxation of financial reporting requirements for a corporation engaged in passive landholding) may be inappropriate in the context of another (eg financial reporting requirements for a corporation providing medical services to a large number of people).

E. FREE DESIGN OF CORPORATE CONSTITUTION

29 In 1976, it was considered appropriate for the ACA Act to require that the constitutions of ACA Act corporations be approved by the Registrar; and to require the Registrar to refuse incorporation if he or she deemed it "unfair" "inequitable", or if it provided insufficient control of the corporation by the members through general meetings. However, this degree of prescription is not appropriate now. It seriously restricts the capacity of corporations to design constitutions to suit their particular needs.

30 The Act also allows incorporators to base the provisions of their corporate constitution on Indigenous 'custom'. At the time of drafting, it was thought that a rule of this nature would make for more flexible and 'culturally appropriate' design of corporate constitutions. This objective was often disappointed at the administrative level, frequently being at odds with the prohibition against "unfair" and "inequitable" rules and the requirement for control by members through general meetings. The notion of 'culturally appropriate' incorporation has also proved to be problematic.

31 Today, most incorporation statutes allow incorporators to use highly individualised – indeed, idiosyncratic – corporate constitutions if they choose to do so. Modern corporations legislation assume that *all* persons incorporating a corporation should be allowed to design their corporate constitution according to their needs and aspirations. These may be grounded in 'Indigenous custom' or any other social, economic or political considerations.

32 There is therefore no need to view flexibility in the design of corporate constitutions as a specifically Indigenous need. Unless legislation advancing other goals provides otherwise,

[9] see Chapter 6(B)(3)

it is to be assumed that all incorporators, Indigenous and non-Indigenous alike, share this need.

4 ACCOMMODATING THE SPECIAL INCORPORATION NEEDS OF INDIGENOUS PEOPLE

33 From the foregoing, it is clear that many Indigenous people using statutes of general incorporation experience needs not experienced by non–Indigenous people. These needs must be addressed if Indigenous people are to enjoy the legal (and attendant socio–economic) benefits that incorporation may confer.

34 This Report argues that these needs can be met, in part, through '**special regulatory assistance**'.

A. THE CONCEPT OF SPECIAL REGULATORY ASSISTANCE

35 In the present context, the term "special regulatory assistance" is used to describe measures that may be undertaken by a corporate regulator to assist and encourage the directors and members of corporations to develop the relevant skills and good corporate governance practices necessary for the long-term viability and success of their corporations.

36 In the present context, 'special regulatory assistance' may take a number of forms:

- Assistance to members and directors of corporations in developing the skills necessary to participate effectively in corporate processes and to satisfy the requirements of regulatory compliance. This may require education and training.
- Assistance to corporations facing corporate governance difficulties and insolvency.
- Context–sensitive enforcement of certain statutory obligations and easy access to incorporation.
- Regulatory intervention to protect members of the corporation from abuses.

37 These special needs are briefly discussed below.

B. EDUCATION AND TRAINING

38 Special regulatory assistance may require the provision of education and training, advice and assistance in relation to incorporation and management of corporations, filing of reports.

39 The Review Team notes that in the international aid and development context "capacity development" of Indigenous people is increasingly seen as a crucial component of both policy development and program delivery by government and other agencies. In the present context, the focus of capacity building undertaken by the corporate regulator should be on corporate governance rather than the broader functions performed by the corporation in the relevant Indigenous community or polity. The regulator's capacity building policies in the context of corporate governance may, of course, be complemented by, and be co–ordinated with, other government policies and the actions of other governmental agencies.

C. CORPORATE GOVERNANCE PRACTICES AND INSOLVENCY

40 In the case of the monitoring and prevention of bad corporate governance and insolvency, it may require additional functions and powers to be given to the corporate regulator.

41 This might enable a form of regulation which is more 'responsive' to the particular difficulties faced by members and directors or indigenous corporations. The regulatory model may need to deviate from the standard 'command and control' style of regulation, to a system where the regulator provides a more active form of assistance to the corporation in meeting the relevant legislative standards, or avoiding insolvency.

D. CONTEXT–SENSITIVE DESIGN AND ENFORCEMENT OF CERTAIN STATUTORY OBLIGATIONS

42 Education and training will not provide all the knowledge and skills required for the successful governance of corporations, to all directors and members of Indigenous corporations. In addition, some of the corporate governance problems in some corporations might result as much from deeply held cultural views and practices as from lack of technical skills.[10]

43 Consequently, there may be a need for flexibility in the implementation of the incorporation statute and the way it is administered and enforced. In the light of past administrative experience under the ACA Act, it is necessary to ensure that minor technical breaches of the statute do not result in the automatic deregistration or winding-up of corporations.[11]

44 A question arises as to whether the special incorporation needs of Indigenous people could support the relaxation of certain standards of corporate financial reporting and corporate governance standards - for example, whether the standard of directors' duties should be modified to reflect the poor educational standards and management experience of Indigenous directors.

45 These questions cannot be addressed on a 'global' basis. The Report has come to different conclusions on different issues. For example, the Report rejects the proposal that the standard of directors' duties be lowered; but it supports the exemption of certain 'passive' corporations from certain types of financial reporting obligations.

46 Given the economic disadvantages faced by many Indigenous people, it is desirable that the costs of incorporation and running a corporation be kept to a minimum.

E. REGULATORY INTERVENTION TO PROTECT MEMBERS

47 The members of ACA Act corporations may not have the knowledge, skills, resources or access to the legal system that are usually required for members to protect and enforce

[10] see Chapter 12(C)

[11] see Chapter 15(D)(3)

their membership rights. They may therefore be particularly vulnerable to oppression or abuses by directors or majority members.[12]

48 While an incorporation statute should encourage members to take action to enforce their own rights, it must be recognised that this will not always be possible. In such cases, there is an argument that the corporate regulator should have some capacity to intervene in the management of corporations on behalf of members. These functions would need to be reflected in the incorporation statute.

[12] see Chapter 11(E)

5 THE NEED FOR A SPECIFIC INDIGENOUS INCORPORATION STATUTE

49 It is necessary to consider the threshold question whether there is still a need for a separate Indigenous incorporation statute.[13] As will be noted below, there are a number of significant problems with the ACA Act, some of which have been addressed in more modern general incorporation statutes.

50 The review has considered this question in two parts –

- Can the special circumstances of Indigenous corporations be appropriately catered for under existing general statutes of incorporation such as the Corporations Act and the State Association Incorporation Acts?[14]
- Would the repeal of the ACA Act and transfer of all ACA Act corporations to other incorporation statutes be practically feasible?

A. CAN GENERAL INCORPORATION STATUTES ADDRESS THE SPECIAL INCORPORATION NEEDS?

51 This question has been answered negatively. Accommodating the special incorporation needs of Indigenous people will require special regulatory functions that do not currently exist under other general incorporation statutes and which could not easily be inserted into them.[15]

52 The capacity of the general incorporation statutes to accommodate the "special measures" required by Indigenous corporations currently incorporated under the ACA Act are briefly discussed in turn below.

(1) Special regulatory assistance

53 Education and training for members and directors of Indigenous corporations incorporated under the Corporations Act and State Association Incorporation Acts could be provided as an external administrative measure.

54 However, there are practical difficulties with such arrangements, including the costs and complexity of coordination of assistance and training across eight incorporation statutes and jurisdictions, with eight different corporate regulators.

55 In addition, education and training is only one component of "special regulatory assistance", which would require broader action in the way the statutes are implemented.

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13 see Chapter 8

14 see Chapter 8(B)

15 see Chapter 8(C)

56 Given the fixity of existing regulatory arrangements it would probably not be possible to provide broader "special regulatory assistance" in the areas of corporate governance and insolvency without substantial amendments to those statutes.[16] This is problematic, given that Indigenous users of these statutes would only form a minority of the total users.

57 The regulators of other incorporation statutes have identified that they have no capacity to adopt a flexible approach to the implementation and enforcement of legislative requirements, in a way which would take into account the special circumstances of Indigenous corporations. These statutes and the administrative arrangements under which their regulators operate are designed to treat all corporations the same.[17]

58 Indigenous corporations would therefore be exposed to potentially significant penalties for failing to comply with various legislative requirements within the same timeframes which apply to voluntary (and commercial) corporations.

59 Incorporation under the Corporations Act may be too expensive for many, although not all, Indigenous people.

60 The protection of members' rights under general incorporation statutes is essentially left to members themselves. Members are generally required to go to court to do so. Regulators do not have any means to make these measures more accessible. And for the same reasons as outlined in relation to intervention to ensure continuity of essential services, they do not have the means resources or capacity to intervene to protect members.[18]

(2) Other issues

Philosophy of other incorporation statutes

61 The Corporations Act and the ASIC Act are designed primarily to facilitate commercial transactions in the marketplace and wealth generation by corporations. This may not match the objectives of many corporations currently incorporated under the ACA Act .[19]

62 State and Territory association incorporation statutes require corporations to be non-profit in character. This may not match the objectives of many corporations currently incorporated under the ACA Act.

Currency of State Association Incorporation Acts

63 Several of the State and Territory association incorporation statutes are out of date in a number of key areas of company law, and suffer many of the same problems as the current ACA Act. There would therefore be little advantage in requiring ACA Act corporations to incorporate under these statutes.[20]

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16 see Chapter 8(C)(2)

17 see Chapter 8(C)(3)

18 see Chapter 8(C)(1)

19 see Chapter 8(C)(2)

20 see Chapter 8(C)(1)

Appropriate reporting requirements

64 Most existing ACA Act corporations would have to incorporate as public companies limited by guarantee if they were incorporated under the Corporations Act. Public companies are subject to comprehensive reporting requirements, which would probably be unnecessarily onerous for the majority of ACA Act corporations.[21]

65 Reporting requirements vary greatly under the State Association Incorporation Acts. Although these statutes are generally simpler than the Corporations Act, some of these might also probably prove overly onerous, particularly for small unfunded land-holding corporations. In addition, many State Association Incorporation Acts or policies implemented by their regulators exclude incorporation under those statutes by corporations with a turnover in excess of either $250,000 or $500,000. Such corporations would have little choice but to incorporate under the Corporations Act as public companies limited by guarantee.

B. PRACTICAL DIFFICULTIES WITH REPEALING THE ACA ACT

66 Even if conclusions in the previous section were not reached, the repeal of the ACA Act and transfer of all ACA Act corporations to other incorporation statutes would be extremely difficult, primarily for following reasons:

- There would be likely to be significant opposition from Indigenous stakeholders to any proposal to repeal the ACA Act.[22]
- All of the regulators of the alternate Commonwealth and State incorporation statutes are opposed to the repeal of the ACA Act and transfer of ACA Act corporations into these other regimes.[23]
- The transfer and transitional arrangements would be likely to be extremely complex, as it would involve coordinating the transfer of ACA Act corporations into a total of eight different incorporation statutes, under eight different jurisdictions. This would require the full support of all the States.[24]
- The transfer of all ACA Act corporations to other incorporation statutes would also be likely to cause a great deal of disruption to them, particularly to smaller corporations. However, long-term "grandfathering" of such corporations is not a practical or viable option.[25]
- The repeal of the ACA Act would also require amendments to the Native Title Act, the PBC Regulations and the NT Land Rights Act.[26]

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21 see Chapter 8(C)(1)

22 see Chapter 8(D)(1)

23 see Chapter 8(D)(2)

24 see Chapter 8(D)(3)

25 ibid. See also the Second Report of this Review – *Policy Discussion Paper for 'Option 5'*

26 see Chapter 8(D)(5)

C. CONCLUSION: CONTINUATION OF A SPECIAL INCORPORATION STATUTE AS A 'SPECIAL MEASURE'

67 From the foregoing, the Review Team has concluded that there is a continuing need for a separate incorporation statute to specifically address the special incorporation needs of Indigenous people. The ACA Act already performs that function, but it must be reformed.

68 The Review Team has put forward a proposal for a new statute, provisionally entitled "**the Indigenous Corporations Act" ('the IC Act')**. The IC Act must distinguish itself from the Corporations Act by providing something the Corporations Act cannot provide. It must provide Indigenous people with the special forms of regulatory assistance noted above. This would enable Indigenous people to use corporations more effectively and in accordance with contemporary standards of good corporate governance.

69 In the context of racial discrimination law, the IC Act is conceived as a 'special measure'. In that spirit, it is a temporary form of 'positive discrimination' based on race which will enable Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities (and attendant socio-economic benefits) that incorporation can confer.

70 Consideration is therefore given to provisions for the transfer of some corporations from the ACA Act to the Corporations Act, where appropriate.

6 REFORMING THE ACA ACT

71 Having concluded that an Indigenous-specific incorporation statute should be retained, it is necessary to explain why the current ACA Act is not capable of meeting the needs of Indigenous incorporators. The proposed reforms to address the current shortcomings with the ACA Act are then discussed.

72 Some of the key problems with the ACA Act were outlined in the "Overview of Conclusions". These include the fact that the ACA Act does not adequately address the special incorporation needs of Indigenous people (it does not provide for "special regulatory assistance). In addition, many of the divergences between the ACA Act system of corporate regulation and that under the Corporations Act and the State and Territory regimes can no longer be justified as 'special measures' for the promotion of the legal rights of Indigenous people. Further, the ACA Act is out of date in key areas of company law and in its conception of Indigenous culture. This disadvantages corporations incorporated under it. It also disadvantages the corporations' members and directors, and persons dealing with the corporations.

73 There are also a number of other problems with the Act which prevent its effective operation.

74 Addressing these issues will require significant reforms to the ACA Act. The Review Team suggests that the new Act be called the Indigenous Corporations Act ("**the IC Act**"). For the purposes of this Review, the corporations incorporated under the IC Act will be referred to as "Indigenous Corporations".

75 The aim of the proposed reforms can be stated as follows:

> *To provide the facilities of a modern incorporation statute, which addresses the special incorporation needs of Indigenous people, by:*
>
> - *providing a regulatory system which is flexible and which can offer members and directors 'special regulatory assistance' (as described above);*
> - *enhancing the capacity of funding bodies and creditors to take a more proactive role in the protection of their interests - thereby increasing the ability of corporation to raise finance and reducing reliance on the Registrar to protect the interests of finance providers;*
> - *providing means for the Registrar to assist with the protection of members' rights, where members are unable to or lack the capacity to take action themselves;*
> - *ensuring that Indigenous people are able to design corporate structures and rules which best suit their specific needs – whether that be by reference to cultural practices or otherwise;*
> - *ensuring that reporting requirements match the size and activity level of the corporation;*

- *enhancing the standard of management of Indigenous Corporations by applying directors' duties to senior management, and ensuring appropriate duties apply to both directors and senior management;*

- *promoting the certainty of internal corporate processes and transactions with third parties (thereby enhancing the functionality of Indigenous Corporations and removing commercial disincentives to dealing with them);*

- *removing unnecessary technical barriers to the effective and efficient operation and regulation of Indigenous corporations;*

- *where equitable, appropriate and practical in the circumstances, to align the Act with modern corporations laws;*

- *providing an appropriate transitional mechanism for appropriate Indigenous Corporations to incorporate under the Corporations Act and enter mainstream corporate practice; and*

- *minimising incompatibility with requirements for NTRBs and PBCs under the Native Title Act and PBC Regulations.*

76 These reforms, and an explanation of the need for them, are set out below.

A. SPECIAL REGULATORY ASSISTANCE

77 The Review Team concluded that there is a need for an Indigenous-specific Incorporation statute as a "special measure" to address disadvantages suffered by Indigenous people in relation to their incorporation needs. The cornerstone of the "special measures" will be the provision of "special regulatory assistance" to Indigenous Corporations. (This concept and what it involves has already been outlined above.)

(1) Current Problems

Limited scope for special regulatory assistance

78 The scope for special regulatory assistance under the ACA Act is very limited.[27] The Registrar's statutory functions are limited to the provision of advice on the procedures for incorporation of ACA Act corporations and to arbitrate in certain disputes.

79 The advice function is extremely narrow in its scope, and the arbitration function (itself a very minor measure) cannot be exercised, because no regulations have been made setting out how the function is to be performed. It would be difficult to find legislative authority for many of the forms of special regulatory assistance mentioned above. (This is discussed further under the "regulatory intervention" heading below).

80 The potential for the ACA Act to be implemented in a much more flexible and "culturally sensitive" manner than other general incorporation statutes has not always been realised in

[27] see Chapter 11(B)

practice. For example, in 1997/1998, 247 corporations were deregistered for failure to comply with reporting requirements. This is in part because the Act does not currently adopt a facilitative approach to achieving compliance. It instead adopts a more traditional enforcement-based approach.

Current system of regulatory intervention difficult to characterise as a 'special measure'

81 The ACA Act itself contains relatively few provisions for regulatory intervention in the affairs of Indigenous corporations. These include:

- appointment of an examiner to conduct an examination of the corporation's affairs;
- appointment of an administrator;
- applying to the court for the winding-up of a corporation; and
- deregistration.

82 None of these is well suited to provide special regulatory assistance for ACA Act corporations. In fact, other than examinations, they all effectively result in the management of ACA Act corporations being taken out of the hands of the Indigenous people running the corporation. As a consequence, the administration of the Act has in the past, not surprisingly, been highly interventionist in nature. It also means that the positive (facilitative and educative) approach taken at present does not enjoy a statutory imprimatur. This undermines certainty about the long-term continuation of this approach, given that it is largely dependent on the views of the Registrar at the time.

83 The powers of examiners and administrators under the ACA Act (and the powers to appoint them) are much broader than their Corporations Act equivalents. It is difficult to justify these broader powers as "special measures" designed to promote the enjoyment of the legal rights of Indigenous people.

84 The process of Registrar-appointed administration under the ACA Act is arguably uncertain and the Act contains no requirement that appropriately qualified persons will undertake the administration.[28] It disables the process of voluntary administration which is also available under the Act, and which is more in keeping with current thinking on effective corporate governance responses in situations where a corporation is facing financial and functional difficulty.

85 The current provisions allowing unilateral appointment of administrators by the Registrar, combined with a lack of clarity about creditors' rights to intervene, have also resulted in improper pressure on the Registrar from public funding bodies, to monitor and regulate the use of public funds by ACA Act corporations. There are a number of problems with this:

- It is generally inappropriate for a corporate regulator to be in effect acting on behalf of a particular creditor (although we note that ORAC regularly resists considerable pressure from funding bodies to do so);

[28] This comment is not intended to reflect on the qualifications, quality or professionalism of administrators currently appointed under the ACA Act.

- Commercial investors under the Corporations Act generally take a broad interest in and responsibility for the corporate governance of corporations in which they invest. It is appropriate for government funding bodies to do the same with ACA Act corporations – particularly where the corporations have been contracted to provide important government services;
- The powers of a corporate regulator are generally not suitable for addressing issues of corporate finance and creditors' interests. Much more effective measures are available to creditors (including government funding bodies) through contract; and
- These provisions arguably promote a culture of dependence on external regulatory intervention in the management of ACA Act corporations when management fails. This dependence is not just on the part of the ACA Act corporations, but also on the part of funding bodies.

86 For these reasons, the Review Team has concluded that the provisions for appointment of administrators under section 71 of the ACA Act should be replaced with a more appropriate mechanism (this alternative is discussed further below). Nonetheless, ORAC prefers maintaining a modified administration process.[29] The Steering Committee has therefore called for further investigation of the legal and practical implications of both approaches to reforming section 71. The Review Team supports this proposal for further investigation, given the complexity of the issues and the potential practical implications relating to the implementation of any changes to section 71.

(2) Proposed Reforms

87 The emphasis in the ACA Act should shift away from enforcement-focussed regulatory intervention towards special regulatory assistance. However, it is recognised that regulatory intervention will remain appropriate in some circumstances.

Special Regulatory Assistance

88 The provision of special regulatory assistance needs to be formally stated as a legislative objective, and adequate statutory power needs to be granted to the regulator to effect this objective. The details of some of the measures that this special regulatory assistance might cover are discussed further in the body of this Report, and are set out in summary form in Part 6.

89 To be effective, special regulatory assistance would need to be integrated into the performance of the Registrar's other regulatory functions.

90 The Review Team notes that the resources available to the Registrar to perform the new special regulatory assistance functions would be increased if other measures proposed below are taken. These include removing the requirement for the Registrar to have a role in the scrutiny and approval of corporate constitutions and in the scrutiny and approval of applications for exemptions to the reporting requirements. Resources should also be freed-up by modifying the role of the Registrar in regulatory intervention, as outlined below.

[29] See Chapter 20(A)(2) for a discussion of the two alternative approaches.

Regulatory Intervention

91 Public funding bodies and creditors should be encouraged to take direct responsibility for the management of funds provided to ACA Act corporations.[30] This would be done by enhancing the capacity of creditors and funding bodies to do so, by making it clear that Corporations Act remedies such as receivership and provisional liquidation are available to them. At the same time, the focus of the Registrar's functions should be shifted away from regulatory intervention, and the Registrar's powers modified (as described below). This would mean that public funding bodies and creditors would have less scope for applying inappropriate pressure on the Registrar to take action on their behalf.

92 The directors of ACA Act corporations would be encouraged to take appropriate action themselves. This would be done by clarifying the application of the Corporations Act voluntary administration provisions to ACA Act corporations, and assisting ACA Act corporations to make use of these provisions.

93 The interventionist regulatory functions of the Registrar would also be modified, including by:

- Bringing examination powers into line with the Corporations Act;
- Inserting an informal intermediate step aimed at resolving corporate governance issues in corporations, before more serious intervention action is taken (in itself a form of "special regulatory assistance");
- replacing section 71 administrations with a power to apply to the Court for appointment of a receiver – a less extreme but in the Review Team's view more efficient and better targeted measure (although we note again that this specific proposal is to be the subject of further consideration by ORAC); and
- providing the Registrar with a flexible range of less interventionist powers which are aimed at assisting address problems experienced by corporations. These might include powers to mediate and arbitrate disputes about the application of corporation's rules, and the power to modify unworkable rules (for example where quorum is set too high).

94 In recognition of the reduced role of the Registrar in intervening unilaterally in the affairs of corporations, various express members' remedies should also be introduced. Special regulatory assistance will be required to enable members to make proper use of those remedies.

B. FLEXIBILITY IN CORPORATE DESIGN

95 The prescriptive nature of the ACA Act has caused numerous problems for ACA Act corporations. In particular, the current prescriptive requirements in the Act stifle innovation in the design of appropriate corporate governance mechanisms. Further, the current requirement for "sufficient" control of the corporation by the members through general meetings may in fact work *against* good corporate governance in many cases.

[30] see Chapter 20(A)(2)

96 The Review Team has concluded that *any* incorporation statute (Indigenous and non-Indigenous alike) must be flexible to accommodate constitutions which reflect the specific needs of the incorporators. This is a critical step in facilitating good corporate governance, although it will not of course guarantee good corporate governance.[31]

97 In addition, the prescriptive approach adopted in the ACA Act is highly resource intensive. Reforms making the Act permissive in relation to corporate constitutions would free up these resources for special regulatory assistance.

C. REPORTING REQUIREMENTS

(1) Current Problems

98 The Act adopts a "one size fits all" approach to financial reporting. The level at which it is currently set is unnecessary and onerous for small ACA Act corporations. But it is also inadequate for larger corporations, particularly those providing important community services.[32]

99 The ACA Act does provide for exemptions to the reporting requirements, but these must be specifically applied for and approved in writing. Most small ACA Act corporations are unable to meet this requirement, effectively putting them in breach of the Act and at risk of deregistration. In addition, assessment of exemption applications is resource-intensive.

(2) Proposed Reforms

100 To ensure that reporting requirements match appropriate accountability requirements, the Review Team is of the view that a reformed ACA Act should make provision for effectively three "tiers" of reporting requirements. The tiers would be determined through a combination of turnover, assets and numbers of employees, as follows:[33]

Exempt corporations

101 Very small corporations ("exempt" corporations) would be automatically exempt from reporting requirements under the ACA Act (and the requirement to hold AGMs), with no requirement to make specific applications for exemptions.

Small corporations

102 "Small" corporations would have to provide minimal financial information in annual reports – more detailed accounting for any public monies would be through grant conditions.

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31 see Chapter 12(B)

32 see Chapter 15(B)

33 see Chapter 20(E)(2)

Large corporations

103 In recognition of the critically important roles they play in Indigenous communities, and the public interest in ensuring their ongoing viability, "Large" corporations (which would include all corporations which are not "exempt" or "small" corporations) would have to meet increased reporting requirements.

104 These reporting requirements for "large" corporations would be to a higher standard than those currently contained in the ACA Act, but not as comprehensive as those required for public companies limited by guarantee. The increased reporting requirements for large ACA Act corporations could also mean reporting requirements under funding arrangements for those corporations could be more specifically focussed on milestones and outcomes.

105 It is proposed that the largest "large corporations" will eventually be required to transfer to the Corporations Act as public companies limited by guarantee, which will require an even higher level of reporting.

106 The Review Team also recommends that duplication of reporting for some "large" corporations be reduced, by deeming financial and directors' reports produced for other purposes (such as reports prepared by NTRBs which meet the standards required by the *Commonwealth Authorities and Companies* Act 1997 (Cth)) to satisfy the ACA Act's reporting requirements. However, the Registrar would have a right to refuse to accept a report if it does not in fact meet the standards required for those other purposes.

D. DIRECTORS' DUTIES

(1) Current Problems

Coverage of directors' duties

107 Because of the socioeconomic status of Indigenous Australians, there is often a significant knowledge and power imbalance between the directors of ACA Act corporations and the senior management of these corporations, who are typically non-indigenous. This means that the senior management of ACA Act corporations may have a disproportionate influence on the directors and hence the management of the corporation (compared with non-Indigenous corporations). However, under the ACA Act, only the directors are expressly subject to directors' duties. The general law may apply some of these duties to senior management of ACA Act corporations, but that is unclear.

108 By contrast, the Corporations Act expressly extends the application of directors' duties to all "officers" of the corporation. That includes any person involved in the management of the corporation, whether on the board or not.[34]

[34] see Chapter 13(B)

The statements of directors' duties

109 The statements of directors' duties under the ACA Act are out of date and arguably unclear. They are also not comprehensive, which has the potential to disadvantage the members of ACA Act corporations by weakening the corporate governance framework.

110 This can be contrasted with the clear and comprehensive statements of directors' and officers' duties under the Corporations Act, which are also clarified by extensive caselaw.

Consequences of breach

111 The ACA Act provides for a very limited range of responses to breaches of directors' duties, primarily injunctions and applying for a corporation to be wound up. These are crude tools, and may disadvantage the members – the very persons the duties are designed to protect. There are no penalty provisions to discourage "rogue" directors and managers.

Disqualification of directors

112 The ACA Act provisions for disqualification of directors are also very crude, and are not well targeted at capacity to direct a corporation. The ACA Act provisions may in fact have unintended consequences of excluding qualified people. This can again be contrasted with the better-targeted system under the Corporations Act.

(2) Proposed Reforms

Extension of directors' duties to cover officers

113 Directors' duties should be expressly extended to "officers" of ACA Act corporations, to ensure that senior management is also covered by directors' duties.[35]

The statement of directors' duties

114 The statement of directors' duties in the ACA Act should be modernised to generally bring it into line with the Corporations Act, including by making provision for a statutory "business judgement rule" in relation to the duties of care and diligence.[36]

The standard of directors' duties

115 The standards of care and diligence expected of Indigenous directors should remain objective and not be lowered, as this would prejudice the position of the members of ACA Act corporations.[37]

Consequences of breach

116 A range of civil and criminal penalties should be introduced to the ACA Act for breaches of directors' duties, but the levels of penalties to be applied in any given case should

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35 see Chapter 20(C)(3)

36 see Chapter 20(C)(1)

37 see Chapter 20(C)(2)

include subjective considerations, because of the special circumstances of many Indigenous directors.

Disqualification of directors

117 The ACA Act should adopt the Corporations Act model, which would disqualify people from management of corporations (not just from holding directorship positions) where they have demonstrated they are not fit to do so.

E. CERTAINTY IN INTERNAL CORPORATE PROCESSES AND TRANSACTIONS WITH THIRD PARTIES

(1) Current Problems

Flow-one effect of procedural irregularities

118 Minor procedural irregularities in the proceedings of ACA Act corporations can result in entire meetings and appointments of directors being invalid. This can have serious flow-on consequences where important decisions were purportedly made at the meetings, or where it subsequently becomes apparent that a director may not have been validly appointed.[38] The general law allows ratification of some decisions, but the scope of the general law is very limited. Evidence indicates that ACA Act corporations are particularly vulnerable to procedural irregularities.

Lack of transactional certainty for third parties dealing with ACA Act corporations

119 Where an ACA Act corporation purports to perform an act which is outside the scope of the corporations' objects, that transaction will be void (this is known as the "*ultra vires* rule").[39]

120 Similarly, where there have been procedural irregularities which result in AGM or board resolutions to enter contracts being invalid, the contracts themselves will again be void. This introduces a great deal of uncertainty for ACA Act corporations entering into commercial transactions. Just as importantly, it could prove a major disincentive for third parties proposing to enter commercial transactions with ACA Act corporations, as they would have no way of knowing whether their contracts with the corporation are valid and enforceable.

(2) Proposed Reforms

Validation of Procedural Irregularities

121 There is a clear need to introduce measures to provide for the validation of procedural irregularities. The Corporations Act contains provisions validating procedural

[38] see Chapter 14(A)

[39] see Chapter 14(C)

irregularities where doing so would not cause substantial injustice. This would be a good model for the IC Act.[40]

Transactional certainty for third parties dealing with ACA Act corporations

122 It will also be important for the commercial viability of ACA Act corporations that measures be introduced to provide transactional certainty to the dealings of ACA Act corporations with third parties. Again, the Corporations Act provides a good model for how this can be done.[41]

F. MISCELLANEOUS REFORMS TO ENSURE THE EFFECTIVE OPERATION OF THE ACT

123 The ACA Act also suffers from a number of other problems, which are outlined below. These prevent the effective operation of the ACA Act as an incorporation statute for Indigenous incorporators.

(1) Membership of Non-Indigenous Persons and Corporations

124 The ACA Act should continue to limit membership of ACA Act corporations and their boards to Indigenous natural persons. Other mechanisms are available for obtaining expert advice for boards. The Corporations Act and State Association Incorporation Acts should provide adequate alternatives for the creation of "umbrella" corporations, although ORAC proposes to conduct further investigation into the feasibility of allowing corporate membership of ACA Act corporations.[42]

(2) Minimum membership requirements

125 The ACA Act currently contains a requirement for ACA Act corporations (other than those holding land or those formed primarily for business purposes) to have a minimum of 25 members.[43] This can cause a number of problems for groups who wish to incorporate but do not have sufficient potential members.

126 The Review Team has concluded that the minimum membership requirements should be reduced to 5 persons for all ACA Act corporations, irrespective of purpose.

(3) Amalgamation of corporations

127 Amalgamation of corporations is currently not possible under the ACA Act. There is a strong demand for a facility to allow the amalgamation of ACA Act corporations. This

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40 see Chapter 20(D)(1)

41 see Chapter 20(D)(2)

42 This issue had previously settled by the Steering Committee on the basis that corporate membership would not be provided for, however ORAC has requested it to be reconsidered. For detailed discussion of the issues involved, see Chapter 20(F)

43 see Chapter 17(G)

demand comes from both Indigenous corporations and public funding bodies, and there are some persuasive arguments why this facility should be provided.

128 The Review Team is of the view that the IC Act should make provision for amalgamation of corporations. Several State Association Incorporation Acts contain mechanisms for the amalgamation of corporations which would serve as appropriate models.

(4) Membership Lists

129 The requirement to define the membership of ACA Act corporations by reference to a membership list has caused numerous difficulties for many ACA Act corporations.[44] These arise primarily because of difficulties encountered in maintaining these lists, the fact that they can become the focus of disputes, and the fact that the community-oriented role of many ACA Act corporations can result in confusion between membership of the relevant Indigenous community and membership of the corporation.

130 The Review Team considered this issue at great length. The problem is that where members are provided with enforceable rights and entitlements, as well as potential liabilities, it is imperative to know precisely who the members are by reference to a certain and objective criteria. Although there are numerous problems with membership lists, there do not appear to be any viable alternatives. It is a necessary feature of corporations that the members of the corporation and the precise nature of their legal rights and obligations be capable of precise ascertainment at any point in time.

131 Therefore, the Review Team concluded that membership lists must continue to form the basis for defining ACA Act corporations' memberships.

(5) The requirement to hold AGMs

132 The ACA Act does not currently have a clear requirement for AGMs to be held annually.[45] The Review Team recommends that the requirement to hold AGMs be clarified.

(6) Meetings by videoconference or teleconference

133 The ACA Act does not make specific provision allowing meetings of members or directors to be held via videoconference or teleconference. Given the highly dispersed nature of many Indigenous groups, this has the potential to cause difficulties where dispersed groups do not have the resources to bring all members or directors to one physical location.

134 The Review Team recommends that provision be made for the holding of meetings of members and directors by videoconference and teleconference.[46]

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44 see Chapter 17(B)

45 see Chapter 17(C)

46 see Chapter 17(D)

(7) Remedying errors in the public record and issuing duplicate certificates of incorporation

135 There is no capacity in the ACA Act for the Registrar to remedy errors (such as spelling mistakes) which appear on the public record (ie the Register). These errors can only be fixed through complex and resource-intensive measures by the corporation in question.

136 There is also no power for the Registrar to issue duplicate certificates of incorporation where they are lost or destroyed.

137 The Review Team recommends that the Registrar be given powers to remedy errors in the public record and issue duplicate certificates of incorporation.[47]

(8) Uncertainty in the application of Part 5 of the Corporations Act

138 Sections 62 and 67 of the ACA Act import by reference various aspects of Part 5 of the Corporations Act. However, the exact scope of these provisions is unclear. Some of the provisions in Part 5 of the Corporations Act relate to measures that would be highly beneficial to ACA Act corporations, such as voluntary administration, receiverships, and provisional liquidations. The Review Team recommends that the effect of sections 62 and 67 be clarified in light of the proposed reforms to regulatory intervention discussed above and in Part 6.[48]

(9) Part III – Aboriginal Councils

139 Part III of the ACA Act (which provides for the creation of Aboriginal Councils) has never been used to successfully establish an Aboriginal Council. It is out of date, and has arguably been superseded by other developments. The Review Team therefore recommends that it should be repealed.

G. TRANSFER OF CERTAIN CORPORATIONS TO THE CORPORATIONS ACT

140 The Review Team has concluded that it would be appropriate to require certain large Indigenous Corporations to transfer to the Corporations Act as public companies limited by guarantee. The rationale for this, and an outline of how it could function are provided below.

(1) Rationale

Retention of the ACA Act as a broadly inclusive incorporation statute

141 In the course of considering whether the ACA Act should be retained, detailed consideration was given by the Review Team to whether the Act should be retained only for small Indigenous corporations. Under this approach, all larger corporations would be

47 see Chapter 17 (E)

48 see Chapter 17(H)

required to transfer to the Corporations Act or State Association Incorporations Acts. This would return the Act to the original legislative intent of providing a flexible, inexpensive and administratively simple incorporation statute.

142 However, the Review Team concluded that the original legislative intent has been superseded by the enormous changes which have occurred since 1976 in the context of Indigenous corporations.

143 The special needs of Indigenous incorporators (outlined above) are not limited to small corporations. In some cases, the needs of the members and directors of large IC for certain special measures may even be more significant than those of the members and directors of small corporations. In addition, consultations by the Review Team revealed that there is a demand from many Indigenous stakeholders for any reformed Indigenous incorporation statute to remain broadly inclusive.

144 There would also be significant technical and other difficulties with any reforms which limited the Act to small corporations. Many of these are the same as for repeal of the Act (discussed above), and are therefore not repeated here.

Rationale for transfer of certain corporations to the Corporations Act

145 Despite the conclusion that the Act should remain broadly inclusive, the Review Team also recommends that certain larger Indigenous Corporations be transferred to the Corporations Act.

146 This is in part to reflect the role of the Act as a "special measure" which should, by definition, be transitional in nature. However, there are also several technical arguments for the transfer of larger corporations to the Corporations Act. These include the following:

- Large Indigenous corporations are likely to be providing important community services and are also likely to be operating more as comparable commercial corporations. There is therefore a strong argument that such corporations should be required to meet the more comprehensive disclosure reporting requirements imposed on public companies limited by guarantee under the Corporations Act. These large corporations are also more likely to have the resources to comply with these higher reporting requirements.
- Where Indigenous corporations are functioning as large commercial operations, the IC Act regulator is less likely to have the capacity to monitor and regulate the activities of these corporations, whereas ASIC has the resources and expertise. It would make more sense for the IC Act regulator to specialise in dealing with the bulk of Indigenous corporations, which are not acting as large and complex commercial entities.

147 This approach would also have the advantage that the IC Act itself would become the transitional mechanism for the transfer of Indigenous Corporations to the Corporations Act – avoiding the complex transitional and grandfathering provisions which would be required if the Act were to be repealed or limited to small corporations.

148 There are of course disadvantages to this approach as well, but the Review Team is of the view that it achieves the best balance.

149 The primary disadvantage with this proposal is that special regulatory assistance of the type proposed above would not be available to the Indigenous members and directors of corporations transferred out of the IC Act regime.

150 These needs might, in some way, be addressed through the more robust corporate governance and disclosure and reporting system required of public companies limited by guarantee. In addition, it would be expected that funding bodies (and other creditors) would take a much more active interest in ensuring the viability of these large corporations, given the large size of their investment in them.

151 Nonetheless, because of the potentially complex issues relating to compulsory transfers of ACA Act corporations to the Corporations Act, this specific proposal will be the subject of further investigation by ORAC and the Steering Committee.

(2) The Transfer Process

152 The determination of which corporations would be required to transfer to the Corporations Act as public companies limited by guarantee would be through objective measures such as turnover, assets and number of employees. However, NTRBs and PBCs would be exempted from transfer, and other corporations would have a right to apply for exemption.

153 The "cut off" point for transfer could be implemented through regulation to provide for the progressive transfer of more Indigenous Corporations to the Corporations Act, as appropriate. However, appropriate transitional lead-in times would need to be provided.

154 Corporations could also voluntarily transfer to the Corporations Act at any time. The transfer provisions would provide for continuity of all property, rights, liabilities and obligations of transferred corporations, to minimise disruption to the operations of the corporations.[49]

H. COMPATIBILITY WITH NATIVE TITLE ACT REQUIREMENTS

155 The Native Title Act and the *Native Title (Prescribed Bodies Corporate) Regulations* ("**the PBC Regulations**") establish two special types of corporation which are both required to be incorporated under the ACA Act. These corporations are Native Title Representative Bodies ("**NTRBs**") and Prescribed Bodies Corporate ("**PBCs**").[50]

156 The Native Title Act and PBC Regulations impose a number of statutory functions and other requirements on NTRBs and PBCs. Many of these functions and requirements are currently incompatible with the requirements of the ACA Act. However, for practical and political reasons, amendment to the Native Title Act and PBC Regulations to address these issues seems unlikely.[51]

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[49] A detailed discussion of the suggested process is contained in Chapter 21.

[50] see Chapter 22(A)

[51] see Chapter 17(A)

157 The proposed reforms would significantly reduce inconsistency between the requirements of the ACA Act and the Native Title Act and PBC Regulations. This would address a number of problems currently faced by such corporations, PBCs in particular. The proposed reforms would also generally enhance the workability of PBCs and NTRBs by providing a modern incorporation statute with special measures to address the particular needs of Indigenous incorporators.[52]

158 However, a review of the ACA Act alone cannot resolve all of the problems relating to these types of corporation, many of which are located squarely within the Native Title Act and the PBC Regulations. For PBCs, these issues must be left to the current ATSIC review of the PBC Regulations.

159 Chapter 22 considers in detail the compatibility of the proposed reforms with the requirements of the Native Title Act, the PBC Regulations, and the NT Land Rights Act.

I. OTHER ISSUES FOR CONSIDERATION

160 In addition to the recommendations made above, which form the core of this Review, the Review Team notes a number of other issues which are outside the scope of this Review, but which are nonetheless potentially very significant. Several of these issues have been raised in previous reviews of the Act.[53]

161 The Review Team has briefly considered these issues and made some suggestions for addressing them. The issues include:

- Establishment of ORAC as an statutory authority independent of ATSIC, with budget autonomy;[54]
- Introduction of AAT Review of decisions of the Registrar;[55]
- Reviewing the penalty provisions in the Act;[56]
- Further reviews to ensure the Act remains up to date.[57]

162 More detailed discussion of these issues is contained in Chapter 23.

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52 see Chapter 22(A)

53 see Chapter 23

54 see Chapter 23(A)

55 see Chapter 23(B)

56 see Chapter 23(C

57 see Chapter23(E)

PART 1

CONDUCT OF THE REVIEW & METHODOLOGY

CONTENTS

163 This Part describes the background to the current Review, the Terms of Reference, the composition and qualifications of the Review Team, the role and composition of the Steering Committee, the Review Team's methodology and consultations undertaken.

CHAPTER 1
DEVELOPMENT OF THE REVIEW

A. COMMISSIONING OF REVIEW

164 Since its commencement, the *Aboriginal Councils and Associations* Act 1976 (Cth) ("**the ACA Act**") has become a significant vehicle for the exercise of self-determination and self-management by a broad range of Aboriginal and Torres Straight Islander associations. There are currently close to 3,000 Aboriginal and Torres Straight Islander associations incorporated under Part IV of the ACA Act. Significantly, these corporations have also come to play a central role in the delivery of Government services (whether Federal or State).

165 Nonetheless, the ACA Act has been the source of much comment and criticism, in particular over the last 10 years.

166 Since the last amendment of the ACA Act in 1992 (which saw increased external "accountability" measures introduced) there have been several significant reviews of the ACA Act, as well as two Bills proposing legislative reform, which eventually lapsed. The reasons for the lapse of these Bills and the findings of the reviews not being acted on in legislative reform are varied. However, there are a number of important issues raised by those reviews and proposed amendments which remain unanswered and unresolved.

167 There have also been significant external developments in that period. Most notably, fundamental changes to the Corporations Act, the advent of native title (and the complex interactions between the *Native Title* Act 1993 (Cth) ("**the Native Title Act**") and the ACA Act) and even greater emphasis by government on the need for "accountability" of Indigenous corporations for public monies. (The developments mentioned in this and the preceding paragraph are considered in more detail in Part 2 of this Paper)

168 In 2000, a new (acting) Registrar was appointed. The previous Registrar had held the position for 9 years. The new Registrar decided that the change in administration provided a timely opportunity to review the ACA Act and the way it is administered, as well as an opportunity to consider the issues arising from the changed policy environment, and the issues raised by previous reviews but which remain unresolved.

169 Against this background, in October 2000 the Acting Registrar of Aboriginal Corporations sought written expressions of interest from persons wishing to undertake an internal review of the ACA Act.

170 On 31 October 2000, the Registrar of Aboriginal Corporations sought written expressions of interest from persons wishing to undertake an internal review of the ACA Act. In accordance with the Commonwealth procurement guidelines, the Registrar restricted the tender process for the consultancy to a limited number of firms.

171 In February 2001, the Registrar appointed a Review Team led by Corrs Chambers Westgarth, and including Anthropos Consulting, Senatore Brennan Rashid, Mick Dodson, and Christos Mantziaris, each of whom brings specialist expertise to the Review. A brief outline of the qualifications of individual members of the Review Team is contained in **Appendix B**.

B. ROLE AND COMPOSITION OF THE STEERING COMMITTEE

172 A Steering Committee was established to serve several functions in relation to the Review:

- Firstly, the Steering Committee was seen as a mechanism to enable the Review Team and ORAC to consult with key government stakeholders, and to keep them informed about what was happening with the Review.
- Secondly, the Steering Committee provided policy direction to the Review Team and oversight to the conduct of the Review by the Review Team.
- Thirdly, the Steering Committee provided a means for ensuring transparency and accountability of the Review Team.

173 In these ways, it was hoped to be able to build some degree of political consensus amongst the key government stakeholders and ensure that reforms were broadly acceptable to these stakeholders. This was considered to be a practical imperative, given some of the difficulties faced by some previous reviews of the ACA Act, which did not enjoy government support.

174 The Review Team has nonetheless been rigorous in ensuring that the independence and integrity of the advice it has provided has not been compromised.

175 The Steering Committee includes representatives of the following:

- ORAC;
- The Office of the Minister for Immigration, Multicultural and Indigenous Affairs;
- The Aboriginal and Torres Strait Islander Commission ("**ATSIC**") – including a representative from each of the ATSIC Board, the ATSIC Legal Office, and ATSIC Executive;
- The Office of Aboriginal and Torres Strait Islander Affairs ("**OATSIA**" – formerly the Department for Reconciliation and Aboriginal and Torres Strait Islander Affairs, now part of the Department of Immigration, Multicultural and Indigenous Affairs, or "**DIMIA**");
- The Australian Securities and Investment Commission ("**ASIC**"); and

- The former Parliamentary Secretary to the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, the Honourable Chris Gallus MP, also participated in some Steering Committee meetings. (There is currently no Parliamentary Secretary in the Indigenous Affairs Portfolio).

176 The Review Team and ORAC have been working closely with the Steering Committee, as described in the next section.

C. CONDUCT OF THE REVIEW

177 The current Review of the ACA Act, up to the preparation of this Final Report took place over the course of some 20 months, and was a relatively complex process. It is important to understand the evolution of the Review over this period – and how and why the original Terms of Reference were departed from – in order to understand the nature of this Final Report.

178 This section therefore describes how the Review evolved and was conducted by the Review Team, and the interactions between the Review Team and ORAC and the Steering Committee. This section also refers to several reports produced for the Steering Committee during the course of the Review. The issues raised in these reports have now all been incorporated and consolidated into this Final Report.

(1) Development of the Terms of Reference and Methodology

179 The original Terms of Reference ("**the TOR**") for the Review, which accompanied the request for tender are set out below. However, the direction of the Review evolved very significantly from those original Terms, both in response to Corrs' tender proposal, and as a result of direction provided by the Steering Committee.

180 The original TOR were as follows:

1. Taking into account the original purpose of the Act as a simplified regime of incorporation and corporate governance for Indigenous bodies, and how that purpose has been implemented over time, consider whether the Act remains an appropriate mechanism for this purpose. In particular, consider whether:

(a) the provisions of the Act (and regulations) should be brought more into line with the Corporations Act, and if so how; and

(b) it might be better for some categories of intending corporations to incorporate under the Corporations Act and State/Territory Associations Act or similar.

2. Compare the Act and the regulations with comparable State and Territory Associations and similar acts and the Corporations Act and recommend how they might be amended to reflect good practice in these regimes;

3. Assess the requirements under the Native Title Act for the incorporation of Native Title Representative Bodies and Prescribed Bodies Corporate under the Act and how changes to the Act and the regulations might ensure improvements and consistency;

4. *Assess the relevance and appropriateness of changes to the Act proposed in the:*

   - *Aboriginal Councils and Associations Legislative Amendment Bill 1994;*
   - *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995*

5. *Examine the Act and the regulations and similar legislation and consider whether the Act should be amended to:*

   - *include education and training as a statutory function of the Registrar;*
   - *include mediation (as well as arbitration);*
   - *allow for companies and corporations to be members of Aboriginal corporations/umbrella organisations being established under the Act;*
   - *continue the need in the Act for categories of corporations (eg: associations formed wholly for business purposes, associations formed principally for the purpose of owning land or holding a leasehold interest, etc);*
   - *allow the Registrar to alter unworkable rules or to exempt corporations from the operation of unworkable rules on application;*
   - *include changes to make the current examination powers of the Act more effective;*
   - *allow the Registrar to remedy inadvertent errors in official documents issued by the Registrar – for example: typographical errors in the official name of a corporation;*
   - *allow for more flexible annual financial reporting arrangements by corporations;*
   - *provide for the electronic lodgement of documents, and the conduct of business under the Act in electronic form and compliance with the Electronic Transactions Act 1999;*
   - *provide for teleconferencing (in relation to committee and general meetings);*
   - *formally regulate the use of proxies at general meetings;*
   - *align the penalty provisions with the Corporations Act;*
   - *provide for video conferencing (in relation to committee and general meetings); and*
   - *provide for term appointments for the office of Registrar.*

6. *Assess the relevance and appropriateness of recommendations for changes to the Act and the regulations for previous reviews and studies and operations of the Office of the Registrar;*

7. *Identify financial and administrative arrangements and resources, best use of resources and practices and other measures that would be necessary to support:*

   - *the current requirements of the Act and the regulations;*
   - *the legislative and administrative framework recommended by this review*

8. *Consider the effectiveness of Part III of the Act and existing State/Territory legislation in meeting Aboriginal and Torres Strait Islander forms of local or regional governance;*

9. *Consider any other relevant matters on the advice of the steering committee.*

181 The Review team responded to the TOR with a tender proposal, which was submitted to the Registrar's Office on 28 November 2000 ("**the Tender**"). The Tender included a detailed "proposed methodology", which ran to some 13 pages. This attempted to provide some structure and focus to the issues raised in the TOR and outline the general approach

which the Review Team proposed to take, if successful in the tender. It also outlined the need to consider a range of structural reform options.

182 Following discussions with the Registrar's Office, the methodology in the Corrs Tender was adopted, but excluded a number of the original Terms of Reference (in particular term of reference 7), and modified the focus of the Review. This formed the basis on which the Review Team was engaged. However, subsequent interactions with ORAC and the Steering Committee as the Review evolved resulted in further departures from the original TOR.

183 In essence, the methodology developed by the Review Team envisaged that the Review would be conducted in several stages. The first would be the development of a policy paper, which would address broader legal and policy issues about the possible directions for reform of the ACA Act. This would be provided to ORAC and the Steering Committee, which would then provide policy direction to the Review. This would then enable the review Team to prepare a more detailed and technical final report on the implementation of the policy positions adopted by the Steering Committee.

(2) The First Report – Policy Options Discussion Paper

184 Following extensive research and the first round of consultations with stakeholders (see next section), the Review Team provided ORAC with a "Policy Options Discussion Paper", as envisaged by the methodology developed by the Review Team. The Policy Options Discussion Paper set out 12 broad policy issues, and provided options for reform in each area followed by a discussion. It then set out four possible models for structural reform, which flowed from the policy issues. The 11 broad policy issues were as follows:

1 Is there a need for a special incorporation regime for Indigenous people?

2 What kind of associations should the ACA Act be aimed at?

3 Should the ACA Act be permissive or prescriptive in its approach to the corporate constitution?

4 How should the ACA Act address "cultural appropriateness" and "Aboriginal custom"?

5 Should the ACA Act retain its emphasis on control by members through the General Meeting?

6 What should the scope and standard of director's duties be?

7 What should the Registrar's functions and powers be?

8 What should the approach to "accountability" and financial reporting be?

9 What should be the degree of consistency with the Corporations Act?

10 How should the ACA Act address self-determination and self-management?

11 What should be the basis of membership of corporations under the ACA Act?

185 The four possible models for structural reform proposed in the Policy Options Discussion Paper were:

1 Repeal the ACA Act altogether, and require Indigenous associations to incorporate under either State associations incorporation legislation or the Corporations Act. The Registrar's Office could be retained in a modified form. Its' role would be to provide education, training and specialist assistance to Indigenous corporations and associations wishing to incorporate.

2 Return the focus of the ACA Act to providing a simple and flexible incorporation regime for smaller corporations. This would require larger and more complex corporations to incorporate under other incorporation legislation, chiefly the Corporations Act.

3 Retain the ACA Act in its current form, which attempts to cater to all sizes and types of Indigenous corporations, but with a range of amendments, for example, to:

- make it more flexible for dealing with a broad range of corporations;
- enable it to better deal with larger and more complex corporations;
- provide the Registrar with a formal role in providing assistance, education and training; and
- address a number of technical difficulties with the current ACA Act.

4 Return to an ACA Act which caters for all sizes and types of Indigenous corporations, but which does this by having different tiers of regulation (similar to the Corporations Act), to allow specifically targeted approaches to the regulation of different corporations. This would involve a simple and flexible approach to smaller and simpler corporations, and a more sophisticated and rigorous approach to larger and more complex corporations.

186 A copy of the First Report is included as **Appendix C**.

(3) The Second Report – Supplementary Policy Discussion Paper for "Option 5"

187 The Steering Committee considered the Policy Options Discussion Paper, but declined at that stage to respond to any of the policy issues raised in it. Instead, the Steering Committee came back to the Review Team with a fifth possible model for structural reform. This "Option 5" was broadly similar to the first option proposed by the Review Team (outlined above), but with several changes. Notably, it would entail a "gateway" system, which would require Indigenous corporations to register with Registrar's Office before they could access the assistance which would be offered by that Office. Bodies registered in this way could also be required to agree to be subject to additional regulatory requirements as well. The Steering Committee requested that the Review Team undertake further research to look at the feasibility of this approach, and also to consider further:

- The viability of the Corporations Act and State/Territory Association Incorporation Acts as alternative incorporation regimes to the ACA Act;
- A range of issues relating to the process for transfer of ACA Act corporations to other incorporation regimes, including grandfathering, mechanisms for transfer, continuity issues, capacity of alternate regulators, rights issues, and implications for amendments to other legislation;
- Consideration of precedents for Indigenous incorporation regimes in Canada and Scandinavia.

188 The Review Team then undertook further research and produced the Supplementary Policy Discussion Paper for "Option 5", which addressed the queries raised by the Steering Committee. (The research undertaken by the Review Team for that Paper has also been incorporated into this Final Report.)

189 A copy of the Second Report is included as **Appendix D.**

(4) The Third Report – The Consultation Paper

190 The Steering Committee considered the further information provided by the Review Team, and gave policy direction in relation to the majority of the policy issues identified in the Policy Options Discussion Paper. (These became the "Settled Issues for Reform" discussed in this Report.) However, the Steering Committee was unable to reach a firm position on a preferred model for structural reform of the Act, and decided that this should be the subject of extensive further consultations with stakeholders. However, the Steering Committee, in discussions with the Review Team, settled on three broad structural reform options to be put forward for the purposes of consultation. These were variations of the proposals put forward in the Policy Options Discussion Paper and the Option 5 Discussion Paper.

191 ORAC requested that the Review Team prepare a further paper to be used for consultation purposes, which outlined and discussed both the Settled Issues for Reform and the Structural Reform Options. The Review Team duly provided the Registrar's Office with the Consultation Report and a Glossary of Key Terms and Concepts. Drawing on the Consultation Paper, ORAC prepared a Summary Consultation Paper with assistance from the Review Team. These documents then formed the basis for the second round of consultations. The methodology invited in the consultations is described in detail in the next chapter.

192 A copy of the Third Report is included as **Appendix E**.

(5) The Fourth Report – Summary of Consultations, Questionnaire Responses and Submissions

193 ORAC requested that the Review Team prepare a separate report on the outcomes of feedback from both the first and second rounds of consultations. This report was subsequently prepared by the Review Team, and provided to ORAC and the Steering Committee. As will be noted elsewhere, the feedback from these consultations has had a significant impact on the conclusions and recommendations made in this Final Report.

194 A copy of the Fourth Report is included as **Appendix F**.

(6) The Fifth Report – The Final Report

195 This Final Report is the culmination of the Review Process described above. It is a consolidation and synthesis of relevant materials from all the previous four reports described above. However, it also develops a number of themes and issues beyond the detail covered in the previous reports (in Parts 3 and 4), and also makes detailed recommendations for reform, which are contained in Part 6.

196 In consolidating material from the previous four reports, a lot of text has been reworked or summarised. In some places, text from the previous four reports has been incorporated directly into this Final Report. In other places, the previous reports address particular issues in a level of detail which is not appropriate for the Final Report, and that material has therefore not been incorporated into this Report. However, reference may be made to that material. (In other places again, relevant technical issues have been dealt with in greater detail in this Final Report than in previous Reports).

197 In addition to their being a useful reference source for some specific issues, the Review Team felt that it was important to include copies of the four previous reports as annexures to this Final Report, to show the development and evolution of issues during the course of the Review.

CHAPTER 2
CONSULTATIONS WITH STAKEHOLDERS

198 The Registrar's Office has been concerned that the Review Team consult as broadly as possible in the conduct of the Review. Meetings with the Steering Committee constitute part of that consultation process. However, there have also been a range of other steps to consult more broadly, in particular with Indigenous corporations. Unfortunately, due to resource constraints, it was not possible to conduct face-to-face consultations with a large number of corporations and Indigenous people around the country.

199 The consultations took place in two distinct rounds. The first round was intended to inform the Review Team of relevant issues (more of a research task); and the second to seek the views of stakeholders on proposals put forward by the Review Team following the first round of consultation.

A. THE FIRST ROUND OF CONSULTATIONS - APRIL-MAY 2001

200 As noted above, an initial round of consultations was undertaken in April and May 2001. The purpose of these consultations was essentially threefold:

- to update and supplement the research undertaken in the course of the 1996 Fingleton Review;
- to inform the Steering committee through first-hand feedback from ACA Act corporations about perceived problems with the ACA Act; and
- to start to develop and discuss with stakeholders some possible ideas for reform of the ACA Act.

201 These consultations consisted of a workshop in Alice Springs followed by field-visits to several ACA Act corporations, and were more limited and targeted than the second round of consultations in 2002.

(1) Workshop in Alice Springs 3-4 May 2001

202 This workshop aimed to both inform participants of the background to the ACA Act and the need for reform, to outline preliminary reform options, and to obtain feedback on potential reforms. Attendees are listed below.

Organisation	Attendee
(Facilitator)	Murray Chapman
(ORAC)	Colin Plowman (Acting Registrar) & John Glynn
(Review Team)	Christos Mantziaris (Corrs)
(Review Team)	Dr David Martin (Anthropos)
(Review Team)	James Whittaker (Corrs)
(Review Team)	M Rashid (SBR)

ATSIC – Alice Springs Regional Council	Eileen Hoosan
ATSIC – Alice Springs Regional Office	Kevin Kerrin + 2
ATSIC – CDEP National Program Centre	Mike O'Ryan
ATSIC – Legal Office	Robert Goodrick
ATSIC – National Housing & Infrastructure	Richard Preece
ATSIC – Native Title & Land Rights Unit	Karen Touchie
ATSIC – Yapakurlangu Regional Council	Noel Hayes
Australian Government Solicitor	Richard Broughton
Batemans Bay Aboriginal Corporation	Rita Davis
Bungala Aboriginal Corporation	David Pearce
Cape York Land Council	Richie Ahmat
Central Land Council	Michael Prowse
Central Land Council	Vicki Gillick
Commonwealth Department of Health - Office of Aboriginal and Torres Strait Islander Health	Roger Brailsford
Commonwealth Department of Prime Minister & Cabinet - Office of Aboriginal and Torres Strait Islander Affairs	Sue Meaghan
DeCastro Sullivan Accountants	Merv Sullivan
Goreta Aboriginal Corporation	Mrs Elaine Newchurch
Ipswich Regional ATSI Corporation for Legal Services	Mr Jim Roe
Mara Worra Worra Aboriginal Corporation	Jodie Bell
National Native Title Tribunal	Lilian Maher
Ngaanyatjarra Council Aboriginal Corporation	2 representatives
Ngurruntjuta-Pmara Aboriginal Corporation	Chris Pearson + 2
Northern Land Council	Bob Gosford
Saima Torres Strait Islander Corporation	Jack Gela
Sydney Regional Aboriginal Corporation for Legal Services	Grant Christian + one

(2) Field Visits

203 It had originally been intended that field visits would be made to several Indigenous associations, comprising a sample in terms of purpose, complexity, and geographic location. In the event, a combination of time constraints and the unavailability of key personnel in some organisations meant that only five were ultimately included in field visits. However, a number of these organisations were associated with other corporate entities, both ACA Act corporations and others, so that it was possible to pursue enquiries as to the advantages and disadvantages of various incorporation statutes for Indigenous people.

204 Organisations with whom field visits were conducted were:

- Ngurratjuta/Pmara Ntjarra Aboriginal Corporation (Alice Springs, NT)
- Ngaanyatjarra Council (Aboriginal Corporation) (Alice Springs, NT)
- Batemans Bay Aboriginal Corporation (Batemans Bay, NSW)

- Bungala Aboriginal Corporation (Port Augusta, SA)
- Nyangatjatjara Aboriginal Corporation (discussions held in Adelaide, SA)

B. THE SECOND ROUND OF CONSULTATIONS – MARCH-JUNE 2002

205 In the beginning of March 2002, the Consultation Paper and a Summary Consultation Paper were made public, and calls were made for submissions, to be received by 26 April. This process included the following steps.

(1) Mail-outs to Indigenous corporations

206 As part of the wider consultation process, basic questionnaires were developed and sent to all associations incorporated under the ACA Act, as well as to 345 Indigenous organisations incorporated under other Commonwealth, State and Territory legislation, including the Corporations Act and the State and Territory Association Incorporation Acts. The questionnaires were accompanied with a copy of the Summary Consultation report.

(2) Advertisements in Indigenous Publications

207 Advertisements were placed in Indigenous publications, including the Koori Mail, National Indigenous Times, Yamatji News, and the Torres Strait News, noting the release of the Consultation Papers and calling for submissions and comments.

(3) Radio Advertisements

208 Advertisements noting the Review and the Consultation Papers were run on the National Indigenous Radio Service (NIRS) network during March and April 2002. NIRS has the ability to broadcast to over 120 Indigenous radio stations Australia-wide, including the BRACS network in remote areas.

(4) ORAC Web-site

209 Details of the Review, plus copies of the Consultation Papers and the questionnaires for Indigenous corporations were made publicly available on the ORAC website.

(5) Reconciliation Australia Conference

210 Reconciliation Australia held an Indigenous Governance Conference on 3-5 April 2002. It agreed to include an information sheet on the Review and a copy of the Summary Consultation Paper on its website. Copies of the papers were also distributed to all participants at the conference.

(6) Circulation of Consultation Papers to Key Stakeholders

211 In addition to the mail-outs to Indigenous corporations, a broad range of key stakeholders were written to, enclosing copies of the Consultation Papers, and seeking submissions. These stakeholders included the following:

- ATSIC – separate correspondence was sent to the Acting CEO, the ATSIC Chairperson, and ATSIC Regional Councils;
- The Torres Strait Regional Authority (TSRA);
- all Native Title Representative Bodies;
- various Commonwealth and State government departments and agencies which provide funding to, or work closely with, Indigenous corporations, including:
  - Indigenous Business Australia,
  - the Indigenous Land Corporation,
  - Aboriginal Hostels Limited,
  - NSW Aboriginal Housing,
  - Office of Aboriginal and Torres Strait Islanders Health,
  - Institute of Aboriginal and Torres Strait Islander Studies, and
  - a range of State departments and agencies.
- The Australian Securities and Investments Commission (ASIC) and the various regulators of the State and Territory association incorporation acts;
- The Human Rights and Equal Opportunity Commission (HREOC);
- The National Native Title Tribunal (NNTT);
- Reconciliation Australia;
- The Australian Labor Party and the Australian Democrats; and
- A sample of consultants and legal service providers appearing on the ORAC consultants register.

(7) ATSIC Briefings

212 In addition to the other steps noted above, the ATSIC Board was briefed at its Board meeting in February. Board members were up-dated on the progress of the Review, and provided with advance copies of the Consultation Papers. Separate briefings were also provided to members of six Regional Councils, some by video-conference.

213 ATSIC was also provided an extra month, until 26 May, to allow time for internal consultations, to prepare a consolidated submission.

(8) Workshop in Alice Springs 9-10 April 2002

214 A second workshop was held in Alice Springs, focussing on a more clearly defined set of reform options and involving many of the same organisations and individuals who had participated in the first workshop.

215 Participants at this workshop were:

Organisation	Attendee
(Facilitator)	Murray Chapman
(ORAC)	Garry Fisk (Director Corporate Relations)
(ORAC)	Joe Mastrolembo (Acting Registrar)
(ORAC)	Lea McEachern
(Review Team)	David Martin (Anthropos)
(Review Team)	James Whittaker (Corrs)
(Review Team)	Mamun Rashid (SBR)
(Review Team)	Tig Pocock (Corrs)
Aboriginal Hostels Ltd	Russell Lanme
Aboriginal Lands Trust, WA	Mike Collins
ATSIC - Alice Springs Regional Manager	Kevin Kerrin
ATSIC – CDEP National Program Centre	Adrienne Gillam
ATSIC – Chairperson, Alice Springs Regional Council	Eileen Hoosan
ATSIC – Chairperson, Yapakurlangu Regional Council	Noel Hayes
ATSIC – Manager, Corporate & Commission Support	Jim Ramsay
ATSIC – National Network Manager	John Kelly
ATSIC – Native Title & Land Rights Centre	Karen Touchie
Batemans Bay Aboriginal Corporation	Tom Slockee
Bungala Aboriginal Corporation	Bill Bejah
Bungala Aboriginal Corporation	David Pearce
Bungala Aboriginal Corporation	Ken Larkins
Central Land Council	Michael Prowse
Commonwealth Department of Health, Office of ATSI Health	David Scholz
Consultant	Chris Marshall
Coreta Aboriginal Corporation	Raymond Wanganeen
DeCastro Sullivan Accountants	Merv Sullivan
DIMIA, Office of Aboriginal & Torres Strait Islander Affairs	Margaret Henderson
Indigenous Land Corporation	Bob Haebich
Kimberley Land Council	Thomas King
Kimberley Land Council	Tom Birch
National Native Title Tribunal	Lillian Maher
Ngaanyatjarra Council Aboriginal Corp	Anne-Sophie Deleflie

Ngurrutjuta-Pmara Aboriginal Corporation	Chris Pearson
Northern Land Council	Philip Van der Eyk/Solicitor
NSW Aboriginal Housing Office	Julie Morgan
NSW Department of Fair Trading	Anthony McCarroll
Saima Torres Strait Islander Corporation	Jack Gela
Sydney Regional Aboriginal Corporation for Legal Services	Grant Christian
Torres Strait Regional Authority	Francis Pearson

C. FEEDBACK FROM CONSULTATIONS

216 Feedback from all stages of the consultations is set out in the Fourth Report – Summary of Consultations, Questionnaires and Submissions, which is included as Appendix F.

217 In a quantitative sense, the feedback received in relation to the Second Round of Consultations included:

- Completed questionnaires received from ACA Act corporations: 106
- Completed questionnaires received from non-ACA bodies: 24
- Written submissions received: 31

218 A detailed discussion of the nature and volume of the questionnaires is contained in Appendix F.

219 The written submissions were received from the following agencies, organisations and individuals:

Statutory regulatory authorities
Australian Securities and Investments Commission
Consumer and Business Affairs, Department of Justice (Vic)
Department of Tourism, Racing and Fair Trading (Qld)
Department of Consumer and Employment Protection (WA)
Department of Fair Trading (NSW)
Registrar General's Office (ACT)

Other Government departments and agencies
Aboriginal Housing Office (NSW)
Aboriginal Lands Trust (WA)
Australian Government Solicitor (Cth)
Department of Aboriginal Affairs (NSW)
Department of Aboriginal and Torres Strait Islander Policy (Qld)
Department of Indigenous Affairs (WA)
National Native Title Tribunal (Cth)
Office for Aboriginal and Torres Strait Islander Health (Cth)
State Aboriginal Affairs (SA)

Indigenous organisations
Aboriginal and Torres Strait Islander Commission
Aboriginal Hostels Ltd

Australian Institute of Aboriginal and Torres Strait Islander Studies
Central Land Council
Indigenous Land Corporation
Northern Land Council
Office of Evaluation and Audit (ATSIC)
Torres Strait Islander Board
Torres Strait Regional Authority
Yamatji Barna Baba Maaja Aboriginal Corporation

Consultants to ORAC
E.J. Pippet, Chartered Accountant
Garry Hamilton, Minter Ellison Lawyers
Lyndsay Roberts, Chartered Accountants
Merv Sullivan, De Castro Sullivan Chartered Accountants
Michael Phelan
Regina Wagner, Training and Consulting

Individuals
Clarrie Isaacs

220 The substance of all the feedback (from all consultations, workshops, questionnaires and submissions) has been incorporated throughout this Final Report, in the context of discussing relevant issues. The executive summary of the Fourth Report included at Appendix F provides a good overview of the nature of the feedback.

PART 2

HISTORY AND DEVELOPMENT OF THE ACA ACT

CONTENTS

CHAPTER 3
HISTORY AND DEVELOPMENT OF THE ACA ACT

221 It is now just over a quarter of a century since the ACA Act was enacted. In that period, there have been major changes in Australian society generally, in the circumstances of Indigenous groups and communities, and in government policies including those relating to Indigenous affairs and corporate regulation. Indigenous corporations have emerged as significant actors within Indigenous societies themselves, and play substantial roles in the implementation of self-determination and self-management. The ACA Act and its regulation have come under considerable scrutiny, including through previous Reviews. Most recently, there has been extensive discussion regarding the complex interaction of the ACA Act and the Native Title Act through the latter's Prescribed Body Corporate regime.

222 This Part first provides a very brief account of the Indigenous policy issues which led to the enactment of the ACA Act in 1976 as a simple incorporation mechanism for Indigenous groups and communities. Secondly it briefly sketches in the subsequent development of the ACA Act and its regulator, the Registrar of Aboriginal Corporations. This development is characterised by an increasing emphasis on accountability of Aboriginal associations and a progressively more prescriptive regulatory regime. It then also outlines developments during the same period in non-Indigenous corporation laws.

A. ORIGINS OF THE ACA ACT

223 Institutionally, during the period 1967-72 Aboriginal affairs were developing as an important Commonwealth policy arena as well as a domain for program and service delivery. Such developments occurred following the Referendum of 1967 where an overwhelming majority of Australians agreed to amend the Constitution, firstly enabling the Commonwealth to concurrently exercise powers and legislate with the States on Aboriginal matters and secondly, to include Aboriginal people in the national census.

224 In 1967, the Commonwealth Liberal Government established the Council of Aboriginal Affairs ("**CAA**") to develop and implement policy under the imprimatur provided by the Referendum. The CAA had a significant impact on Indigenous affairs policy development, and its concerns presaged many if not most of the dilemmas confronting contemporary Indigenous affairs. This period of Commonwealth policy development marked a significant shift from assimilation to self-management and self-determination.

225 In a 1968 policy paper for the Liberal Government, the CAA advocated the need to provide for the incorporation of locally based Aboriginal groups and communities as an appropriate vehicle for self-determination. The CAA also advised the Government to adopt social policies more supportive of community-based social action and self-management.

226 In 1971 the idea of an incorporation statute for Aboriginal people was also specifically highlighted in a recommendation of the Gibb Committee following its inquiries concerning the situation of Aboriginal people on pastoral leases in the Northern Territory.

227 The policy shift to self-management and self-determination was also explicitly part of the Whitlam Labor Government's broad social reform agenda. The Labor Government sought particularly to implement legislation facilitating self-determination and community

development as part of its reform agenda, which it saw as arising directly from the 1967 Referendum and the powers granted to the Commonwealth to implement beneficial legislation.

228 Aboriginal people were to be consulted regarding service delivery, which it was anticipated could be developed and managed in accordance with Indigenous community priorities and cultural requirements. Under "self-determination", it was envisaged that community priorities could be realised through government grants to Aboriginal community organisations. The capacity for communities to incorporate and for Aboriginal councils to be established was seen by the Labor Government as providing a legal solution to the question of Aboriginal self-determination.

B. ENACTMENT OF ACA ACT IN 1976

229 The ACA Act specifically emerged as one of the responses to the 1972–74 Woodward Aboriginal Land Rights Commission, commissioned by the Commonwealth Government, which *inter alia* recommended the enactment of a simple, flexible and appropriate general incorporation statute for Indigenous people.

230 The intention was to enable Indigenous groups to incorporate in accordance with their own membership requirements, customs and decision-making practices, rather than forcing Indigenous incorporators to fit in with European legal concepts and procedures. The broad aim of the ACA Act was to provide a flexible, inexpensive and administratively simple system of incorporation that:

- enabled Indigenous groups to incorporate in a "culturally appropriate" way;
- provided accountability for the corporation's activities to the members of these groups and to outsiders dealing with the groups, particularly in using grant funds; and
- facilitated a system of local and regional governance for Indigenous communities in the provision of community services.

231 The resulting ACA Act broadly reflects the principles recommended in the Woodward Reports. In the Second Reading Speech, it was stated that the ACA Act was intended to enable Aboriginal groups to incorporate in ways appropriate to Aboriginal culture. This was understood as the culture of traditionally-oriented Aboriginal people.

232 Parliament intended that Aboriginal corporations could be used as a bridge between the Australian legal system and Indigenous cultural values and practices. This broad policy aim is evident in section 43(4) of the ACA Act, which states that "[t]he Rules of an association with respect to any matter may be based on Aboriginal custom".

233 At the time, both incorporated associations legislation (designed for non-profit entities) and the "mainstream" companies legislation, had relatively complex corporate governance and reporting requirements. The ACA Act was seen as distinct from both incorporated associations statutes and companies legislation by reason of:

- its relative simplicity; and

- its utility for both profit and non-profit functions.

234 However, despite the intentions of the Government stated in the second reading speech, the Act that was passed was for many Aboriginal groups complex, highly regulatory, culturally alien and difficult to comply with. Non-compliance was soon a major issue. It must also be said that in some areas, unsound decisions by inexperienced groups and opportunism may also have led to regulatory concern, as more groups realised the potential for accessing grant funds following incorporation.

C. SUBSEQUENT DEVELOPMENT OF THE ACA ACT AND REVIEWS OF ITS OPERATION

235 In 1984, a number of relatively minor amendments were made to the ACA Act. These were to permit the non-Aboriginal spouse of an Aboriginal member to become a non-voting member of an Aboriginal corporation, to remove all restrictions placed on the capacity of an Aboriginal corporation to dispose of property, and to grant the Registrar some discretion in relaxing the financial reporting requirements of certain simple Aboriginal corporations in cases where compliance would be impracticable or unduly onerous.[58]

(1) The Neate Review 1989 and the Aboriginal Councils and Associations Amendment Act 1992

236 By 1989, there were over 800 associations incorporated under the Act.[59] In that year, Graeme Neate was commissioned by the Registrar to conduct a major review of the Act, to address the Registrar's concerns regarding an apparent lack of accountability of many ACA Act associations, a lack of clarity in the Act regarding breaches and perceived inadequate penalties for breaches, powers for the Registrar to enforce compliance, and remedies for aggrieved members of associations. The terms of reference of the review required examination of the following issues: [60]

- *whether the Act meets the objectives envisaged for it in the second reading speech of the Minister for Aboriginal Affairs and other supportive documentation;*
- *whether, having regard to comparable Associations incorporation legislation, the Act is adequate to provide for the rights of members of Associations incorporated under the Act and other persons with an interest in the Associations;*
- *whether the Act provides adequate requirements for the committees and public officers of Associations incorporated under the Act to be accountable to members of the Associations and the Registrar of Aboriginal Corporations; and*

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58 Fingleton, J. 'A chronology of the Aboriginal Councils and Associations Act 1976', in "*Final Report Review of the Aboriginal Councils and Associations Act 1976* (hereafter referred to as the *Fingleton Report*) Volume 2, 1996; Registrar of Aboriginal Corporations, *Annual Report 1995-96*, p. 28

59 Registrar of Aboriginal Corporations, *Annual Report 1999–2000*, p. 6

60 Neate, G. *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976* (hereafter referred to as *Neate Report*) 1989, p. 4

- *whether the Act is framed in such a manner to enable it to be efficiently and effectively administered*

237 It also required development of preliminary recommendations for amendments resulting from the examination of these issues.

238 In his report to the Registrar submitted in September 1989, Neate made a number of recommendations which ultimately led to a substantial tightening of the reporting procedures for non-exempted corporations through amending legislation passed in 1992.[61] The amendments however did not incorporate a number of Neate's recommendations (such as appeals from decisions of the Registrar to the AAT).

239 Relevant amendments contained in the *Aboriginal Councils and Associations Amendment Act* 1992 (Cth) include those set out below:

- A widening of the scope to enforce compliance with requirements under the ACA Act (by giving the Rules the effect of a contract).
- General meetings were increased in importance.
- Enhanced accountability of the Governing Committee. Governing Committee members are now subject to duties of honesty, diligence and disclosure of interests which in part reflect the duties imposed on directors under the Corporations Act.
- Increased reporting on irregularities in operations or financial affairs. The range of documents to be submitted for audit inspection now go beyond the balance sheet and include full income and expenditure statements. The auditor must report on compliance with the ACA Act, regulations and the corporation's Rules. The Registrar may, at any time, appoint an additional auditor.
- Enhancement of the Registrar's regulatory powers, particularly in respect to investigation and the appointment of an administrator. As the ACA Act now stands, the Registrar has the power to grant or refuse an application for incorporation. In exercising this power, the Registrar may consider the proposed Rules of Association. The Registrar's practice has become to recommend Rules that reflect the Office's Model Rules of Association. These represent a simplified version of the basic rules one would find in the Corporation Law's "Table A" which consists of a set of rules which, amongst other things, divide corporate power and its exercise between the general meeting and the board of directors.
- Once the corporation comes into existence, alterations to the Rules or changes of name must be filed with and approved by the Registrar. The Registrar may appoint an administrator to a corporation in trouble, request the Court to wind up the corporation, and investigate any irregularity or failure to comply with the ACA Act. The Administrative Appeals Tribunal may review the decisions of Administrators appointed under the ACA Act.

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[61] *Neate Report*, 1989; These changes are discussed in detail at paragraph 6.10 to 6.15 of the *Fingleton Report* Vol 1, 1996

- The Registrar may also compel the appearance of any person, and has powers of entry, search and seizure. The Federal Court hears appeals from the decisions of the Registrar or complaints against the Registrar.

240 These amendments, combined with governments' requirement for tighter regulation of Indigenous corporations and the Registrar's increasingly protectionist policy approach during the 1990's, meant that the ACA Act came to be seen as unduly oppressive and intrusive by many Indigenous groups. The administration of the Act by the Registrar is discussed further in Section 5 below.

241 These amendments were the last substantive amendments to the ACA Act. **Appendix A** contains a "snapshot" overview of the ACA Act as it currently stands.

(2) The Native Title Act 1993

242 The role of the ACA Act was expanded further by the enactment of the *Native Title Act 1993* (Cth) ("**the NTA**"), and later by the *Native Title (Prescribed Bodies Corporate) Regulations* ("**the PBC Regulations**"), introduced in 1994.

243 The NTA itself establishes a system of Native Title Representative Bodies ("**NTRBs**") which imposes a range of important statutory functions (primarily to assist the running of native title claims and negotiations) on bodies recognised for that purpose by the Minister. To be eligible for recognition as an NTRB, a body is generally required to be incorporated under the ACA Act.[62]

244 The Native Title Act also requires that once native title has been determined, the native title holders must nominate a "prescribed body corporate" ("**PBC**") which either holds the native title in trust for the native title holders, or acts as their agent.[63] The details of the functions of PBCs are left to regulations.

245 The *Native Title (Prescribed Bodies Corporate) Regulations* then "establish a regime under which decisions concerning the management of native title rights and interests by common law holders will be taken through the registered native title body corporate."[64] Importantly for the purposes of this Review, the PBC regulations require a PBC to be incorporated under the ACA Act. The fundamental role of the PBC is to speak for and make decisions on behalf of, the group. This relates to the corporate law relationship between the corporation and its group members.[65]

246 The process for determining a PBC is lengthy and technical, and is set out in Part 2, Division 6 of the Native Title Act. In the *Hopevale* case, Justice Beaumont noted that the Native Title Act and the incorporation requirements of the ACA Act were fundamentally

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62 *Native Title Act*, section 201B. The main exception to this is non-ACA Act bodies which were recognised as NTRBs prior to the commencement of that section (section 201B(1)(b))

63 *Native Title Act*, Part 2, Division 6

64 *WA v Ward* [2000] 170 ALR 159 at 209

65 Mantziaris, C. & Martin, D. 2000, p. 91

incompatible.[66] ATSIC's submission to the Fingleton review pointed out difficulties with the operation of the Regulations and the requirements of the ACA Act.[67] Other academic criticism followed,[68] and more recently the Native Title Tribunal has published an exhaustively detailed examination of the needs of Prescribed Bodies Corporate and the incompatibility of the various corporate regimes that they fall within.[69] At the time of writing, ATSIC is currently in the process of conducting a detailed review of the PBC Regulations and the functioning of the PBC system. Members of the Review Team have been involved with that review as well.

(3) *Aboriginal Councils and Associations Legislation Amendment Bill 1994* and *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995*

247 Following the 1992 amendments, the Registrar at the time moved to further entrench his Office's regulatory functions. In 1994 the *Aboriginal Councils and Associations Legislation Amendment* Bill 1994 was introduced. It included the following proposed amendments:

- transformation of the Registrar's Office into an independent statutory authority;[70]
- extending the powers of examiners and investigators to examine a wider class of documents and to have power to question people under oath, subject to the right against self-incrimination;[71]
- disqualification from management of persons who had been convicted of certain offences, or who have previously been involved in corporate mismanagement;[72]
- duplication of many of the reporting requirements of the Corporations Law for all ACA Act Corporations, in order to increase public accountability, and allow monitoring of the expenditure of public money;[73] and
- reform to make winding up processes identical to those in the Corporations Act.[74]

248 The Registrar of the time supported the Bill as attempts to 'overhaul and modernise' the legislation.[75] It was argued that the original purpose of the statute as a simple vehicle for

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66 *Erica Deeral & Ors v Gordon Charlie & Ors* [1997] 1408 FCA

67 See Fingleton Report

68 Patrick Sullivan. 'A Sacred Land, A Sovereign People, An Aboriginal Corporation: Prescribed Bodies and the Native Title Act', NARU Report Series No. 3, North Australia Research Unit, Darwin 1997.

69 Mantziaris, C. & Martin, D. 2000

70 *Aboriginal Councils and Associations Legislation Amendment Bill*, section 6

71 Ibid., section 10

72 Ibid., sections 18-20

73 *Fingleton Report*, 1996, Volume 1, p.1

74 Ibid., p. 34-36

75 Registrar of Aboriginal Corporations, *Annual Report 1995-96*

incorporation had been superseded by a new statutory purpose to aid corporate minorities by means of regulatory intervention.[76]

249 However, the Bill was opposed by the ATSIC Board because of concerns with the administration of the Act by the Registrar, and the general suitability of the Act and proposed amendments for Indigenous corporations (raised in a paper by Dr Jim Fingleton). Other issues relating to the capacity of the Registrar's office to properly administer the Act once amended were raised in a separate report by Peter Daffen[77], giving rise to further concerns.

250 On that basis, the ATSIC Board recommended a full review of the Act.[78] The Minister agreed to the review and the Government deferred the 1994 Bill. However, in 1995 the Registrar approached the Minister about the urgent need for some amendments proposed in the 1994 Bill to be made. This resulted in the *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995*.[79] The 1995 Bill was subject to similar criticism as the 1994 Bill. It was referred by the Senate to a Committee, which recommended changes to which the Minister agreed.[80] However the Bill was not proceeded with and lapsed: it had effectively been superseded by the Fingleton Review.

251 Several of the issues raised in these Bills are revisited and considered in some detail in this Report, although this Review has approached them from a different perspective and considers them in the context of much broader (counterbalancing) reforms to the Act.

(4) The Fingleton Review 1996

252 In 1995, with the agreement of the Minister, ATSIC commissioned an independent review of the ACA Act. The tender to conduct the Review was won by the Australian Institute for Aboriginal & Torres Strait Islander Studies (AIATSIS), headed by Dr Jim Fingleton.

253 The terms of the Fingleton Review arose from recommendations of the ATSIC Board, and the impacts of the changed policy environment over the previous two decades. They reflected a concern with three specific areas; cultural appropriateness, accountability, and self-governance. Underpinning the specific focus of the Review was also a general concern with the effectiveness of the ACA Act.

254 The Report was prepared in two volumes, the first being a discussion of the issues addressed, the second contained detailed case studies and supporting material. Volume one addressed:

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76 Ibid., Registrar of Aboriginal Corporations, *Annual Report 1996-97*

77 Daffen, P. "*Review of Human and Financial Resources required for the New Australian Indigenous Corporations Commission*," a report for the Registrar of Aboriginal Corporations (1994) (hereafter referred to as the *Daffen Report*)

78 *Fingleton Review*, Special Issues Paper, Fingleton, J. "A Chronology of the Aboriginal Councils and Associations Act 1976" p. 12-13

79 Ibid,.

80 Ibid,.

- corporate Indigenous Australia (including characteristics of Indigenous groups, purposes of incorporation and the options for incorporation);
- cultural appropriateness (policy goals, the provisions of the ACA Act, general dissatisfaction, particular areas of concern, specifically group membership and decision-making by the group);
- accountability (accountability concept, measurement of accountability, enforcement of accountability);
- local and regional government (Part III applications, State and Territory regimes for local or regional governance, new political relationships, alternative funding arrangements and native title and regional agreements); and
- reforms (the direction of reform, legislative reforms, financial reforms, administrative reforms, and transitional arrangements).

255 An important component of the Review comprised the conduct of 32 case studies of a broad cross-section of Indigenous corporations, including a number of peak bodies. The case studies were seen as providing the core conduit by which the views of Indigenous organisations themselves could be brought into the review process. The Final Report argued that these case studies provided essential information relevant to the terms of reference, and that its conclusions and recommendations were heavily based upon the case studies.[81] Additionally, a number of Indigenous peak bodies made detailed submissions to the Review.

256 The Review recorded much dissatisfaction with the corporate reporting requirements, which were viewed as being disproportionately onerous in relation to the activities of most Indigenous corporations and the educationally disadvantaged status of their office-holders. A significant finding of the Fingleton Review was that the ACA Act did not provide a straightforward process by which cultural differences could be accommodated in corporate governance, nor did it provide a simple or flexible method of incorporation for Indigenous groups.

257 The 1996 Review recommended two principal courses of action. These centred on first, re-writing the ACA Act to recapture its original intent, and second, on a shift of emphasis in accountability, away from the corporate reporting system to 'direct accountability' to finance providers under service agreements and grant conditions. This would require the revision of funding agencies' grants procedures[82] in order to highlight performance outcomes as the primary objective of accountability rather than the incorporation regime itself. However, the Review also provided a set of recommendations ranging from legislative and financial matters to administrative reforms.

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81 *Fingleton Report*, Vol 1, 1996, para 1.19-1.26. The case studies are presented in Vol 2 of the Report.

82 The Fingleton Review only referred to ATSIC, but presumably all funding agencies would have had to change their procedures.

258 The Fingleton Review has been the subject of debate, which has been responded to by Fingleton.[83] The main criticism was that the corporate law aspects were not taken seriously:

> …the Report's own utility as a vehicle for law reform is compromised by its superficial treatment of most of the important corporate law issues facing Indigenous corporations, in particular its response to problems of corporate governance in a cross cultural context.[84]

259 It was also argued that there was a lack of correlation between the empirical work in the case studies and the final report itself.

260 The Fingleton Report was presented to ATSIC at the same time as the change of government in 1996, and for a number of reasons (including the opposition of the then Registrar), was not acted on.

261 Nevertheless, the Fingelton Report contained highly detailed information on the development and operation of the Act, much of which has proved useful to the current Review. This Review has attempted to build on and update much of the research contained in the Fingleton Report - in particular the empirical data, case studies and special issues papers contained in Volume 2.

262 In addition, although the rationale and basis on which they were put forward is different, it is noted that the "structural reform options" proposed in the first three Reports of this review were similar in effect to some of the options discussed in Fingleton's recommendations.

263 However there are fundamental differences between this review and the Fingleton review, primarily (but by no means exclusively):

- The approach to the concept of "cultural appropriateness" and how it should be addressed;
- The emphasis in this review on the need to consider and analyse the ACA Act in the light of modern corporate philosophy and developments in corporations law;
- The level of detail in which reform options have been considered and explored in the course of this Review; and
- The higher level of detail of the recommendations made in Part 6 of this Report.

(5) The Administration of the Act

264 The commissioning of the Neate report and consequent passage of the 1992 amendments, and the 1994 and 1995 amendment bills reflected an increasing emphasis by the Registrar's

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83 Mantziaris, C. 1997, 'Beyond the *Aboriginal Councils and Associations Act*? (Part 1) (1997) 4(5) *Indigenous Law Bulletin* 10.; (Part 2) (1997) 4(6) *Indigenous Law Bulletin* 7-13, 16; Fingleton, J. 'Back of beyond: the review of the Aboriginal Councils and Associations Act 1976 in Perspective', (1997) 4(6) *Indigenous Law Bulletin*; Mantziaris, C. 'Reply to Jim Fingleton', *Indigenous Law Bulletin* 4 (6) October 1997

84 Mantziaris, C. 1997, 'Beyond the *Aboriginal Councils and Associations Act*? (Part 1) (1997) 4(5) *Indigenous Law Bulletin* 10.

office on its regulatory role. It is also the case that Registrars had begun to develop their own philosophy of regulation in tandem with tightening their regulatory powers. It is not clear that the two were necessarily related.[85]

265 This major shift in regulatory philosophy was towards the protection of members of Aboriginal corporations from what the Registrar judged to be oppressive or discriminatory behaviour within the corporation. The Registrar suggested that the ACA Act no longer served its original purpose of providing a simple means for the incorporation of Indigenous groups. It was proposed that the contemporary purpose lay in the protection of corporate minority rights by means of the Registrar's powers of intervention in the corporation's affairs. In the 1996/97 Annual Report, it was stated that:

> Aside from its restriction on non-Aboriginal membership, the Act's most notable and valuable feature is the degree of protection it affords to minority rights. This protection is reinforced by the powers of intervention vested in the Registrar, powers which are readily made use of. In practice therefore, the Act is now operating to protect Aboriginal minorities from oppression and exploitation by other Aboriginals. In that sense, the Act is both unique and uniquely valuable.[86]

266 The Registrar sought to achieve this protection of members through enforcement, evidenced for example in the fact that discussion of regulatory interventions by the Registrar (administrations, liquidations and deregistrations) were all included under the heading "Enforcement" in the Registrar's Annual Reports.[87]

267 Criticism of this approach is dealt with elsewhere in this report.

268 More recently there has been a significant change away from this enforcement-based "protective" role towards a focus on assistance and training for Aboriginal corporations. In the 2000/01 Annual Report, the corporate direction for the Office of the Registrar of Aboriginal Corporations is stated as being:[88]

- to administer the Aboriginal Councils and Associations Act efficiently and effectively;
- to provide support services for all matters arising out of the administration of the Aboriginal Councils and Associations Act;
- to improve governing committees' awareness and understanding of their responsibilities under the Aboriginal Councils and Associations Act as well as their roles in managing the affairs of Aboriginal and Torres Strait Islander corporations;
- to promote the requirement for corporations to be accountable to their members.

269 These changes in regulatory philosophy are clearly reflected in the statistics available on interventions by the Registrar. These are detailed in Table 5 in Chapter 11, Section D.

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85 Mantziaris, C. & Martin, D. 2000, pp. 224-31

86 Registrar of Aboriginal Corporations, *Annual Report 1996–97*, pp. 1–2

87 See for example Registrar of Aboriginal Corporations, *Annual Report 1996–97, 1997-98, 1998-99*

88 Registrar of Aboriginal Corporations, *Annual Report 2000-01*, p. 4

These data show a consistent increase in the number of Registrar-initiated liquidations of Aboriginal corporations to a peak of 57 in 1999/00, followed by a quite dramatic drop to just 6 in the following year. While in 1999/00 53% of all liquidations were initiated by the Registrar; in the following year only 6% were.

270 Equally, while there was a significant increase in the number of deregistrations to a peak of 276 in 1998/99 (twice the number of incorporations in that year); this had reduced to only 106 in 2000/01. Also important is that in 1998/99 as many as 73% of all deregistrations appear to have been initiated by the Registrar rather than as the result of the winding-up of the corporations; this had reduced to only 9.4% in 2000/01.

271 Furthermore, in pursuit of this more facilitative role, in 2001-2002 the Registrar established Memoranda of Understanding ("**MOUs**") with a number of key funding agencies, including the Aboriginal and Torres Strait Islander Commission's Network and Regional Offices, as well as the Office of Aboriginal and Torres Strait Islander Health, the NSW Aboriginal Housing Office, Aboriginal Hostels Ltd and the Torres Strait Regional Authority.

272 These MOUs set out frameworks for cooperation between the relevant agency and the Registrar in areas of common interest, where this is desirable for the effective and efficient performance of their respective functions with respect to the operation and supervision of Aboriginal and Torres Strait Islander corporations for which they are responsible.

D. DEVELOPMENTS IN CORPORATIONS LAWS 1976 TO PRESENT

273 It is important to note some of the key developments in corporations laws during the period 1976 to present. This is because the fundamentals of the ACA Act have changed so little, but modern corporate philosophy has changed enormously. In particular, the current Corporations Act differs markedly from the State Companies Codes which were in existence at the time the ACA Act was drafted.

274 Of the many changes in the *Corporations Act* and its legislative predecessors, several which are relevant to the ACA Act may be highlighted:

- The abolition of the memorandum of association and the articles of association. This was accompanied by the introduction of the 'replaceable rule' system which gave greater flexibility to persons incorporating to design a corporate constitution tailored to their needs, while providing a default constitution for incorporators that did not lodge a constitution.[89]
- Successive amendments to the formulation of directors' duties which have converted the statutory duty of 'honesty' to a duty to act in 'good faith' and for a 'proper purpose'. The uncertainty in the law regarding whether the duty was established through an objective or a subjective standard has been clarified in

[89] *Corporate Law Economic Reform Program Act 1999* (Cth)

favour of an objective standard. The most recent amendments have included the enactment of a statutory 'business judgment rule'.[90]

- The adoption of new rules permitting wide-ranging delegation by directors and protecting directors from liability in situations where reliance on the delegate or reliance on information or advice provided by others meets certain standards.[91]
- The enactment of related party transaction provisions to clarify the situations in which directors owe fiduciary duties to the company.[92]
- The abolition of the doctrine of *ultra vires* for companies in order to address the uncertainty created by the general law of corporate legal capacity.[93]
- The enactment of a statutory indoor management rule to clarify the application of the general law of corporate authority to companies.[94]
- The adoption of provisions deeming procedural irregularities not to invalidate meetings and proceedings unless the Court is of the view that the irregularity would cause substantial injustice.[95] This gives much more certainty to the internal workings of corporations.
- The introduction of a system of voluntary elect administration under which the board of the corporation in financial trouble may itself place the corporation under the management of a professional administrator.[96]
- The simplification of reporting requirements for smaller companies and the abolition of the requirement of an annual general meeting. This was done by creating the regulatory categories of 'small' and 'large' proprietary companies.[97]
- The adoption of a statutory derivative action for members to overcome the problem with the rule in *Foss v Harbottle* and its numerous exceptions.[98]
- The progressive reduction of the minimum number of members needed for a valid incorporation from five, then two and then one person.[99]

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90 Ford, HAJ. Austin, RP. and Ramsay, IM. *An Introduction to the CLERP Act 1999*, 2000 para 2.26–2.28

91 *Corporate Law Economic Reform Program Act 1999* (Cth)

92 The first reform was enacted following the Companies and Securities Advisory Committee's *Report on the Reform of the Law Governing Corporate Financial Transactions* (July 1991) and continued with the *Company Law Review Act* 1998 (Cth)

93 This occurred through a series of reforms commencing in 1983: *Companies and Securities Legislation (Miscellaneous Amendments) Act 1*983 (Cth) and *Company Law Review Act* 1998 (Cth) . See Gates, S J. 'Recent Changes to Corporate Capacity and Agency' (1985) 15 *FL Rev* 206; Woodward, S. '"Ultra vires" Over Simlified' (1997) 15 *Company and Securities Law Journal* 162

94 These reforms were commenced with the *Corporations Act* 1991 (Cth) and continued by the *Company Law Review Act* 1998 (Cth). See generally; Chapple, L. and Lipton, P. 2002

95 Section 539 of the Companies Act 1988 (Cth), introducing what is now *Corporations Act 2001* (Cth), section 1322

96 *Corporate Law Reform Act* 1992 (Cth) introducing what is now *Corporations Act* 2001 (Cth), Pt 5.3A

97 The main movement towards this position was effected by the *Corporate Law Simplification Act* 1995 (Cth)

98 *Corporate Law Economic Reform Program Act 1999* (Cth)

99 *First Corporate Law Simplification Act 1985* (Cth)

275 The trend of these reforms to the Corporations Act is towards facilitating the commercial objectives of corporations. Regulatory intervention in the internal affairs of the corporation has been minimised. The State's role is to provide secure rules that will facilitate transactions between the corporations and outsiders; and rules that will safeguard certain standards of corporate governance. Within bounds established by the statute, the incorporators are given autonomy to select arrangements that will best facilitate their needs.

276 This trend is in keeping with international trends in corporate governance which call for even greater 'contractual freedom' in the design of corporate governance structures and fewer mandatory provisions.[100] Recent corporate collapses might retard this trend towards greater liberalisation, but they are unlikely to reverse it significantly.

277 By contrast, the ACA Act has remained an incorporation statute under which the autonomy of the incorporators is inhibited. The protection of corporate minorities is simply left to regulatory intervention. The powers of regulatory intervention are greater and more invasive of the autonomy of the incorporators and the corporation than equivalent powers possessed by the Corporations Act regulator.[101] Transactions with ACA Act are still subject to the uncertainties of the general law of corporate capacity and corporate authority. The statement of corporate governance standards is out of step with that in the 'mainstream' commercial community.

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[100] See for example, the debate: Coffee, JC. 'The Mandatory/Enabling Balance in Corporate Law; An Essay on the Judicial Role' (1989) 89 *Columbia Law Review* 1618; Gordon, JN. 'The Mandatory Structure of Corporate Law' (1989) 89 *Columbia Law Review* 1549; and Romano, R. 'Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws' (1989) 89 *Columbia Law Review* 1599

[101] See below, Chapter 11

PART 3

SPECIAL INCORPORATION NEEDS OF INDIGENOUS PEOPLES

CONTENTS

OUTLINE

278 This part considers the "special incorporation needs" of Indigenous people. This is done to provide background on certain features of the Indigenous sociopolitical environment against which reform options for the ACA Act must be assessed. The Part is divided into three Chapters, each of which addresses a key feature of Indigenous corporations.

279 **Chapter 4** provides a snapshot of the socioeconomic status of Indigenous Australia. This is done to provide an overview of many of the socioeconomic disadvantages suffered by the Indigenous population. It is from this population that both the directors who must run Indigenous corporations and their members are drawn. Part A is statistical rather than analytical.

280 **Chapter 5** considers corporations within Indigenous societies. This provides an analysis of some of the sociopolitical and cultural features that impact on the way Indigenous Australians interact with (and within) corporations.

281 **Chapter 6** considers the contemporary roles and functions of Indigenous corporations.

282 It is these three features of Indigenous corporations incorporated under the ACA Act:

- socioeconomic status of members and directors (widespread, relatively low formal education and management skills);
- particular values and practices which Indigenous members and directors bring to bear on their participation in corporations; and
- the functions performed by many Indigenous corporations (especially in the delivery of publicly funded essential services)
- which provide crucial elements of the policy background against which this Review is being conducted.

283 **Chapter 7** then outlines the implications of these "special incorporation needs" for any incorporation regime to be able to effectively and appropriately incorporate and regulate Indigenous corporations.

CHAPTER 4
SOCIO-ECONOMIC SNAPSHOT OF INDIGENOUS AUSTRALIA

284 This Chapter provides a brief snapshot of some of the key socio-economic features of Indigenous Australia. Many of these are well known, but it is worthwhile setting them out again, since the key features of low education rates, low employment rates (and hence experience with business), and in many regions language difficulties, mean that many of the skills needed by Indigenous people to be able to properly run a corporation (as directors of corporations) are often lacking. Almost as important, the *members* of corporations are also less likely than their non-Indigenous counterparts to have the skills to understand their rights and to be in a position to take action to protect those rights. These disadvantages are likely to be even more significant in remote areas.

285 The problems are further exacerbated when considering that many Indigenous corporations are not truly "voluntary" associations, but are instead required by governments in order to facilitate their interaction with diffuse non-centralised Indigenous groups and communities. This is discussed in the Section C of this Chapter.

A. EDUCATION

286 Compared with non-Indigenous Australians, relatively few Indigenous people have the formal education or training needed for organising and maintaining a corporation or organisation. Evidence from the 1996 census confirms that the rates of educational participation of Indigenous Australians are significantly lower than those of other Australians for all education levels.

287 A significantly higher proportion (3.1%) of Indigenous Australians did not ever attend school in comparison with non-Indigenous people (0.7%), and 44.2% of Indigenous Australians had left school by the time they were 15, compared with 35.7% of non-Indigenous Australians. While 25% of non-Indigenous Australians aged 15-24 were attending a tertiary institution, only 13.8% of the equivalent Indigenous population were. Only 23.6% of Indigenous people aged 15 years and over had a post-school qualification, compared to 40.2% of all Australians.

288 Figures from 1999 revealed that of the 21% of Indigenous students undertaking post-school studies, 3.6% were studying in the field of law, and only 10% in business, administration and economics (compared with over 20% of non-Indigenous students

undertaking post-school studies). Five per cent of Indigenous people were reported as never having attended school.[102]

289 However, Indigenous people who reside in major urban centres (centres of 100,000 people or more) are more likely to have stayed at school longer and gained a qualification than those living in rural areas.[103]

B. EMPLOYMENT

290 In 2000, 44% of the Indigenous population aged 15 years and over were employed. The unemployment rate was 17.6%, more than double the rate for the total population (7.3%).[104] Nearly 20% of this Indigenous group live in relatively remote areas where employment opportunities are scarce. For these Indigenous people, the unemployment rate in February 2000 was measured at 9.4% but the labour force participation rate was only 29.3%. However, Indigenous people participating in the Commonwealth Government's Community Development Employment Projects ("**CDEP**") scheme are classified by the ABS as employed, and are likely to form a significant proportion of the Indigenous labour force in these sparsely settled areas.[105]

C. LAW AND JUSTICE

291 In terms of access to legal services, over 80% of Indigenous people who live in rural Australia are more than 50 kilometres from the nearest legal service, as are 57% of those living in non-capital city urban areas.[106] In 1998, 15% of Indigenous people aged 13 years and over reported using legal services. Of this number, 67% used a specialist Aboriginal Legal Service rather than a State or Territory Legal Aid Commissioner, private legal practitioner or other form of legal service.[107]

292 Of the 197,500 Aboriginal and Torres Strait Islander people aged 13 years and over in 1994, over 20% reported having been arrested between 1989 and 1994. Forty-six per cent of these arrests involved young men in the age group 18-24 years, 32% of whom had been arrested more than once over the five year period. Thirty-seven per cent of unemployed

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[102] Australian Bureau of Statistics, *Population: Special Article – Aboriginal and Torres Strait Islander Australians: A Statistical Profile from the 1996 Census (Year Book Australia, 1999)*

[103] Australian Bureau of Statistics, *Australian Social Trends 1994. Education – Participation in Education: Education of Aboriginal and Torres Strait Islander People 1994*

[104] Australian Bureau of Statistics, *Occasional Paper: Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians. "Experimental Estimates from the Labour Force Survey,"* 2000

[105] Ibid.,

[106] Australian Bureau of Statistics, *Occasional Paper 4189.0: National Aboriginal and Torres Strait Islander Survey – Law and Justice Issues,* 19 May 1998

[107] Ibid.,

Aboriginal and Torres Strait Islander people were arrested during this time, more than double the percentage of employed people arrested (18%).

D. AGE

293 The Indigenous population, median age of 20 years, is younger than the total population by 14 years. Approximately 40% of Indigenous Australians are under the age of 15 compared to 21.4% of the total population. Further, there are very low proportions of people aged 65 years and over in these Indigenous populations - 2.6% compared to 12% of the total population.[108]

E. LOCATION

294 The Australian Indigenous population is becoming increasingly urbanised ('urban' refers to a population centre of 1,000 or more people). In 1991, 67.6% of the Indigenous population lived in urban areas. By 1996, this figure had increased to 72.6%, with 30.3% of Indigenous people living in major urban areas of 100,000 and more people and 42.3% living in smaller urban centres of between 1,000 and 99,999 people. However that still leaves 27.4% of the Indigenous population living in remote areas.

F. LANGUAGE

295 In 1996, 13.3% of Australian Indigenous people reported speaking an Indigenous language at home. Indigenous language use is highest amongst older Indigenous people and those living outside urban areas. Most Indigenous language speakers are concentrated in the north and west of Australia.[109]

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[108] Australian Bureau of Statistics, *Population. Special Article – Aboriginal and Torres Strait Islander Australians: A Statistical Profile from the 1996 Census (Year Book Australia, 1999)*

[109] Ibid,.

CHAPTER 5
CORPORATIONS WITHIN INDIGENOUS SOCIETIES[110]

296 There are a range of views that portray associations and other types of incorporated entities as alien institutions which have been imposed on Indigenous groups and communities. It should be accepted that there are frequently differing cultural understandings of the meaning of incorporation. Some of the difficulties this causes are discussed in more detail in later sections of this Paper.

297 However, Indigenous corporations have come to play more than an ancillary role in government service delivery, having integral roles in Indigenous social, political and economic action. The evidence demonstrates that Indigenous groups have incorporated with enthusiasm for a multiplicity of reasons, absorbed corporations into their own cultural practices, and utilise them with a vigour that had not been foreseen by the legislators.

298 Members and boards of Indigenous corporations typically bring to the operations of their corporations distinctive understandings and practices regarding such matters as the undertaking of responsibilities, the exercise of authority, the conduct of disputes, and the making of decisions. Formal legal abstractions such as "the interests of the corporation as a whole", central to the fiduciary duty of directors, may have little meaning within some Indigenous polities.

299 In many cases, Indigenous organisations are formed to promote the values, culture and identity of a particular grouping within Indigenous society, such as "tribes" or their constituent "families". Struggles over legitimacy and authority within the group are often transferred to the formal legal setting of the corporation associated with the group. Members of a corporate board may assert authority by virtue of their position *within the corporation*, rather than their position *within the group*.

300 Such factors may be manifested in factional struggles to control the admission of members into a corporation and the composition of the register of members[111], or challenges to a person's capacity to be a corporate member or hold public office on the ground that the person is not Indigenous, or is not a member of the relevant Indigenous group[112]. Disputes within or between families may be converted into legal disputes that courts are required to resolve by reference to the particular legal action and the rules of corporate law it invokes,

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110 Much of this discussion is drawn from arguments presented in Mantziaris, C. and Martin, D. 2000

111 Examples are provided in Registrar of Aboriginal Corporations, *Annual Report 1995-96* pp 36-7, 43; *Annual Report 1996-97*, p 36; Levitus, R. 'The Boundaries of the Gagudju Association Membership: Anthropology, Law and Public Policy' in Connell, J..& Howitt, R. (eds), 1991; and allegations as to corporate practices made in *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA

112 For example; *Shaw v Wolf* (1998) 83 FCR 113 (election to ATSIC Regional Council); Registrar of Aboriginal Corporations, *Annual Report 1995-96*, pp 34-5 (election to board of corporation)

rather than by reference to the broader process and interests of the Indigenous group itself.[113]

301 Given the requirements of ATSIC and other agencies for groups and communities to be incorporated in order to receive funding, Indigenous corporations also provide significant sites for competition over resources between groups and sub-groups. Case studies conducted for the Fingleton Review and reports of regulatory intervention provide empirical evidence of this competition over resources.[114] Sometimes the facts of intra-Indigenous competition for resources come before the courts as corporate law actions.[115] Such cases illustrate the centrality of corporations and their resources in contemporary Indigenous politics.

302 There is frequently intense competition between groups and sub-groups to ensure that they have their own representatives on the Board of a corporation, or even to control it, since those from other groups may not be trusted to "represent" broader interests. It may be difficult to establish confidence in the accountability of the Board to either the membership of the corporation generally or to the clients or constituency, for as a rule, it will not be practicable for an institution to enable every class of interest to be directly represented on the board. Thus, a proposal to establish a corporation with a "broadly representative" board might be resisted by sub-groups or individuals within the Indigenous group, unless they can be assured that they will have a direct place on it.

303 As a consequence of such factors, many Indigenous organisations are characterised by intense competition between different groups and by corporate histories in which competing factions alternate in their control of the board, or fission off to form new organisations. Political conflict in these organisations can often be conducted through manipulation of membership and meeting processes, to establish control of boards (and therefore of organisational resources)[116].

304 This can also be manifested in organisations that have been established to deliver services to a broader Indigenous constituency, such as legal advice, native title and land rights representation, health or housing. Notwithstanding this broad service delivery basis, the

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113 This distinction was drawn in *Nyul Nyul Aboriginal Corporation v Dann* (unreported, WASC, Owen J, 2 August 1996) at 26–7

114 Libesman, T. & Cuneen, C. 'Case Studies, NSW' in the *Fingleton Review*, Vol 2, para 6.3 (role of ATSIC regional councils in resource competition); Crough G & Cronin, D. 'Aboriginal Resource Centres in the Kimberley Region' in the *Fingleton Review*, Vol 2, para 7.10; Registrar of Aboriginal Corporations, *Annual Report 1995-96*, pp 37-8 (use of campsite and corporate bus); p 49 (control of corporate vehicle); Registrar of Aboriginal Corporations, *Annual Report 1997-98*, pp 69-70 and *Annual Report 1998-99*, pp 32-3 (rent-free occupation of corporate houses by board members)

115 For example, *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* [1999] FCA 521. See also *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* (unreported, FCA, Perth, Nicholson J, 23 June 1995) and Registrar of Aboriginal Corporations, *Annual Report 1998-99*, pp 37–8; see also *Nyul Nyul Aboriginal Corporation v Dann* (unreported, WASC, Owen J, 2 August 1996, digested (1996) *Australian Current Law* [355 WA 10])

116 For example, see Levitus, R. 'The Boundaries of Gagudju Association Membership: Anthropology, Law and Public Policy', in Connell, J. and Howitt, R. (eds) 1991; and allegations regarding corporate practices are raised in the facts of *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA

boards of such organisations may comprise individuals associated with specific factions or families, rather than being drawn broadly from across the wider group or constituency. Such matters can be exacerbated by the reliance in the scheme of the ACA Act on control of the corporation through the general meeting of an undifferentiated membership.

305 It would be incorrect and unjustified to portray all Indigenous corporations as dysfunctional because of factors such as those outlined above. However, the evidence suggests that they are particularly vulnerable to corporate governance failures. This can be seen in the case of associations incorporated under the ACA Act, although this must be read in the context of the relatively onerous reporting requirements under that statute.[117] In the financial year 1998–9, 274 of the 2,999 corporations registered under the ACA Act at the commencement of the financial year (that is, 9 per cent of the total) were "deregistered" in the course of the year.[118] A high proportion of these corporations did not comply with corporate reporting requirements, despite the adoption of a proactive corporate compliance strategy by the Office of the Registrar of Aboriginal Corporations.[119]

306 A significant workload for the Registrar's Office was occasioned by complaints by aggrieved members of corporations, governing committee members and employees, as well as by government agencies and members of the public. The most common complaints alleged breaches of the corporation's rules of association, discriminatory conduct by governing committees, improper notice of and conduct of meetings, financial mismanagement, and improper restrictions on information available to members.[120] Fraud investigations conducted under the ACA Act have lead to a number of referrals to State and Commonwealth law enforcement agencies.[121]

307 While a lack of the requisite management skills is likely to be a significant factor in many of the problems identified above, the influence of ethical principles based on obligations and responsibilities to immediate kin and associates rather than to the broader "community" should not be discounted.

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117 Since 1993-94, all annual reports of the Registrar of Aboriginal Corporations provide examples of poor financial management in corporations which have occasioned regulatory intervention in the form of examinations, fraud investigations, the appointment of an administrator, or the winding up of the corporation

118 see Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p. 5 & Appendix J

119 Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p. 28

120 Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p 21

121 The annual reports of the Registrar of Aboriginal Corporations disclose the following statistics on referrals to law enforcement agencies: 1993-94 (12 referrals); 1994-95 (23); 1995-96 (10) 1996-97 (21); 1997-98 (10); 1998-99 (3 investigations by contracted investigators)

CHAPTER 6
CONTEMPORARY ROLES AND FUNCTIONS OF INDIGENOUS CORPORATIONS

A. DEVELOPMENT OF THE ROLES OF INDIGENOUS CORPORATIONS

308 As previously discussed, the passage of the ACA Act in 1976 was one manifestation of a significant government policy shift from "assimilation" to "self-determination". The capacity of Indigenous groups and communities to incorporate under the ACA Act has been seen by them as an important aspect of self-determination. However, there are differing perspectives on what "self-determination" entails, and its relationship to what is termed "self-management".

309 One important aspect of both self-determination and self-management, is the ability of Indigenous groups and communities to choose the most appropriate governance structures for their aspirations and needs. The delivery of services by appropriately structured and functioning Indigenous organisations is just one dimension of this. Another central aspect is that of the advocacy of Indigenous rights and aspirations, for example by legal services and by Native Title Representative Bodies.

310 An important aspect of the self-determination or self-management policies of both ATSIC and of State and Territory governments, involves the funding of Indigenous corporations for the delivery of services in such areas as health, legal services, housing, and outstation development, and for other purposes such as cultural and language maintenance and arts and crafts support.

311 Many of these corporations are providing critical services to the Indigenous communities in which they operate, or otherwise performing important statutory functions (such as land-holding). This is evident in part from the available figures on the functions of ACA Act corporations (discussed under heading (2) "Features of ACA Act corporations" below).

312 The importance of Indigenous corporations in the delivery of essential services and performance of important statutory functions can also be briefly illustrated by the following examples:

- ABS calculations reveal that CDEPs are likely to form a significant proportion of the Indigenous labour force in sparsely settled areas.[122] CDEPs are all required by ATSIC to be incorporated, and many are ACA Act corporations.
- Some 63.8% of Indigenous households were renting their homes, of which 36.9% were renting from private landlords and real estate agents and 36.5% through Government agencies. Community housing organisations (many of which would be ACA Act corporations) were landlords for 15.7% of renting Indigenous

[122] Australian Bureau of Statistics 2000

households; by comparison only 1.9% of all renting households were renting from this type of landlord. Community housing organisations were landlords to renting Indigenous households most often in rural areas.[123] Many of these are ACA Act corporations.

- With the enactment of the Native Title Act, a national system of Native Title Representative Bodies ("**NTRBs**") was established. NTRBs are responsible for running and assisting with native title claims and negotiations, and have a form of statutory monopoly in prioritising, funding and/or performing these functions within their regions. As a general rule, these bodies are required by the Native Title Act to be incorporated under the ACA Act; and most are.[124]
- Native title, once recognised, must be managed by corporations known as "Native Title Prescribed Bodies Corporate" (or "**PBCs**"), which also are required to be incorporated under the ACA Act.[125]
- The establishment of the Indigenous Land Corporation ("**ILC**") has also led to the transfer to Indigenous groups of various interests in land. Under ILC policies, these interests must be held in trust by ACA Act corporations.

313 A critical feature of these and many other Indigenous corporations, which distinguishes them from many non-Indigenous corporations, is that they are arguably not truly "voluntary" associations of individuals. That is certainly the case with PBCs, where the native title holders are required by the Native Title Act to incorporate. However, the emphasis by Commonwealth and State governments on the delivery of essential community services by Indigenous corporations (and the requirement to be incorporated in order to receive government funding) has also resulted in the formation of corporations in circumstances which are not entirely "voluntary". This marks a substantial difference from the majority of non-Indigenous corporations, in particular those formed for commercial purposes.

314 Nonetheless, an increasing emphasis on economic development, and its policy linkage to self-determination at the community or group level, has led to the establishment of many corporations for commercial purposes. There are also increasing numbers of Indigenous associations being formed to represent the interests and reflect the identities of Indigenous groups and communities.

(1) Growth in number of ACA Act corporations

315 The increase in the number of ACA Act corporations alone since the enactment of the Act can be seen in Figures 1 and 2 below. While there was growth in the number of associations in the early 1980s, the most significant increase occurred in the first half of the

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123 Australian Bureau of Statistics 1999

124 See Part 11 of the *Native Title Act*, which sets out: the processes for recognition of NTRBs (including the requirement that there be only one NTRB per region, and the requirement that NTRBs be ACA Act corporations); their powers and functions; finance obligations; accountability requirements; the conduct of directors and miscellaneous issues. It is understood that all NTRBs with the exception of the Northern Land Council and the Central Land Council are now ACA Act corporations.

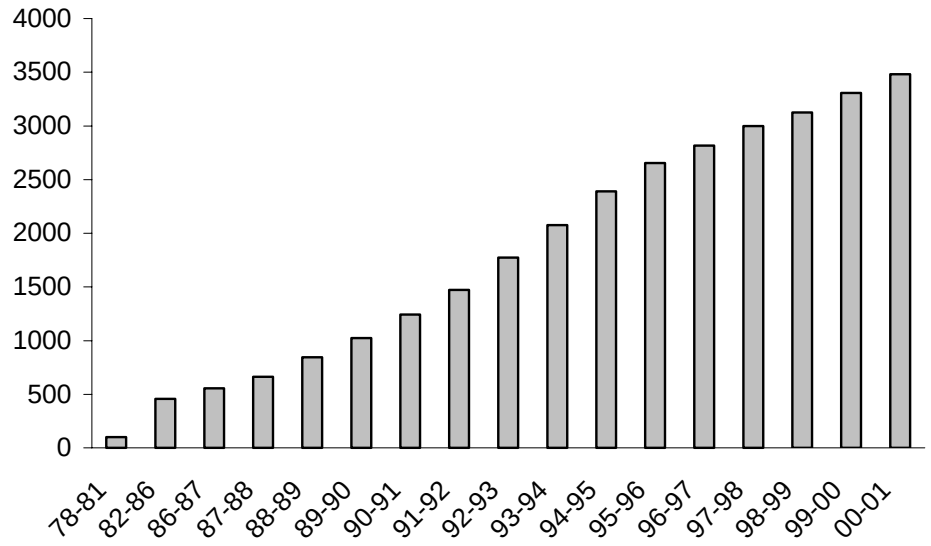
125 *Native Title (Prescribed Bodies Corporate) Regulations 1999* Statutory Rules 1999 no 151

1990s, a period following the establishment of ATSIC, the availability of direct funding from ATSIC and other agencies to Indigenous groups via their corporations, and the increasing role of corporations in service delivery to Indigenous communities.

316 While there was growth in the number of associations in the early 1980s, the most significant increase occurred in the first half of the 1990s, a period following the establishment of ATSIC, the availability of direct funding from ATSIC and other agencies to Indigenous groups via their corporations, and the increasing role of corporations in service delivery to Indigenous communities.

317 In considering these figures, it should be kept in mind that the Fingleton Report estimated that only roughly half of all Indigenous corporations were incorporated under the ACA Act[126].

Figure 1: Cumulative growth in numbers of incorporations under the *Aboriginal Councils and Associations Act 1976*



Source: Registrar of Aboriginal Corporations, *Annual Report 1999–2000*, p 6, and *Annual Report 2000-2001*, p6. Note: This figure does not take into account deregistrations and is therefore not a representation of the actual number of corporations in existence at any point in time.

318 Figure 1 is taken from previous Annual Reports of the Registrar of Aboriginal Corporations. In effect, it shows that the numbers of new incorporations have remained more or less steady since the early 1990s, and that the demand for new ACA Act corporations has not significantly slowed.

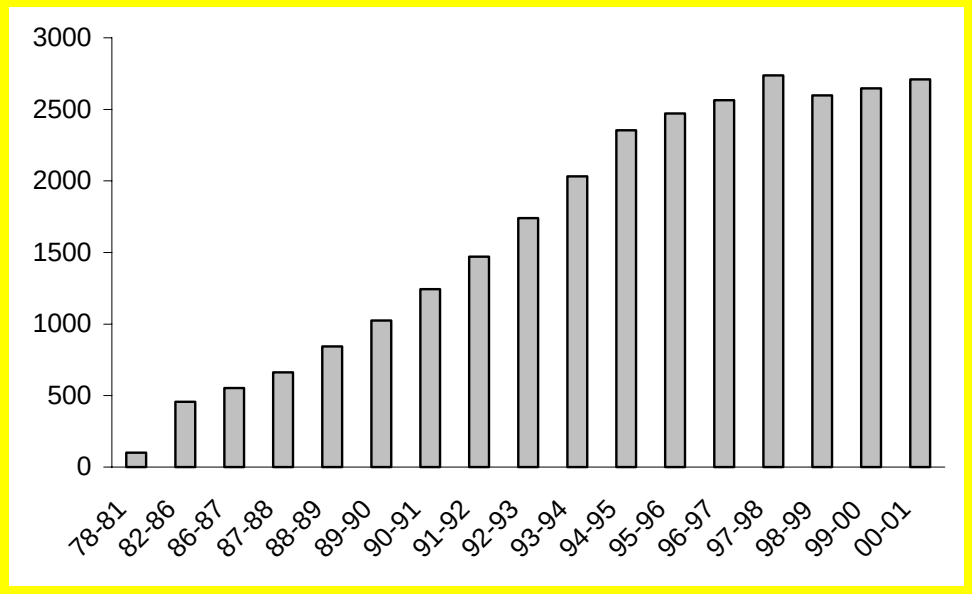
319 The Registrar's Annual Reports have only ever presented historical data on incorporations in this form – presenting the *cumulative* number of *incorporations* under the ACA Act. This is somewhat misleading, as it does not indicate the total number of corporations at any

[126] The Review Team notes however that the calculation of this estimate may be problematic.

given time. The number of *corporations* will be lower than the cumulative total of *incorporations*, because the latter does not take into account deregistrations.

320 Figure 2 shows the change in total number of *corporations* registered under the ACA Act in each year. This figure was prepared with the assistance of the Registrar's office by calculating the effect of deregistrations.

Figure 2: Numbers of corporations incorporated under the *Aboriginal Councils and Associations Act 1976*



Source: ORAC

321 Figure 2 shows that the number of corporations incorporated under the ACA Act grew rapidly in the early 1990s, then slowed down somewhat, before decreasing in 1998-1999. (The decrease in 1998-1999 was the result of the Registrar taking action to deregister 247 corporations which had consistently failed to provide annual reports. This will be discussed at some length later in this Report) The number of corporations has slowly increased again since 1998-1999, but has not yet reached the 1997-1998 levels.

322 A small part of the growth in ACA Act corporations in recent years is likely to have been as a result of incorporations of PBCs following native title determinations. Although those numbers are currently still small[127], it is anticipated that the numbers of PBCs could grow significantly in the future. It remains to be seen whether the PBC Regulations will

[127] The data available on the total number of ACA Act corporations incorporated for the purposes of being a PBC is unclear. However, of these there are currently only 20 which are registered native title bodies corporate (RNTBCs) following determinations of native title. (Personal communication with Garry Fisk, Director Corporate Relations, ORAC, 2 September 2002.)

continue to require PBCs to be incorporated under the ACA Act in the future[128], but it seems likely that the requirement will stay for the near future.[129]

B. FEATURES OF CONTEMPORARY ACA ACT CORPORATIONS

(1) Problems with statistical analysis of the features of ACA Act corporations

323 It is unfortunately extremely difficult to obtain meaningful statistical information on the nature of ACA Act corporations – for example, their turnover, assets, number of employees or functions. There are several reasons for this.

324 The main reason is that the Registrar's Office has not in the past maintained any systematic data collection on the features of corporations incorporated under the ACA Act. There is no requirement to do so under the ACA Act, and indeed no particular administrative reason to do so, as there are few 'categories' of corporation under the Act (land-holding and for-profit corporations), with little requirement for them to be monitored. ORAC has advised that it has now implemented a new database and workflow management information system which will address this issue in the future, although no data from it was available in time for the current Review.

325 The Registrar's Office nonetheless does have an old database ("the CANDA database") which contains some information about ACA Act corporations, including attributes such as turnover and function (as indicated by corporations' objects). This was initially developed at ATSIC's request in 1995, to allow better monitoring of corporations it was funding. No central database was kept before that time, and in fact prior to 1992 all financial reporting was to DAA/ATSIC rather than ORAC. However, the CANDA database has not been fully maintained since 1998. It does include data on some more recent organisations, but these seem to have been added on an ad-hoc basis.

326 Apart from the ad-hoc nature of the data-entry into that database, there are also other difficulties with drawing meaningful information from it.

327 For example, there are some difficulties with the classification of corporations by function under the database. The categories of functions were originally developed to try to match up with ATSIC funding categories. However, ACA Act corporations may of course have functions which are much broader than ATSIC funding categories, and may have multiple functions. Equally, an ACA Act corporation may have multiple objects set out in its rules, but receive no funding to undertake some or all of the functions commensurate with these objects.

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[128] This issue is currently being considered by a review of the PBC Regulations by ATSIC.

[129] See NNTT Submission on page 28 of, Summary of Consultations, Questionnaire Responses and Submissions, July, 2002

328 Further, ORAC staff allocate an organisation to a given category at the time of incorporation, by having regard to the organisation's objects. However, the objects are not always easy to translate into any functional category, and it appears to be the case that many ACA Act corporations are now performing functions that may differ substantially from their original objects.[130]

329 There are also difficulties with maintaining comprehensive records on financial data such as turnover, assets and liabilities. This is because such a significant number of ACA Act corporations fail to comply with their financial reporting requirements under the Act; during the financial year 2001-2002, only 960 of 2709 corporations (35%) submitted section 59 reports. During this period, a further 338 corporations held exemptions from the reporting requirements under section 59A. 1411 corporations (52%) failed to provide a report or obtain an exemption. (Most of these corporations failing to comply with the reporting requirements are likely to be small and under resourced, however, this is probably not exclusively the case.)[131]

330 The Review Team has nonetheless attempted to draw some information from the ORAC database, for illustrative purposes. However, caution should be used in using this information, because of problems with the reliability and comprehensiveness of the data as outlined above.

(2) Functions of ACA Act corporations

331 An indication of the diversity of ACA Act associations is provided by Table 1, which aggregates bodies in terms of their objects.

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[130] Where ACA Act corporations act beyond the scope of their objects, those actions will be "ultra vires" and any contracts or agreements entered will be void and unenforceable. This could also breach directors' duties. This issue is discussed in some detail in Chapter 14.

[131] In order to target their activities, ORAC currently cross-checks with ATSIC to see whether any corporations failing to provide annual reports are receiving ATSIC funding. If so, ORAC follows-up these corporations. Corporations not receiving ATSIC funding are less likely to be pursued. (The Review Team presumes that this arrangement is in place with all finding bodies with whom ORAC has MOUs.) Personal communication with Garry Fisk, Director Corporate Relations, Office of the Registrar of Aboriginal Corporations, 24 July 2002

Table 1: Objects of ACA Act associations

Arts & Culture	229
Business	165
CDEP	24
Community Support/Welfare	1116
Education	198
Employment/Training	200
Health Service	156
Housing	179
Land Title Holding	216
Legal Service	23
Media	15
Other	166
Other Land Activity	113
Resource Agency	31
Sport & Recreation	78
Grand Total	**2909**

Notes:

See qualifications to the reliability of this statistical information, discussed at paragraphs 323-330 above.

Some organisations may appear twice where they have been allocated two different categories, hence the figure of 2909, which exceeds the total number of 2709 registered ACA Act corporations.

According to relevant ORAC staff, it is likely that multi-function organisations with broad goals will fall under "other".

332 In addition to the above, it is worth noting that the Registrar's Office only has record of 42 ACA Act corporations which have made provision for members to share in the profits of the corporation in accordance with s44 of the Act.[132]

333 If this figure can be relied on, it means that *only about 1% of ACA Act corporations are acting as commercial corporations equivalent to proprietary companies under the Corporations Act*. Turning that figure around, it means that approximately 99% of ACA Act corporations are non-profit corporations, which would be equivalent to public companies limited by guarantee under the Corporations Act, or incorporated associations under the State Association Incorporation Acts.

[132] Personal communication with Garry Fisk, Director Corporate Relations, Office of the Registrar of Aboriginal Corporations, 24 July 2002

(3) Size of ACA Act Corporations

334 In comparison with corporations established under other statutes, particularly the Corporations Act, ACA Act associations are small. Tables 2-3 below demonstrate that, for those corporations for which data were available, very few would exceed the $10 million in turnover or $5 million in assets, that is the definition of large proprietary companies: most would fall well within the thresholds set for qualifying as small proprietary companies under the Corporations Act.

335 As discussed above, the figures for corporations with relatively low assets/turnover (probably below around $100,000) are notoriously unreliable because of the number of such corporations which are exempted from reporting or which are simply in default of their reporting requirements. It is likely that small corporations will form the bulk of those defaulting on the reporting requirements, but this is probably not exclusively the case, and may be one explanation for the large fluctuations in numbers of corporations with turnover greater than $1 million. Casual estimates by one ORAC staff member are that up to about 50% of ACA Act corporations may actually fall in the $0-$50,000 turnover range.[133]

Table 2: Turnover of ACA Act corporations*

Turnover	FY95/96	FY98/99	FY99/00	FY00/01
$0-$50K	118	105	76	83
$50K – $100K	60	58	43	42
$100K - $250K	153	118	75	99
$250K - $500K	139	125	81	83
$500K - $1M	99	98	76	78
$1M - $5M	113	144	104	115
> $5M	5	11	8	11
TOTAL	687	659	463	511

Source: CANDA – ORAC Database

[133] Personal communication with Dean Reyaldeen, Office of the Registrar of Aboriginal Corporations, March 2001

Table 3: Assets of ACA Act corporations*

Assets	FY95/96	FY98/99	FY 99/00	FY 00/01
$0-$50K	120	117	89	85
$50K – $100K	74	48	24	38
$100K - $250K	125	94	74	80
$250K - $500K	98	94	64	73
$500K - $1M	119	123	86	83
$1M - $5M	145	167	118	146
> $5M	9	19	9	18
TOTAL	690	662	464	523

Source: CANDA – ORAC Database

Table 4: Liabilities of ACA Act corporations*

Liabilities	FY95/96	FY98/99	FY99/00	FY00/01
$0-$50K	417	366	238	227
$50K – $100K	84	79	65	76
$100K - $250K	89	94	80	100
$250K - $500K	46	58	27	37
$500K - $1M	31	31	28	41
$1M - $5M	17	22	15	27
> $5M	1	-	-	1
TOTAL	685	650	453	509

Source: CANDA – ORAC Database

* For Tables 2-4, see qualifications to the reliability of this statistical information, discussed at paragraphs 323-330 above.

(4) Analysis and Discussion

336 These Tables illustrate not only the considerable increase in the number of associations incorporated under the ACA Act, but also the increasing complexity of many of these associations. As far as can be gleaned by a functional breakdown based on the objects of the associations, Table 1 suggests that a significant percentage of these associations have been established to deliver crucial services such as health, housing, legal services, and CDEP schemes, to their constituencies or memberships - and for which therefore the issue of corporate viability is of major concern. For such bodies, the regulatory regime under the ACA Act and its potential to assist in good corporate governance practices will be very important.

337 Also, the data demonstrates that there is considerable variation in the assets and incomes of ACA Act corporations, from those that clearly must be relatively passive, with incomes and assets below $10,000 to those that have assets and incomes measured in the millions of

dollars. Data from 2000/01 indicate that at least 320 ACA Act corporations had assets of over $250,000, while 287 had turnovers of over $250,000. It can be safely assumed that the substantial majority of these corporations would have been in receipt of grant monies for the delivery of services to Indigenous communities.

338 Indigenous corporations play an increasingly important role in the delivery of publicly funded services to Indigenous communities. At the same time, it has been argued that these corporations are typically in a vulnerable position through two sets of factors. First, their Indigenous participants, whether as members of the corporation or of the Board, suffer from well-documented disadvantage in terms of core skills and experience necessary for good corporate governance. Secondly, they typically bring to their participation in their corporations certain values and practices which may compromise corporate governance and the stability of the corporations.

339 These factors have important implications for the policy principles underlying a reformed ACA Act.

340 The arguments advanced in this Chapter regarding the "special incorporation needs" of Indigenous peoples, suggest the need for a different regulatory philosophy than those operating under either State Association Incorporation Acts or the Corporations Act. This is discussed at length in Part 4.

CHAPTER 7
IMPLICATIONS OF THE SPECIAL INCORPORATION NEEDS

341 The "special incorporation needs" of Indigenous people described above must be accommodated by special measures. Some of these can be addressed through administrative arrangements, some require legislative grounding. In brief these special measures are:

- Special regulatory assistance
- Flexibility in implementation and enforcement of legislative requirements
- Flexibility in corporate design
- Appropriately targeted reporting requirements
- Regulatory intervention to ensure continuity of essential services
- Regulatory intervention to protect members

342 These special measures are briefly discussed below.

A. CAPACITY-BUILDING: SPECIAL REGULATORY ASSISTANCE[134]

343 The Review Team has identified a significant need for development of the capacities of both members and, in particular, directors of those Indigenous corporations currently incorporated under the ACA Act, in relation to corporate governance issues.

344 Capacity building (or as it is known in the international aid and development context, capacity development) is increasingly seen as a crucial component of both policy development and program delivery by government and other agencies.

345 The Review Team recognises the clear need for capacity building to underpin government policy development and program delivery for Indigenous people and communities. The Review Team also recognises that capacity building is not just necessary for Indigenous groups and communities and their organisations, but also for the agencies providing services and resources to them.

346 While there is a need for broad and coordinated Indigenous capacity building, the focus of the capacity building undertaken by a corporate regulator should be consistent with its role as the regulator of the Act. The regulator's capacity building policies and delivery should be coordinated with those of other agencies through the use of such mechanisms as memoranda of understanding.

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[134] The concepts of "capacity building", "capacity development" and "special regulatory assistance" are discussed in further detail in Chapter 11, Section C.

347 Therefore, in the context of this review, the Review Team has adopted the term "special regulatory assistance" to describe the specific capacity building functions required of a regulator of Indigenous corporations for improving the *corporate governance* of Indigenous corporations. This is more specific and limited than broader concepts of "capacity building" and "capacity development". The definition which the Review Team has adopted for the use of the term in this Review is accordingly:

> ***Special regulatory assistance*** *means assisting and encouraging the directors and members of Indigenous corporations to develop the relevant skills and good corporate governance practices necessary for the long-term viability and success of their corporations.*

348 Effective special regulatory assistance will require administrative assistance measures (such as education and training, advice and assistance in relation to incorporation and management of corporations, filing of reports, etc) but will also need to be integrated into the regulatory functions of the regulator. This will in part need to be in ensuring flexible implementation and enforcement of legislative requirements (discussed in the next section). However, it will also need to be reflected in the specific regulatory powers and tools available to the regulator.

B. FLEXIBILITY IN IMPLEMENTATION AND ENFORCEMENT OF LEGISLATIVE REQUIREMENTS

349 Realistically, education and training is not going to be able to provide all the knowledge and skills required for the successful governance of corporations, to all directors and members of Indigenous corporations. In addition, some of the corporate governance problems in some corporations might result as much from deeply held cultural views and practices as from lack of technical skills.

350 Consequently, there is a need for flexibility in the implementation of the incorporation statute and the way it is administered and enforced. This is necessary to ensure that minor technical breaches do not result in the automatic deregistration or winding-up of corporations. This is especially important considering that many corporations may be providing essential community services.

351 Some of this flexibility would need to be reflected in the structure and content of the incorporation statute.

C. FLEXIBILITY IN CORPORATE DESIGN

352 There is a need for a permissive and flexible approach to the design of corporate rules, to ensure that incorporators can design corporate governance structures which reflect their particular needs and cultural circumstances. In some cases, that may be to reflect "Aboriginal custom"; in other cases it may be specifically to minimise the potential for inter-group conflict resulting from deeply held cultural views and practices.

353 The incorporation statute itself would have to provide the necessary flexibility and permissiveness.

D. APPROPRIATELY TARGETED REPORTING REQUIREMENTS

354 Given the diversity in sizes and functions of ACA Act corporations, there is a need for different reporting requirements for different corporations.

355 The aim of company reporting requirements is to provide members and creditors of corporations with a general understanding of the viability of the corporation. For small corporations with few members and which receive little income and have few activities, there is no particular need or justification for reporting. In addition, small corporations are least likely to be able to have the skills or resources to comply with reporting requirements. However, for corporations with a high turnover, and which provide important services using public funding, relatively high levels of reporting may be appropriate. For other corporations, appropriate reporting levels may fall somewhere in between.

356 Appropriate reporting requirements would need to be provided for in the incorporation statute and/or delegated legislation.

E. REGULATORY INTERVENTION TO ENSURE CONTINUITY OF ESSENTIAL SERVICES

357 In most circumstances, it would be most appropriate for a government funding body to ensure the continuity of essential services provided through corporations it funds. To be able to do this effectively, creditors and funding bodies need to have access to appropriate remedies.

358 In some circumstances, the funding body may not be willing or able to intervene in the management of a corporation. In such cases, it would be appropriate for the corporate regulator to have the capacity to take action, in order to ensure that the essential services do not fail because of corporate governance or financial problems in the corporation performing those services.

359 These functions would need to be reflected in the incorporation statute.

F. REGULATORY INTERVENTION TO PROTECT MEMBERS

360 The members of ACA Act corporations may not have the knowledge, skills, resources or access to the legal system that are usually required for members to protect and enforce their membership rights. They may therefore be particularly vulnerable to oppression or abuses by directors or majority members.

361 While any incorporation statute should encourage members to take action to enforce their own rights, it must be recognised that this will not always be possible. In such cases, there

is an argument that the corporate regulator should have some capacity to intervene in the management of corporations on behalf of members.

362 These functions would need to be reflected in the incorporation statute.

PART 4

THE NEED FOR A SPECIFIC INDIGENOUS INCORPORATION STATUTE

CONTENTS

OUTLINE

363 The Review Team commenced with no settled view as to whether the Act should be retained. In the course of the analysis and in response to submissions put by various stakeholders, the Review Team concluded that there was still an important function to be served by a statute of general incorporation reserved for the use of Indigenous people.

364 Detailed reasons for this conclusion are provided in Chapter 8 below.

365 The overwhelming majority of those consulted supported the retention of the ACA Act and with it the incorporation and regulation functions of the Registrar, provided those functions were reformed consistently with the conclusions outlined in Part 5 above. In addition, the majority of stakeholders supported an incorporation model that caters for all sizes and types of Indigenous corporation.

366 Almost all stakeholders consulted advanced reasons as to why there should continue to be a separate (but reformed) incorporation statute available for Indigenous people. Some of these reasons related to the "special incorporation needs" of Indigenous peoples. Others related to the perceived inappropriateness of alternative incorporation statutes for many Indigenous incorporators.

367 Arguments for repeal of the ACA Act were advanced in only three written submissions, from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the South Australian Department of State Aboriginal Affairs (DOSAA), and the Torres Strait Islander Advisory Board (TSIAB).

368 Part 4 is divided into two Chapters, each dealing with one of the structural policy questions, as follows:

- The need for a specific Indigenous incorporation statute; and
- The scope of that statute.

CHAPTER 8
THE NEED FOR A SPECIFIC INDIGENOUS INCORPORATION STATUTE

A. INTRODUCTION AND OUTLINE

369 A fundamental question to be answered by this Review is whether, in the light of:

- the changed circumstances since the ACA Act was enacted (outlined in Part 2);
- the technical shortcomings of the ACA Act (many of which are discussed further in Part 5); and
- the flexibility now offered by the Corporations Act and State Association Incorporations Acts (discussed below and throughout Part 5),

there still is justification for a separate Indigenous incorporation statute.

370 The Review Team acknowledges that there is a strong argument that, under the ACA Act as it is currently drafted, many Indigenous corporations would be better off under the Corporations Act or a State Association Incorporation Act. However, this arguably misses the point.

371 In the Review Team's view, the central issue is probably best phrased in this way:

> *"Can the 'special incorporation needs' of Indigenous peoples be appropriately addressed solely through the provision of supplementary special regulatory assistance (such as education and training), if Indigenous corporations were instead required to incorporate under the Corporations Act and/or State Association Incorporation Acts?"*

372 There are, of course, a range of other issues as well, including a consideration of the technical and practical consequences of any decision to shut-down the ACA Act as an incorporation statute. The question arising from these issues is:

> *"Would the shutting-down of the ACA Act and transfer of ACA Act corporations to other incorporation statutes be practically feasible?"*

373 This is an important question, but is arguably only relevant if the first question can be answered in the affirmative.

374 These two issues are considered in turn in this Chapter, in Sections C and D. Section B first provides a brief outline of how the Corporations Act and State Associations Acts work, by way of comparison and background.

B. INTRODUCTION TO THE CORPORATIONS ACT AND STATE ASSOCIATION INCORPORATION ACTS

375 This section is intended to give a brief introduction to relevant aspects of the Corporations Act and State Association Incorporation Acts, and how those Acts function. This is intended only to give a very basic understanding of some basic features, by way of background to the discussion in Sections C and D of this Chapter. Various specific features of the Corporations Act and the functioning of corporations incorporated under it will be discussed in further detail in Part 5, as will some aspects of State Association Incorporation Acts.

376 Much of this material was considered in more detail in the *Second Report – Policy Options Discussion Paper for "Option 5"*, which is included as Appendix D.

(1) The Corporations Act

377 The Corporations Act offers a comprehensive and thoroughly modern incorporation regime. Some of the key advances in the Corporations Act over recent years are outlined in Chapter 3, Section D.

378 The Corporations Act is essentially intended to facilitate commerce. It adopts a highly permissive and "hands-off" philosophy to the design of the corporate constitution. Monitoring of corporate governance by corporate creditors and members is an important part of this system of corporate regulation.

379 The Corporations Act does however apply different reporting and other requirements to different types of corporation, based largely on size, and whether or not the corporation is a "public" or "proprietary" company. (This distinction is discussed further below.)

380 Beyond this, ASIC treats all corporations the same, and does not single out specific classes of corporation for special treatment, based on purpose or membership base. This is partly because the sheer numbers of corporations incorporated under the Corporations Act (estimated at some 1.2 million) make such administrative differentiation administratively unfeasible, but it also partly reflects the corporate philosophy of equal treatment and non-intervention in the marketplace underlying the Act itself.[135]

381 Based on the assessment of the functions and features of ACA Act corporations, the two company types most directly comparable to ACA Act corporations are small proprietary companies and companies limited by guarantee.

Small Proprietary Companies

382 A proprietary company is a company that is registered as a proprietary company under the Corporations Act. A proprietary company must:

- be limited by shares or be an unlimited company with share capital;

[135] See Submission by ASIC

- have no more than 50 non-employee shareholders (s113); and
- not invite the public to invest in its shares.

383 A proprietary company is a *small* proprietary company if it satisfies at least 2 of the following paragraphs (otherwise it is treated as a large proprietary company):

- the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than $10 million;
- the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $5 million;
- the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

384 As with all Corporations Act corporations, small proprietary companies are only required to have one member/shareholder.

385 A significant feature of small proprietary companies is that they have very limited reporting requirements, and are not required to hold AGMs. (The reporting requirements of small proprietary companies are discussed in more detail in Chapter 15 C).

386 The profits of small proprietary companies are distributed between the shareholders on the basis of the rights conferred by the shares. Different classes of shares can carry different voting rights and different rights to income. The shares can be transferred, bought and sold, subject to the prohibition on fundraising through inviting public investment in shares.

387 It is again worth noting that probably only the 1% of ACA Act corporations which permit profit-sharing between members currently approximate this model.

388 A significant number of ACA Act corporations would also be excluded from incorporation as a proprietary company on the basis that large, representative membership bases are common in Indigenous corporations, whereas proprietary companies are limited to a maximum of 50 shareholders.

Public Companies Limited by Guarantee

389 A public company is defined in the Corporations Act as any company other than a proprietary company.[136] There are therefore no limits based on number of members, turnover, asset base or numbers of employees.

390 Public companies limited by guarantee are companies which limit the liability of members to an agreed amount set out in the constitution[137] (as opposed to companies limited by shares, where a shareholder's liability is limited to the value of the shares held by them). Because of this feature, companies limited by guarantee are commonly used for the incorporation of charities and non-profit organisations.[138]

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136 *Corporations Act* Pt 1.2 section 9 "Dictionary"

137 Ibid.,

138 Lipton, P. Herzberg, A. 2000, p.59

391 Not being based around shares, the membership of companies limited by guarantee is based on a membership list, with the constitution setting out the process for how new members may be admitted. In this respect, public companies limited by guarantee are very similar to the structure of ACA Act corporations. However, unlike under the ACA Act, there is no restriction on corporations being members.

392 In recognition of the fact that public companies limited by guarantee are often established as charities or non-profit organisations, the Corporations Act applies significantly reduced annual return lodgement fees ($36 as opposed to $900) for "special purpose" companies, which prohibit the distribution of income to members.[139]

393 The reporting requirements for all public companies are very high. These are discussed in more detail in Chapter 15.

394 It is worth noting that 99% of ACA Act corporations are functionally and structurally equivalent to public companies limited by guarantee or corporations incorporated under the State Association Incorporation Acts.

(2) State Association Incorporation Acts

395 As will be noted in the discussion in the next section below, the specific requirements for incorporation of associations under the various State Association Incorporation Acts varies from jurisdiction to jurisdiction, as do many of the other essential features of the Acts (such as directors' duties, reporting requirements, regulator's powers, etc). It is therefore not possible to set out "the features" of a State Association Incorporation Act, as they are all different. Nonetheless, some general features common to most of the statutes are set out below. For a more detailed comparison of aspects of the NSW, ACT and WA Acts, refer to the Second Report (included as Appendix D), and the comparative tables attached to that Report.

396 Association incorporation legislation is intended to provide a simple means for associations of persons formed for social, sporting or community purposes.[140] The primary benefits of incorporation are:

(i) the conferral, upon the association, of a single legal personality with perpetual succession; and

(ii) the limitation of the liability of members for the debts of the association.

397 In these respects, the State Association Incorporation Acts are very similar in purpose and effect to the ACA Act and those provisions of the Corporations Act relating to public companies limited by guarantee.

398 Other "typical" features of the State and Territory Association Incorporation Acts include the following:

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139 *Corporations (Fees) Regulations 2001* item 7

140 Ford, HAJ. Austin, RP., Ramsay, IM. *Ford's Priniciples of Corporations Law 10th ed.* (hereafter referred to as *Ford's Principles of Corporations Law)*, 2001, p.17

- The legislation generally requires a minimum membership of 5, although this is typically not limited to natural persons and can include corporations.[141]
- The legislation generally does not permit corporations that permit the distribution of profits to members. It also often limits eligibility by the purpose - for example permitting charitable, social, sporting, educational or religious purposes, but prohibiting incorporation of corporations which are primarily formed for the purposes of engaging in trade (even if the profits are not shared by members).[142]
- Further, limits are sometimes set on turnover of corporations incorporated under State Association Incorporation Acts, or they may provide a discretion to the regulator to refuse to incorporate an association based on its turnover or other characteristics, or to require such corporations to transfer to the Corporations Act as public companies limited by guarantee.[143]
- Reporting requirements are not as comprehensive as for companies limited by guarantee under the Corporations Act, and may in fact be less onerous than under the ACA Act.[144] Several State Acts adopt a tiered approach to reporting, imposing more comprehensive requirements for larger corporations (defined by turnover).[145]
- The incorporation and ongoing costs and penalties for breach of provisions of the Acts are generally much lower than under the Corporations Act, although they vary substantially.[146] However, they are still higher than the ACA Act costs and penalties.
- Scope for regulatory intervention in the management of corporations by the regulator is generally very limited.
- On the whole the legislation adopts a permissive approach to the corporate constitution, but not as permissive and flexible as the Corporations Act. Typically, constitutions will be required to contain a number of compulsory features.[147]

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141 *Associations Incorporations Act 1984 (NSW)* section 7 (NSW Act); *Associations Incorporations Act 1987 (WA)* section 4 (WA Act); *Associations Incorporations Act 1991 (ACT)* section 14 (ACT Act)

142 NSW Act section 4; WA Act section 4; ACT Act section 14

143 NSW Act section 10

144 NSW Act sections 26,27; WA Act section 5; ACT Act sections 72, 74

145 ACT Act sections 74, 76

146 See comparisons in the Second Report of this Review, at Appendix D.

147 NSW Act section 11; WA Act section 16, schedule 1; ACT Act sections 31, 32

C. CAN THE SPECIAL INCORPORATION NEEDS OF INDIGENOUS PEOPLES BE APPROPRIATELY CATERED FOR THROUGH ADMINISTRATIVE ASSISTANCE, IF THEY WERE INCORPORATED UNDER GENERAL INCORPORATION STATUTES?

399 In light of the general features of Corporations Act and State Association Incorporations Act corporations discussed above, can a combination of these incorporation statutes, combined with special regulatory assistance provided by a transformed ORAC, adequately address the "special incorporation needs" of Indigenous people if the ACA Act were to be discontinued as an incorporation statute?

400 This Section considers the suitability of the Corporations Act and the State Associations Incorporation Acts as alternative incorporation regimes for current ACA Act corporations, in light of the special needs and features of these corporations, which were discussed in Part 3. Specifically, this Section considers the capacity of other incorporation statutes to:

- meet the special incorporation needs of Indigenous corporations relating to the socioeconomic status of the directors and members;
- meet the special incorporation needs of Indigenous corporations relating to cultural values and practices; and
- accommodate the special nature of the functions of Indigenous corporations currently incorporated under the ACA Act.

(1) Capacity of other incorporation statutes to meet the special incorporation needs of Indigenous corporations relating to the socioeconomic status of the directors and members

401 The low levels of formal education, low employment and the nature of that employment (resulting in poor development of company management skills), lack of access to legal services, and language difficulties all make the complexity of alternative incorporation statutes a significant issue. Highly complex reporting requirements and legislative provisions are likely to be unsuitable for many Indigenous groups, particularly those in remote areas.

402 Where the legislation and reporting requirements are complex, the provision of appropriately targeted special regulatory assistance should be able to assist directors of Indigenous corporations meet these requirements. However, that will only be of limited effectiveness, and it is probable that there would need to be some degree of flexibility in the way the corporate regulator responded to problems of non-compliance by Indigenous corporations (the reasons for this are discussed in detail in Chapter 11, Section C).

403 In addition, because of their socioeconomic status, *members* of Indigenous corporations are likely to be particularly vulnerable. While special regulatory assistance may address some of the problems faced by *directors* of Indigenous corporations, assisting members to protect their rights only through educative means is much more problematic.

404 The costs of these alternative incorporation statutes must also be considered. Many small Indigenous corporations which do not receive government funding or other sources of

income (such as passive land-holding corporations) would find it difficult to meet high incorporation and ongoing costs (such as costs associated with lodgment of annual returns).

405 Some of these issues are explored in light of the Corporations Act and State Associations Incorporation Acts below.

Corporations Act

406 As noted above, the principal corporate vehicles likely to be available under the Corporations Act to ACA Act corporations are small proprietary companies and companies limited by guarantee. The capacity of each of these vehicles to accommodate the special socioeconomic needs of the members and directors of ACA Act corporations is considered in turn below.

Small Proprietary Companies

407 The provisions relating to small proprietary companies in the Corporations Act are very straightforward. The Act contains a relatively easy to use plain-English "Small Business Guide" for small proprietary companies. Small proprietary companies have very few reporting requirements, being exempt from annual reporting requirements and the obligation to hold AGMs. In addition, the Corporations Act has abolished the doctrine of *ultra vires* and introduced provisions for the validation of procedural irregularities. Those will be of assistance where there are minor instances of departure from the strict requirements of the Act or the corporation's constitution.

408 These features would all at first glance appear to make small proprietary companies an ideal vehicle for incorporation of Indigenous corporations. However, a closer examination indicates that this may not in fact be the case.

409 One reason for this is that incorporation and ongoing costs for proprietary companies are relatively high. For example, the ASIC fee for incorporation of a proprietary company is $740, and there is an annual $200 lodging fee for annual returns.

410 In addition, timeframes for compliance with reporting requirements are strict and inflexible (largely because the processes are automated), and the penalties for failure to comply are much higher than under the ACA Act. For example, notices of changes to office holders, changes of address, amendments to the company constitution must all be lodged within 14 days of the event. Late fees of $60 apply if the notice is received outside this time, and $240 if more than one month late. The same late fees apply if annual returns are not lodged in time. Applications for exemptions to reporting requirements cost $120, and applications for extension to the time for holding AGMs cost $30.

411 The general inflexibility of the timeframes could disadvantage Indigenous corporations, particularly those in remote locations where fluency in English is more limited, there are lower skill levels, postal addresses are problematic, and postal services at times irregular.

412 One submission to the Review noted that deregistration processes under the Corporations Act are automatically commenced if annual returns are not lodged and there is no response to a follow-up letter. The submission expressed concern that "automatic deregistration" could cause serious problems for Indigenous communities where the corporation in

question provides essential community services.[148] The Review Team notes that this is similar to the problem of inappropriate deregistrations under the ACA Act, which adopts the Corporations Act's deregistration regime[149]. However, where the Registrar has a discretion under the ACA Act, the automation of ASIC's processes and sheer volume of corporations effectively removes much of the discretion.

413 ASIC has indicated that it would not consider it to be appropriate or practicable to amend the Corporations Act to modify these costs, timeframes and penalties solely for Indigenous corporations.[150]

414 In small proprietary companies (and all types of Corporations Act corporations) the protection of members rights is left largely to the members themselves, through the provision of statutory members' remedies, and the nature of the corporate constitution as a statutory contract. This presumes that the members will be aware of their rights, and have the capacity to bring actions in Court to enforce them. However, such presumptions simply cannot be applied to the members of Indigenous corporations. External "special regulatory assistance" focussed on education and training is also unlikely to be able to address this problem effectively.

415 Small proprietary companies are also not a suitable vehicle for non-profit corporations performing community services. They are intended for small profit-making businesses, with shares that can be transferred or bought and sold. Small proprietary companies may be appropriate for Indigenous corporations established for such purposes, but as noted in Part 3, Chapter 6, this probably represents only about 1% of all ACA Act corporations. The other 99% are non-profit corporations, the majority of which are performing some kind of community service.

416 For these reasons, a small proprietary company under the Corporations Act is unlikely to be a suitable alternative for most ACA Act corporations, even with the provision of external special regulatory assistance.

Public Companies Limited by Guarantee

417 The vehicle which the Corporations Act provides for non-profit corporations is the public company limited by guarantee. Public companies limited by guarantee have the advantage over small proprietary companies of lower incorporation and ongoing costs: incorporation fees are only $300, and annual return lodgement fees are only $36 for non-profit "special purpose" companies (which would include most ACA Act corporations). However, the same lodgement fees, timeframes and penalties apply in relation to the lodgement of certain documents and notifications, as for small proprietary companies – with the same implications for Indigenous corporations.

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148 Submission by Northern Land Council (NLC), 3 June 2002

149 This is discussed in detail in Part 5, Chapter 11 above.

150 Submission by ASIC, 2 July 2002 p.2 "ASIC does not support amendments to the Corporations Act to create special rules for Indigenous corporations. The Corporations Act will rarely be an appropriate vehicle for the implementation of social or cultural policy objectives…. the Corporations Act is a broad and flexible statute that caters for a very broad, variety of corporations. However it does so by predominantly applying the same rules to all those corporations…"

418 Public companies limited by guarantee enjoy the other benefits of Corporation Act corporations. However, there is no equivalent to the "small business guide" in the Corporations Act for public companies limited by guarantee.

419 The reporting requirements for public companies limited by guarantee are much more comprehensive than the requirements under the ACA Act. It is likely that most small Indigenous corporations would not have the resources or capacity to comply with these reporting requirements given that 52% of all ACA Act corporations already fail to comply with the lesser reporting requirements under the ACA Act. External special regulatory assistance would be likely to only have limited impact on this, given the highly technical nature of the reporting requirements. It could also prove extremely costly, without being particularly cost-effective.

420 The capacity of members to protect their rights under the Corporations Act (as discussed in the context of small proprietary companies above) would also be a significant issue.

State Association Incorporation Acts

421 The alternative to the Corporations Act for many small corporations would be the various State Association Incorporation Acts. The general characteristics of these incorporations statutes have been explained above. The key advantages of the State Association Incorporation Statutes is that, on the whole, they (relative to the Corporations Act):

- are simple and easy to use;
- have straightforward reporting requirements;
- have low incorporation and ongoing costs; and
- are appropriate for non-profit bodies providing community services.

422 However, there are also a number of problems with the State Association Incorporation Acts, for example:

- Many contain provisions requiring corporations above a certain size to transfer to the Corporations Act as public companies limited by guarantee.[151] This threshold level may be set too low for Indigenous corporations, in light of their special incorporation needs.
- There is a significant amount of inconsistency between the different State Association Incorporation Acts, making some less suitable than others for Indigenous corporations.[152]
- The variation between the different State Association Incorporation Acts could also make a national system of assistance and special regulatory assistance unwieldy and expensive.

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[151] The Second Report of this Review, included in Appendix D contains a more detailed description of how this process works and what the thresholds are in a number of jurisdictions

[152] Submission by Minter Ellison Lawyers, 1 May 2002; Aboriginal Lands Trust (Western Australia), 30 April 2002; Submission by Central Lands Council (CLC) April 2002; see also "Review of the Aboriginal Councils and associations Act 1976, Corrs Chambers Westgarth, Supplementary Policy Discussion Paper for 'Option 5'" October 2001, p. 11

- Many of the State Association Incorporation Acts are also out of date, and themselves in need of reform.[153] Some therefore do not offer some of the significant advantages of a modern incorporation statute, such as abolition of the doctrine of *ultra-vires*, voluntary administration processes, or modern statements of directors' duties.[154]

  The effect of repealing the ACA Act and transferring to State Acts could therefore be seen as transferring Indigenous corporations from an out of date Indigenous-specific incorporation regime into a number of out of date incorporation regimes which make no special statutory or administrative provisions for Indigenous corporations, and which vary around the country.

423 A further problem with adoption of the State Association Incorporation Acts is (as it is with the Corporations Act), the availability of measures for members to protect their rights and interests. Most rely on the members accessing the Court system to protect their rights, which as discussed above, is often not suitable for members of Indigenous corporations.[155] Again, this is an issue which special regulatory assistance measures primarily aimed at the boards of such corporations are unlikely to be able to address easily.

Conclusions

424 In light of the above, the Review Team concludes that the Corporations Act alone would probably not provide an appropriate alternative to an Indigenous-specific incorporation statute, even if assistance and special regulatory assistance were to be provided to Indigenous corporations incorporated under it. This is particularly the case for smaller Indigenous corporations.

425 While the various State Association Incorporation Acts provide a more suitable alternative for smaller Indigenous corporations, the lack of uniformity in these statutes would make an assistance and special regulatory assistance regime which attempted to cover them as well as the Corporations Act potentially unwieldy and expensive. Further, many of the State Association Incorporation Statutes are themselves out of date and in need of reform, which also limits their utility. Finally, many State Association Incorporation Act would not be available to Indigenous corporations which are larger than the thresholds for incorporation set in those statutes, yet such corporations would still struggle to meet the requirements of public companies limited by guarantee, even with assistance.

426 Further, under all of these Incorporation statutes, "the special incorporation needs" of the *members* of Indigenous corporations are not well catered for. This is because there is an underlying presumption that members have the capacity to understand, access and make use of the Court system to protect their rights.

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153 Submission by Minter Ellison Lawyers, 1 May 2002; Submission by NLC, 3 June 2002, Submission by Department of Fair Trading (NSW) (DoFT), April 2002; Submission by Department of Consumer and Employment protection (WA) (DOCEP) 23 April 2002

154 Submission by Minter Ellison Lawyers, 1 May 2002 in relation to the Queensland Associations Incorporation Act

155 NSW Act section 16, ACT Act section 49

(2) Capacity of other incorporation statutes to meet the special incorporation needs of Indigenous corporations relating to cultural values and practices

427 This section considers how well the Corporations Act and State Associations Incorporation Acts can accommodate the specific cultural values and practices of Indigenous communities.

Capacity to reflect cultural practices in the corporate constitution

428 One clear advantage which the other incorporation statutes under consideration have over the ACA Act as it currently stands is the permissive approach adopted in relation to the corporate constitution.

429 Problems with the prescriptive approach to the corporate constitution in the ACA Act, and difficulties with the express use of terms such as "Aboriginal custom" in the incorporation statute are discussed in detail in Part 5, Chapter 12.

430 As discussed in that Chapter, the Review Team is of the view that the best approach to enable Indigenous corporations to design "culturally appropriate" corporations is to adopt a highly permissive and flexible approach to the corporate constitution.

431 The Corporations Act in particular provides an extremely permissive approach to the corporate constitution, with its system of replaceable rules. ASIC plays no role in reviewing, checking or approving corporations' rules or amendments to them.

432 In practice, the relevant State regulators of incorporated associations also generally take a very permissive approach, simply checking that provisions covering required topics are included, although some are less permissive and flexible in this regard than the Corporations Act.[156]

433 In this sense at least, both the Corporations Act and the State Association Incorporation Acts are appropriate for the purposes of Indigenous corporations.

Incompatibility with philosophy underlying the regulatory systems of other incorporation statutes

434 Despite the conclusion that the approach to the corporate constitution under the Corporations Act and State Association Incorporations Acts is appropriate for Indigenous corporations, there are other, deeper cultural problems. These relate to the regulatory philosophy underlying these incorporation Statutes.

435 A number of submissions to the Review expressed concerns about the degree of understanding ASIC and State Association Incorporation Act regulators have of Indigenous culture and the special incorporation needs of Indigenous peoples to be able to appropriately regulate them. ASIC and the State regulators also expressed a number of these concerns.

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[156] Submission by NLC, 3 June 2002

436 For example, ASIC noted that it does not have the expertise to deal with complex cultural issues that may arise in relation to the regulation of Indigenous corporations.

437 ASIC also stated that the Corporations Act will rarely be an appropriate vehicle for the implementation of social or cultural policy objectives. While the Corporations Act is a broad and flexible statute that caters for a very broad variety of corporations, ASIC noted that it does so by predominantly applying the same rules to all those corporations, large and small, whatever their nature or purpose, and irrespective of the nature or capacity of their incorporators, members or directors.

438 While ASIC has the power to exempt a person or class of persons from certain provisions of the Corporations Act and to modify the application of such provisions, the Corporations Act does not, and in ASIC's view should not, apply special rules to corporations based upon the nature or origin of the corporation or its incorporators, members or directors. Assuming Indigenous peoples have special incorporation needs, these needs should be met outside of the statutory requirements in the Corporations Act.

439 Various regulators of State Association Incorporations Acts expressed similar concerns about their lack of capacity to effectively understand and deal with Indigenous corporations.

Conclusions

440 Ironically, because of the permissive approach to the corporate constitution adopted in the Corporations Act, and to a lesser extent the State Association Incorporation Acts, these other statutes arguably provide a much more "culturally appropriate" framework for incorporation than the ACA Act does at present.

441 However, there is no specific expertise within the relevant regulators of these statutes in dealing with Indigenous corporations, and the statutes themselves treat all corporations equally, with little capacity for flexibility in dealings with Indigenous corporations.

(3) Capacity of other incorporation statutes to accommodate the special nature of the functions of Indigenous corporations currently incorporated under the ACA Act

442 The final question is the suitability of the Corporations Act and State Association Incorporation Acts in light of the special functions performed by Indigenous corporations. As noted in Part 3, Chapter 6, a significant bulk of Indigenous corporations are providing community services, and often with public money. That Chapter also discussed the particularly important role of Indigenous corporations within many Indigenous communities. Safeguarding the ongoing viability and survival of these corporations is therefore often critical to Indigenous communities.

443 The previous two sections considered several ways that this viability and continuity of services can be assisted, for example:

- improving corporate governance through special regulatory assistance;

- flexibility in the way reporting requirements and penalties are enforced, to ensure that non-compliance does not lead straight to deregistration or winding-up;
- permissiveness in the approach to the corporate constitution, to encourage relevant and appropriate design of constitutions, thereby laying the foundations for good corporate governance.

444 However, these alone will not always suffice, and it may be appropriate that the corporate regulator takes action to intervene in the affairs of the corporation in certain limited circumstances. (Intervention in the management of corporations is discussed in detail in Part 5, Chapter 11).

445 This subsection considers in turn:

- the capacity for appropriate intervention in management under other incorporation statutes (which may be required because of the special functions of ACA Act corporations); and
- the appropriateness of reporting requirements under other incorporation statutes in light of the special functions of ACA Act corporations.

Capacity for appropriate intervention in management under other incorporation statutes

Corporations Act

446 Under the Corporations Act, ASIC has relatively broad powers to intervene in the management of a corporation. These include powers to apply to the Court for appointment of receivers and provisional liquidators.[157]

447 ASIC's power to apply to the Court for the appointment of receivers or voluntary liquidators are used relatively rarely in practice, because ASIC generally adopts a very "hands-off" approach to regulation, leaving intervention to creditors.[158] ACA Act corporations are government-funded. Government funding agencies may not monitor funds advanced to such corporations in the same way as ordinary commercial creditors. This may cause weaknesses in the corporate governance system for such corporations.

448 Another concern expressed in submissions to the Review is that ASIC is very much focussed on targeting very large corporations in its investigations, such that Indigenous corporations would rarely qualify for investigation, regardless of the conduct of officers.[159] And once any such intervention is commenced, ASIC would again be required to treat the Indigenous corporation the same as any other non Indigenous corporation, without regard to the role the corporation may be playing in the community it serves.

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[157] Under section 12GN of the ASIC Act 2001 (Cth), ASIC may apply to the Court for appointment of a receiver, in certain circumstances. These mechanisms are discussed in Part 5, Chapter 11 above.

[158] As discussed in Part 5, Chapter 11, this is generally also an appropriate approach for Indigenous corporations, but intervention may in some circumstances be necessary to ensure the continuity of essential services, where creditors and funding bodies have failed to take any action

[159] Submission by NLC, 3 June 2002

State Association Incorporation Acts

449 Similar arguments apply to State Association Incorporation Acts, although many of these completely lack means for managerial intervention (other than winding up and deregistration).[160]

Possible "supplementary" regulatory role for successor to ORAC?

450 As can be seen from the discussion above, if the ACA Act were to be repealed, there would be a regulatory "gap" because of the lack of capacity for appropriate regulatory intervention under other incorporation statutes. An option considered by the Review Team to fill this gap is the reservation of some regulatory powers (such as the power to appoint an administrator) to ORAC or its successor.

451 A number of practical difficulties were identified with this approach, including:

- Determining the scope and nature of this power in the absence of an actual (single) incorporation regime;
- Coordinating the exercise of these supplementary regulatory powers with the regulators of other incorporation statutes, who have the primary responsibility for the administration of their respective statutes.

452 In its submissions to this Review, ASIC was firmly opposed to any such proposal, largely for the reasons outlined above.[161] The WA Department of Consumer and Employment Protection, which administers the *Associations Incorporation Act 1987* (WA), was also opposed, because of the potential for conflict between the two regulatory roles.[162] Some other State regulators expressed similar concerns[163], while others did not believe that there would be significant problems, because of their own lack of capacity to take regulatory intervention.[164] Several Indigenous peak bodies noted the problems outlined above and opposed the retention of a special regulatory assistance role for ORAC in the event the ACA Act were discontinued as an incorporation statute.[165] A number of other submissions also expressed concerns.[166]

453 In light of the above, the Review Team has concluded that the retention of specific statutory regulatory powers by ORAC, to "supplement" the shortcomings in other incorporation statutes, would not be feasible.

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160 Submission by Queensland Office of Fair Trading, within the Department of Toursim, Racing and Fair Trading, undated

161 Submission by ASIC, 2 July 2002, p.5

162 Submission by Department of Consumer and Employment Protection WA (DOCEP), 23 April 2002

163 Submission by Department of Justice, Consumer and Business Affairs Victoria, 23 April 2002

164 Submission by DoFT NSW, April 2002, Submission by ACT Registrar General's Office, 27 March 2002. The proposal was favoured by DAA NSW and Minter Ellison Lawyers for the same reasons.

165 Submission by NLC, 3 June 2002; submission by CLC, April 2002

166 For example submissions by: Department of Indigenous Affairs Western Australia 9 April 2002; Aboriginal Lands Trust Western Australia, 30 April 2002, Department of Aboriginal and Torres Strait Islander Policy (Qld) (DATSIP), Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) 3 May 2002

454 However, the Review Team notes a possible alternative, which may address some of these concerns. This would be to provide the regulator with standing to apply to the Court, in its equitable jurisdiction, for the appointment of a receiver to a relevantly defined class of corporations. This would largely remove the potential for conflict with other regulators (receivers can also be appointed by creditors), and has the advantage of being appointed by and subject to scrutiny and supervision by the Court.

455 However, in light of the conclusions of this Chapter, the Review Team has not considered it necessary to explore this issue in any further detail at this point.

456 Other possible alternatives suggested in submissions to the Review but which have not been explored included delegation of regulatory functions by ASIC and State and Territory regulators in appropriate circumstances;[167] and memorandum of understanding for cooperation with ASIC and State Regulators under which the ACA Act regulator would simply advise other regulators of situations where intervention is required.[168]

Appropriateness of reporting requirements under other incorporation statutes in light of the special functions of ACA Act corporations

457 As discussed in Part 5, Chapter 15, there is a public interest in requiring larger Indigenous corporations, which are likely to be providing important community services, to have quite comprehensive disclosure and reporting requirements, so that there is transparency in their operations to members, service recipients and funding bodies, and so that these stakeholders are kept aware of the general health of the corporation.

458 Under the Corporations Act, the reporting requirements for public companies limited by guarantee are comprehensive, and probably even exceed what is strictly necessary for the purposes outlined above.

459 However, the reporting requirements for small proprietary companies (which require no annual financial, directors' or auditor's reports) would clearly be inadequate for these purposes. If they were instead incorporated as proprietary companies, almost all ACA Act corporations would currently fall under the definition of small proprietary company.[169] This could make it necessary to require that all ACA Act corporations transferring to the Corporations Act transfer as companies limited by guarantee. An exception could be provided for those few ACA Act corporations which make provision for the distribution of profits between members. This approach matches with the general unsuitability of the proprietary company structure to non-profit corporations that are performing any kind of community service.[170] However, it could prove difficult to impose such a restrictive approach.

460 Many State Association Incorporation Acts include reporting requirements similar to those contained in the ACA Act. Again, these requirements vary from jurisdiction to

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167 Submission by NLC, 3 June 2002

168 Submission by Regina Wagner, 15 April 2002

169 The threshold above which proprietary companies are deemed to be large proprietary companies is set at a turnover of more than $10 million, assets of over $5 million, or more than 50 employees.

170 See discussion above in section B

jurisdiction, meaning that there will not be uniform standards. One problem with many of the State Association Incorporation Acts being out of date is that they (like the ACA Act) fail to make appropriate provision for disclosure by directors.

Conclusions

461 The Corporations Act and various State Association Incorporation Acts generally fail to provide reporting and disclosure requirements which appropriately balance the need for a relatively high level of disclosure for larger Indigenous corporations with the need to avoid unnecessarily onerous reporting requirements for smaller Indigenous corporations.

(4) A note on Indigenous corporations currently incorporated under other statutes

462 It has been noted that many Indigenous corporations are already incorporated under various other incorporation statutes, and this has been put forward as an argument that other incorporation statutes do in fact offer a suitable alternative to the ACA Act.

463 While the Review Team agrees that other incorporation statutes may well be appropriate in certain circumstances, the Review Team nonetheless was of the view that it is important to consider this proposition in more detail, and to test its conclusions.

Lack of data and evidence on Indigenous corporations incorporated under other incorporation statutes

464 Fingleton estimated that as many as half of all Indigenous corporations are incorporated under incorporation statutes other than the ACA Act (being a combination of the Corporations Act, State Association Incorporation Acts, and a variety of other statutes including various State cooperative acts). This Review has adopted that figure for want of any other statistics, but considers it to be at best a rough "guesstimate", and is wary of placing too heavy a reliance on it.

465 Unfortunately, it is extremely difficult to find any reliable data on these other corporations and their success (or otherwise) under the other incorporation statutes. This is largely because the other incorporation regimes do not record the race of persons forming a corporation, or of person participating in it as members or directors.

466 The Review Team therefore has only been able to identify the following limited sources of information:

Feedback from mailout

467 In an attempt to gain some insight into the issues facing these corporations, the Review Team identified 345 Indigenous corporations not incorporated under the ACA Act, and sent them brief questionnaires.[171] However, only 24 questionnaires were returned, and of

[171] These were identified through a combination of ATSIC records of funded bodies, and a search of ASIC's register (which includes *Corporations Act* and *State Association Incorporation Act* corporations), using search terms such as "Aboriginal", "Torres Strait Islander", "Indigenous", "CDEP", etc.

these, only 10 provided meaningful feedback. This low level of responses in itself could indicate that such corporations may also struggle with procedural requirements such as the completion of forms, although it could equally simply indicate a lack of interest. The ten proper responses received can hardly be regarded as statistically meaningful (representing only about 0.3% of all such corporations, if Fingleton's calculations were correct).

468 For what it is worth, the experiences under other incorporation statutes of the bodies which provided meaningful feedback appears mixed – about half expressed a desire for the ACA Act to be retained and reformed, and indicated that they would prefer to be incorporated under it if reforms were implemented. The other half indicated that they had no problems with their current incorporation statute (mostly State Association Incorporation Acts), and saw no point in the retention of the ACA Act. Of the remaining 14 corporations which indicated no preference, it may be worth noting that a number of them stated as their primary reason for not incorporating under the ACA Act either the fact that they were incorporated pre-1976, or the fact that they were unaware of the ACA Act. Again this might indicate that the ACA Act would have been preferred, but this is not necessarily the case.

Written submissions to the Review

469 The ATSIC Regional Network Manager for Victoria in his submissions to this Review commented that ASIC and State regulators had badly failed Indigenous corporations.[172]

Fingleton Report case studies

470 Fingleton noted that the case studies undertaken as part of the 1996 Review "demonstrate a low level of awareness of the provisions and compliance requirements of all incorporation legislation".[173] Again, this would indicate that many Indigenous corporations may well have similar difficulties as those incorporated under the ACA Act, except where the reporting requirements are non-existent (for example small proprietary companies under the Corporations Act) or poorly enforced (such as under a number of State Association Incorporation Acts).

ASIC Gazette

471 A crude survey of the ASIC Gazette indicated that between 10 and 15 Indigenous corporations incorporated under the Corporations Act were deregistered in 2001.[174]

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172 Submission by ATSIC (Victorian Network Regional Manager), 27 May 2002

173 *Fingleton Review*, Volume 1, p. 28

174 See ASIC Gazette ASIC31/01 (December 2001), Part 3 – Company Deregistrations, available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/asic31_01_part3.pdf/$file/asic31_01_part3.pdf. The figures were estimated based on a search of terms such as "Aboriginal", "Islander", "CDEP", "Indigenous", and "Native". Obviously non-indigenous corporations were then excluded. This approach will of course miss out any Indigenous corporations which do not carry one of those terms in their name (for example those simply using an Aboriginal or Torres Strait Islander word or name).

Other potential sources

472 One other approach to obtain information (not attempted by the Review Team) might be through the records of funding bodies. However, these records are limited in their scope and are, of course, focussed on the funding grants rather than the corporations to which the grants were provided. They are also scattered across an array of Commonwealth, State and Territory funding bodies. Some Indigenous corporations would receive funding from multiple sources; many others from none, in which case they would not appear on any records.

Drawing Conclusions

473 It is difficult to draw any conclusions from the above, given the paucity of information.

474 For example, it is difficult to draw any conclusions without knowing the characteristics of these corporations incorporated under other incorporation statutes. Their success and survival under other incorporation statutes may owe as much to the particular characteristics of and resources available to these corporations as to the relevant statute. For example, of the 24 corporations which responded to questionnaires sent out as part of this Review, 21 indicated their annual turnover. Of these:

- 4 have an annual turnover of $500,000 to $1 million;
- 10 have an annual turnover of $1 million to $5 million; and
- 2 have a turnover in excess of $5 million.

475 These are all quite large in comparison to the bulk of ACA Act corporations (see Part 3, Chapter 6).

476 Further, it is felt that the continuing existence and survival of these corporations incorporated under other Statutes cannot fairly be used as an argument for the repeal of the ACA Act, given the ACA Act's present deficiencies, and the differences in the ways the different incorporation statutes are administered and enforced. (For example, it may be more a product of the "hands-off" approach and lack of resources of other regulators, and/or lower reporting requirements).

477 In light of available information and drawing on its own professional experience, the Review Team is of the view that the simple existence of Indigenous corporations under other incorporation statutes does not necessarily reflect the suitability of these other statutes for Indigenous corporations.

478 In conclusion, the lack of relevant information means that at present, the existence and status of organisations incorporated under other incorporation statutes cannot meaningfully be used in support of or against any argument for repealing the ACA Act.

(5) Conclusions about appropriateness of other incorporation statutes if the ACA Act were to be repealed

479 In light of all the issues discussed above, the Review Team is of the view that the special incorporation needs of Indigenous peoples probably cannot be appropriately catered for through a combination of other general incorporation statutes and special regulatory

assistance alone. There is therefore a need for a specific incorporation statute to address those special incorporation needs.

D. WOULD THE TRANSFER OF ALL ACA ACT CORPORATIONS TO OTHER INCORPORATION STATUTES BE PRACTICALLY FEASIBLE?

480 It is worth considering the feasibility of the transfer of all ACA Act corporations to other statutes, despite the Review Team's conclusions above that these statutes do not offer an appropriate alternative to Indigenous corporations.

481 There are a number of practical considerations involved, which are discussed below.

(1) Views of Indigenous stakeholders

482 Despite the very limited numbers of responses received from ACA Act corporations, the results showed that nearly two-thirds of those who responded opposed the repeal of the ACA Act.[175] This is consistent with the submissions received from peak Indigenous bodies, including ATSIC, which were unanimously opposed to the repeal of the ACA Act.

483 The clear preferences of such significant stakeholders, and of the subjects of the Review, cannot be easily overlooked.

A note on rights and the *Racial Discrimination* Act

484 In light of the preference of many Indigenous corporations for retaining the ACA Act, concern was expressed as to whether the repealing of the ACA Act could be inconsistent with the *Racial Discrimination Act 1975* (Cth).

485 The Review Team notes that there is in fact no legal "right" to a separate Indigenous incorporation statute under Australian law. Further, current problems with the ACA Act arguably disadvantage Indigenous corporations. Replacing the ACA Act with a range of other (administrative) special measures aimed at assisting Indigenous corporations would therefore be consistent with the Racial Discrimination Act and the races power under the Constitution. Even without the additional special measures, simple repeal of the ACA Act would be unlikely to be unconstitutional or in breach of the *Racial Discrimination* Act.[176]

486 However, this of course does not alleviate the political and moral issues which would be involved with repealing the ACA Act against the express wishes of Indigenous Australians.

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[175] For a full discussion of the results of the feedback received from ACA Act corporations, see section 4.3.3 of the *Fourth Report – Summary of Consultations, Questionnaire Responses and Submissions*, included in Appendix F.

[176] This issue and the legal arguments surrounding it are explored in detail in the Second Report – *Policy Discussion Paper for 'Option 5'* , included in Appendix D.

(2) Capacity and views of ASIC and State Regulators

487 It is significant to note that ASIC and the State Association Incorporation Act regulators *unanimously* opposed the repeal of the ACA Act and transfer of ACA Act corporations to their respective statutes. In combination with the strong views of ACA Act corporations and peak bodies, this in itself is a very persuasive ground for retaining the Act. Without the support of these two stakeholder groups, measures such as repealing the ACA Act would seem to be politically unfeasible.

488 However, in addition to the political issues, there are also a number of technical (legal) problems with requiring ACA Act corporations to transfer to these statutes of general incorporation, many of which have been discussed above.

489 In terms of the capacity of these regulators, the absence of expertise in dealing with Indigenous people and the inability to take special action to accommodate the special incorporation needs of Indigenous people has also been discussed above.

490 A further practical issue is the capacity of these regulators, in particular the State regulators, to physically cope with the potential increase in the number of corporations falling under their jurisdiction. Most of the State regulators noted in their submissions that they are currently under-resourced and that transfers of ACA Act corporations would place them under severe strain[177] (for example, the Department of Consumer and Employment Protection (WA) noted that it has only three staff to administer 18,000 incorporated associations). A number of submissions from other parties also raised concerns with the capacity of State Regulators to properly administer additional Indigenous corporations.[178]

491 Nonetheless, it may be possible to minimise this impact, by introducing appropriate transitional arrangements. For example, presuming that 75% of all current ACA Corporations were to transfer to the State and Territory Association Incorporation Acts over the course of 3 years, this would mean a total of 675 corporations transferring per year. Those would be divided between the seven State and Territory jurisdictions, although with some likely to receive more than others – for example Victoria, Tasmania and South Australia have relatively few ACA Act corporations. Even if all 675 were to be split between the remaining four jurisdictions, it would make for an influx of (on average) only 169 additional incorporations per year over the three years. (In the example of WA noted above, this represents less than a 1% addition to the total numbers of corporations.)

492 However, there are also other practical problems with transfer arrangements.

(3) Transfer arrangements and grandfathering

493 If the ACA Act were to be repealed as an incorporation statute, it would probably necessitate transferring all existing ACA Act corporations across to the Corporations Act and State and Territory Association Incorporation Acts, probably over the course of 3-5 years. Although problematic, "grandfathering" existing ACA Act corporations (allowing

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177 Submission by DOCEP (WA), 23 April 2002, Submission by Queensland Office for Fair Trading, undated

178 Submission by Lindsay J Roberts, 26 April 2002, Submission by Mervyn Sullivan- De Castro & Sullivan, 22 April 2002

them to continue to function under the ACA Act as it stands, but not letting any new corporations set up) would be necessary as a transitional measure, but would probably not be viable on an ongoing basis. This is because existing corporations would continue to operate under the unreformed ACA Act for an indefinite period, and the necessary changes to the Act would never be made. It would also mean ORAC would have to continue to devote substantial resources to its current role, and would not be able to dedicate those resources to special regulatory assistance. These issues are explored in some detail in the Second Report of this Review, included in Appendix D.

494 In its submissions, ASIC noted that its experience with transitional and "grandfathering" arrangements of this kind (for example under Schedule 4 to the Corporations Act) is that they are complex, resource-intensive and time-consuming to develop and operate.

495 These arrangements would be particularly complex and difficult where it would involve coordinating the transfer of ACA Act corporations to the Corporations Act and seven different State and Territory Association Incorporation Acts – a total of eight incorporation statutes under eight different jurisdictions. This would also require the full cooperation and support of all relevant governments, which would presumably be guided in part by their relevant regulatory body. (As noted above, ASIC and all State regulators are unanimously opposed to the repeal of the ACA Act and transfer of ACA Act corporations to the Corporations Act and State Association Incorporation Acts.)

496 There would also presumably be the need to come to a range of financial arrangements between the Commonwealth and the States if a significant number of ACA Act (Commonwealth) corporations were effectively required by Commonwealth legislation to transfer to State statutes.

497 Many submissions to the Review also expressed concerns with the potential for compulsory transfers to cause significant disruption to the Indigenous corporations currently incorporated under the ACA Act, and also for funding bodies dealing with them.

(4) Coordination of special regulatory assistance functions

498 One of the features of any proposal to repeal the ACA Act is that the "special measure" represented by the Act would be replaced with an "office of special regulatory assistance and assistance" for Indigenous corporations.

499 While submissions to the Review were almost unanimous in their support for ORAC or its successor adopting a special regulatory assistance role, there were a number of concerns expressed as to how this would function if the ACA Act were to be repealed. These are outlined below:

Resource implications

500 If the ACA Act were to be repealed as an incorporation statute, this successor to ORAC would need to develop expertise in dealing with the Corporations Act as well as all seven State Association Incorporation Acts. This would clearly be much less cost-effective and efficient than a special regulatory assistance body focussed on a single incorporation statute. Several submissions queried whether, given the complexity of providing specialist

advice under all the different statutes, the regulator would in fact be able to dedicate any more resources to actual special regulatory assistance than it does currently.[179]

501 This is a valid concern, and is a matter that would have to be considered in the costing of any proposal to repeal the ACA Act. It may be possible to achieve some cost-efficiencies by outsourcing some of the functions to organisations with particular expertise with these other incorporation statutes; however, it may prove difficult to find such organisations which also have expertise in dealing and communicating with Indigenous groups.

Coordination of special regulatory assistance and regulatory powers

502 ASIC and several State regulators expressed concerns that it would be inappropriate to have advice being given by one statutory body in relation to legislation which is administered by another statutory body.[180] The NSW Department of Fair Trading expressed a concern that it could lead to a fragmented approach, whereby the role of a regulator and that of support and development would be undertaken by two broadly different jurisdictions. This fragmented administration of functions could end up being unsuitable for addressing the "special incorporation needs" of Indigenous peoples.[181]

503 The Review Team is of the view that, while valid, a number of these concerns may be overstated. It should be possible to address a number of them by clearly defining the specific roles and functions to be played by the regulator, and coordinating and delineating functions with other regulators through appropriate MOUs.

(5) Amendments to the *Native Title Act* and *Aboriginal Land Rights (Northern Territory) Act.*

Native Title Act

504 Any proposal to repeal the ACA Act and require all ACA Act corporations to transfer to the Corporations Act or relevant State Association Incorporations Act would conflict with the requirements under the *Native Title Act* for NTRBs and PBCs to be incorporated under the ACA Act.

505 The Review Team examined this issue in some detail, and concluded that it would be possible to address these requirements without the need for amendment to the Native Title Act itself. Instead, they could be addressed by regulation. The requirement for NTRBs to be incorporated under the ACA Act could be addressed by introduction of a new regulation prescribing corporations incorporated under other statutes (and possibly with special features) for the purposes of s201B(1)(c) of the Native Title Act. The requirement for

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179 See the Fourth Report of this Review - *Summary of Consultations, Questionnaire Responses and Submissions*, at heading 5.2

180 Submission by ASIC, 2 July 2002; Submission by DoCEP WA, 23 April 2002

181 Submission by DoFT NSW, April 2002

PBCs to be incorporated under the ACA Act is currently contained in the PBC Regulations, and could be addressed by amendment to those regulations.[182]

506 However, this would require the range of other issues surrounding the PBC Regulations to also be dealt with in a way that is consistent with the repeal of the ACA Act. At present, it is understood that a number of the options being considered by the current ATSIC Review of the PBC Regulations do still envisage the ACA Act as an important part of the PBC system (one option including insertion of a separate Part into the ACA Act to attempt to address a number of current problems with PBCs).

507 As a matter of practical and political reality, the complexity of the issues relating to PBCs, and the political sensitivity of any proposed amendments to the Native Title Act, make it unlikely that the Native Title Act and PBC Regulations will be amended any time soon to remove the requirement for incorporation under the ACA Act. On this basis, several submissions, including from the NNTT, have suggested that the ACA Act is likely to have to remain the vehicle for incorporation of such corporations for the foreseeable future.[183]

Aboriginal Land Rights (Northern Territory) Act

508 The repeal of the ACA Act would also require amending the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("the **NT Land Rights Act**"), which requires certain royalty associations to be incorporated as ACA Act corporations. In addition, for certain purposes, the NT Land Rights Act only permits land trusts to transfer interests vested in them to an Aboriginal person, an ACA Act corporation or an Aboriginal Council.[184] It is noted that the NT Land Rights Act is also currently the subject of highly politically sensitive review and reform proposals, and the nature of those issues could also potentially make additional amendments at this time difficult.

(6) Conclusions in relation to practical issues

509 The Review Team is of the view that, although the practical difficulties involved with implementing transfer of all ACA Act corporations to other incorporation statutes are not insurmountable, they are nonetheless extremely complex, and would require significant resources and the goodwill and cooperation of the States. There are also serious political considerations if such an approach were to be undertaken against the will of the ACA Act corporations and peak bodies.

E. CONCLUSIONS

510 The Review Team concludes that it would not be technically possible to properly accommodate the special incorporation needs of Indigenous peoples through a combination

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[182] These issues are discussed in some detail in the Second Report – *Supplementary Policy Discussion Paper for Option 5*, in Part C, section 3.7

[183] Submission by NNTT 24 June 2002; Submission by LRNTC, undated; Submission by Yamitiji Land and Sea Council, 20 May 2002

[184] see *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* sections 19(2), and 35..

of other general incorporation statutes and special regulatory assistance. In addition, there would be a number of significant practical and political difficulties in attempting to do so, and the resources required would probably be better spent on special regulatory assistance and administrative measures under a reformed ACA Act.

511 The Review Team therefore concludes that the ACA Act should be retained at present.

CHAPTER 9
THE SCOPE OF THE STATUTE

A. AN ACT FOR SMALL CORPORATIONS?

512 As noted in Chapter 3 the original intent of the ACA Act was to provide a flexible, inexpensive and administratively simple system of incorporation for Indigenous people.

513 However, as was also noted in Chapter 3, the range of purposes for which ACA Act corporations have been formed, and the sizes of some ACA Act corporations, have both grown enormously since the enactment of the Act. This has placed significant strains on the regulatory system, which was not intended to serve this purpose, and has also placed strains on the corporations incorporated under it.

514 If the ACA Act is to be retained, an obvious question is therefore whether it should be returned to its original purpose of providing a simple and flexible incorporation statute for small Indigenous corporations.

515 On first consideration, this suggestion holds a certain appeal. For example:

- It is arguably the smaller ACA Act corporations which are most in need of a simple regulatory regime focussed on special regulatory assistance for directors.
- This approach would provide a nationally uniform system, avoiding many of the problems associated with the varying approaches and standards of the different State Association Incorporation Acts.
- A nationally uniform incorporation statute for small Indigenous corporations would also be much more cost-effective to provide special regulatory assistance for. It would also remove problems of potential conflict between a Commonwealth-run special regulatory assistance body and diverse State regulatory bodies.
- It would potentially avoid the need to amend the Native Title Act and/or PBC Regulations in relation to the requirement for PBCs to be incorporated under the ACA Act.

Most of these issues are addressed in detail elsewhere in this Report, and so are not reconsidered in detail here.

516 However, on closer examination, there are a number of significant potential difficulties with such a proposal. For example:

- While small corporations may have the most need in terms of special regulatory assistance for *directors*, the *members* of larger ACA Act corporations are still in need of special measures to assist them to protect their rights. In addition, it seems likely that the directors of many "larger" ACA Act corporations are also in need of special regulatory assistance.

- Special regulatory assistance is not likely to be able to address many of the specific cultural values and practices brought to the management of Indigenous corporations by their members and directors. These issues will nonetheless potentially affect all ACA Act corporations, irrespective of size.
- In some ways, a special Indigenous-specific regulatory system is even more important for *larger* ACA Act corporations than for smaller ones, because of the fact that they are likely to be providing essential services to the communities in which they operate, using public monies.
- In light of these competing special incorporation needs, it would be very difficult to determine what an appropriate "cut-off" point for the Act should be.
- Depending on the "cut-off" level, many ACA Act corporations would effectively be required to transfer to the Corporations Act as public companies limited by guarantee. This entails comprehensive technical reporting requirements that all but the largest and best resourced ACA Act corporations may find difficult to meet. The alternative would be to enable such corporations to transfer to the State Association Incorporation Acts, but this would then effectively neutralise many of the practical advantages discussed above.
- Complex "grandfathering" and transitional requirements may still be necessary if significant numbers of ACA Act corporations were required to be transferred to alternative incorporation Statutes.
- Depending on where the "cut-off" is drawn, the reformed Act might not be able to include all PBCs. In addition, NTRBs would be unlikely to fall into a "small" category for an incorporation statute focussed on small and simple corporations.
- Finally, the bulk of feedback from ACA Act corporations and peak bodies seems to indicate that there is a desire for an incorporation statute which is broadly inclusive and open to all Indigenous corporations, irrespective of size or function. Requiring transfer of ACA Act corporations which do not fit within the scope of an Act aimed at "small" corporations would therefore be likely to meet with strong resistance from many Indigenous corporations and groups.[185] (Some of this feedback is considered in more detail in the next section below.)

Again, most of these issues are addressed in detail elsewhere in this Report, and so are not reconsidered in detail here.

517 In light of the above, the Review Team is of the view that many of the advantages of reforming the ACA Act to cater only for small ACA Act corporations are largely illusory, and implementation could also face a number of serious practical difficulties. On that basis, the Review Team concludes that this proposal would not be appropriate.

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[185] See, for example submissions by: Office of the Registrar of Aboriginal Corporations, 9 May 2002; NSW Department of Aboriginal affairs (DAA), 24 April 2002; Department of Indigenous Affairs Western Australia (DIA), 29 April 2002

B. THE PREFERRED APPROACH: A BROADLY INCLUSIVE ACT

(1) Outline

518 An alternative to focussing the Act on small Indigenous corporations, and requiring all others to transfer to the Corporations Act or State Association Incorporations Acts, would instead be to "raise the bar" so that the Act is broadly inclusive, but excludes the particularly large corporations. These large corporations would be required to transfer to the Corporations Act as companies limited by guarantee.

519 There are several reasons for limiting this transfer out of the ACA Act to public companies limited by guarantee (as opposed to State Association Incorporation Acts):

- First, the size "cutoff" levels contained in many State Association Incorporation Acts, would probably mean that many would simply not be available as alternative incorporation statutes for "large" Indigenous corporations of the kind and size contemplated.
- In addition, it would be desirable to have a single alternative, because of the complexity of providing for transfer to multiple incorporation statutes across many jurisdictions.
- Finally, as discussed below, the specific reporting requirements for public companies limited by guarantee, and ASIC's specialist technical capacity to deal with them, are one of the major advantages of public companies limited by guarantee.

520 The approach suggested here would enjoy many of the advantages of the proposal to focus on "small" corporations described above, while avoiding many of the disadvantages.

521 Any approach to reform of the ACA Act will of course involve balancing competing considerations – legal, practical and political. No one approach is likely to be able to address all of these. The Review Team is of the view that this approach achieves the best balance, with the advantages outweighing the negative considerations. Nonetheless, we note that ORAC and Steering Committee have flagged the issue of compulsory transfers of large ACA Act corporations to the Corporations Act as a matter for further internal deliberation, due to the potential legal and practical complexities. The Review Team supports this approach.

(2) Discussion of relative advantages and disadvantages

522 Reforming the ACA Act to provide a broadly inclusive Indigenous-specific incorporation statute, but which excludes particularly large corporations, has the following advantages:

- It would enable measures to be implemented recognising the particular vulnerability and needs of *members* of ACA Act corporations, as well as the needs of directors. The vulnerability and needs of members of ACA Act corporations are likely to apply irrespective of the size of the corporation, and this proposal would cover most sizes of ACA Act corporations. The need for special measures for directors are likely to be less in large well resourced corporations than in small to medium sized corporations.

- Particularly large ACA Act corporations are likely to be providing important community services and are also likely to be operating more as comparable commercial corporations. There is therefore a strong argument that such corporations should be required to meet the more comprehensive disclosure reporting requirements imposed on public companies limited by guarantee under the Corporations Act. These large corporations are also more likely to have the resources to comply with these higher reporting requirements, which should therefore not prove too onerous.
- Where ACA Act corporations are functioning as large commercial operations, the staff of ORAC is less likely to have the capacity to monitor and regulate the activities of these corporations, whereas ASIC has the resources and expertise. It would make more sense for ORAC to specialise in dealing with the bulk of ACA Act corporations, which are not acting as large and complex commercial entities. ASIC does not have the skills and capacity to meet the "special incorporation needs" of these smaller corporations.
- In can be argued that where ACA Act corporations are acting as commercial entities, it would be appropriate for them to do so within the "mainstream", with all other corporations. This would address concerns expressed over the risk that a completely separate Indigenous incorporation statute would perpetuate a culture of dependence on special measures.
- There would be no need for complex transitional and grandfathering provisions, because the numbers of corporations transferring would be limited, and a reformed ACA Act itself could be used as the transitional mechanism.
- This approach would provide a nationally uniform system, avoiding many of the problems associated with the varying approaches and standards of the different State Association Incorporation Acts.
- It would also avoid the risk of placing additional resourcing pressures on the various State regulators, if significant numbers of Indigenous corporations were to transfer to the State Association Incorporation Acts. In fact, it could even *alleviate* some of those pressures if provisions were introduced to permit voluntary transfer of state associations into the reformed Act.
- A nationally uniform incorporation statute for Indigenous corporations would also be much more cost-effective to provide special regulatory assistance for than if ACA Act corporations were dispersed between eight different Commonwealth and State statutes. It would also remove problems of potential conflict between a Commonwealth-run special regulatory assistance body and diverse State regulatory bodies.
- This proposal would mean that a reformed ACA Act could accommodate *all* PBCs and NTRBs under the Native Title Act and PBC regulations, as well as relevant corporations under the *Aboriginal Land Rights (Northern Territory) Act*. This would avoid any need for specific amendments to any of these Acts or regulations.
- Finally, this approach would address the demand amongst most Indigenous stakeholders for a broadly inclusive Indigenous incorporation statute and specialist regulator. It would therefore not be likely to involve the same political risks as repealing the ACA Act or limiting it to small corporations.

523 Of course, there are disadvantages to this approach as well.

- The primary disadvantage is that the special vulnerability of the members of the transferred corporations would not be addressed, as it would not be possible for the Registrar to take action on their behalf where corporations are incorporated under the Corporations Act. Similarly, the need for "last resort" regulatory intervention by the Registrar to try to save failing corporations would also not be available.

524 It is hoped however that the risks to such members would be minimised through a more robust corporate governance and disclosure and reporting system required of public companies limited by guarantee.

525 In addition, it would be expected that creditors and, in particular, funding bodies, would take a much more robust approach to protecting their financial interests in such corporations, including through the appointment of receivers and managers where appropriate. This would also provide some protection to members and ensure the continuity of services.

C. CONCLUSIONS

526 The Review Team is of the view that the advantages of requiring particularly large Indigenous corporations to comply with the more comprehensive reporting requirements of public companies limited by guarantee, and the specialist expertise of ASIC in regulating these requirements, outweigh the disadvantages. This approach would allow the development of a broadly inclusive specialist Indigenous incorporation statute and regulator, in line with the functional issues discussed in Part 5 of this Report.

527 Part 6 of this Report contains a detailed discussion of how such a statute might work, as well as how the transfer and transition arrangements would work (including the setting of the "cut-off" levels).

528 Again, however, the Review Team notes that ORAC and the Steering Committee will undertake further internal deliberation in relation to the proposal to require compulsory transfer of ACA Act corporations to the Corporations Act in certain circumstances.

PART 5

REFORMING THE ACA ACT:

DISCUSSION OF ISSUES

CONTENTS

CHAPTER 10
INTRODUCTION AND KEY CONCEPTS

A. OVERVIEW

(1) Purpose of Part 5

529 In the previous Part, the conclusion was reached that the special needs of Indigenous incorporators need to be addressed through a separate broadly inclusive Indigenous incorporation statute. The ACA Act already provides such a statute, however, it is in need of reform to ensure it can meet the needs of Indigenous people incorporating under it.

530 The purpose of Part 5 is to:

- identify and explain the key shortcomings of the ACA Act;
- explain the need to address these shortcomings; and
- consider how those issues might be addressed, and outline general conclusions about the nature of the reforms required.

531 Part 6 of this Report includes detailed suggestions for how the conclusions reached in this Part could be implemented. Part 5 and Part 6 of this Report are therefore intended to be read together: Part 5 provides the argument in support of the detailed suggestions contained in Part 6.

(2) Purpose of this Chapter

532 This Chapter seeks to introduce and set-up the detailed discussion of issues relating to reform of the ACA Act contained in Part 5.

533 First, Section B sets up the argument for reforming the ACA Act by outlining key problems with the ACA act which currently prevent it from performing the roles required of it.

534 Section C then gives a general discussion of the concept of "accountability", which has been at the heart of previous reforms to the Act, but which has improperly (in the Review Team's view) focussed on external financial accountability to funding bodies; rather than internal accountability to the corporation and its members.

535 Section D then discusses how a reformed ACA Act, and any specific measures contained in it - measures which are only available to Indigenous persons - would need to be conceived as "special measures" in terms of the Racial Discrimination Act.

536 Section E then contains a detailed outline of the remainder of the Chapters in Part 5. This was thought to be useful because of the length of Part 5.

B. THE NEED FOR REFORM – KEY PROBLEMS WITH THE ACA ACT

(1) Problems with the ACA Act

537 The ACA Act as it currently stands suffers from a number of serious problems which undermine its capacity to provide an appropriate and effective incorporation regime for Indigenous corporations. The problems are diverse, but can be divided into the following groupings for convenience:

The ACA Act fails to address the special needs of Indigenous incorporators

538 The ACA Act does not deliver the special measures identified as necessary for ACA Act corporations earlier in this Report. Specifically:

- The ACA Act does not provide for or accommodate special regulatory assistance to corporations incorporated under it;
- Flexibility in implementation and enforcement of legislative requirements has not been realised under the ACA Act;
- The ACA Act is inflexible in relation to corporate design;
- The reporting requirements in the ACA Act are inappropriate;
- Regulatory intervention under the ACA Act is poorly targeted and does not address the "special incorporation needs" of ACA Act corporations

The ACA Act is out of date in key areas of company law

539 The ACA Act has failed to keep up to date with a number of key areas of company law. This puts ACA Act corporations, their directors and members at potentially significant disadvantage in several areas, including:

- Directors' duties – the statement of directors' duties under the ACA Act is out of date, and directors duties do not extent to senior management of corporations;
- There are no specific processes for validation of procedural irregularities; and
- There are no provisions providing transactional certainty to dealings with third parties.

The ACA is incompatible with Native Title Act requirements

540 The ACA Act is currently incompatible with many of the requirements under the Native Title Act and PBC Regulations for NTRBs, and in particular PBCs. These corporations are required to be incorporated under the ACA Act.

The ACA Act suffers from technical problems

541 The ACA Act also suffers from a variety of more technical problems which reduce its effective operation. These include issues relating to membership requirements, the conduct of meetings, amalgamation of corporations and so-on. (These issues have simply been grouped together for convenience – some could probably equally be grouped with the broader issues discussed above.)

(2) Feedback from Consultations

542 Almost all feedback received through the consultations generally supported reforming the ACA Act to address all of the issues identified in the outline above. The Review Team therefore considers that the concept of reforming the ACA Act to address each of these issues enjoys broad support amongst key stakeholders – including ACA Act corporations, Indigenous peak bodies, and relevant government departments and funding bodies.

543 There were of course some differences of opinion about the best ways to implement these reforms, but even those were relatively minor. Where relevant, specific feedback has been incorporated into or referred to in the body of the text in Part 5.

544 The Review Team notes however that stakeholders will not have had a chance to consider the detailed discussion of issues set out below in Part 5 (as these issues have been worked up in detail since the consultation process, in light of the clear preference for retaining the ACA Act). They will also not have seen the detailed proposals for addressing the functional issues contained in Part 6. It cannot therefore be presumed that all stakeholders consulted will necessarily agree with these specific proposals. The Review Team has attempted to minimise the potential for disagreement with the proposals by making every effort to address all the concerns expressed by stakeholders. However, it is of course not always possible or appropriate to do so.

C. THE CONCEPT AND FOCUS OF ACCOUNTABILITY

(1) The Concept of Accountability

545 The term "accountability" has been used a great deal in conjunction with the ACA Act, and has been the source of much discussion and debate. Unfortunately, much of the debate has suffered from a lack of clarity in defining what is meant by accountability, to whom the corporations are accountable, and the most appropriate mechanisms for achieving this.

546 It is therefore necessary to define what is being discussed here. Accountability is a term used to denote processes of "giving account", "answering" and "responding" for an institution's performance to a variety of persons or other institutions who are affected by the activities of the institution held accountable.[186]

547 Two broad types of "accountability" in relation to ACA corporations may be distinguished:

- **internal accountability** – the requirement that the directors act in the best interests of the corporation as a whole, and that the corporation be responsive to the interests of its members; and
- **external accountability** – the requirement that the corporation be accountable for its performance to external parties such as regulatory authorities, funding agencies, Parliament and the wider public. For present purposes, "external accountability" also includes (in the case of those corporations delivering

[186] Mantziaris, C. & Martin, D. 2000, p 317

services) the requirement that the corporation be accountable to its clients or service recipients.[187]

548 A corporation therefore has a number of 'accountability constituencies',[188] and an important aim of this review is to examine the most appropriate accountability mechanisms for each of those constituencies.

(2) The Focus of accountability for Indigenous corporations

549 Indigenous corporations must, of necessity, operate in the complex intercultural zone between the Indigenous and non-Indigenous domains.[189] In this zone, the accountability of a corporation may be contested on the basis of the potential incompatibility of principles and values deriving from each of the two domains.

550 Nevertheless, despite the possibility of conflict between the demands of internal and external accountability, these two dimensions of accountability can be linked through appropriate organisational structures and procedures. Indigenous organisations that have developed effective participatory, decision-making and service delivery mechanisms that maximise internal accountability have been observed to demonstrate higher levels of external accountability. This has manifested itself in more effective use of resources, good financial management and reporting, and higher levels of regulatory compliance.[190]

551 Corporations that operated solely on the basis of informal arrangements in accordance with law and custom would be highly unlikely to satisfy the requirements of either external accountability or of internal accountability.

552 The internal accountability of corporations to their members and of directors to corporations is more appropriately achieved through corporate governance and regulatory mechanisms. For example, the procedures of the annual general meeting are a way of making the corporation and its management accountable to the members. Directors' duties are a way of making the management of the corporation accountable to the corporation (and thereby, indirectly, accountable to the members). Reporting requirements can also be viewed as an aspect of internal accountability, by which the corporation is held accountable to its members (rather than as a form of external accountability to funding bodies and creditors). It is this form of internal accountability which is the proper focus of the corporate regulator and the Incorporation statute.

553 By contrast, the external accountability to service recipients or clients is best established by means of contractual instruments between the corporation and the funding agency. Such

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187 Martin, D.F. & Finlayson, J.D. 1996; Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination, Darwin:* North Australian Research Unit, 1992, p 72; Mantziaris, C. & Martin, D. 2000, pp 317-21

188 Mantziaris, C. & Martin, D. 2000 p 319

189 Rowse, *Remote Possibilities*; Sullivan, P. 'Aboriginal Community Representative Organisations: Intermediate Cultural Processes in the Kimberley Region, Western Australia', *East Kimberley Working Paper 22* Centre for Resource and Environmental Studies, Australian National University, Canberra, 1988

190 Martin, D.F. & Finlayson, J.D, 'Linking Self-determination and Accountability in Aboriginal Organisations', Centre for Aboriginal Economic Policy Research Discussion paper No 116, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1996

mechanisms are also likely to be the best means for achieving appropriate external accountability to funding bodies and creditors. Corporate financial reporting may be able to play a supplementary role in such external accountability, but it should not be the main source of such external accountability; and external accountability should not be the main focus of corporate financial reporting.

554 To date, the focus of "accountability" under the ACA Act and its regulation has been on financial reporting as a form of *external* accountability - particularly where public monies are involved. This focus on the use of the ACA Act as a means of achieving external accountability has resulted in increasingly complex and onerous financial reporting provisions in the ACA Act, which apply irrespective of the size or nature of the corporation.

555 As will be discussed in some detail in Chapter 15, such financial reporting mechanisms are not in fact an effective means for achieving external accountability to funding bodies and creditors. Further, they may not promote (and may even detract from) the desired levels of internal accountability - of the board and corporation to members, and the board to the corporation.

556 The Review Team is of the view that the current focus in the ACA Act and its regulation on externally-focussed financial reporting as the major form of "accountability", is inappropriate. This focus has also come at the cost of the more appropriate forms of internal accountability. The appropriate balance needs to be restored, by refocussing the Act and its regulation on internal accountability.

557 This will require reforms to the relevant forms of internal accountability under the Act, including:

- The general meeting – relevant aspects of which are discussed in Chapter 12 Section D and Chapter 17 Section C.
- Directors' duties – discussed in Chapter 13
- Appropriate financial reporting – discussed in chapter 15

D. A REFORMED ACT AS A SPECIAL MEASURE

558 In the previous two Parts of this Report, the Review Team identified the special incorporation needs of Indigenous people, and concluded that special arrangements are needed to address those needs. The Review Team also concluded that these special needs cannot be addressed under the Corporations Act and State Association Incorporation Acts. Therefore, it concluded that a separate Indigenous incorporation statute will be necessary to deliver the special arrangements, and the existing ACA Act could be used as a base for that statute. This reformed ACA Act would be reserved for Indigenous people

559 Because this reformed ACA Act would confer rights on Indigenous people which are not available to non-Indigenous people, the reformed Act would potentially contravene the requirements of the *Racial Discrimination Act 1975* (Cth) ("**the RDA**").

(1) The effect of contravention of the RDA

560 The RDA generally makes it unlawful for a person to do any act which makes a distinction based on race, and which has the effect of impairing the equal enjoyment of human rights or fundamental freedoms of a race.[191]

561 More relevant for present purposes is section 10(1) of the RDA, which provides for a right to equality before the law. It states that where members of a race enjoy rights not available to the members of another race, then the members of the latter race will, by force of the RDA, be entitled to enjoy the same rights.

562 This would mean that if a reformed ACA Act were to provide rights to Indigenous people which are not available to non-Indigenous people, then non-Indigenous people would also have access to the same rights - ie the Act could not be reserved only to Indigenous people, and would have to be open to non-Indigenous people to use as well.

(2) Special measures as an exception

563 There is however an exception to these provisions of the RDA. This is where the law enacted or other measure taken is defined as a "special measure" under section 8(i) of the RDA. Section 8(i) implements Articles 1(4) and 2(2) of the *International Convention on the Elimination of all forms of Racial Discrimination* ("**CERD**").[192] Articles 1(4) and 2(2) read as follows:

> 1(4) Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. (…)
>
> 2(2) States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

564 In summary, the concept of special measures recognises the need for "positive" discrimination in certain limited circumstances, to redress any imbalances in the enjoyment of human rights and fundamental freedoms by disadvantaged groups.

565 There are many examples of laws being enacted as "special measures" for the purposes of the RDA and CERD. The current ACA Act (although not expressly so) and the Native

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191 *RDA*, section 9(1)

192 New York, 7 March 1966, Australian Treaty Series 1975 No 40, Department of Foreign Affairs, Canberra, (AGPS, 1995); available at www.austlii.edu.au

Title Act are but two examples which relate to Indigenous Australians. Others include the various State Indigenous land rights acts.[193]

(3) Requirements of Special Measures

566 "Special measures" have two important requirements.

Addressing disadvantage through the advancement of human rights

567 Special measures must be to address disadvantage suffered by a particular racial group by providing measures for the "advancement" of the human rights and fundamental freedoms of the relevant racial group, to put them on equal footing with the rest of the population.

568 The notion of "advancement" has been interpreted broadly and most measures that will benefit the particular racial group are likely to qualify as an advancement.[194]

Special measures must not be permanent

569 Because they are intended to address imbalances, special measures are not intended to be permanent. Special measures must not lead to the maintenance of separate rights after the objectives for which they have been undertaken have been achieved.[195]

570 This does not mean that a special measure must be temporary. Rather, it means that a special measure, in this case the IC Act, will be valid as a special measure until some indeterminate time in the future – for as long as the disadvantage exists.[196]

(4) Implications for a reformed ACA Act

571 The implications of these requirements for reforms to the ACA Act are as follows:

Referability of special measures to special needs

572 Where mechanisms in the reformed Act depart from the Corporations Act or State Association Incorporation Acts, these departures should generally be referable to addressing the disadvantages faced by Indigenous people, and in particular, the special incorporation needs of Indigenous people.

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193 Australia has already introduced many legislative changes as special measures in line with its obligations and these are listed in the Tenth, Eleventh and Twelfth Periodic Report of the Government of Australia to the UN under Article 9 of the International Convention on the Elimination of all forms of Racial Discrimination, 1 July 1992 – 30 June 1998; available at www.austlii.edu.au

194 See generally *Gerhardy v Brown* (1985) 59 A.L.J.R. 311; Wojciech Sadurski, "Gerhardy v Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't", Sydney Law Review, Vol. 11, 1986-88, p 5 at 26

195 See *Gerhardy v Brown* (1985) 59 A.L.J.R. 311, per Mason J at 326, 327; Wilson J at 330; Brennan J at 342; Deane J at 348

196 *Gerhardy v Brown*, per Murphy J at 327, Wilson J at 330, Gibbs CJ at 319

573 Some of the "special measures" which are proposed for the reformed Act below include adoption of "special regulatory assistance" measures (in the sense that this term is used in this Report), and special reporting requirements.

574 Other reforms proposed below (such as the removal of the power to appoint administrators under section 71 of the ACA Act) are proposed where the Review Team is of the view that departures from the Corporations Act cannot be sustained as "special measures".

Reformed Act as a transitional mechanism

575 Where the provision of special rights are no longer needed, they should not be continued. Partly in recognition of this, the reforms proposed below include provision for the transfer of certain corporations to the Corporations Act, in appropriate circumstances. Although there are also other reasons for requiring such transfers, these provisions means that the Act could be characterised in part as a "transitional" mechanism, in keeping with the spirit of the RDA and CERD.

E. OUTLINE OF PART 5

(1) Outline

576 Part 5 is the largest Part of this Report. This is because to address specific reform proposals, it must include a degree of technical detail. The Review Team therefore felt it worthwhile including here a relatively detailed outline of Part 5, and what each of the Chapters in it attempts to achieve.

Chapter 11 - The role of the Registrar

577 Chapter 11 broadly considers the need to shift the focus of the Registrar's role away from enforcement and intervention in management, toward special regulatory assistance, to allow corporations to stand on their own.

578 In addressing these issues, it considers:

- The meaning of special regulatory assistance, and what it would entail; and current statutory and practical limitations on the Registrar's ability to deliver special regulatory assistance.
- Problems with the focus in the ACA Act on regulatory intervention by the Registrar, and the need to shift the responsibility for intervention onto creditors, funding bodies, and the corporations themselves, while also providing the Registrar with more appropriate mechanisms for intervention where appropriate.
- The need to provide members remedies.

Chapter 12 – The corporate constitution and corporate design

579 Chapter 12 looks at the need to adopt a flexible and permissive approach to the design of corporations' constitutions. It does this in the context of

- The need for a "culturally appropriate" incorporation statute (including consideration of the meaning of that term and problems with current references to "Aboriginal custom in the ACA Act);
- Problems caused by prescribing control by members through general meetings in the Indigenous context;
- Problems with a prescriptive approach for profit-sharing corporations; and
- Problems with administration and implementation of a prescriptive incorporation statute.

Chapter 13 – Directors and Directors' Duties

580 Chapter 13 considers the need for reform of directors' duties under the ACA Act. In particular, it examines:

- The need for directors' duties to expressly extend to "officers" and senior management;
- The need for a modern statement of directors' duties in the ACA Act, including the duty of care, the introduction of a statutory "business judgement rule", the duty of honesty, and duties of disclosure of interests and against conflicts of interest;
- The standard of duties of care and honesty which should apply to Indigenous directors;
- The need for appropriate penalties for breaches of directors' duties; and
- The need for appropriately targeted provisions for disqualification of directors (and anyone involved in management of ACA Act corporations).

Chapter 14 –Transactional Certainty

581 Chapter 14 looks at the need to adopt in the ACA Act procedures similar to those now included in the Corporations Act for the validation of procedural irregularities, and for the creation of transactional certainty for third parties dealing with ACA Act corporations. This includes a discussion of corporate capacity and corporate authority.

Chapter 15 –Corporate Reporting

582 Chapter 15 considers the need to reform the reporting requirements in the ACA Act. There are two principal elements to this:

- Ensuring the focus of "accountability" of corporations under the ACA Act is appropriate, and shifting the focus of accountability for public funds away from the incorporation statute and onto funding arrangements; and
- Ensuring the ACA Act corporate reporting regime properly recognises and accommodates the different sizes of corporations.

Chapter 16 –Membership Restrictions

583 Chapter 16 considers the requirement that membership of ACA Act corporations be limited to Indigenous natural persons. In doing so, it examines:

- The need for and appropriateness of a requirement that members of Indigenous corporations be Indigenous. This is considered in the context of both the general membership and the board membership of ACA Act corporations; and
- Whether there is a need to allow corporate membership of ACA Act corporations, for the formation of "umbrella corporations".

Chapter 17 – Miscellaneous Issues

584 Chapter 17 considers a range of miscellaneous issues which will need to be addressed in any reform of the Act. These tend to be more technical in nature, but include a number of very important issues, such as

- Lowering the minimum membership requirements to 5 for all ACA Act corporations;
- The requirement to define corporations' membership by reference to membership lists;
- Clarifying the requirement to hold annual general meetings;
- Permitting the holding of meetings by teleconference or videoconference;
- Giving the Registrar the power to remedy errors in the public record and to issue duplicate certificates where the originals are lost or destroyed;
- Addressing technical problems caused by the application for incorporation;
- Providing for amalgamation of ACA Act Corporations; and
- Clarifying the application of Part 5 of the Corporations Act to ACA Act corporations.

Chapter 18 – Aboriginal Councils - Part III of the Act

585 Chapter 18 argues the case for repealing Part III of the ACA Act.

CHAPTER 11
THE ROLE OF THE REGISTRAR

A. INTRODUCTION AND OUTLINE

586 At present, the ACA Act provides the Registrar with extensive powers to intervene in the management of ACA Act corporations, for the enforcement of compliance with the Act. These powers are much more extensive than the powers of the regulators of other incorporation statutes, such as ASIC. This reflects the historical origins of the Act, but also an increasing demand for accountability in ACA Act corporations. These powers and the way they have been exercised in the past have been the subject of significant criticism.

587 One consequence of the existence of these extensive powers has been the reliance of creditors, funding bodies, and arguably also the boards of ACA Act corporations themselves, on regulatory intervention by the Registrar. In each of these three cases, this reliance is inappropriate, and the powers themselves are not well suited to those tasks.

588 Contrasting with the broad powers of intervention for enforcement purposes, the Act makes scarce provision for the Registrar to play a role in the provision of special regulatory assistance to ACA Act corporations. There is a high level of demand for special regulatory assistance, and it is arguably a better mechanism for achieving long-term improvements in corporate governance and compliance with the Act than enforcement-oriented regulatory intervention.

589 This chapter considers the need to shift the focus of the Registrar's role away from enforcement and intervention in management, toward special regulatory assistance for ACA Act corporations.

590 In addressing these issues, it considers:

- The meaning of special regulatory assistance, and what it would entail; and current statutory and practical limitations on the Registrar's ability to deliver special regulatory assistance;
- Problems with the focus in the ACA Act on regulatory intervention by the Registrar, and the need to shift the responsibility for intervention more onto creditors, funding bodies, and the corporations themselves;
- The need to provide members remedies in recognition of a decreased interventionist role for the Registrar; and
- The need to nonetheless retain appropriate powers for intervention by the Registrar in certain circumstances.

B. OUTLINE OF THE REGISTRAR'S CURRENT FUNCTIONS AND POWERS

591 The relevant functions of the Registrar that are specified in the ACA Act include:[197]

- to maintain a Register of Incorporated Aboriginal Associations; and
- to advise Indigenous Australians on the procedures for the incorporation of ACA Act corporations.

592 Important powers of the Registrar include the following:

- the power to approve, or refuse to approve, the proposed objects or rules of an association that wishes to incorporate under the ACA Act, or proposed amendments to the objects or rules of existing associations;[198]
- the power to require a corporation to provide an up-to-date list of the names and addresses of all the members of the corporation;[199]
- the power to arbitrate in disputes between a corporation and one or more of its members (or in disputes between members, if those members request the Registrar to do so);[200]
- the power to call a special general meeting of the members of a corporation if, in the opinion of the Registrar, there is a need to do so;[201]
- the power to require that documents of a corporation be made fully and freely available to the Registrar or a nominee of the Registrar, and that "any person" answer questions asked by the Registrar or Registrar's nominee;[202]
- the power to appoint an administrator, including in circumstances where (1) the Registrar is satisfied that the association has been trading at a loss for at least 6 of the last 12 months, (2) the governing committee has not complied with the ACA Act or the corporation's rules, without satisfactory explanation, (3) the governing committee has acted in their own interests or in a way that is unjust or unfair to other members; or (4) appointment of an administrator is otherwise in the public interest;[203]
- the power to conduct an election for membership of the governing committee of a corporation, once the Registrar has decided that administration is no longer necessary;[204] and

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197 *ACA Act 1976*, section 5(1)

198 Ibid., sections 4(1), 45(3), 52, 54

199 Ibid., section 58

200 Ibid., section 58A

201 Ibid., section 58B(4)

202 Ibid., sections 60, 68, 70

203 Ibid., section 71

204 Ibid., section 77D

- the power to petition the Federal Court for a corporation to be wound up, either on the advice of an administrator or where, in the Registrar's opinion, winding up would be in the interests of the members of the corporation.[205]

593 In addition, the Registrar has the incidental power to do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of his functions including, but without limiting the generality of the foregoing, power to act as agent for an Aboriginal corporation.[206]

C. SPECIAL REGULATORY ASSISTANCE

594 As noted in the introduction to this chapter, the Review Team is of the view that the role of the Registrar as set out in the ACA Act should shift from its current focus on compliance and enforcement, to more of a focus on assisting Indigenous corporations achieve good corporate governance through special regulatory assistance. This view received wide support from all stakeholders consulted with, as well as ORAC and the Steering Committee.

595 This section starts by defining what the Review Team means by "special regulatory assistance", and how that differs from more general concepts of "capacity development" and "capacity building". It then outlines the current limitations on the Registrar playing a special regulatory assistance role, which necessitate reform of the Act. It then sets out some general conclusions, the implementation of which is explored in detail in Part 6 of this Report.

(1) The meaning of "special regulatory assistance"

"Capacity building" and "capacity development"

596 Earlier Reports prepared as part of this Review, and in particular the Consultation Paper, used the term "capacity building" to describe the role to be played by the Registrar in assisting ACA Act corporations.

597 A number of submissions to the Review expressed concern with the term "capacity building", and thought that it should be clarified and defined for the purposes of this Review. The Review Team concedes that this is a valid concern. The term "capacity building" has become something of a buzz-word in relation to how to develop responses to the wide range of problems facing Indigenous communities within Australia and developing economies overseas, but is used in many different ways, often without a clearly defined or concrete meaning.

598 The term "capacity building" is closely allied to (or even essentially identical to) "capacity development", a key concept now widely used in international development and aid programs. Some prefer the term capacity development, because it suggests building upon

[205] Ibid., section 62A

[206] Ibid., section 5(2)

already-existing capacities within the group or community concerned. In the international context, understandings of the roles of institutions in development are changing, and conventional ideas about organisational engineering are being supplemented by broader notions on promoting learning, empowerment, social capital and an enabling environment. Capacity development is understood in this context as the processes by which individuals, organisations, institutions and societies develop abilities (individually and collectively) to perform functions, solve problems and set and achieve objectives.[207] Capacity development is increasingly seen as central to sustainable development.

599 In the Australian context, capacity building is increasingly seen as a crucial component of both policy development and program delivery by government and other agencies. Thus, for example, New South Wales Health set out to clarify capacity building as a concept, and to develop indicators that could determine whether or not capacity building was being undertaken well by health promotion workers. New South Wales Health combined literature review with focus group research and broader state, national and international consultations. On the basis of this process, New South Wales Health defined capacity building as (at least) three activities:

- building infrastructure to deliver health promotion programs;
- building partnerships and organisational environments so that programs are sustained—and health gains are sustained; and
- building problem-solving capacity.[208]

600 The importance of capacity building is also recognised in the recently announced inquiry into capacity building in Indigenous communities by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ("**HORSCATSIA"**). On 19 June 2002, the Minister for Immigration and Multicultural and Indigenous Affairs referred the following terms of reference regarding capacity building to HORSCATSIA:

> The Committee will inquire into and report on strategies to assist Aboriginal and Torres Strait Islanders better manage the delivery of services within their communities. In particular, the Committee will consider building the capacities of:
>
> (a) community members to better support families, community organisations and representative councils so as to deliver the best outcomes for individuals, families and communities;
>
> (b) Indigenous organisations to better deliver and influence the delivery of services in the most effective, efficient and accountable way; and
>
> (c) government agencies so that policy direction and management structures will improve individual and community outcomes for Indigenous people.[209]

601 The Review Team notes in particular that while HORSCATSIA seeks submissions on developing the capacities for Indigenous organisations to deliver services, it also intends to

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[207] *Capacity Development: Technical Advisory Paper 2*, Bureau for Policy Development, United Nations Development Programme, http://www.undp.org.

[208] *Indicators to Help with Capacity Building in Health Promotion*, New South Wales Health: http://www.health.nsw.gov.au/public-health/health-promotion/pdf/indicators/capbuild.pdf

[209] http://www.aph.gov.au/house/committee/atsia/index.htm

consider the related need for capacity building within government agencies. In this regard, it should be noted that the effective implementation of reforms to the ACA Act outlined in this Report will require capacity building within relevant agencies. For example, the proposed reforms would result in a changed focus in the reporting and accountability requirements of many Indigenous corporations, as outlined in Chapter 15. This will require an enhanced capacity to develop and monitor more appropriate funding methodologies within agencies funding Indigenous corporations to deliver community services. Equally, the roles envisaged for the Registrar's office in a reformed Act (including those relating to capacity building itself) will require the development of additional capacities within that Office.

602 The Review Team recognises the clear need for broad capacity development or capacity building to underpin government policy development and program delivery for Indigenous people and communities. This will require not only partnerships between both government and non-government agencies and Indigenous corporations, but also coordination of the capacity building initiatives of these agencies, in line with their particular functional responsibilities. The Review Team is thus of the view that the focus of capacity building for the Registrar's office should be consistent with its role as a corporate regulator. Coordination of capacity building policies and delivery with other agencies (such as ATSIC, health departments etc) could be achieved through the use of such mechanisms as memoranda of understanding.

"Special regulatory assistance"

603 In order to distinguish it from the more general terms "capacity building" and "capacity development" discussed above, the Review Team has adopted the term "special regulatory assistance" to describe the "capacity building" role of the Registrar under a reformed ACA Act. Unlike the broader concepts of capacity building and capacity development, special regulatory assistance is specifically focussed on improving the corporate governance of ACA Act corporations. The definition which the Review Team has adopted for use in this Review is as follows:

> ***"Special regulatory assistance"*** *means assisting and encouraging the directors and members of Indigenous corporations to develop the relevant skills and good corporate governance practices necessary for the long-term viability and success of their corporations.*

604 The incidents of the term - ie what type of actions special regulatory assistance will actually entail - are set out in some detail in Part 6.

Special regulatory assistance to include cross-cultural education

605 As has been argued elsewhere in this Report,[210] the lack of formal education and skills to effectively manage and administer corporations is not the sole reason for poor corporate governance in Indigenous corporations.

[210] Part 3, Chapter 5 and Chapter 6 regarding cultural appropriateness and control by general meetings

606 Indigenous corporations are sometimes fragile instead because the members and directors bring particular deeply held cultural views and practices to bear on their participation in corporations. These may be fundamentally inconsistent with good corporate governance.

607 Therefore, special regulatory assistance (and indeed any broader "capacity development") is unlikely to be a magical "cure-all" for the corporate governance or other problems experienced by Indigenous corporations. However, it will be most effective if, in addition to providing important administrative and technical knowledge and skills, it also takes the form of cross-cultural education, in which Indigenous peoples' enhanced capacity to achieve self-determination through their own institutions provides a bridgehead to engagement with the institutions of the wider Australian society.

(2) Limitations on special regulatory assistance under the current ACA Act

608 The "special incorporation needs" of Indigenous Australians (discussed in Part 3), in particular the widespread lack of formal education and training and low business management experience, all make compliance with many formal and procedural requirements of the ACA Act difficult for many Indigenous corporations and their members and directors. As is discussed elsewhere in this report,[211] many Indigenous corporations simply fail to comply with many of these requirements – for example 52% of ACA Act corporations failed to lodge an annual report or apply for an exemption in 2000-2001.

609 These breaches of the Act can lead to corporate governance problems where appropriate and necessary actions are not taken. However, they can also expose the corporation to potentially serious 'enforcement' action being initiated by the Registrar – including deregistration, winding-up or the appointment of an administrator.[212] As will be argued in the next section, such actions have not proven themselves particularly effective – largely because they do not address the root problem which is generally a lack of capacity.

610 In the opinion of the Review Team, there is therefore a very strong argument for the Act to focus on encouraging good corporate governance through special regulatory assistance rather than on enforcement (although some enforcement mechanisms will always remain necessary).

611 At present, however, the powers of the Registrar to provide assistance to ACA Act corporations are very limited. For example, under section 5, the Registrar's assistance functions are currently limited to the following:

> (b) advise adult Aboriginals on the procedures for the constitution of Aboriginal Council areas and the establishment of Aboriginal Councils and for the incorporation of Aboriginal associations.

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[211] See Chapter 5 and 7D, and 15 relating to compliance with reporting requirements

[212] See Chapter 11D on Intervention in Corporations in difficulty

612 This is a very narrow function, technically only allowing advice on the "*procedures*" for incorporation – not more detailed assistance in the form of advice about the most appropriate structures or form of Rules for any particular corporation.

613 Further, there is very little scope for assistance to be provided once the corporation is up and running. As discussed elsewhere in this Report, there is a critical need for special regulatory assistance to be provided to ACA Act corporations in the running of their corporations.

614 The Registrar currently has a power under section 58A to "assist" corporations in the arbitration of disputes between members or between members and the corporation. However, this role is very limited in its application and is reactive rather than proactive, in that a dispute must first exist. If the dispute is between members, the Registrar must be invited to arbitrate before doing so.[213] In the case of a dispute between a member and the corporation, the Registrar may initiate the arbitration.[214] However, in both cases, the Registrar's decision is not binding on the parties; and the parties are not prevented from bringing an action in Court during or after the arbitration.[215]

615 Further, Section 58A(6) requires the arbitration to be conducted "in accordance with the regulations". No regulations dealing with arbitration have ever been passed, effectively rendering the power to arbitrate disputes in Section 58A impotent.

616 Staff of the Registrar's Office have expressed their own frustration with the limitations the Act places on their capacity to provide genuine assistance.[216] Nonetheless, as discussed in Part 2, Chapter 3 , the appointment of a new Acting Registrar in 2001 saw a significant change in the way the ACA Act was administered, although a general trend towards a more facilitative regulatory approach had already started. ORAC now offers a number of important administrative measures to assist ACA Act corporations, and to try to avoid the need for intervention in the management of corporations experiencing difficulties. These include the following:

- provision of "incorporation kits" and telephone advice on incorporation under the ACA Act;
- responding to inquiries and requests for information;
- provision of information and training workshops for ACA act corporations;
- provision of training videos;
- provision of training brochures;
- personal delivery and explanation of section 60A notices (notices to comply), sometimes leading to the provision of information and training workshops; and

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213 *ACA Act 1976*, s58A(2)

214 Ibid., s58A(3)

215 Ibid., s58A(7)

216 This sentiment was conveyed to members of the Review Team on numerous occasions by members of ORAC staff. It was also included in submissions from Joe Mastrolembo Director Client Services (at the time), 7 June 2001.

- assistance with dispute-resolution.

617 However, many of these measures do not technically fall within the current functions of the Registrar's Office, which has the potential to cause difficulties. Further, there is nothing to prevent another Registrar reverting to the low-assistance/high intervention approach that prevailed previously. An outdated, ineffective and arguably paternalistic philosophy of enforcement and intervention remains at the core of the ACA Act.

(3) Delivery of special regulatory assistance

Outsourcing special regulatory assistance services

618 In the feedback received during the consultations, several stakeholders suggested that consideration be given to outsourcing some of the Registrar's special regulatory assistance functions.[217] For example, it might be that particular functions could be performed by professional training corporations, or by independent specialist legal advisers (including NTRBs).

619 Outsourcing certain special regulatory assistance functions to individuals or bodies with a local presence could be a cost-effective means of providing special regulatory assistance to remotely-based corporations. An individual or organisation with a local presence may also have background knowledge of the local culture, circumstances, and possibly language of the Indigenous community in which the relevant corporation operates. These could all be highly beneficial for specific special regulatory assistance functions (although care would need to be taken to ensure there are no conflicts of interest or apprehensions of bias within the target corporation or community because of the other activities of the selected individual or organisation). Outsourcing may also be appropriate in circumstances where specialist technical skills are required which are not available from within the Registrar's Office. Certain native title representative bodies might meet all three of these criteria, for example if dealing with complex interactions between issues arising under the Native Title Act and the IC Act.

620 Nonetheless, such outsourcing or delegation of special regulatory assistance powers raises issues relating to the qualification and selection of bodies to perform the functions (such as accreditation, establishment of panels and tendering processes). These issues all fall outside the scope of this Review, and the Review Team therefore makes no recommendations in relation to the potential for outsourcing special regulatory assistance functions.

Coordination with other training programmes

621 Several submissions to the Review noted that there are already a number of corporate governance and other management skills training programmes being run by a variety of government agencies, including ATSIC. Clearly, the Registrar's Office in performing its special regulatory assistance functions would need to coordinate with any such other programmes, to maximise the cost-efficiency of scarce resources.

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[217] See for example, Submissions of Aboriginal Housing Office, June 2002; Submissions of Regina Wagner, June 2002; Submissions of Ngaanyatjarra Council, June 2002; Submissions by NLC, 3 June 2002

622 Although important, this is essentially an administrative issue.

623 The Review Team notes that the Registrar's Office has already taken several steps to coordinate with other programmes, such as supporting the development by the Australian National Training Authority and ATSIC of national competency standards for the governing of Aboriginal and Torres Strait Islander corporations.

624 ORAC has also entered into MOUs with a number of other agencies, which could also serve as a basis for developing coordinated special regulatory assistance strategies.

Coordination with regulators of other incorporation statutes

625 Some concern was expressed by the regulators of other incorporation statutes about the suitability of a reformed regulator providing special regulatory assistance services to corporations incorporated under other statutes. This issue is discussed in some detail in Part 4, Chapter 8

626 The Review Team therefore concludes that it would not be appropriate for the regulator to provide special regulatory assistance to corporations incorporated under other incorporation statutes.

627 However, there may be merit in entering into MOUs with other regulators. These could cover topics such as information sharing in relation to Indigenous corporations incorporated under those statutes, transfer processes for corporations transferring between other incorporation statutes and the ACA Act.

(4) Conclusions in relation to special regulatory assistance

628 There is a strong demand amongst stakeholders for the Registrar's Office to provide a greater range of special regulatory assistance services, and for the focus of the Act to shift from sole reliance on enforcement towards an increased emphasis on special regulatory assistance. This question attracted more attention than any other in the written submissions from stakeholders, and was one of the central themes in each of the two stakeholder workshops and various consultations. Support was almost unanimous.[218]

629 Although much can be achieved through administrative arrangements, the Review Team is of the view that it is essential that the Act itself expressly reflect this important role. This is in part to ensure that there is statutory authority for the Registrar's special regulatory assistance activities, but also to express the regulatory philosophy of the Act.

630 The Review Team also notes that the regulatory powers of the Registrar, allowing him or her to intervene in the management of ACA Act corporations, will be an important element of any special regulatory assistance role. This is considered in detail in the next section.

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[218] See the Fourth Report of this Review – *Summary of Consultations, Questionnaire Responses and Submissions*, at heading 5.2.

D. INTERVENTION IN CORPORATIONS IN DIFFICULTY

(1) Introduction and outline

631 As noted above, one of the major problems with the ACA Act is the approach it takes to dealing with corporations which fail to comply with the statute, or finds itself in financial difficulty. At present, the Act adopts a highly interventionist approach, giving the Registrar significant powers to enforce compliance or otherwise to wind-up or deregister the corporation. These actions typically result in control of the corporation being completely removed from Indigenous hands, and where a corporation providing important community services is wound-up or deregistered, this action can also have a significant negative impact on the Indigenous community it serves.

632 This section argues that such measures are an ineffective and inappropriate way to achieve compliance with the Act and improve corporate governance. It argues that in many circumstances, properly focussed assistance and less intrusive enforcement mechanisms would be a more appropriate response. Special regulatory assistance in these circumstances would be aimed at assisting and encouraging the directors of Indigenous corporations to take more responsibility for themselves.

633 Where intervention is necessary for financial reasons, this should in most cases be a matter for those with financial interests in the corporation – creditors and funding bodies. However, perhaps because of the readily available intervention of the Registrar, there appears to be significant reliance by government funding bodies on the Registrar to protect government funds. This section argues that it is generally inappropriate for the corporate regulator to undertake such a role, and that there are in fact more effective and appropriate means available to creditors and funding bodies to protect their own interests. However, this would involve some reconsideration of the way in which government funding bodies frame and administer their funds.

634 The approach of the ACA act can be broadly contrasted with the approach taken under the Corporations Act. One of the key aspects of the Corporations Act is that the corporate regulator, the Australian Securities and Investment Commission (ASIC), generally plays a much more "hands-off" role than the Registrar under the ACA Act. Instead, the Corporations Act provides enhanced scope for creditors to take interventionist action to protect their interests, and also provides directors of a company with the opportunity to voluntarily appoint a person to manage the affairs of the corporation.

635 The discussion in this Section is divided as follows:

(1) Introduction and outline

(2) Intervention by the Registrar

This considers the more significant and problematic of the Registrar's powers under the ACA Act and how they are used, and considers their effectiveness and appropriateness. The powers considered are as follows:

- Examination and investigation – Sections 60, 68-70

- Administration – Section 71
- Winding up – Section 63
- Deregistration – Section 82, regulation 18

(Specific suggestions for altering the Registrar's powers to intervene in ACA Act corporations are then made in Part 6 of the Report.)

(3) Intervention by creditors and funding bodies

This section examines mechanisms which are likely to be available to creditors and funding bodies through sections 62 and 67 of the ACA Act, which imports by reference significant parts of Part 5 of the Corporations Act. It also considers how these provisions could be better used by creditors and funding bodies as an alternative to reliance on the Registrar's powers. Relevant remedies considered include:

- Receivership
- Grant Controllers
- Other remedies

(4) Pre-emptive action by the corporation itself

The imported Corporations Act provisions include means for the directors of corporations in difficulty to themselves take the initiative in handing over management to professional managers. This section discusses the advantages of such an approach and how these mechanisms work. The relevant processes are:

- Voluntary administration
- Provisional liquidation

(5) Conclusions

The conclusion then brings together the conclusions from the discussion in the other sections, to provide a coherent argument for reform.

(2) Intervention by the Registrar

636 The Registrar has several significant powers to intervene in the affairs of corporations which are available under the express provisions of the ACA Act (as opposed to through the imported provisions under the Corporations Act, which are considered later). These include:

- issuing compliance notices to corporations;
- applying to Court for injunctions to stop or prevent breaches of the Act occurring;
- conducting examinations and investigations of corporations;
- appointment of administrators to corporations;
- applying to Court for the winding-up of corporations; and

- deregistration of corporations.

637 The discussion in this section will focus on the last four of these, because they are the more controversial and problematic of the Registrar's powers of intervention.

638 Before considering the details of the different forms of regulatory intervention available to the Registrar (and to creditors/funding bodies), it is worthwhile setting out a table showing the patterns in the use of these powers by the Registrar over the previous 6 years. This table and the figures in it will be referred to in the discussion following.

Table 5: Summary of intervention actions by the Registrar 1995-2001

Activity	**1995-96**	**1996-97**	**1997-98**	**1998-99**	**1999–00**	**2000-01**
section 60 examinations	56	70	65	35	47	36
section 60A compliance notices	30	22	44	14	32	18
section 61 injunctions	0	0	1	0	0	0
section 71 administrations	23	34	30	15	13	5
Liquidations from Registrar – initiated winding-up applications	11	28	26	34	57	6
(Total liquidations)	13	39	58	74	107	96
Deregistrations	89	86	n/a	276	137	106
(New incorporations)	265	162	183	128	192	171

Source: Registrar of Aboriginal Corporations, *Annual Reports*, 1995-2001; personal communications with ORAC staff, July 2002.

Compliance Notices (section 60A) and Injunctions (section 61)

639 As noted in the introduction to this section, these two powers are considered here only very briefly.

Compliance notices

640 Where the Registrar believes that an ACA Act corporation has failed to comply with the Act, regulations or its constitution, section 60A gives the Registrar the power to issue a notice on the director of the corporation to rectify the irregularity or breach.

641 Compliance notices issued under section 60A can be used as a means for requiring corporations to remedy situations themselves before more interventionist enforcement action is taken. At present section 60A notices are often used to provide information to directors about their obligations under the Act, as a means to ensure compliance with the

Act. This is done by personal delivery of the notices, the contents of which are explained to the directors of the subject corporation.[219] The Review Team regards this as a positive administrative process which is intended to achieve compliance with the Act through special regulatory assistance measures.

642 However, there is no legislative requirement to follow such an approach. Nor is there any requirement to issue section 60A notices before taking more severe action (such as appointment of an administrator or initiating winding-up proceedings).[220] It is noted that there are no specific penalties for failure to comply with a section 60A notice, although failure to do so would be likely to result in other measures being taken.

Injunctions

643 Under section 61, the Registrar may issue a show-cause notice as to why an injunction should not be sought from the Court. After the period in the notice expires, the Registrar may apply to the Court for an injunction requiring action to be taken or cease to be taken. This is a fairly standard enforcement mechanism in incorporation statutes.[221]

644 However, the power to seek injunctions under section 61 is rarely used by the Registrar's Office: in the six years preceding this Review, only three applications were made (two in 1996/97, one in 1998/98), and only one injunction has been granted. On each occasion, the injunction was sought following a request for assistance from a liquidator, to protect property of the corporation.[222]

Examinations and Investigations[223]

645 The Registrar has extensive powers to conduct examinations and investigations of the affairs of corporations. The power of examination is conferred under Section 60. An examination under section 60 typically leads to the following action being taken by the Registrar:

- issuing a Section 60A compliance notice;
- appointing an administrator under Section 71;
- applying to the Court for a winding up order under Section 62A;
- referral of a matter to an appropriate law enforcement agency for criminal investigation; or
- no action, where the examination revealed no issues of significant concern.

646 The powers to investigate are conferred under sections 68–70. There is substantial duplication in the purposes for which these powers are conferred and in the way they are

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219 Registrar of Aboriginal Corporations, *Annual Report 2001-2002*

220 *ACA Act* s. 60A(2)

221 *Corporations Act* s. 1324

222 Registrar of Aboriginal Corporations, *Annual Reports 1996-1997, 1997-1998*

223 This text is drawn from Mantziaris, C. & Martin, D. 2000, pp 209–210

expressed in the Act. One law reform issue is whether these powers, if retained, can be harmonised.

647 The most important issue however, is whether the extensive powers of entry, search and seizure granted to an administrative official and exercisable *without prior judicial authorisation,* can be justified.

648 After reviewing the Registrar's functions and powers and, in particular, the Registrar's powers to intervene in the internal affairs of a corporation, Kiefel J remarked that the Registrar 'may require more information than is usual with respect to a company [incorporated under the *Corporations Act*]'.[224]

649 The Registrar's power of examination under section 60 is a very broad discretionary power. The power was explained by the Federal Court in *NAILS v Registrar of Aboriginal Corporations* (1998).[225] The Court stated that the purpose of Section 60 is to obtain information to enable the Registrar to carry out his statutory function, including prudential supervision of the operations and financial affairs of incorporated Aboriginal Associations. There is nothing which requires that the Registrar have any particular concern before exercising the power under section 60 to inspect documents and obtain a report. Nor is there anything which requires that, where there is a matter of concern, the exercise of the power under section 60 be limited to that concern. As the Federal Court noted, the concern might be the catalyst for a wider investigation into the operations and financial affairs of the Association as disclosed by its documents.

650 Examinable documents are defined broadly to include any document relating directly or indirectly to the operations of the corporation, the receipt or payment of money by the corporation or the acquisition, receipt, custody or disposal of assets by the corporation.[226] The 'operations' of the corporation are 'the methods by which the [corporation] goes about the conduct of its affairs and the activities in which it engages in the furtherance of the objects under its Rules'.[227]

651 As the provision is currently worded, there is no restriction to the Registrar's access to the documents by reason that they are in the possession of a person other than the corporation or its officers. A person authorised by the Registrar may 'at all reasonable times' have 'full and free access' to the documents of the corporation, and make copies or take extracts from them. *Any person* may be required to answer a question or produce a document when required to do so by the examiner appointed by the Registrar. Refusal to answer the question on the grounds that it may incriminate or make that person liable to penalty is not

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224 *Re Deeral Aboriginal Corporation* (1996) 70 FCR 229 at 230

225 *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] FCA 743

226 *ACA Act* section 60(9)

227 *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] FCA 743 at p 16 of the report..

permissible; however, the answer is not admissible in any proceedings other than a proceeding for the refusal to answer.[228]

652 Exercise of this power may be extremely invasive in the case of confidential documents containing matters relating to the identity and descent of persons and matters of traditional law and custom. It is to be expected that corporations involved in the conduct of native title claims or managing native title, and cultural associations may generate documents of this kind.

653 Under Section 68, the Registrar may investigate the affairs of a corporation if the Registrar suspects, on reasonable grounds, that the corporation has failed to comply with the Act or regulations made under it, or there has been an 'irregularity' in the corporation's financial affairs. The term 'irregularity' is not defined.

654 For the purposes of the investigation, the Registrar may compel any person whom the Registrar believes to have some knowledge of the affairs of the corporation to appear before the Registrar at a nominated time and place. That person is placed under an obligation to answer questions and produce documents, notwithstanding that the answers to questions, or the documents might tend to incriminate the person.

655 Under Section 70, the Registrar is given power to enter land or premises occupied by the corporation if the Registrar believes on reasonable grounds that it is necessary for the purposes of an investigation into the affairs of a corporation. The Registrar may examine books that the Registrar believes relate to the affairs of the corporation, take possession of these books and make copies or take extracts from them.

656 Sections 60 and 68–70 contain powers of examination and investigation which are extremely broad and far more invasive than the powers granted to the Australian Securities and Investment Commission ('ASIC') and powers granted to the regulators of State and Territory Incorporated Associations.[229] The following paragraphs provide some points of broad comparison between ASIC's powers under the *ASIC Act*[230] and the Registrar's powers under the *ACA Act.*

657 Firstly, ASIC's powers of investigation require a more concrete triggering event than the power to investigate or examine under Sections 60 and 68–70. ASIC may make an investigation as it thinks expedient for the due administration of the corporations legislation *where it has reason to suspect that there is a contravention of the corporations legislation or another law concerning the management or affairs of a body corporate or managed investment scheme, or a contravention which involves fraud or dishonesty* and relates to corporate matters.[231] Once ASIC is entitled to undertake an investigation, the ambit of the investigation may be broadened to enable it to perform any of its regulatory functions. However, the threshold requirement is narrower than that under the *ACA Act,*

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[228] *ACA Act* sections 60(4)–(7), Compare *Australian Securities and Investment Commission Act* 1989 (Cth) section 68; and *Ford's Principles of Corporations Law* para 3.170

[229] Sievers, AS. 'Voluntary Associations' para 435–395

[230] *Australian Securities and Investment Commission Act* 2001 (Cth)

[231] Ibid. section 13(1) ASIC also has a power to investigate in cases of 'unacceptable conduct' relating to takeovers and mergers: *ASIC Act* s. 13(2)

and provides the corporation with more protection (through judicial review) from arbitrary investigations.

658 Secondly, when ASIC needs to gather information for an investigation, it will proceed either by issuing notices to produce documents or through search and seizure warrants issued by a judge. ASIC is authorised to inspect books that the corporations legislation requires a person to keep.[232] ASIC then proceeds through notices to produce books. These can be issued to 'eligible persons'.[233] Where an ASIC member or staff member has reasonable grounds to suspect that there are on a particular premises books that have not been produced in compliance with a notice, he or she may obtain from a search warrant of those premises.[234] This warrant will be scrutinised under normal common law principles. The law requires a relatively high degree of certainty in the grounds of suspicion and a high degree of specificity in the identification of the relevant documents. A search warrant procedure is also provided under most State and Territory associations incorporation legislation.[235]

659 By contrast, the ACA Act Registrar may move straight to the seizure of books *without a judicially approved warrant.* These provisions of the ACA Act are highly invasive entry, search and seizure provisions. They amount to a 'general warrant'. Since the middle of the eighteenth century, through cases such as *Entick v Carrington* (1765),[236] the common law has struck down the arbitrary exercise of executive power under general warrants. Most modern regulatory statutes impose a requirement for judicial authorisation prior to entry on premises.

660 Thirdly, legal professional privilege, claimed by a legal practitioner who is acting for an addressee of a notice may be claimed under the ASIC Act.[237] There is no equivalent provision under the ACA Act.

661 Fourthly, under the ASIC Act there is an obligation on the person conducting an examination, when requested by the examinee, to produce a written record of the examination and to provide the examinee with a copy of that record. There is no such requirement in an examination conducted under section 60 of the ACA Act.

662 In the view of the Review Team there is nothing in the special incorporation needs of Indigenous people to suggest that anything more than the investigative powers and examination powers of ASIC are needed by the Registrar under a reformed ACA Act. The argument that such powers are needed to safeguard the use of public funds (which are more likely to be granted to ACA Act corporations than Corporations Act corporations) misunderstands the purpose of a general incorporation statute. As noted in several places in this report, it is to confuse the system which protects the interests of creditors and

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232 *ASIC Act* section 28

233 *ASIC Act* sections 30-34

234 *ASIC Act* section 35

235 *Associations Incorporation Act* 1981 (Vic) section 37F

236 (1765) 2 Wils KB 275; 95 ER 807

237 *ASIC Act* s. 69; See also *Associations Incorporation Act* 1981 (Vic) s. 37N

grantors with the system that facilitates incorporation and provides a governance structure for corporations.

Appointment of Administrators

How administration works under the ACA Act[238]

663 The Registrar may serve a notice calling on a corporation to show cause why an administrator should not be appointed. After considering any representations by the corporation, and obtaining the approval of the Minister, the Registrar may appoint an administrator to the corporation.[239] No similar measures for direct intervention by a regulator are provided under the Corporations Act or the State and Territory associations incorporation legislation.

664 Grounds for the appointment of an administrator arise where trading at a loss has occurred for at least six months during the preceding 12 months, where there is a failure to comply with the statute, where board members have acted 'in their own interests rather than in the interests of the members of the [corporation] or otherwise in a way that appears to be unfair or unjust to members', where the appointment is in the interests of the members and creditors, and where the appointment is 'otherwise required in the public interest'.[240]

665 The appointment of an administrator under the ACA Act causes the offices of the board members and the public officer to become vacant. It also vests in the administrator a general power to conduct the affairs of the corporation for the purposes of Pt V of the ACA Act.[241] The administrator is responsible for the conduct of the affairs of the corporation with the duties and functions of the public officer.[242] The administrator has wide powers and must give the Registrar such information as the Registrar requires from time to time.[243] Where the Registrar is satisfied that the administration is no longer required, the Registrar must cause an election for a new board to be held.[244]

666 The Registrar may, as an alternative to proceeding with the appointment of an administrator, choose to enter into an informal agreement with the corporation.[245] The agreement provides the corporation with an opportunity to comply with a notice served on it by the Registrar under section 60A of the Act.

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238 This text is drawn from Mantziaris, C. & Martin, D. 2000 pp. 211-2

239 *ACA Ac*t ss. 71(1), (3); *Kazar v Duus* (1998) 88 FCR 218 at 238–9

240 *ACA Act* s. 71(2)

241 *ACA Act* ss. 73, 75; *Kazar v Duus* (1998) 88 FCR 218 at 224; *Re Deeral Aboriginal and Torres Strait Islander Corporation* (1996) 70 FCR 229 at 235

242 *ACA Act* section 75

243 *ACA Act* section 77C

244 *ACA Act* section 77D; *Registrar of Aboriginal Corporations v Barker* [1997] 1489 FCA. As to 'cancellation' of an administration and re-vesting of power in the board, see *Aboriginal Land Rights (Northern Territory) Act 1976 and the Alcoota Land Claim No 146* [1998] FCA 281 at [21]–[22]; the *ACA Act* section 77E; and *Kazar v Duus* (1998) 88 FCR 218 at 238–9

245 Registrar of Aboriginal Corporations (n 85), *Annual Report 1998–99*, p 42

667 In 1997–98, notices under section 71 were issued to 21 corporations; informal agreements were entered with 10 corporations, and administrators were appointed to 10 corporations. In 1998–9, no informal agreements were entered into, but administrators were appointed to 17 corporations.[246] In 1999–2000, notices were issued to 25 corporations, and administrators were appointed to 15 corporations (although some corporations had more than one administrator appointed). In 2000-2001, only 7 notices were issued, and administrators were appointed to only 5 corporations.[247] The Review Team is of the opinion that the decrease in the number of Registrar–appointed administrations reflects a change in the Registrar's policy regarding intervention, following the appointment of a new Acting Registrar.

Problems with the appointment of Administrators under section 71 of the ACA Act

668 From the perspective of most ACA Act corporations, events such as appointment of an administrator by the Registrar are experienced as external interventions in the Indigenous polity and, in the main, strongly resented.[248]

669 For example, when faced with the prospect of a Registrar-appointed administrator, Goolburri Aboriginal Corporation Land Council attempted to avoid the this event by going into voluntary administration with Indigenous membership.[249] These actions led to the litigation in *Kazar v Duus* (1998) 88 FCR 218.

670 There is also anecdotal evidence that a number of corporations which currently incorporate under the Corporations Act and various State Association Incorporation Acts may have chosen those alternative statutes so as to avoid this kind of intervention by the Registrar under the ACA Act.[250]

671 This is not to say that all corporations are resentful of the exercise of the Registrars' current powers, particularly where they are used in a consensual and consultative framework: ORAC advises that some corporations actively seek the appointment of an administrator by ORAC, and are satisfied with the outcomes. ORAC also advises that it receives numerous requests from members of corporations and community members seeking the appointment of administrators, which it regularly declines to act on.[251]

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246 Registrar of Aboriginal Corporations, *Annual Report 1997*–98, pp 60–1; Registrar of Aboriginal Corporations, *Annual Report 1998–99*, p 18

247 Registrar of Aboriginal Corporations, *Annual Report 2000–2001*, p. 3

248 Concerns with the previously highly interventionist approach of the Registrar, through administrations, winding-up applications and deregistrations, was expressed by many stakeholders at both the Alice Springs Workshops. It is also evident from the broad support for changing the emphasis of the Registrar's role in many written submissions.

249 Registrar of Aboriginal Corporations, *Annual Report 1998–99*, pp 11–13

250 For example, one confidential questionnaire response from an Indigenous Corporations Act corporation stated that it's incorporation under the Corporations Act was the result of a "conscious decision taken to avoid unnecessary involvement of ORAC in this organisation's affairs."

251 Correspondence with ORAC, 30 October 2002. The Review Team notes that this is consistent with a common pattern of Indigenous parties to a dispute seeking to use an external party to impose an outcome favourable to their position on the other party or parties. This is one of the reasons external involvement in Indigenous disputes can be

672 Nonetheless, the Registrar's ability to appoint an administrator under section 71 of the ACA Act reflects a regulatory philosophy which places little faith in the ability of corporate management to discern whether the corporation is in financial difficulty. It is more in keeping with a regulatory philosophy based on strong centralised state control of corporations with Indigenous membership.

673 Under the Corporations Act, the regime of voluntary administration introduced by Part 5.3A encourages corporate management to take early and orderly steps to deal with an existing or impending state of insolvency. Because this is a process which is generated by the corporation itself, it is a process which the corporation does not experience as an external intervention by the state. Moreover, much of the animus for placing a corporation under voluntary administration comes from the directors themselves. Directors have an incentive to transfer the management of the corporation to the administrator so as to avoid liability for managing a corporation that is trading while insolvent. In this way, the incentive to improve corporate governance aligned with the incentive of avoiding personal liability. The availability of voluntary administration to Indigenous corporations is discussed further under Heading (4) below.

Winding-up applications[252]

674 Winding up refers to a form of external administration under which a person called a 'liquidator' assumes control of a company's affairs in order to discharge its liabilities in preparation for its eventual dissolution.

675 Winding-up proceedings may be brought by the corporation itself, a creditor, a member of the corporation, 'the judicial manager of a corporation' or the Registrar.[253] Compulsory winding-up occurs where a corporation is insolvent and the Court makes an order winding up the corporation on the application of a creditor, member or director or the corporation. The liquidator realises the corporation's assets and pays its debts to the extent that payment is possible. After a winding up is finalised, the corporation may be deregistered.

676 Under the ACA Act, the Registrar may petition for a winding-up if this is recommended by a corporation's administrator, or where the Registrar is of the opinion that the winding up would be in the public interest or in the interests of the corporation's members.[254] The Registrar or other entitled petitioners may specify any of the following grounds for winding-up:[255]

- where the corporation itself has resolved to be wound up;
- where the business of the corporation was not commenced within one year of its incorporation or has been suspended for a year;

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fraught with risks and difficulties. However, this is not to say that such interventions should not occur in appropriate circumstances.

252 Much of this text is drawn from Mantziaris, C. & Martin, D. 2000, pp 213-4

253 *ACA Act* s. 63(1)

254 *ACA Act* s. 62A Compare *Australian Securities Commission v AS Nominees Ltd* (1995) 18 ACSR 459 at 517-19

255 *ACA Act* s. 63(2)

- where the corporation has fewer than five members;
- where the corporation is unable to pay its debts;
- where board members have acted in their own interests rather than in the interests of the corporate membership or 'otherwise in a way that appears to be unfair or unjust' to the membership;
- where 'by reason of the complexity or magnitude' of the corporation's activities, it is 'inappropriate that it continue to be incorporated under [the ACA] Act';[256] and
- where it is 'just and equitable' that the corporation be wound up.

677 Members of the corporation have more restricted rights of petition – they can only apply under grounds (c) or (e) unless there are fewer than five members; or the petitioner has been a member of the corporation since incorporation or for more than six months.[257]

678 Under section 67 the provisions of the *Corporations Act* that relate to winding up of companies registered under that Act apply, so far as they are capable of application and subject to modifications, adaptations and exceptions as are provided in the *ACA Act.* This arrangement allows for a large number of detailed statutory provisions to become part of the *ACA Act.*

679 This arrangement provides the *ACA Act* with a comprehensive winding-up regime. But it may create some uncertainty in the interaction between the relevant part of the *Corporations Act* and the provisions in sections 62A to 66 of the ACA Act. In the opinion of the Review Team, this is a suitable arrangement, but any reform of the ACA Act would have to address these interactions very carefully.

680 A suggested approach is a more clear and express adoption of relevant parts of the Corporations Act in sections 62A and 66, possibly in substitution for ACA Act section 63. This could also allow the Court to read down provisions of the Corporations Act which either (a) by their terms, have no application to the ACA Act; or (b) are expressly modified, adapted or qualified by provisions of the ACA Act.

681 One of the effects of bringing the ACA Act into line with the Corporations Act would be to expand the grounds upon which an Aboriginal Corporation may be wound up by the Court and broaden the standing of persons who are able to apply for a winding up order. If this is considered inappropriate, express provision could be made in the *ACA Act* to retain the existing formulation in preference to the provisions in the *Corporations Act.*

682 The Review Team is of the opinion that there is a distinct advantage in allowing ACA Act corporations and their creditors to use the winding-up provisions of the *Corporations Act.* These provisions are well understood by insolvency professionals and the commercial community. Moreover, they are, to a large degree, already part of the *ACA Act.*

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256 This ground for winding-up (*ACA Act* s. 63(2)(g)) has become significant in the refusal of incorporation applications for native title purposes. See below, Chapter 12, Section B on grounds for refusal of incorporation applications).

257 *ACA Act* s. 63(4)

683 The drafting arrangement suggested above would give considerable discretion to the Court in the determination of the details of the law of winding-up that becomes part of the ACA Act. However, in the opinion of the Review Team, this is to be preferred over an attempt to enact a simplified insolvency regime specifically tailored for the ACA Act.

Problems with the approach to winding-up under the ACA Act

684 The power of the Registrar to apply for a corporation to be wound up on "public interest" grounds, where it is "just and equitable" to do so, has been arguably misunderstood and misused by the Registrar in the past. This has resulted in successful applications for winding-up of corporations by the Registrar in the past, in circumstances where winding-up may not in fact be appropriate.

685 An example is the case of the National Indigenous Advisory Group Aboriginal Corporation, whose objects included the provision of decision-making advice and training to Aboriginal organisations. The Corporation organised several conferences. The Registrar applied for, and succeeded in winding up the corporation. This was described in the Registrar's report in the following terms:

> [A] winding up order was made on various grounds including that it was not in the public interest to allow it to continue to exist as it was a mere shell of an organisation. [258]

686 Such reasoning would threaten a significant number of corporations in Australia with winding-up – many are established simply to function as "shells" until required for more substantive purposes. As can be seen in Table 5 above, between 1998 and 2000, the Registrar initiated unprecedented numbers of winding-up actions of Indigenous corporations, as well as extraordinarily high numbers of deregistrations. These actions were mostly taken as measures to enforce compliance with the annual reporting requirements – not because of more substantive problems with the solvency or corporate governance of the corporations.

687 The rationale was explained in the Registrar's 1997-1998 Annual Report:

> The Registrar has in place a strategy to deal with corporations which fail to submit annual returns. This involves *one or more* [Review Team's emphasis added] of the following steps at varying intervals:
>
> - The issue of an information package to all corporations outlining the requirements to file annual returns.
> - The issue of information brochures to all corporations on the financial reporting requirements of the Act.
> - Individual letters to corporations in breach, highlighting outstanding requirements.
> - Review of corporation files for strike-off action.
> - The targeting of corporations in breach for closer scrutiny, particularly through statutory examinations under section 60 of the Act.
>
> Notwithstanding the comprehensive approach outlined above, [the Review Team would query the effectiveness of some of these measures] some 700 corporations have failed to file audited financial statements for the last three years.

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[258] Registrar of Aboriginal Corporations, *Annual Report 1996–97*, p 35

> In May 1998, the Registrar sought legal advice on how to deal with corporations which continually fail to file annual returns. The advice indicated that continuing breaches of section 59 of the Act, subsequent to the forwarding of reminder notices and letters requesting the submission of annual returns, provide sufficient grounds for the Registrar to proceed with action to wind-up the corporation.
>
> The Registrar has therefore instructed Minter Ellison Lawyers (Brisbane) to write to the governing committees of all corporations which have failed to file annual returns for the last three years and request that they file the outstanding audited financial statements. The letters are to indicate that failure to submit the outstanding annual returns would result in the Registrar taking action in 1998-99 to wind-up the corporations.[259]

688 This approach appears to be disproportionate to the nature of the breaches, and also largely self-defeating: how does the winding-up and deregistration of 700 corporations (or about 25% of all ACA Act corporations) achieve compliance with the Act, or address the underlying issues of non-compliance?[260]

689 The situation has improved significantly with the very different approach adopted by the new Acting Registrars to the administration of the Act. In 2000-2001, there were only 5 Registrar-initiated liquidations, down from 57 the previous year.

690 The simplification and streamlining of reporting requirements would help to prevent inappropriate use of the winding-up provisions arising again; and providing the Registrar with special regulatory assistance functions should assist address some of the causes of non-compliance. There is nonetheless still clearly scope under the ACA Act as it currently stands for inappropriate use of the winding-up provisions by the Registrar. The introduction of intermediate steps before such drastic action is taken would be one way to address this.

Deregistration

691 Deregistration refers to the cancellation of a company's registration in circumstances defined by the Corporations Act. Section 82 of the ACA Act and Regulation 18 of the ACA Regulations incorporate relevant provisions of the Corporations Act dealing with deregistration. The relevant provisions are contained in Part 5A.1 of the Corporations Act.

692 The effects of deregistration are:

- The company ceases to exist;[261] and
- The company's property vests in the Registrar, and the Registrar has all powers of an owner of such property.[262]

693 However, a company which has been deregistered can be reinstated by the Court in certain circumstances.[263] The (former) directors of the deregistered company must keep the company's books for three years.[264]

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259 Registrar of Aboriginal Corporations, *Annual Report 1997–98*, p 37

260 See below discussing deregistration.

261 *Corporations Act* s. 601AD(1)

262 Ibid., s. 601AD(2), (4)

694 There are two kinds of deregistration provided for under the incorporated Corporations Act provisions: voluntary deregistration, and deregistration initiated by the Registrar.

Voluntary deregistration

695 Corporations may voluntarily deregister where the corporation is not carrying on business, has no assets or liabilities, and *all* the members agree.[265] If these conditions are met, it is a quick and cheap alternative to a voluntary winding-up, which would require appointment of a liquidator and compliance with all the provisions relating to winding-up of corporations.

Deregistration by the Registrar

696 The Registrar may decide to take action to deregister a company on his or her own initiative, if:

(a) the company's annual report is at least six months late;

(b) the company has not lodged any other documents in the previous 18 months; and

(c) the Registrar has no reason to believe that the company is carrying on business.[266]

697 Commentators have noted that the threat and practice of de-registration has been used by the Registrar to enforce compliance with reporting obligations under the ACA Act. This is problematic given the onerous nature of these obligations and the practical difficulties many ACA Act corporations and their members face in meeting them (eg poor reading, writing and numeracy skills, lack of familiarity with the corporate form and corporate roles).[267]

698 The deregistration provisions have been used by the Registrar on a similar basis to the broad winding-up provisions, discussed in the previous subsection. Hence, in the Registrar of Aboriginal Corporations' 1998-9 *Annual Report*, the Registrar noted that:

> [A] high proportion of corporations did not comply with the reporting requirements of section 59 of the Act for the three consecutive years to 30 June 1997. In the previous reporting period, the Registrar sought legal advice on how to deal with corporations that continually fail to file annual returns. The advice indicated that continuing breaches of section 59 of the Act, subsequent to reminder notices and letters requesting the submission of annual returns, provide sufficient grounds for the Registrar to proceed with action to wind-up the corporations. Solicitors were ... instructed to write to the governing committees of 446 corporations, which, for the three years to 30 June 1997 had failed to file their returns, and require them again to do so. The letters informed

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263 *Re Bayonet Pty Ltd* (1986) 11 ACLR 559. See also *Corporations Act* s. 601AH

264 *Corporations Act* s. 601AD(5)

265 Ibid., s. 601AA

266 This is provided in s. 601AB of the *Corporations Act*, but its terms have been substituted for *ACA Act* terms in accordance with Regulation 18

267 Mantziaris, C. & Martin, D. 2000, p 208

> the governing committees of the corporations which were in breach that failure to submit outstanding returns, within a specified period, would result in the Registrar initiating winding up proceedings. As a result of these actions, 44 corporations were wound up and 274 corporations were deregistered . As at 30 June 1999 action with respect to the balance was still pending.[268]

699 The practice of deregistration for non-compliance with the reporting requirements is a good indicator of the health of either the corporations operating under the ACA Act or the corporate reporting system itself. If 274 corporations out of a total of approximately 3,000 corporations were deregistered in one year, this is close to 10% of the total number of ACA Act corporations. (It is also close to double the number of new incorporations for that year). These figures are very high.

700 Although the percentage of deregistrations per annum has decreased to about 5% over each financial year since 1998-1999, that is still arguably a high percentage. By comparison, in December 2001, ASIC deregistered approximately 27,500 corporations, representing only about 2% of the total number of registered corporations under the Corporations Act.[269] And many of those deregistrations are likely to be the result of the winding-up of corporations following insolvency rather than failure to lodge annual returns.

701 The Review Team has speculated that the high deregistration figures for ACA Act corporations might be produced by the public funding context. Corporations are often formed specifically for the purpose of applying for public funds under competitive conditions. When such corporations fail to obtain the funds they are unlikely to conduct any other activity and may be deregistered.

702 Nonetheless, the number of deregistrations still appear to be unacceptably high, even if this speculation is correct. The 2000-2001 Annual Report shows that since the enactment of the ACA Act, a cumulative total of 3481 corporations have been registered, but only 2709 are current. This means that there have also been a cumulative total of 772 deregistrations – or 22% of all ACA Act corporations.

703 The Review Team is concerned that the reporting breaches which have led to deregistration being initiated by the Registrar may often be a result of the lack of capacity on the part of the directors and the members of corporations to meet the current reporting and exemption application requirements under the ACA Act, and will not necessarily be an indicator that the corporation is "defunct" or not operating.

704 As a compliance and enforcement measure, such a drastic mechanism is self-defeating. Deregistering corporations (or threatening to) in the past has clearly failed to influence compliance with the Act or improve corporate governance. The statistics in Table 5, showing the continuing high numbers of deregistrations every year, is evidence that such an approach does not work. Some 52% of ACA Act corporations appear to have failed to lodge annual reports in 2000-2001, without obtaining an exemption.[270]

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[268] Registrar of Aboriginal Corporations, *Annual Report 1998–99*, p 36

[269] *Commonwealth of Australia Gazette*, No. ASIC 31/01, Tuesday 18 December 2001, Part 5

[270] Of 2709 registered ACA Act corporations in 2000-2001, 960 annual returns were filed and 338 corporations were granted exemptions under s59A. This would mean that 1411 corporations did not file annual returns: Registrar of Aboriginal Corporations, *Annual Report*, 2000-2001

705 Deregistrations can also have serious consequences for "passive" land-holding corporations that may not perform any other functions, and for other corporations providing community services but lacking the skills to comply with the ACA Act's reporting requirements. That this is the case can be seen in the outcry following the Registrar's 1998-1999 "clean-up" operations.[271]

706 The current high level of deregistrations under the ACA Act is essentially not the fault of the Registrar's policies and practice: the Registrar arguably has little choice in cases where a corporation has repeatedly, and over a number of years, failed to lodge annual reports or apply for exemptions. In these cases, simplifying and streamlining the corporate reporting requirements (as discussed in Chapter 20, Section E), and providing some basic training in compliance with reporting requirements, would help to reduce the numbers of deregistrations of corporations that are not in fact defunct.

707 However, the Review Team is also of the view that the potential for "inadvertent" deregistration of non-defunct corporations needs to be addressed further. This could be done by better defining the circumstances under which the Registrar can initiate deregistration and possibly requiring further steps to ascertain the actual status of the corporation in question.

708 Some of this could be done through administrative arrangements. In that respect, the Review Team notes with approval the fact that the Acting Registrar entered into a Memorandum of Understanding ("**MOU**") with ATSIC in February 2002, which amongst other things:

- Requires the Registrar to provide ATSIC with "details of specific corporations for which deregistration action is proposed to allow input from the Regional and Network Offices on the proposition"; and
- Requires ATSIC to "provide information on whether the corporation [identified by the Registrar] is active and/or holding assets".[272]

709 It is understood that the Registrar's Office has also entered MOUs on similar terms with the following bodies:

- The Commonwealth Office of Aboriginal and Torres Strait Islander Health;
- The NSW Aboriginal Housing Office;
- Aboriginal Hostels Ltd; and
- The Torres Strait Regional Authority.[273]

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[271] see for example, ABC 7:30 Report. 'Remote NT Community Faces Land Title Wrangle'. Transcript 20 Feb 2000. http://www.abc.net.au/7.30/stories/s97445.htm; Contractor, A. 'Government Inaction 'Depriving' Black of their Land'. *Canberra Times.* 23 March 2000; Downing, Rev J. *The New Aboriginal Dispossession.* 2000. http://www.jinx.sistm.unsw.edu.au/-greenlft/2000/401/401p13.htm; MacDonald, J. & Hancock, D. 'The Missing Mail Spells Trouble for Timber Creek'. *The Age.* 29 Jan 2000. http://www.theage.com.au/news/20000129/A52168-2000Jan28.html

[272] *Memorandum of Understanding Between Aboriginal and Torres Strait Islander commission (ATSIC) Network Offices and Regional Offices and the Registrar of Aboriginal Corporations*, February 2002, pp. 5, 7

710 Clearly, the more such MOUs are entered, the more effective this system of checks will be. Considering that many "passive" and unresourced land-holding corporations may be particularly vulnerable to deregistration, the Review Team suggests that it may be beneficial for the regulator to explore the possibility of entering similar MOUs with bodies responsible for or involved with such land-holding corporations. This might include the Indigenous Land Corporation, the Northern Land Council and the Central Land Council.

(3) Intervention by Creditors and Funding Bodies

Note on the interaction of the ACA Act and the Corporations Act

711 The ACA Act is a more complex statute than its casual reader may appreciate. In important areas of corporate regulation, such as the procedures for the external administration of corporations in financial difficulty and winding-up, the ACA Act provides for the direct adoption of Corporations Act procedures.

712 Sections 62 and 67 of the ACA Act introduce into the Act most of Chapter 5 of the Corporations Act. This Chapter of the Corporations Act contains more than 200 discrete provisions, many of which are highly complex.[274]

713 Nonetheless, these provisions are well understood by legal and financial practitioners in the field, and the complexity in this area will mostly be borne by creditors and the Registrar, rather than by the directors and members of ACA Act corporations.

714 These Corporations Act provisions also make available a range of effective and efficient mechanisms for creditors and funding bodies to protect their interests. These are arguably much more effective and appropriate than relying on the Registrar's powers under the ACA Act, which are simply not suited to the task of protecting creditors' interests (nor should they be).

Breadth of the provisions

715 While a strict reading of sections 62 and 67 only apply to Parts 5.1 and 5.4 – 5.9 of the Corporations Act, they have been treated by the Courts as being potentially broad enough to encompass the complete contents of Chapter 5 which is entitled 'External Administration'. However, there is some uncertainty about the breadth of the application of these provisions. This is discussed in more detail in Chapter 17, Section H.

Appointment of Receivers

716 Receivers[275] can be appointed at the instigation of *creditors* rather than the Registrar. The aim of a receivership is generally to protect the creditor's assets or funding. In such

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[273] Personal communication with Garry Fisk, Director of Corporate Relations, Office of the Registrar of Aboriginal Corporations, 23 July 2002

[274] In one of the standard commercial editions of the Corporations Act – *Australian Corporations Legislation 2001* (Butterworths, Sydney, 2001), Chapter 5 runs over 188 closely printed pages

[275] Under the Corporations Act, receivers can be brought within the definition of 'controllers" of corporate property (see *Corporations Act* s. 9) Note also that a receiver is called a "receiver and manager" if the receiver manages or

circumstances, the appointment of a receiver offers an attractive and more appropriate alternative to Registrar-appointed administrators under section 71 of the current ACA Act.

717 There is no express provision in the ACA Act governing the appointment of a receiver or controller. Instead the relevant provisions are imported from Part 5.2 of the Corporations Act through sections 62 and 67 of the ACA Act (although there is some slight uncertainty as to whether the relevant provisions have in fact been incorporated – see discussion at Chapter 17 below).

718 Receivers are generally appointed under contract (although they may be appointed by the Court as well in some circumstances). Typically, the contract for provision of finance to a corporation will set out the triggers which entitle the creditor to appoint a receiver. These may include where required repayments have not been made, milestones not met, monies have not been properly acquitted, or reporting requirements have not been met. The contract will also set out the objects of the receiver's appointment and any conditions on the exercise of the receiver's powers (their general powers are set out in section 420 of the Corporations Act). Although the appointment and powers of a receiver are determined by contract, receivers are recognised and regulated by Part 5.2 of the Corporations Act.

719 One advantage to a creditor of using a receiver (as opposed to an administrator under section 71 of the ACA Act) is that the receiver owes a primary duty to the person or body making the appointment, as well as a duty to act in the interests of the corporation as a whole. Although the primary focus of receiverships for many commercial creditors is simply the securing or recovery of monies, receivers may also be provided with broader management powers to enable them to carry on the business of the corporation consistently with the purpose of the credit agreement under which the receiver is appointed. This may be important for public funding bodies where the purpose of the funding is to perform essential community services, and the achievement of outcomes is more important than the recovery of funds.

720 An advantage to the corporation of having a receiver appointed is that the receiver must work with the board of the corporation. Unlike an administrator appointed by the Registrar under section 71 of the ACA Act, the appointment of a receiver generally does not result in suspension of the board; and when it does, it does not result in the full dismissal of the board members (and so there is also no need to elect a new board of directors once the receiver has completed his or her task, unlike following appointment of an administrator under s71).

721 Receivers are required to be registered liquidators, and must not generally have any relationship to the corporation subject to receivership (as an officer, auditor, or mortgagee) or a related body.[276] They also owe certain duties of care in the exercise of any powers of sale;[277] and must provide reports to ASIC on the corporation's affairs and any offences of which the receiver becomes aware.[278] The receiver is also subject to supervision by the

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has the power to manage the affairs of a corporation (*Corporations Act* s. 90). For the sake of convenience and because of common usage, the term "receiver" is used here.

276 *Corporations Act* s. 420

277 Ibid., section 420A

278 Ibid., sections 421A, 422

Court (if not performing their functions properly), and can be removed by the Court in the event of misconduct.[279]

Monitoring of Corporations by Finance Providers

722 Many ACA Act corporations receive public funding under conditional grants.[280] Grants do not have the same legal features as contracts.[281] Monies provided under grant are generally not regarded as loans. Some conditional grants may be enforceable in equity,[282] if the Court is prepared to apply equitable principles to government grants. There is uncertainty as to whether restitutionary remedies might be available for return of funds granted to corporations where the grantee corporation has breached the terms of the grant.[283] However, the remedy of damages for breach or specific performance is not available for the breach of grant conditions.

723 The legal position raises questions about the ability of funding bodies using grants to use common commercial contractual mechanisms such as receivership to ensure that finance provided to the corporation is used for the purposes for which it was provided.

724 Contemporary grant conditions usually provide for the appointment of "grant controllers". The most common criticisms of the grant controller practice are:

- The operational focus of grant controllers is very narrow. They will only perform those activities that are necessary to administer and look after the funds which have been given to the corporation by the public grantor.
- Unlike receivers, grant controllers are not required to be registered liquidators. They therefore often lack the requisite qualifications and capacity to properly address the root cause of the financial problems that necessitated their appointment to the corporation.
- When issues relating to the financial management of the company arise, grant controllers will typically look to the board or to the Registrar-appointed administrator to address these issues and make the necessary decisions.
- Unlike receivers, there is no obligation on the grant controller to provide publicly available reports to the Registrar's office. Therefore, the Registrar, other creditors, the members of the ACA Act corporation and the corporation's service recipients may be unaware of the position of the corporation and the grant controller's activities.[284]

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279 Ibid., sections 423, 434A

280 The high proportion of ACA Act corporations receiving public funding is examined in Part 3 of this Report

281 See generally Seddon, N. 2nd ed, 1999 at para 3.2–3

282 *Muschinski v Dodds* (1986) 160 CLR 583, 604–6, 624 but compare *Aboriginal Development Corporation v Treka Aboriginal Arts & Crafts Pty Ltd* [1984] 3 NSWLR 502

283 Seddon, N. 2nd ed. 1999 at para 2.23. Such an arrangement would not give rise to a trust along the lines suggested in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567

284 One of the reasons for the very broad definition of "receiver" in s9 of the *Corporations Act* was precisely to rein-in unregulated "non-receiver" appointments, with little accountability to unsecured creditors: Townley, A & Pratt D, 1995, p. 186

725 It is not within the terms of this Review to address the legal form in which funding is provided by various governmental agencies to *ACA Act* corporations. Nevertheless, it is clear that current funding practices are placing a strain on the regulatory system created by the *ACA Act*. In the mind of the public bodies funding *ACA Act* corporations, there appears to be an assumption that the incorporation statute is there to be used to monitor the purposes to which the agency's funds are put. In the opinion of the Review Team, this is inappropriate.

726 In the opinion of the Review Team, this situation places a great burden on the Registrar's office to provide an administrator *for the purpose of protecting the grantor's interests!* This is a situation that perhaps arises because of a less aggressive pursuit of the finance–provider's interests by public funding bodies in comparison to private finance providers. There, a creditor would be expected to protect his or her exposure to the debtor through the taking of security and by appointing receivers who are willing, and indeed typically *obliged*, to take over management of the company experiencing difficulty.

727 Law reform in this area would be greatly assisted by a more pro–active approach by government agencies towards their *own involvement in corporate management as a means of monitoring the use to which public funds are put.*

728 The regulatory system would be improved if:

- Corporations experiencing financial difficulty could be assisted through early intervention by the regulator which would analyse the situation and advise the corporation of the best method to resolve the difficulty;
- the only form of administration available were voluntary administration; and
- public funding bodies provided funding under contractual instruments (such as deeds) which allowed more expressly for the taking of security and the appointment of receivers.

Other remedies available to creditors and funding bodies

Compositions or arrangements with creditors

729 Schemes of arrangement are dealt with in Part 5.1 of the Corporations Act. A compromise or arrangement with a corporation's creditors is reached through a series of meetings and Court orders and the result is that all the corporation's creditors, or all the creditors in a specific class of creditors, will be bound by the terms of the scheme. This will be the case even if individual creditors vote against the scheme, as long as the scheme is passed by a majority of creditors.

730 Since the introduction of Part 5.3A in 1993, voluntary administrations have become far more prevalent and the use of schemes of arrangement has decreased dramatically. For this reason, schemes of arrangement are not discussed in any detail in this chapter.

Provisional liquidators

731 An alternative to the appointment of receivers is the appointment of a provisional liquidator. Provisional liquidators are generally appointed as an interim measure, for example where there are urgent reasons for securing the assets of an insolvent corporation until the hearing of a winding-up application. The role of the provisional liquidator is

limited. His or her "primary duty is to preserve an existing status quo with the least possible harm to all concerned".[285] This can provide some respite for the corporation while decisions are made about whether the corporation can continue to operate.

732 Provisional liquidators are appointed by the Court. Under the imported provisions of the Corporations Act, an application for a provisional liquidator may be made by a creditor, a contributory, the corporation itself, a member of the corporation or the Registrar.

733 A creditor may apply if it is of the view that the assets of a corporation are in jeopardy or being used to pay other creditors in preference or being used for the purpose of benefiting the directors. A contributory may seek an appointment if it is of the view that the affairs of a corporation are being conducted in a manner that is improper, or contrary to its objectives.[286] An order may be obtained by a member under section 246AA of the Corporations Act, which deals with members' rights against a company if its affairs are being conducted in an oppressive, unfairly prejudiced or unfairly discriminatory manner. Orders may also be obtained under section 461(1)(h) of the Corporations Act, relating to winding up by the Court on the basis it is just and equitable to do so.

734 The powers and functions of the provisional liquidator will be set out in the Court Order.[287] The provisional liquidator has, pursuant to Section 472(5) of the Corporations Act, the power to carry on business and power to inspect records. Also, the provisional liquidator has powers that mirror Section 477(2)(a) to (k) of the Corporations Act.

735 If a restructure of a corporation is contemplated, the provisional liquidator may also appoint an administrator, under Section 436B(2) of the Corporations Act. The effects of the appointment include suspension of directors' functions, and stay or suspension of enforcement powers, but it does not effect secured creditors' rights.[288]

736 Similar to receivers (discussed above), a provisional liquidator must be a registered official liquidator.[289] The provisional liquidator is independent and will have to report to and is supervised by the Court[290] in respect of his or her conduct and dealings.

Administration

737 Under Section 436C of the Corporations Act, a creditor with a charge over all, or substantially all, the assets of a corporation can appoint an administrator. The administration process itself is similar to that for voluntary administrators under the Corporations Act, discussed in further detail below.

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285 *Re Carapark Industries Pty Ltd* [1967] 1 NSWLR 337

286 Keay, A. "An Exposition of the Principles of Provisional Liquidation", *Insolvency Law Journal*, March 1998, Volume 6, Number 1, p. 21

287 Ibid., p. 28

288 *Corporations Act*, ss. 471A(2), 471B and 471C

289 Ibid., section 472(1)

290 Ibid., section 536

Winding-up applications

738 Creditors may also make winding-up applications under the imported Corporations Act provisions.[291]

(4) Action by the corporation itself

739 The importation of most of Part 5 of the Corporations Act has also several important mechanisms available to directors of corporations in difficulty to appoint professional managers themselves, before the need for external intervention by the Registrar. However, these provisions are little used.

740 Potentially the most important mechanism is voluntary administration. However, this section will also discuss provisional liquidation. Discussions above have noted voluntary winding-up and voluntary deregistration.

Voluntary Administration

741 Under the Corporations Act, administrators cannot be appointed by ASIC. Instead, they can only be appointed by the board of the corporation ("**voluntary administration**"), by a liquidator or provisional liquidator, or by a person entitled to enforce a charge on substantially the whole of a company's property.[292] This discussion will focus on voluntary administrations.

742 Voluntary administration occurs where the directors of a corporation apply for the appointment of an administrator. This is done where the board is of the opinion that the corporation may be insolvent or is likely to become insolvent. One of the reasons for it is to protect the directors from breaching their duty against insolvent trading. This is because, on appointment of the administrator, the board steps aside, and the administrator becomes responsible for managing the affairs of the corporation. Voluntary administration is only available to ACA Act corporations through section 62, which imports the relevant provisions of the Corporations Act.[293]

743 Voluntary administration is dealt with under Part 5.3A of the Corporations Act. Part 5.5A was introduced in 1993 to overcome inadequacies in former insolvency administration procedures such as official management. The purpose of the Part is to:

- maximise the chances of the company, or as much as possible of its business, continuing in existence; or

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[291] see *Corporations Act* sections 459B, 459 P-459T

[292] Ibid., sections 435C, 436A, 436B, 436C

[293] This is the result of judicial interpretation of the incorporation reference in *ACA Act* s. 62 which makes no express reference to the voluntary administration process: *Kazar v Duus* (1998) 88 FCR 218; reading down *Re Deeral Aboriginal and Torres Strait Islanders Corporation* (1996) 70 FCR 229. See the heading " interaction of voluntary and Registrar-appointed administration" below.

- if it is not possible for the company or its business to continue in existence – administer the company in a way that results in a better return for creditors and members than would result from an immediate winding up of the company.

744 Administration under the Corporations Act involves the appointment of an administrator who investigates the business of the corporation and reports to the creditors. The administrator makes a recommendation to the creditors that: the company be returned to the directors; be wound up; or that the company execute a Deed of Company Arrangement. A Deed of Company Arrangement usually results in a compromise between the company and the creditors, under which the creditors receive a pro rata payment of the debts.

745 The advantages of this procedure are predominantly:

- the speed with which the administration takes place (the meeting of creditors to decide the company's future is usually within a month of the administrator's appointment); and
- that there may be a higher return to creditors than a winding up, and in fact, that there may be a full repayment of debts in some circumstances, particularly where the restructure or reorganisation of the company allows the administrator to continue to trade, resulting in maximum returns to creditors.

746 Although reliable statistics are unavailable, it is understood that the voluntary administration provisions currently available through the imported Corporations Act provisions are rarely used by ACA Act corporations.[294] This is probably largely because they are not clearly identified in the text of the ACA Act itself, and a lack of awareness on the part of directors of ACA Act corporations of the availability of voluntary administrations and their advantages.

The interaction of voluntary and Registrar-appointed administration[295]

747 An administrator appointed under section 71 of the ACA Act is not an administrator for the purposes of Part 5.3A of the Corporations Act. As the Corporations Act is incorporated by reference into the ACA Act, voluntary administration under the procedures of Pt 5.3A of the Corporations Act is now also available to ACA Act corporations.[296]

748 The effect of a voluntary administration is different from the effect of the Registrar's appointment of an administrator. Under a voluntary administration, the offices of the board and public officer are not vacated – their powers and functions are merely suspended for the duration of the voluntary administration.[297]

749 Recognition of voluntary administration under the ACA Act has confronted the Court with the possibility of two inconsistent schemes of administration within the Act – voluntary

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294 The previous Acting Registrar, Joe Mastrolembo, was aware of only 3-4 voluntary administrations over the course of the previous several years. Personal communication, 23 July 2002

295 This text is drawn from Mantziaris, C. & Martin, D.2000, p. 212

296 *ACA Act* s. 62; *Kazar v Duus* (1998) 88 FCR 218 at 223–4; *Re Deeral Aboriginal and Torres Strait Islander Corporation* (1996) 70 FCR 229. See generally, Crutchfield, P. 2nd ed, 1997

297 *Kazar v Duus* (1998) 88 FCR 218 at 224

administration and Registrar-appointed administration. In *Kazar v Duus*, the Court reconciled these schemes by holding that a voluntary administration will be suspended, if the Registrar appoints an administrator, for the duration of the term of the administrator appointed by the Registrar.[298]

750 It is clear from this decision that the board cannot use the voluntary administration procedure for the purpose of impeding the appointment of an administrator by the Registrar or for the improper purpose of retaining influence or control of the corporation.[299] However, uncertainty remains because of the duplication of roles and functions of ACA Act administrators and administrators appointed under the Corporations Act.

751 The interaction between the regimes of Registrar–appointed administration and voluntary administration is not smooth. This problem would be resolved if, as proposed, the Registrar's power to appoint an administrator under section 71 of the ACA Act were removed.

(5) Discussion

752 The ACA Act provides very broad powers to the Registrar to intervene in the affairs of corporations which may be in financial or other difficulty. However, the tools it provides (administration, winding-up and deregistration) are generally crude, outdated, and inappropriate for achieving the desired policy outcome of decreasing regulatory intervention and promoting the ability of Indigenous people to properly manage their corporate affairs.

753 In particular, it is the opinion of the Review Team that the Registrar's power of appointing an administrator to a corporation is a deviation from the Corporations Act model which is not sufficiently justified by the "special incorporation needs" of Indigenous people. These "special incorporation needs" might support the provision of less disruptive alternatives.

754 The shortcomings of the administration system in section 71 of the ACA Act have been exacerbated by the preference of one long-standing Registrar for heavy use of the special administration procedure in section 71. That Registrar saw his role as protecting the members of corporations from their boards. This was viewed with great resentment by many corporations, which saw it as paternalistic and inappropriate. In some cases this approach had serious negative consequences for the communities in which the corporations were located.

755 The problems created by heavy regulatory intervention have been exacerbated by a tendency on the part of public funding bodies to rely on the Registrar's powers under the ACA Act (in particular the capacity to appoint administrators) to address situations where funding is misused. These provide perhaps too easy alternative to taking proper contractual responsibility for the funding.

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298 *Kazar v Duus* (1998) 88 FCR 218 at 224–5, reading down *Re Deeral Aboriginal and Torres Strait Islander Corporation* (1996) 70 FCR 229

299 *Kazar v Duus* (1998) 88 FCR 218 at 233–4

In the view of the Review Team, the appointment of administrators by the Registrar is an ineffective and inappropriate means to protect the financial interests of creditors or funding bodies. The interests of funding bodies and creditors would be better protected through appropriate use of contractual mechanisms, including charges and receiverships. Ironically, many such mechanisms are in fact available under the ACA Act through the imported provisions of the Corporations Act. They would also be available through simple contractual mechanisms.

756 One of the reasons for the failure of many funding bodies to make use of receivers, creditors' compositions, and provisional liquidators (measures which are all initiated by creditors) may be the fact that these provisions are incorporated into the ACA Act only by reference to the Corporations Act, and are therefore not immediately obvious. Government funding bodies are also less likely to be familiar with standard commercial processes of due diligence, contractual performance measures and monitoring, and the use of Corporations Act creditors' remedies (such as appointment of receivers) than their private-sector counterparts.

757 There is a need to place more responsibility to take appropriate action on the shoulders of the ACA Act corporations themselves. It is not desirable to encourage a situation where corporate management leaves the responsibility for addressing corporate insolvency to the Registrar rather than attempting to remedy the situation itself. The availability of the voluntary administration provisions in the Corporations Act provide an appropriate means for this responsibility to be exercised.

758 The particular difficulties faced by Indigenous people in the management of corporations suggests that the regulator should provide extra assistance to corporations facing financial difficulty. This should aim at assisting the board and management of a corporation towards and analysis of problems and suggestions as to the course of action that the corporation might take to address them. Finally, there is a need for additional functions and powers to be introduced, such as mediation of disputes, and introducing regulations to allow the arbitration of disputes.

759 Chapter 20 in Part 6 contains a detailed suggestion of how the Registrar's role in regulatory intervention under a reformed ACA Act might work. That Chapter also discusses mechanisms for shifting more responsibility onto creditors, funding bodies and the corporations themselves.

E. PROTECTING MEMBERS' RIGHTS

The current position

760 Under the ACA Act as currently drafted, there is very limited scope for members to take action to protect their rights. There are no statutory members' remedies available in the ACA Act, meaning that members are limited to members' remedies available through the general law; or they may seek the intervention of the Registrar.

761 Under the general law, members' rights and remedies are currently unclear, largely because of the rule in *Foss v Harbottle*[300] which states that subject to certain exceptions, only the company is the proper plaintiff for a wrong committed against the company. Over many years of judicial interpretation, the exceptions to the rule allowing members to step into the shoes of the company in order to sue, have become more important than the rule itself.[301]

762 In part for this reason, the previous Registrar came to see protecting members' rights as one of his primary functions:

> Aside from its restriction on non-Aboriginal membership, the Act's most notable and valuable feature is the degree of protection it affords to minority rights. This protection is reinforced by the powers of intervention vested in the Registrar, powers which are readily made use of. In practice therefore, *the Act is now operating to protect Aboriginal minorities from oppression and exploitation by other Aboriginals.* In that sense, the Act is both unique and uniquely valuable.[302]

763 There are some serious problems with this approach. For a start, the ACA makes no specific provision for such a role. This is highly problematic in a jurisdiction that gives very little room to interpretations of regulatory statutes by administrators, particularly where the interpretation expands their powers[303].

764 There are also other problems with this approach. It is arguably a paternalistic and takes the capacity for Indigenous people to resolve corporate governance problems out of their own hands. And because the Act is silent about the Registrar playing such a role, there are no guidelines or restrictions on when such intervention may or may not be appropriate. Further, the regulatory intervention powers under the ACA Act as currently drafted are not well suited to such a role[304]. Finally, there is a risk that this approach could result in an undesirable dependence on the Registrar to resolve problems that are properly in the domain of the members and management of ACA Act corporations. It is also open to abuse: disaffected groups within a corporation may invite regulatory intervention simply as a means for shifting the political and financial costs of internal dispute resolution onto the Registrar's Office.

An alternative approach

765 It would be much more desirable (and consistent with the proposed philosophy for a reformed Act) to increase the capacity for members to take action on their own behalf, rather than relying on the Registrar.

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300 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189

301 See Sealy, L. 'The Rule in *Foss v Harbottle*: The Australian Experience' (1989) 10 *The Company Lawyer* 52; Baxter, C. 'The True Spirit of Foss v Harbottle' (1987) 38 *NILQ* 6; Wedderburn, KW. 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) *CLJ* 194 (Pt I) and (1958) *CLJ* 93 (Pt II)

302 Registrar of Aboriginal Corporations (n 167), *Annual Report 1996–97*, pp 1–2 (emphasis added).

303 At the time of writing the latest example of the High Court's reticence in this area was *City of Enfield v Development Assessment Commission* [2000] HCA 5

304 Problems with regulatory intervention under the *ACA Act* as currently drafted have been described earlier in this Chapter.

766 An important means for doing this would be the introduction of statutory members' remedies. Possible statutory remedies are suggested by those contained in the Corporations Act, which were designed to overcome the problems with the general law. These include the following:

- a statutory oppression remedy;
- a statutory injunction remedy; and
- a statutory derivative action for members (introduced by the CLERP reforms to provide express exceptions to the rule in *Foss v Harbottle*.)

767 Another important means for members to take action themselves to protect their interests is by amending their corporation's constitution. Members will be in a better position to do so if a flexible and easy to use system is in place for the drafting and amendment of corporate constitutions. This issue is discussed in more detail in Chapter 12. In brief, the Corporations Act provides an example of a flexible and simple approach to the modification of the corporate constitution. To register a company under the Corporations Act, a person need not submit a draft corporate constitution to the corporate regulator. *If needed*, a company may adopt a constitution *after* registration by special resolution.[305] A company may elect to use all or any of the 'replaceable rules' that appear in the Corporations Act. Any provision designated as a 'replaceable' rule applies to a corporation until it has been excluded, modified or replaced by the company's adopted constitution.[306]

Regulatory assistance in exercise of members' remedies

768 A problem with statutory members' remedies is that members will have to go to Court to protect their rights. A number of submissions pointed out that this may be very difficult for many Indigenous people to do, because of cultural differences, lack of education, training, familiarity with company law and Court processes, and their financial status.[307] Further, as noted in Chapter 4, many Indigenous people, particularly those in remote areas, have limited physical access to legal representation. One submission noted that even under the Corporations Act statutory remedies are very rarely used, partly because of cost and the need to resort to the Court system[308].

769 This rationale had been used previously by the Registrar to justify the interventionist approach criticised above:

> For reasons of costs, delays, ignorance of the process and cultural factors, Aboriginals make little use of the Court system to resolve corporate conflicts pitting Aboriginal against Aboriginal. They are also, generally, loath to invoke avenues of redress open to them under the rules of association, such as forcing a general meeting of members. There are sound cultural reasons for this. In many cases, those whose conduct is sought to be impugned are elders in the same community, or relatives. There can be other cultural factors at play. In such an environment, *the availability of a regulatory authority able and willing to intervene is eagerly seized upon.*

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[305] *Corporations Act* sections 117(3), 136(1)(b). Only a public company is required to lodge a constitution on registration if it is to have a constitution on registration.

[306] *Corporations Act* sections 135(1), (2), and Pt 2B.4 *passim.* See generally, *Ford's Principles of Corporations Law*, paras 6.010–6.020

[307] See for example, Submission by NLC, 3 June 2002; Submission by ATSIC Land Rights and Native Title Centre, June 2002

[308] Submission by NLC, 3 June 2002

> Where such recourse is not available, as is generally the case for organisations incorporated elsewhere, anecdotal evidence indicates that the injustice and the waste, sometimes grievous, remains unaddressed and continues to fester, at considerable social cost to the community.[309]

770 Despite this, cases may be cited where Court-based remedies have been used for this purpose.[310] And as noted previously, there are also risks with taking this "protective" regulatory approach too far: it could be seen as paternalistic, and could give rise to dependence on the Registrar resolving what are properly internal issues between members or members and directors.

771 There is therefore a need for the approach to members remedies to balance the risks of inappropriate intervention by the Registrar with the genuine needs of members of ACA Act corporations for appropriate assistance.

Conclusions

772 The members of ACA Act corporations should be empowered to take action to protect their rights through the introduction of specific statutory members' remedies. These could be based on relevant remedies available under the Corporations Act.

773 However, it seems likely that the mere introduction of statutory members' remedies alone will not be sufficient for the protection of members' rights. Education campaigns and training may have some limited impact on members' understanding of what their rights are and what options are open to them, but it will not address other problems, such as cost and access to legal services.

774 On that basis, it may be appropriate that in certain circumstances and on request, the Registrar be able to step into the shoes of aggrieved members, to take action on their behalf.

775 However, caution needs to be used with such a role, to ensure that it is a course of last resort in legitimate cases, where other avenues available to members (such as any provided under their corporation's rules) have been exhausted.

776 The availability of a range of more flexible forms of regulatory intervention under a reformed Act (including the members' remedies themselves and other powers described earlier in this Chapter and Chapter 20) should also make intervention by the Registrar to protect members' rights more effective (and appropriate) where it becomes necessary.

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309 Registrar of Aboriginal Corporations (n 167), *Annual Report 1996–97*, p 2 (emphasis added).

310 See Chapter 14, Section C on native title institutions and the Indigenous polity

F. CONCLUSIONS

777 The Review Team is of the view that there does need to be a shift in emphasis in the ACA Act, away from enforcement-focussed regulatory intervention, towards special regulatory assistance. This would be achieved by:

- Including appropriate special regulatory assistance functions in the express statutory functions of the Registrar, and providing the necessary statutory powers to perform appropriate special regulatory assistance functions;
- Modifying the interventionist regulatory functions of the Registrar by:
  - Bringing examination powers into line with the Corporations Act;
  - Inserting an informal intermediate step aimed at resolving corporate governance issues in corporations, before more serious intervention action is taken;
  - replacing section 71 administrations with a less extreme and better targeted measure; and
  - providing a range of other special measures, such as mediation, and arbitration
- Enhancing the capacity of creditors and funding bodies by clarifying the Act to make it clear that Corporations Act remedies such as receiverships and provisional liquidations are available to them; and
- Enhancing the capacity of corporations to take appropriate action themselves, by clarifying the application of the Corporations Act voluntary administration provisions to ACA Act corporations.

778 In recognition of the reduced role of the Registrar in intervening unilaterally in the affairs of corporations, various express members' remedies should also be introduced. Special measures would probably be required to enable members to make proper use of those remedies.

CHAPTER 12
THE CORPORATE CONSTITUTION AND CORPORATE DESIGN

A. INTRODUCTION AND OUTLINE

779 The ACA Act was originally intended to facilitate the incorporation of a wide variety of organisations. The incorporation procedure would be flexible enough to accommodate corporate constitutions tailored to the particular economic and cultural needs of different Indigenous groups. This objective was not realised. Instead, the corporate governance provisions of the ACA Act are now more prescriptive than the equivalent provisions under other statutes of general incorporation.

780 The discussion in this Section will focus primarily on section 45(3) of the ACA Act and the need for a flexible approach to the constitutions[311] of ACA Act corporations. However, there are a number of other aspects of the ACA Act which are prescriptive, and potentially over-prescriptive. These include provisions relating to obligations to maintain registers of members, and so on. Those provisions (and problems with their prescriptive nature) are addressed in the context of other parts of this report

781 There is an argument that the prescriptive nature of the ACA Act is paternalistic and outdated. This is particularly the case where the level of prescription involved does not seem to serve a necessary purpose in relation to the contemporary incorporation needs of Indigenous people (as discussed in Chapter 2).

782 There is anecdotal evidence that a number of Indigenous corporations which would otherwise have chosen to incorporate under the ACA Act, have instead chosen to incorporate under the Corporations Act, solely because of the rigid prescriptive requirements of the ACA Act. This is despite the fact that other aspects of the Corporations Act may be regarded as less than ideal (this issue is discussed in more detail in Part 4, Chapter 8).

783 In some cases, however, alternative incorporation regimes are not available. This is the case with respect to corporations created for the purpose of holding native title, and in cases where government funding policies require incorporation under the ACA Act.

784 This chapter considers the need for adopting a permissive approach to company rules and corporate design as follows:

785 Section B outlines the current position under the ACA Act.

786 Sections C to F then discuss a number of the specific problems caused by the current position, including:

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311 The ACA Act uses the term "Rules" to describe the corporate constitution. The term "constitution" is preferred by the Review Team and is generally used by preference in this Report; however the terms are interchangeable.

- Problems with "cultural appropriateness" and reference to "Aboriginal custom" (Section C);
- Problems with prescribing control by members through general meetings (Section D);
- Problems with prescription of equality in commercial ACA Act corporations (Section E); and
- Administrative difficulties caused by the ACA Act's prescriptive approach (Section F).

787 Section G then sets out the Review Team's conclusions.

B. THE CURRENT POSITION UNDER THE ACA ACT

788 Under section 45(1) of the ACA Act, the Registrar must *refuse* to issue a certificate of incorporation if he or she is not satisfied that it is "proper" for to do so, having regard to the application for incorporation.

789 This at first appears to be a broad discretion accept or reject an application for incorporation. Under section 45(3), the Registrar must refuse an incorporation application if he or she is satisfied that the provisions of the proposed constitution are:

(a) unreasonable or inequitable; or

(b) do not provide sufficiently for members to have effective control over the running of the corporation through annual general meetings and special general meetings (including by not setting out requirements relating to intervals between meetings, quorums, procedure and voting by proxy).[312]

790 "Unreasonable", "inequitable", "sufficient" and "effective control" are broad, subjective concepts. Whether or not the constitution is approved is therefore effectively within the Registrar's discretion. There is little to structure this discretion.

791 Staff in the Registrar's Office have indicated that the "effective control" ground has been difficult to enforce in practice.[313] They have also noted that it has been problematic trying to reconcile the terms "unreasonable" and "inequitable" with the subsection 43(4), which permits the rules to be based on "Aboriginal custom". This is because they are not in a position to be able to determine what may be reasonable or equitable under "Aboriginal custom".[314] Consequently, it is necessary to base the judgment on an "objective" consideration of the draft constitution (ie which is not by reference to Aboriginal custom).[315]

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312 *ACA Act* s. 45(3)

313 Corrs Chambers Westgarth, Interview with delegates of the Registrar of Aboriginal Corporations, 18 April 2001

314 See also Mantziaris, C. & Martin, D. 2000, pp. 225 – 228

315 Other problems with the concept of "Aboriginal custom" and the "cultural appropriateness" are discussed in detail in the next sub-section of this Chapter.

792 To some extent this problem was exacerbated by the previous Registrar's administration of the ACA Act. That Registrar conceived of his role as protecting corporate members from each other, and in particular protecting corporate minorities from "oppression" by corporate majorities. Adopting such a position placed greater emphasis on the prescriptive requirement that the Registrar refuse to approve Rules which were, in his view, "unjust" or "unreasonable".

793 This can be contrasted with the situation under other incorporation regimes, where avoiding such oppression is primarily the responsibility of the members themselves. Members of corporations created under other regimes are generally expected to protect their own rights and interests and to take direct legal action themselves if necessary to prevent oppression.

794 The position has improved greatly with a much more flexible approach being adopted by the current Acting Registrar and his immediate predecessor. This has seen a number of more innovative approaches to constitutions being approved by ORAC, and has seen a much faster turnaround time for the approval of many ACA Act corporations' constitutions.[316]

795 As long as the Registrar is under the section 45(1) obligation to refuse incorporation upon the section 45(3) grounds, he or she is obliged to expend whatever time and expend whatever resources are necessary to fulfil the obligation. If the Registrar does not do so, he or she may be exposed to unacceptable legal and political risks.

796 For example, if the Registrar were to approve a constitution which was subsequently revealed to lead to unreasonable or inequitable consequences, or to the oppression of certain members of a corporation, the Registrar could potentially be exposed to applications for judicial review of the Registrar's decision, as well as to considerable public and political criticism. Understandably, the Registrar may be unwilling to accept such risks and may therefore take a very cautious approach to the approval of Rules.

C. PROBLEMS WITH "CULTURAL APPROPRIATENESS" AND REFERENCE TO "ABORIGINAL CUSTOM"

797 Section 43(4) of the ACA Act allows the Rules of an association to be based on "Aboriginal custom". However, as noted above, this has in practice been difficult to implement, largely because of the prescriptive nature of the requirements of section 45(3).

798 The retention of a specific provision which allows for reference to "Aboriginal custom" in an association's Rules nonetheless remains popular. It is part of a broader concern that the

316 Submissions by Joe Mastrolembo, (then) Director, Client Services, ORAC, 7 June 2001, enclosed copies of 18 recently approved ACA Act associations' rules, which demonstrate a trend towards a more flexible approach to the approval of rules. On several occasions staff of the Registrar's Office during meetings with the Review Team noted that they have recently, in urgent cases, incorporated an association within a 24 hour period.

Act is at present "culturally inappropriate" and should be made more "culturally appropriate".[317]

799 Unfortunately, both the terms "Aboriginal custom" and "culturally appropriate" are problematic, and therefore require some discussion.

(1) Background to the references to "Aboriginal Custom" in the ACA Act

800 As discussed in Part 2, the original development of the ACA Act reflected the concern of government at the time for a flexible, simple, and "culturally appropriate" incorporation statute to facilitate Indigenous self determination. This concern arose in part through the influence of the Council of Aboriginal Affairs in the 1970s, may be seen as a product of attempts to reflect traditional or "classical" Indigenous cultural practices in statutes, particularly the *Aboriginal Land Rights* Act (NT) 1976, and the ACA Act.[318]

801 Sections 23(3) and 43(4) are the only provisions of the ACA Act which formally attempt to enable the adoption of traditional law and custom in corporate decision-making and other procedures. Section 43(4) of the ACA Act reads:

> (4) The Rules of an association with respect to any matter may be based on Aboriginal custom.[319]

802 Only two clauses of the model rules provided by ORAC to person applying for incorporation refer to custom. The first clause enables the corporation to give notices to the members in a manner according with Aboriginal custom. The second enables the Governing Committee to be elected by processes in accordance with Aboriginal custom.[320]

803 As noted in the previous section, the prescriptive nature of the ACA Act (including its administration by the Registrar) has restricted the scope for Indigenous people to design what they consider to be "culturally appropriate" corporations. Requirements of the ACA Act which have caused difficulty include the minimum number of members, disqualification criteria for membership, and most importantly the centrality given to control of the corporation by its members through the general meeting. Another aspect of the ACA Act which has caused difficulties is the requirement for governance by a board which has been delegated managerial powers and must operate in accordance with the fiduciary principle.

804 These requirements are all centred around concepts underlying Western organisational and political culture, rather than those commonly observed within Indigenous groups, whether "traditionally oriented" or otherwise.[321]

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317 For example, this sentiment was expressed at both the workshops in Alice Springs.

318 The term 'classical' has been adopted following Sutton, P. 1998 p. 60

319 *ACA Act* s. 23(3) establishes the equivalent provision for Aboriginal councils

320 ORAC, 'Model Rules' 15(3)(c) and 17(1) at http://www.orac.gov.au/publications/pdf/modrules.pdf/ See also comments in *Fingleton Report*, Volume 1, para 5.12

321 Mantziaris, C. & Martin, D. 2000, pp. 187–94; see also *Fingleton Report*, 1996, Volume 1, para 5:14

(2) "Aboriginal Custom"

805 If there is to be meaningful discussion about the role of Aboriginal custom in corporate governance, it is important to attempt to clarify what kinds of matters might be encompassed by Indigenous "custom" or "tradition" in so far as it applies to the operations of a corporation. While there is no general agreement as to precisely what is meant by customary law,[322] for the purposes of this Review, it could usefully be defined in the following terms:

> *Aboriginal custom* refers to those norms, values, understandings and practices broadly accepted within the relevant Indigenous group or community, which inform such aspects of group or community life as personal and group identities, relationships and behaviours between individuals and between groups of people, differential rights and entitlements such as those relating to traditional country and to access to resources, and the distribution of authority within the group and the matters to which it pertains.

806 This definition would therefore encompass the particular values and practices that Indigenous people bring to bear on the place of their corporations within the Indigenous polity, making decisions within their corporations and in seeking to gain access to its resources. It would also encompass the bases on which differentiation within an Indigenous group or community is established, for example in terms of "families" or "tribes".[323]

(3) Problems with introducing "Aboriginal Custom" into the corporate constitution

807 There are considerable difficulties confronting attempts to provide systematic accounts of Indigenous custom or law, for example in the clauses of corporate constitutions. A number of broad problems can be identified.[324] Firstly, there will be inevitable distortions arising from attempts to write down or codify a body of practices that have their origins within Indigenous cultures in which oral forms continue to have primacy.

808 Secondly, it may not be feasible to reduce Indigenous "law" or custom to sets of readily ascertainable rules. The complexity and diversity of contemporary Indigenous cultures do not allow for reference to a homogenous and historically prior notion of "culture" that would assist in the formulation of institutional rules and practices. In many cases, the content of law and custom will be unclear.[325]

809 Thirdly, there are no formal overarching political or religious institutions within Indigenous groups or communities which have the capacity, or authority, to state the precise terms of law and custom. There may be disputation within the group or community as to the terms of the relevant area of law and custom. Corporations can be vulnerable to

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322 Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31 AGPS, 1986, vol 2, para 99-100

323 Mantziaris, C. & Martin, D., 2000, pp. 71–7, 169–70

324 Ibid., pp. 39–43

325 Merlan, F. 'The Objectification of "Culture": An Aspect of Current Political Process in Aboriginal Affairs' (1989) 6 *Anthropological Forum* 105

instrumental behaviour by individuals which is legitimated in terms of being in accordance with Aboriginal custom, despite the fact that not all behaviour by Indigenous people in relation to their participation in corporations can be simply referable to law and custom or other manifestations of "culture". The problems with the requirement for "effective control by members" because of the significance of meetings within the Indigenous polity is discussed further in the next section.

810 Despite such difficulties, the Fingleton Review argued strongly that the ACA Act failed to enable culturally sensitive and appropriate forms of incorporation.[326] However, Fingleton's main criticism relates more to what is held to have been an overly legalistic administration of the ACA Act than to an examination of what the principles of a "culturally appropriate" Indigenous corporation might be. The criticisms by peak Indigenous bodies quoted in Fingleton also relate more to the administration of the ACA Act at the time than to establishing alternative principles for "culturally appropriate" incorporation.[327]

811 There can be little doubt that the notion of "culturally appropriate" forms of incorporation have broad currency amongst Indigenous people, their advisers, and in reviews of pertinent legislation.[328] Nevertheless, the criticism that the ACA Act is "culturally *inappropriate*" is too diffuse. At one level, the critique may attach to any of the features of the ACA Act, as the idea of a corporation, the rights and obligations it creates, and the decision-making procedures it requires are all foreign to traditionally-oriented Indigenous groups. In the case of less traditionally oriented groups, the critique raises the difficult question of what model would be more "culturally appropriate".

812 It could in fact be argued that the concept of "cultural appropriateness" is a convenient ticket-of-leave from a more rigorous analysis of the characteristics that Indigenous corporations require to effectively operate within the wider Australian legal, economic and political system.[329]

813 The focus of the Fingleton Review's recommendations on this matter lay on providing a less legalistic incorporation process, and on enabling corporate governance to be conducted in ways held to be "culturally appropriate".

814 However, it can be argued that real problems will be encountered in attempting to reflect law and custom in the formal instruments of corporate governance, most particularly the Rules.

815 There are two areas in particular where attempts to incorporate or reflect "Aboriginal custom" in corporations' rules have focussed:

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326 *Fingleton Report*, 1996, Volume 1, pp. 32–63

327 For example, ibid., para 5.16–5.27

328 For example, compare *Fingleton Report*, 1996, Vol 1: and Reeves, J. 2nd ed., 1998, Ch. 9

329 See the critiques of the *Fingleton Report's* use of 'cultural appropriateness' by Mantziaris, C. 'Beyond the *Aboriginal Councils and Associations Act*?' (Part I) (1997) 4(5) *Indigenous Law Bulletin* 10; (Part II) (1997) 4(6) *Indigenous Law Bulletin* 7–13, 16; Rowse, T. 'Culturally Appropriate Indigenous Accountability' (2000) *American Behavioural Scientist*; Fingleton's reply to Mantziaris appears as 'Back of Beyond: The Review of the Aboriginal Councils and Associations Act 1976 in Perspective' (1997) 4(6) *Indigenous Law Bulletin* 14; and Mantziaris, C. & Martin, D. 2000 pp. 286, 293–4

- Subgroup representation and differentiated voting rights; and
- Decision-making principles.

816 These attempts illustrate some of the difficulties discussed above.

Subgroup representation and differentiated voting rights

817 The first area relates to the desire to express differentiation within the membership of the corporation that reflects social differentiation within the Indigenous group or community from which the membership is drawn.

818 In order to minimise the potentially destabilising consequences of competition between groups for control of a corporation, Indigenous people have sought to have board representation based on sub-groups such as "families", "clans", or "tribes".

819 A criticism of the ACA Act and its previous administration has centred on the strong (prescriptive) emphasis on control of the corporation through equality of voting at the general meeting.[330] The prescriptive nature of the ACA Act has made it difficult if not impossible to establish mechanisms acceptable to the Registrar whereby board representation could be guaranteed to defined sub-groups of the corporation's membership (although, as noted above, the Registrar's office has recently become more flexible in this regard).

820 One solution may simply be to adopt a more permissive approach to the requirements for the Rules of Association. A permissive system of regulation may meet the Indigenous demand for "culturally appropriate" rules. If the Registrar's jurisdiction over the content of corporate constitutions were to be removed, then the incorporators could choose whatever rules *they* regarded as "culturally appropriate" to their situation. In many Indigenous settings, a rule which is considered to be "culturally appropriate" may not necessarily be a rule which has a basis in traditional law and custom.

821 The Corporations Act system of replaceable rules provides a structure wherein this can be done. The Corporations Act also allows membership classes with differentiated voting rights to be established. This might allow for more effective subgroup representation on the boards of ACA Act corporations.

Decision-Making

822 A number of the problems with attempting to codify detailed "Aboriginal customs" relating to decision-making and corporate governance in corporate Rules are discussed above.

823 However, there is no reason that adoption of *express principles* of decision-making, such as requiring "consensus" or granting a defined role to "elders" or "elders committees" could not be accommodated if the ACA Act were to adopt a more permissive approach to the Rules of Association.

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[330] This stems from the requirement that the Registrar refuse to accept Rules which are "unreasonable" "inequitable" or do not give members "effective control", as discussed in Section B.

(4) Accommodating "Aboriginal custom" in corporate governance

824 Indigenous people will bring their own particular values, understandings and practices to their participation in the activities of their corporations, whether as clients or service recipients, members or directors. The key question is whether these matters should be formally brought into corporate governance, and whether the incorporation statute should specifically facilitate this.

825 It is desirable that Indigenous corporations be designed in such a way as to accommodate the particular political, social and economic context of the relevant Indigenous group or community. Such accommodation is at the very least necessary to ensure the legitimacy of the organisation within that group. However, unless the organisation can establish an effective "interface" with the wider Australian legal, economic and administrative system, it cannot fulfil the functions required by its service recipients or clients. The approach balance is best formed by the corporations themselves rather than mandated by the state.

826 In the contemporary situation, the important issue is not the degree of "traditionalism" or otherwise of Indigenous corporate governance structures, it is the degree of *control* Indigenous people have over the *design and operation* of their own governance structures.

D. PROBLEMS WITH PRESCRIBING CONTROL BY MEMBERS THROUGH GENERAL MEETINGS

827 The ACA Act currently prescribes an "associational" model for corporations – ie corporations are required to be an association of natural persons, who control the corporation through General Meetings. Indigenous corporations often face difficulties which arise because of conflict between principles of standard corporate governance and those typically encountered in the Indigenous polity. Most of these conflicts potentially arise in Indigenous corporations irrespective of the statute under which they are incorporated. However, it is argued here that the model of control of the corporation by the membership through undifferentiated voting at the general meeting, renders ACA Act corporations particularly vulnerable to failure.

828 Such corporations may be less vulnerable if the association has been formed primarily to reflect and represent the interests and identity of a particular group or community, receives little public funding and thus has few administrative or accountability requirements. However, where the corporation receives significant public funding to provide services, conflict and competition within the wider Indigenous constituency which the organisation serves (including conflict and competition over control of the organisation and its resources) can be brought into corporate governance through members' attempts to control the organisation through the general meeting. Attempts to make such organisations accountable by having large memberships may therefore paradoxically lead to instability.

829 Associations with large memberships may also be inappropriate vehicles for conducting commercial activities, since the requirement for delegation of managerial responsibility to enable effective commercial decision making in accordance with the dictates of the market may conflict with the desire of the corporation's members to directly control its activities through the general meeting.

830 Some of the problems with the associational model could be addressed by adopting a less prescriptive approach to the Rules of corporations, and in particular the requirement that the Rules give the members effective control over the running of the association. Allowing for differential voting rights would go some way to addressing the problem.

(1) Difficulties with the associational model and the general meeting[331]

831 The corporate governance structure of the incorporated "association" or "company" is based on two organising principles:

- the significance accorded to the general meeting, and
- governance by the board according to the fiduciary principle.

832 These principles are based on the values and practices of Western organisational culture and English law, which both have a particular historical development, and which are quite foreign to the values and practices of Australian Indigenous societies. Consequently, there is the potential for a significant disparity between the formal legal model of a corporation, and the understandings and practices which Indigenous people bring to their participation in it.

(2) The general meeting in corporate governance

833 The formal legal model of the corporation is based on a division of corporate power between two decision-making organs – the general meeting of the corporation's members and the board of directors. The associational model of the ACA Act places particular importance on the general meeting of members.

834 Decision-making in the general meeting is governed by the ACA Act and the corporation's constitution. It is also supported by the common law of meetings, a body of law that has emerged in the context of decision-making within civic associational and public political institutions. The formal legal model of the general meeting is based on a deliberative process based on the principles of majority voting.

835 The ACA Act, like most general incorporation statutes, makes provision for regular meetings, the right of members to call a special meeting, the right of members to be notified of meetings, the specification of a meeting quorum, and the appointment and use of proxies. At meetings, motions are put, points of order and procedural motions may be made, elections of office-holders are conducted, minutes are kept, and resolutions of the general meeting are held to bind the meeting until altered by another resolution. The legitimate expression of dissent through debate in the general meeting and the binding character of its resolutions are foundational assumptions of the model.

[331] This section is drawn from Mantziaris, C. & Martin, D. 2000, pp 187-9

(3) The significance of meetings within the Indigenous polity

836 One reason associational forms of corporation (such as those established under the ACA Act) have been so widely accepted by Indigenous groups and communities is that the principle of control by the membership through the general meeting resonates strongly with certain widespread principles of Indigenous political culture.

837 Indigenous people are often very reluctant to delegate authority to others. It is well illustrated by the common Indigenous sayings, "no one else can speak for my country", or "nobody is boss for me".

838 Indigenous political culture is typically characterised by a high degree of "localism", with a strong emphasis on the autonomy of individuals, and on the rights and identities of local groupings, particularly those established through kinship.[332] In many, if not most, regions of Indigenous Australia, groupings of people called "families" are of considerable importance. Such "families" are defined through shared common descent from specific ancestors, are typically associated with particular surnames, have connections to defined traditional "country" and language, and play a central role in defining and organising social, economic and political relations within Indigenous society.[333] They are therefore not to be seen as straightforward equivalents to the extended families of non-Indigenous groups.

839 In their participation in meetings, Indigenous people bring to bear world-views, life histories and personal and social identities which are intensely grounded in particular connections such as those to "family", language, and traditional country. There may be deep mistrust of those from other groups, despite the objective existence of commonalities through shared histories and experience as Indigenous residents of a community or region. Meetings can often provide forums for expressing competitive political relations between individuals and groups such as "families", rather than means of arriving at consensus on particular proposals.

840 While obviously writing and other forms used by wider society have now become of great significance to Indigenous social and political life, orally based processes remain of central importance. This is not simply a matter of the relatively low levels of literacy amongst Indigenous people, but of fundamental principles of social action with strong links to the past, in which political relations between people, and between groups of people, are established and maintained through both private and public speech.[334] In such circumstances, public meetings continue to constitute core elements of political process, and of the production and reproduction of social and political relations within Indigenous societies.

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[332] Ibid. pp. 282-3; Martin, D.F. & Finlayson, J.D. 'Linking Self-determination and Accountability in Aboriginal Organisations', Centre for Aboriginal Economic Policy Research Discussion paper No 116, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1996

[333] Sutton, P. 'Families of Polity: Post-classical Aboriginal Society and Native Title', in Sutton, P. 1998; Mantziaris, C. & Martin, D. 2000, pp. 169-79

[334] Ibid., pp. 41–3, 188

841 The general emphasis within Indigenous societies on the autonomy of individuals, and of locally based groups, can hinder the use of meetings as effective means for producing resolutions that participants consider to be binding on them, even if a meeting apparently arrives at a mutually agreed outcome. Participants will typically reserve the right to subsequently act in accordance with their own interests or those of their particular group or family.

(4) Implications for general meetings of Indigenous corporations

842 In relation to those meetings that are specifically general meetings of an Indigenous corporation, there may be confusion between membership of particular groups or sub-groups (for example, "families"), and formal membership of the corporation itself.

843 Meetings and corporate governance in general, may be destabilised by the "politics of representation",[335] in which considerable effort may be expended by individuals and sub-groups in ensuring that members of their own group are on the board. Individuals may adopt strategies to maximise participation by those from their own group who can be expected to support them, or conversely to minimise participation by those from other groups. Supporters may be transported in to the meeting, or the meeting held in a location or at a time which prevents potential opponents from attending. Consequently, many Indigenous corporations are characterised by corporate histories in which competing factions alternate in their control of the board, or fission off to form new organisations.

844 In such circumstances, associations can be highly vulnerable to having competitive political relations within the wider Indigenous group or community brought into the forum of the general meeting, and thus destabilising corporate governance.

845 The factors discussed above mean that while in theory, the exercise of the members' common law voting power in the corporations general meeting provides a mechanism for monitoring the activities of directors and disciplining aberrant behaviour, in practice this may not be the case. The contribution of general meetings to high quality corporate governance may be diminished due to:

- the problematic nature of such meetings as decision-making forums within the Indigenous polity; and
- their use for collateral social or political purposes not directly related to the business of the corporation.[336]

846 These problems may result in technical breaches of the requirements of the corporation's rules, or those of the ACA Act. Such factors can often be exacerbated by the logistical difficulties which Indigenous organisations, particularly those in remote and rural Australia, face in conducting meetings and in gaining the necessary quorum.

847 Consequently, frequently encountered problems in ACA Act corporations include the failure to conduct annual general meetings,[337] low attendance at meetings and non-

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[335] Ibid., pp. 194, 304-5

[336] See discussions in ibid., pp. 188, 312-3

satisfaction of quorum requirements,[338] a lack of "meaningful participation",[339] poor understanding of minutes procedures,[340] procedural irregularities in the conduct of meetings and elections of the board,[341] and confusion between the memberships of corporations operating in the same area leading to the purported exercise of corporate rights (usually voting rights) by non-members.[342] In many corporations poor education levels and lack of familiarity with the technical requirements of corporate governance renders the annual general meeting's approval of the financial statements of the corporation a largely fictional exercise.[343]

(5) The Associational Model and Service-Delivery Corporations

848 A further problem with the associational model arises where the corporation is engaged in the delivery of publicly funded services. This is particularly the case where the service recipients to whom the corporation is providing services are a broader group than the membership. This is because there may be tensions between the wishes of the members and the obligations under grant conditions to provide services impartially to non-members. Similarly, there may be increased suspicion by the non-member service recipients of the corporation and it's capacity to provide impartial services. (This stems largely from the "politics of representation" discussed under the previous subheading, *Implications for general meetings of Indigenous corporations.*)

E. PROBLEMS WITH THE PRESCRIPTION OF EQUALITY IN PROFIT-MAKING ACA ACT CORPORATIONS

849 The Requirement in the ACA Act that the Registrar refuse to accept rules which are unreasonable" or "inequitable" and provide for "effective control" by the members, has the potential to cause particular difficulties for ACA Act corporations which are intended to secure profits for distribution for their members. This is because the Registrar has in the

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337 For example, Registrar of Aboriginal Corporations, *Annual Report 1997–98*, p. 50 (corporation had not conducted an annual general meeting between 1991 and 1996); see also p. 46

338 For example, ibid. n 98, pp. 78–9; Registrar of Aboriginal Corporations (n 85), *Annual Report 1998–99*, pp. 49–51

339 For example, *Fingleton Report*, 1996, Vol 1, para 5.53–5.57

340 See, for example, *Aboriginal Land Rights (Northern Territory) Act 1976 and the Alcoota Land Claim No 146* [1998] 281 FCA at 30

341 Evidence of procedural irregularities in meetings is to be found in almost all of the summaries of 'administrations' provided in the annual reports of the Registrar of Aboriginal Corporations. See also the facts of *Baxter v Marra Worra Aboriginal Corporation* (1988) 5 SR (WA) 42 at 46–7; *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA; *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation*; (unreported, FCA, Perth, Nicholson J, 23 June 1995); *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* [1999] FCA 521

342 For example, Registrar of Aboriginal Corporations, *Annual Report 1997–98*, pp 86–7, 88; and the facts of *Walker v Daniel* [1996] FCA 1159; *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] FCA 743. Cf: *Kolotex (Hosiery) Australia Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 571 (non-members cannot vote)

343 *ACA Act* s. 59A(5)(a); Richards, R. 'Financial Management and Related Matters: A Question of Accountability', in *Fingleton Review*, vol 2

past tended to interpret the requirements of section 45(3) as requiring undifferentiated equality between members.

850 Under the general law relating to corporations and associations, there is also a presumption that the rights of all members (or the rights attaching to all shares, as the case may be) are equal. However, this presumption can be displaced with respect to three important incidents of membership:

(a) ***Voting rights***: the right to vote in a general meeting of the corporation – the presumption may be displaced by setting out, for example, that specific members or groups of members do not have a vote (either generally or in specific circumstances) or that the votes of specific members or groups of members are to be weighted differently (either generally or in specific circumstances).

(b) ***Participation in the income of the corporation***: the right to receive a dividend – the presumption may be displaced by setting out, for example, that specific members or groups of members do not receive a dividend, or that the amount, timing or priority of a dividend to specific members or groups of members may be different.

(c) ***Participation in the capital of the corporation on winding up***: the right to receive part of the capital of a corporation when that corporation is wound up (after creditors have been satisfied) – the presumption may be displaced by setting out, for example, that specific members or groups of members do not participate in the capital on winding up, or that the amount, timing or priority of participation in the capital by specific members or groups of members may be different.

851 In corporations which are formed with an intention to secure profits for their members, it is common that the different participants will bring different things to the venture. This will commonly result in a desire for the corporation's constitution to recognise this by also providing for differentiated rights. There will also often be a desire that the corporations' constitution require differing monetary contributions to the corporation, and provide for different obligations to contribute to the debts of the corporation.

852 The ACA Act currently disables differentiation of this type. This is a significant shortcoming which will need to be addressed if the Act is intended to continue to provide for incorporation of corporations which are intended to secure profits for members. Much of the problem could be addressed by simply removing the prescriptions in section 45(3). Concerns to protect minorities in such corporations can be addressed through other means (see Chapter 11 dealing with regulatory intervention).

F. PROBLEMS WITH ADMINISTERING A PRESCRIPTIVE REGIME

853 The current prescriptive approach of the ACA Act in relation to the Rules of association (as discussed above) has been a particular source of frustration for many Indigenous corporations and prospective incorporators which reflect their desire for "culturally appropriate" structures and processes. This has been because the "culturally appropriate"

approaches taken in proposed Rules are often perceived by the Registrar as being "unreasonable" or "inequitable", or as not allowing sufficient control by the members.[344]

854 The Registrar receives approximately 200 applications for incorporation annually. The obligation for the Registrar to scrutinise all applications for incorporation and attached Rules (as well as proposed amendments to Rules) is highly resource-intensive, and has also led to significant delays.

855 In many cases, uncertainty over the nature of the prescriptive requirements and the scope of the Registrar's discretion have obliged the Registrar to seek legal advice. The Registrar has also had to expend resources on lengthy correspondence and consultation with applicants. This has diverted resources away from other regulatory tasks that might be more appropriate, for example, assisting members and directors of Indigenous corporations in the understanding and performance of basic corporate governance activities.

856 Interpretations of the ACA Act requirement by different Registrars and employees of the Registrar's Office have also lead to inconsistencies over time in the nature of Rules that have been approved. The resulting uncertainty has been a source of frustration for organisations attempting to incorporate under the ACA Act.

857 It is not known whether those seeking to incorporate have ever taken legal action against the Registrar in relation to the Registrar's decision to refuse to issue a certificate of incorporation or in relation to an undue delay by the Registrar in making a decision.[345]

G. CONCLUSIONS

858 The majority of feedback from consultations conducted as part of this Review strongly supported making the Act more permissive and flexible in its approach to corporations' constitutions.[346]

859 A minority of stakeholders suggested that the review of constitutions before corporations were registered was a valuable function, as it would ensure only appropriate or 'functional' rules were approved.[347] The Review Team believes that this concern may be misplaced, as under the current proposal the Registrar would still be able to provide pre-incorporation assistance to Indigenous groups, as part of the Registrar's special regulatory assistance functions. In any case, the Review Team believes the arguments in favour of adopting a permissive approach to corporate constitutions discussed in this Chapter heavily outweigh this one point.

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344 The issue of "cultural appropriateness" and its relationship to the prescriptive nature of the ACA Act have been explored in detail in Chapter 5

345 Mantziaris, C. and Martin, D. 2000, p. 232

346 See the Fourth Report of this Review - *Summary of Consultations, Questionnaire Responses and Submissions*, at heading 5.2

347 Submission by Merv Sullivan, of De Castro and Sullivan Chartered Accountants, 22 April 2002

860 The Review Team believes that the strongest argument for adopting a permissive approach is as follows: providing ACA Act corporations with the flexibility to design constitutions that match their particular needs will encourage good corporate governance. Of course this will not guarantee good corporate governance or well designed constitutions in every case. However, the current prescriptive requirements stifle innovation designed to introduce appropriate governance mechanisms into ACA Act corporations' constitutions.

861 In conclusion, the Review Team is of the view that the ACA Act should adopt a broadly permissive approach to the design and content of ACA Act corporations' constitutions. This would primarily be achieved by:

- Repealing the prescriptive requirements in section 45(3) for ACA Act which mean they cannot be registered if they are "unreasonable" or "inequitable" or fail to provide for members to have "effective control" over the corporation through general meetings.
- Removing any specific references to "Aboriginal custom" or any similar problematic terms, and accommodating the need for "culturally appropriate" constitutions by providing the flexibility to allow Indigenous corporations to adopt whatever processes suit their circumstances.

CHAPTER 13
DIRECTORS AND DIRECTORS' DUTIES

A. INTRODUCTION AND OUTLINE

862 Like most general incorporation statutes, the ACA Act creates two 'organs' for the exercise of the corporation's powers – the general meeting of members and the board of directors. The corporate constitution which, under the ACA Act, is known as 'the Rules of Association', then divides these powers between the two organs. In most cases, the power to manage the corporation is allocated to the board.

863 The board of a corporation incorporated under Part IV of the ACA Act is termed 'the Governing Committee'. For convenience, in this Report, the Governing Committee will be known as 'the board'. Board members will be known as 'directors'.

864 Directors of ACA Act corporations owe a variety of statutory, equitable ("fiduciary")[348] and common law duties to the corporation as a whole. These duties are broadly similar to those owed by the directors of other corporations, such as associations incorporated under State and Territory associations incorporation legislation and the Corporations Act.

865 Within Australia, the Corporations Act offers the most comprehensive and advanced model of directors' duties. It sets a benchmark by which all other statutory statements of directors' duties can be measured. On one view, the Corporations Act's statement of duties may be too complex to adopt in the circumstances of many Indigenous corporations. An important countervailing consideration is that the harmonisation of the statement of directors' duties under the ACA Act with the language of the Corporations Act might promote a clearer understanding of the duties owed.

(1) The rationale for directors' duties

866 The exercise of managerial power by the board of directors creates the potential for the abuse of the corporation's powers. Board members and the management of the corporation are usually better informed than the members of the corporation. This informational advantage could be used for the personal gain of board members and to the detriment of the corporation's members.

867 It is not possible for the corporate constitution and the statute under which the corporation is created to regulate all possible instances of misconduct by corporate office holders in advance. The imposition of duties upon directors allows for the statement of the required standard of conduct *in advance* of the particular problem. The statement is usually broad

[348] Strictly speaking, not all equitable duties owed by a director of a corporation are fiduciary duties. In particular, a director owes an equitable duty of care to the corporation which is not to be equated with or termed a fiduciary duty: *Permanent Building Society (In liq) v Wheeler* (1994) 14 ACSR 109 at 156-158. However, to avoid complication, unless otherwise specified, the terms "equitable" and "fiduciary" and cognate words will be used interchangeably in this Chapter.

enough to capture many different and novel instances of corporate misconduct. For this reason, directors' duties continue to be an important component of the governance structure of any corporation.

(2) Sources of directors' duties

868 There are three sources of law for an ACA director's duties. These are:

- equity ("fiduciary law"),
- the common law; and
- the incorporation statute itself.[349]

869 It is important to classify the precise legal source of these duties, as the breach of each duty has different legal consequences. For convenience, the common law and fiduciary duties are often referred to as 'general law' duties so as to distinguish these from the statutory duties.

The three sources of the law

870 A person occupying the position of director of a corporation occupies a 'fiduciary' office.[350] This means that the director owes special obligations to the corporation. The fiduciary principle states:

> A fiduciary:
>
> (a) cannot misuse his [or her] position, or knowledge or opportunity resulting from it, to his [or her] own or to a third party's possible advantage; or
>
> (b) cannot, in any matter falling within his [or her] service, have a personal interest or an inconsistent engagement with a third party –
>
> unless this is freely and informedly consented to by the beneficiary or is authorised by law.[351]

871 The two rules which emerge from the fiduciary principle are known respectively as 'the conflict rule' and 'the profit rule'.[352] In turn, a number of directors' duties can be said to have emerged from these rules. These include the director's duty to act honestly, the duty to disclose material personal interests and to avoid conflicts of interest and the director's duty not to fetter his or her discretion.

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349 There is no clear authority that equitable and common law duties of company directors apply to the "directors" of unincorporated or incorporated associations. But, it is generally accepted that this is the case: see *Halsbury's Laws of Australia* para [435-205]. See also K Fletcher, M McGregor-Lowndes and AS Sievers *Legal Issues for Non-Profit Associations* LBC, Information Services, 1996 p 50 n 197.

350 PD Finn *Fiduciary Obligations* Sydney, LBC, 1977, Ch 2. Fiduciary relationships are sometimes referred to as special relationships of trust and confidence: see *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-7; 55 ALR 417 at 454.

351 PD Finn 'Fiduciary Law and the Modern Commercial World', in *Commercial Aspects of Trusts and Fiduciary Obligations*, E McKendrick (ed), Clarendon, Oxford, 1992, p 9; and PD Finn 'The Fiduciary Principle', in *Equity, Fiduciaries and Trusts*, TG Youdan (ed), Carswell, Toronto, 1989, p 27.

352 See *Chan v Zacharia* (1984) 145 CLR 178 at 198.

872 Directors also owe a duty of care to their company. The duty of care has both equitable and common law origins.[353] These duties of care are now indistinguishable in their content although the remedies available for breach and the circumstances in which they are litigated may differ.[354]

873 The fiduciary and common law duties referred to above are supplemented by statutory directors' duties. Only the core general law directors' duties have been provided for in the ACA Act. The duties of directors are set out in sections 49C (members to act honestly and diligently) and 49D (disclosure of pecuniary interests). These statutory duties are based on the general law duties but do not replace these duties.

874 In some circumstances, the availability of a more favourable remedy for breach of one form of duty but not the other will allow plaintiffs to pick and choose which duty to litigate. The law governing the remedies for breach of duty at general law is likely to produce results that were not anticipated by Parliament. Any reform of the Act must consider the clarification of the consequences for breach of the various duties. This aspect of the legislation is discussed in more detail below, under Section D.

(3) The development of directors' duties under the ACA Act

875 The current directors' duties provisions were introduced in 1992 under the *Aboriginal Councils and Associations Amendment Act 1992* (Cth) following the recommendations of the Neate Report.[355]

876 Prior to the 1992 amendments, the general law of directors' duties would have applied to directors of ACA Act corporations.

877 The statement of directors' duties under the ACA Act was based on the text of similar provisions in other incorporation statutes. In turn these were adapted from the 1981

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353 An equitable duty of care and diligence is similar to the duty of care and diligence which arises from the relation of a trustee to a beneficiary, but (as mentioned in note 1 above) this equitable duty is not to be equated with or termed a fiduciary duty: *Permanent Building Society (In liq) v Wheeler* (1994) 14 ACSR 109 at 156-158.

354 See para discussion of equitable and common law remedies below. See also *Permanent Building Society v Wheeler* 14 ACSR 109; Daniels t/as *Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438; 16 ACSR 607; 13 ACLC 614. See also *Ford's Principles of Corporations Law* para [8.010].

355 *Neate Report*, 1989. The Neate Report was primarily concerned with the "need to ensure appropriate standards of accountability by members of the Governing Committee of an Association to the members of the Association and to the Registrar and those with whom the Association has financial dealings". The broad recommendations in relation to directors' duties in the Neate Report were to give consideration to amending the *ACA Act* to provide for:

(a) an obligation on directors to act honestly and diligently in the discharge of their duties;

(b) an obligation on directors to disclose any relevant interests in a contract or proposed contract, and to not to vote on such a contract;

(c) each director to be liable for the contravention by the Board of any provision of the ACA Act or the regulations.

The 1992 amendments wholly adopted the recommendations to provide for directors' duties (see sections 49C and 49D). However, the recommendations relating to the consequences of breach (that is, penalty provisions) were not adopted in the 1992 amendments.

Companies Codes. Many of the provisions of the Companies Codes relating to directors' duties have evolved over time in response to the demands of the business community for greater clarity and to the decisions of Courts interpreting the duties. The changes introduced under the *Corporate Law Economic Reform Program* Act 1999 ("**CLERP**") are only the latest of a series of changes to the Corporations Act and its predecessor statutes.

(4) General comparison with duties of a Corporations Act director

878 The directors of Corporations Act companies also owe general law duties and statutory duties. The statutory duties supplement the general law duties and do not replace them.[356] Company law has undergone many stages of evolution since the uniform Companies Acts in the early 1960's. Recently, the CLERP reforms[357] introduced a number of significant changes to the duties of directors and other officers. These reforms included the reformulation of the duty of care and the duty to act honestly and the introduction of a new statutory 'business judgment rule' which may, in many circumstances, alter the duty of care.

The statutory duties under the Corporations Act

879 The statutory directors' duties provided in the Corporations Act are quite extensive and include:

- the duty to act in good faith in the best interests of the corporation and for a proper purpose (section 181(1));
- the duty of care and diligence (section 180(1));
- the duty not to improperly use position and information (sections 182 and 183);
- the obligation to disclose a director's material personal interest in a matter that relates to the affairs of the company (section 191);
- the prohibition, on a director of a public company who has a material interest in a matter, from participating in the directors' decision in relation to that matter (section 195);
- the rules in relation to a public company or an entity controlled by a public company giving financial benefits to related parties of the public company (Chapter 2E);
- the rules in relation to the giving of benefits to directors and officers on retirement or loss of office (Part 2D.2 Div 2);
- the rules in relation to insider trading (Part 7.11 Div 2A); and
- the rules against insolvent trading (section 588G).

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356 Section 185 of the Corporations Act provides that sections 180 to 184 do not replace any rule of law relating to the duty or liability of directors or officers. For a recent explanation of the concurrent operation of statutory and general law directors' duties, see *Digital Pulse Pty Ltd v Harris* [2002] NSWSC33.

357 Corporate Law Economic Reform Program Act 1999.

(5) Difficulties with the fiduciary principle in the Indigenous context

880 The fiduciary principle introduces difficulties for Indigenous corporations and their boards.

881 The office of corporate director is a fiduciary office. The director of a corporation has a duty to act "bona fide in the best interests of the corporation as a whole" and not in the interests of particular members or groups of members.

882 Despite the problems presented by this formulation,[358] the law has been extremely reluctant to recognise a direct fiduciary duty owed by the director to a member of the corporation. Rare exceptions to this rule have emerged in the context of family companies, a context which may, in given circumstances, be of relevance to some ACA Act corporations.[359] Furthermore, a director must not act at the direction of others in the exercise of his or her fiduciary duties, even if these persons are members of the corporation.[360] The law has not given effect to the purported duty of the nominee director to act in accordance with the interests of, or directions issued by, his or her appointor.[361]

883 The fiduciary principle assumes that the director's office has a scope that may be delimited[362] from the broader social or economic interactions of the director, and from which he or she may be released only through a process of informed consent. The assumption that social relations can be segmented in this fashion is generated by the cultural context within which the fiduciary principle was formulated. English law was responding to the need to regulate the conduct of persons in whom "trust" and "confidence" was reposed in specific, culturally bounded, social situations – for example, the conduct of the person entrusted with minding the infant's option to purchase, of the person in receipt of real property under promises made between family members (sometimes in an attempt to reduce liability to taxation on land transfers), or of the person entrusted with the management of other people's money. The principle was shaped by the

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358 See eg Sealy, LS. '"Bona Fides" and "Proper Purpose" in Corporate Decisions' (1989) 15 *Monash University Law Review* 265; and *Ford's Principles of Corporations Law*, 2001 para 8.070–8.160

359 *Coleman v Myers* [1977] 2 NZLR 225 (CA), the Court recognised a director's fiduciary duty to individual corporate members arising from a transaction between shareholders and directors. The Court noted the family character of the company, the trust and confidence which other shareholding family members reposed in family members occupying the office of director, and the use, by these directors, of their position of trust and confidence and 'inside knowledge' to induce other shareholding family members to undertake the transaction. See also *Glavanics v Brunninghausen* (1996) 19 ACSR 204 and *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* (1996) 19 ACSR 483. Compare the orthodox position in *Percival v Wright* [1902] 2 Ch 421

360 Finn, PD. *Fiduciary Obligations* 1977, chs 6–7; Thomas, G. *Thomas on Powers* 1998, pp. 299–308; *Thorby v Goldberg* (1964) 112 CLR 597 at 605–6

361 The limited recognition of nominee director's duties to their appointors attempted by Jacobs J in *Levin v Clark* [1962] NSWR 686 and *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWR 1648 does not appear to have altered the orthodox position as expressed in *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) (NSW) 306; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 and *Harkness v Commonwealth Bank of Australia* (1993) 12 ACSR 165. See generally Austin, RP. 'Representatives and Fiduciary Responsibilities: Notes on Nominee Directorships and Life Arrangements' (1995) 7 *Bond Law Review* 19.

362 *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3rd) 371 at 381–2; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 99–100. See generally, Glover, J. *Fiduciary Relationships* 1995, ch 4

peculiar jurisdiction of the Court of Chancery and its procedures which addressed the conscience of the fiduciary in the execution of its office.[363]

884 It is clear that the fiduciary principle is informed by the particular set of cultural experiences and the socio-economic conditions that underpin such experiences. These experiences may appear remote to Indigenous people whose values have been formed under sometimes radically different conditions. Individuals within Australian Indigenous societies are typically embedded in a system of social relations that knows no overarching political institutions and which gives primacy to allegiances based on kinship and the representation of particularistic interests.[364] The capacity for the particular form of internal role differentiation which the fiduciary principle presupposes within the individual, may not be as easily presupposed for Indigenous office-holders in Indigenous institutions, who are typically subject to great pressure to be accountable to particularistic "constituencies" which cut across legal abstractions such as "the corporation as a whole".[365]"

885 The dependence of the corporate governance model on the fiduciary principle undermines its efficacy in the Indigenous context. For this reason, it is sometimes argued that institutional structures that do not rely on the fiduciary principle as an accountability technique are more likely to succeed in the Indigenous context.[366]

886 Some of the implications of these problems with the fiduciary principle are discussed further below under the sections relating to the standards of the duty of care and the duty of honesty.

(6) Outline of the Chapter

887 This Chapter considers a range of issues relating to directors and to directors' duties.

888 **Section B** discusses the scope of directors' duties under the ACA Act and the need to broaden their coverage to include all "officers", as well as shadow directors.

889 **Section C** then looks at a range of important directors' duties as expressed in the ACA Act and under the general law, discusses problems with those duties, and then compares with the approach under the Corporations Act. Relevant duties considered include:

- The duty of care;

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363 From the voluminous literature on the institutional history of equity, see the summary provided by Holdsworth, W. 7th edn, 1969, pp. 445–76. In the specific context of equitable procedure and the fiduciary duty, see Parkinson, P. 'Fiduciary Obligations', in P Parkinson (ed), 1996, para 1009–1011 and, more generally, Sealy, LS. 'Fiduciary Relationships' [1962] *Cambridge Law Journal* 69 and Sealey, L.S. 'Some Principles of Fiduciary Obligation' [1963] *Cambridge Law Journal* 119

364 See discussion in Chapter 2. An early exploration of this theme in relation to the operation of the ACA Act corporation is Eckermann A.K. and Dowd, L.T. 'Structural Violence and Aboriginal Organisations in Australia' (1988) 27 *Journal of Legal Pluralism* 55

365 See Chapter 5, and Mantziaris and Martin, 2000, pp. 319–20

366 Such arguments have been advanced in the context of the *ACA Act* by Martin DF and Finlayson, JD 'Conclusions and Recommendations', in *Fingleton Review*, Vol 2, 1996; P Sullivan, 'The Needs of Prescribed Bodies Corporate under the *Native Title Act* 1993 and Regulations', in *Fingleton Review*, Vol 2; and Mantziaris, C. 'Beyond the *Aboriginal Councils and Associations Act*? Part II' (1997) 4(6) *Indigenous Law Bulletin* 7, 16.

- The duty of honesty;
- Duties of disclosure and to avoid conflicts of interest; and
- Duties against insolvent trading; and

890 **Section D** then looks at the consequences of breach of directors duties under the ACA Act and compares with the approach under the Corporations Act.

891 **Section E** considers whether the ACA Act should prohibit exemptions, indemnities or insurance for liability flowing from certain types of breaches of directors' duties (primarily where the breach involves dishonest behaviour).

892 **Section F** looks at the provisions for disqualification from holding the position of director under the ACA Act, and compares with the approach under the Corporations Act.

893 **Section G** contains a summary of the conclusions from each of the preceding sections of this Chapter.

B. THE SCOPE OF DIRECTORS' DUTIES – APPLICATION TO OFFICERS

894 One of the main functions of director's duties is to ensure that directors, being persons who have control over the affairs of the corporation, are accountable for their actions. However, it is not unusual for persons other than the validly elected directors of a company to have de facto power and influence in the affairs of the corporation. In principle, such persons should be subject to the same duties to the corporation as that owed by directors.

895 This is arguably even more important with Indigenous corporations, where there is more likely to be an imbalance in experience, skills and knowledge between senior management and the board of directors.

(1) The position under the ACA Act

896 Under the ACA Act as it stands, the scope of the statutory directors' duties is limited to validly elected directors. It does not expressly extend to the public officer, de-facto directors, shadow directors or other persons involved in the management of the corporation.

897 The general law is likely to operate such that the public officer, senior managers, *will* be held to account for their actions in respect of ACA Act corporations. However, there is uncertainty around the application of this law to different factual circumstances. Further, it is questionable whether the concept of a director under the ACA Act extends to include de-facto directors or shadow directors.

(2) The position under the Corporations Act

898 By contrast, the Corporations Act extends the application of director's duties to persons other than validly elected directors who exercise a real influence over the affairs of the corporation.

899 The statutory duties under the Corporations Act, apply to a "director" and often to "officers" as well. The definition of "director" in section 9, extends beyond directors validly appointed and includes "de-facto" directors and "shadow" directors.

900 The term de-facto director is used to describe a person who openly acts as a director but who has not been validly appointed as a director. A de-facto director includes a person who is appointed to the position of a director regardless of the name that is given to the position.[367]

901 A shadow director is a person who is not validly appointed as a director but the directors of the corporation are accustomed to act in accordance with the person's instructions or wishes.[368]

Application of directors' duties to "officers"

902 Under the Corporations Act the following core directors' duties are imposed on "officers" as well as directors:

- the duty to act with reasonable care and diligence (section 180);
- the duties to act in good faith in the best interests of the company and for a proper purpose (section 181); and
- the duties not to improperly use their position or information (sections 182 and 183).

903 Section 9 of the Corporations Act provides that "officer" of a corporation means[369]:

> (a) a director or secretary of the corporation;
>
> (b) a person:
>
> (i) who makes, or participates in making, decisions that effect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to effect significantly the corporation's financial standing; or

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[367] Corporations Act section 9 (definition of "director"). A de-facto director also includes someone who acts as a director even if there has been no purported appointment and a person that describes himself as a consultant, where that person undertakes tasks that would typically be expected of a director: *Ford Principles of Corporations Law* para [8.020].

[368] Although a body corporate cannot be appointed as a director, it could be a shadow director: *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] AC 187 cited in *Ford Principles of Corporations Law* para [8.020].

[369] The term "officer" has a variety of meanings in different statutory contexts. In addition to the definition of "officer" in section 9, "officer" is also defined in section 82A. However, as the introductory section to Ch 2D (section 179(2)) of the *Corporations Act* makes reference to the section 9 definition of "officer", it appears that this definition is the one that applies for the purposes of the general duties imposed on officers under Ch 2D.

(c) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance, functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

(d) a receiver, or receiver and manager, of the property of the corporation; or

(e) an administrator of the corporation; or

(f) an administrator of a deed of company arrangement instituted by the corporation; or

(g) a liquidator of the corporation; or

(h) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

904 "Officer" is widely defined and includes the concept of a "shadow" officer.

905 Thus, directors' duties under Corporations Act apply broadly, to all those who might be involved in the management and control of the corporation.

(3) Conclusions

906 The scope of application of directors' duties under the ACA Act is very limited. The Act fails to recognise the realities of the power relations involved in corporate control. Accordingly, in circumstances where a de-facto or shadow director misappropriates funds of an ACA Act corporation or acts in a way which would otherwise be a breach of the directors' duties under the Act, the provisions of the ACA Act would be impotent in an action to bring the rogue officer to account. This is a highly unsatisfactory position.

907 The Review Team is strongly of the view that the scope of relevant directors' duties under the ACA Act should be extended to include "officers" as is the case under the Corporations Act (but expressly including the Public Officer).

908 In addition the definition of "director" should be expressly extended to include "shadow directors" and "de facto directors".

909 These particular views received very strong support from stakeholders during the course of consultations.[370]

C. THE DIRECTORS' DUTIES

(1) The Duty of Care

910 Broadly speaking, the law relating to the statutory duty of care under the ACA Act (and the Corporations Act) can be said to be interchangeable with that relating to the general law duty. The ACA Act formulation of the duty is outdated. However, the scope and nature of the duty can be said to be broadly consistent with the duty under the Corporations Act.

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[370] See Heading 5.3 of the Fourth Report for this Review – *Summary of Consultations, Questionnaire Responses and Submissions* for an overview of those responses.

911 The main law reform issue in this context is whether the Courts should be able to adjust the standard of care to take into account the cross-cultural problems and the disadvantages in terms of education, skill and experience which may be faced by Indigenous officers.

912 Another related issue is whether the statutory business judgement rule should be incorporated in the ACA Act, and if so, whether the rule should be applied in a culturally sensitive manner.

The sources of the duty and the standard of care

913 The directors' duty of care applies in three different ways:

- As a common law duty of care (that is, under the general principles of the law of negligence);[371]
- through the principles of equity[372] or
- under statute (depending on the context, the ACA Act, the Corporations Act or similar statutes).

914 The duties in equity and in law to exercise reasonable care and skill are, in content, the same.[373] However, the different origins of the duties may be significant in the circumstance of a cross-claim for contribution between parties[374] and in determining the quantum of compensation for breach.[375] Under the ACA Act, the directors' duty of care is stated as a requirement that the director act "diligently in exercising powers and performing functions and duties".[376]

915 Despite the differences in the formulations of the duties, it is recognised that the statutory duty replicates the general law duties and judges tend to treat the cases on the general law and statutory duties as interchangeable.[377] The standard for the duty of care is an *objective standard*.

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371 See *Daniels t/as Deloitte Haskins & Sells v AWA Ltd and Permanent Building Society (in liq) v Wheeler*.

372 The duty of care and diligence in equity is similar to the duty arising from the relation of a trustee to a beneficiary. However, the directors duty of care and diligence is not to be equated with or termed a fiduciary duty: *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109; 12 ACLC 674 at ASR 156 per Ipp J.

373 *Permanent Building Society (in liq) v Wheeler* at ACSR 157, 166 per Ipp J.

374 *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438; 16 ACSR 607 at 655; 13 ACLC 614 (directors were concurrently liable to compensate their company both at common law and in equity and consequently were "tortfeasors" for the purposes of the contribution legislation). See Mantziaris and Martin p 203 n 123 and *Ford's Principles of Corporations Law* para [8.320].

375 See Mantziaris and Martin p 203 n 124 and also *Ford's Principles of Corporations Law* para [8.320].

376 ACA Act section 49.

377 This statement was made in the context of the Corporations Act duty of care, however, by inference, it can be said to apply to the relationship between the general law duties and the ACA Act duty of care: see J Bird "The Duty of Care and the CLERP Reforms" (1999) 14 *Company and Securities Law Journal* 157.

The Corporations Act duty of care

916 The CLERP amendment reformulated the statutory duty of care under the Corporations Act. The new formulation under section 180(1) provides that directors or other officers of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that *a reasonable person* would exercise if he or she:

- were a director or other officer of a corporation in the corporation's circumstances; and
- occupied the office held by and had the same responsibilities within the corporation as, the director or officer.[378]

917 It has been observed that the CLERP reforms change the wording but not the meaning of the statutory duty of care.[379] The CLERP reforms confirm that the test is objective. They also confirm that a Court should have regard to the company's circumstances and the officer's position and responsibilities within the company when determining whether a director or other officer has breached the statutory standard of care and diligence.

Adjustment of duty of care for the Indigenous context?

918 The director's duty of care and diligence has now become one of the main pillars of corporate governance.[380] Yet standards of reasonableness in the degree of care and diligence are pegged to a variety of social, economic and moral expectations formed within particular societies.

919 The director's duty of care under both the ACA Act (expressed as an obligation to act "diligently" in section 49C of the ACA Act) and the general law, is an *objective* duty. The Courts are unlikely to adjust this duty of care downwards. This raises some concerns in the Indigenous context where many persons holding office may face cross-cultural problems and disadvantages in respect of skill and experience.[381]

920 It may also be argued that the ACA Act "duty of care and diligence" should be amended to ensure that a Court would take into account the following factors:[382]

- poor standards of education within Australian Indigenous society;
- poor opportunities for the development of managerial skills and poor understanding of financial concepts;
- that election to the board may reflect the judgment by the corporate membership as to the directors authority and position within the Indigenous polity rather than a judgement about the person's ability to perform the duties of the position;

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[378] As section 180(1) refers only to "care and diligence" but not "skill", the standard of skill required is unclear. However, it is likely that the objective standard of skill under the common law will apply: *Ford Principles of Corporations Law* [20.080].

[379] J Bird "The Duty of Care and the CLERP Reforms" (1999) 14 *Company and Securities Law Journal* 157

[380] See below, pp 204–5 (director's duties of diligence in the ACA Act corporation)

[381] See Mantziaris and Martin, 2000 p 152

[382] Ibid.,p. 205

- that in corporations serving the needs of Indigenous groups dispersed in a wide geographical region, the ability of directors to convene board meetings and exercise oversight of the affairs of the corporation may be more limited;
- that the corporation has been formed in response to the requirements of the *Native Title Act 1993* or funding body policy rather than on a truly voluntary basis, so that board members may have accepted appointments under conditions where to refuse would have occasioned hardship for the Indigenous group served by the corporation.

921 A subjective approach might also be able to address some of the cultural and other problems with the use of the fiduciary principle in the Indigenous context, discussed in the previous Section.

922 At one level, such an approach has some appeal in the potential to recognise some of the disadvantages faced by Indigenous participants in corporations. However it is also problematic: the contrary view would be that this is a paternalistic attitude which is indistinguishable from the attitudes underlying the policies that have recently been criticised for creating a culture of "welfare dependence" amongst Indigenous Australians. It could be argued that lowering of the standard may result in a culture of complacency and apathy in relation to the running of Indigenous corporations.

923 In addition, while lowering the standard of the Indigenous director's duty of care may reflect their relative disadvantage in terms of skills and knowledge, it may also prejudice the interests and expectations of the corporation's Indigenous members, who themselves are most likely to be disadvantaged.

924 Ultimately, the Steering Committee and the Review Team concluded that the potential disadvantages of lowering or modifying the standard of the duty of care outweighed the benefits. Some consideration was given to alternative approaches, such as having split standards of care between directors and officers (with standards for directors being lowered while standards for officers remain high). These proposals were ultimately rejected as unworkable and as offering few advantages.

925 One possible compromise approach would be to introduce a "business judgement rule" similar to that included in the Corporations Act. This is discussed in more detail below.

Consideration of a statutory business judgment rule

926 The CLERP reforms introduced a statutory "business judgment rule" in section 180(2). Section 180(2) provides that a director or other officer of a corporation who makes a business judgment is taken to meet the requirements of the statutory duty of care and diligence in section 180(1) and the equivalent duties at common law and in equity, in respect of the judgment if that officer:

- makes the judgment in good faith for a proper purpose; and
- does not have a material personal interest in the subject matter of the judgment; and
- informs himself or herself about the subject matter of the judgment to the extent that officer reasonably believes to be appropriate; and

- rationally believes that the judgment is in the best interests of the corporation.

927 Under section 180(2) a director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in that position would hold.

928 The desirability of a statutory business judgment rule was a contentious issue at the time it was introduced, and remains so. In the Corporations Act context, the basis for introducing it was that it would encourage entrepreneurial risk taking to ensure that directors do not fail to take advantage of opportunities that involve responsible risk taking for fear of prosecution. On the other hand, some commentators argue that a statutory business judgment rule is not needed because it does not offer superior protection to that already provided by long established general law doctrines.[383] However, despite the lack of substantive change in the law brought about by the introduction of the rule, it has been recognised that the rule is nonetheless advantageous as it eliminates any uncertainty associated with the duty of care.[384]

929 In the Indigenous context, the introduction of a statutory business judgement rule may be particularly advantageous for Indigenous directors who are heavily reliant on advice from senior management or external sources. This might help to alleviate some of the difficulties potentially experienced with the standard of the duties of care and diligence, discussed above. Further, it could be argued that if such a concession is given to corporations operating in the mainstream commercial sphere, then it should not be denied to Indigenous directors.

(2) The Duty of Honesty

930 The duty of honesty is a difficult legal obligation to define. Its historical origins lie in the director's fiduciary obligation to the company. The duty to act honestly was adopted in earlier versions of the Corporations Act and also in the ACA Act.

931 In the context of the Corporations Act, the main difficulty with the statutory duty of honesty was whether the duty was subjective or objective. Courts struggled with the question of whether a director acting honestly in the subjective sense could nonetheless breach the statutory duty of honesty.

932 As a result of the difficulties associated with the concept of honesty, the CLERP amendments, among other things, replaced the duty to act honestly with two separate *objective* duties: the duty to act in good faith in the best interests of the company and the duty to act for proper purposes. The ACA Act has not been similarly amended.

933 The central policy issue in the present context is whether the statutory duty to act honestly in the ACA Act should be revised. More particularly, should the amendments to the Corporations Act in respect of the duty to act honestly be followed in a reformulated ACA Act?

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383 *Ford's Principles of Corporations Law*, 2001, para 2.25

384 J Bird "The Duty of Care and the CLERP Reforms" (1999) 14 *Company and Securities Law Journal* 157.

The choice between a subjective and an objective standard

934 ACA Act provides for the duty of honesty in section 49C. This Section states that

> [a] member of the Governing Committee of an Incorporated Aboriginal Association must act honestly and diligently in exercising powers and performing functions and duties under this Act, the regulations and the Rules.[385]

935 It is unclear whether the standard by which the duty is assessed is *subjective* or *objective*.

936 The subjective standard lays down *a lower standard of conduct* than an objective standard. Under a subjective standard, a director who is an "amiable lunatic" or 'amoral' may be both honest and believe he or she is acting for the benefit of the company as a whole, even when – by reference to an objective 'community' standard – he or she cannot be said to be so acting.[386]

937 The problem of choosing between an objective and a subjective standard for the statutory duty of honesty has been encountered in the interpretation of section 232(2) of the Corporations Act as it stood prior to the CLERP reforms. The Courts disagreed about whether section 232(2) was breached where the director was subjectively honest but where the Court considered the purpose to be improper.

938 On one line of authority, a breach of the duty of honesty requires a consciousness that what is being done is not in the interests of the company and deliberate conduct in disregard of that knowledge.[387] This view suggests that directors who honestly believe their acts to be in the interests of the company do not breach the duty. The contrary line of cases considers that the duty to act honestly is breached where a director exercises powers in a subjectively honest way but for a purpose which the Court judges to be improper.[388]

939 The conflict in the judicial interpretation of this section appears to have been settled with the introduction of the CLERP amendments.[389] The new section 181(1) which replaced the former section 232(2) provides that a director or other officer of a corporation must exercise his or her powers and discharge their duties:

- in good faith in the best interests of the corporation; and
- for a proper purpose.

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385 The wording of section 49C is identical to the formulation under section 124(1) of the former *Uniform Companies Act* 1961 (Cth).

386 V Mitchell "The Concept of 'Honesty' Under Section 232(2) of the Corporations Act" (1994) 12 *Company and Securities Law Journal* 231 p 234.

387 Line of cases starting from *Marchesi v Barnes* [1970] VR 434.

388 Line of cases starting from *Australian Growth Resources Corp Ltd v Van Reesema* (1988) 13 ACLR 261. See *Ford's Principles of Corporations Law* [8.065]; HAJ Ford, RP Austin and IM Ramsay *An Introduction to the CLERP Act 1999* Butterworths, Sydney, 2000 paras [2.26]-[2.28] and C Mantziaris and D Martin *Native Title Corporations – a legal and anthropological analysis* Sydney, The Federation Press, 2000 p 204 n 126.

389 For a discussion of the problems with the former section 232(2) see B Fisse "The Criminal Liability of Directors: Honesty in Law and Corporate Law Reform" (1992) 3 JBFLP 151.

940 In addition, the new provisions impose *criminal sanctions* for breach of the duty to act in good faith in the best interest of the corporation and for a proper purpose only if the director or other officer was intentionally dishonest or reckless.[390]

941 The CLERP amendments have clarified the statutory duty of honesty in a number of respects:

- The amendments replace the problematic concept of the duty to act honestly with two separate duties: the duty to act in good faith in the best interests of the corporation and the duty to act for a proper purpose.
- The standard by which the director is judged in respect of these are duties are now clearly objective standards.[391]
- The circumstances in which the civil and criminal penalty provisions will apply are more clearly defined.

Conclusion

942 Given the problematic history of the duty of honesty, there are strong grounds for the formulation under the ACA Act to be amended or at be least clarified.

943 The question of whether duty of honesty in an Indigenous context should be stated as a subjective or objective duty raises some similar questions to those discussed in relation to the duty of care. Problems with the application of the fiduciary principle in the Indigenous context (discussed in section A above) also arise.

944 However, ultimately, the Review Team and Steering Committee were of the view that creating subjective standards would ultimately be to the detriment of the members of ACA Act corporations. That being the case, an appropriate objective test is required. The Corporations Act again provides a good model.

(3) Duties of disclosure and duties against conflicts of interest

945 The 'conflict rule' states that a director must not, in any matter falling within the scope of his or her service, have a personal interest or inconsistent engagement with a third party, except with the corporation's fully informed consent.

946 There are a number of circumstances in which the conflict rule is applied. These include: situations where a director has a material personal interest in a matter being considered by the corporation, improperly uses their position or information, related party transactions and the concept of the nominee director. These are discussed in turn below.

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390 Corporations Act section 181(1).

391 As originally proposed, section 181(1) provided that a director or other officer must act in good faith "in what they believe to be" in the best interests of the corporation and for a proper purpose. The words in quotation marks were deleted in the Parliamentary debates in order to take a subjective test and make it an objective test: Ford et al para [2.27]. Further, by virtue of section 184(1), the duty under section 181(1) applies where a director exercises powers for a purpose which the director thinks is proper but which the Court judges to be improper: Ford et al para [2.26].

Duties of disclosure under the ACA Act

947 Many incorporation statutes state the conflict rule and its exception – that is, the circumstance where a conflict of interest has been disclosed and approved with the fully informed consent of the corporation – as separate statutory duties. The ACA Act follows this pattern.

948 Section 49D(1) of the ACA Act provides that

> [a] member of the Governing Committee of an Incorporated Aboriginal Association who has a direct or indirect pecuniary interest in a matter being considered or about to be considered by the Committee must disclose the nature of the interest at a meeting of the Committee as soon as possible after the relevant facts have come to his or her knowledge.

949 Section 49D(2) provides that the disclosure must be recorded in the minutes of the meeting of the Committee and the member *must not*, without the approval of the Committee:

- be present during any deliberation of the Committee about that matter; or
- take part in any decision of the Committee on that matter.

950 The wording of the duty to disclose pecuniary interests was based on the formulation of the duty to disclose material personal interests under the *former* section 231(1) of the Corporations Law. The formulation under section 231(1) required a director of a proprietary company who was in any way, directly or indirectly, interested in a contract or proposed contract with a company, to declare the nature of the interest at the meeting of directors as soon as practicable after the relevant facts came to the director's knowledge. Section 231(1) was repealed by the CLERP Act and replaced by the current section 191.

951 Section 191(1) provides that a director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless the interest is exempt under section 191(2).[392]

Discussion

952 There are two aspects of the ACA formulation of the disclosure duty which may need reconsideration. Firstly, the ACA duty is limited to matters in which a director has "pecuniary" interests whereas the Corporations Act duty uses the broader concept of "material personal interests". It is foreseeable that a director of an Indigenous corporation may have a vested interest in a matter confronting the corporation which is *non-pecuniary*. For example, a certain decision before the board may have the effect of giving the director and/or his or her family more power within the Indigenous community or control over certain community assets. It will be desirable to ensure that such conflicts of interests are notified to the board and that the relevant director does not participate in any decision in which he or she has a conflict of interest without the consent of the board.

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[392] The two major changes made by section 191(1) to the previous disclosure requirements are that, firstly, the requirements are extended from proprietary companies to apply to both public and proprietary companies. Secondly, section 231(1) was narrower in scope, it applied to direct or indirect interests in respect of contracts or proposed contracts. Section 191(1) is not so limited and applies broadly, to material personal interest in a matter that relates to the affairs of the company: see Ford et al para [2.31].

953 It must be recalled that many Indigenous corporations are established in order to provide a publicly funded service to a community or group wider than the corporate membership. Native Title Representative Bodies, and health and legal services are significant examples. It should also be noted that the board of such corporations may not necessarily broadly represent the wider client base of the corporation, but may have been appointed through processes whereby one faction or group has gained ascendancy through control of a general meeting. In such circumstances, it would be common for a director to have "material personal interests" in the outcome of decisions which are brought to the board. Again, it would be desirable for such interests to be covered by the duty of disclosure.

954 Secondly, the duty under the ACA Act only applies to matters being considered, or about to be considered, by the board. The Corporations Act on the other hand, covers any matter that "relates to the affairs of the company" and is therefore much broader in scope. Conflicts may arise in the course of business which are not given board consideration. Under the present formulation, directors of ACA Act corporations will not be obliged to disclose such conflicts. This should also be addressed in relation to the ACA Act.

Improper use of position and information

955 The Corporations Act also contains two additional provisions which are based on, but are not identical to the general fiduciary duty regarding conflicts of interest.[393] The duties prohibit directors from gaining an advantage for themselves or someone else or causing detriment to the corporation by:

- improperly using their position (section 182); or
- improperly using information they have obtained as a director or officer (section 183).

The ACA Act does not contain such provisions.

956 Although the general law principles which are similar to sections 182 and 183 will apply to directors of an ACA Act corporation, the clarity and certainty gained from having clear statutory duties may favour inserting such provisions in the ACA Act.

The regulation of related party transactions under the Corporations Act

957 Another body of statute and case law which has developed from the "conflict rule" deals with related party transactions, that is, the conferral of benefits on director-related or other entities within a corporate group.

958 The ACA Act does not have any specific rules in relation to related party transactions. In the absence of any such statutory rules, the general law fiduciary rules will apply. In addition, the statutory obligations of honesty and diligence may also operate to prevent a director abusing his position to benefit related parties.

959 Under Chapter 2E of the Corporations Act, there is a comprehensive regime designed to "protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those

[393] *Ford's Principles of Corporations Law* [9.290].

interests".[394] Accordingly, section 208 permits the giving of a benefit where the company has obtained the approval of its members in the way set out in sections 217-227.

960 The categories of persons that are considered to be related parties are as follows[395]:

- controlling entities (those who control the company's financial and operational policies);
- directors and their spouses, parents and children;
- entities controlled by other related parties;
- an entity which was a related party at any time in the previous six months;
- an entity which reasonably believes that it will become a related party at any time in the future; and
- an entity which acts in concert with a related party on the understanding that they will benefit financially from any dealing between the public company and the related party.

961 It is important to note that the related party transaction provisions under the Corporations Act only apply to public companies.

Discussion

962 To some extent, a director's ability to engage in related party transactions under the Corporations Act will be regulated by the general law or the statutory duties to act honestly and diligently. However, in the context of a reform of the ACA Act, there may be some utility in adopting provisions regulating related party transactions for the purposes of certainty and clarity. A clear statement of these rules might send a clear message to directors that financial dealings with related parties should be undertaken openly with the consent of the members of the corporation.

963 However, the provisions relating to related party transactions in the Corporations Act may be more complex and comprehensive than is required for ACA Act purposes. In this particular circumstance, there may be an advantage to adopting a simplified statement of the duty.

(4) Insolvent trading

964 Insolvent trading provisions are aimed at protecting unsecured creditors who may deal with rogue directors who are operating an insolvent company. The Corporations Act contains provisions prohibiting insolvent trading. The ACA does not.

965 The law reform issue which arises is whether provisions proscribing insolvent trading should be expressly incorporated in the ACA Act.

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394 Corporations Act section 207.

395 Corporations Act section 228.

966 It is in fact arguable that they might in fact already be part of the ACA Act. Section 62 of the Act applies large parts of Chapter 5 of the Corporations Act (the provisions relating to the external administration of companies) to ACA Act companies. This is considered in more detail below. Whether this argument is correct or not, the position should be clarified under any reform of the Act.

Comparison with Corporations Act

967 The insolvent trading provisions under the Corporations Act are detailed and relatively comprehensive. If the conditions for the application of the insolvent trading provision (section 588G) are satisfied, depending on the circumstances, a director is considered to have contravened the section or to have committed a criminal offence.[396]

968 Section 588G applies where:

- a person is a director at the time the company incurred a debt;
- the company was at the time insolvent, or was pushed into insolvency by the debt; and
- there were at the time reasonable grounds for suspecting insolvency.[397]

969 Under section 588G(2) *a contravention* occurs if the above conditions are satisfied and the director fails to prevent the company from incurring the debt.

970 Under section 588G(3) a director commits *an offence* if the above conditions are satisfied and the director's failure to prevent the company incurring the debt was dishonest.

971 Further, under section 588J or section 588K the Court may order the director to pay to the company (not to the creditor) an amount equal to the loss or damage. If the company is being wound up, there are additional remedies under section 588M.[398] In particular, with the liquidator's consent or with the Court's leave, a creditor may bring proceedings under section 588M(3) to recover its loss against the director.

972 Section 588H provides for defences to proceeding for a contravention of section 588G(2). The defences include: reasonable grounds to expect solvency, reasonable reliance on information supplied by others, not taking part in management, or taking reasonable steps to prevent incurring the debt.

973 The insolvent trading provisions do not apply to officers of the corporation other than directors. However, the wide definition of directors in section 9, which includes de-facto directors and shadow directors, applies.

Discussion

974 The main purpose of insolvent trading provisions are to protect unsecured creditors.

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396 Corporations Act sections 588G(2) and (3), respectively.

397 Corporations Act section 588G(1). See *Ford's Principles of Corporations Law* para [20.080].

398 Corporations Act section 588M. See *Ford's Principles of Corporations Law* para [20.080].

975 It is arguable that creditors' interests are adequately protected under the other directors' duties and it is not strictly necessary to provide for a further duty to prevent insolvent trading. For example, in certain circumstances, the duty to act in the interests of the corporation and for proper purposes requires directors to consider the interests of creditors.[399] Also, there is a considerable degree of overlap between the duty of care and diligence and the insolvent trading duty. Therefore, if a director exercises due care and diligence, they are likely to know whether a company is insolvent or not.[400]

976 However, these provisions are only of limited effect, and the Review Team is of the view that the reformed ACA Act should be clear and unambiguous wherever possible.

Conclusions

977 This Report recommends the strengthening of the position of creditors of ACA Act corporations in a number of critical areas, in particular by providing for the appointment of receivers, and through increased reporting and disclosure requirements for larger corporations. Making voluntary administration clearly available to the directors of ACA Act corporations would also help to address insolvent trading.

978 A directors' duty not to trade while the corporation is insolvent or where there are reasonable grounds of suspecting insolvency should also be introduced. This should be modelled on section 588G of the Corporations Act.

(5) Conclusions

979 As with most of the State and Territories Association Incorporation Acts, the director's duties sections of the ACA Act are outdated. They have not kept up with the development in general law standards of fiduciary obligations and duties of care (eg *AWA v Daniels; Byrnes Hopwood*) of the offices of directors. These standards have been formed through the interpretation of the reformed Corporations Act provisions.

980 If the directors duties in the ACA Act were generally harmonised with the text of the Corporations Act, interested parties could take advantage of the more settled jurisprudence on the meaning of these sections.[401]

981 The *Commonwealth Authorities and Companies Act 1997* ("**the CAC Act**") has been amended consistently with the Corporations Act for precisely this reason. The directors' duties contained in the CAC Act are almost identical to those provided in the Corporations Act. There may also be some benefits from reformulating the statement of directors' duties to be consistent with the Corporations Act for clarity and certainty.

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399 R Langford "The New Statutory Business Judgement Rule: Should it Apply to the Duty to Prevent Insolvent Trading?" (1998) 16 *Company and Securities Law Journal* 533 at p 554-55. In the process of concluding that a statutory business judgement rule should not apply to the duty to prevent in insolvent trading, Langford discusses the areas of overlap between the insolvent trading duty and the statutory business judgement rule and the insolvent trading duty and the duty of care and diligence: Langford p 554-558.

400 See Langford p 556-558.

401 Mantziaris and Martin, pp. 203-4

982 Relevant duties which should be brought into line with the Corporations Act include:

- the duty of care;
- the duty of honesty;
- the duties of disclosure and to avoid conflicts of interest (although with a simplified provision in relation to related party transactions); and
- the duty not to trade while insolvent.

983 It is noted that the feedback from stakeholders in response to the consultations broadly supported the modernisation of the directors' duties to reflect the approach in the Corporations Act.[402]

D. CONSEQUENCES OF BREACH

984 Having addressed the scope and content of directors' duties, it is now necessary to give consideration to the consequences where those duties are breached.

985 Breaches of general law duties will attract general law remedies.

986 A breach of a duty under the ACA Act, however, may result in the Registrar obtaining an injunction requiring the director to cease the breach or an order for winding up on the petition of an interested party. These remedies, are quite limited and may have the result of punishing the corporation rather than the rogue director.

987 The Corporations Act addresses the issue by providing a broad range of civil penalties and also includes criminal penalties.

988 The principal law reform issue in this area is whether the ACA Act should also provide for a broad range of civil and criminal penalty provisions, similar to those contained in the Corporations Act.

(1) Breach of general law duties and remedies under the general law

989 The remedies available for breach of fiduciary duty by a director are flexible and will depend on the nature of the breach[403]. For example:

- Where the breach relates to a contract or disposition by the company then the natural remedy will be rescission coupled with orders for restitution under which the company's property will be restored to it.
- Where breach of duty relates to the making of unauthorised profit, the remedy will be that the director account to the company for that profit.

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402 See the Fourth Report of this Review – *Summary of Consultations, Questionnaire Responses and Submissions*, at heading 5.3.

403 The remedies for breach of fiduciary duty are largely an application of broader principles governing the availability of equitable relief: *Ford's Principles of Corporations Law* para [9.340].

- If the breach of duty has caused loss to the company, the appropriate remedy will be equitable compensation.
- Where a director misappropriates company property, the Court will declare that the director holds the property as a constructive trustee.

990 A breach of the duty of care could give rise to a claim for monetary compensation for any loss caused by the breach. The basis of the claim could be the common law duty of care or the equitable duty of care.

991 The damages will differ according to whether the cause of action is in law or in equity. Equitable compensation can be distinguished from common law damages in two principal respects:

- in equity, damages are assessed by reference to the value of the assets depleted by the defendant's wrongdoing as at the date of restoration, rather than at the date of the defendant depriving the plaintiff of their use;[404] and
- factors such as foreseeability and remoteness, to which damages at common law are subject, are not relevant to equitable compensation.[405]

992 From the above, it can be seen that the consequences of breaches under the general law can be complex and generally require recourse to the Court system. This is not particularly satisfactory in the light of the special needs of Indigenous people.

(2) Breach of ACA Act duties and consequences

993 There are a number of provisions under the ACA Act which can be used to remedy a breach of the ACA Act directors' duties. These are set out below[406]:

- Section 61 provides that where the Registrar is of the opinion that the board is not complying with a provision of the ACA Act, the regulations, or the rules of the corporation the Registrar may apply for an injunction requiring a member or members to cease the contravention.
- Under section 62A, the Registrar may petition that a corporation be wound up if the winding up would be in the public interest or in the interests of the members of the corporation.
- Under section 63, if, among other things, directors of an corporation have acted in the affairs of the corporation in their own interests rather than in the interests of members as a whole or in any other manner whatsoever that appears to be unfair or unjust to other members, the corporation may be wound up under an order of the Court on the petition of the corporation, any creditor, a member of the corporation, the judicial manager of the corporation[407] or the Registrar.

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404 *Ford's Principles of Corporations Law* para [8.320] discussing *Re Dawson* [1966] 2 NSWR 211 at 216.

405 *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438; 16 ACSR 6097 at 655; 13 ACLC 614.

406 These powers are all discussed in detail in Chapter 11, Section D.

407 The term "judicial manager" is not defined in the ACA Act.

(3) Civil and criminal penalties under the Corporations Act

994 By the operation of section 185 of the Corporations Act, a breach of a general law duty by a director of a Corporations Act corporation will avail relevant parties to the general law remedies discussed above. This is because section 185 provides that sections 180 to 184 is not in derogation of any rule of law relating to the duty or liability of directors or officers.

995 In addition, the Corporations Act provides for a statutory penalty regime which consists of a range of civil and criminal sanctions.

Civil penalty provisions

996 Some statutory directors' duties are declared to be *civil penalty provisions* under the Corporations Act. These include:

- section 180 – the duty to exercise reasonable care and diligence; and
- section 181 – the duty to act in good faith in the best interests of the company and the duty to act for a proper purpose.
- section 182 and 183 – the duties not to make improper use of position or information.

997 Where a contravention of a civil penalty provision has been proved, the Court may make a declaration of contravention.[408] Then, ASIC can obtain:

- a pecuniary penalty order for up to $200,000 to be paid to the Commonwealth;[409]
- a disqualification order which can prevent a person from managing companies for a period which the Court considers appropriate;[410] or
- compensation order under which the person can be required to compensate the company for damage suffered by it.[411]

998 A company may also seek a compensation order but not a pecuniary penalty order or a disqualification order.[412]

Criminal penalty provisions

999 Criminal penalties under the Corporations Act vary according to the duty.[413] There are no longer any criminal penalty provisions for the breach of section 180 which relates to the duty to act with reasonable care and diligence. The change was reasoned on the basis that the concept of negligence is inconsistent with dishonesty, in that dishonesty suggests an

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408 Corporations Act section 1317E.

409 Corporations Act section 1317G.

410 Corporations Act section 206C.

411 Corporations Act section 1317H.

412 No-one but ASIC or a company damaged by the contravention of a civil penalty provision may seek these orders: section 1317J.

413 See *Ford's Principles of Corporations Law* para [8.365].

active awareness of wrongdoing, rather than a failure to exercise sufficient care and diligence.[414]

1000 However, acts of dishonesty or recklessness attract criminal penalties. A breach of section 181, the duty to act in good faith in the best interests of the company and the duty to act for a proper purpose, may result in a criminal penalty if a director or officer is reckless or intentionally dishonest.[415] Similarly, in relation to the duties not to misuse information or position, an offence is committed if the misuse is dishonest.[416]

1001 A director or other officer who commits an offence by breaching a statutory duty may be fined up to $200,000, or imprisoned for up to five years, or both.[417]

(4) Introduction of a wider range of penalties under the ACA Act

1002 The current sanctions for breach of directors' duties under the ACA Act are inadequate:

- The options available to the Registrar and to members to respond to a breach are highly limited. The Registrar can apply for an injunction or a winding up. Members can only apply for a winding up.
- The winding up of a corporation as a result of misconduct on the part of a director would unfairly punish the members of the corporation for conduct for which they are not responsible.

1003 However, considering:

- the "non-voluntary" nature of many Indigenous corporations and appointments to directorship positions; combined with
- the special circumstances of Indigenous people which make it likely that the directors of Indigenous corporations will not have the same formal education, skills or training as directors of non-ACA Act corporations,

it may be queried whether the imposition of a broad range of civil and criminal penalties for breaches of directors' duties would be appropriate or desirable. This is particularly the case if the standards of the duties to be imposed (as proposed above) are to be objective rather than subjective.

1004 It may also be questioned whether the imposition of penalties would have much "deterrent" effect, if the relevant directors (through lack of relevant training or accessible information) are not aware of the penalties; or if they are in a position where they are unable to comply with the duties in any case.

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414 Ford et al para [2.23].

415 Corporations Act section 184(1). The duty not to make improper use of position in section 182 and the duty not to make improper use of information in section 183 can also be the subject of criminal penalties: see Corporations Act sections 184(2) and (3).

416 Corporations Act sections 184(2) and (3).

417 Corporations Act Schedule 3.

1005 Nonetheless, the Review Team believes that it would be appropriate to insert a range of civil and criminal penalties under the ACA Act, particularly in relation to cases of dishonest or bad faith actions. It has been noted elsewhere that the members of ACA Act corporations are particularly vulnerable to abuse by "rogue" directors or officers. Appropriate penalty provisions should help deter such persons.

1006 However, in recognition of the special circumstances of many Indigenous directors (discussed above), it is suggested any reform of the Act consider the creation of a wide judicial discretion in the imposition and settling of civil and criminal penalties. Such a discretion could be used to accommodate many of the special and cultural considerations and socio-economic difficulties that many Indigenous directors face.

E. EXEMPTIONS, INDEMNIFICATION AND LIABILITY INSURANCE

1007 The Corporations Act contains provisions which are designed to prevent directors from making arrangements to avoid paying their liabilities to the corporation through exemptions, indemnification or insurance. The ACA Act does not contain any such provisions.

1008 The law reform issue in this section is whether the ACA Act should restrict the extent to which directors can be given exemptions from liability, or be indemnified or insured.

(1) The Corporations Act provisions

1009 Section 199A(1) of the Corporations Act provides that a company must not exempt a person from liability to the company incurred as an officer or auditor of the company. Section 199A(2) provides that company cannot indemnify a person for certain liabilities. These include:

- a liability owed to the company or a related body corporate;
- liability for a pecuniary penalty order under section 1317G or a compensation order under section 1317H; or
- liability arising out of conduct not done in good faith.

1010 Section 199A(3) provides for circumstances where a company can and cannot indemnify officers or auditors for legal costs. A company cannot indemnify a person for his or her legal costs in defending an action for a liability incurred by that person as an officer or auditor of the company if the costs are incurred:

- in defending or resisting proceedings which the person is found to have a liability for which the person could not be indemnified under section 199A(2);
- broadly speaking, in defending or resisting criminal proceedings in which the person is found guilty;
- in defending or resisting proceedings brought by ASIC or a liquidator for a Court order if the grounds for making the order are found by the Court to have been established; or

- in connection with proceeding for relief to the person under the Corporations Act in which the Court denies relief.

1011 Under section 199B, a company cannot pay the premium for insurance of an officer or auditor against liability (other than legal costs) arising out of:

- conduct involving a wilful breach of their duty to the company; or
- a contravention of section 182 (improper use of position) or section 183 (improper use of information).

1012 Any act purporting to exempt, indemnify or insure a director or officer in contravention of section 199A and 199B is void.[418]

(2) Should the ACA contain exemption, indemnification and insurance provisions?

1013 Provisions similar to sections 199A and 199B of the Corporations Act would be in the interests of any corporation, at least to the extent that they relate to acts of bad faith.

1014 The *Commonwealth Authorities and Companies Act 1997* (Cth) has adopted provisions which are almost identical to those appearing in the Corporations Act.[419] The ACA Act should follow the approach taken under the *Commonwealth Authorities and Companies Act*. However, the legislation drafter should give consideration to how the lengthy provisions of the Corporations Act could be simplified.

F. DISQUALIFICATION FROM BOARD MEMBERSHIP

(1) Section 49B of the ACA Act

1015 Section 49B of the ACA Act prohibits persons who have been convicted of certain offences from being elected or holding office as a member of the Board. The section states:

> **49B**
>
> (1) A person cannot be elected, or hold office, as a member of the board if he or she has been convicted of an offence against a Commonwealth, State or Territory law and sentenced:
>
> (a) if the offence involved fraud or misappropriation of funds – to imprisonment for 3 months or longer; or
>
> (b) in any other case – to imprisonment for one year or longer.
>
> (2) The conviction does not prevent the person from standing for election, or being elected, if:
>
> (a) at least 5 years have elapsed since the date of the conviction; and

[418] Corporations Act section 199C(2).

[419] However, various State Association Incorporation Acts do not contain such provisions. For example, the ACT Associations Incorporation Act does not contain any provisions relating to exemption, indemnification and insurance of directors for liabilities incurred as officers.

(b) the person is not serving a term of imprisonment.

1016 There is provision in section 49B for the Registrar to declare that the section does not apply to a particular person.

1017 Most State Association Incorporation Acts do not contain such a disqualification provision.[420] A comparable Corporations Act provisions is drafted to prohibit a **narrower** class of persons from corporate management (see below).

1018 Section 49B was introduced by the *Aboriginal Councils and Associations Amendment Act 1992* (Cth) after a similar provision in the *Associations Incorporations Act 1985* (SA) provision was discussed, but not endorsed, in the Neate Report. Neate concluded that there does not appear to be any strong justification for an automatic disqualification provision under the ACA Act.[421]

(2) Disqualification under Part 2.6D of the Corporations Act

1019 Part 2D.6 of the *Corporations Act* (titled "*Disqualification from managing corporations*"), arguably provides a more appropriate approach than section 49B of the ACA Act, in that it confines the circumstances or offences that can lead to disqualification, to those which bear a close relationship with the ability and fitness to manage a corporation. The emphasis is on protecting the public by preventing persons with a history of financial failings and/or dishonest behaviour from operating in the commercial world.[422]

1020 These provisions are flexible. They include automatic disqualification for certain offences, disqualification by the Court on application by ASIC in certain circumstances, and disqualification by ASIC directly in other circumstances. The ASIC provisions apply to officers of corporations, thereby covering all persons involved in the management of corporations, not just the directors.

1021 Key aspects of Part 2.6 are explained below.

Persons who are convicted of certain offences or are insolvents under administration are subject to automatic disqualification.[423]

1022 The Corporations Act only subjects persons to automatic disqualification if they have committed offences or have engaged in certain activities which are directly related to the person's ability and fitness to manage a corporation.

1023 A person will be automatically disqualified from management of a corporation where convicted of an offence which concerns the making, or participation in making, of

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420 The ACT, QLD and South Australian associations incorporation legislation provide for automatic disqualification. Whereas, similar acts in NSW, Victoria, Tasmania, Northern Territory and Western Australia have no such provisions

421 *Neate Report* pp 22-23

422 Cassidy, J. "Disqualification of Directors Under the Corporations Law," *Company and Securities Law Journal*, Vol. 13, 1995, p 221 at 225

423 Corporations Act section 206B

decisions that affect the whole or a substantial part of the business of the corporation,[424] or which concern an act that has the capacity to significantly affect a corporation's financial standing.[425]

1024 A person will be also be automatically disqualified from management of corporations if convicted of any offences against the Corporations Act punishable by term of imprisonment of more than twelve months,[426] and any offences involving dishonesty that are punishable by imprisonment for three months or more.[427]

1025 The disqualification lasts for 5 years from the date of release from prison, or from the date of conviction if the person does not serve a term of imprisonment.[428]

1026 Persons who are undischarged bankrupts are also automatically disqualified from management of a corporation,[429] as are persons who have executed deeds of company arrangement which have not fully been complied with, or have entered compositions with creditors under Part X of the *Bankruptcy Act* 1966 (Cth)[430], where final payment has not been made.

The Court also has power to disqualify on application by ASIC

1027 On application by ASIC the Court may disqualify a person from managing corporations (for an appropriate period of time) where they have been involved in insolvency and non-payment of debts,[431] where they have repeatedly contravened the Corporations Act, or where a declaration has been made under section 1317 of the Corporations Act that the person has contravened a corporation/scheme civil penalty provision.[432] This latter power of disqualification requires that the Court be satisfied that the disqualification is justified[433] and in determining that the Court may have regard to the person's conduct and anything else it considers appropriate.[434]

1028 The Court may disqualify someone (for an appropriate period of time) where that person has twice been an officer of a corporation that has contravened the Corporations Act, and failed to take reasonable steps to prevent that contravention;[435] or has at least twice

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424 Corporations Act , section 206B 1(a)(i)

425 Corporations Act, section 206B 1(a)(ii)

426 Corporations Act, section 206B 1(b)(i)

427 Corporations Act, section 206B(1)(b)(ii)

428 Corporations Act, section 206B(2)

429 Corporations Act, section 206B (3)

430 Corporations Act, section 206B (4)

431 Corporations Act, section 206D

432 Corporations Act, section 206C (1)

433 Corporations Act, section 206C (1)(b)

434 Corporations Act, section 206C (2)

435 Corporations Act, section 206 E (1)(a)(i)

contravened the ACA Act while they were an officer of a body corporate;[436] or the person is an officer of a body corporate and has done something that would have contravened section 180 or 181 (director's responsibility to exercise care and diligence) if the body corporate was a corporation.[437] The Court must be satisfied the disqualification is justified in the same way as for the civil penalty provision above.[438]

1029 Where a person acting as an officer of a corporation has been wholly or partly responsible for two or more corporations failing within seven years, that person may be prevented from managing corporations for ten years if the Court is satisfied that the disqualification is justified.[439]

1030 The Court has power to grant leave to a person to manage certain corporations, or a particular class of a corporation, or a particular corporation subject to certain requirements and possibly conditions and exceptions as the Court sees fit,[440] if the person was not disqualified by ASIC.

Disqualification under ASIC's Statutory Power

1031 ASIC has a statutory power to disqualify a person directly, without going through the Court. This power may be exercised to disqualify a person for up to five years. It operates where a person has been an officer of two or more corporations[441], and while the person was an officer of the corporation or within a 12 month period subsequently, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation's inability to pay its debts.[442]

1032 Within seven years of the first liquidation, ASIC must give the person a prescribed form requiring them to demonstrate why they should not be disqualified[443] and must provide the person an opportunity to be heard on the question.[444] ASIC must be satisfied the disqualification is justified[445] and must consider the following:[446]

- whether the corporations are related,
- the person's conduct in relation to the management, business or property of any corporation,

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436 Corporations Act, section 206 E (1)(a)(ii)

437 Corporations Act, section 206 E (1)(a)(iii)

438 Corporations Act, section 206 E (1)(b)

439 Corporations Act, section 206D

440 Corporations Act, section 206G (1)

441 Corporations Act, section 206F (1)(a)(i)

442 Corporations Act, section 206F (1)(a)(ii)

443 Corporations Act, section 206F (1)(b)(i)

444 Corporations Act, section 206F (1)(b)(ii)

445 Corporations Act, section 206F (1)(c)

446 Corporations Act, section 206F (2)

- the public interest in disqualification, and
- any other matters ASIC considers appropriate.

1033 The rationale behind allowing ASIC to disqualify certain persons from managing corporations is to protect creditors from persons "whose past conduct indicates that they are unfit to be directors of or be concerned in, or take part in the management of corporations".[447]

1034 The test in determining whether a person should be disqualified has been developed and stated by the Court to be as follows:

> There must I think be something about the case, some conduct which if not dishonest is at any rate in breach of standards of commercial morality, or some really gross incompetence which persuades the Court that it would be a danger to the public if he were to be allowed to continue to be involved in the management of companies, before a disqualification order is made.[448]

1035 ASIC may grant leave to a person it has disqualified to manage a particular corporation or corporations, by written permission and subject to such conditions as it sees fit.[449]

(3) Section 49B and the special incorporation needs of Indigenous people

1036 There are compelling reasons which favour the amendment of section 49B of the ACA Act. These include:

- the high rates of imprisonment in the Indigenous population (outlined in Part 2) could mean that this provision has a disproportionate effect on Indigenous corporations;
- section 49B is not in keeping with the original spirit of the ACA Act as a 'special measure';
- similar provisions do not apply to directors of corporations incorporated under the Corporations Act or most State Association Incorporation Acts;
- section 49B does not capture persons who probably should be excluded from acting as directors but who have not committed offences of the specific and types covered; and
- section 49B is limited to directors and will not capture others involved in the management of corporations.

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447 *Dwyer v National Companies and Securities Commission* (1989) 7 ACLC 571 at 575

448 Hoffman J in *Re Dawson Print Group and Anor* (1987) 3 BCLC 601 at 604 (in relation the previous section 600(3) which corresponds to 206F (1)(c)); this was endorsed by Young J in *Blunt v Corporate Affairs Commission* (No 2) (1988) 6 ACLC 1,077

449 Corporations Act section 206F (5)

(4) Conclusion

1037 For the reasons outlined above, the Review Team is of the view that section 49B of the ACA Act should be repealed and replaced with provisions equivalent to those contained in Part 2.6D of the Corporations Act.

1038 This approach would also necessitate amendments to require the Register of Incorporated Aboriginal Associations to list directors, and for ACA Act corporations to notify changes in appointment of directors. It may also require the establishment of a register of persons disqualified from holding a position as a director or officer of an ACA Act corporation.

G. CONCLUSIONS

1039 In summary, the Review Team concludes that the provisions relating to directors and directors' duties in the ACA Act should generally be modernised and brought into line with the Corporations Act. However, in some circumstances the Corporations Act approach may not in fact be necessary or suitable, or may overly complex for the circumstances of ACA Act corporations.

1040 Specifically, the Review Team recommends as follows:

The scope of directors' duties

1041 The Review Team is strongly of the view that the scope of relevant directors' duties under the ACA Act should be extended to include "officers" as is the case under the Corporations Act (but expressly including the Public Officer). In addition the definition of "director" should be expressly extended to include "shadow directors" and "de facto directors".

The statutory directors' duties

1042 The statutory directors' duties under the ACA Act should generally be brought into line with the Corporations Act. Relevant duties which should be brought into line with the Corporations Act include:

- the duty of care;
- the duty of honesty;
- the duties of disclosure and to avoid conflicts of interest (although with a simplified provision in relation to related party transactions); and
- a duty not to trade while insolvent.

Consequences of breach

1043 It would be appropriate to adopt a range of civil and criminal penalties, similar to the approach adopted in the Corporations Act, particularly in relation to cases of dishonest or bad faith actions, to protect the members of ACA Act corporations from the actions of "rogue" directors or officers.

1044 However, in recognition of the special circumstances of many Indigenous directors, it is suggested that there should be a significantly judicial discretion in the consideration and calculation of any penalties.

Exemptions, indemnities and insurance

1045 The ACA Act should include provisions prohibiting exemptions, indemnities or insurance for actions of directors done in bad faith. The approach should be similar to the approach in sections 199A and 199B of the Corporations Act, but should be simplified.

Disqualification of directors

1046 Section 49B of the ACA Act should be repealed and replaced with provisions equivalent to those contained in Part 2.6D of the Corporations Act.

CHAPTER 14
TRANSACTIONAL CERTAINTY

A. INTRODUCTION AND OUTLINE

1047 At present, a considerable number of ACA Act corporations operate in ways which breach their 'Rules of Association' (ie their corporate constitution). If challenged, most acts in direct breach of the constitution, or performed pursuant to the breaches, would be declared void - they would have no legal effect. Affected would be acts such as the decisions of invalidly appointed boards of directors, resolutions of invalidly convened general meetings, and transactions with outsiders to the corporation made with respect to matters which are beyond the objects of the corporation.

1048 Under the Corporations Act, such problems are addressed by a series of special rules governing corporate legal capacity and corporate legal authority. These rules are the historical response to the *commercial* uncertainty generated by the invalidity of corporate acts. They are designed to validate a wide range of invalidities resulting from minor departures from the corporate constitution. They are also designed to protect outsiders contracting with the corporation from claims by the corporation, or its members, that the contract is invalid.

1049 The ACA Act does not contain provisions of this nature. It relies on the general law of corporations to determine whether a particular act is within corporate capacity or authority. The application of these rules to different factual scenarios is unpredictable. This is why most of these rules have been replaced under the Corporations Act. The ACA Act has not kept pace with these developments.

1050 The problem of invalidity appears to be acute, as anecdotal evidence suggests that there are high levels of non-compliance among ACA Act corporations with the procedural requirements of corporate constitutions. This includes actions that go beyond the scope of the corporations' objects, and actions by directors which inadvertently exceed their authority.

1051 The reformed rules of corporate capacity and corporate authority under the Corporations Act provide a high level of clarity and certainty for parties dealing with the corporation. This may, however, come at the cost of protection of the members of corporations against unscrupulous persons purportedly acting on behalf of the corporation. The balance achieved in the Corporations Act may be appropriate in a highly commercial setting. However, given the particular vulnerability of the members of ACA Act corporations to corporate mismanagement and abuse, and the fact that a significant number of ACA Act corporations are not acting in a truly commercial context, consideration needs to be given to whether all aspects of the Corporations Act approach are in fact appropriate.

1052 This Chapter discusses the relevant issues:

- Section B discusses corporate capacity (including the doctrine of *ultra vires*).

- Section C discusses corporate authority (including applicable rules of agency, the indoor management rule, and ratification of defective transactions).
- Section D deals with validation of procedural irregularities.
- Section E then addresses issues relating to the corporate seal.

B. CORPORATE CAPACITY

(1) The concept of corporate capacity

1053 Corporate capacity refers to the ability of the corporation to be the bearer of rights and duties in the legal system. If an ACA Act corporation performs an act that is beyond its capacity, the act will not bind the corporation. Corporate contracts entered through such acts will be void under the common law doctrine of *ultra vires*.[450]

(2) The capacity of ACA Act corporations

1054 Once an ACA Act corporation is issued with a certificate of incorporation, the association becomes 'a body corporate' with the standard characteristics of perpetual succession, the capacity to sue and be sued in its corporate name, and the capacity to acquire, hold and dispose of real and personal property.[451] The corporation is required to have a 'common seal'.[452] Subject to these statutory provisions, and any limitations on capacity expressed under its corporate constitution, the corporation also has the capacity to borrow money 'upon such terms, and in such manner as it thinks fit' and to satisfy debts and liabilities by 'giving a mortgage, charge, or other security' on or over all or any of its property.[453]

1055 The definition of legal capacity for an ACA Act corporation proceeds on the basis of different principles from those adopted under many contemporary statutes of general incorporation. The capacity of the ACA corporation is defined by reference to both the statute and *the objects* of the corporation, which are stated in the corporation's constitution.[454] Section 43 of the ACA Act requires an application for incorporation to include a statement of the objects of the proposed corporation. The statement of the corporation's objects therefore allows the members of the corporation to restrict the capacity of the corporation to enter contracts not referable to the objects. Such contracts are void under the common law doctrine of *ultra vires*.

1056 Corporate *ultra vires* actions based on contraventions of objects clauses turn on the judicial interpretation of the particular clause and the facts of the case. In the past, the general law rules on corporate capacity created so much uncertainty in the transactions of registered

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450 See generally, *Ford's Principles of Corporations Law* Ch 12

451 *ACA Act* section 46(1); the certificate of incorporation is issued under s 45(1)(a)

452 Ibid., section 46(1)(b)

453 Ibid., section 51

454 See the approach adopted in *Baxter v Marra Worra Aboriginal Corporation* (1998) 5 SR(WA) 42; and *Aboriginal Land Rights Act 1976 and the Alcoota Land Claim No 146* [1998] FCA 281 (discussion of Question 7).

business companies that its application was modified by successive amendments to the Corporations Act.[455] The ACA Act has not adopted these reforms.

(3) The consequences of ultra vires actions

1057 A contract which is void for lack of corporate capacity is inherently ineffective[456]. That is, it will be void from its inception (void *ab initio*) and will be ineffective to create rights for the corporation or any other party — ie the contract will not bind the corporation. As noted in Ford:

> A person dealing with a company could find that a supposed contract or other transaction was not enforceable against the company because of the doctrine of ultra vires if the dealing could not be related to the company's objects. Even a unanimous vote of the members purporting to authorise or ratify the dealing could not cure the defect; members could not supply the capacity that the Legislature had withheld…
>
> The ultra vires doctrine was a pitfall for an outsider dealing in good faith with a company whether as a creditor, a disponee of property or otherwise. It was also inconvenient for companies seeking finance and wanting to do business.[457]

1058 If an agreement is void, but a party has complied with the terms of the agreement, that party is entitled to claim reasonable remuneration for acts performed in compliance if performance has been accepted.[458] Similarly, money paid in contemplation of the receipt of contractual performance under a void agreement may be recovered.[459] However, these remedies are limited in scope and may not be satisfactory to commercial creditors.

(4) The approach under the Corporations Act

Abolition of the doctrine of ultra vires

1059 The Corporations Act adopts a 'wide powers approach', which grants the corporation the capacity of an 'individual' subject to statutory extensions and qualifications.[460] The doctrine of ultra vires has now been abolished under the Corporations Act. The corporation no longer needs to lodge a corporate constitution. Where it lodges a constitution, such a constitution does not require a statement of objects. This in effect means that a corporation will have the same capacity as an ordinary to person enter into a contract.

Use of statements of objects and express restrictions on powers

1060 The Corporations Act still permits a corporation to have a constitution which sets out the corporations objects or which places express restrictions or prohibitions on the exercise of

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455 See the brief historical review in *Ford's Principles of Corporations Law* para 12.100

456 Mason, K. and Carter, J.W. 1995, para 903,1010

457 *Ford's Principles of Corporations Law* para 12.100

458 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221

459 *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912

460 *Corporations Act* section 124

any of the corporation's powers.[461] Statements of objects of this type are still commonly used by public companies limited by guarantee wishing to obtain charitable tax status.

1061 However, an act of the company will *not* be rendered invalid merely because it contravenes or exceeds any objects, restrictions or prohibitions.[462] Therefore, a transaction in excess of the objects, restrictions or prohibitions will generally still be valid and enforceable against the corporation.[463] It may, however, provide evidence in actions for other corporate complaints — for example, a breach of directors' duties or an oppression action..[464]

(5) Discussion of issues relevant to reform of the ACA Act

1062 In deciding whether ACA Act corporations should also be given the legal capacity of a natural person, it is necessary to undertake a balancing act between several competing principles.

1063 The approach taken under the Corporations Act places the emphasis on commercial certainty and convenience for outsiders dealing with corporations. It does this to addresses the problems identified under Subsection (3) above. This approach works well in a commercial context, although it has not been without criticism.[465] However, many ACA Act corporations are not formed for commercial purposes, and it might be questioned whether the same emphasis on commercial certainty is relevant for ACA Act corporations.

1064 In the case of statutory authorities performing limited functions, limiting the corporate capacity may be regarded as desirable. In such cases, there may be a public interest in ensuring that the objects are not exceeded or departed from, and that any excesses are ineffective. It could be argued that there are some parallels between these and those ACA Act corporations which are formed to perform community services under contract or grant from government agencies. But even in this context, the problems created by the invalidity of transactions beyond the statutory statement of the corporation's purposes has led to the gradual abolition of the doctrine.[466]

1065 Not all ACA Act corporations are formed for such purposes. In any case, it could be argued that more appropriate controls could be placed on the performance of community functions through effective grant conditions and grant management.

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461 *Corporations Act* s125(1)

462 Ibid.,s125(2).

463 An exception is where the person dealing with the corporation seeking to enforce the validity of the transaction was aware of the breach. In such cases the contract will be voidable (not void): *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112

464 See *Ford's Principles of Corporations Law* para 12.160

465 See *Ford's Principles of Corporations Law* para 12.080

466 See for example: *State Owned Corporations Act* 1989 (NSW) sections 20Z(1) and 20ZA(1)(a) and (2); and *Government Owned Corporations Act* 1993 (Qld) sections 149(1). These statutes also give only limited effect to express restrictions on the exercise of intra vires corporate powers: *State Owned Corporations Act* 1989 (NSW) sections 20ZC–E and 20ZA (1)(b) and 20ZA(1)(a); and Government *Owned Corporations Act* 1993 (Qld) sections 150–1

1066 There are other practical problems with placing such restrictions as well. Evidence suggests that many ACA Act corporations are likely to be acting in excess of their statements of objects, including in performing some of those same community functions under government grants. Adhering strictly to the doctrine of *ultra vires* could have the effect of causing disruption to such services, as well as commercial transactions.

1067 Another argument for the retaining the doctrine of *ultra vires* goes to the historical origin of the rule — namely, the need to protect members from actions by management which travel outside the originally agreed purpose of the corporation. One problem with this argument is that it presumes that the members were actively involved in the setting of the objects, as a means of deliberately delineating the capacity of the corporation. In practice, however, it is likely that the objects clause of many ACA Act corporations is not the result of such deliberation.

1068 Protecting members from the actions of rogue directors is nonetheless a valid concern. But given the growing range of purposes which ACA Act corporations are performing and wanting to perform, it seems that the disadvantages of inflexibility and potential uncertainty from restricting corporations to their objects would outweigh the protection offered to members.

1069 One area where it might be appropriate to protect members' interests by limiting corporate capacity (and invalidating actions in excess of it) is in the context of corporations performing statutory land-holding duties – such as native title PBCs and landholding corporations under the NT Aboriginal Land Rights Act. However, this small subset should not decide such an important principle for all ACA Act corporations. (This issue is considered further in Chapter 22).

(6) Conclusions

1070 The approach to corporate capacity in the ACA Act is overly restrictive on ACA Act corporations, and has the potential to cause problems for ACA Act corporations and third parties dealing with those corporations.

1071 The Corporations Act has taken a very broad approach to corporate capacity and has abolished the doctrine of *ultra vires*. Although perhaps not ideal, this approach is greatly preferable to the approach under the ACA Act as it stands.

1072 Therefore, corporations formed under the ACA Act should be granted the full legal capacity of a natural person; and the *ultra vires* rule should be expressly abolished.

C. CORPORATE AUTHORITY

1073 Corporate authority refers to the ability of a person (an officer or agent) to act for the corporation in a way that binds the corporation.

1074 The rules defining the authority of officers and agents of the corporation to act for the corporation originated in the law of agency, but have now become part of the general law of corporations. For the purposes of a brief exposition, the law on corporate authority can be subdivided into three main bodies of rules:

- the general principles of agency law defining the authority of agents acting for a corporate principal;
- the application of these principles to the circumstances of corporations through the 'indoor management rule'; and
- the general law rules on the ratification of defective corporate transactions.

1075 The law in this area is very complex and so only the barest outline may be provided in the following sections. Empirical evidence regarding procedural irregularities in ACA Act corporations and the poor understanding of corporate offices and procedures within Indigenous organisational culture indicates that problems of corporate authority are likely to assume some significance in the affairs of native title corporations.

(1) Principles of agency law defining actual and apparent authority[467]

1076 Where an agent enters a transaction with a third party on behalf of a principal who has authorised the agent to make such a contract, the principal can sue and be sued by the third party on the contract.[468] Where there is no authority, the principal is not bound and the third party is left to restitutionary remedies.[469]

1077 The law of agency has developed rules defining

- the 'actual' or 'express' authority of agents, and
- the 'apparent' or 'ostensible' authority of agents.

1078 Historically these have been applied to the circumstances giving rise to a claim that a corporation has authorised a person (usually a corporate office-holder) to act on its behalf. The corporate organ granting the authority may be the general meeting of members or, more typically, the board of the corporation.

1079 Actual authority exists where the principal has given consent to the agent to act for the principal. The extent of actual authority may be implied by:

- reference to what is necessarily or normally incidental to the particular acts authorised; or
- reference to the usual authority going with the appointment of a person to a particular position (for example, the position of managing director, director, chairperson, or public officer of the corporation).[470]

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467 See *Ford's Principles of Corporations Law* paras 13.020–13.140

468 Fridman, G.H.L. *The Law of Agency* 7th ed, 1996, p 194

469 See above Chapter 11, Section D(3)

470 Managing director: *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* (1975) 133 CLR 72; *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) WAR 68; 5 ACSR 424; *Hely Hutchinson v Brayhead Ltd* [1968] 1 QB 549. Director: *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 361; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 205. Chairperson: *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 867. Secretary (a position corresponding to the position of 'public officer' under the *ACA Act* section 57): *Panorama Developments (Guilford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711

1080 Under the strict laws of agency, certain procedural requirements must be fulfilled for a board to grant actual authority to an agent (such as an officer or employee of the corporation). These include that the directors were properly appointed, there was a properly convened meeting of the board at which the decision was made, and that the directors had been properly informed as to the issues prior to making the appointment.[471] Difficulties are caused for third parties dealing with an agent if they have to satisfy themselves that all these requirements were met before entering any transaction in which the agent purports to bind the corporation.

1081 Apparent or ostensible authority arises by operation of law and so may arise in circumstances where the principal did not give its actual express consent. The basis of apparent authority in the principles of common law estoppel is explained by Ford et al in the following terms:[472]

> [I]f persons so act as to give a reasonable person the impression that they are appointing an agent with a certain range of authority and the person receiving that impression deals with the agent within that range of authority, the persons creating the impression cannot deny that the agent was authorised to deal. Any person giving the impression is said to be estopped from denying that the agent had authority.

(2) The indoor management rule

Principles of the indoor management rule

1082 The indoor management rule (also known as 'the rule in *Turquand's Case*') states that a person dealing with a corporation in good faith may assume that acts within the corporation's constitution and powers have been properly and duly performed, so that this person is not bound to inquire whether external acts of the corporation have complied with internal corporate rules.[473] This addresses the problems arising from the procedural requirements for actual authority.

1083 The indoor management rule assists an outside party dealing with a corporation to establish that the corporation has given its authority (whether implied actual authority or apparent authority) to a transaction. The application of the rule allows the outsider to assume that all conditions precedent to the granting of authority by the board of a corporation to an agent have been fulfilled. These conditions include matters such as the proper appointment of board members and the validity of the board resolution creating the delegation of authority to the agent.[474]

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471 See *Ford's Principles of Corporations Law* para 13.150

472 See *Ford's Principles of Corporations Law* para 13.040

473 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 154-5; *Royal British Bank v Turquand* (1856) 6 EL and BL 327; 119 ER 886

474 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 178

1084 The application of the rule to ACA Act corporations was recognised in the *Alcoota Land Claim No 146 Case* and in *Baxter v Marra Worra Aboriginal Corporation*.[475]

1085 The application of the rule may be defeated where the outsider has actual knowledge of irregularities or has constructive notice of these irregularities after being put on inquiry.[476] In *Baxter v Marra Worra Aboriginal Corporation*, a person who had a 'deep and intimate involvement' with the affairs of the ACA Act corporation with whom he had purported to contract, was refused the benefit of the rule. This allowed the corporation to deny the contract, in circumstances where the validity of appointments to the board were in 'grave doubt', and where the rules of the corporation had not been observed in the transaction.[477] In the native title context, the indoor management rule cannot uphold a contract that would be defective by reason of the statutory consent and consultation procedure.

Problems with the general law applicable under the ACA Act

1086 The general law relating to the indoor management rule, which applies to corporations incorporated under the ACA Act, suffers from a number of difficulties. These arise because the rule is of uncertain application, particularly in relation to the situations under which a person dealing in good faith with a company and without notice can rely on the rule.

The approach under the Corporations Act

1087 The operation of the indoor management rule has been altered and clarified through successive legislative amendments to the Corporations Act (but not in the ACA Act).[478]

1088 Under section 128 of the Corporations Act, certain assumptions listed in section 129 can be made about a company, its officers or agents by a person dealing with the company (section 128). The assumptions in section 129 broadly relate to:[479]

- compliance with the company's constitution and any replaceable rules in the Corporations Act that apply;
- the authority of a director or company secretary, appearing to be such from ASIC records available to the public and based on information from the company;
- the authority of a person held out by the company to be an officer or agent of the company;
- the proper performance of duties by officers and agents of the company;
- the due execution of documents by the company;

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475 *Aboriginal Land Rights (Northern Territory) Act* 1976 and *the Alcoota Land Claim No 146* [1998] FCA 281 (FFC, discussion of Questions 3 and 8); and *Baxter v Marra Worra Aboriginal Corporation* (1988) 5 SR (WA) 42 at 47

476 *Bank of New Zealand v Fiberi Pty Ltd* (1992) 14 ACSR 736; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722; 10 ACSR 699

477 See *Baxter v Marra Worra Aboriginal Corporation* (1988) 5 SR (WA) 42 at 47

478 The present position is stated at *Corporations Act* Pt 2B.2 (sections 128–130)

479 *Ford's Principles of Corporations Law* para 13.280

- the authority of an officer or agent of a company authorised to issue a document to warrant that it is genuine.

1089 Like the general law rule, section 128(4) of the Corporations Act provides that a person is not entitled to make an assumption of the kind stated in section 129, if at the time of the dealings they knew or suspected that the assumption was incorrect. Sections 128 - 129 are not considered to be a code and therefore the general law rule can still operate.[480]

Discussion of issues relevant to reform of the ACA Act

1090 The indoor management rule is for the protection of the persons who wish to uphold a transaction and who are not in a position to know the company's internal workings. However, its application often requires a balancing between considerations of commercial convenience (that an outsider need not investigate the internal workings of the corporation), and the protection of corporate members and creditors who may be the victims of unscrupulous practices within the management of the corporation.[481] This was noted by Mason CJ in *Northside Developments Pty Ltd v Registrar-General*[482]:

> [A]n overextensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies.

1091 The lack of formal education and business skills of many Indigenous people often results in a significant power imbalance between the management (or sometimes particular board members) of ACA Act corporations on the one hand, and the board and members on the other. As a result, the members of ACA Act corporations have been particularly vulnerable to the predations of unscrupulous persons purporting to act on their behalf.

1092 One way in which this Report recommends addressing this problem is by extending the application of directors' duties to all officers of corporations, and by clarifying and modernising the statement of directors' duties.[483] The adoption of modern provisions for the disqualification of certain persons from management of ACA Act corporations would also assist.[484]

1093 However, the question remains whether these measures alone are sufficient, and therefore whether a Corporations Act formulation of the indoor management rule is appropriate for ACA Act corporations.

(3) Ratification of corporate acts beyond authority

1094 The basic rule under the general law is that where an agent of the corporation exceeds his or her authority, and the corporation is not bound under the doctrine of apparent authority,

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480 *Ford's Principles of Corporations Law* para 13.340

481 *Bank of New Zealand v Fiberi Pty Ltd* (1993) 14 ACSR 736; *Morris v Kanssen* [1946] AC 459 at 474–5 (HL); *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 164

482 (1990) 170 CLR 146 at 164

483 See Chapter 13

484 See Chapter 17

the corporation can ratify the act of the agent under the law of principal and agent. Ratification cures the defect that the original act was performed without authority. It has the effect that the corporation is both bound by the act and entitled to take advantage of the act as if the agent had been authorised when he or she acted.[485] Some sub-rules may also be stated:[486]

- A transaction by the board or any other agent beyond authority can be ratified in the general meeting of the corporation, provided the transaction does not fall outside the corporate constitution or involve a breach of fiduciary duty.
- The board may ratify an unauthorised act on behalf of the company where the board has the authority to perform the act.
- The rules governing the ratification, by the corporation, of pre-incorporation obligations entered into by a person who purports to act for the corporation is a particular application of the general law on ratification

1095 Once again, the Corporations Act has clarified the application of a variety of general law rules governing when the board or the general meeting may ratify corporate acts that have occurred beyond the authority of the corporation.[487]

1096 Sections 201M and 201E of the Corporations Act provide that acts of directors (section 201M) and secretaries (section 201E) are effective even if their appointment, or the continuance of their appointment are invalid because the company or relevant officer did not comply with the company's constitution or the Corporations Act. This provision validates only those acts that would otherwise have been effective had the person been validly appointed. Section 201M will not validate the appointment of the Director. It merely validates the transaction undertaken by the Director when there has been an unintended mistake in breaching the constitution.

1097 One of the advantages of sections 201M and 201E over the indoor management rule is that they can also operate in relation to the *internal* affairs of a company, where an action has been taken by an invalidly appointed director (such as the calling of or participation in a board or general meeting). By contrast, the indoor management rule only operates in favour of outside parties having dealings with the corporation.

1098 The ACA Act has not been amended in an equivalent manner. Thus, in *Kazar v Duus*, the Court proceeded on the basis of general law when it considered an argument that the board of an ACA Act corporation could not validly resolve to appoint an administrator because its members were elected invalidly.[488]

1099 Given the anecdotal evidence on high levels of informal corporate conduct in ACA Act corporations, it may be advantageous for the ACA Act to adopt provisions similar to those contained in sections 201M and 201E of the Corporations Act.

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485 See *Ford's Principles of Corporations Law* para 15.110

486 Ibid., para 15.110–15.190

487 *Corporations Act* sections 131–133 (pre-incorporation contracts), 201M (the effectiveness of acts of directors), and 204E (the effectiveness of acts of secretaries).

488 *Kazar v Duus* (1998) 88 FCR 218 at 226–7 (the argument was rejected on the facts of the case)

D. PROCEDURAL IRREGULARITIES

1100 As has been noted above, anecdotal evidence suggests that there are high levels of non-compliance amongst ACA Act corporations with the formal requirements of corporate constitutions. Even apparently very minor procedural irregularities can have potentially serious consequences – for example where insufficient notice is given of an annual general meeting at which board members are appointed, those appointments will be invalid.

1101 The other measures relating to corporate capacity outlined above only go so far in addressing these problems:

- The indoor management rule only addresses the consequences of an excess of authority to the extent that it may affect an outside party – it does not cure the excess of authority.
- Sections 201M and 201E of the Corporations Act only allow certain defects to be overlooked, they do not cure the underlying defects themselves. Therefore, although the act of an invalidly appointed director may be validated, the underlying invalidity in the appointment will not of itself be cured.
- In some cases, the underlying defects may be cured through ratification. However, invalidity arising from the conduct of a general meeting can only be ratified through another general meeting. Holding a further general meeting can prove costly and inconvenient. Ratification in this way also requires identifying the invalidity in the first place, which may not always happen within a reasonable time.

1102 Unlike the Corporations Act, the ACA Act does not provide for any specific means to address procedural breaches. This places ACA Act corporations at a significant disadvantage.

1103 Under section 1322 of the Corporations Act, a wide variety of procedural irregularities will not invalidate proceedings or meetings (and hence actions flowing from decisions made at those meetings) unless the Court declares the proceedings invalid. The Court can do this where it is of the view that substantial injustice has occurred as a result of the procedural irregularity or that the injustice caused cannot be remedied by Court orders.[489]

1104 "Procedural irregularities" are defined[490] as including a lack of quorum at certain meetings (which include "meetings of a corporation") and a defect, irregularity or deficiency in notice or time.[491] Procedural irregularities have included insufficient notice of meeting, moving of resolutions which have not been properly notified, or a failure to make out a director's statement within the time limits.[492]

1105 The Court decides whether or not there is substantial injustice by assessing the circumstances as they appear. The injustice must be caused by the procedural irregularity

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489 *Corporations Act*, s1322(2)

490 Ibid.,, s1322(1)

491 *Roma Industries Pty Ltd v Bliim* (1983) 1 ACLC 1079

492 See *Re Casayand No 64 Pty Ltd* (1993) 11 ACLC 1, 197

itself rather than by resolutions passed at the proceeding. The Court has interpreted substantial injustice as arising from procedural irregularities such as where shareholders were deprived of notice of important resolutions or where a person was excluded from meetings.

1106 Under section 1322(4) of the Corporations Act, the Court can make a broad range of orders declaring an act valid or invalid, or extending the specified timeframes for doing an act. The Court can also exercise its other powers, such as granting injunctions (section 1324), and prohibiting payment of money or property (section 1323).

1107 Because of the suspected high levels of procedural irregularities within ACA Act corporations, it is strongly recommended that provisions equivalent to those in the Corporations Act be adopted.

E. ASSENT TO A TRANSACTION THROUGH THE COMMON SEAL

1108 Rules governing the use of the corporate seal ("common seal") deal with the conditions for a valid performance of a legal act by the corporation itself. This act is the affixing of the corporate seal to a document in order to grant the corporation's assent to a transaction. These provisions are distinct from the provisions on corporate authority, which deals with the performance of a legal act by the corporation through an agent (as opposed to performing the act directly).

1109 A corporation's constitution, or other legislation (such as conveyancing legislation), may mandate that a transaction requires the direct assent of the corporation, rather than an agent acting for the corporation. Thus, a corporate constitution might require that transactions of a certain type be executed by the corporation through a deed.

1110 The most common context for the application of these rules is in conveyancing transactions, where legislation may require the corporation to manifest its intention to be bound to the transaction through the affixing of its corporate seal on the relevant conveyancing document. Much of the case law on the use of the corporate seal has arisen from cases of forgery or improper use.

1111 The use of the corporate seal to give the assent of the corporation to a range of transactions is no longer mandated for Corporations Act companies, but the requirement persists with ACA Act corporations.[493]

1112 Hence, in *Baxter v Marra Worra Aboriginal Corporation*, a party external to an ACA Act corporation argued that the corporation had accepted the external party's contractual offer. The Court rejected the argument because the purported acceptance lacked the corporation's seal.[494]

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493 *ACA Act* sections 46(1)(b), 46(3), 46(4); of *Corporations Act* sections 126(1), 127, 129(5). See generally *Ford's Principles of Corporations Law* , Ch 14

494 (1988) 5 SR (WA) 42, 45.

1113 The general law in relation to the use of the common seal is complex. It is also unclear about when exemptions apply to the requirement that the common seal be properly used for a transaction to be effective.

1114 Again, this shortcoming would tend to reduce the commercial effectiveness of ACA Act corporations by reducing certainty for third parties dealing with ACA Act corporations, in situations where unintentional non-compliance by ACA Act corporations is likely to be common.

F. CONCLUSIONS

1115 The ACA Act relies on old general law rules governing corporate capacity and corporate authority. These appear to be intended to protect the members of ACA Act corporations from the actions of unscrupulous persons acting for, or purporting to act on behalf of the corporation.

1116 This means that requirements for valid actions and transactions by a corporation or its agents under the ACA Act are complex and require a high degree of formality. In particular, to ensure the validity of their actions and transactions, ACA Act corporations are required to ensure:

- that any action or transaction accords with the corporations' objects;
- that any person acting on behalf of the corporation is properly appointed and authorised to do so; and
- that the corporation's seal has been attached to those transactions for which the corporation's constitution, or a law other than the ACA Act, requires the attachment of the seal.

1117 However, as a matter of practice, evidence suggests that many ACA Act corporations and their directors and members do not understand or meet all these technical requirements. As a consequence, it is likely that a significant number of ACA Act corporations' actions and transactions are inadvertently made void.

1118 In addition, the scope for addressing such invalidity through the ACA Act is very limited: there are no provisions equivalent to sections 201M or 1322 of the Corporations Act, which automatically ratify actions of invalidly appointed directors and provide for the validation of certain procedural irregularities.

1119 This may have very serious consequences for ACA Act corporations. It may produce a high degree of uncertainty within the corporation as to whether certain decisions are valid. Furthermore, the lack of certainty for third parties dealing with ACA Act corporations could prove a major disincentive to those parties from entering transactions with ACA Act corporations.

1120 The approach adopted in the Corporations Act produces a high degree of certainty for corporate transactions. In doing so, it operates in favour of third parties dealing with corporations, potentially at the expense of members, where the action of rogues may be upheld.

1121 The balancing of the need for transactional certainty with the need to protect members is a very difficult task. Unfortunately this is an "either-or" decision. The Review Team has concluded that the practical disadvantages of the current approach under the ACA Act outweigh the need to protect the members of ACA Act corporations through the mechanisms discussed in this Chapter. The current approach has the potential to significantly inhibit the capacity of ACA Act corporations to operate effectively, in particular within a commercial context.

1122 Further, there are other ways in which members can be provided with some protection against the actions of rogue agents. These include provisions for the disqualification of certain persons from the management of ACA Act corporations[495]; and by providing a modern and comprehensive statement of directors' duties, which extends to all officers of ACA Act corporations.[496]

1123 The Review Team therefore recommends that the ACA Act adopt a similar approach to the Corporations Act in relation to all aspects of transactional certainty discussed in this Chapter.

[495] see Chapter 17 Section E

[496] See Chapter 13

CHAPTER 15
CORPORATE REPORTING

1124 This Chapter considers the reporting requirements of corporations under the ACA Act and considers what appropriate reporting requirements are in light of appropriate accountability requirements.

A. INTRODUCTION AND OUTLINE

1125 As discussed in the Introduction to this Part (Chapter 10, Section C), corporate reporting (and in particular, financial reporting) is but one aspect of "accountability" of ACA Act corporations, although it has become almost the sole focus of discussion of accountability in the context of the Act. To date, the focus of reporting requirements under the Act has been on delivering external accountability (primarily financial accountability to funding bodies). However, this is an ineffective and problematic use of an incorporation statute's reporting requirements. This Chapter argues that the more appropriate focus of financial reporting under the Act is internal accountability – of directors to the corporation and; the directors and the corporation to the members.

1126 In addition, the current "one-size-fits-all" reporting requirements in the ACA Act sit uncomfortably with the enormous diversity of corporations incorporated under the Act: they are arguably too complex for small corporations, and not comprehensive enough for large corporations, particularly those providing essential community services.

1127 The provisions in the ACA Act relating to exemptions from reporting requirements are also problematic.

1128 This Chapter starts by outlining the reporting requirements under the ACA Act (Section B).

1129 It then provides a brief comparison with reporting requirements for different types of corporation under the Corporations Act and select State Association Incorporation Acts (Section C).

1130 Consideration is then given as to how best to match appropriate accountability requirements with appropriate corporate reporting requirements (Section D).

1131 The Review Team's conclusions are then set out in Section E.

B. THE CURRENT POSITION UNDER THE ACA ACT

1132 Section 59 of the ACA Act requires the governing committee of an ACA Act corporation to "keep proper accounts and records of the transactions and affairs of the Association".[497]

[497] *ACA Act*, section 59(1)

It then requires the governing committee to prepare a report ("the Committee's Report") as soon as practicable after 30 June each year, which includes:

- A statement of compliance with the Act, regulations and their corporation's rules;
- A balance sheet setting out assets and liabilities;
- An income and expenditure statement; and
- A copy of the latest membership list.

1133 Section 59 also requires preparation of an "examiner's report" (essentially an auditor's report), in which a person authorised by the Registrar reports on:

- whether the governing committee has in fact complied with the Act, regulations and their corporation's rules; and
- whether the financial statements in the Committee's Report are correct.

1134 The examiner is required to provide the governing committee with a copy of the examiner's report, drawing attention to any irregularities.

1135 The governing committee is required to file a copy of both the Committee's Report and the examiner's report no later than 31 December. The governing committee is also required to make a copy of the reports available at the AGM, and "at all reasonable times" for examination by members of the corporation.

1136 If the governing committee contravenes any of these requirements, each governing committee member is liable to a fine of $200; although there is a defence if a member played no direct or indirect part in the contravention.

1137 Section 59A permits exemptions from the reporting requirements in certain circumstances. (Exemptions and section 59A are dealt with in detail in Subsection D(4) below.)

1138 It is the annual reporting requirements in section 59 (and exemptions in section 59A) which are the focus of this Chapter. However, it should be noted that there are a number of other "reporting" requirements in the ACA Act, for example:

- notification of change of objects;[498]
- notification of change of name;[499] and
- notification of change in Public Officer.[500]

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498 *ACA Act* section 52

499 Ibid., section 53

500 Ibid., s57

C. REPORTING REQUIREMENTS UNDER OTHER STATUTES

1139 Having described the reporting requirements under the ACA Act, it is worthwhile noting for the sake of comparison, the reporting requirements imposed on other types of corporation under the Corporations Act and some State Association Incorporation Acts.

(1) Corporations Act Requirements

The Annual Return

1140 Under the Corporations Act, all companies must lodge an Annual Return. The Annual Return is automatically generated by ASIC from records relating to the company, and sent out to the company for updating or simply signing and dating if it is up to date. The Annual Return only contains basic details about the company's directors, shareholders/members, and principal place of business.

Annual Financial Reports and Directors' Reports

1141 Financial reporting requirements vary, depending on the type of company. For example:

- Small proprietary companies are generally not required to provide annual financial reports. However, they may be directed to prepare financial reports by shareholder direction or by ASIC direction. When this occurs, small proprietary companies may be exempted from compliance with all or some of the accounting standards and may also be exempt from preparing a director's report.
- All public companies and large proprietary companies are required to prepare and lodge with ASIC a financial report and a directors' report each year.

1142 The financial report must comply with the accounting standards (AASB1034) and consist of:

- The financial statements for the year; and
- The notes to the financial statements; and
- The directors' declaration about the statements and notes.

1143 The directors' report must consist of:

- general information about operations and activities (including principal activities and arising influential circumstances during the year and likely developments); and
- specific information about operations and activities (including dividends, shares, options, unissued shares, etc.

1144 The report must be made in accordance with a resolution of the directors and prejudicial information need not be disclosed. There are further special reporting requirements depending on whether the company is a public or a listed company.

Half Yearly Financial Reports and Directors' Reports

1145 Certain companies, known as "disclosing entities" are required to also prepare half-yearly financial and directors' reports. This is unlikely to apply to any corporations transferred across from the ACA Act, at least in the short term.

Audit and Auditor's Report

1146 The financial reports must be audited. The auditor must report to members on whether the auditor is of the opinion that the financial report is in accordance with the Act, including:

- whether the financial reports are in accordance with accounting standards; and
- whether the financial reports give a *true and fair view* of the financial position and performance of the company.

1147 The auditor has a right to access the books of the company at all reasonable times, and may require any officer of the company to give the auditor information, explanations or other assistance for the purposes of the audit or review. The auditor must also report to ASIC if there are reasonable grounds to suspect that a contravention of the Act has occurred.

Accounting Standards

- In performing all of the accounting that must be done for the purposes of completing these requirements the AASB (Australian Accounting Standards Board) standards must be complied with.

(2) State Association Incorporation Act Requirements

1148 Under the State Association Incorporation Acts, incorporated associations are required to keep true and fair accounting records of the financial position of the association, and to submit annual accounts to the AGM. However, the level of detail required, and the specific requirements vary from jurisdiction to jurisdiction.

1149 Specific requirements from WA, NSW and the ACT are set out below, by way of illustration.

Western Australia

1150 In WA, section 5 of the *Associations Incorporation Act 1987* (WA) ("**the WA Act**") requires incorporated associations to keep accounting records. Section 5(c) specifies that accounting records should be kept in a manner that will enable the true and fair accounts of the association to be conveniently and properly audited.

New South Wales

1151 In NSW, associations incorporated under section 26(6) of the *Associations Incorporation Act 1984* (NSW) ("**the NSW Act**") must submit a statement to the AGM which gives a true and fair view of, amongst other things:

- the assets and liabilities of the association at the end of its last financial year; and

- the mortgages, charges and other securities of any description affecting any of the property of the association at the end of its last financial year.

1152 Section 27 (1) of the NSW Act requires this statement to be lodged with the director-general within one month of the AGM accompanied by a certificate (certifying that the statement has been submitted to the members and an AGM), and payment of a prescribed fee.

1153 Under section 27(4) the director general may exempt the public officer of the association from any of the provisions in subsection (1), either generally or in a specified year.

Australian Capital Territory

1154 Section 72(2) of the *Associations Incorporation Act 1991* (ACT) ("**the ACT Act**") largely mirrors section 26(6) of the NSW Act. However, the ACT Act contains more sophisticated and complex financial reporting requirements by prescribing tiers of accounts. These are as follows:

- Under section 74(2) of the ACT Act, accounts of all incorporated associations are to be audited by a person who is not an officer of the association, and who has not assisted with the preparation of those accounts.
- Section 74(3) provides that where the gross receipts or gross assets of the association exceed $150,000 per annum[501] the association's accounts are to be audited by a person with prescribed qualifications (this includes, amongst others, members of the Institute of Charted Accountants in Australia, the National Institute of Accountants, or the Australian Society of Certified Practising Accountants).
- Where an incorporated association has gross receipts exceeding $500,000 per annum,[502] section 76 requires the association to appoint an auditor who is a "registered auditor" under the Corporations Act. Section 76 then goes on to set out specific detailed auditing requirements for these associations.

D. RECONCILING "ACCOUNTABILITY" AND FINANCIAL REPORTING

(1) The position under the ACA Act

1155 As was noted in the discussion of "accountability" in the Introduction to this Part (See Chapter 10 Section C), the focus of accountability under the ACA Act has been on "external" financial accountability to funding bodies, and accountability to clients or service recipients of ACA Act corporations, rather than internal accountability by the corporation to members and the board to the corporation.

1156 The focus on the use of the ACA Act as a means of achieving external accountability has resulted in increasingly complex and onerous financial reporting and accountability

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501 NSW *Association Incorporation Regulations 1991 No. 31* Part 3 reg 12 (1)

502 Ibid. Part 3 reg 12 (3)

provisions in the ACA Act. As noted in Section B above, these now include the provision of balance sheets and expenditure and income statements, which must in effect be audited by an "examiner". These requirements apply irrespective of the size or nature of the corporation. The specific accounting standards required for audited financial statements under the ACA Act are currently unclear, and there is also some confusion about other aspects of the reporting requirements (such as whether it should extend to trusts or entities administered by the corporation).[503]

1157 The requirements under the ACA Act are overlaid by a potentially bewildering array of financial reporting requirements required under funding agreements or other legislative regimes, which may apply to some corporations (such as the reporting requirements for NTRBs under the NT Act). These reporting requirements are often inconsistent with the reporting requirements under the ACA Act, because they adopt different accounting standards or require reporting of different financial indicia.

1158 The resulting multiplicity of financial reporting requirements can be very complex, costly and inefficient. For example, NTRBs may have to prepare different kinds of financial reports using different accounting standards to meet:

- ACA Act requirements;
- Native Title Act (and through it, CAC Act) requirements;
- ATSIC grant requirements; and
- the requirements of various State-based funding agencies.

1159 Specific assessment of compliance costs has not been possible under the present review, but a submission prepared by Ernst & Young for the Fingleton Review estimated the annual costs of compliance with the ACA Act's audit requirements alone to be "in the order of $20 million".[504]

1160 One of the difficulties in the area of Indigenous corporate governance is that governmental creditors do not utilise, to the fullest extent, the various *contractual instruments* (eg loan and grant conditions, the appointment of receivers and controllers) to monitor debtor or grantee corporations. Instead, there is an awkward, ineffective, and at times, potentially improper reliance on the corporate governance system for debt monitoring. This observation is discussed in more detail in Chapter 11.

(2) The rationale for and focus of financial reporting

1161 Should the focus of the ACA Act's financial reporting requirements remain external accountability, or should it be aimed at two dimensions of internal accountability, that of directors to the corporation, and that of the corporation to its members? It is the opinion of the Review Team that the appropriate focus of the Act should be the latter forms of accountability.

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503 Written comments provided by Joe Mastrolembo of the Office of the Registrar of Aboriginal Corporations.

504 *Fingleton Report*, Volume 1, p82

1162 In the Corporations Act context, the rationale for the disclosure of financial information is that all persons dealing with the corporation will be better able to protect their interests. In practice, however, the disclosure of corporate information is in fact to protect the members of the corporation, rather than the interests of creditors or to satisfy the regulator's curiosity. Creditors can protect their interests more effectively through contractual means. Ford, Austin and Ramsay, the authors of the leading work on Australian corporate law, discuss the gap between the theory and the practice of disclosure for Corporations Act companies in the following terms:

> As an instrument of creditor protection, public disclosure of corporate information is a blunt weapon. Trade creditors, frequently small business enterprises, are unlikely to consult ASIC's records, and those records will be of only historical interests for most purposes. Lenders and other major creditors will use their position of strength to obtain up-to-date financial information about the borrower, and will protect themselves by taking security over corporate assets and (where appropriate) personal guarantees from principal shareholders and directors.[505]

1163 The Fingleton Review considered the question of external accountability at length. It also concluded that the emphasis on financial reporting mechanisms in the ACA Act was misplaced, and that a more appropriate focus for external accountability measures should be through the grant conditions or service agreements, under which service delivery organisations receive funding.[506] The Review Team concurs with this general conclusion, with the additional argument that a focus on grant conditions or service agreements would also serve to establish corporations' accountability to clients or service recipients.

1164 If the above rationale is adopted, it can then be said that the appropriate level of financial reporting is the level required to allow a member to adequately protect his or her interests (and to allow the Registrar to perform his or her regulatory functions).

1165 However, this level will vary depending on the nature of the corporation, as will the capacity of the corporations to comply with the reporting requirements. As discussed in Part 2, ACA Act corporations vary enormously in size, function, financial turnover and source of funding. But the ACA Act, adopts a "one size fits all approach" to financial reporting. All corporations, except the small number that have applied for and been provided with exemptions, are required to comply with the same level of reporting requirements.

(3) Matching appropriate reporting levels to appropriate accountability

Small corporations

1166 For smaller ACA Act corporations, the level of reporting required by the ACA Act is probably not necessary or appropriate, as their activities are likely to be limited. (Indeed, for the smallest, reporting may be largely unnecessary – this is discussed further in the next Subsection, *Exemptions to Reporting Requirements*.)

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505 *Ford's Principles of Corporations Law*, para [10.010]

506 *Fingleton Report*, paras 6.63–6.70.

1167 These small corporations would also be likely to find such reporting requirements onerous (and it is clear from the high numbers of corporations which fail to meet the ACA Acts reporting requirements that many do.[507])

1168 It is ironic that small corporations under the ACA Act are currently required to meet significantly heavier reporting requirements than would be the case if they were incorporated as small proprietary companies under the Corporations Act.

Large corporations

1169 At the other extreme, for large corporations, the relevant level of reporting required to enable members to protect their interests may necessitate something even more comprehensive than the current reporting requirements in the ACA Act. The current reporting requirements contain a number of shortcomings, for example:

- The ACA Act does not require the committee's report to include comprehensive disclosure statements from the governing committee members, as are required of reporting entities under the Corporations Act. This is because the "statement of compliance" required in the Committee's report is relatively narrow in scope (as are the directors' duties to which that statement of compliance relates).
- The accounting standards required are also not well defined and are not as comprehensive as are those contained in the Corporations Act (or some State Association Incorporation Acts, such as the ACT Act, for similar sizes corporations).
- Further, the nature of the examiner's role and examiners' qualifications are vague, and do not meet the standards of the Corporations Act or even a number of the State Association Incorporation Acts.

1170 It was argued in Chapter 10, Section C that the appropriate focus of accountability for ACA Act corporations is internal accountability to members. "External accountability" to creditors, funding bodies, clients/service recipients and the broader public should be addressed through funding agreements.

1171 Nonetheless, in the case of large ACA Act corporations that receive public funding to provide important community services, there may also be a public interest in enhanced corporate reporting playing some role in external accountability (in addition to its primary role in providing increased internal accountability).[508] While most such "external accountability" should remain under the domain of funding agreements, these agreements will generally not extend to the sort of broader disclosures required of reporting entities and their directors under the Corporations Act, because such information does not relate directly to the grant funds.

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[507] See Subsection (4) *Exemptions to Reporting Requirements*

[508] Increased internal accountability as well as a public interest in some degree of external accountability to the general public in essence also forms the rationale behind higher corporate reporting requirements for public companies and large proprietary companies under the Corporations Act.

The balance of corporations

1172 Many corporations are likely to fall somewhere between these two extremes of size. For such corporations, intermediate reporting requirements would also be appropriate, although probably not to the levels currently required under the ACA Act.

(4) Exemptions From Reporting Requirements

1173 Section 59A(1) of the ACA Act permits the Registrar to grant exemptions from the reporting requirements contained in section 59 where the Registrar:

> is satisfied that it would be impracticable for an Incorporated Aboriginal Association to comply… or that the application of those requirements… would be unduly onerous.

1174 Exemptions must be made by the Registrar in writing, and can be in relation to all or part of the reporting requirements. In addition, the Registrar may set other conditions relating to the keeping of accounts and filing reports.[509]

1175 There is no formal requirement to apply for an exemption to reporting requirements. The Registrar can in theory initiate the exemption. However, this has not been the case in practice, because in order to do so, the Registrar must be "satisfied" that the reporting requirements would be "impracticable" or "unduly onerous". Without an application or any relevant information from the relevant corporation, the Registrar has nothing with which to satisfy himself or herself that the exemption should be granted.

1176 It is the Registrar's experience that many corporations which might be eligible for exemptions are not even capable of something as basic as applying for the exemption in the first place.[510] This is supported by statistics available in the Registrar's Annual reports: in 2000/2001 there were 2709 corporations incorporated under the ACA Act. 338 corporations were granted exemptions from various reporting requirements, and only 960 lodged annual returns – indicating that slightly over half of all ACA Act corporations (52%) wholly failed to comply with the Act's reporting requirements. And when such corporations do fail to comply with the Act's reporting requirements, they are exposed to deregistration. A high proportion of the large number of corporations which have been deregistered each year were deregistered because of non-compliance with the reporting requirements. Issues relating to the deregistration of corporations are discussed in Chapter 11.

1177 In addition to the problems faced by corporations in applying for exemptions, the requirement that each exemption be considered individually and provided in writing is a resource burden on the Registrar's staff.

1178 For these reasons, the Review Team is of the view that the Act should make clear provision for classes of exemptions to the reporting requirements, rather than requiring exemptions to be granted on an individual basis.

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509 *ACA Act*, s59A(2).

510 Personal communications with Joe Mastrolembo; Submission by Joe Mastrolembo, (then) Director, Client Services, ORAC, 7 June 2001

E. CONCLUSIONS

1179 There was strong support amongst stakeholders for a streamlining of the financial reporting requirements for smaller ACA Act corporations. However, there was also concern that large corporations meet relatively high reporting standards.[511]

1180 In light of this and the discussion above, the Review Team is of the view that a reformed ACA Act should make provision for effectively three "tiers" of reporting requirements, as follows:

- Very small corporations ("**exempt corporations**") would be exempt from reporting requirements under the ACA Act;
- "Small" (small to intermediate sized) corporations would have to provide minimal financial information, sufficient to enable a finding body or the Registrar to see if there appear to be any problems; and
- "Large" corporations would have to meet increased reporting requirements, above those currently contained in the ACA Act.

1181 This would mean that for exempt and small corporations, there would be a shift in the source of financial reporting obligations from the Act to funding agreements. Conversely, the increased reporting requirements for large corporations could also mean reporting requirements under funding agreements for those corporations could be more specifically focussed on milestones and outcomes, and may not require the same level of general financial reporting.

1182 A detailed discussion of how the reformed corporate reporting requirements might work is contained in Part 6.

[511] Personal communications with Joe Mastrolembo; Submission from Joe Mastrolembo, (then) Director, Client Services, ORAC, 7 June 2001

CHAPTER 16
MEMBERSHIP RESTRICTIONS

A. INTRODUCTION AND OUTLINE

1183 The ACA Act essentially requires that all voting members of ACA Act corporations be "Aboriginal" (which is defined as including Torres Strait Islanders).[512] It also requires that the governing committee be comprised of members, thereby effectively restricting membership of the governing committees to Indigenous persons as well. These race-based restrictions reflect the character of the ACA Act as a "special measure" designed to enhance the enjoyment of legal rights by Indigenous people.

1184 In addition, the ACA Act is based on the premise of providing a mechanism for an association of natural persons to incorporate. It therefore does not allow corporate membership of ACA Act corporations.[513]

1185 There have been varying demands for these requirements to be reconsidered particularly the prohibition on the membership of artificial persons.

1186 This chapter considers these matters in turn.

B. RACIALLY BASED MEMBERSHIP RESTRICTIONS

1187 Use of the ACA Act is generally restricted to Indigenous Australians. This restriction is justified as a "special measure" for the purposes of the *Racial Discrimination Act 1975* (Cth).[514]

(1) Definition of "Aboriginal"

1188 The term "Aboriginal" is defined in section 3 of the ACA Act. Section 3 provides that:

> '**Aboriginal**' means a person who is:
>
> (a) a member of the Aboriginal race of Australia; or
>
> (b) a descendant of an indigenous inhabitant of the Torres Strait Islands.

1189 This is a very broad definition, but is generally consistent with the definition in the *Aboriginal and Torres Strait Islander Act 1989* (Cth) ("**the ATSIC Act**")[515].

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512 *ACA Act* section 3, 49(1)

513 Mantziaris, C. & Martin, D. 2000, p.198

514 See the detailed discussion of the RDA and Special Measures in Chapter 10, Section D

515 See ATSIC Act, s4(1)

1190 Difficulties with this definition of "Aboriginal", and questions of who qualifies, have been highlighted by events and disputes surrounding the establishment of the controversial Tasmanian ATSIC Electoral Roll.[516]

1191 There may eventually be a need to amend the definitions of "Aboriginal" and "Torres Strait Islander" contained in the Act, as a consequence of these developments in Tasmania and elsewhere. However, these developments are still very dynamic, and it may be premature to pre-empt development of new definitions by the courts or legislature as a response to these developments. In addition, the Review Team suggests that when such changes in definition become necessary, it will need to be a whole-of-government exercise involving all relevant legislation, to ensure a coordinated response. For these reasons the Review Team believes there may be benefits in retaining a very broad and general definition, and do not recommend any significant changes to the definition at present.

1192 However, the Review Team does recommend separate definitions for "Aboriginal" and "Torres Strait Islander", and consistent use of "Aboriginal and Torres Strait Islander" or possibly "Indigenous" (which would be defined to include both "Aboriginal" and "Torres Strait Islander") throughout the amended Act. (The absence of a separate specific recognition of Torres Strait Islanders was raised by Torres Strait Islanders consulted with in the course of this Review.) Such an approach would also bring the ACA Act into line with the ATSIC Act.

(2) Membership of Non-Indigenous Persons

1193 Originally, the ACA Act did not make provision for non-Indigenous persons to become members of ACA Act corporations. However, this position was changed in 1984 under the *Statute Law (Miscellaneous Provisions) Act (No.2) 1984 (Cth)*. The 1984 amendments allowed non-Indigenous spouses of Aboriginal persons to become full members (under section 3 – "definition of aboriginal") and for non-Indigenous persons generally to obtain certain membership rights (under section 49A – discussed below).

1194 Section 49A of the ACA Act provides that where more than 75% of the membership of the corporation agrees, the corporate constitution may provide for the membership of persons other than Aboriginals and their spouses. Such persons cannot be given the right to vote or the right to stand for election to the board.[517] However, where provision for the liability of members is made in the constitution, they may become liable for the debts of the corporation.[518]

1195 It is clear that the spirit of the ACA Act requires that the core membership of an ACA Act corporation be Indigenous. Section 49A attempts to achieve this objective by preventing non-Indigenous members from having a right to vote or for standing for election to the board.

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[516] See *Shaw v Wolf* (1998) 83 FCR 113 for a case on disputed Aboriginality before the Federal Court. In relation to the Tasmanian ATSIC Electoral Roll, see for example: ABC News Online, "Indigenous Roll Ruffles Tasmania", 30 August 2002, http://abc.net.au/news/newsitems/s663238.htm".

[517] *ACA Act* section 49A.

[518] *ACA Act* section 49(2).

General Membership

1196 Section 49A leaves very few corporate rights to which non-Indigenous members can be entitled. Membership under section 49A is largely inert. It is primarily used as a means for collecting revenue through membership fees or as a means of demonstrating political support from the broader community (which alone may nonetheless be sufficient justification for retaining section 49A in its present form).

1197 However, if full membership were to be extended to non-Indigenous people, it might be difficult to ensure that control of the corporation is retained by Indigenous members. It is possible that this could be achieved through a number of mechanisms, such as requiring Indigenous majorities at both the general membership and the board levels. But this would be very difficult to monitor or enforce in practice.

Board Membership

1198 One issue for the Review was whether it would be desirable to have non-Indigenous board members, either because of the special skills they may be able to bring, or because of their perceived independence from any Indigenous sub-groups. Many non-Indigenous charities rely on skilled business people to donate their time and skills to act as directors on the charity's board.

1199 Indigenous associations incorporated under the ACA Act are at present effectively prevented from accessing that resource. Nevertheless, the involvement of non-Indigenous persons in the control of Indigenous corporations would cause controversy, as the expectation is that Indigenous organisations would be controlled by Indigenous people.

1200 Some of the benefits of non-Indigenous participation on boards could probably be delivered through other mechanisms, such as:

- Employing management staff with required skills.
- Engaging non-Indigenous, non-voting "advisers" to assist the board.

  This could be done on a regular basis (for every board meeting), or could be done on an ad-hoc basis (as and when specialist assistance is required). It is possible that, as with the directors of many charities, some of these advisers could be persuaded to give their time for free. If the adviser exercised control of the board through force of personality or dominant position, they may be deemed to be acting as a "shadow director" and be subject to the full range of director's duties (see Chapter 13 for discussion of shadow directors and directors' duties).

- Establishing consultative mechanisms with relevant non-Indigenous community organisations may be another means by which the Board could receive assistance without requiring non-Indigenous board members.

C. MEMBERSHIP OF ARTIFICIAL PERSONS (CORPORATE GROUPS)

1201 Membership of ACA Act corporations is currently limited to natural persons.

1202 An ACA Act corporation can be a member of a corporation that has been incorporated under another incorporation statute, (for example, the Corporations Law). But a corporation cannot be a member of an ACA Act corporation.

1203 There are a number of arguments for and against allowing other ACA Act corporations to be members of ACA Act corporations. The arguments in favour include:

- There appears to be a strong demand amongst Indigenous groups to create umbrella organisations as a way of securing representation of local and corporatised interests in larger regional based corporations.[519]
- In a community context, the creation of a corporate group has been considered to be an attractive way of separating a community's business activities from other cultural activities or passive land-holding activities.[520]
- The use of umbrella corporations might be one way to group together and more efficiently manage, large numbers of Indigenous corporations within an area. The large numbers of corporations can cause difficulties for members, who are required to attend multiple meetings and keep track of what the relevant corporations are doing.

1204 The counter-arguments are as follows:

- Allowing for membership of artificial persons is inconsistent with the associational model of the corporation, which forms the basis of the ACA Act as currently drafted.
- Proposals for nominee directorships (where directors are nominated by individual corporate members, and act in accordance with the instructions of the nominee) are highly problematic.
- Allowing for the establishment of corporate groups would need to be accompanied with requirements for corporate group accounts to be prepared, which could make the reporting requirements under the ACA Act very complex.
- The amendments required to enable effective corporate membership would make the ACA Act more complex, negating the original intent of providing a simple incorporation regime for Indigenous people.
- If groups seek to create corporate groups through corporate membership, then this can be sufficiently done using the Corporations Act
- Having corporate groups would not in fact reduce the number of meetings that the members of the different group corporations would have to attend – it would just add another layer on top.

1205 The Steering Committee and ORAC initially took the view that the arguments against allowing corporations to be members of ACA Act corporation outweigh those in favour – particularly in light of the fact that the Corporations Act provides a generally suitable alternative. However, because the arguments are relatively finely balanced, ORAC has

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519 Mantziaris, C. & Martin, D. 2000 p 198. See *Fingleton Report*, Volume 1 p 48.

520 Mantziaris, C. and Martin, D. p 199

reconsidered its position, and requested that this issue be the subject of further internal investigation. The Steering Committee has agreed to this change in position. The Review Team is also supportive of further investigations into this issue.

D. CONCLUSIONS

1206 There was strong support from stakeholders for restricting membership to Indigenous natural persons. While some stakeholders saw the need to be able to establish "umbrella" type corporations with other Indigenous corporations as members, the general view was that such arrangements could be appropriately pursued under other statutes, particularly the Corporations Act. There was also support for the proposition that directors of ACA Act corporations should be limited to Indigenous persons, since other mechanisms exist whereby Indigenous boards can access expertise if required.

1207 However, the definition of "Aboriginal" needs to be amended so that there are separate definitions for "Aboriginal" and "Torres Strait Islander", and possibly also "Indigenous".

1208 The Review Team is of the view that the arguments against allowing corporate membership of ACA Act corporations probably outweigh the arguments for; however this issue is to be the subject of further internal investigation by ORAC.

CHAPTER 17
MISCELLANEOUS ISSUES

A. MINIMUM MEMBERSHIP REQUIREMENTS

1209 Section 45(3)(A) of ACA Act currently requires ACA Act corporations to have a minimum of 25 members, unless the corporation is:

- "formed wholly for business purposes"; or
- "formed principally for the purpose of owning land or holding a leasehold interest in land"

in which cases the minimum requirement is five (5).

1210 This can be compared with the Corporations Act, where the minimum for all corporations is now one (1), and the State Association Incorporation Acts, which generally have a minimum membership requirement of five (5).

1211 The original basis for setting minimum membership numbers in statutes of general incorporation reflected the origin of corporations in ventures that comprised of several business partners joining together for a common purpose. Over time, the nature of corporations has changed, and statutes of general incorporation have become more flexible to reflect that. The Corporations Act now allows one member corporations, to accommodate the fact that many individuals legitimately undertake business on their own and wish to take advantage of the benefits of incorporation.

1212 The reason for the minimum membership requirements in association incorporation statutes reflects the fact that they are principally intended for associations of natural persons engaged in non-profit activities. Typically, this includes social or sporting clubs or charities, where groups of people have come together.

1213 The ACA Act is intended to cater to both business activities and the sort of associational activities contemplated by association incorporation statutes. Why then is there a requirement for a minimum of 25 members in most circumstances?

1214 The answer appears to be based in part on a highly problematic assumption that 25 people is equivalent to a basic, universal, Aboriginal 'social unit'.[521] However, it also seems to be in part based on concerns by government that a lower minimum results in "too many" Indigenous corporations (criticism of this approach is discussed below).

1215 A number of difficulties have been noted with the minimum membership requirements of 25 persons in the ACA Act, for example:

[521] Ibid. p.197

- Groups of persons smaller than 25 wishing to incorporate for the purposes of attracting public funding (which may by policy be linked to a requirement for incorporation under the ACA Act) would be prevented from doing so.
- This can then also lead to the creation of corporations including members from several groups, which may be unwieldy and susceptible to destabilisation through sub-group competition.
- It has the potential to cause difficulties in the case of PBCs, where it is in theory possible that a native title group may have fewer than 25 members. (This particular issue is covered in more detail in Part 6, Chapter 4, which discusses PBCs and NTRBs.)
- It unnecessarily limits Indigenous people's rights of freedom of association.

1216 In light of the above, feedback from consultations was mostly in favour of lowering the minimum membership numbers.

1217 However, some concerns were expressed that lowering the minimum membership requirements for all ACA Act corporations to five would result in a multiplication of Aboriginal corporations, and this would then place drains on government funding to Indigenous communities.

1218 With respect, the Review Team considers that this concern confuses:

- the role of an incorporation statute – which is to provide an appropriate and effective means for associations to incorporate; and
- the role of government funding bodies - which is to determine which corporations are best suited to receiving specific grants of government funding for particular purposes.

1219 Just because an Indigenous association is incorporated should not mean that it is automatically entitled to government funding.

1220 The Review Team is firmly of the view that it would be entirely inappropriate for difficulties experienced by government funding bodies in identifying appropriate funding candidates, to curb Indigenous' people's rights to freedom of association.

1221 Such an approach is unlikely to be effective in any case, as Indigenous incorporators could simply turn to the State Association Incorporation Acts or the Corporation Act, which both have lower membership requirements.

1222 Slightly raising the costs of incorporation might be another way to ensure that only "genuine" incorporators establish corporations, although this would have to be done with great caution. Given the socioeconomic status of most Indigenous people, significant increases to costs could prove prohibitive, and would defeat the rationale of providing an accessible incorporation statute for Indigenous people.

1223 Finally, it is possible that the introduction of mechanisms such as allowing amalgamation of ACA Act corporations could address some of the concerns with the multiplicity of Indigenous corporations.

1224 The Review Team therefore concludes that the minimum membership requirements for all ACA Act corporations should be lowered to five (5).

B. MEMBERSHIP LISTS AND DEFINING CORPORATIONS' MEMBERSHIP

1225 Section 58 of the ACA Act requires that a corporation's membership be defined by reference to a register of members maintained by the public officer.

1226 This requirement has caused particular difficulty for many corporations for a number of reasons, for example:

- There may be confusion between membership of particular groups or sub-groups (such as "families"), and formal membership of the corporation itself. Such problems may arise for technical reasons, for instance the corporation failing to maintain adequate membership records. This confusion can also have more complex origins, however, in that the corporation may have been assimilated into the particular Indigenous polity to the extent that it is effectively identified with the particular Indigenous group or community. Membership of the corporation therefore may not be differentiated from membership of the group.
- The corporation may be unresourced, and the board and public officer may have limited formal education, training or experience with corporate management. In such cases, records are often not maintained and are easily lost. Formal requirements in the ACA Act and Rules of Association relating to eligibility for membership or requiring endorsement by the Board may not be followed.

1227 Further, members of the staff of the Registrar's office have noted that the power to require production of up-to-date lists of names and addresses of members is largely meaningless. This is because they are not in a position to verify the lists or do anything with them – even if they were accurate and up to date.

1228 A number of corporations have attempted to address the difficulties faced with maintaining membership lists by defining membership by reference to more flexible criteria, for example by defining a corporation's membership as:

- all Indigenous people living within a defined area, or
- all members of a particular language, tribal or family group or groups.

1229 All persons who meet the relevant condition would automatically be deemed a member, without any need for specific application and approval or entry on a register of members.

1230 The main difficulty with such approaches is that they still leave a great deal of uncertainty. For example, in relation to the two examples given above:

- given the mobility of many Indigenous populations, defining residency can be problematic, and it may be difficult for a person to provide clear evidence of residency;

- clearly defining who is or is not a member of a family, clan or tribal group is highly problematic.

1231 Such approaches can themselves become the focus for disputation. Although in a different context, this problem is clearly illustrated by the disputes over group membership arising from native title claims (which the NNTT and Federal Courts are still struggling with); and even over the definition of Aboriginality itself, which has resulted in the controversial Aboriginal electoral roll in Tasmania.[522]

1232 Other practical problems can also arise from not knowing the number of members, or their identity, for example:

- Lack of certainty can cause problems for the exercise and enforcement of membership rights – as soon as members are provided with enforceable rights, it becomes necessary to know exactly whether any given person is a member of the corporation.
- If members bear any liability (even a token amount) under the constitution to contribute to the debts of the corporation in the event of the winding-up of a corporation, how can the members be identified?
- Not knowing how many members there are can cause difficulties for the purpose of determining quorum for meetings or passing special resolutions.
- If a corporation wished to voluntarily deregister itself or wind itself up, it would be difficult to obtain the necessary consent of all the members.[523]

1233 Automatic membership could also potentially cause difficulties with the expulsion of members for disciplinary reasons.

1234 A number of these issues can probably be addressed to some extent by careful drafting of extremely precise definitions of the class of persons who are deemed members, and also by carefully defining how the rights and liabilities of membership work, and how meetings and votes are to take place.

1235 The Review Team considered a proposal that members of a corporation be defined in the way that 'objects' of a discretionary trust may be defined.

1236 Discretionary trusts can have membership consisting of classes of persons (although there must be a relatively high degree of certainty in the definition of this class as well). But under a trust trade-off for the greater degree of flexibility in defining the class of beneficiaries is that the beneficiaries' rights are at the discretion of the trustee, and very difficult for the beneficiary to enforce harder to enforce.[524]

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522 See "See *Shaw v Wolf* (1998) 83 FCR 113 for a case on disputed Aboriginality before the Federal Court. In relation to the Tasmanian ATSIC Electoral Roll, see for example: ABC News Online, "Indigenous Roll Ruffles Tasmania", 30 August 2002, http://abc.net.au/news/newsitems/s663238.htm".

523 *Corporations Act* section 601AA(2)

524 Meagher, R.P & Gummow, W.M.C, sixth edition, 1997 at 2315

1237 In light of the above, the Review Team reluctantly concludes that there is unfortunately probably no alternative but to require Indigenous corporations to define their membership by reference to membership lists, and to require that those lists be properly maintained.

1238 The maintenance of such membership lists might be an appropriate matter which could be a focus of assistance and/or special regulatory assistance from the Registrar's Office.

C. THE REQUIREMENT TO HOLD ANNUAL GENERAL MEETINGS

1239 Section 58B of the ACA Act deals with general and special meetings. The requirement to hold an annual general meeting ("AGM") in section 58B is currently unclear.

1240 Section 58B(1) requires the Governing committee "to call and conduct annual general meetings of the Association as provided in the Rules". But section 58B(8) only requires the Rules to "make provision for and in relation to: (a) the intervals between meetings…" There is no express requirement for an AGM to be held every year, as it is possible that the Rules might not provide for the holding of AGMs.

1241 On the other hand, it could be argued that the mere use of the term "annual general meeting" in section 58B(1) implies that the section intends AGMs to be held annually. The term "annual general meeting" is also used in section 59(5)(a) which requires the Governing Committee to make a copy of the financial reports available "at the next annual general meeting after they have been prepared". However, this could be argued to go against the express wording of section 58B(1) and (8) which leave it to the Rules.

1242 It is the view of the Review Team that section 58B needs to be clarified, so that it is clear that an AGM must be held every year. However, the Review Team also considers that exemptions to the requirement to hold AGMs should be made available to small corporations, which would bring the ACA Act into line with the requirements for small proprietary companies under the Corporations Act. (See Chapter 20E above in relation to the proposed exemptions.)

D. MEETINGS BY TELEPHONE OR VIDEOCONFERENCE

1243 The ACA Act does not currently make express provision for the holding of meetings by telephone or videoconference. There is nothing in the Act expressly prohibiting meetings using technology, and it is possible that the Court could read into it that such meetings would be possible. However, this is unclear.

1244 Communication using such technologies may be particularly important for Indigenous corporations – particularly, but certainly not exclusively, those in remote areas. There are two principal reasons for this.

1245 First, membership of Indigenous corporations and their boards of directors may be highly dispersed. The costs of physically bringing members/directors of such corporations together for meetings can be prohibitive – particularly if the corporation has few resources; or if those resources are tied up in grant funds which do not cover the high costs of administration of Indigenous corporations. This may make it impossible for such

corporations to meet quorum for meetings. Expressly allowing the meetings to take place using telephone or video-conference could alleviate this.

1246 The second reason is that oral communication is particularly important where the directors of a corporation may not be able to easily read or write. This makes other "mechanisms of convenience", such as flying resolutions, unavailable.

1247 For these reasons, the Review Team considers that express provision should be made for the holding of meetings using telephone or videoconference. This could be by way of regulation to ensure flexibility for future technological developments.

E. GIVING THE REGISTRAR POWERS TO REMEDY ERRORS IN THE PUBLIC RECORD AND ISSUE DUPLICATE CERTIFICATES

(1) Remedying Errors in the Public Record

1248 It has been noted that the Registrar currently has no power to rectify minor errors in the public record – for example if a corporation's name is incorrectly recorded on the Register.[525] In particular in the case of corporation's names, the process of applying to change a name is relatively lengthy and complex. Section 53 currently requires a written application to the Registrar, who must consider whether or not to approve the proposed name, and if approval is given, to issue a new certificate of incorporation with the new name. It is also possible that more significant errors in the processing of documents by the Registrar's Office could not be easily rectified once the details appear on the Register.

1249 The Review Team considers that it would be appropriate, and would enhance the efficient working of the Act, to give the Registrar a power to rectify such minor errors, at his or her discretion. This could be either where the error is brought to the Registrar's attention by a member or director of a corporation, or otherwise.

(2) Issuing Replacement Certificates of Incorporation

1250 As has been noted elsewhere in this Report, the maintenance and keeping of a corporation's records and documents is often problematic in unresourced Indigenous corporations, particularly in more remote locations. As a consequence, corporations occasionally lose their certificate of incorporation. The certificates are also occasionally destroyed or damaged.

1251 The Review Team is of the view that it would be appropriate to provide the Registrar with the capacity to issue replacement certificates of incorporation, provided that appropriate safeguards are put in place to ensure that this facility is not abused.

[525] Review Term of Reference No.5; Submission by Joe Mastrolembo, 2001

F. AMALGAMATION OF INDIGENOUS CORPORATIONS

1252 There have been demands from both ACA Act corporations and funding bodies to provide for the amalgamation of ACA Act corporations. This is largely because of the fact that there may in some areas be multiple corporations all formed for essentially the same or similar purposes, and it would be more efficient to merge the different corporations into a single entity. Demand for this facility is likely to be particularly strong in light of the Review Team's conclusions that corporate groups or "umbrella corporations" should not be allowed under the reformed ACA Act. (See Chapter 22 above.)

1253 Several State Associations Incorporation Acts provide a model for how this could be achieved. The *Associations Incorporation* Act 1984 (NSW) and the *Associations Incorporation Act* 1991 (ACT) both contain similar processes for the amalgamation of incorporated associations.

1254 Under those statutes, any two or more incorporated associations may apply to be amalgamated (in the ACT to the Registrar-General[526] and in New South Wales to the Director-General.)[527] In each case the following requirements must be addressed:

- Each of the incorporated associations must pass a special resolution approving the terms of the proposed amalgamation, the statement of objects and the rules of the new association.[528] In the ACT those rules may be the model rules as in force from time to time or rules which comply with section 32 of the same Act.
- An application must be filed with the details of the new association and three of its members with other attachments.[529] Those attachments must include, *inter alia*, copies of the above mentioned statement of objects, the rules and a notice in approved form showing the resolutions have been duly passed.[530]
- If the Registrar General (in the ACT) or the Director-General (in NSW) is satisfied that the application is in order, a certificate of incorporation for the new association is issued.[531]

1255 The amalgamating associations are then subsumed into the new association, and all property and proprietary rights belonging to the amalgamating associations are vested in the new association.[532] All of the amalgamating associations' liabilities, obligations, and penalties will be recoverable against the new association.[533] Finally all investigations,

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526 ACT Act section 26 (1)

527 NSW Act section 47

528 NSW Act section 46(2); ACT Act section 26 1(a) and (b)

529 NSW Act section 46 (3)(d); ACT Act section 26 (2)

530 NSW Act sections 46 (3)(a), (b) and (c); ACT Act sections 26 (2)(b)(i), (ii) and (iv)

531 NSW Act section 47; ACT Act section 27

532 ACT Act section 28 (c)

533 ACT Act section 28 (d)

legal proceedings or remedies may be instituted, continued or enforced against the new association.[534]

G. CLARIFICATION OF APPLICATION OF PART 5 OF THE CORPORATIONS ACT

1256 As noted in Chapter 12 above, there is some confusion about the extent to which sections 62 and 67 of the ACA Act apply Part 5 of the Corporations Act (ie how much of Part 5 is incorporated by reference under these two sections).

1257 Section 62 of the ACA Act applies the provisions of the Corporations Act to compromises or arrangements with the creditors of ACA Act corporations. Section 62 states: "Subject to this Act, the provisions of the Corporations Act that relate to compromises or arrangements between companies and their creditors apply, so far as they are capable of application and subject to such modifications, adaptations and exceptions (if any) as are prescribed, to and in relation to Incorporated Aboriginal Associations".[535]

1258 Section 67 states that, subject to other provisions of the ACA Act, 'the provisions of the Corporations Act that relate to the winding up of companies registered under that Act apply, so far as they are capable of application and subject to such modifications, adaptations and exceptions (if any) as are prescribed, to and in relation to the winding up of Incorporated Aboriginal Associations'.[536]

1259 There has now been some case-law addressing the issue. For example:

1260 In *Kazar v Duus*, it was stated that 'the purpose of section 62 is to ensure that an Aboriginal Association incorporated under Pt IV of the *ACA Act* is to have the benefit of all of the provisions of the [Corporations Act] that relate to compromises or arrangements.'[537]

1261 The application of Part 5.3A of the Corporations Act was confirmed by the Federal Court in both *Kazar v Duus* and *Re Deeral Aboriginal and Torres Strait Islander Corporation* (1996) 70 FCR 229. Further clarification has been provided by cases such as *Aboriginal and Torres Strait Islander Commission v Jurnkurakurr Aboriginal Resource Centre*

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534 ACT Act section 28 (e)

535 The section continues: '…in the application of those provisions: (a) a reference to a company shall be read as a reference to an Incorporated Aboriginal Association; (aa) a reference to the Commission shall be read as a reference to the Registrar of Aboriginal Corporations; (b) a reference to the directors of a company shall be read as a reference to the members of the Governing Committee of an Incorporated Aboriginal Association; and (c) a reference to the Court shall be read as a reference to the Federal Court of Australia.'

536 The section continues in a manner similar to section 62: see above note 535.

537 *Kazar v Duus* [1998] 1378 FCA at 4; 88 FCR 218

Aboriginal Corporation (in liquidation) (1992)[538] and *Aboriginal and Torres Strait Islander Commission v Kainggati Aboriginal Corporation* [2000][539].

1262 However, the case-law has still not fully clarified the position. In light of the conclusions in Chapter 6 above, the Review Team is of the view that there are strong policy grounds for amending the ACA Act to specifically apply those parts of the Corporations Act dealing with:

- Receivers and receivership;
- Liquidation, including provisional liquidation;
- Administration, specifically including voluntary administration.

1263 More detailed discussion of how these provisions should apply, and how their application could be achieved, is contained in Chapter 20, Section A.

[538] 110 FLR 1

[539] [2000] FCA 148

CHAPTER 18
ABORIGINAL COUNCILS - PART III OF THE ACT

1264 The Review Team would argue that Part III of the ACA Act, in its present form, is inoperable for three main reasons:

- It is politically impractical, since the powers of the Registrar and the Commonwealth Minister are the source of opposition by the States. Resistance to the implementation of Part III appears to stem more from the involvement of a Commonwealth official in State affairs of local government, than in fear of Aboriginal community control of service delivery.
- Although it began life as a potential measure for self-determination, Part III as it currently stands would arguably no longer be seen as achieving this outcome in any case. This is because the powers the ACA Act suggests be conferred on a Council are quite limited; and the extensive involvement of the Registrar in establishing the Council would now be considered excessive and paternalistic.
- The intention of Part III, so far as it is clear, has arguably been overtaken by developments since the ACA Act's inception in 1978.

(1) Opposition by State and Territory Governments

1265 It is clear from Fingleton's analysis of correspondence about the implementation of Part III[540] that the States felt the provisions not only interfered in their affairs by having the Councils answerable to the Registrar rather than the State regime, but were also contrary to principles of good governance.

1266 There is some justification for this. Part III gives the power to make rules in the Council area that affect only the Aboriginal residents. In the original formulation of the ACA Act these could conflict with the powers and by-laws of present or future local government authorities in the same area. Even with the negotiated amendments that stipulated the Commonwealth Minister must consult with the relevant State or Territory Minister before declaring a Council area, there is still the power under the ACA Act to do so following consultation.

1267 The States' fears seem to have been based on the understanding that the Aboriginal Council, established under Commonwealth legislation, which overrides State law wherever they are in conflict, would be exempt from local government and perhaps State authority in respect of its Aboriginal inhabitants. If this were the case it may leave non-Aboriginal residents of a Council area unrepresented in local government.

1268 The governance provisions in Part III are so limited that they are likely to be unacceptable to most Indigenous communities in any case. Indigenous people require the ability to make by-laws that affect all residents of community land. It is an indication that the States were not, and are not, in fear of this in their opposition to Section III that, since 1978,

[540] *Fingleton Report* Volume 1, para 7.3

many State based self-management regimes have been implemented that improve on this provision. These are among the changes that render Section III no longer appropriate.

(2) Involvement of Registrar

1269 It appears that the original intent was for a Council to oversee the operation of services for a community that remained undefined and constituted along lines of customary cultural authority. Nevertheless, the provisions for the establishment of a Council require the Registrar to be highly involved in establishing the rules and the electoral structure.

1270 The ATSIC Native Title Branch submitted to the Fingleton review the following statement:

> Sections 21 and 22 [of the ACAA] abrogate the rights of common law native title holders under Aboriginal custom to the Registrar. Elections are required where, in many cases, office is held by ascription under Aboriginal customary law. The number of Councilors and the electoral procedures are determined by the Registrar. Under section 22 the Registrar is able to rescind the rules of the Council passed at the first meeting and, if not satisfied that rules acceptable to him will be passed, declare the election of Councilors void....
>
> The potential for common law native title holders to have an Aboriginal Council area declared over their NT land with the Aboriginal Council as the Registered Native Title Body Corporate is initially appealing. However, scrutiny of the actual mechanism for doing this reveals its origins in a period when the meaning of Aboriginal self-determination was still to be grappled with. There is an overall encouragement of advice, guidance, intervention and ultimate control of the outcome of the application process that is incompatible with the free exercise of common law rights, respect for Aboriginal custom, and the enjoyment of the right to self-determination.

(3) Part III superseded by other developments

1271 It can be argued that the original purpose and intent of Part III of the ACA Act has been superseded by other developments since the ACA Act's enactment. These include:

- Several states have made provision for Aboriginal communities either to provide local government services or to exercise limited self-governance by the declaration of community-wide by-laws, or both. The Northern Territories' *Local Government* Act is a leading example of this.
- Most large Indigenous communities operate municipal services using other forms of incorporation. There are, nevertheless, funding disparities with local government regimes that require consideration.
- Indigenous people in many regions are taking controlling, or influential, positions within "mainstream" local government councils.
- Since 1976, the establishment of ATSIC regional councils has allowed local Indigenous political representation as well as control over grant funding for the provisions of special services for Indigenous people within ATSIC Council regions.
- There now exist networks of Aboriginal service organisations in the owners of health, education, media, welfare, legal services, accounting, and remote community support that give Indigenous control over more profound aspects of Indigenous life than conceived of under Part III.

- The recognition of native title in the *Mabo* decision and the subsequent enactment of the NT Act, makes any Part III declaration of a Council Area, which is controlled by residents rather than native title holders, problematic. For example, carrying out Council functions could require following a range of "future act" processes under the NT Act. (Although this problem would not be unique to Part III Councils – such problems are already encountered with a form of Indigenous local government in Queensland, called Deed of Grant In Trust ("DOGIT") Councils, primarily located in Cape York, and Island Councils in the Torres Strait).
- Arguably, ILUAs, determinations of native title and the subsequent establishment of PBCs could eventually be used to establish the equivalent of "Councils" and "Council Areas" closer to the import of Minister Viner's apparent intent in the second reading speech of the ACAA than does Part III itself. However, it is noted that these are available only where native title survives, and that there are at present numerous difficulties with the PBC Regulations.

(4) Conclusions

1272 Virtually all stakeholders who expressed a view on this issue were of the opinion that Part III should be repealed. Some Northern Territory Indigenous bodies had expressed concerns during the first round of consultations that Part III, while possibly anachronistic, offered an important alternative to other community government schemes, and should be retained for that reason. However, those views were not repeated (or were in fact reversed) in their final submissions to the Review.

1273 Those few stakeholders who did not directly support this proposal did not argue directly against it either. Instead, they either argued that the repeal of Part III would not be a true reform, and its continued existence in the statute would neither add to nor detract from anything; or that more consultation was needed before adopting such a policy position.

1274 In light of the strong arguments outlined in this Chapter, and in the absence of any strong arguments to the contrary or opposition from stakeholders, the Review Team is of the view that Part III of the ACA Act should be repealed.

1275 Further detail of the troubled history of Part III of the ACA Act, and more discussion of the reasons why it should not be retained are included in **Appendix G**.

PART 6

SUGGESTED MODEL FOR REFORM AND OTHER RECOMMENDATIONS

CONTENTS

CHAPTER 19
INTRODUCTION AND OUTLINE

A. PURPOSE AND GUIDING POLICY CONCLUSIONS

1276 In the Part 4, the Review Team concluded that there is a continuing need for a statute of general incorporation, which is reserved for the use of Indigenous people and which accommodates their "special incorporation needs".[541] That statute would not be intended to cater for all corporations with Indigenous membership. Indigenous people would still be free to use other statutes of general incorporation. Furthermore, the special purpose statute would not cater for some of the larger corporations currently incorporated under the ACA Act.

1277 That statute needs to be modern but at the same time relatively simple and flexible. It must accord with the conclusions of Part 5 in relation to the party direction settled by the Steering Committee. These conclusions are summarised in the Executive Summary, and need not be repeated here.

1278 In light of the conclusions in Parts 3 and 4 of this Report, the Review Team suggests thorough going amendments to the ACA Act.

1279 The aims of the reform can be stated as follows:

> *To provide a thoroughly modern incorporation statute, which addresses the "special incorporation needs"[542] of Indigenous people by:*
>
> - *providing a regulatory system which is flexible and aims to promote and develop good corporate governance primarily through special regulatory assistance, but which recognises that regulatory intervention mechanisms will still have their place;[543]*
> - *ensuring the Act is flexible enough to enable Indigenous people to design corporate structures and rules which best suit their specific needs – whether that be by reference to cultural practices or otherwise – which should in turn facilitate good corporate governance and internal accountability to members;[544]*
> - *ensuring reporting requirements match appropriate accountability requirements and recognising that these requirements will vary with different sized corporations;[545]*

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541 See Part 3

542 See Part 3

543 See Chapter 11

544 See Chapter 12

545 See Chapter 15

- *enhancing the capacity of funding bodies and creditors to take a more proactive role in the protection of their interests – thereby increasing the ability of corporations to raise finance, and also reducing improper reliance on the Registrar to protect creditors' or funding bodies' interests;*[546]
- *providing means for the Registrar to assist with the protection of members' rights, where members are unable to or lack the capacity to take action themselves;*[547]
- *providing an appropriate transitional mechanism for large corporations to incorporate under the Corporations Act;*[548]
- *enhancing the standard of management by applying directors' duties to senior management, and ensuring appropriate duties apply to both directors and senior management;*[549]
- *providing for certainty in the internal operations of the corporation and in their transactions with third parties, thereby enhancing the functionality of corporations and removing commercial disincentives to dealing with them;*[550]
- *removing other unnecessary technical barriers to the effective and efficient operation and regulation of corporations;*[551] *and*
- *minimising incompatibility with requirements for NTRBs and PBCs under the Native Title Act and PBC Regulations.*[552]

1280 The purpose of this Part is to draw together the conclusions reached in Parts Three, Four and Five into a coherent whole, and to develop in more detail a model of how the IC Act might work.

B. TERMINOLOGY

1281 The Review Team proposes that the amended Act be called the ***Indigenous Corporations Act*** (or "**IC Act**"), to address concerns of Torres Strait Islanders that the current name of the ACA Act is not properly inclusive,[553] and to remove the redundant reference to Aboriginal Councils.

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546 Chapter 11D

547 See Chapter 11E

548 See Chapter 21

549 See Chapter 13

550 See Chapter 14

551 See Chapter 17

552 See Chapter 22

553 Submission by Torres Strait Islander Advisory Board (TSIAB), 11 April 2002, which stated that ORAC should be retitled as the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations. The issue was raised at both Consultation Workshops in Alice Springs by Torres Strait Islander representatives.

1282 The Review Team also suggests that the terminology under the proposed Indigenous Corporations Act be brought into line with the Corporations Act, hence:

- "**IC Act**" instead of "ACA Act"
- "**Corporation**", "**Indigenous Corporation**" and "**IC Act Corporation**" instead of "association", "Aboriginal association", and "ACA Act corporation"; and
- "**director**" and "**board of directors**" instead of "Governing Committee member" and "Governing Committee".

In addition,

- "**Indigenous**" (or possibly "Aboriginal and Torres Strait Islander") should be used instead of "Aboriginal"[554]

1283 This terminology will be used in Part 6.

[554] Refer to Chapter 16, Subheading(B)(1) for the rationale behind this.

CHAPTER 20
PROPOSED REFORMS

A. THE ROLE OF THE REGISTRAR

1284 The Role of the Registrar should be changed in four fundamental ways:[555]

- The Registrar's role should be generally brought into line with the role of ASIC, except where there is a need for special measures.
- The Act should provide for and promote the role of the Registrar in special regulatory assistance;
- The Act should reduce the scope for inappropriate external intervention in the management of corporations by the Registrar; and
- The Act should no longer require the Registrar to play a role in approving the Rules of proposed corporations, or applications for exemptions from reporting requirements.

(1) Special regulatory assistance

1285 One of the key features of a reformed Act would be emphasising the role of the Registrar in special regulatory assistance as a means of improving corporate governance in Indigenous corporations.

1286 As discussed in Part 5, many aspects of "special regulatory assistance" can be achieved through administrative arrangements: the approach of the previous Acting Registrars has clearly demonstrated this. However, the express statements of the functions of the Registrar set out in the Act need to reflect this important role. This is in part to ensure that there is an adequate statutory authority for special regulatory assistance activities, but also to entrench it in the regulatory philosophy of the Act.

1287 The additions to the statement of the functions of the Registrar should be drafted in broad terms, to ensure maximum flexibility, and not limit the type of assistance the Registrar's Office might be able to provide.

1288 By way of example only, the range of measures that would be appropriate for the Registrar's Office to undertake might include the following (many of which are currently already being undertaken by the Registrar's Office):

- Providing assistance with drafting of rules and applications for incorporation;
- Providing training and advice on good corporate governance;
- Providing training and advice about the operation of the Act and Regulations;

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[555] See Chapter 11

- Providing assistance with compliance with the regulatory and reporting requirements of the Act and Regulations;
- Preparation and provision of educational materials to promote better understanding of the Act and Regulations and corporate governance;
- Developing or supporting the development of appropriate skills, training and accreditation schemes for directors and officers of Indigenous corporations;
- Coordinating with and, where appropriate, entering agreements with relevant government public funding bodies to ensure the efficient operation of the Act and Indigenous Corporations (including through the sharing of information, coordinating external intervention in the management of Indigenous corporations, and coordinating special regulatory assistance activities);
- Where appropriate, providing education and training to other government agencies (both Federal and State) involved in the funding of Indigenous corporations on the operation of the Act, about the respective roles of the Registrar's Office and public funding bodies in relation to the oversight of and intervention in the affairs of Indigenous Corporations;
- Consulting with Indigenous communities about emerging issues in corporate governance and company law.

1289 However, a simple change to the statement of the Registrar's functions will not of itself be sufficient to change the focus of the Act to special regulatory assistance. It will also be necessary to introduce some structural amendments to change the way in which the various powers and functions of the Registrar are exercised as well, in particular when intervening in the management of corporations. This forms the focus of the next section.

(2) Corporations in Difficulty and Regulatory Intervention by the Registrar

Introduction

1290 As discussed in some detail in Chapter 11 above, the Review Team and the Steering Committee were of the view that the role of the Registrar's office should be less interventionist than is currently provided for under the ACA Act, and it should focus more on special regulatory assistance.

1291 Nevertheless, given the "special incorporation needs" of Indigenous people - in particular the limited capacity (educational, financial and geographic) of many Indigenous individuals to access the legal system to protect their rights[556] – the Review Team is of the view that there is a need for the Registrar to retain the ability to intervene in the operation of an Indigenous corporation under certain circumstances.

1292 In accordance with the general policy adopted by the Steering Committee, it is suggested that a reformed ACA Act should emphasise the role of "special regulatory assistance". The Review Team believes that the Registrar's powers to intervene in management should

[556] See Part 3

generally be focussed more on matters relating to breakdowns in corporate governance rather than financial issues. The latter would be the primary responsibility of creditors and funding bodies.

1293 It is felt that the protection of creditors' interests (including public funding bodies) are much better dealt with using contractual (or grant) conditions and the provisions of the Corporations Act relating to the appointment of receivers and provisional liquidators. (These creditor-remedy provisions are already imported into the ACA Act and should remain in place though they may need clarification.) Arguments for the better use of these provisions by creditors have been discussed in detail in Chapter 11 above.

1294 However, it is nonetheless recognised that there will be circumstances where there may be an overlap in the jurisdiction of the Registrar's role and creditors' remedies – particularly where creditors' interests are put at risk because of serious breaches in corporate governance – for example insolvent trading. In such cases, it may not be possible to make a distinction between problems with corporate governance and financial management. In addition, in the course of performing its regulatory role dealing with corporate governance issues, the Registrar or his/her delegate may become aware of serious financial irregularities. In such cases, the Registrar should not be expected to "turn a blind eye", and should have appropriate means available to address such irregularities.[557]

1295 In some cases, there may be no funding bodies or creditors to intervene in relation to financial issues; and if the corporation itself fails to take action to remedy financial issues, there may be no alternative to the intervention by the Registrar.

1296 However, in the majority of cases it will probably be appropriate for the Registrar to encourage creditors (and the corporations themselves) to pursue other means open to them before they seek intervention by the Registrar.

Action by the Corporation - Voluntary Administration and other Measures

1297 The Act should be clarified to ensure that the voluntary administration provisions of the Corporations Act are clearly incorporated into the Act by express reference. The voluntary administration mechanism should be readily available to the directors of Indigenous corporations to enable them to take action when necessary, without the need for external intervention by the Registrar.[558]

1298 The Act should also be clarified to ensure that the provisional liquidation and voluntary deregistration provisions of the Corporations Act are also available to Indigenous Corporations.

Intervention by Creditors

1299 The focus of external intervention needs to be shifted away from the Registrar and towards creditors and public funding bodies. Creditors and public funding bodies must take responsibility for funds provided to Indigenous corporations. The best way to achieve this

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557 See Chapter 11D(2)

558 See Chapter 11D(4)

will be through a combination of measures such as the appointment of receivers and provisional liquidators through the Corporations Act, and shifting the focus of intervention mechanisms available to the Registrar. This will make the Registrar becomes a less attractive alternative for creditors and public funding bodies. As discussed in Chapter 11, the Review Team considers that reliance on an incorporation statute as a means for the protection of public funding, is misplaced.

1300 To ensure that creditors are able to appoint receivers and provisional liquidators (and take advantage of other Corporations Act mechanisms such as creditor voluntary liquidation), it will be necessary to amend the Act to ensure that the relevant parts of the Corporations Act apply to IC Act corporations.

1301 In this context, it may be necessary to establish a register of charges for ACA Act corporations.[559] Charges are an extremely important tool for securing commercial finance. The inability to register charges may prove a significant disadvantage to Indigenous Corporations attempting to raise debt finance from the private sector. However, it is appreciated that there may be administrative costs and difficulties in establishing such a register. For that reason, the Review Team suggests that the ACA Act be amended to permit the Registrar to establish a Register of Charges, and/or to enter into an arrangement with ASIC for the maintenance of such a register. To keep this flexible, the details of any such arrangements could be established through delegated legislation.

1302 The Review Team also suggests that public finding bodies should consider changing the focus of their grant conditions, to take more responsibility for the broader health of the corporations subject to grants. In particular, the Review Team notes that although "grant controllers" may be achieving their desired outcomes in relation to the short-term acquittal of grant monies, this has the potential to be at the expense of the long-term viability and health of the corporation. This can be compared with receivers, who are deemed officers of the corporation, and have an obligation to act in the corporation's best interests. Receivers also provide more transparency to creditors, members, and service recipients of the corporation, and the Registrar, through the obligation to prepare reports.[560] On this basis, the Review Team is of the view that the use of receivers (rather than grant controllers) by public funding bodies could provide better long-term outcomes for Indigenous corporations. One way that funding bodies might be able to appoint receivers is by ensuring that grant, and letters of offer are legally formalised as deeds.[561]

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559 The establishment of a register of charges under the *ACA Act* was proposed under Clause 36 of the *Aboriginal Councils and Associations Legislation Amendment Bill 1994*. However, it was only to ensure the continuation of charges which applied to Corporations Law corporations transferring to the *ACA Act*. It was therefore only intended as a means for ensuring that transfer to the *ACA Act* could not be used against the interests of secured creditors of companies. It was not intended to establish a register of charges for all ACA Act corporations. (See paragraph 84 of the Explanatory Memorandum to the *Aboriginal Councils and Associations Legislation Amendment Bill 1994*).

560 See Chapter 11D(3)

561 Issues relating to the appointment and roles of grant controllers and receivers under public funding grants is discussed in some detail in Chapter 11, section D (3) "Intervention by Creditors and Funding Bodies" – in particular under the heading "Receivers, public funds and grant controllers."

1303 Alternatively, consideration could be given to requiring grant controllers (either through administrative measures by funding bodies or by including a broadened definition of 'receiver' in the amended IC Act) to meet some of the same requirements (qualifications, status as officers, and reporting) as are imposed on receivers.

Early Intervention to Assist the Corporation

1304 One of the problems with external intervention in the affairs of corporations by the Registrar in the past, has been that even drastic steps such as the appointment of an administrator, can proceed without any requirement for attempts to assist the corporation which is the subject of the intervention.

1305 The Review Team is of the view that an "intermediate step", focussed on special regulatory assistance, should be introduced before the Registrar can exercise his or her other powers to intervene in the management of a corporation. This step should be quick and informal, aimed at assisting the Board and members of a corporation to resolve any problems on their own. (However, in urgent cases, such as insolvency, it may be necessary to bypass this step.)

1306 The circumstances in which the Registrar is able to take action should also be more closely prescribed, to limit the capacity for improperly interventionist administration of the Act. On the other hand, the Registrar should be provided with a discretion so that he or she is not required to take action in situations where it would be, in his or her view, inappropriate to do so.

Replacement of Section 71 Administrations

Replacement of current section 71

1307 The Review Team is of the view that the current administration process provided for in section 71 should be replaced – it is overly heavy-handed, out of line with other modern incorporation statutes, and has arguably been used inappropriately in the past (albeit in good faith).[562] In addition, this procedure is the antithesis of special regulatory assistance, as the external administrator completely replaces the board of directors, whose positions are vacated, and completely takes over the management of the corporation. Section 71 should be replaced with less drastic measures that generally involve the directors.

1308 There are currently two possible alternative approaches for the replacement of the current section 71 administration provisions, one favoured by ORAC, the other favoured by the Review Team. These are:

- modifying the current administration provisions; or
- replacing the administration provisions with court-appointed receivers.

[562] See Chapter 11D(2)

Modified administration provisions

1309 The Registrar's Office is strongly in favour of retaining a capacity to appoint an administrator under a modified version of s71. The suggested changes to section 71 include the following:

- removing the requirement for ministerial approval;
- making the appointment of an administrator subject to AAT review;
- giving the Registrar the discretion to determine whether the full board of directors should be dismissed on appointment of the administrator (as currently required), or should instead only stand-aside or even remain in their current positions to work with the administrator; and
- setting minimum qualifications for administrators.

1310 Such changes would certainly be a significant improvement on the role of administrators under s71 as it currently stands. (It would also be useful to specifically clarify the relationship between ORAC-appointed administrators and voluntary administrators (and receivers, provisional liquidators, etc) appointed under the imported Corporations Act provisions.)

1311 However, the Review Team is not persuaded that even such a modified administration process would be appropriate. In particular, the Review Team notes:

- This approach would give the Registrar significant discretionary power to intervene in the management of corporations. Unlike the appointment of a receiver as proposed above, this power would not be subject to supervision by the Court. Given the socioeconomic status of many Indigenous people, AAT review may not provide an effective counter-balance to the exercise of this power. There has been a high level of concern amongst ACA Act corporations about the past use of the power to appoint administrators. This proposal would be likely to meet similar objections.
- The Review Team cannot see how this broad discretionary power, which departs from the standard approaches in the Corporations Act, can be justified by reference to the special incorporation needs of Indigenous peoples. In most cases, the Review Team is of the view that court-appointed receivership (as outlined above) would be just as appropriate and effective, if not more-so.
- Creating a new and unique category of regulatory intervention is likely to create uncertainty as to its operation. Unlike receivership, there is no extensive case law explaining how such a provision would work. There will also be uncertainty about how these provisions interact with imported provisions of the Corporations Act such as those relating to voluntary administration, receivership, and liquidation.

Court-appointed receivers

1312 The Review Team is of the view that measures available through the Corporations Act, such as Court-appointed receivers would provide a more suitable alternative to section 71 administrations. This would involve providing the Registrar with an express power to apply to the Court in its equitable jurisdiction for the appointment of a receiver. The

Registrar would have to provide reasons, and would also propose the scope of the receivership.

1313 This process has the following advantages over the administrations under section 71 of the ACA Act:

- It can potentially be done more quickly where urgent intervention is needed, by removing the requirement for Ministerial approval;
- In addition, the receiver can be provided with broad investigatory powers. This is more efficient than the two-step "examiner then administrator" process under the ACA Act as it stands;
- The decision to make the appointment is made by the Court, and is therefore effectively subject to effective independent scrutiny/review;
- The receiver is subject to ongoing supervision by the Court and the process is transparent to creditors, members and service recipients;
- It is not as drastic as appointment of a section 71 administrator, because the board of the corporation is not dismissed;
- The law on receivership (unlike the law relating to s71 administrations) is generally very well understood and is supported by extensive case-law; and
- Because it allows for earlier intervention, and is more tailored to the specific circumstances, appointment of a receiver may be more cost-effective than section 71 administrations.

1314 Although the process for appointment is different from creditor-appointed receivers, the other requirements (must be a registered liquidator, deemed to be an officer of the corporation, reporting) all still apply.

1315 Appointment of a receiver by the Court is a different process from the appointment of receivers by creditors under a contract, which is usually financially focussed, and defined by reference to a loan or charge.

1316 The Court can appoint a receiver to a corporation under its equitable jurisdiction. Being an equitable remedy, this has the advantage of being very flexible. Applying to the Court for the appointment of a receiver could therefore be used, for example, to address serious corporate governance issues, where appointment of a facilitator and/or other mechanisms have failed to provide results. The Court would have regard to the facts of the situation in determining whether appointment of a receiver is justified and if so, in setting the scope of the receiver's role and powers. The receiver will then report to and be supervised by the Court.

1317 The qualifications (ie requiring experience with Indigenous corporations as well as being a registered liquidator) and costs of receivers could be managed and controlled through the establishment of a register of receivers and scale of fees, which the Court would be required to have regard to in appointing a receiver. (This measure would require a specific provision in the IC Act.)

1318 The Review Team notes that it may be preferable to also include some guidance in the reformed Act as to the specific role, functions and processes of receivers appointed by the Court on application by ORAC. This would be to avoid any potential uncertainty by leaving these issues solely to the inherent jurisdiction of the Court.

Further investigation

1319 Because of the importance of retaining an appropriate form of regulatory managerial intervention in the affairs of corporations in difficulty, ORAC and the Steering Committee have recommended further internal investigation of this particular function. This further investigation would need to consider the legal and practical implications (including timeliness and cost) of both approaches to reform of section 71.

1320 However, ORAC, the Review Team and the Steering Committee all agree on the need to introduce reforms to the current section 71 administration process. These are required to ensure regulatory intervention in management is rendered more efficient, and also more appropriate in the context of a general philosophical shift away from high levels of regulatory intervention, towards a focus on special regulatory assistance.

Other powers of intervention

1321 Many of the Registrar's current powers and functions are appropriate (particularly with the interposition of an intermediate step) and should remain in the Act.[563] A number of additional alternative options should also be provided for, including mediation and the capacity to pursue (on request) members remedies on behalf of an individual where requested by a member who lacks the skills or resources to do so.

1322 All additional powers proposed below which depart from the powers provided to ASIC, are designed to address the special incorporation needs of Indigenous people, and would therefore be intended as "special measures" for the purposes of the RDA.[564]

Outline of suggested approach

1323 A suggested outline for the ordinary process for intervention by the Registrar is set out below.

Basis for intervention

1 The Registrar would be able to intervene in the affairs of an Indigenous corporation for the purposes of providing assistance:

(a) where the Registrar receives a complaint from a member or director of an Indigenous corporation, or

(b) on his or her own motion;

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563 See Chapter 11B

564 See Chapter 10 for discussion of special measures and the RDA.

2 However, the Registrar would need to have reasonable grounds to believe that:

(a) There is an infringement of a member's (or members') rights such that the member(s) would be entitled to sue using the statutory members remedies;

(b) An act or conduct in potential breach of directors' or officers' duties is threatened or has occurred;

(c) There are or have been non-trivial breaches of the Rules of the corporation or of the Act which might affect the interests of members (the determination of what is trivial and non-trivial would be in the Registrar's discretion); or

(d) There is a dispute between:

- The corporation and a member or members;
- The corporation and the public officer;
- The corporation and a director or directors;

and the dispute is affecting the ability of the corporation to function effectively.

3 The Registrar would also have a discretion *not* to take any further action, if satisfied that:

(a) The issue is more properly an issue to be dealt with by a creditor or a funding body;

(b) The complainant has the financial and/or technical ability to directly make use of the statutory members remedies available to them without the need for the Registrar to intervene;

(c) That the costs involved would not justify the intervention – for example in relation to a corporation with no assets, turnover, liabilities, statutory function, etc, where the problem raised is of a relatively minor nature; or

(d) The corporation's members have not taken sufficient steps to make use of internal mechanisms available to them directly under their constitution, the Act or regulations.

Informal intermediate step – appointment of Facilitator

4 The first step the Registrar would take would be to appoint a "Facilitator". This would be intended to be a quick and informal approach to assisting a corporation's board resolve any issues itself. The Facilitator would be required to work with the corporation (and, if relevant, any parties in dispute) with a view to resolving the dispute or remedying any breaches, by agreement.

The means open to the Facilitator could include providing independent advice to the parties about their roles, responsibilities, rights and obligations under the Act

and their corporation's Rules, or advising on appropriate courses of action open to the corporation. It should be noted here that there are few successful models for resolution of Indigenous disputes by external parties, and the specific functions of the facilitator will therefore require further consideration.

There should be a strict limit to the timeframes for the Facilitator to try to achieve a voluntary resolution of any issues (in particular "mediation" of disputes, which could be intractable), so that it is not an open-ended and overly resource-intensive exercise.

The Facilitator would also be empowered to assist the corporation to resolve any other issues of which the Facilitator becomes aware during the course of his/her appointment, whether as a result of his/her investigations or otherwise.

The focus of the Facilitator's functions would usually be on corporate governance issues, rather than financial matters, in particular where those matters are better dealt with by creditors or public funding bodies. However, as noted in the introduction to this section, it is not always possible (or even desirable) to separate out corporate governance and financial management.

If a Facilitator were to become aware (or have reasonable grounds for suspecting) that a corporation was insolvent, then the appropriate action might be to provide advice to the directors of the corporation so that they are aware of their obligations, and potential personal liability if they fail to take appropriate action, such as by appointing a voluntary administrator. In such circumstances, the Facilitator could possibly even assist the corporation to appoint the voluntary administrator. This should then avoid the need for further external intervention by the Registrar.

5 If the Facilitator is successful in achieving a voluntary resolution of the issues, the Facilitator would report (within a set time) to the Registrar on issues, steps taken and outcomes. The matter would end there.

6 If resolution of the issue(s) is not achieved within the specified timeframes, the Facilitator must report (within a set time) to the Registrar setting out action taken and the outcomes. The Facilitator would also set out recommendations for what further action is required, providing reasons. (The recommendations would need to have regard to the options available to the Registrar, discussed below.)

Further action

7 The Registrar would then make a decision about the appropriate action to take, having regard to the Facilitator's report and any other relevant material available to the Registrar.

8 The options for further action would mostly be similar to those which the Registrar currently has available, with a couple of notable differences.

- First, the appointment of administrators under the current section 71 would no longer be available. This would be replaced with a modified

administration process or a right to apply to the Court for appointment of a receiver (see discussion above).

- Second, several additional options would be available, above what is available at present. However, these additional measures would be aimed at a more facilitative approach to ensuring compliance with the Act. Such measures would include education, mediation, arbitration, altering unworkable constitutions, and others. This is discussed in further detail below.

9 The options for further action available to the Registrar could include some or all of the following:

(a) No further action;

(b) Extension of a Facilitator's appointment;

(c) Providing education and training to a corporation's board and/or members;

(d) Altering any unworkable provisions in a corporation's constitution which relate to the conduct of meetings (eg provisions relating to quorum where it is not possible or practicable to obtain the quorum required to change the constitution to lower the quorum);

(e) Conducting a general meeting - and possibly also election of a new board of directors (this is similar to current section 58B, except the Registrar would have had to go through the Facilitator process first);

(f) Requiring the board of directors to take specified action to remedy a breach of the Act, regulations or a corporations' rules. (This is similar to the current section 60A, and might in many cases be an intermediate step towards appointment of a receiver or possibly a winding-up action);

(g) Appointing an arbitrator to arbitrate a dispute (similar to section 58A of the ACA Act, however it would be necessary to draft the necessary regulations);

(h) Taking legal action on behalf on an aggrieved member (stepping into the member's shoes to exercise of members' remedies) – either directly or through an appointed "members' friend";

(i) Applying to the Court for appointment of a receiver (see discussion above);

(j) Applying to the Court to wind-up the corporation The winding-up of a corporation at the initiative of the Registrar should generally be a last resort, where all other options have been exhausted, or would be inappropriate because of potential prejudice to creditors. If possible, the Act should reflect this. However, it is recognised that winding-up will in some cases be necessary and appropriate. The grounds for winding-up

and issues for consideration by the Court in making its decision set out in section 63 should be brought into line with the Corporations Act.

Urgent Cases

1324 In cases where urgent action is required (for example where it appears that a corporation may be insolvent), the Registrar would be able to go straight to the Court to apply for the appointment of a receiver or for a winding-up order.[565]

Deregistration

1325 The potential for inappropriate deregistrations taking place can probably be addressed largely through administrative mechanisms to ensure there are better checks of the status/functions of corporations. The Review Team considers the current approach under MOUs with various funding bodies to be an appropriate approach.[566] However, this approach would be more effective if extended to additional bodies which deal with small land-holding corporations – in particular organisations such as the ILC, Northern Land Council and Central Land Council and the NNTT.

(3) Members' remedies

1326 A range of members' remedies should be made available for members to make use of if they are able.[567] However, as discussed in Chapter 11E above, it is recommended that provision be made for the Registrar to exercise certain remedies on behalf of a member or group of members. This is to address the "special incorporation needs"[568] of many Indigenous individuals, and to ensure that the remedies are as accessible as possible.

1327 The Corporations Act provides for a range of members' remedies that may provide appropriate models, specifically introduced to overcome the problems with the general law. These include the following:

- a statutory oppression remedy;
- a statutory injunction remedy; and
- a statutory derivative action for members.

(4) Registrar's Role in Approval of Rules

1328 The Registrar would no longer have any role in the scrutiny or approval of rules. (See discussion of rules and corporate design in the next section below).

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565 See Chapter 11D(2)

566 See Chapter 11D(2)

567 See Chapter 11E

568 See Part 3

B. RULES AND CORPORATE DESIGN

1329 In order to ensure that a flexible approach is taken to company rules and corporate design, the Registrar would no longer have any role in approving rules. In particular, the prescriptive requirements in section 45(3) that Rules must not be "unreasonable or inequitable" and must "make sufficient provision… to give members effective control over the running" of the corporation should be removed. As discussed in Part 5, these provisions have caused significant problems for Indigenous corporations attempting to design rules which fit their particular needs and circumstances.[569]

1330 In addition, the provision in section 43(4) allowing Rules to be "based on Aboriginal custom" will be removed. As discussed in Part 5 of this Report, this term is problematic.[570] It is the Review Team's view that it would be better to simply allow the Rules to be based on any principles that the members agree and suits their particular needs – whether that is "Aboriginal custom" or otherwise.

1331 Nonetheless, it is recommended that Indigenous corporations' Rules be required to at least make provision for certain essential features. The specific essential features settled on will require further consideration, but the Review Team suggests that the following might be appropriate:

- The corporation's name and address
- Basis for membership;
- Appointment and removal of directors;
- Calling of, and the basis for decision-making at meetings;
- Keeping of financial records;
- Dispute resolution; and
- Liability of members

1332 However, the Registrar's Office would not have a role in the scrutiny of individual corporation's rules, other than a brief "checklist" exercise to ensure that the minimum required features are included. (The content of these features – ie the way in which they are implemented – would not be scrutinised.)

1333 One approach that the Review Team believes could be useful would be to adopt a system of "replaceable rules", similar to that under the Corporations Act. The system of replaceable rules may be summarised as follows. Provisions in the Corporations Act which contain the words "replaceable rules" in their title (being provisions relating to the internal organisation and procedures of a corporation) apply to a corporation as they were set out in that corporation's constitution. However, replaceable rules can be displaced or modified in a corporation's constitution.[571] The system of replaceable rules is therefore

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569 See Chapter 12B

570 See Chapter 12B

571 *Corporations Act* s 135

intended to maximise the convenience of the incorporators and to maximise the flexibility of the arrangements among the incorporators.

1334 In addition, it is recommended that as an *administrative* measure a variety of precedent rules (compatible with the statutory requirements) be developed for Indigenous corporations performing different functions, for example:

- land-holding;
- PBC;
- CDEP;
- Housing;
- Private business.

1335 These would need to be developed by various public funding bodies working in conjunction with the Registrar's Office (or possibly just the Registrar's Office in the case of private business), and could be made available for incorporators *to adopt or to modify as necessary to suit their specific circumstances*. They would not be compulsory.

C. DIRECTORS AND DIRECTORS' DUTIES

1336 In summary, the Review Team concludes that the provisions relating to directors and directors' duties in the ACA Act should generally be modernised and brought into line with the Corporations Act. However, in some circumstances the Corporations Act approach may not in fact be necessary or suitable, or may overly complex for the circumstances of ACA Act corporations.

1337 Specifically, the Review Team recommends as follows:

(1) The scope of directors' duties

1338 The Review Team is strongly of the view that the scope of relevant directors' duties under the ACA Act should be extended to include "officers" as is the case under the Corporations Act (but expressly including the Public Officer). In addition the definition of "director" should be expressly extended to include "shadow directors" and "de facto directors".

(2) The statutory directors' duties

1339 The statutory directors' duties under the ACA Act should generally be brought into line with the Corporations Act. Relevant duties which should be brought into line with the Corporations Act include:

- the duty of care;
- the duty of honesty;
- the duty not to trade while insolvent; and

- the duties of disclosure and to avoid conflicts of interest (although with a simplified provision in relation to related party transactions).

(3) Standard of duties

1340 The duties of care and honesty should remain objective duties, as under the Corporations Act. Making these subjective, to take into account the special circumstances of Indigenous directors, would be likely to introduce uncertainty and would ultimately prejudice the members of the corporations.

(4) Consequences of breach

1341 It would be appropriate to adopt a range of civil and criminal penalties, similar to the approach adopted in the Corporations Act, particularly in relation to cases of dishonest or bad faith actions, to protect the members of ACA Act corporations from the actions of "rogue" directors or officers.

1342 However, in recognition of the special circumstances of many Indigenous directors, it is suggested that there should be a subjective element in consideration and calculation of any penalties.

(5) Disqualification of directors

1343 Section 49B of the ACA Act should be repealed and replaced with provisions equivalent to those contained in Part 2.6D of the Corporations Act.

D. TRANSACTIONAL CERTAINTY

1344 Given the suspected levels of non-compliance by Indigenous corporations with procedural requirements, and the shortcomings in the general law relating to correction of such irregularities, there is a clear need to introduce measures to provide for the correction of such procedural irregularities and errors.[572] This is as important for providing certainty to members and service recipients of Indigenous corporations as it is for third parties dealing with Indigenous corporations.

1345 There is also a need to provide greater certainty to transactions entered by Indigenous Corporations with third parties.[573] This could be done by giving Indigenous Corporations the capacity of natural persons, and permitting third parties to make assumptions about the validity of internal processes of Indigenous Corporations, so that contracts which are otherwise valid are enforceable.

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572 See Chapter 14B

573 See Chapter 14C

1346 The Corporations Act provides a good model for how all this could be done, and it is recommended that the IC Act include provisions similar to the relevant sections of the Corporations Act.[574]

E. CORPORATE REPORTING

1347 As discussed in Chapter 15B, the reporting requirements under the ACA Act are probably unnecessarily complex for the bulk of ACA Act corporations; and are also not particularly well targeted. A new approach is required so as to alleviate the reporting burdens on smaller corporations, and to expand the disclosure requirements for larger corporations.

(1) Principles

1348 The specific standards to be set for financial reporting is an issue which is beyond the scope of this report. However, the relevant policy issues have already been discussed.[575] Several competing "special incorporation needs"[576] must be balanced:

- On the one hand is the comparatively low levels of formal education and business skills in the Indigenous population, from which the directors and (in many cases) the staff of Indigenous corporations are drawn.[577] Combined with the financial pressures many corporations are under, this provides an argument in favour of a reporting system for which compliance is simple and cheap.
- On the other hand, the very same issues of education and business skills make members of corporations vulnerable and, combined with the fact that many Indigenous corporations are providing essential community services with public funding, this provides an argument in favour of more rigorous financial reporting.[578]

1349 These factors will be differently balanced in small and large Indigenous corporations.

1350 For example, a large and well funded corporation should be able to recruit appropriately qualified personnel to deal with more comprehensive reporting requirements. Such corporations are also more likely to be providing essential services to their community, or in any case be in a position that their transparent and accountable operation is in the interests of creditors, its members and the broader community. In such cases, full disclosures and comprehensive audited financial reporting is probably justified.

1351 However, a small, passive land-holding body may receive little or no income, and undertake few if any activities. As such, the reporting requirements would have to be met by the board of directors, who are drawn from the local community, and may have little

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574 In particular sections 124, 125, 128, 129, 201E, 201M, 1322, 1323

575 See Chapter 15D and E

576 See Part 3

577 See Chapter 4

578 See Chapter 6

formal education or appropriate training. The requirement to hold AGMs and provide detailed audited reports would clearly be onerous for such corporations. There is also little public interest in a high level of reporting and disclosure, as the corporation is not engaged in any significant activities.

1352 Many corporations will fall somewhere in between these two extremes, where some basic financial reporting would probably suffice.

(2) Proposed levels of reporting standards

1353 In light of the above, the Review Team recommends that a reformed ACA Act should make provision for effectively three "tiers" of reporting requirements, as follows:

- **Exempt corporations** - Very small corporations ("exempt corporations") would be automatically exempt from reporting requirements under the ACA Act (and the requirement to hold AGMs), with no requirement to make specific applications for exemptions.
- **Small corporations** - "Small" corporations would have to provide minimal financial information in annual reports – more detailed accounting for any public monies would be through grant conditions.
- **Large corporations** - In recognition of the critically important roles they play in Indigenous communities, and the public interest in ensuring their ongoing viability, "Large" corporations (which would include all corporations which are not "exempt" or "small" corporations) would have to meet increased reporting requirements.

1354 These are discussed in more detail below.

Exempt Indigenous Corporations

1355 All corporations falling within the category[579] would be automatically exempt from the requirement to provide financial reports to the Registrar and from the requirement to hold AGMs. (The current process for exemptions under the ACA Act and problems with it are discussed in Chapter 15E(3) above. See Chapter 17C in relation to AGMs.)

1356 However, under this model, corporations would still be required to maintain balance sheets for any income and expenditure, and would be required to make these available to members and the Registrar, on request.

1357 There are several reasons for setting a class exemption of this type. These reasons might also assist guide the policy decision about what level the threshold should be set at:

[579] See below for suggested approach to defining the categories.

- The current requirement for the Registrar's office to approve individual exemptions is highly resource intensive, and usually leads to the exemption being granted in any case;[580]
- Corporations with a turnover below a certain level may have great difficulty in meeting the reporting requirements which apply to larger and better resourced corporations;
- Such corporations are likely to have difficulty even applying for an exemption to reporting requirements, which they would probably be granted under the ACA Act as it currently stands;
- Very small corporations are much less likely to be receiving public funds or providing essential community services such that there is a public interest in the increased public scrutiny provided by the standard reporting requirements proposed for all Indigenous corporations;
- Corporations with very low turnover may be "passive" companies, such as land-holding entities, which may not have any activities to report to members on a yearly basis;
- If public funds are being received by such small corporations, the grant conditions attaching to such funds should provide a better mechanism for ensuring accountability for those funds;

Small Indigenous Corporations

1358 Small Indigenous Corporations would be required to hold AGMs and to prepare and lodge very simple annual financial statements with one-line summary entries outlining:

- Cash at bank;
- Current assets;
- Non-current assets;
- Current liabilities; and
- Non-current liabilities.

1359 This level of information should be easy to produce and is consistent with current ATSIC grant reporting requirements. The financial report would not have to be audited.

1360 The rationale for requiring this level of information is that it would be sufficient for the Registrar, and creditors, including public funding bodies (and possibly well informed members/service recipients) to get a broad idea of the financial status of the corporation. If that information indicates that the corporation may be in financial difficulty, it would form the basis for further inquiries into the detailed financial position of the corporation.

[580] Discussions with staff at the Registrar's Office is that exemption applications are almost always accepted. Personal communication with Garry Fisk, Director of Corporate Relations, 21 July 2002

Large Indigenous Corporations

1361 In recognising the fact that many larger Indigenous corporations would be providing essential community services, (and also that they should have the resources to comply with more comprehensive reporting requirements), the reporting requirements for Large Indigenous Corporations would be increased above the standards presently required.

1362 It is proposed that Large Indigenous Corporations would be required to meet the standards of "general purpose financial reports" required of "reporting entities" under the Corporations Act. This would mean full compliance with all Corporations Act accounting standards, and full disclosure by directors. The reports would have to be audited by a registered company auditor.

1363 This general approach is in line with the approach adopted in the ACT *Associations Incorporation Act 1991*, which applies successively more stringent reporting and audit requirements for associations with turnovers in excess of $150,000 and $500,000.[581]

1364 It is noted that the proposed level of reporting is not as comprehensive as that required for public companies under the Corporations Act. There are two reasons for this:

- for the majority of Indigenous corporations, the full reporting requirements imposed on public companies under the Corporations Act would probably be unnecessarily onerous, in light of the "special incorporation needs"[582] of Indigenous peoples; and
- assessing responses and monitoring compliance with the requirements would be highly resource-intensive for the Registrar's Office, and may also be beyond the capacity of the staff.[583]

1365 Although it is outside the scope of this Review, the Review Team considers that if the approach suggested above were adopted, the need for detailed financial reporting currently imposed by some public funding bodies (for example requirements for quarterly financial reports) would be decreased. This is because funding bodies would have more comprehensive financial details about the corporation and its directors, which should provide them with a greater degree of comfort about the general health of the corporation. Public funding bodies would instead then focus more on achievement of "milestones", "outputs" and "outcomes". Such an approach would also reduce the administrative burden on grantee corporations, freeing up their resources to focus on achieving outcomes. The Review Team notes the Australian National Audit Office's recent report on grant management by ATSIC, which identified the non-financial aspects of ATSIC's grant management process as an area for improvement.[584]

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581 *ACT Act* ss74, 74; *Associations Incorporation Regulations* (ACT), regulations 12, 13

582 See Part 3

583 see generally *Daffen Report*

584 This report also found that use of certain special grant conditions was placing unnecessary administrative burdens on some grantees – however, this finding did not relate to financial reporting requirements: Australian National Audit Office, Audit Report No.2 2002-2003, "Performance Audit: Grants Management - Aboriginal and Torres Strait Islander Commission," 2002

(3) Defining exempt, small and large corporations

1366 It is not within the scope of this Review to determine what appropriate levels would be for setting the cut-off between exempt, small and large corporations. Indeed, such levels should probably contain some flexibility in them, and for that reason should probably be set through regulation rather than in the Act itself.

1367 However, the Review Team is able to provide some guiding principles for the determination of the thresholds, and to make some indicative suggestions for what might be appropriate levels.

Basis for Defining the Categories

1368 It is recommended that the categories be defined using objective criteria, and should not include purpose. A purpose-based approach would potentially be too subjective, difficult to monitor, and would be restrictive for corporations which want to change purpose.

1369 The approach taken under the Corporations Act for Small Proprietary Companies is one possible model. It uses a combination of turner, assets and number of employees. However, some modifications might be necessary, for example:

- **Turnover** - Given the dependence of many Indigenous corporations on grants, some of which might be irregular or one-off, the relevant turnover thresholds should be based on an average over the three proceeding years.
- **Assets** - calculation of the value should probably exclude non-disposable assets – in particular, land held as a result of a native title determination, land claim or land grant.
- **Employees** – It is noted that CDEP participants are considered employees, and that most CDEPs are required to have a minimum of 50 CDEP participants. This means that all CDEPs would be classified as "Large Indigenous Corporations" if employees are used as a criterion, and the level is set anywhere below 50. (As an aside, the Review Team notes that it is of the view that it probably *would* be appropriate for CDEPs to be regarded as Large Indigenous Corporations, given the purpose and functions of CDEPs).

Suggested Definitions

1370 The following definitions are suggested as being indicative of appropriate levels:

- **Exempt Indigenous Corporations -** An appropriate level might be a turnover under $100,000; and disposable assets worth less than $100,000 and fewer than 2 employees. (Exceeding any one of these criteria would make the corporation a Small Indigenous Corporation).
- **Small Indigenous Corporations -** An appropriate level might be a turnover under $500,000, disposable assets worth less than $500,000 and fewer than 10 employees. (Exceeding any one of these criteria would make the corporation a Large Indigenous Corporation.)

- **Large Indigenous Corporations** - would be all those Indigenous corporations which are not exempt or Small Indigenous Corporations.

Disclosure and Monitoring of Reporting Status

1371 One of the problems with this approach is that if a self-regulating approach is adopted, and the Registrar's Office does not scrutinise the turnover levels of corporations, it will be difficult to enforce in practice. One submission suggested that ASIC does not scrutinise small proprietary companies to see whether they remain under the threshold, nor does ASIC have the means to do so.[585] This is an issue which will therefore clearly need to be given careful further consideration. However, the Review Team suggests that there are several ways in which it could be addressed:

- Requiring Indigenous corporations to report information relevant to the measurement of the threshold in their annual reports. If entered into computer systems, this information could be automatically processed so that the computer automatically generates a report when the threshold has been met;
- Requiring corporations to identify whether they have passed the threshold in their annual reports;
- Requiring corporations to report to the Registrar's Office within a certain time of becoming aware that the threshold has been passed;
- Imposing significant penalties for failure to provide the relevant information in a timely manner; and/or
- Imposing significant penalties for false or misleading reporting, to discourage attempts to abuse the system.

(4) Accreditation of certain financial reports

1372 In order to reduce unnecessary duplication in reporting requirements (and associated wastage of scarce resources), copies of annual reports prepared to satisfy the reporting requirements of the *Commonwealth Authorities and Companies Act* 1997 (Cth)[586] could simply be lodged with the Registrar, and would be deemed to satisfy the reporting requirements of the IC Act. However, the Registrar would probably need to be provided with a well defined discretion to refuse to accept a report for IC Act purposes, for example if it did not in fact comply with the CAC Act requirements.

1373 Such a proposal would mean, for example, that NTRBs would be able to provide copies of their annual reports prepared under section 203DC of the Native Title Act to the Registrar, and would not have to prepare additional reports for the purposes of the IC Act.[587]

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585 Submission by Northern Land Council, 3 June 2002

586 *Commonwealth Authorities and Companies Act 1997* (Cth) (*CAC Act*) Part 5, Division 2

587 Although s 203DC of the *Native Title Act* does not require the financial reports to be in accordance with *CAC Act* requirements, or to cover all economic activities (only those relating to the NTRB's Native Title Act functions), it is understood that the Minister has imposed such requirements under s 203DC(4)

1374 The scope of such "accreditation" provisions could be set out in regulations, and possibly broadened if reporting requirements imposed by other sources (possibly including public funding bodies) met appropriate standards.

F. MEMBERSHIP RESTRICTIONS

(1) The Corporation's Membership

1375 As at present, membership of corporations under the IC Act would be limited to Indigenous natural persons, their spouses and children (which could include adopted children). It would be open to a corporations' rules to limit it strictly to Indigenous natural persons only. The definition of "Aboriginal" would be modified to ensure separate definitions for "Aboriginal" and "Torres Strait Islander", and these terms or "Indigenous" would need to be used consistently throughout the Act. (The issue of corporate membership of corporations is being given further internal consideration by ORAC.)

(2) Board Membership

1376 Board membership would also be limited to Indigenous natural persons. However, corporations would be free to make provision in their Rules for the appointment of non-voting non-Indigenous advisers to assist their board. In addition, Indigenous Corporations should be free to appoint Indigenous persons who are not members of the Corporation to the board of the Corporation.

G. MISCELLANEOUS ISSUES

(1) Minimum membership requirements

1377 Minimum membership numbers for IC Act corporations would be set at five (5). For discussion of the reasons see Chapter 17A.

(2) Amalgamation of Indigenous corporations

1378 Provisions should be inserted into the ACA Act facilitating the amalgamation of ACA Act corporations. The *Associations Incorporation Act 1991* (ACT) provides an appropriate model for this (see Chapter 17G).

(3) Membership lists and definitions of corporations' membership

1379 Despite all the problems with membership lists, the Review Team considers that the requirement to define a corporation's membership by reference to a membership list must

be retained.[588] This would also mean the proper maintenance and upkeep of membership lists.

(4) The requirement to hold AGMs

1380 Section 58B should be amended to clarify that Indigenous corporations must hold an Annual General Meeting each calendar or financial year, unless they are an Exempt Indigenous Corporation.[589]

(5) Meetings by telephone or videoconference

1381 The Act should allow both general meetings and board meetings to take place using appropriate technology. Because of the rapidly changing nature of communications technology, it is recommended that the specific means of communication allowed be dealt with in Regulations rather than the body of the Act. Telephone conference and videoconference should both be allowed.[590]

(6) Giving the Registrar powers to remedy errors in the public record and issue duplicate certificates

1382 The Registrar should be given powers to:[591]

- Remedy errors in the public record (for example spellings of names, etc); and
- The capacity to issue duplicate certificates if incorporation, where satisfied that the original has been lost or destroyed.

(7) Clarification of interaction with Corporations Act imported provisions

1383 Sections 62 and 67 would need to be amended to make it clear exactly which aspects of Part 5 of the Corporations Act apply to Indigenous Corporations.[592] This should be done in light of the recommendations relating to regulatory intervention described in section A above.

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588 See Chapter 17B

589 See Chapter 17C

590 See Chapter 17D

591 See Chapter 17F

592 See Chapter 17H

H. ABORIGINAL COUNCILS - PART III OF THE ACA ACT

1384 It is the Review Team's view that Part III of the ACA Act should be repealed. The reasons for this have been set out in Chapter 18.

CHAPTER 21
TRANSFER OF CERTAIN CORPORATIONS TO THE CORPORATIONS ACT

1385 The rationale for requiring large Indigenous corporations to transfer to the Corporations Act as public companies limited by guarantee was set out in Part 4, in particular Chapter 9 Heading B, and Chapter 10 Heading D(4). (However, it is again noted that ORAC is conducting further investigations into the legal and practical implications and feasibility of any compulsory transfer provisions.)

1386 In brief, the Review Team considers that the benefits of the more comprehensive reporting and disclosure required of public companies under the Corporations Act would outweigh the disadvantages resulting from the loss of the "special measures" provided in the IC Act. These larger Large Indigenous Corporations should also have the resources to be able to comply with the increased reporting requirements and costs of the Corporations Act.

1387 However, the Review Team also proposes that the largest of the Large Indigenous Corporations should not be required to all transfer out of the IC Act to the Corporations Act immediately. Rather, they would be progressively transferred out over course of the next 10 years or so. This would enable the corporations to prepare for the transfer, with appropriate assistance from the Registrar's Office. In that sense, the IC Act (with reporting requirements more comprehensive than currently required, but not as comprehensive as the Corporations Act) could be seen as providing a "transitional" arrangement for these larger Large Indigenous Corporations.

1388 An outline of how this process could work, and relevant issues to be addressed, is provided below.

A. TRIGGERS FOR TRANSFER TO THE CORPORATIONS ACT

1389 There are two triggers by which Indigenous corporations would be transferred to the Corporations Act:

- **Automatically triggered** - once a pre-determined size has been reached (this is discussed in more detail below).
- **Voluntary nomination** – if the members of the corporation pass a special resolution at a general meeting, the corporation could transfer to the Corporations Act as a Public Company Limited by Guarantee.

  Corporations wishing to become proprietary companies under the Corporations Act, or incorporated associations under the State Association Incorporation Acts, could choose at any time to wind themselves up and reincorporate as such. However, the IC Act would not provide a specific "transfer" mechanism.

Indigenous corporations which make provision for the sharing of profits between members would be able to transfer to the Corporations Act as proprietary companies at any time, and the IC Act would need to make special provision of such transfers.

1390 Corporations which are subject to automatic transfer would have a right to apply to the Registrar to be allowed to remain under the ACA Act. The Registrar would then have a discretion to allow a company to remain under the ACA Act, having regard to certain criteria such as the size, nature, purpose and functions of the company and how they fit with the purposes of the Act. This is similar to the powers of certain regulators under State and Territory Associations Incorporation legislation which allows the regulator to require a corporation to transfer to the Corporations Act. The Registrar's decision would be reviewable by the AAT.

B. TRANSITIONAL ARRANGEMENTS

1391 Corporations which exceed the specified size and do not qualify for an exemption would be given three years to prepare for transfer to the Corporations Act, after which the transfer would apply automatically.

1392 By using this approach no "grandfathering" arrangements would be necessary, as the provisions relating to Large Indigenous Corporations would provide an appropriate regulatory scheme for Indigenous corporations in transition to the Corporations Act.

1393 For example, for the first "tranche" of the largest Indigenous corporations, part of the preparation would include the compliance with the higher reporting requirements proposed for Large Indigenous Corporations.

1394 However, transferring corporations should be provided with assistance and training well in advance of the transfer date, to ensure the transfer runs smoothly.

C. SETTING THE CUT-OFF LEVEL FOR TRANSFER TO THE CORPORATIONS ACT

1395 As with the criteria for defining Exempt, Small and Large Indigenous Corporations (see Chapter 20E(3)), the cut-off trigger would need to be based on objective criteria, and should not include purpose. Again, turnover (averaged over the preceding three years), assets (excluding native title and other non-disposable land) and number of employees would probably be appropriate.

1396 Suggested levels are as follows:

- **Turnover** - As seen in Chapter 6, there are estimated to only be 10-15 Indigenous corporations with a turnover in excess of $5 million. A number of these are likely to be NTRBs and therefore exempt from transfer. Nonetheless, this may be an appropriate level to set the cut-off at, at least to start with.
- **Assets** - $5 million would also probably be an appropriate level.

- **Employees** – 150 would probably be appropriate, in light of CDEP participants being included as "employees".

1397 As one possibility, the cut-off levels could be included in Regulations, with a mechanism so that at a point in the future (perhaps 3 years) the cut-off levels for compulsory transfer to the Corporations Act would be reduced (ie to take in more corporations). This could be done progressively (in stages), to allow more Indigenous corporations to be brought under the Corporations Act.

1398 However, the cut-off level should probably should not be reduced below a specified level, eg turnover of $2.5 million, assets of $2.5 million, and 75 employees. It is unlikely that below this kind of level the benefits of transferring would outweigh the benefits provided by the special measures in the IC Act.

D. EXEMPTIONS FOR NATIVE TITLE AND CERTAIN OTHER CORPORATIONS

1399 Corporations which are required by statute to be incorporated under the ACA Act (ie NTRBs, PBCs and certain corporations under the *Aboriginal Land Rights (Northern Territory) Act 1976*) would be exempted from the transfer provisions.

E. CONTINUITY ARRANGEMENTS

1400 The actual mechanics of the transfer process would need to ensure full continuity between the ACA Act corporation and the Corporations Act corporation. This would be necessary to avoid contractual problems, stamp duty on transfer of assets, etc. An appropriate model for such an arrangement already exists under the various State Association Acts.

F. TRANSFER FROM OTHER INCORPORATION STATUTES TO THE IC ACT

1401 Provision should also be made to allow transfer of appropriate corporations from State Association Incorporation Acts and the Corporations Act (proprietary companies limited by guarantee and possibly small proprietary companies) to the ACA Act. This would include the relevant provisions providing for continuity of rights, liabilities, assets, etc.

1402 This would address some of the difficulties currently being experienced in WA; and would also provide a means for organisations which would prefer to be incorporated under the IC Act to transfer easily and inexpensively.

CHAPTER 22
COMPATIBILITY OF THE PROPOSED REFORMS WITH THE NATIVE TITLE ACT

A. INTRODUCTION

1403 The Review Team has endeavoured wherever possible throughout the course of this Review to have regard to the issues raised by the incompatibility of the Native Title Act and the ACA Act. The Review team has been careful to try to consider the implications of the proposed reforms for Native Title Act corporations (NTRBs and PBCs). However, it is simply not possible to resolve all of the problems with Native Title Act corporations through a review of the ACA Act. There are several key reasons for this:

- The primary focus of the current Review has been the position of *all* ACA Act corporations, of which NTRBs and PBCs represent only a tiny minority (although it is appreciated that it may be an important and growing minority).[593] The Review Team was of the view that the position of the majority of ACA Act corporations could not be compromised for the sake of NTRBs and PBCs.
- Some of the most significant problems with NTRBs and in particular PBCs lie in the Native Title Act and PBC Regulations, not in the ACA Act. It is not within the scope of this Review to address these issues.

1404 Therefore, the guiding principle adopted by the Review Team, was to try to ensure that any reform of the ACA Act would be implemented in a way so as to minimise inconsistencies with the Native Title Act and PBC Regulations.

1405 A number of the proposed reforms should result in a significant improvement of the position of NTRBs and in particular PBCs. This Chapter outlines how those improvements are achieved. It also addresses a number of concerns raised in submissions about the potential impact of reform of the ACA Act on native title corporations, and notes where the differences between a reformed ACA Act and the PBC Regulations in particular, may be irresolvable.

1406 An outline and discussion of some of the major problems with the Native Title Act and PBC Regulations and the requirements for NTRBs and PBCs to be incorporated under the ACA Act, is contained in Chapter 5, Part A of the First Report – *Policy Options Discussion Paper*, which is included as **Appendix C**.

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593 The data available on the total number of ACA Act corporations incorporated for the purposes of being a PBC is unclear. However, of these there are currently only 20 which are registered native title bodies corporate (RNTBCs) following determinations of native title. (Personal communication with Garry Fisk, Director Corporate Relations, ORAC, 2 September 2002.)"

B. RULES AND CORPORATE DESIGN

(1) Rule Design

PBCs

1407 By adopting a flexible approach to the design of corporate constitutions and removing the requirement for their scrutiny and approval by the Registrar, most of the problems currently experienced in the incorporation of PBCs would be remedied.[594] For example it would be possible to draft corporate constitutions which:

- created classes of members by reference to different voting rights; and
- reflected decision-making processes under traditional law and custom.

1408 Under such a system, the timeframes for incorporating would be greatly reduced.

1409 Of course this does not of itself, mean that there will not be a range of challenges facing the drafter of a PBC's constitution. (Some of the difficulties with adopting classes of membership and attempting to codify traditional decision-making are discussed in Mantziaris and Martin,[595] with some suggestions as to ways to minimise the problems).

1410 An administrative measure that could reduce the difficulties with drafting PBC constitutions, would be the development of one or more precedent constitutions, to be made widely available to native title groups needing to establish PBCs. However, it is recognised that there will probably need to be adjustments made in each case.

NTRBs

1411 The advantages of flexibility discussed above would also be of potential benefit to NTRBs. This flexibility with drafting and amending their constitutions might assist NTRBs to adapt to the statutory requirements imposed upon them by the Native Title Act.

(2) The Associational Model and Prescribed Bodies Corporate

1412 Some concern was raised in several submissions[596] that the removal of the prescription for control by members would be inappropriate for PBCs.[597] It was suggested that a shift in emphasis, from control by members to control by management, would conflict with the decision-making requirements of the Native Title Act and PBC Regulations.

1413 The Review Team is of the view that this concern is misplaced. There are a couple of reasons for this:

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[594] See Chapter 20B and Chapter 12

[595] Mantziaris, C. & Martin, D. 2000, p 94-96

[596] See for example Submission by NLC, 3 June 2002, and Submission by Yamatji Land and Sea Council, 20 May 2002

[597] See Chapter 12D

- By adopting a permissive approach to the drafting of the corporate constitution, it will still be entirely open to the drafters of a PBC's constitution to require a high level of control by members, if desired.

- However, this seems to confuse the role and nature of the decisions that can be made by the directors of a PBC. The directors - and indeed the members of the corporation in a general meeting themselves - are not able to make "native title decisions".

  "Native title decisions" are decisions to surrender or otherwise do an act that affects native title.[598] The scope of "native title decisions" has in effect been clarified by the High Court's recent decision in *Ward v WA*[599], which held that native title only protects rights in relation to land and waters. "Native title decisions" are therefore only decisions which relate to rights of access to or use of land and waters, and which will "affect" native title. Where the access/use will not "affect" native title (ie will not extinguish, suppress, or suspend native title rights), it is not a "native title decision". Decisions that relate only to the use or protection of cultural knowledge are not "native title decisions".[600] Neither are decisions of an administrative nature (eg purchase of equipment by a PBC).

  "Native title decisions" must be made in accordance with the underlying statutory trust or agency relationship between the PBC and the members of the native title group. They must be made in accordance with "consultation and consent" provisions of the PBC Regulations, or they are deemed to be of "no effect".[601] These "consultation and consent" provisions require consultation with and obtaining the consent of all native title holders – which is likely to be a broader group than either the directors or the membership of the PBC.

  Attempting to include all common law native title holders as members of the PBC would be impracticable, potentially even impossible. Attempts to do so may lead the PBC to confuse the membership and processes of the PBC with the membership of the group of native title holders and the consultation and consent requirements. This in turn could expose purported native title decisions to being deemed to be of "no effect". For example, a decision made by a general meeting of the members of a PBC might not satisfy the "consultation and consent" requirements of the PBC Regulations, which must be addressed to the common law holders. The common law holders will be a broader group than the members of the PBC.

- By extending directors' duties to all officers of the corporation, and modernising and strengthening directors' duties, the Review Team is of the view that the

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598 The term "native title decision" is used here for convenience. Regulation 5 of the PBC Regulations requires consultation with and consent of the "common law holders" of native title "before making any decision, or doing any act, that will affect the native title rights or interests of the common law holders."

599 *WA v Ward; A.G (NT) v Ward; Nigarmara v NT* [2002]HCA 28 (8 August 2002)

600 It is conceded that the distinction will not necessarily always be clear-cut.

601 *Native Title (Prescribed Bodies Corporate) Regulations*, regulation 5.

proposed reforms should actually further clarify and reinforce the obligation for the PBC to comply with the consent and consultation provisions, where "native title decisions" are made.[602]

C. REPORTING REQUIREMENTS

(1) PBCs

1414 A concern expressed in a number of submissions was the fact that the current reporting requirements under the ACA Act are likely to be unduly onerous for small PBCs, with no functions other than the holding of land.

1415 The broad exemptions proposed under the model outlined above should address this problem.[603] However, it would mean that if a PBC were to engage in a broader range of activities that brought the turnover or assets above the relevant levels, the fuller reporting requirements for Small Indigenous Corporations or Large Indigenous Corporations would apply. The Review Team believes this to be appropriate.

(2) NTRBs

1416 Without pre-empting the determination of the relevant turnover/asset/employee levels, most NTRBs would be likely to qualify as Large Indigenous Corporations.

1417 However, in recognition of the multiple layers of reporting requirements imposed on NTRBs, and the stringent nature of the reporting requirements imposed on NTRBs by the Native Title Act, NTRBs would be able to simply lodge a copy of their annual report prepared for section 203DC of the Native Title Act to satisfy the IC Act's reporting requirements. This should help to reduce some of the administrative burden on NTRBs.

D. VALIDATION OF PROCEDURAL IRREGULARITIES AND TRANSACTIONAL CERTAINTY

1418 The proposed processes for validation of procedural irregularities should be of great benefit to both PBCs and NTRBs.[604]

1419 Several submissions[605] noted a concern that the introduction of provisions increasing transactional certainty for third parties, had the potential to conflict with requirements of the provisions of the PBC Regulations, which deem "native title decisions" to be of "no

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602 See Chapter 20C and 13B

603 See Chapter 20E

604 See Chapter 20D

605 See for example, Submissions by ATSIC LRNTC, July 2002; Submissions by Yamatji Land and Sea Council

effect", if they have not been made in accordance with the requirements under the Regulations, for consulting with and obtaining the consent of the native title holders.[606]

1420 The Review Team notes this potential conflict, but is of the view that this alone should not drive the reform for all Indigenous corporations, where there is clearly a need for greater transactional certainty.[607]

1421 The introduction of increased transaction certainty is arguably also important for PBCs, in relation to "non-native title decisions", which could in some cases (if they are not acting just as simple land-holding bodies) amount to a significant part of a PBC's business.

1422 The Review Team takes the view that issues relating to PBCs are more appropriately dealt with through the current ATSIC review of the PBC Regulations. One reason for this is the fact that the "no effect" provision in the PBC Regulations is already in conflict with the provisions for Indigenous Land Use Agreements within the Native Title Act itself (this deems an ILUA with a PBC as effective, without reference to the internal processes of the ILUA)[608]. The resolution of such issues is clearly outside the scope of this Review.

1423 However, it is nonetheless possible that an express exception to the provisions providing transactional certainty to third parties could be inserted into a reformed Act, solely in relation to "native title decisions" of PBCs.

E. REGULATORY INTERVENTION

(1) Special regulatory assistance

1424 The Review Team is of the view that the increased emphasis on special regulatory assistance (rather than enforcement) in the proposal for a reformed Act set out above would be beneficial to both PBCs and NTRBs.[609] Most submissions supported this proposition.

(2) Regulatory Intervention and NTRBs

1425 The general thrust of the proposed reforms should assist NTRBs by:

- Requiring an intermediate step (in most cases) before regulatory intervention by the Registrar;
- Reducing the role of intervention by the Registrar while enhancing the role of ATSIC, through appropriate mechanisms such as receivers and grant controllers;

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606 See Chapter 20D

607 See Chapter 20D and Chapter 14C

608 See Part 2, Division 3, Subdivision B of the *Native Title Act 1993* (Cth)

609 See Chapter 20A and 11C

- Requiring grant controllers appointed by ATSIC to be subject to similar requirements and duties as receivers; and
- Providing more flexibility to the directors to take action through voluntary administrations (and removing the scope for conflict with Registrar-appointed Administrators).

(3) Administrations

1426 Many of the steps outlined above are equally relevant to PBCs – especially the introduction of intermediate remedial measures before intervention, winding-up or deregistration.

1427 Administrations under section 71 of the ACA Act would be removed, although a PBC would still be able to appoint a voluntary administrator.[610]

1428 Concerns have been raised that control of the corporation by an administrator might cause a group of native title holders or persons entitled to statutory land rights to lose control of their respective rights to land.[611] In the context of the Northern Territory land rights legislation, the Full Federal Court countenanced the possibility that an administrator to an ACA Act corporation could grant the corporation's written consent in relation to a land claim affecting 'an estate or interest' in land held by the corporation on behalf of the traditional Aboriginal owners of that land.[612]

1429 Given the strong attachment of Indigenous people to land, and the importance of the land rights and native title system in contemporary Indigenous life, the possibility of such decision-making is problematic. It strengthens the argument in favour of a system of voluntary administration, rather than Registrar–appointed administration.

1430 The same argument may be made in the native title context. However the fear that an administrator could deal with native title without the consent of the native title group is probably misplaced. There are three sources of constraint on the administrator.[613] Firstly, the administrator only has such powers to conduct the corporation's affairs as may have been exercised by the public officer and the board prior to the administration. These powers are governed by the corporate constitution (the 'Rules of Association'), the ACA Act and the delegation by the Registrar.[614] The corporate constitution may limit the powers of the corporation in relation to the native title.

1431 Secondly, the administrator must act in accordance with the terms of the statutory trust or agency relationship and the consent and consultation procedures established by regulations

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610 See Chapter 20A and Chapter 11

611 See Mantziaris, C. & Martin,D. 2000, p.213

612 *Aboriginal Land Rights Act 1976 and the Alcoota Land Claim No 146* [1998] FCA 281 at pp 22–23 of the report on <http://www.austlii.edu.au>, in respect of the consent required under the Aboriginal Land Rights (Northern Territory)Act s 50(2C).

613 This text is drawn from Mantziaris, C. & Martin, D. 2000, p. 213

614 *Aboriginal Land Rights Act 1976 and the Alcoota Land Claim No 146* [1998] FCA 281 at pp 22–23 of the report on <http://www.austlii.edu.au>; ACA Act ss 73, 75.

made under the *Native Title Act*[615]. Unless the native title group consents to a dealing in relation to the native title, that dealing will have 'no effect'. Thirdly, the title itself is not capable of alienation to persons other than the Crown.

(4) Winding-up and deregistration of PBCs

1432 Winding-up is one area that there may be a real potential for conflict between the IC Act and the Native Title Act. These problems already exist under the ACA Act, and would not be exacerbated by the proposals for reform outlined in the previous Chapter. Most of the problem would seem to in fact lie with the Native Title Act and PBC Regulations.

1433 The 'just and equitable' ground for winding up is a wide discretionary remedy which courts will adapt to the circumstances of the case.[616] In the context of a native title corporation, the 'just and equitable' ground might be triggered in circumstances where fundamental disagreement between the members creates a deadlock in the general meeting so that it is unable to pass resolutions,[617] or where the purpose of serving as a PBC has failed.[618]

1434 The winding-up of a native title corporation would create an immediate problem for the current native title management system. The key problem is that, at the time of writing, no provision has been made under the NTA or PBC Regulations for the replacement of PBCs.[619]

1435 Although the Review Team is of the view that resolution of this issue is probably outside the scope of the current Review, there are a couple of (less than ideal) options open when reforming the ACA Act, which might be considered (in light of any recommendations of the ATSIC Review of PBCs), for example:

- Making express provision in the reformed IC Act preventing/prohibiting the winding-up or deregistration of PBCs; or
- Requiring that any winding-up or deregistration of a PBC be supervised by the Federal Court.

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615 *Native Title (Prescribed Body Corporate) Regulations* 1999, regs 7–9. See Mantziaris, C. & Martin, D. pp 102, 143-4, 183-4

616 See generally, *Re Westbourne Galleries Ltd [1973] AC 360;* Macpherson, 'Winding up on the 'Just and Equitable' Ground" (1964) 27 *Modern Law Review* 282; Prentice, D.D. "Winding up on the Just and Equitable ground: The Paternership Anaology' (1973) 89 *Law Quarterly Review* 107; and *Ford's Principles of Corporations Law*, para 11.388-11.400

617 Compare *Re Yenindje Tobacco Co Ltd* [1916] 2 Ch 426; and *Re Macman Pty Ltd* (1992) 10 ACLC 287

618 Compare the 'failure of substratum' cases: *Re Tivoli Freeholds Ltd* [1972] VR 445. The purpose of the corporation would be determined by reference to the objects clause in the corporate constitution

619 Compare with s 60 *Native Title Act*

F. MISCELLANEOUS ISSUES

(1) Minimum Membership Requirements and PBCs

1436 One problem with the ACA Act as it stands is the requirement for a minimum of 25 members except where formed "wholly for business purposes" or "principally for the purpose of owning land or holding a leasehold interest in land", in which cases the minimum number of members is 5.[620] A number of commentators and stakeholders have expressed concern that PBCs are not in fact formed "principally for the purpose of owning land or holding a leasehold interest in land",[621] which could mean that the minimum of 25 would apply. Scenarios have been envisioned where there might be fewer than 25 members of a native title group, which could cause problems for the establishment of a PBC.[622]

1437 Reducing the minimum membership levels to 5 for all corporations should largely address this concern. The Review Team is of the view that it is highly unlikely that a native title group with fewer than 5 members would be the subject of a determination of native title. However, to address this issue, an exemption could be created to the minimum membership requirements for PBCs, where the Registrar is satisfied that it would be appropriate.

(2) Corporate Membership and PBCs

1438 Several submissions[623] expressed the view that corporate membership would be particularly useful and relevant in the context of PBCs. Reasons given include the following:

Coordinating commercial activities

1439 One argument is that there is already a multitude of Indigenous corporations in many areas, and native title may ultimately form the basis for a range of commercial activities which would tie-in with these other corporations. In these circumstances, it would be useful for a PBC to be able to establish itself as an "umbrella" body to coordinate these commercial activities.[624]

1440 The Review Team is of the view that there is nothing unique to PBCs in this type of arrangement, and notes that such an arrangement is probably best dealt with through the PBC becoming a member of a Corporations Act corporation, which would play the "umbrella" role, rather than the other way around. There is currently nothing preventing a

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620 *ACA Act*, s 45(3A)

621 See Chapter 17A and Chapter 20G

622 Mantziaris, C. & Martin, D. 2000, p. 197; Submission by Yamitji Land and sea Council, 20 May 2002, Submission by National Native Title Tribunal (NNTT), 24 June 2002, Submission by ATSIC NTLRC.

623 Submission by Yamitji Land and Sea Council, 20 May 2002

624 See for example, Submissions by Yamatji Land and Sea Council.

PBC from doing so. The issues relating to corporate membership of ACA Act corporations have already been discussed at length in Chapter 17.

Multiplicity of PBCs

1441 A better argument, and one which may be unique to PBCs, relates to the potential creation of multiple PBCs for a single native title claimant group. Native title claims for a particular claimant group are often run in "stages" – broken-up into several claims for strategic purposes, with different claims covering different land tenures or different respondent parties. The result of these claims all succeeding would be a number of different PBCs, all relating to the same group – with consequent administrative multiplication and confusion over which PBC meeting was for which determination. It has been argued that it would therefore be useful to establish an "umbrella PBC" which could coordinate and administer the other PBCs.

1442 Again, however, it is the Review Team's view that this approach is not the solution to the problem. The real problem lies in the Native Title Act and PBC Regulations, which require a separate PBC for each determination of native title. An "umbrella PBC" arrangement of the type envisaged above would have the potential to in fact introduce further complexities to the administration of the native title. In any case, it is noted that the provision of administrative assistance for the running of a series of PBCs does not require them to all be incorporated under an "umbrella PBC".

1443 Provisions for amalgamation of the different PBCs might provide some relief in such a situation (amalgamations are discussed in Chapter 17B. However, this would not get around the current requirement in the Native Title Act and PBC regulations for separate PBCs, which would currently prevent PBCs from making use of any amalgamation provisions in the ACA Act.

Conclusion

1444 The Review Team is therefore of the view that these issues are best addressed through the current ATSIC Review of PBCs under the Native Title Act and PBC Regulations.

G. TRANSFER TO THE CORPORATIONS ACT

1445 NTRBs and PBCs would be exempted from the requirements of corporations to the Corporations Act under certain circumstances. This would avoid potential conflict with the requirements in the Native Title Act and the PBC Regulations for these types of corporations to be incorporated under the ACA Act.

CHAPTER 23
OTHER ISSUES FOR CONSIDERATION

A. THE ESTABLISHMENT OF THE REGISTRAR'S OFFICE AS AN INDEPENDENT STATUTORY BODY

1446 The establishment of the Registrar's Office as a separate statutory body, independent of ATSIC, was proposed in the (now lapsed) *Aboriginal Councils and Associations Legislation Amendment Bill 1994*. The Explanatory Memorandum to that Bill noted that

> Appointment of the Registrar from within the Department of Aboriginal Affairs and ATSIC has caused confusion as to the respective roles of the Registrar and the Department/ATSIC. The potential exists for conflicts of interest to arise while the Registrar remains an ATSIC officer.[625]

1447 While disagreeing with many aspects of the 1994 Bill, the Review Team concurs with this particular view. The Review Team also notes Peter Daffen's observations in his Special Issues Paper to the Fingleton Review entitled *ATSIC and the Office of the Registrar of Aboriginal Corporations*, that several previous reviews had reached the same conclusions.[626]

1448 In fact, the location of ORAC within ATSIC may be one of the underlying reasons that public funding bodies, and ATSIC in particular, have tended to rely inappropriately on the Registrar's Office to protect grant funds - instead of adopting appropriate mechanisms within their grant conditions (as suggested elsewhere in this Report). If the role of the Registrar is going to be changed as recommended in this Report, the independence of the Registrar's Office from ATSIC will become even more important.

1449 Other possible advantages of this approach suggested by Daffen, include:

- Improvement in public accountability of the Registrar through making the Registrar directly accountable to the Minister rather than indirectly via ATSIC;[627] and
- Securing a separate funding stream for the Registrar's office, which would address difficulties experienced in the past of inadequate funding resulting from ATSIC giving the Registrar's office low priority.[628]

1450 The Review Team expresses no opinion in relation to these particular points.

1451 It is understood that a confidential 1999 report to the Minister for Aboriginal and Torres Strait Islander Affairs about the relationship between ATSIC and ORAC, by Mr Bill Blick, also concluded that the ACA Act should be amended to establish the Registrar as an

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625 *Aboriginal Councils and Association Amendment Bill 1994 Explanatory Memorandum*, para 3

626 *Daffen Report* p. 3

627 Ibid.

628 Ibid., p 4

independent statutory office with budgetary autonomy, but still located in the portfolio of the Minister for Aboriginal and Torres Strait Islander Affairs.

1452 Finally, the Review Team notes that because ORAC is not currently directly subject to the *Financial Management and Accountability Act 1997* (Cth) ("**the FMA Act**") or the CAC Act, its own accountability and financial reporting position is somewhat unclear. For example, ORAC is not required to prepare an Annual Report, although it has done so since 1992 (but not necessarily to FMA Act or CAC Act specifications).

1453 In early 2000, the Minister proposed establishing ORAC as a separate agency under the FMA Act, with its own budget appropriation and full operational autonomy.[629] However, it is understood that the Minister subsequently changed his position – so that ORAC continues to operate as a branch of ATSIC for administrative and budgetary purposes.[630] The reasons for the change in the Minister's position are unknown to the Review Team.

Conclusion

1454 Although it has not been possible in the course of this Review to examine the issue in detail, the Review Team believes that in light of:

- the consistent recommendations of previous reviewers; and
- the additional issues raised in this paper

careful consideration should be given to the establishment of the Registrar's Office as an independent statutory authority, in the context of any amendments to the ACA act.

B. REVIEW OF REGISTRAR'S DECISIONS BY THE AAT

(1) Introduction

1455 It has not within the scope of this Review to give detailed consideration to the need for review of decisions by the Registrar by the Administrative Appeals Tribunal ("**AAT**"). However, it is an issue which has been the subject of detailed analysis in the course of previous reviews, specifically in the Neate Report[631] and in a Special Issues Paper to the Fingleton Report prepared by consultant John Ley[632]. Rather than re-examining the issues, this section simply outlines the views put forward in those papers (and updates them where necessary). The following is therefore not intended to be a comprehensive consideration of the issue by the Review Team.

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629 See Registrar of Aboriginal Corporations, Annual Report 1999-2000, piii.

630 Personal communication with Garry Fisk, Director Corporate Relations, ORAC, 3 August 2002.

631 *Neate Report*, 1989

632 Ley, J, *Administrative Decision-making and Review under the Aboriginal Councils and Associations Act 1976* (1996): in Special Issues Paper, prepared by Ley attached to the Fingleton Report

(2) Review of Decisions under the ACA Act

1456 At present, there is only limited scope for review of decisions of the Registrar. It derives from three sources:

- Express provisions for review by the Minister
- Review by the Federal Court under the ADJR Act
- Review by the Ombudsman

Review by the Minister

1457 Some decisions of the Registrar are expressly made subject to review by the Minister. These include:

- The decision to refuse to approve the alteration of an association's objects[633]
- The decision to refuse to approve the change of an association's name;[634] and
- The decision to appoint an administrator.[635]

1458 Neate considered the suitability of review of decisions by the Minister in relation to these decisions, and also the suitability of Ministerial review for a broader range of decisions under the Act. However, he identified a number of potential problems with such a process and concluded that the Minister may not be the appropriate person to review decisions of the Registrar. The reasons included:[636]

- In the case of administrations, the Minister may have requested the Registrar to perform the action.[637]
- The Minister may be dealing with other matters relating to the association seeking review.
- The Minister, while reviewing a decision, may rely on ORAC for advice and information, possibly resulting in a conflict of interest.
- Review may not be a priority for the Minister considering his or her existing workload, resulting in delays.

Review by the Federal Court under the ADJR Act.

1459 The only real option for review of the Registrar's decisions under the current ACA Act is review by the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("**the ADJR Act**").

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633 *ACA Act* s52.

634 *Ibid.*, s53

635 Ibid., s71

636 *Neate Report*, 1989, p 99

637 Under s 71 of the *ACA Act*, the "approval" of the Minister is required before the Registrar can appoint an administrator– it is not a true "review" of the Registrar's decision.

1460 However, the review of decisions under the ADJR Act presents a number of problems. The Federal Court is limited to conducting a legal review. That is – only the lawfulness of a decision is decided upon by the Court, not the merits of the decision.

1461 Further problems arise because of the cost and complexity of legal proceedings and the relative inaccessibility of the Federal Court, particularly for Indigenous people in rural areas. In 1996 Ley speculated that this might be why ADJR challenges are so rare.[638] Only one challenge to a decision made by the Registrar or by an administrator was brought before the Federal Court during 2000/2001,[639] illustrating the fact that this situation has not changed.

Review by the Ombudsman

1462 The Commonwealth and State Ombudsman also have the capacity to review decisions made by the Registrar. However, the findings of the Ombudsman are deemed to be recommendations only and are not enforceable. In addition, Ley noted that due to recent funding cuts, the Ombudsman, may become less accessible.[640]

Conclusion

1463 Both Ley and Neate concluded that the absence of appropriate and easily available means to review decisions of the Registrar is unacceptable. Ley concluded that if Aboriginal groups, or communities or individuals are "aggrieved by statutory decisions made by the Registrar, the Minister, or an Administrator, they and Associations incorporated under the Act should be able to have those decisions reviewed – not only on the basis of their lawfulness or timeliness, but on their merits."[641] The Review Team concurs with these conclusions.

(3) Review of Decisions by the AAT

Background

1464 The Administrative Appeals Tribunal (AAT) operates on a merit-based system but is only available to review decisions where it is provided for in statute.[642] An AAT review of decisions made by the Registrar is not currently available under the ACA Act.[643] The question is whether an express provision for AAT review of decisions of the Registrar would fill the gap identified by Neate and Ley.

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638 Ley, J. 1996, p. 6

639 Registrar of Aboriginal Corporations Annual Report 200/2001

640 Ley, J.1996, p. 8

641 Ibid., pp. 9-10

642 *AAT Act* s 25(4)

643 Only the decisions of an administrator to vary or terminate a contract of employment may be reviewed by the AAT as provided by s 76 of the *ACA Act*

Advantages of AAT Review

1465 Both Neate and Ley noted the following benefits of AAT Review:

- The AAT is empowered to substitute itself for the primary decision-maker and to exercise all the powers vested in that person or body in determining what decision should have been made under an enactment.[644]
- The AAT reviews a decision on its merits and can affirm or vary the original decision, or substitute it for a fresh one, or remit the matter for reconsideration by the primary decision-maker.[645]
- The cost of an AAT review is relatively low ($574).[646] Furthermore, this fee will be waived in a number of circumstances.[647]
- The AAT does not have the capacity to award costs,[648] therefore, there is no risk of the losing party being forced to pay costs for the other party.[649]
- It is not necessary for lawyers to represent the parties (although they can appear) and the AAT is experienced in hearing cases without legal representatives.[650]
- An application for review can be made on behalf of any person who's interests are affected by the decision.[651]
- Proceedings are conducted with as little formality and as much speed as is appropriate, and the AAT is not bound by rules of evidence.[652]
- Hearings are usually in public but may be held in private, where the AAT is satisfied that this is desirable. The same applies to the publication of documents following proceedings.[653]
- The AAT has a registry in each capital city[654] and preliminary conferences and direction hearings can be conducted by telephone or video conference.[655]

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644 *AAT Act* s 26, 40

645 ibid., s. 43

646 Commonwealth Government, www.aat.gov.au/fees.htm (2002).

647 Circumstances include those listed in Schedule 3 to the *AAT Regulations 1976* and circumstances where the applicant holds a health care card, pensioner concession card, Commonwealth Seniors health care card, or any other card issues by the Department of Social Security or the Department of Veterans' Affairs. The fee will also be waived if an applicant has been granted legal aid for the application, is in prison or immigration detention, is under the age of 18 years or is receiving Youth Allowance, Austudy or Abstudy payments (www.aat.gov.au).

648 The AAT can award costs in certain proceedings in the Security Appeals Division under s 69B of the *AAT Act*

649 *Neate Report*, 1989, p 101

650 *AAT Act* s 32

651 Ibid., s 27

652 Ibid., s 33

653 Ibid., s 35

654 Ibid., s 24

655 Ibid., s 35A

- The AAT may appoint members who are experts in a particular area if such appointments are justified.[656]

Limitations of AAT review

1466 However, it should be noted that the AAT does have some limitations, including the following:

- The AAT does not have general discretion in the order it may make – it can only move within the power of the primary decision-maker.
- The AAT can only hold a review if an actual decision was made, unlike the Federal Court. Self-executing decisions cannot be reviewed by the AAT.
- The AAT is not obliged to keep records of proceedings. This causes problems, particularly in relation to appeals to the Federal Court.
- Despite the intended informality, the AAT has been criticised for becoming too formal and driven by lawyers.

(4) Conclusion

1467 It is the Review Team's view that many of the characteristics of AAT Review appear to match very well with the "special incorporation needs"[657] of Indigenous peoples. On that basis, it is probably desirable to provide for AAT review of a number of the Registrar's decisions.

1468 Ley gave relatively detailed consideration to the decisions in the ACA Act that should be made subject to AAT review, and the principles for determining this.[658] However, further consideration is required of which specific decisions would need to be reviewed in light of the amendments to the Act proposed in this Report.

1469 It is noted that the Review Team has recommended AAT review for certain decisions relating to the proposed powers and functions under the proposed model for a reformed Act, outlined above. These are not intended to be an exhaustive or exclusive list of decisions that should be subject to AAT review.

C. PENALTY PROVISIONS

1470 Previous Reviews have queried the appropriateness of the penalty provisions under the ACA Act, in particular whether the penalty levels are sufficiently high.[659]

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656 Ibid., s 7

657 See Part 3

658 Ley, J. 1996 pp 9-18

659 *Neate Report*, 1989, p. 41

1471 This is an issue which falls outside the capacity and expertise of the Review Team. However, it is clearly a matter which should be given consideration in the context of other amendments to the ACA Act.

1472 The Review Team nonetheless suggests that any review of the penalty provisions should at least have regard to the "special incorporation needs" of Indigenous directors. These are relevant in several respects:

- Indigenous directors may have limited understanding of their obligations under the Act. Lower maximum penalties recognising these "special incorporation needs" might be an alternative to providing for subjective standards for the exercise of directors' duties of care and diligence.
- The ability of many existing ACA Act corporations to meet requirements of the Act within set timeframes may be limited, particularly for Indigenous corporations in remote locations. Daily penalties may be inappropriate.
- Capacity to pay penalties may also be very limited. Imposition of high penalties could prove particularly onerous.
- Formation of Indigenous corporations and nominations to their boards may not be "voluntary" in the true sense of the word, particularly with small Indigenous corporations.[660]

1473 It is also suggested that it would be more appropriate to set the penalties in regulations, rather than in the text of the Act, to introduce flexibility and bring the Act into line with modern statutory drafting techniques.

D. DRAFTING ISSUES

(1) Use of Delegated Legislation

1474 In recommending reforms to "the ACA Act" in this Report, the Review Team has generally not distinguished between the ACA Act and any regulations which might be made under it. In that sense the proposed reforms to the ACA Act could be read as reference to the Act and any subsidiary delegated legislation.

1475 For the Act to remain effective, it will need to have a certain amount of flexibility built into it. For that reason, the Review Team considers that it would be appropriate for the detailed operation of a number of aspects of the reformed Act to be set out in regulations.

1476 In particular, the Review Team considers that the cut-off thresholds separating the different categories of corporation for reporting purposes should be contained in regulation. This will allow those provisions to be "fine-tuned" as appropriate. Details of the specific reporting requirements themselves could also be set out in regulations.

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[660] See the discussion of this point in the Executive Summary and Chapters 5 and 6.

1477 A similar rationale applies to the location of thresholds for transfer of larger corporations to the Corporations Act.

(2) Drafting techniques to ensure a reformed ACA Act is easy to understand

1478 During the course of consultations, a number of stakeholders expressed a concern that the ACA Act is too difficult for many Indigenous people to understand, or that it would become so if amended.

1479 Unfortunately, it is impossible to avoid some complex technical provisions if the IC Act is to function effectively and with legal certainty. By its very nature, an incorporation statute will also have to refer to abstract legal concepts alien to Indigenous cultures. (The fiduciary duty of owed by directors to the corporation is one such concept which has been discussed at some length in this and previous Reports prepared for the current Review of the Act).

1480 This Report has also examined in some detail the need for special regulatory assistance, to enable members and directors of Indigenous Corporations to understand their rights and obligations under the Act, regulations and their own corporation's constitution.

1481 Assisting Indigenous people to understand the IC Act and how it functions would be made a great deal easier and more effective if the Act itself is drafted so that it is clear and easy to understand. There a number of ways that this can be done, which are outlined below:

Plain English drafting

1482 Legislative drafting techniques have evolved significantly since the ACA Act was originally drafted. Legislative drafting now is generally much more "Plain English" that it was in the 1970s. However, it is recommended that special attention should be paid to ensuring that the language used in the IC Act is as clear and accessible as possible, while remaining technically accurate. In addition, attention should be paid to ensuring that the structure of the Act is easy to use and follow. Other more specific drafting suggestions are also included below.

Preamble and statement of objects

1483 Legislation now sometimes includes a statement of purpose or a preamble setting out the reasons Parliament took into consideration in passing the legislation. It also sometimes includes a statement of objects.

1484 These can be very useful in providing guidance to the interpretation of the Act, particularly if there a section is unclear. The Review Team would argue that this is particularly important in the case of legislation which is intended to provide "special measures" to address disadvantage of a particular section of society.

1485 The Native Title Act is a good example of an Act which makes use of both a preamble and a statement of objects.[661]

Explanatory notes

1486 It is now a relatively common legislative drafting technique to include explanatory notes under the text of particular sections of an Act. These may be used to clarify the meaning of a section, or to cross-refer to related sections.

1487 The Review Team recommends the liberal use of such explanatory notes in the IC Act.

Outline and Plain English Guide

1488 Other suggestions which would make the IC Act easier to use and understand are the inclusion of an outline or overview of the Act, and a plain English guide.

1489 An outline or overview simply outlines the key features of the Act, so the main effect of the Act can be seen and understood easily.[662]

1490 The Corporations Act includes a Small Business Guide. This guide summarises the main rules in the Corporations Act that apply to proprietary companies. The Guide gives a general overview of the Corporations Act for those companies, directing the readers to the operative provisions.

1491 Again, the Review Team suggests that both these approaches would be highly beneficial for a reformed IC Act.

(3) The approach to implementing greater consistency with the Corporations Act

1492 The proposed reforms include a number of proposals to adopt the approach taken in the Corporations Act. There are a number of ways in which this can be done, all of which have their advantages and drawbacks. These are discussed below.

1493 It should be noted that the conclusions reached in relation to adoption of Corporations Act provisions may also impact on the adoption and use of drafting techniques suggested in the previous sub-section.

Use of identical provisions

1494 Harmonisation of the ACA Act provisions with the provisions contained in the Corporations Act would mean that interested parties can take advantage of the settled jurisprudence relating to the Corporations Act provisions. This would arguably lead to greater clarity and certainty. As discussed above in section G, the *Commonwealth*

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661 The statement of objects is at section 3 of the *Native Title Act*

662 Again, the *Native Title Act* provides an example – see section 4

Authorities and Companies Act 1997 ("**CAC Act**") has been kept in line with the Corporations Act for precisely these reasons.

1495 The principal factor weighing against the wholesale adoption of the Corporations Act provisions is that such a step would arguably lead to a more complex ACA Act which most of its users would find too difficult to comprehend. A resolution of this issue requires reference, again, to the underlying policy question of: "Who is the ACA Act aimed at?". Arguably, if the ACA Act is to cater for complex corporations, there is some basis for adopting provisions which are identical to the Corporations Act provisions.

1496 Again, there is the risk that the more the ACA Act replicates the Corporations Act, the more questionable will be the apparent need for a separate ACA Act.

Adoption by reference

1497 An alternative to reproducing the provisions of the Corporations Act in the ACA Act would be to adopt the relevant Corporations Act provisions by reference in the ACA Act. This is already done in section 67 of the ACA Act which provides for the application of the Corporations Act provisions, that relate to the winding up of companies to the winding up of ACA Act corporations.

1498 The principal advantage of this approach would be that subsequent changes to the Corporations Act would automatically be incorporated in the ACA Act. This would avoid the need to amend the ACA Act each time amendments are made to the Corporations Act.

1499 One significant problem with this approach is that the relevant provisions would not be apparent "on the face" of the ACA Act, and it would be necessary to refer to the Corporations Act as well as the ACA Act in order to understand the workings of the ACA Act. This may in fact be one reason that a number of the tools currently available to creditors of ACA Act corporations under Part 5 of the Corporations Act (which are incorporated by reference through sections 62 and 67 of the ACA Act) – such as receivers and provisional liquidators – have not been used. Therefore, if Corporations Act provisions are adopted by reference, it would probably be necessary to include (possibly in a note) an outline of the provisions that have been adopted.

1500 Another foreseeable problem with such an approach is that certain amendments to the Corporations Act may not be appropriate for adoption in the ACA Act. If such amendments were automatically adopted in the ACA Act, inconsistencies could arise (in fact, this has arguably already happened with the winding-up provisions imported under sections 62 and 76 – see discussion in Chapter 11D). This would undermine the integrity of the ACA Act. Therefore, the incorporation by reference provision would have to be drafted very carefully so as to avoid any doubt as to which parts of the Corporations Act have been introduced to the ACA Act.

1501 One suggestion for addressing these potential problems is to expressly provide that where inconsistencies arise, the Court should have regard to the preamble and objects of the IC Act and "read down" inconsistent Corporations Act provisions to ensure alignment with the intent behind the IC Act.

Simplified provisions

1502 There is some argument for the adoption of simplified versions of Corporations Act provisions to be incorporated in the ACA Act.

1503 This suggestion has been rejected because there is risk that the simplified formulations may be given different judicial interpretations to the original Corporations Act provisions. As a result, the certainty of the ACA Act could be undermined.

1504 It would also mean that the ACA Act could fall behind developments and amendments to the Corporations Act unless the ACA Act is updated and amended when there are relevant changes to the Corporations Act – for example through consequential amendments.

Conclusion

1505 The outcome of these competing factors is that it will probably be necessary to consider the drafting approach on a case-by-case basis, depending on the nature of the provisions which are sought to be incorporated.

1506 Most amendments to bring the directors' duties into line with the Corporations Act would probably be best achieved by adoption of identical provisions (similar to the approach adopted in the CAC Act). Some, such as the directors' duties for related party transactions may need to be simplified.

1507 Where provisions are incorporated by reference (for example relevant parts of Part 5 of the Corporations Act incorporated in the current sections 62 and 67), it is recommended that express reference to the nature of the imported provisions be made. At present, section 67 of the ACA Act simply applies "the provisions of the Corporations Law that relate to the winding up of companies registered under that Act". For clarity, it is suggested that section 67 should instead specify that it is intended to incorporate from the Corporations Act:

- Part 5.2 - Receivership
- Part 5.3A - Voluntary administration
- Part 5.4B - Provisional liquidation […etc][663]

This is so that a casual reader of the IC Act will be aware of the nature of the imported provisions.

1508 Alternatively, reference to the relevant provisions could be made by way of explanatory note inserted into the text of the Act.

1509 Ultimately, however, the Review Team expresses no concluded view on the drafting of the provisions, as this is a matter for the Office of Parliamentary Counsel.

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[663] In this regard, the Review Team is of the view that the approach adopted in clause 36 of the *Aboriginal Councils and Associations Amendment Legislation Amendment Bill 1994* is insufficiently clear on its face. That clause proposed that s 67 refer to "Parts 5.4, 5.4A, 5.4B, 5.5, 5.6, 5.7B, 5.8 and 5.9 of the Corporations Law".

E. FURTHER REVIEWS TO ENSURE THE ACT REMAINS UP-TO-DATE

1510 It was suggested in the submissions from ASIC that a further review of the ACA Act (or IC Act if amended) be conducted in approximately ten years time, to ensure that it remains up to date with relevant developments in Corporations Acts.[664] The Review Team supports this suggestion, and believes that it will be particularly important if significant amendments are made to the Act to bring it into line with the Corporations Act, as recommended in this Report. A relatively straightforward technical review of this kind should not be regarded as "optional", or there is a serious risk that the Act will again become outdated and disadvantageous to Indigenous corporations.

1511 However, in addition to this "technical" review, there may also be a further opportunity, after the reformed Act has been operational for perhaps ten years, to:

- Review the effectiveness of reforms introduced as a result of this review;
- Review the changes (if any) in the "special incorporation needs"[665] of Indigenous peoples; and
- Possibly (depending on the outcomes of the previous point), to re-examine the ongoing need for an Indigenous incorporation statute, and to consider in detail a model for how Indigenous corporations could be brought under the Corporations Act and/or State Association Incorporation Acts.

1512 In relation to this last point, the Review Team notes the conclusion of this Review that repealing the ACA Act is not feasible or appropriate at present, not least because of the widespread views of Indigenous corporations, peak bodies and other stakeholders against such an approach.

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664 Submission by ASIC, 2 July 2002

665 See Part 3

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GLOSSARY OF KEY TERMS AND CONCEPTS

NOTE: This Glossary is intended to assist understanding the *Final Report of the Review of the Aboriginal Councils and Associations Act 1976* (Cth). Definitions in this Glossary provide general meanings of terms *as used in the Final Report*. These might not be the same as the ordinary meanings of the terms, and may also differ slightly from technical legal definitions.

Terms explained in this glossary

Note: Words in **bold** are defined in the Glossary, and can be cross-referenced.

Aboriginal custom *Aboriginal custom* refers to those norms, values, understandings and practices broadly accepted within the relevant Indigenous group or community, which inform such aspects of group or community life as personal and group identities, relationships and behaviours between individuals and between groups of people, differential rights and entitlements such as those relating to traditional country and to access to resources, and the distribution of authority within the group and the matters to which it pertains.

ACA Act ***A**boriginal **C**ouncils and **A**ssociations Act 1976* (Cth). An **incorporation statute** specifically established for the creation of corporations whose membership is restricted to Indigenous people. For more discussion on the origins of the *ACA Act* and problems with it, see Parts A and B of the Consultation Paper.

administration, administrator Under the **ACA Act**, the Registrar may under certain circumstances directly appoint a person to take over the running of the corporation. This person is called the *administrator*, and they take over the positions of the **governing committee** and the **public officer**, and the existing governing committee and public officer are dismissed. Where an administrator has been appointed, the relevant corporation is referred to as being "under *administration*".

Under the **ACA Act**, the Registrar can appoint an *administrator* to take over the running of a corporation where the Registrar believes:

- the corporation has been trading at a loss for at least 6 months over the previous year;
- the governing committee has failed to comply with the **ACA Act** or the corporation's **rules**;
- the governing committee members have breached their **fiduciary duties** or acted in a way that is unfair or unjust to members of the corporation;
- it is necessary to protect members or **creditors**;
- it is necessary for the public interest.

Part IV of the **ACA Act** imports various parts of the **Corporations Act**, which also includes those parts relating to the appointment of *administrators*. These provisions allow "**voluntary administration**" and appointment of an *administrator* by the Court, on application of a **creditor**. This duplication has caused some confusion under the **ACA Act**.

AGM ***A**nnual **G**eneral **M**eeting*. An *AGM* is the meeting of a corporation's members which must happen at least once each year. At the *AGM*, issues such as the corporation's finances are discussed and **governing committee**

members are elected.

arbitration Where two or more parties to a dispute agree not to go to court, but to be bound by the decision of an independent person ("an *arbitrator*") who will hear their arguments and decide what should happen. *Arbitration* processes are usually less formal than court processes.

ASIC ***A**ustralian **S**ecurities and **I**nvestments **C**ommission*. *ASIC* is the government **regulator** for corporations incorporated under the **Corporations Act**. *ASIC* also regulates financial services (eg superannuation) and a range of other activities undertaken by certain corporations performing special functions.

association A group of people who have come together for a particular purpose. *Associations* may incorporate and become a **corporation**.

ATSIC ***A**boriginal and **T**orres **S**trait **I**slander **C**ommission*. *ATSIC* is an independent Commonwealth government statutory authority. *ATSIC* advises and lobbies the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs on Indigenous policy issues. It is also responsible for the delivery of a number of national service programs for Indigenous people including housing, **CDEP** and native title. *ATSIC* has a Board of Commissioners who are elected from within the Indigenous community on a regional basis. **ORAC** is currently a part of *ATSIC*.

bill Draft legislation which has not yet been passed by Parliament and made into law.

board of directors The committee of directors appointed under a corporations' **rules** or **constitution** to manage and govern a corporation. This term is used in the **Corporations Act** – see also "**governing committee**", which is the term used in the **ACA Act**.

special regulatory assistance Assisting and encouraging corporations to develop good **corporate governance** practices**,** for the long-term stability and success of the corporation.

Special regulatory assistance might range from assisting and advising on the design of appropriate **corporate structures** and **rules** before a corporation is incorporated, to ongoing training for governing committee members on how to properly run a corporation. It might also include assisting corporations in difficulty to overcome their difficulties. For a detailed description of what *special regulatory assistance* might involve, see Chapter 20 of the Final Report.

CDEP ***C**ommunity **D**evelopment **E**mployment **P**rojects*. *CDEP* is a "work for the dole" employment/training scheme for Indigenous communities, which is funded by the Commonwealth Government and administered by **ATSIC** through locally-based CDEP corporations.

conflict of interest A *conflict of interest* exists where a person involved in making a decision has some other interest which could affect the way they make that

decision. Governing committee members must act for the benefit of the corporation as a whole, and not for themselves or their families. They must not try to profit personally from their position, and they must declare any *conflict of interest*. For example:

- If a governing committee member makes a decision that the corporation enter a contract which he/she would personally make money from, or which a family member would make money from, there is a *conflict of interest.* (The governing committee member in this case has a **pecuniary interest** in the decision.)
- If a governing committee member makes a decision to use grant funds (for example to progress a particular native title claim over other claims) in a way that directly benefits his/her family or clan, that might also be a *conflict of interest.*

constituency This is not a legal term, but it is sometimes used in this Report to describe a group of people, which may or may not include the formal members of the corporation, to whom the corporation provides services. The *constituency* is often determined by external requirements such as **grant conditions**, but may also be reflected in the corporation's rules. For example:

- An Indigenous health corporation provides health services to all Indigenous people within an area [its *constituency*], rather than just the members of the corporation itself.
- An NTRB is required by the *Native Title* Act 1993 (Cth) to provide services to all Indigenous people who hold or are seeking to claim native title within the NTRB's allocated area [its *constituency*]. Some NTRB regions have recently been joined under a single pre-existing NTRB whose members are only drawn from one of the regions. In such cases, the *constituency* (including all people who hold or may hold native title across both regions) is much broader than the membership (only some people from only one region).

constitution A corporation's *constitution* is the set of rules by which the corporation operates. "*Constitution*" is the term used in the **Corporations Act**. The **ACA Act** uses the term "**rules**".

corporate governance The processes by which a corporation is directed, controlled and made accountable to its members. This includes the way that the **governing committee** or **board of directors** make decisions and interact with **members**, as well as issues such as financial reporting and disclosures of interests.

corporate philosophy The theory of how the government should regulate corporations.

corporate structure The way in which a **corporation** is organised under its **rules** or **constitution** – for example, the way in which **governing committee** members are appointed and decisions are made.

corporation A body created to recognise an **association** as a single legal entity, separate from its members. A *corporation* has a continuous existence and has rights, obligations, powers and liabilities distinct from those of its members. *Corporations* are often called "companies" (although "company" has a particular legal meaning), and include incorporated **associations**.

Corporations Act *Corporations Act 2001* (Cth) (formerly the "Corporations Law"). This is the main national **incorporation statute**. Over 1.3 million corporations are **incorporated** under the *Corporations Act*. The *Corporations Act* is very flexible and **permissive**, and caters for a wide range of different types of corporation. The *Corporations Act* is updated every year or two.

creditor A person to whom money is owed. This might be a person who has provided funds to a corporation for a specific purpose, or to whom the corporation owes money for goods or services bought, or because it has been borrowed. For example:

- ATSIC may be a *creditor* where it makes a grant of money for a specific purpose, such as money given to a **CDEP** corporation to run a **CDEP** program, or money given to an NTRB to run native title claims. The grant is a special type of contract which gives the money subject to certain conditions about how it can be used, called **grant conditions**.
- A supplier of goods or services is a *creditor* where money is owed to them. For example:
  - If a new photocopier is bought on lay-by, the person who sold it is a *creditor* until it is paid off.
  - The landlord of an office rented by a corporation is a *creditor* if the corporation gets behind in rent payments.
  - A bank is a *creditor* where it makes a loan.

deregistration *Deregistration* is the process under which a corporation is removed from the **Register of Incorporated Aboriginal Associations** and formally ceases to exist as a corporation. Deregistration may happen after:

- All the **members** of the corporation agree that it should be deregistered, where the corporation is not operating and has no liabilities and few assets;
- The **Registrar** decides that the corporation is not functioning because it has not lodged its annual report or other documents with the Registrar; or
- After a corporation has been **wound up**.

DIMIA *The **D**epartment **o**f **I**mmigration, **M**ulticultural and **I**ndigenous **A**ffairs.* DIMIA is the Commonwealth Government department responsible for Indigenous affairs.

director A member of a corporation's **board of directors** (see also **governing committee member** and **governing committee** which are the **ACA Act**

equivalents).

fiduciary
fiduciary duty

A *fiduciary* relationship generally arises where one person is taken to have placed trust and confidence in another person. A *fiduciary* is under a legal obligation to act in the best interests of that person or body – this is their *fiduciary duty*. For example:

- a **director/governing committee** member of a corporation owes a *fiduciary duty* to act in the best interests of the corporation as a whole, and may not act in his/her own interest or in the interest of only one or a few members;
- a doctor owes a *fiduciary duty* to a patient, and must act in the patient's best interest, and cannot tell anyone else about the patient's illness unless the patient agrees;
- *fiduciary* relationships also arise between a lawyer and his/her clients, and between a trustee and beneficiaries of a trust.

governing committee

The committee of people appointed under a corporation's **rules** who manage and govern the corporation. The *governing committee members* have a **fiduciary duty** to act in the best interests of the corporation. *Governing committee* is the term used in the **ACA Act** - see also **board of directors**, which is the term used in the **Corporations Act**.

grant condition

When a government funding body gives a grant of money to an Indigenous corporation, the grant is subject to a range of conditions about the use of the money, and subsequent reporting and accountability requirements. For example:

- An **ATSIC** grant to a **CDEP** corporation will contain *grant conditions* that state that the money can only be used for **CDEP** purposes. It may also include rules about how the **CDEP** scheme must operate, and how the money can be used to buy equipment, office space, etc. The grant conditions will also require that the **CDEP** corporation keep financial records of how the grant money is spent, and requiring the **CDEP** corporation to provide financial reports to **ATSIC**. It may also give ATSIC the right to appoint a **grant controller** under certain circumstances.

grant controller

A *grant controller* is someone who is appointed to a corporation by a government funding body to manage grant money, where the funding body is worried that the corporation is not using the money properly. Government funding bodies may reserve the right to appoint a grant controller under their **grant conditions**. The role of a *grant controller* is similar to the role of a **receiver**, but is often more limited.

incorporation

The process by which a **corporation** is formed and recognised under the law. The process for *incorporation* is regulated by the relevant **incorporation statute**.

incorporation

A law under which a corporation may be formed. Generally, this statute will also regulates some of the activities of corporations formed under it.

statute The **ACA Act** is an *incorporation statute*. So are the **Corporations Act**, and the **State Association Incorporation Acts**.

insolvent When a corporation is unable pay its debts when they become due and payable to its **creditors**.

interventionist Taking a role of active involvement or interference in the affairs of a corporation.

liquidation The winding-up of a company, halting its business, realising its assets, discharging its liabilities, and dividing any surplus assets among its members. The process of *liquidation* is undertaken by a **liquidator**. A *liquidation* may be voluntary or imposed by a court order.

liquidator A person appointed in a winding up of a company to assume control of the company's affairs and to discharge its liabilities in preparation for its dissolution. The *liquidator* ascertains the liabilities of the company, converts its assets into money, terminates its contracts, disposes of its business, distributes the net assets to **creditors** and any surplus to the proprietors, and extinguishes the company as a legal entity by formal dissolution.

mediation A process where people involved in a dispute agree to appoint a neutral third person ("the *mediator*"), whose job is to try to help them reach agreement. Unlike an *arbitrator*, a *mediator* does not make a decision about what should happen (see **arbitration**).

Native Title Act *Native Title Act 1993* (Cth). The *Native Title Act* sets up a system under which native title can be established through native title claims, and also under which native title can be extinguished by government or developers. The *Native Title Act* also sets up the systems of **NTRBs** and **PBCs**.

NTRB ***N**ative **T**itle **R**epresentative **B**ody*. An NTRB is a corporation which has been given specific native title functions under the Native Title Act. These include making or helping people make native title claims, responding to "future acts" by government or developers, helping settle arguments between native title groups, and helping native title claimants make Indigenous Land Use Agreements (ILUAs). Currently, any new *NTRB* must be incorporated under the **ACA Act**.

OATSIA *The **O**ffice of **A**boriginal and **T**orres **S**trait **I**slander **A**ffairs*. OATSIA is the part of **DIMIA** responsible for Indigenous affairs, and provides support to the Minister for Immigration, Multicultural and Indigenous Affairs.

objects The purposes for which the **corporation** is established. The **ACA Act** requires that **ACA Act corporation** includes a statement of the corporation's *objects*. An **ACA Act corporation** cannot lawfully do anything which goes beyond what its *objects* allow. For example, if a company's *objects* state that it is for education purposes, but it undertakes native title work, it is breaching its *objects*, and anything it does for native

	title purposes is **void**. The **Corporations Act** does not require a corporation to include a statement of the corporation's *objects*, although corporations may if they wish. Actions done in breach of a **Corporations Act** corporation's *objects* will not be void.
officer	An *officer* is any person who takes part in the management of a corporation. This may include employees such as senior staff, as well as **directors** or members of the **governing committee**.
ORAC	***O**ffice of the **R**egistrar of **A**boriginal **C**orporations* – ORAC is the office which supports the **Registrar** and is the Commonwealth **regulator** responsible for administering the **ACA Act** and regulating corporations incorporated under the **ACA Act**.
PBC	***P**rescribed **B**ody **C**orporate* – A specific type of Indigenous corporation which must be incorporated under the **ACA Act**, for the purpose of managing native title after a successful native title claim. The use of a *PBC* is required by the **Native Title Act**.
pecuniary interest	An interest involving money; a financial interest. For example, if you stand to make money out of a deal, you have a *pecuniary interest* in the deal.
permissive	Flexible; allowing the freedom to decide the best way to do things (opposite of **prescriptive**).
prescriptive	Giving directions or determining the manner in which certain actions must be performed (opposite of **permissive**).
provisional liquidation	The safeguarding of a company's business and property pending the application for a winding up order. A *provisional liquidation* is undertaken by a **provisional liquidator**.
provisional liquidator	A person appointed to safeguard the company's business and property pending the outcome of an application for a winding up order. The role of the *provisional liquidator* is limited, and his or her primary duty is to preserve an existing status quo, with the least possible harm to all concerned.
public officer	A special position appointed by the **governing committee** of an **ACA Act** corporation. The **public officer** has certain roles he/she must perform, including maintaining the **register of members**. The position is similar to that of a company secretary under the **Corporations Act**. A *public officer* does not have to be a member of the **ACA Act** corporation or its **governing committee**.
punitive	Focussed on punishment or penalties to address breaches in rules or laws – instead of being focussed on preventing those breaches in the first place.

quorum The minimum number of members of a **corporation** or **governing committee** required to be present for a meeting to be valid. For example,

- if under an ACA Act corporation's rules say that the quorum for an **AGM** is 25 people, then the **AGM** can only take place if more than 25 people show up. If the **AGM** goes ahead with less than 25 people, it is **void**.

ratify, ratification Confirming an act of the **corporation** which the **corporation** or a person acting on its behalf had no power or authority to perform. For example:

- if a governing committee member enters a contract on behalf of a corporation, and it later turns out that the governing committee member was not properly appointed, the other governing committee members can *ratify* the contract, so that it is valid.

There are limits on what can be ratified. Under the **ACA Act**, those limits are very narrow.

receiver A **receiver** is a person appointed by a **creditor** or a court to investigate and play a role in the management of the affairs of a company which has run into financial difficulties. Creditors will often include a right to appoint a *receiver* in a contract lending or investing money in a corporation. A *receiver* generally has the power to do anything necessary to achieve the objectives for which the *receiver* was appointed. In the case of receivers appointed by a creditor, this will usually be limited to protecting the creditor's money or investment.

Unlike **administrators**, *receivers* generally work with the **governing committee** or **board of directors** of a corporation, and are also deemed to be an officer of the corporation (so they are bound by directors duties).

Unlike **grant controllers**, *receivers* are regulated by the **Corporations Act**, which requires them to act in the best interest of the corporation as well as in the interest of their appointer. They also have to be qualified as registered liquidators, and must make publicly available reports about the corporation and their actions.

receivership The process in which a **receiver** is appointed to a company to collect or protect property for the benefit either of the appointor or the persons ultimately entitled to that property. *Receivership* is typically initiated where a company is at or near insolvency. The aim of *receivership* is generally to protect the **creditor's** assets or funding.

register of members A list of all the current members of a corporation. Under the **ACA Act**, the **public officer** of a corporation must keep an up-to-date *register of members*, and the **governing committee** must provide ORAC with a copy every year.

Registrar *The **Registrar** of Aboriginal Corporations* – The Registrar is the person who is appointed to head **ORAC** and has specific powers given to him/her under the **ACA Act**, as the **regulator**.

Regulations Laws which Parliament has allowed the government to make after certain guidelines have been established. These are usually developed by a government department and then formally made by the Governor-General. *Regulations* can only be made where an Act of Parliament allows them to be made, and they are generally laws of an administrative nature (dealing with the details of how the Act works in practice). For example, the list of fees payable under the **ACA Act** are not set out in the **ACA Act**, but are instead left to the *Aboriginal Councils and Associations Regulations*.

regulator The person or body responsible for administering and ensuring compliance with an **incorporation statute**, for example:

- **ORAC** is the *regulator* under the **ACA Act**;
- **ASIC** is the *regulator* under the Corporations Act; and
- The NSW Department of Fair Trading (and the Minister of Fair Trading) is the *regulator* under the NSW *Associations Incorporation Act*.

rules A corporation's *rules* are the rules by which the corporation operates. "*Rules*" is the term used in the **ACA Act**. The **Corporations Act** uses the term "**constitution**". Under the **ACA Act**, a corporation's *rules* must deal with certain issues, including:

- who is eligible for membership;
- how the **governing committee** is to be appointed and what its powers are;
- procedures for governing committee meetings;
- procedures for settling disputes between members of the corporation;
- how the corporations' funds are to be managed;
- how the *rules* can be amended or varied;
- how the **objects** can be altered.

The **ACA Act** also requires that the **Registrar** approve a corporation's *rules*. The **Registrar** must refuse to do so if the rules are "unreasonable or inequitable" or "do not provide the members effective control over the running of the association".

The Corporations Act does not impose similar requirements and is much more flexible and **permissive** in its approach to a corporations' rules. A number of the State Association Incorporation Acts are also more permissive.

shadow director Someone who effectively runs the corporation and tells it what to do, even though that person might not be a **director**/**governing committee** member or have an elected or formal role in the **corporation**.

special measure An action undertaken by the government to try to make up for a disadvantage suffered by a specific group of people. S*pecial measures* might include:

- State Aboriginal land rights Acts; and
- Equal employment opportunity ("EEO") Acts and programs which encourage and promote Indigenous people.

State Association Incorporation Acts The *State Association Incorporation Acts* are special State-based **incorporation statutes** which are mostly aimed at simple, non-profit corporations. They are generally cheap and easy to use compared with the Corporations Act, but can only be used for certain limited purposes. The *State Association Incorporation Acts* are the following Acts:

- ACT: *Associations Incorporation Act 1991*
- NSW: *Associations Incorporation Act 1984*
- NT: *Associations Incorporation Act 1963*
- Qld: *Associations Incorporation Act 1981*
- SA: *Associations Incorporation Act 1985*
- Tas: *Associations Incorporation Act 1964*
- Vic: *Associations Incorporation Act 1981*
- WA: Associations Incorporation Act 1987

Steering Committee The committee of representatives from government parliamentary bodies formed to guide and provide input into the current review of the *Aboriginal Councils and Associations Act 1976* (Cth), for which this Consultation Paper was prepared. The bodies represented on the *Steering Committee* are listed in the Consultation Paper at paragraph 3.

transaction A business dealing, which if legally valid, creates rights and obligations for the parties involved in it. For example a contract with an outside party to purchase or sell goods or services:

- where an Aboriginal health corporation buys some medical equipment, that is a *transaction*;
- where a **CDEP** corporation enters a contract under which it gets paid to run a rubbish collection and recycling service, that is a *transaction*.

transactional certainty This is a non-legal term, which is used to describe the expectation that a **transaction** between a corporation and a person, or organisation outside the corporation, will be binding on and enforceable by both sides.

transitional arrangement If there is major reform of the **ACA Act**, it will take some time for all existing Indigenous corporations to adjust to the new law and legal requirements. To help make that adjustment, existing Indigenous corporations might be given some time (a "transition period"), and special legal arrangements might be put into place to help make the change. These are called *transitional arrangements*. Once the time is up for making the change to the new system, these arrangements finish, and all Indigenous corporations will have to comply with the reformed **ACA Act**.

umbrella A **corporation** whose members are other corporations; a corporation with

corporation	a corporate membership.
void	Not legally binding or enforceable; having no effect.
voluntary administration	Where the **governing committee** or **board of directors** of a corporation appoints an **administrator** (as opposed to the **Registrar** or a **creditor** appointing the administrator). This is a process which encourages the directors to take early and orderly steps to deal with an existing or impending state of **insolvency**. Directors have an incentive to transfer the management of the corporation to the administrator**,** which is to avoid liability for managing a corporation that is trading whole insolvent.
winding up	The process which is used to terminate a **corporation**. When a corporation is wound-up, a **liquidator** is appointed to pay off any debts and dispose of the corporation's assets (see also "**liquidation**"). After it has been wound up, the corporation is **deregistered**, and then no longer exists.

LIST OF APPENDICES

(PLEASE SEE ATTACHED APPENDICES)

Appendix A	"Snapshot" of the ACA Act
Appendix B	About the Review Team
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Appendix D	The Second Report – *Supplementary Policy Discussion Paper for "Option 5"*
Appendix E	The Third Report – *The Consultation Paper*
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Appendix G	History of Part III of the ACA Act

APPENDIX A

SNAPSHOT OF THE ACA ACT

SNAPSHOT OF THE ACA ACT

This Appendix contains a brief overview of the ACA Act as it currently stands.

Part I – Preliminary

1 Part I contains preliminary provisions such as the short title, commencement provisions, and definitions.

Part II – Registrar

Appointment of Registrar

2 Under Part II, the Minister may appoint a Registrar of Aboriginal Corporations **("Registrar")**. The Registrar must fulfil the functions and duties accorded to him under the ACAA and the regulations[1]. A Deputy Registrar may also be appointed to assist the Registrar in carrying out those duties and functions.[2] Both are engaged under the *Public Service Act 1999* and may resign by writing signed by them and delivered to the Minister.[3]

Delegation by Registrar and Acting Appointments

3 The Registrar may delegate any of his powers under the ACAA[4] to another person. An acting Registrar may also be appointed during the Registrar or Deputy Registrar's absence.[5]

Functions of Registrar

4 The functions of the Registrar are conferred by the ACAA. A general power is also conferred on the Registrar to do all things necessary or convenient to be done in or in connection with the performance of his functions.

5 In addition to those functions, the Registrar must[6] maintain a Register of Aboriginal Councils and a Register of Incorporated Aboriginal Associations. The Registrar must also advise adult Aboriginals on the procedures for establishing an Aboriginal Council and on the incorporation of Aboriginal associations.

6 The Registrar may also be required under the Rules of an Aboriginal Council to arbitrate when a dispute arises.

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[1] S4(2) ACAA
[2] s4(4) ACAA
[3] s7 ACAA
[4] s9 ACAA
[5] s6 ACAA
[6] s5 ACAA

Part III - Aboriginal Councils

Establishment of Aboriginal Council

7 An application to establish an Aboriginal Council in a particular area may be made by a group of ten adult Aboriginals living in that area[7] to the Registrar.[8] The Registrar then convenes a meeting with adult Aboriginals living in that area[9] to discuss the functions[10] and area[11] of the proposed Aboriginal Council. Following the meeting, the applicants may withdraw or vary their application.[12] However, the area to which the application relates cannot be extended.[13]

8 The Registrar considers various factors to determine whether the application will be approved.[14] These factors relate to the consent of the Aboriginal people living in the area[15], the capacity of the proposed Aboriginal Council to fulfil its functions[16], the physical area to which the application relates[17] and the proposed name of the Aboriginal Council area.[18]

9 The Minister then consults and may make agreements[19] with affected Aboriginal Councils and their creditors.[20] If the application is approved, the Minister directs the Registrar to publish a notice in the Gazette.[21] If no direction is made, the Minister must provide reasons for his decision and direct the Registrar to refuse the application.[22]

Status and functions of Aboriginal Council

10 An Aboriginal Council is a body corporate[23] that may sue and be sued in its corporate name.[24] It may acquire, hold and dispose of real and personal property[25] and have a common seal.[26] The functions of an Aboriginal Council are stated in the Gazette notice published when the Aboriginal Council was established.[27]

11 An Aboriginal Council may submit a request to the Registrar to alter the functions of the Council.[28] Approved alterations are published in the Gazette.[29]

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[7] s11 ACAA
[8] s12 ACAA*A*
[9] s13 ACAA
[10] s13(b) ACAA
[11] s13(a) ACAA
[12] s15 ACAA
[13] s14 ACAA
[14] s16 ACAA
[15] s16(1)(A)(i) ACAA
[16] s16(1)(a) (ii) ACAA
[17] s16(1)(aa) and s16(1)(b) ACAA
[18] s16(1)(c) ACAA
[19] s17)(2)(a) – (e) ACAA
[20] s17(2) ACAA
[21] s17(5) ACAA
[22] s18 ACAA
[23] s19(3)(a) ACAA
[24] s19(3)(e) ACAA
[25] s19(3)(c) ACAA
[26] s19(3)(b) ACAA
[27] s20(2) ACAA
[28] s33 ACAA
[29] s33 ACAA

Composition of Aboriginal Council

12 Councillors are elected soon after the establishment of the Council.[30] The Registrar determines how[31] and when[32] the election is to be conducted as well as the number of councillors to be elected.[33] To be eligible to vote or be a candidate a person must be over the age of 18 years[34], living in the area of the Council[35] and Aboriginal.[36] Councillors are not required to contribute towards the payment of debts or liabilities of an Aboriginal Council.[37]

Part IV - Incorporated Aboriginal Associations

Process of Incorporation

13 In order to be registered as an Aboriginal Association the committee of the proposed association may apply to the Registrar. The application must be accompanied by a number of details, including the personal details of the committee members and the objects of the Association.[38]

14 On receiving an application for incorporation the Registrar, if satisfied that it is proper to do so, must issue a certificate of incorporation to the Association. If the Registrar is not satisfied with the application he must stipulate, in writing, the reasons for his refusal of the application.[39] The Registrar must refuse to issue a certificate of incorporation unless:

(a) The Association is formed for business purposes; or

(b) The Association is formed principally for dealing with land; or

(c) Upon incorporation the Association will have at least 25 members.[40]

On Incorporation

15 If the Registrar issues a certificate of incorporation, the Association becomes a body corporate with perpetual succession. The Association shall:

(a) Have a common seal;

(b) May acquire, hold and dispose of real and personal property; and

(c) May sue or be sued in its corporate name.[41]

16 An incorporated Association has the ability to raise and borrow money and secure the repayment of money so raised and borrowed.[42]

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[30] s21(1) ACAA
[31] s21(1)(c) ACAA
[32] s21(2)(d) ACAA
[33] s21(1)(b) ACAA
[34] s21(4)(b)(i) ACAA
[35] s21(4)(b)(ii) ACAA
[36] s21(4)(a) ACAA
[37] s41 ACAA
[38] s43(2) ACAA
[39] s 45(1) ACAA
[40] s45(3A) ACAA
[41] s46 ACAA

Membership of the Association

17 A person who is not Aboriginal, or the spouse of an Aboriginal, is not entitled to become a member of an Incorporated Aboriginal Association.[43] Specified rights of membership (other than the right to vote at meetings of the Association and the right to stand for election to the Governing Committee of the Association) may be conferred on persons not entitled to become members if more than 75% of the members of the Association agree.[44]

18 A person may not hold office as a member of the Governing Committee if they have committed an offence involving fraud or misappropriation of funds and were imprisoned for at least 3 months; or convicted of any offence and imprisoned for at least 1 year. Previous convictions are irrelevant to a person's election if at least five years have elapsed since the date of conviction.[45] A member of the Governing Committee ceases to hold office if he or she becomes bankrupt.[46]

19 A member of the Governing Committee must disclose their pecuniary interests in a matter if that matter is being considered by the Committee. The member must not take part in discussions relating to the matter unless the Committee has approved their participation. If disputes arise between members of the Association, the Registrar has the power to arbitrate.[47]

Alterations to the Association

20 If the Association wishes to alter its objects it must notify the Registrar of any changes within 6 weeks of the alteration. If the Registrar refuses to give his approval, the Association must be notified, in writing, of the reasons for his refusal.[48] The Association has an avenue of appeal to the Minister.

Meetings and records of the Association

21 The Governing Committee must conduct annual general meetings and special general meetings according to the Rules of the Association.[49] The Registrar also has the power to call special general meetings under certain circumstances.[50]

22 The Governing Committee must ensure than proper accounts and records are prepared and kept by the Association. As soon as practicable the Committee must release a Committee's Report which must include an income and expenditure statement and a balance sheet.[51] A copy of the Report must be filed with the Registrar.

Winding up of an Association

23 An Association may be voluntarily wound up, or wound up under an order of the Court.[52]

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[42] s51 ACAA
[43] s49(1) ACAA
[44] s49A ACAA
[45] s49B ACAA
[46] s49E ACAA
[47] Procedures are set out in s58A ACAA
[48] s52(2) ACAA
[49] s58B ACAA
[50] s58B(2)-(5) ACAA
[51] s59(2) ACAA
[52] s 62-s67 ACAA

Part V - Investigation and Administration of Aboriginal Corporations

Investigation of an Aboriginal Corporation

24 The Registrar may investigate the affairs of an Aboriginal corporation if he reasonably suspects that:

(a) The corporation has failed to comply with a provision of the Act; or

(b) There has been an irregularity in the corporation's financial affairs.[53]

25 To assist in this investigation the Registrar may call on a person (in writing) who has knowledge of the affairs of the corporation to answer questions or produce documents[54]. Any person who fails to attend before the registrar[55], or provides false or misleading information[56] shall be liable to punishment under the Act.

26 Where it is necessary for the Registrar to enter the land or premises occupied by the corporation under investigation he may examine, take possession or make copies of any books that relate to the affairs of the corporation.[57] However, he must allow any person that would ordinarily have had access to the books in his possession to inspect them.[58]

Appointment of an Administrator

27 Before the Registrar can appoint an administrator he must serve on the public officer of the corporation a notice calling on the corporation to demonstrate why an administrator must not be appointed.[59] Taking into account any submissions from the Corporation the Registrar may appoint an administrator if the following grounds have been established:

(a) Incorporated Aboriginal Associations – the Association has been trading at a loss for at least 6 of the last 12 months[60]; the members of the Association have acted in their own interest or otherwise in a way that is unjust to members[61] or the appointment of an administrator is necessary to protect the interest of creditors.[62]

(b) Aboriginal Councils – the Council has failed to comply with a provision of this Act, the regulations or the Rules without explanation[63], or the appointment of an Administrator is required in the interest of Aboriginals in the Council area.[64]

28 Upon appointment of an administrator the positions of public officer of a corporation; members of the Governing Committee of an Association and councillors of a council become vacant.[65] Instead, the Administrator is responsible for the affairs of the Corporation.[66] Thus, the Administrator may vary or cancel any contract or agreement for

[53] s 68(1) ACAA
[54] s68(2) ACAA
[55] s69(1) ACAA
[56] s69(2) ACAA
[57] s70(1) ACAA
[58] s70(2) ACAA
[59] s71(1) ACAA
[60] s71(1)(a) ACAA
[61] s71(1)(c) ACAA
[62] s71(1)(d) ACAA
[63] s71(1)(b) ACAA
[64] s71(1)(e) ACAA
[65] s73 ACAA
[66] s75 ACAA

employment between the corporation and any other person.[67] A person may apply to the Administrative Appeals Tribunal for a review of any such decision. [68]

29 The Administrator must declare any interest they have in the Corporation.[69] They are also required to provide the Registrar with such information as they require from time to time.[70] The Administrator is not subject to any action or claim or liable to any person for act done within the performance of their duty.[71]

Cancellation of Appointment of Administrator

30 Once the Registrar determines it is no longer necessary for there to be an Administrator he must conduct an election to fill the offices of councillors or the members of the Governing Committee of the Association.[72] If the Registrar cancels the appointment of the Administrator and does not immediately appoint another one the conduct of the affairs of the corporation vests in the Council or the Governing Committee.[73]

Part VI - Miscellaneous

31 Part VI covers miscellaneous matters. For example, the Minister or Registrar can extend the time for performance of part of the ACAA in special circumstances.[74] In addition, s4K(2) of the *Crimes Act* doesn't apply to an offence under the ACA Act.[75]

[67] s76 ACAA
[68] s77 ACAA
[69] s 75A ACAA
[70] s77C ACAA
[71] s77B ACAA
[72] s77D ACAA
[73] s77E ACAA
[74] s79 ACAA
[75] s79ACAA

APPENDIX B

ABOUT THE REVIEW TEAM

James Whittaker – Corrs Partner and Team Leader

Partner James Whittaker, was the Registrar's primary point of contact in relation to this project and team leader.

Experience with Indigenous Legal Issues

James relevant experience includes:

- He was responsible for co-ordinating and co-authoring Corrs' contribution to the Public Interest Legal Centre's submission to HREOC's Stolen Generation Inquiry including preparation of specific papers on the effect of removal on the ability of potential applicants to pursue native title claims.

- Between 1997 and 1999, James was the Principal Legal Officer for the Cape York Land Council. James' responsibilities included supervising and running the Land Council's claims under the Aboriginal Land Act (Qld) and the Native Title Act, providing general, legal and policy advice on a range of issues including compliance with the requirements of the Act.

- He also participated in negotiations leading to the landmark $200 million Alcan - Ely Bauxite agreement in Western Cape York and in the ongoing negotiations with other mining companies in the Cape York region. This involved analysing the available incorporation models, establishing a number of trusts and drafting incorporation documents for Aboriginal groups benefiting from the Ely Bauxite Agreement.

- James previously has been appointed as a Presidential Consultant by the National Native Title Tribunal to conduct a mediations between disputing Aboriginal groups.

- He assisted in the administration of ATSIC grant controllerships for a number of Aboriginal corporations, as well as reviewing compliance by a native title representative body with ATSIC funding guidelines and drafted rules for Aboriginal associations.

- James was a member of ATSIC's Re-Recognition team. In that capacity he reviewed approximately one third of the NTRB's in Australia. He was also a member of ATSIC's Transition Management Team. In that capacity he:

    - assisted in the drafting of a native title procedures manual;

- assisted ATSIC develop the policy framework for implementation of the Native Title Act Amendments;

- provided advice about the relationship between the Native Title Act and the Aboriginal Councils and Associations Act;

- provided specific advice on a range of additional matters including strategic planning, funding, internal review, administrative law and transfer of documents from one Native Title Representative Body to another.

- James was part of team that undertook a major internal review of the corporate governance of the Indigenous Land Corporation, working to the Honourable Andrew Rogers QC;

- Working with Dr Martin and Dr Finlayson, James advised the Victorian Attorney General about confidential matters relating to native title determinations;

General Legal Experience

James is also a dispute resolution specialist and has experience in proceedings before the Federal Court, the NSW Court of Appeal, the Supreme Courts of NSW and Queensland, the District Court, the Land & Environment Court and numerous Commissions and Tribunals including Industrial Commissions, the Human Rights and Equal Opportunity Commission (Cth), the Anti-Discrimination Tribunal (NSW), Royal Commissions and the NSW Crime Commission.

He has particular expertise in the strategic management and planning large scale litigation. He has acted for a number of clients in matters that have exceeded one month sitting time including matters in the Federal Court, Supreme Court of NSW and various tribunals. His areas of speciality include litigation dealing with insolvency, corporate governance issues, inquiries and investigations and commercial disputes.

Recent Major Transactions

James' recent experience includes:

- Leading the Corrs team advising US-based Lucent Technologies on all issues arising from the collapse of One.Tel, creating a potential exposure to Lucent in excess of $1.2B.

- Advising Ferrier Hodgson, liquidator of Market Holdings, one of the Plaintiff's in a $50 Billion claim against National Australia Bank.

- Advising a NSW Government Department in relation to a commercial dispute which tested the applicability of the Trade Practices Act and Fair Trading Act to the Department's activities.

- Advising AMP Limited about matters relating to the collapse of HIH Limited.

- Advising NRMA Limited in proceedings in the ACT Supreme Court concerning publications by Channel Nine on the Sunday Program.

- Advising AMP Limited in relation to its rights and obligations as a seed shareholder in telecommunications start up COMindico Holdings Pty Limited.

- Advising on and drafting numerous Deed of Company Arrangement.

- Acting for Woolworths Limited, Parker Enzed, Channel 7, NRMA Ltd and Leighton Contractors Pty Ltd in respect of a raft of commercial disputes.

Tig Pocock – Corrs Senior Associate

Tig's experience includes a working at the Cape York Land Council in Cairns.

During the time he spent at Cape York Land Council, Tig was involved in a wide range of activities relating to Aboriginal land rights including under the *Native Title Act 1993* (Cth) and the *Aboriginal Land Act* 1991 (Qld). Tig has also worked on matters relating to native title in the form of significant legal and policy advice to ATSIC and State governments.

His relevant experience includes:

Aboriginal Corporations

- Drafting of rules for Prescribed Bodies Corporate (PCB's) under the Native Title Act and the Aboriginal Councils and Associations;

- Drafting and amending rules for a range of other (non-native title) Aboriginal associations under the Aboriginal Councils and Associations Act;

- Assisting various Aboriginal associations conduct meetings (annual and special general meetings and board meetings);

- Drafting a manual for ATSIC to assist Native Title Representative Bodies comply with their legislative obligations, primarily under the Native Title Act, but also under certain aspects of the Aboriginal Councils and Associations Act;

Native Title

- Negotiation of a significant Indigenous Land Use Agreements (ILUA's);

- Negotiation and drafting of consent native title determinations;

- Preparation of native title determination applications and materials for the purposes of the registration test for native title applications;

- Conducting regular meetings with claimant groups in remote locations;

- Briefing senior State government officials (up to and including Ministerial level) on specific native title proposals (for CYLC).

- Preparing high level policy and legal advice on native title for State government;

- Preparation of policy and legal advice to CYLC executive; and

Aboriginal Land Act

- Assisted in running a significant claim over Mungkan-Kaanju National Park, (Cape York) his role including proofing and taking evidence from witnesses before the Aboriginal Land Tribunal and drafting of submissions;

- Advising and assisting claimants in setting up appropriate organisational structures for trusteeship of claimed land.

Consultant Barrister – Christos Mantziaris

Christos is a Barrister with the ACT Supreme Court and has consulted to a range of Aboriginal corporations and state owned corporations. Christos specialises in government commercial law and corporate law and has lectured in these areas of law at the Faculty of Law, Australian National University, Canberra. He has also lectured in Company Law in Trusts and Equity.

Christos has been involved in a number of consultancy projects relevant to the Registrar including:

- Consulting to the National Native Tribunal on Native Title Corporations including the interaction of the *Aboriginal Councils and Associations* Act and the *Native Title Act* 1993 (Commonwealth) together with anthropologist David Martin.

- Consulting with ATSIC on the interaction of the *Native Title Act* and the Act

- Acting for the Cape York Council in the area of government commercial law (while at Blake Dawson Waldron)

- Consulting to the Parliamentary Library in government commercial law and constitutional law

Christos has written a number of publications dealing with a range of issues in the context of legislation and Indigenous law. He has also been involved in major research projects on state-owned corporations and Indigenous corporations.

Chartered Accountants: Senatore Brennan Rashid

Eddie Senatore – Principal and Mamun Rashid – Principal

Eddie Senatore and Mamun Rashid are chartered accountants with the firm Senatore Brennan Rashid (SBR). The firm has Insolvency practitioners and management consulting specialists. SBR provides consulting services to government departments, organisations and agencies as well as advice to solicitors, accountants and financial institutions on commercial matters.

They have a number of publications pending with respect to the interaction between common law insolvency and the interaction with the Act.

SBR's relevant firm experience includes:

- Undertaking a review of organisations funded by ATSIC including the organisation's compliance with grant conditions and its capability of promoting the objectives of the grant. SBR also reviewed organisations in relation to management planning and development and compiled reports on ministerial processes;

- Being registered administrators of the Act and undertaking an examination assignment on behalf of the Registrar;

- Ministerial Assessments for Native Title Representative Bodies;

- Appointment as Grant Controller to Cobowra CDEP Aboriginal Corporation and to Wallaga Lake CDEP Aboriginal Corporation;

- Major reviews of Aboriginal Organisations including the following:

  Aboriginal Torres Strait Islander Commission

  - government funded grant reviews
    - ⇒ feasibility study
    - ⇒ business funding scheme
    - ⇒ management planning and development
    - ⇒ community surveys
    - ⇒ grant controller
    - ⇒ ex-poste and ex-ante program evaluations
    - ⇒ assessment reports for ministerial processes

  Registrar of Aboriginal Corporations

  - examination

  Aboriginal Organisations Reviewed

  - Wreck Bay Aboriginal Corporation
  - Munjuwa Aboriginal Corporation
  - Aboriginal Corporation for Sporting & Recreation Activities
  - South Coast Youth Movement Aboriginal Corporation
  - Illawarra Aboriginal Medical Services Corporation
  - Dharawal Housing Aboriginal Corporation
  - Eden Local Aboriginal Land Council

Anthropos Consulting Services

David Martin – Consulting Anthropologist

David is currently an independent consultant to a number of organisations and a Research Fellow at the Centre for Aboriginal Economic Policy Research (CAEPR), Australian National University. In his capacity both as a consultant and at CAEPR, David has conducted wide ranging research with a focus on policy implications of the engagement of Aboriginal social political and economic systems.

Earlier in his career David was an Outstation Co-ordinator for the Aurukun Community for seven years, working with the inhabitants to develop a logistic and infrastructural support for the various outstations. This required fluency in the local language (Wik Mungkan) and a sensitivity to the needs of the Aboriginal peoples' cultural and social mechanisms.

David was appointed for special tenure to the Queensland Division of Aboriginal and Islander Affairs (1990 – 1993) to develop policies incorporating Aboriginal interests in the management of National Parks and options for land rights in Queensland. He also advised on the development of policy options regarding issues of Aboriginal community development.

Relevant research with multidisciplinary teams

The majority of David's further work in research and consultancy has been as part of multidisciplinary teams including extensive collaboration with Aboriginal colleagues. Relevant experience is as follows:

- Engaged by the National Native Tribunal to undertake a major research project in conjunction with Christos Mantziaris on the significant legal and anthropological issues of the Prescribed Bodies Corporate regime under the *Native Title Act* 1993. Research also explored the issue of internal and external accountability and mechanisms for maximising accountability with regard to Aboriginal social and political values.

- Engaged by the Institute of Aboriginal and Torres Strait Islander Studies to review organisational structures for Indigenous people and accountability within those structures including recommendations for a more flexible ACA Act.

- Worked with the Institute of Aboriginal and Torres Strait Islander Studies developing Regional Agreements in relation to the *Native Title Act. The* research resulted in a published paper.

- Researched and published papers in a number of areas relating to the interface between Aboriginal and non-Aboriginal societies including co-authoring a paper on features of the ABS Remote Area Census Strategy, and research for recommendations on indigenous alcohol issues in remote communities.

Relevant Consultancy work

The major focus of David's consultancy work has been assisting indigenous groups to develop and establish effective organisational structures, community development, native title and land rights. Major consultancy work is as follows:

- Principal consultant on a long term project implementing the Century Mine Agreement between three Native Title Groups in the Gulf region, Queensland. The aim was to establish a special purpose organisation, (the Gulf Aboriginal Development Company), to administer the Agreement on behalf of the Native Title Groups, co-ordinate and facilitate employment, training and business ventures and to distribute funds to eligible corporations.

- The project required detailed collaborative work with legal practitioners in establishing representative and commercial organisational structures. Developing interpretive materials for the Native Title groups in relation to the Agreement and proposed structures were key elements of the project.

- Engaged by ATSIC to provide advice to the Federal Minister on appropriate structures and processes for a Native Title Representative Body to be established in north-western Queensland

- Provided a major report to the Minister for Aboriginal Affairs with regard to a proposal for a land council in north east Arnhem land. The report examined the processes and

recommended amendments to the *Land Rights Act* 1976 (Northern Territory) as well as accountability provisions relating to royalty associations.

- A continuing role in a range of capacities in the Wik Native Title claim in Cape York and undertaking anthropological site mapping work for the Aurukun Wik people to form evidence underpinning the claim. Preparation of anthropological materials and assisting lawyers and other specialists to advise Aboriginal people in relation to legal and policy issues was also a major part of the role.

- Engaged by the Victorian Department of Justice working with Dr Julie Finlayson to provide advice on appropriate criteria for consent determinations of native title.

- Consulted to Aboriginal groups and organisations in relation to developing land claims under the *Land Rights (Northern Territory) Act* 1976 and under the *Aboriginal Land Act* (Queensland).

- Assisted in developing the claim for the Mungkan (Wik) groups with traditional affiliations to the Mungkan-Kaanjy National Park under the Queensland Act.

- Conducted a workshop and produced a report on the feasibility of a successful joint venture arrangement with large agribusinesses on procedure for developing a live cattle export industry in Cape York

- Acted as negotiator between traditional Aboriginal landowners and Comalco Pty Ltd in its oil and gas exploration in the Aurukun area.

- Consulted to the Royal Commission into Aboriginal Deaths in Custody in its Aurukun hearings which involved working as a translator during court proceedings and preparing comprehensive written submissions to the Commission relating to its investigations.

Dr Mick Dodson

Chairperson of the Australian Institute of Aboriginal and Torres Strait Islander Studies

Dr Mick Dodson is a member of the Yawuru peoples the traditional Aboriginal owners of land and waters in the Broome area of the southern Kimberley region of Western Australia.

Dr Dodson is currently a Director of Dodson, Bauman & Associates Pty Ltd - Legal & Anthropological Consultants. He is formerly the Director of the Indigenous Law Centre at the University of New South Wales, Kensington.

Mick Dodson was Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner with the Human Rights and Equal Opportunity. He served as Commissioner from 27 April 1993 - 22 January 1998.

Born in the Northern Territory township of Katherine, Mick was educated in Katherine, Darwin and Victoria. He completed a Bachelor of Jurisprudence and a Bachelor of Laws at Monash University. He was awarded a Doctor of Letters from the University of Technology Sydney in 1998. He also holds an honorary Doctor of Laws from the University of NSW. He worked with the Victorian Aboriginal Legal Service from 1979 to 1981, when he became a barrister at the Victorian Bar. He joined the Northern Land Council as Senior Legal Adviser in 1984 and became Director of the Council in 1990.

From August 1988 to October 1990 Mick was Counsel assisting the Royal Commission into Aboriginal Deaths in Custody. He has been a member of the Victorian Equal Opportunity Advisory Council and secretary of the North Australian Legal Aid Service. He is a member and the current Chairman of the Australian Institute of Aboriginal and Torres Strait Islander Studies. He is the former Chairman of the National Aboriginal Youth Law Centre Advisory Board. He serves on the National Children's & Youth Centre Board and is the convenor of the Advisory panels of the Rob Riley and Koowarta Scholarships. Mick is also a member of the Publications Committee for the University of New South Wales Indigenous Law Reporter.

Mick Dodson has been a prominent advocate on land rights and other issues affecting Aboriginal and Torres Strait Islander peoples.

Mick Dodson is a vigorous advocate of the rights and interests of the Indigenous Peoples of the world. He was the Co-Deputy Chair of the Technical Committee for the 1993 International Year of the World's Indigenous People. He is also chairman of the United Nations Advisory Group for the Voluntary Fund for the Decade of Indigenous Peoples. He serves as a member of the Board of Trustees of the United Nations Indigenous Voluntary Fund.

Mick has for over a decade participated in the crafting of the text of the Draft Declaration on the Rights of Indigenous Peoples in the United Nation Working Group on Indigenous Populations and in its more recent consideration by the Working Group of the United Nations Commission on Human Rights.

Mick is a founding director of the Australian Indigenous Leadership Centre.

Patrick Sullivan

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Indigenous Regional Organisation and Governance
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Dr. Patrick Sullivan began tertiary study with South-East Asian Studies in 1977 following some years of travel in the region. He graduated with honours in SE Asian Studies and Social and Political Theory in 1980. He began to work in areas of Australian Aboriginal development in 1983 during fieldwork for a PhD in Anthropology. His numerous field studies and placements within indigenous organisations have involved practical research and advice on issues of land use and distribution, community control of community development, and governance institutions at the local and regional levels.

Professional Experience

2002 ->	Visiting Research Fellow
	Indigenous Organisation and Governance
	Australian Institute of Aboriginal and Torres Strait Islander Studies
2001- 02	Consultant Anthropologist
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1999-00	Senior Research and Policy Officer
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1998-99	Senior Anthropologist
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1997-98	Consultant Anthropologist
1994-97	Research Fellow
	North Australia Research Unit
	Darwin, Northern Territory.
1993-94	Senior Anthropologist
	Kimberley Land Council
1991-93	Lecturer Aboriginal and Intercultural Studies
	Edith Cowan University, Perth, Western Australia
1989-90	Research Officer
	Royal Commission into Aboriginal Deaths in Custody
	Perth, Western Australia.
1986-89	Consultant Anthropologist
1983-85	Resource Coordinator
	Ngoonjuwah Aboriginal Resource Agency,
	Halls Creek, Western Australia.

Publications

1 Monographs

- Social Relations of Dependence in a Malay State: 19th Century Perak, Malaysian Branch of the Royal Asiatic Society, Monograph No: 10, Kuala Lumpur.
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2 Edited volumes

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- 'Native Title and Regional Agreements: the Kimberley case' CAEPR seminar series Policy Aspects of Native Title Canberra May.

- 'From Land Rights to the Rights of Peoples' Land Rights Past Present and Future joint conference of the Central and Northern Land Councils for the 20th anniversary of the Land Rights (NT) Act Canberra 16-17 August.

- 'Conflict and Authority - the Rubibi Case' Fighting Over Country native title workshop series jointly sponsored by Australian Anthropological Society and Australian Institute of Aboriginal and Torres Strait Islander Studies Canberra 30 Sept - 1 Oct.

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APPENDIX C

REVIEW OF THE ABORIGINAL COUNCILS & ASSOCIATIONS ACT 1976

POLICY OPTIONS DISCUSSION PAPER

October 2001

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REVIEW OF THE *ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976*

POLICY OPTIONS DISCUSSION PAPER

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CHAPTER 1 INTRODUCTION & EXECUTIVE SUMMARY

A. BACKGROUND TO REVIEW

1.1 Since its commencement, the *Aboriginal Councils and Associations Act 1976 (Cth*) ("**the ACA Act**") has become a significant vehicle for the exercise of self-determination and self-management by a broad range of Aboriginal and Torres Straight Islander associations. There are currently some 3,000 Aboriginal and Torres Straight Islander associations incorporated under Part IV of the ACA Act. Significantly, these corporations have also come to play a central role in the delivery of Government services (whether Federal or State).

1.2 Nonetheless, the ACA Act has been the source of much comment and criticism, in particular over the last 10 years.

1.3 Since the last amendment of the ACA Act in 1992 (which saw increased external "accountability" measures introduced) there have been several significant reviews of the ACA Act, as well as two Bills proposing legislative reform, which eventually lapsed. The reasons for the lapse of these Bills and the findings of the reviews not being acted on in legislative reform are varied. However, there are a number of important issues raised by those reviews and proposed amendments which remain unanswered and unresolved.

1.4 There have also been significant external developments in that period. Most notably, fundamental changes to the Corporations Law, the advent of native title (and the complex interactions between the *Native Title Act 1993 (Cth)* ("**the NT Act**") and the ACA Act) and even greater emphasis by government on the need for "accountability" of Indigenous corporations for public monies. (The developments mentioned in this and the preceding paragraph are considered in more detail in Chapters 2 and 3 of this Paper)

1.5 In 2000, a new (acting) Registrar was appointed. The previous Registrar had held the position for 9 years. The new Registrar decided that the change in administration provided a timely opportunity to review the ACA Act and the way it is administered, as well as an opportunity to consider the issues arising from the changed policy environment, and the issues raised by previous reviews but which remain unresolved.

1.6 Against this background, in October 2000 the Acting Registrar of Aboriginal Corporations sought written expressions of interest from persons wishing to undertake an internal review of the ACA Act.

1.7 The terms of reference developed by the Registrar are as follows:

> *1. Taking into account the original purpose of the Act as a simplified regime of incorporation and corporate governance for Indigenous bodies, and how that purpose has been implemented over time, consider whether the Act remains an appropriate mechanism for this purpose. In particular, consider whether:*
>
> *(a) the provisions of the Act (and regulations) should be brought more into line with the Corporations Law, and if so how; and*
>
> *(b) it might be better for some categories of intending corporations to incorporate under the Corporations Law and State/Territory Associations Act or similar.*

2. Compare the Act and the regulations with comparable State and Territory Associations and similar acts and the Corporations Law and recommend how they might be amended to reflect good practice in these regimes;

3. Assess the requirements under the Native Title Act for the incorporation of Native Title Representative Bodies and Prescribed Bodies Corporate under the Act and how changes to the Act and the regulations might ensure improvements and consistency;

4. Assess the relevance and appropriateness of changes to the Act proposed in the:

- *Aboriginal Councils and Associations Legislative Amendment Bill 1994;*
- *Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995*

5. Examine the Act and the regulations and similar legislation and consider whether the Act should be amended to:

- *include education and training as a statutory function of the Registrar:*
- *include mediation (as well as arbitration);*
- *allow for companies and corporations to be members of Aboriginal corporations/umbrella organisations being established under the Act;*
- *continue the need in the Act for categories of corporations (eg associations formed wholly for business purposes, associations formed principally for the purpose of owning land or holding a leasehold interest, etc);*
- *allow the Registrar to alter unworkable rules or to exempt corporations from the operation of unworkable rules on application;*
- *include changes to make the current examination powers of the Act more effective;*
- *allow the Registrar to remedy inadvertent errors in official documents issued by the Registrar – for example: typographical errors in the official name of a corporation;*
- *allow for more flexible annual financial reporting arrangements by corporations;*
- *provide for the electronic lodgement of documents, and the conduct of business under the Act in electronic form and compliance with the Electronic Transactions Act 1999;*
- *provide for teleconferencing (in relation to committee and general meetings);*
- *formally regulate the use of proxies at general meetings;*
- *align the penalty provisions with the Corporations Law;*
- *provide for video conferencing (in relation to committee and general meetings); and*
- *provide for term appointments for the office of Registrar.*

6. Assess the relevance and appropriateness of recommendations for changes to the Act and the regulations for previous reviews and studies and operations of the Office of the Registrar;

7. Identify financial and administrative arrangements and resources, best use of resources and practices and other measures that would be necessary to support:

- *the current requirements of the Act and the regulations;*
- *the legislative and administrative framework recommended by this review*

8. Consider the effectiveness of Part III of the Act and existing State/Territory legislation in meeting Aboriginal and Torres Strait Islander forms of local or regional governance;

9. Consider any other relevant matters on the advice of the steering committee.

1.8 In February 2001, the Registrar appointed a Review Team led by Corrs Chambers Westgarth, but also including Anthropos Consulting, Senator Brennan Rashid, Mick Dodson, and Christos Mantziaris, each of whom brings specialist expertise to the review.

B. PURPOSE OF THIS POLICY OPTIONS DISCUSSION PAPER

1.9 This Policy Options Discussion Paper ("**Paper**") is intended to set out the more substantive policy issues that will need to be decided by the Steering Committee. It identifies and discusses the issues and suggests options relating to each issue.

1.10 The decisions made in relation to these key policy issues will determine the direction of any proposed reforms to the ACA Act. They will therefore also set the parameters and focus for the final report to be prepared for the present Review.

1.11 This approach has been adopted in order to:

- maximise accountability of the project to the Registrar and to the Steering Committee;
- ensure that project outcomes and recommendations are consistent with policy assessments and judgements of the Registrar and the Steering Committee; and
- ensure cost effective and efficient use of project resources.

1.12 It is envisaged that the policy options set out in this Paper will be discussed and settled with both the Registrar and the Steering Committee. Once the policy issues have been settled, it will be possible to prepare the final report which will focus in on the more technical issues arising from the preferred reform option(s) selected by the Registrar and Steering Committee.

1.13 It is anticipated that much of the work done in preparing this Paper will be suitable for incorporation into the final report. The Review Team has also already given extensive consideration to a number of more technical issues likely to arise from reform to the ACA Act. An outline of that work is set out in Attachment A. Much of the analysis contained in that body of work will be utilised in the final report, once the policy preferences of the Steering Committee have been established.

C. STRUCTURE AND OVERVIEW

1.14 This Paper is divided into five (5) chapters. An outline of each of these chapters and the issues and options identified in each of them, is summarised below.

Chapter 1 – Introduction and Executive Summary

1.15 Chapter 1 introduces the Paper, putting both the current review of the ACA Act and the Paper itself in context. It also includes a brief outline of the rest of the Paper.

Chapter 2 - Background

1.16 Chapter 2 provides a context for the policy issues which are addressed in Chapter 3. It is divided into two sections, dealing respectively with the origins and development of the ACA Act and contemporary Indigenous incorporation needs.

Origins of the Aboriginal Councils and Associations Act

1.17 This section provides the context for the Paper by setting out the policy origins of the ACA Act and how the underlying policy framework has changed over time – as a result of amendments to the ACA Act and the way in which it has been administered by various Registrars.

1.18 It suggests that the ACA Act has moved away from the original policy intent of providing a simple and "culturally appropriate" incorporation mechanism for Indigenous people, to a progressively more complex, prescriptive and inflexible regime, with significant emphasis on external "accountability".

Corporations and Contemporary Indigenous Societies

1.19 This section of the Paper first examines the place of incorporated bodies within contemporary Indigenous societies. It does this largely by outlining certain features of what can be termed "Indigenous organisational culture"; that is, distinctive values and practices which many Indigenous individuals and groups bring to bear in managing and participating in their organisations. It then briefly outlines the roles, functions and significance of Indigenous corporations against key relevant issues within contemporary Indigenous policy.

1.20 This section reveals that corporations have been adopted with enthusiasm by Indigenous people to serve a wide range of purposes and functions and are deeply integrated into Indigenous political, social and economic life. It will also be apparent from this section that ACA Act corporations now encompass a far wider and more complex range of goals, functions, incomes and asset bases than could have been contemplated by the legislature in the passage of the original ACA Act in 1976.

Chapter 3 – Policy Issues for Decision

1.21 Chapter Three then sets out the fundamental policy issues which will have to be decided for any reform of the ACA Act. It is these broad policy issues which will drive the shape and direction of the ACA Act.

1.22 The key issues for consideration are as outlined below. **Attachment B** contains a complete summary of all the key policy issues for decision, and the options for addressing them.

Chapter 4 – Models for Structural Reform

1.23 Chapter Four considers the broad structural models for reform of the ACA Act which would flow from the policy decisions made in response to the issues and options discussed in Chapter 3.

1.24 In brief, there are four possible options:

- Repealing the ACA Act, on the basis that other incorporation regimes can cater for all likely Indigenous incorporation needs, but retain the Registrar's office in a modified role to provide specialist assistance, advice, education and training for members and directors of Indigenous corporations.
- Focussing the ACA Act on providing a simple and flexible incorporation regime for small and simple Indigenous associations, and requiring other Indigenous associations to incorporate under other incorporation regimes.
- Retaining the ACA Act in essentially its current form, but making a number of changes to update it, address technical problems, and enable it to better cater for a broad range of corporations.
- Retaining the ACA Act as an incorporation regime for a wide range of Indigenous corporations, but adopt tiers of regulation to enable it to specifically address the issues facing different kinds and sizes of corporations.

Chapter 5 – Special Issues

1.25 Chapter Five addresses two discrete but central policy issues upon which the Steering Committee will need to provide direction to the Review Team. These are the interaction of the ACA Act with the NT Act, and the fate of Part III Councils.

Interaction with the Native Title Act

1.26 There are two principal areas of interaction between the ACA Act and the NT Act. Each of these poses special issues. Neither presents a comfortable interaction at present. These areas relate to:

- Native Title Representative Bodies; and

- Prescribed Bodies Corporate.

1.27 Native Title Representative Bodies ("**NTRBs**") perform a range of functions under the NT Act, and are (generally) required to be incorporated under the ACA Act. The prescriptive nature of the ACA Act, and in particular the requirement for control by members, has the potential to cause difficulties for NTRBs attempting to perform their functions under the NT Act. There does not appear to be any specific reason to require NTRBs to be ACA Act corporations.

1.28 Prescribed Bodies Corporate ("**PBCs**") are the bodies that either hold native title on trust for native title holders, or act as their agent. PBCs are also currently required to be incorporated under the ACA Act. As with NTRBs, there are also some direct conflicts between the NT Act and ACA Act requirements.

1.29 There are a number of different ways in which the interactions between the NT Act and the ACA Act may be resolved. There is a need for a solution that will consider the policy objectives of both statutes. Some native title objectives may be easier to accomplish if a more permissive approach to the corporate constitution were adopted under the ACA Act.

Aboriginal Councils and Part III

1.30 For a range of historical and political reasons, no Councils have been established under Part III of the ACA Act. It seems highly unlikely that any will be. Many aspects of the policy rationale for Part III have since been superseded in any case. On that basis, Part III should either be repealed, or significantly amended to ensure its continuing relevance. This could be through formalising roles for ATSIC regional councils or other broadly based but non-exclusive bodies which would then play coordinating roles between both Indigenous service-providing organisations in the region, and between those organisations and relevant State and Local government agencies. Another option would see Part III attempt to provide for a form of local government which would be acceptable to State and Territory governments.

CHAPTER 2 BACKGROUND

A. ORIGINS OF THE ABORIGINAL COUNCILS AND ASSOCIATIONS ACT

Introduction

2.31 It is now a quarter of a century since the ACA Act was enacted. In that period, there have been major changes in Australian society generally, in the circumstances of Indigenous groups and communities, and in government policies including those relating to Indigenous affairs and corporate regulation. Indigenous corporations have emerged as significant actors within Indigenous societies themselves, and play substantial roles in the implementation of self-determination and self-management. The ACA Act and its regulation have come under considerable scrutiny, including through previous Reviews. Most recently, there has been extensive discussion regarding the complex interaction of the ACA Act and the NT Act through the latter's Prescribed Body Corporate regime.

2.32 This section first provides a very brief account of the Indigenous policy issues which led to the enactment of the ACA Act in 1976 as a simple incorporation mechanism for Indigenous groups and communities. Secondly it briefly sketches in the subsequent development of the ACA Act and its regulator, the Registrar of Aboriginal Corporations. This development is characterised by an increasing emphasis on accountability of Aboriginal associations and a progressively more prescriptive regulatory regime.

2.33 The next section examines in summary form the roles and functions of Indigenous corporations within contemporary Indigenous societies, both for Indigenous groups, communities themselves and for government. These two sections of the Paper provide an analysis of the basic policy framework and the Indigenous socio-political environment against which reform options for the ACA Act must be assessed.

Development of the ACA Act

2.34 Institutionally, during the period 1967-72 Aboriginal affairs were developing as an important Commonwealth policy arena as well as a domain for program and service delivery. Such developments occurred following the Referendum of 1967 where an overwhelming majority of Australians agreed to amend the Constitution, firstly enabling the Commonwealth to concurrently exercise powers and legislate with the States on Aboriginal matters and secondly, to include Aboriginal people in the national census.

2.35 In 1967, the Commonwealth Liberal Government established the Council of Aboriginal Affairs ("**CAA**") to develop and implement policy under the imprimatur provided by the Referendum. The CAA had a significant impact on Indigenous affairs policy development, and its concerns presaged many if not most of the dilemmas confronting contemporary Indigenous affairs. This period of Commonwealth policy development marked a significant shift from assimilation to self-management and self-determination.

2.36 In a 1968 policy paper for the Liberal Government, the CAA advocated the need to provide for the incorporation of locally based Aboriginal groups and communities as an appropriate vehicle for self-determination. The CAA also advised the Government to adopt social policies more supportive of community-based social action and self-management.

2.37 In 1971 the idea of an incorporation statute for Aboriginal people was also specifically highlighted in a recommendation of the Gibb Committee following its inquiries concerning the situation of Aboriginal people on pastoral leases in the Northern Territory.

2.38 The policy shift to self-management and self-determination was also explicitly part of the Whitlam Labor Government's broad social reform agenda. The Labor Government sought particularly to implement legislation facilitating self-determination and community development as part of its reform agenda, which it saw as arising directly from the 1967 Referendum and the powers granted to the Commonwealth to implement beneficial legislation.

2.39 Aboriginal people were to be consulted regarding service delivery, which it was anticipated could be developed and managed in accordance with Indigenous community priorities and cultural requirements. Under "self-determination", it was envisaged that community priorities could be realised through government grants to Aboriginal community organisations. The capacity for communities to incorporate and for Aboriginal councils to be established was seen by the Labor Government as providing a legal solution to the question of Aboriginal self-determination.

Enactment of ACA Act in 1976

2.40 The ACA Act specifically emerged as one of the responses to the 1972–74 Woodward Aboriginal Land Rights Commission commissioned by the Commonwealth Government, which *inter alia* recommended the enactment of a simple, flexible and appropriate general incorporation statute for Indigenous people.

2.41 The intention was to enable Indigenous groups to incorporate in accordance with their own membership requirements, customs and decision-making practices, rather than forcing them to fit in with European legal concepts and procedures. The broad aim of the ACA Act was to provide a flexible, inexpensive and administratively simple system of incorporation that:

- enabled Indigenous groups to incorporate in a "culturally appropriate" way;
- provided accountability for the corporation's activities to the members of these groups and to outsiders dealing with the groups, particularly in using grant funds; and
- facilitated a system of local and regional governance for Indigenous communities in the provision of community services.

2.42 The resulting ACA Act broadly reflects the principles recommended in the Woodward Reports. In the Second Reading Speech, it was stated that the ACA Act was intended to

enable Aboriginal groups to incorporate in ways appropriate to Aboriginal culture. This was understood as the culture of traditionally-oriented Aboriginal people.

2.43 Parliament intended that Aboriginal corporations could be used as a bridge between the Australian legal system and Indigenous cultural values and practices. This broad policy aim is evident in section 43(4) of the ACA Act, which states that "[t]he Rules of an association with respect to any matter may be based on Aboriginal custom".

2.44 At the time, both incorporated associations legislation (designed for non-profit entities) and the "mainstream" companies legislation, had relatively complex corporate governance and reporting requirements. The ACA Act was seen as distinct from both incorporated associations statutes and companies legislation by reason of:

- its relative simplicity; and
- its utility for both profit and non-profit functions.

2.45 However, despite the intentions of the Government stated in the second reading speech, the Act that was passed was for many Aboriginal groups complex, highly regulatory, culturally alien and difficult to comply with. Non-compliance was soon a major issue. It must also be said that in some areas, unsound decisions by inexperienced groups and opportunism may also have led to regulatory concern, as more groups realised the potential for accessing grant funds following incorporation.

Subsequent development of the legislation and its regulation

2.46 It is arguable that increased public and political focus on the supposed lack of accountability of Indigenous corporations, and the difficulties that many Aboriginal corporations had in meeting the regulatory requirements of the ACA Act led, on the one hand, to amendments to the ACA Act in 1984 to allow the Registrar to exempt certain simple Aboriginal corporations from the reporting requirements of the ACA Act.[1] On the other hand, the Registrar commissioned a report (the Neate report) which led to substantial tightening of the reporting procedures for non-exempted corporations. In 1989 Graeme Neate made a number of recommendations in his *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976*.[2]

2.47 In 1992, the ACA Act was amended and the reporting requirements were extended in response to Neate's recommendations. The *Aboriginal Councils and Associations Amendment Act 1992 (Cth)* made a number of reforms to the ACA Act. The 1992 amendments were seen as the first stage in improving the accountability of bodies incorporated under the ACA Act.[3] Some of the measures are set out below:

- A widening of the scope to enforce compliance with requirements under the ACA Act (by giving the Rules the effect of a contract).
- General meetings were increased in importance.

- Enhanced accountability of the Governing Committee. Governing Committee members are now subject to duties of honesty, diligence and disclosure of interests which reflect the duties imposed on directors under the Corporations Law.

- increased reporting on irregularities in operations or financial affairs. The range of documents to be submitted for audit inspection now go beyond the balance sheet and include full income and expenditure statements. The auditor must report on compliance with the ACA Act, regulations and the corporation's Rules. The Registrar may, at any time, appoint an additional auditor.

- Enhancement of the Registrar's regulatory powers, particularly in respect to investigation and the appointment of an administrator. As the ACA Act now stands, the Registrar has the power to grant or refuse an application for incorporation. In exercising this power, the Registrar may consider the proposed Rules of Association. The Registrar's practice has become to recommend Rules that reflect the Office's Model Rules of Association. These represent a simplified version of the basic rules one would find in the Corporation Law's "Table A" which consists of a set of rules which, amongst other things, divide corporate power and its exercise between the general meeting and the board of directors.

- Once the corporation comes into existence, alterations to the Rules or changes of name must be filed with and approved by the Registrar. The Registrar may appoint an administrator to a corporation in trouble, request the Court to wind up the corporation, and investigate any irregularity or failure to comply with the ACA Act. The Administrative Appeals Tribunal may review the decisions of Administrators appointed under the ACA Act.

- The Registrar may also compel the appearance of any person, and has powers of entry, search and seizure. The Federal Court hears appeals from the decisions of the Registrar or complaints against the Registrar.

2.48 The Registrar's increasingly protectionist policy and the political requirement for tighter regulation of Indigenous corporations meant that the ACA Act came to be seen as oppressive and intrusive by many Indigenous groups.

Aboriginal Councils and Associations Legislation Amendment Bill 1994

2.49 The Registrar moved to further entrench the Office's regulatory functions. In 1994 and 1995 two further Amendment Bills were introduced to Parliament, which sought to duplicate many of the requirements of the Corporations Law, thereby increasing public accountability, and monitoring the expenditure of public money.[4] For example, the two amendment Bills sought to introduce requirements that annual financial statements be produced 'in accordance with accounting standards'.[5]

2.50 An important element of the Bills, and a significant departure from long standing institutional practice, involved not simply an upgrade of reporting requirements, but the

granting of independence from ATSIC to the Registrar's Office and further expanding the Registrar's powers.

2.51 The 1994 Bill included the following clauses:

- transformation of the Registrar's Office into an independent statutory authority;[6]
- examiners and investigators to examine a wider class of documents and to have power to question people under oath, subject to the right against self-incrimination;[7]
- disqualification from management of persons who had been convicted of certain offences, or who have previously been involved in corporate mismanagement;[8] and
- reform to make winding up processes identical to those in the Corporations Law.[9]

2.52 The Registrar supported these Bills as attempts to 'overhaul and modernise' the legislation.[10] It was argued that the original purpose of the statute as a simple vehicle for incorporation had been superseded by a new statutory purpose to aid corporate minorities by means of regulatory intervention.[11] Recommendations that the exercise of the Registrar's powers be subject to review by the Administrative Appeals Tribunal have not been adopted. Judicial review at common law or under the *Administrative Decisions (Judicial Review) Act 1977 (Cth*) or remedies under the *Ombudsman Act 1976 (Cth)* are the sole avenues for appeals from the Registrar's decisions.

The 1996 (Fingleton) Review

2.53 The Bills did not proceed through the Senate and lapsed. Instead, the then Minister for Aboriginal and Torres Strait Islander Affairs, Mr R Tickner, called for a further review of the Act. The Fingleton Review of the ACA Act was commissioned by ATSIC from the Australian Institute of Aboriginal and Torres Strait Islander Studies.

2.54 The terms of the Review arose from recommendations of the ATSIC Board, and the impacts of the changed policy environment over the previous two decades. They reflected a concern with three specific areas; cultural appropriateness, accountability, and self-governance. Underpinning the specific focus of the Review was also a general concern with the effectiveness of the ACA Act.

2.55 It recorded much dissatisfaction with the corporate reporting requirements, which were viewed as being disproportionately onerous in relation to the activities of most Indigenous corporations and the educationally disadvantaged status of their office-holders. A significant finding of this Review was that the ACA Act did not provide a straightforward process by which cultural differences could be accommodated in corporate governance, nor did it provide a simple or flexible method of incorporation for Indigenous groups.

2.56 The 1996 Review recommended two principal courses of action. These centred on first, re-writing the ACA Act to recapture its original intent, and second, on a shift of emphasis in

accountability, away from the corporate reporting system to 'direct accountability' to finance providers under service agreements and grant conditions. This would require the revision of ATSIC's funding system in order to highlight performance outcomes as the primary objective of accountability rather than the incorporation regime itself. However, the Review also provided a detailed set of recommendations ranging from legislative and financial matters to administrative reforms. None of the Review's recommendations were adopted.

B. CORPORATIONS AND CONTEMPORARY INDIGENOUS SOCIETIES

2.57 This section of the Paper first examines the place of incorporated bodies within contemporary Indigenous societies. It does this largely by outlining certain features of what can be termed "Indigenous organisational culture"; that is, distinctive values and practices which many Indigenous individuals and groups bring to bear in managing and participating in their organisations. It then briefly outlines the roles, functions and significance of Indigenous corporations against key relevant issues within contemporary Indigenous policy.

2.58 The core purpose of this section is to lay the foundations for the analysis in subsequent sections of the ACA Act and its reform options.

Corporations within Indigenous societies

2.59 There are a range of views which portray associations and other types of incorporated entities as alien institutions which have been imposed on Indigenous groups and communities. It should be accepted that there are frequently differing cultural understandings of the meaning of incorporation. Some of the difficulties this causes are discussed in more detail in later sections of this Paper.

2.60 However, Indigenous corporations have come to play more than an ancillary role in government service delivery, but have integral roles in Indigenous social, political and economic action. The evidence demonstrates that Indigenous groups have incorporated with enthusiasm for a multiplicity of reasons, absorbed corporations into their own cultural practices, and manipulated them with a vigour that had not been foreseen by the legislators.

2.61 Members and boards of Indigenous corporations typically bring to the operations of their corporations distinctive understandings and practices regarding such matters as the undertaking of responsibilities, the exercise of authority, the conduct of disputes, and the making of decisions. Formal legal abstractions such as "the interests of the corporation as a whole", central to the fiduciary duty of directors, may have little meaning within some Indigenous polities.

2.62 In many cases, Indigenous organisations are formed to promote the values, culture and identity of a particular grouping within Indigenous society, such as "tribes" or their constituent "families". Struggles over legitimacy and authority within the group are often transferred to the formal legal setting of the corporation associated with the group. Members of a corporate board may assert authority by virtue of their position *within the corporation* rather than their position *within the group*.

2.63 Such factors may be manifested in factional struggles to control the admission of members into a corporation and the composition of the register of members[12] or the challenge of a person's capacity to be a corporate member or hold public office on the ground that the person is not Aboriginal, or is not a member of the relevant Indigenous group.[13] Disputes within, or between, families may be converted into legal disputes that courts are required to resolve by reference to the particular legal action and the rules of corporate law it invokes,

rather than by reference to the broader process and interests of the Indigenous group itself.[14]

2.64 Given the requirements of ATSIC and other agencies for groups and communities to be incorporated in order to receive funding, Indigenous corporations also provide significant sites for competition over resources between groups and sub-groups. Case studies conducted for the Fingleton Review and reports of regulatory intervention provide empirical evidence of this competition over resources.[15] Sometimes the facts of intra-Indigenous competition for resources come before the courts as corporate law actions.[16] Such cases illustrate the centrality of corporations and their resources in contemporary Indigenous politics.

2.65 There is frequently intense competition between groups and sub-groups to ensure that they have their own representatives on the Board, or even to control it, since those from other groups can not be trusted to "represent" broader interests. It may be difficult to establish confidence in the accountability of the Board to either the membership of the corporation generally or to the clients or constituency, for as a rule, it will not be practicable for an institution to enable every class of interest to be directly represented on the board. Thus, a proposal to establish a corporation with a "broadly representative" board might be resisted by sub-groups or individuals within the Indigenous group, unless they can be assured that they will have a direct place on it.

2.66 Consequently, many Indigenous organisations are characterised by intense competition between different groups and by corporate histories in which competing factions alternate in their control of the board, or fission off to form new organisations. Political conflict in these organisations can often be conducted through manipulation of membership and meeting processes to establish control of boards (and therefore of organisational resources).[17]

2.67 This can also be manifested in organisations that have been established to deliver services to a broader Indigenous constituency, such as legal advice, native title and land rights representation, health or housing. Notwithstanding this broad service delivery basis, the boards of such organisations may comprise individuals associated with specific factions or families, rather than being drawn broadly from across the wider group or constituency. Such matters can be exacerbated by the reliance in the scheme of the ACA Act on control of the corporation through the general meeting of an undifferentiated membership.

2.68 It would be incorrect and unjustified to portray all Indigenous corporations as dysfunctional because of factors such as those outlined above. However, the evidence suggests that they are particularly vulnerable to failure in corporate governance. This can be seen in the case of associations incorporated under the ACA Act, although this must be read in the context of the relatively onerous reporting requirements under that statute.[18] In the financial year 1998–9, 274 of the 2,999 corporations registered under the ACA Act at the commencement of the financial year (that is, 9 per cent of the total) were "deregistered" in the course of the year.[19] A high proportion of these corporations did not comply with corporate reporting requirements, despite the adoption of a proactive corporate compliance strategy by the Office of Aboriginal Corporations.[20]

2.69 A significant workload for the Office was occasioned by complaints by aggrieved members of corporations, governing committee members and employees, as well as by government agencies and members of the public. The most common complaints alleged breaches of the corporation's rules of association, discriminatory conduct by governing committees, improper notice of and conduct of meetings, financial mismanagement, and improper restrictions on information available to members.[21] Fraud investigations conducted under the ACA Act have lead to a number of referrals to State and Commonwealth law enforcement agencies.[22]

2.70 While a lack of the requisite management skills is likely to be a significant factor in many of the problems identified above, the influence of ethical principles based on obligations and responsibilities to immediate kin and associates rather than to the broader "community" should not be discounted.

Roles and functions of Indigenous corporations

2.71 As previously discussed, the passage of the ACA Act in 1976 was one manifestation of a significant government policy shift from "assimilation "to "self-determination". The capacity of Indigenous groups and communities to incorporate under the ACA Act has been seen by them as an important aspect of self-determination. However, there are differing perspectives on what "'self-determination" entails, and its relationship to what is termed "self-management".

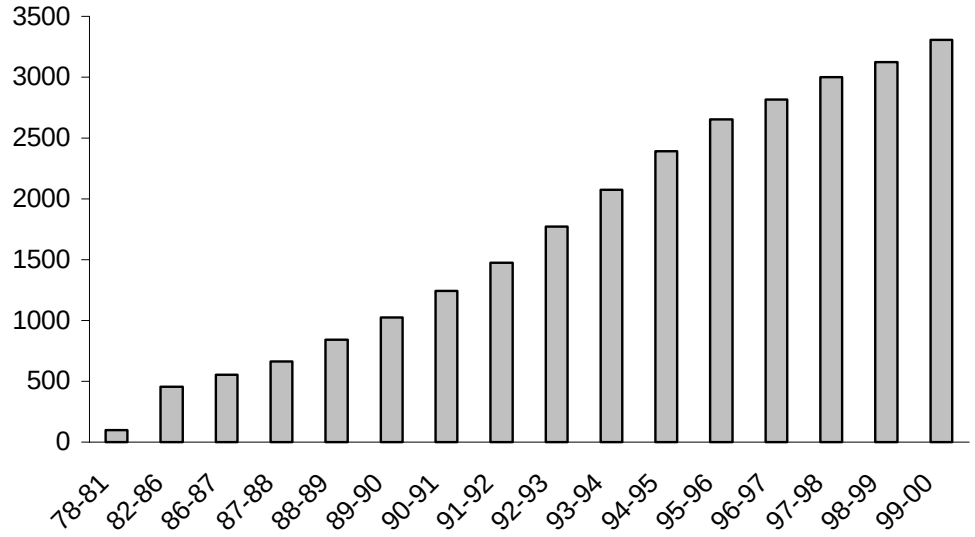
2.72 One important aspect of both self-determination and self-management is the ability of Indigenous groups and communities to choose the most appropriate governance structures for their aspirations and needs. The delivery of services by appropriately structured and functioning Indigenous organisations is just one dimension of this. Another central aspect is that of the advocacy of Indigenous rights and aspirations, for example by legal services and by Native Title Representative Bodies.

2.73 An important aspect of the self-determination or self-management policies of both ATSIC and of State and Territory governments involves the funding of Indigenous corporations for the delivery of services in such areas as health, legal services, housing, and outstation development, and for other purposes such as cultural and language maintenance and arts and crafts support. An increasing emphasis on economic development, and its policy linkage to self-determination at the community or group level, has led to the establishment of many corporations for commercial purposes. There are also increasing numbers of Indigenous associations being formed to represent the interests and reflect the identities of Indigenous groups and communities.

2.74 With the arrival of native title and the NT Act, a national system of Native Title Representative Bodies was established. Most of these bodies are incorporated under the ACA Act. Native title once recognised must be managed by corporations known as "Native Title Prescribed Bodies Corporate", which must be incorporated under the ACA Act. The subsequent establishment of the Indigenous Land Corporation ("**ILC**") has also led to the transfer to Indigenous groups of various interests in land, which under ILC policies, must be held in trust by ACA Act corporations.

2.75 The Fingleton Report estimated that only roughly half of all Indigenous corporations were established under the ACA Act. The increase in the number of ACA Act corporations alone since the enactment of the Act can be seen in Figure 1 below. While there was growth in the number of associations in the early 1980s, the most significant increase occurred in the first half of the 1990s, a period following the establishment of ATSIC, the availability of direct funding from ATSIC and other agencies to Indigenous groups via their corporations, and the increasing role of corporations in service delivery to Indigenous communities.

Figure 1: Cumulative growth in numbers of Aboriginal corporations incorporated under the *Aboriginal Councils and Associations Act 1976*[23]



2.76 An indication of the diversity of ACA Act associations is provided by Table 1, which aggregates bodies in terms of the functions provided for in their Objects.

Table 1: Functions of ACA Act associations

Arts & Culture	229
Business	165
CDEP	24
Community Support/Welfare	1116
Education	198
Employment/Training	200
Health Service	156
Housing	179
Land Title Holding	216
Legal Service	23

Media	15
Other	166
Other Land Activity	113
Resource Agency	31
Sport & Recreation	78
Grand Total	**2909**

Notes:

- Categories were developed by ORAC staff, initially at ATSIC's request, to try to match up with ATSIC funding categories. ORAC staff does allocation of an organisation to a category, by having regard to the organisation's objects.
- The allocation of categories to new corporations has not been fully maintained since 1997/8, however the database does include some more recent organisations as well (but on an ad-hoc basis).
- Some organisations may appear twice where they have been allocated two different categories. However, it is likely that multi-function organisations with broad goals will fall under "other".

2.77 The increasing importance of ACA Act corporations in Indigenous life, and their sometimes quite significant corporate assets and liabilities, are demonstrated in Tables 2, 3 and 4 following.

Table 2: Growth in assets of ACA Act associations

Assets	80/81	81/82	94/95	95/96	98/99	99/00
$0-10,000	1	2	5	50	43	30
$10K - $50K	-	-	3	70	74	59
$50K – $100K	-	-	4	74	48	24
$100K - $250K	-	-	11	125	94	74
$250K - $500K	-	-	11	98	94	64
$500K - $1M	-	-	10	119	123	86
$1M - $5M	-	-	8	145	167	118
> $5M	-	-	1	9	19	9

Table 3: Liabilities of ACA Act associations

Liabilities	80/81	81/82	94/95	95/96	98/99	99/00
$0-10,000	1	1	18	242	195	116
$10K - $50K	-	-	8	175	171	122
$50K – $100K	-	-	9	84	79	65
$100K - $250K	-	-	9	89	94	80
$250K - $500K	-	-	4	46	58	27
$500K - $1M	-	-	-	31	31	28
$1M - $5M	-	-	4	17	22	15

> $5M	-	-	-	1	-	-

Table 4: Growth in incomes of ACA Act corporations

Income	80/81	81/82	94/95	95/96	98/99	99/00
$0-10,000	1	1	4	40	31	26
$10K - $50K	-	-	6	78	74	50
$50K – $100K	-	-	7	60	58	43
$100K - $250K	-	-	6	153	118	75
$250K - $500K	-	-	8	139	125	81
$500K - $1M	-	-	6	99	98	76
$1M - $5M	-	-	6	113	144	104
> $5M	-	-	-	5	11	8

Note:

- For Tables 2–4, the ORAC database was not established until 1995, explaining the big jump in numbers from 94/95 to 95/96. In addition, prior to 1992, reporting was to SAA/ATSIC rather than to ORAC.
- These tables would also not include figures for corporations exempted from reporting/providing such figures, and (obviously) those corporations which are/were in default in providing them. Casual estimates by one staff member are that about 50% of corporations would actually fall in the $0-$50,000 range.

2.78 These Tables illustrate not only the considerable increase in the number of associations incorporated under the ACA Act, but also the increasing complexity of many of these associations. As far as can be gleaned by a functional breakdown based on the objects of the associations, Table 1 suggests that there is a significant percentage of these associations who deliver crucial services such as health, housing, legal services, and CDEP, to their constituencies or memberships - and for which therefore the issue of corporate viability is of major concern. For such bodies, the regulatory regime under the ACA Act and its potential to assist in good corporate governance practices will be very important.

2.79 One policy option discussed in Chapter 4 is for the ACA Act to provide a basic incorporation vehicle for simple associations, and for more complex corporations, defined for example through such objective criteria as assets or turnover, to transfer to other statutes, such as the Corporations Law. Table 2 however suggests that over 200 corporations would be affected by any reform of the ACA Act which mandated re-incorporation under another statute for associations with assets of over, say, $500,000. Equally, Table 4 suggests that some 200 associations have an income of at least $500,000, and would be affected by equivalent income-based transition requirements.

2.80 Also, the data demonstrates that there is considerable variation in the assets and incomes of ACA Act corporations, from those that clearly must be relatively passive with incomes and assets below $10,000 to those that have assets and incomes measured in the millions of dollars. This could suggest that the "tiers of regulation" approach is desirable, but as discussed in Chapter 4, it has a number of inherent problems.

CHAPTER 3 POLICY ISSUES FOR DECISION

A. OUTLINE OF CHAPTER

3.1 The previous two Chapters have discussed the original intent of the ACA Act, how that has changed over time, and how it fits with the contemporary needs of Indigenous people in Australia.

3.2 The issues raised in those Chapters give rise to a number of fundamental policy considerations that will go to the heart of the regulatory philosophy for a reformed ACA Act. These issues are the focus of this Chapter.

3.3 The position adopted in relation to the issues discussed in this Chapter will drive the nature of any "macro-level" structural reforms to the ACA Act (discussed in the next Chapter), as well as the nature of many of the more technical reforms. A number of these key policy issues also cut across the broader structural reform options, and will have to be considered and addressed, whichever of those options is adopted.

3.4 By way of overview, the key policy considerations which will drive reform of the ACA Act and which are considered in the Chapter are set out below. It should be noted that there is overlap between a number of the categories, and some are broader or narrower than others. The different underling policy issues will also interact with one another, and may have wide-ranging "flow-on" effects. To an extent these interactions and overlaps are unavoidable - the complexity of the issues unfortunately does not readily lend itself to simple categorisation and separation.

3.5 The key policy issues are as follows:

- Is there a need for a special incorporation regime for Indigenous people?
- What kind of associations should the ACA Act be aimed at?
- Should the ACA Act be permissive or prescriptive in its approach to the corporate constitution?
- How should the ACA Act address "cultural appropriateness" and "Aboriginal custom"?
- Should the ACA Act retain its emphasis on control be members through the General Meeting?
- What should the scope and standard of director's duties be?
- What should the Registrar's functions and powers be?
- What should the approach to "accountability" and financial reporting be?

- What should be the degree of consistency with the Corporations Law?
- How should the ACA Act address self-determination and self-management?
- What should be the basis of membership of corporations under the ACA Act?

B. IS THERE A NEED FOR A SPECIAL INCORPORATION REGIME FOR INDIGENOUS PEOPLE?

Issues

3.6 Incorporation under the ACA Act is restricted to associations comprising Indigenous people. Has the need for a special incorporation regime for Indigenous people changed since the inception of the ACA Act in 1976?

3.7 Can such a legislative requirement be justified today?

Options

3.8 Three options flow from this issue. These options are closely reflected in the options for structural reform set out in the next chapter:

- repeal the ACA Act, on the basis that there is no longer any need for a separate incorporation statute, as the needs of Indigenous people can be met through incorporation under existing "mainstream'"statutes; or
- maintain a separate statute under which *any* association of Indigenous persons can incorporate for whatever purpose; or
- maintain a separate incorporation statute, but limit the types of association that may incorporate under it, by reference to a criterion of purpose or size.

Discussion

3.9 This is a fundamental question which must be explored if the review is to be complete.

3.10 It is estimated that as many as a half of all Indigenous corporations are incorporated under either the Corporations Law or State associations incorporation legislation. This fact alone demonstrates that Indigenous corporations can and do function under other incorporation regimes.

3.11 As discussed in the previous chapter, the original intent of the ACA Act was that it provide a "simple" and "culturally appropriate" means for incorporation (these issues are both explored separately in further detail below).

3.12 The problem is that, through amendments and the way that it has been administered in the past, the ACA Act has arguably failed to deliver these underlying objectives. In fact, it is possible to argue that the ACA Act is neither simple nor culturally appropriate. At the same time, other incorporation regimes have drastically changed since the time the ACA Act was established, greatly simplifying the processes for incorporation outside the ACA Act.

3.13 In addition, many of the other factors which led to establishment of the ACA Act have been superseded, as other laws, the needs of Indigenous organisations, and the socio-political context have changed, in some cases quite dramatically since the time of its drafting and eventual enactment.

3.14 However, none of this necessarily means that there is not a role for an incorporation regime specifically tailored to the needs of Indigenous Australians.

3.15 The fact that the other half of all Indigenous corporations have still chosen to incorporate or remain under the ACA Act could be argued to show that the ACA Act has continuing relevance.

3.16 Further, the ACA Act was never intended be the exclusive means for Indigenous people to incorporate, only that it provide a specifically tailored option. Doing away with ACA Act could be said to simply be removing an option currently available to Indigenous Australians. If people do not like it, on the whole they have the freedom to choose to incorporate under other legislation. Freedom of peoples to choose is one of the cornerstones of the right to self-determination.[24]

3.17 In addition, the argument that the ACA Act is no longer relevant or required stems in significant part from criticism of specific aspects of the ACA Act and the way it is administered. If reforms can address those problems, there is no reason why a revitalised ACA Act could not be made highly relevant to Indigenous people's contemporary needs.

3.18 The consultation undertaken to date with representatives of Indigenous corporations indicates that there is still strong grassroots support amongst Indigenous people for an incorporation statute specifically for Indigenous people. This support for the ACA Act appears to stem largely from a feeling of "ownership" of the ACA Act and the belief that there is a need for an ACA Act which can take into account some of the special needs and disadvantages of many Indigenous people.

3.19 If it is accepted that there is some role for a reformed ACA Act to play, the key issue becomes whether it should try to cater to the needs of *all* Indigenous corporations, or whether it would in fact be more appropriate for some of those organisations to be dealt with under the Corporations Law or State associations incorporation legislation.

3.20 This will turn on the criterion which is used to distinguish between associations that are eligible to be incorporated under the ACA Act, and those that are not (and which might seek incorporation under other "mainstream" statutes). This requires a policy decision as to whom the ACA Act should cater. This is explored further below, under Section C: *Who should the ACA Act be aimed at?*

C. WHO SHOULD THE ACA ACT BE AIMED AT?

Issue

3.21 If there is a need for a special incorporation statute for Indigenous people, what types of association should be eligible for incorporation and regulation under this ACA Act?

3.22 Should *any* type of association be allowed to incorporate under the ACA Act? Or, is the category of eligible associations to be more narrow? If so, what is the criterion for selection?

Options

3.23 Again, the issues here flow directly into the structural reform options discussed in the next Chapter. The options are:

- small corporations - returning the ACA Act to its original intent of providing a simple incorporation statute for smaller Indigenous organisations, and requiring larger and more complex corporations to incorporate under the Corporations Law or under the State and Territories associations incorporation legislation (depending on their size and nature);
- all corporations, no tiers - making the ACA Act more sophisticated so that it can address the more complex issues relating to the requirements of all Indigenous corporations, including large multi-purpose organisations; or
- all corporations, tiered - adopting a "tiered" approach which distinguishes between different categories of corporation and applies different rules to the different tiers.

Discussion

3.24 Presuming that it is decided that the ACA Act should remain in some form, there is a need to consider what types of corporation a reformed ACA Act should be aimed at servicing, and how.

3.25 As noted in Chapter 2, the original intent of the ACA Act was to provide a "simple" means for incorporation for Indigenous people – with "simple" corporations in mind.

3.26 However, as also noted in Chapter 2, there has been a proliferation of organisations incorporated under the ACA Act, many of which are not "simple" organisations. A number of organisations incorporated under the ACA Act are in fact quite large and perform complex functions. Further, the ACA Act itself has evolved to become more complex, partly in response to the nature of the organisations incorporated under it.

3.27 As a consequence, it could be argued that the ACA Act is currently too complex and onerous for "simple" corporations (eg small landholding corporations), but not sophisticated enough for dealing with larger and more complex corporations (such as those which have multiple functions including service delivery to non-members).

Option 1 - Simplified ACA Act for Small Corporations

3.28 The first of the options here would see a return to the concept of providing a simple incorporation regime for very basic incorporation needs – such as incorporation for the purposes of passive landholding or native title management, or incorporation for the purpose of conducting social, cultural and sporting activities. The ACA Act would be simplified to make it easier for such organisations to incorporate and would remove much of the regulation currently imposed on them.

3.29 It can be argued that it is this type of small corporation which has unique and specific needs which are not catered for under other incorporation regimes. Typically these corporations will have limited or no resources, have a small number of members, and will have very limited functions. It is also likely that the members and directors of many such organisations will have the most limited formal education and experience in corporate governance. This is because many such corporations are typically established in response to external requirements for incorporation (eg for landholding) rather than in response to an active desire on the part of members to form a corporation to undertake activities.

3.30 It is estimated that as many as half of the corporations incorporated under the ACA Act would probably fall into this category.[25]

3.31 Under this option, which are above a certain size or perform other functions would have to incorporate under other legislation, primarily the Corporations law. There will need to be a clear criterion for (a) eligibility for incorporation under the ACA Act; and (b) eligibility for regulation under the ACA Act. This is discussed further in Chapter 4.

3.32 As an aside, one problem with this option is that the NTA currently requires NTRBs to be incorporated under the ACA Act. NTRBs are typically amongst the larger and more complex corporations incorporated under the ACA Act. This option would therefore also probably require amendment to the NTA. The relevant issues are discussed further in Chapter 5.

Option 2 – An ACA Act for All Corporations (No Tiers)

3.33 The second option would require the ACA Act to be more sophisticated to ensure that it can properly address the regulatory issues raised by the incorporation of larger and more complex corporations. However, in order to be able to also cater to smaller "simple" corporations, there would be a need for greater flexibility in the ACA Act.

3.34 The main difficulty with this option would be to find the optimal level of regulation that would simultaneously cater for "small" and "large", "simple" and "complex" corporations. This is one of the most important problems facing the current ACA Act. If this problem is not resolved, there would be little advance.

3.35 Speculation on this option leads, logically, to a consideration of different tiers of regulation under which the level of regulation matches the type of corporation. This option is considered separately below.

Option 3 – An ACA Act for All Corporations (Tiers of Regulation)

3.36 If the ACA Act is to try to cater for all possible types of Indigenous corporation, an alternative approach would be to establish tiers of regulation. This would have the advantage of allowing it to cater for the specific needs of different kinds of corporation. Different principles and mechanisms of regulation might then be applied to corporations in each of the tiers.

3.37 Careful consideration would have to go into the definition of the tiers of regulation. A criterion by which corporations could be classified would have to be established. This requires a consideration of whether purpose– or size-based criterion should be adopted.

3.38 Size–based criteria are to be preferred. However, the specific criteria adopted may need to be different from those used in the Corporations Law. (These issues are considered in more detail in the next Chapter).

3.39 One disadvantage of the "Tiers of Regulation" approach is that it could result in a very complex ACA Act, taking it a long way from the original intent. There is also a risk that greatly varying requirements under different tiers could create a high degree of inflexibility for movement by a corporation between tiers – for example, when it grows beyond a certain size, or takes on additional functions.

D. SHOULD THE ACA ACT BE PRESCRIPTIVE OR PERMISSIVE IN ITS APPROACH TO THE CORPORATE CONSTITUTION?

Issue

3.40 Should the act be prescriptive or permissive in its approach to the corporate constitution?

3.41 On its face, the ACA Act appears to adopt a permissive approach to the design of the "Rules of Association" which form the corporation's constitution. However, the grounds upon which the Registrar must refuse incorporation or amendment to the Rules lead to a highly prescriptive system of regulation. In the past, the administration of the ACA Act may have increased the degree of prescription even further.

Options

3.42 The principal question in considering whether an incorporation statute should be permissive or prescriptive is whether the respective rights and obligations of the corporation, the members, the board and other officers of the corporation should be:

(a) left to the members to decide and agree among themselves (a permissive approach); or

(b) prescribed by legislation or regulations or by the administrative discretion of a regulator such as the Registrar (a prescriptive approach).

3.43 Of course it is possible to have *degrees* of prescription or permissiveness, so it may not necessarily be a question of choosing either one or the other.

3.44 A possible compromise between permissiveness and prescription may be to amend the ACA Act to limit the range of matters the corporate constitution must address, and to require the Registrar to approve all proposed Rules that comply with the ACA Act *except* where the Registrar becomes aware of evidence that there has been duress, unconscionability or misrepresentation by any members or groups of members in obtaining the agreement of the other members to the proposed Rules).

3.45 Another possible approach to making the ACA Act more permissive, would be to amend the ACA Act to set out (perhaps in a schedule to the ACA Act) a number of "replaceable rules", similar to the replaceable rules under the Corporations Law. These replaceable rules could address a range of essential corporate matters such as matters of procedure and matters of corporate governance. ACA Act corporations could choose to adopt Rules which displaced the replaceable rules, but where this was not done the replaceable rules would apply.

3.46 It is also possible that a combination of more or less permissive and prescriptive approaches could be adopted if a tiered approach to regulation is adopted – for example, by being more permissive with some types of organisation and more prescriptive with others.

Discussion

Background - Current Position under the ACA Act

3.47 The current ACA Act was originally intended to be reasonably permissive. However, this permissiveness was not realised, and it is arguably highly prescriptive in practise.

3.48 The discussion in this Section will focus primarily on section 45(3) of the ACA Act in particular. However, there are a number of other aspects of the ACA Act which are prescriptive, and potentially over-prescriptive. These include provisions relating to the contents of Rules of Association, obligations to maintain registers of members, and so on. Those provisions (and problems with their prescriptive nature) are addressed in the context of other Section of this Paper.

3.49 Under the ACA Act as it stands, the Registrar must *not* issue a certificate of incorporation if he is not satisfied that it is "proper" for him to do so, having regard to the application for incorporation.[26] Therefore, the Registrar appears to have an unfettered discretion as to whether or not to accept the application for incorporation, and in particular whether or not to accept the proposed objects of the corporation and the proposed allocation of liability for the debts of the corporation as between the corporation and its members.

3.50 However, under section 45(3) of the ACA Act, the Registrar is also under an obligation to refuse to incorporate an association if the Registrar is satisfied that the proposed Rules:

(a) are ***unreasonable*** or ***inequitable***; or

(b) do not provide ***sufficiently*** for members to have ***effective control*** over the running of the corporation through annual general meetings and special general meetings (including by not setting out requirements relating to intervals between meetings, quorums, procedure and voting by proxy).[27]

3.51 "Unreasonable", "inequitable", "sufficient" and "effective control" are broad, subjective concepts. Whether or not the Rules are approved is therefore effectively within the Registrar's discretion. There is little to structure this discretion.

3.52 Staff in the Registrar's Office have indicated that the "effective control" ground has been difficult to enforce in practice[28]. They have also noted that it has been problematic trying to match the terms "unreasonable" and "inequitable" with the subsection 43(4), which permits the rules to be based on "Aboriginal custom". This is because they are not in a position to be able to determine what may be reasonable or equitable under "Aboriginal custom". Consequently, they base the judgment on an "objective" consideration of the draft Rules (ie which is not by reference to Aboriginal custom).

3.53 In many respects the Registrar arguably has relatively little scope to reduce the prescriptive character of the ACA Act. The ACA Act imposes an obligation on the Registrar to scrutinise and come to a decision on all applications for incorporation and all proposed Rules (as well as amendments to the Rules of existing corporations). For as long as the Registrar is under this statutory obligation, the Registrar is obliged to take whatever time and expend whatever resources are necessary in order to ensure that he or she does not

accept an application for incorporation or approve Rules where there is doubt in the Registrar's mind as to whether they should be accepted or not. If the Registrar does not do so, he or she may be exposed to unacceptable legal and political risks.

3.54 For example, if the Registrar were to approve Rules which were subsequently revealed to lead to unreasonable or inequitable consequences or to the oppression of certain members of a corporation, the Registrar could potentially be exposed to applications for judicial review of the Registrar's decision, as well as to considerable public and political criticism. Understandably, the Registrar may be unwilling to accept such risks and may therefore take a very cautious approach to the approval of Rules.

3.55 The prescriptive nature of the ACA Act has been exacerbated in the past by the approach of the Registrar. The general attitude of the Registrar in the past has been that the Registrar has a "protective" role, namely, to protect members of Indigenous corporations from each other, including protecting the members of a corporation that are in the minority from oppression and exploitation by the majority. The previous Registrar went as far as stating in the *1996-1997 Annual Report* that "the Act is now operating to protect Aboriginal minorities from oppression and exploitation by other Aboriginals."[29] Adopting such a position placed greater emphasis on the prescriptive requirement that the Registrar refuse to approve Rules which were, in his view, "unjust" or "unreasonable".

3.56 This can be contrasted with the situation under other incorporation regimes, where avoiding such oppression is primarily the responsibility of the members themselves. Members of corporations created under other regimes are generally expected to take care to protect their own rights and interests when they agree on the terms of the corporate constitution and on the terms of any members' or shareholders' agreement and to take direct legal action themselves if necessary to prevent oppression.

Problems with the current prescriptive approach

3.57 The current prescriptive approach of the ACA Act and the Registrar in relation to the Rules of association (as discussed above) has been a particular source of frustration for many Indigenous corporations and prospective corporations. In particular, it has frustrated the attempts of many corporations to adopt Rules which reflect their desire for "culturally appropriate" structures and processes. This has been because the "culturally appropriate" approaches taken in proposed Rules are often perceived by the Registrar as being "unreasonable" or "inequitable", or as not allowing sufficient control by the members. The issue of "cultural appropriateness" and its relationship to the prescriptive nature of the ACA Act are explored in detail in the next Section.

3.58 The Registrar receives approximately 200 applications for incorporation annually. The requirement on the Registrar to scrutinise all applications and attached Rules is highly resource-intensive, and has also led to significant delays. In many cases, uncertainty over the nature of the prescriptive requirements and the scope of the Registrar's discretion have obliged the Registrar to seek legal advice. The Registrar has also had to expend resources on correspondence and consultation with applicants. This has diverted resources away from other regulatory tasks that might be more appropriate, for example, assisting members and directors of Indigenous corporations in the understanding and performance of basic corporate governance activities.

3.59 Attempts by different Registrars and employees of the Registrar's Office to adopt more or less prescriptive or permissive approaches to address their perceptions of the requirements of the ACA Act have also lead to inconsistencies over time in the nature of Rules that have been approved. This and the resulting uncertainty has been a source of frustration for organisations attempting to incorporate under the ACA Act. Such uncertainty combined with potentially lengthy delays must be seen as a significant deficiency in an incorporation statute. It is not known whether those seeking to incorporate have ever taken legal action against the Registrar in relation to the Registrar's decision to refuse to issue a certificate of incorporation or in relation to an undue delay by the Registrar in making a decision, although such remedies are likely to be available in appropriate cases.[30]

3.60 There is an argument that the prescriptive nature of the ACA Act is patronising and outdated. This is particularly the case where the level of prescription involved does not seem to serve a necessary purpose in relation to the contemporary incorporation needs of Indigenous people (as discussed in Chapter 2). Further, neither the Corporations Law nor State associations incorporation legislation involve this degree of prescription and scrutiny (the Corporations Law in particular takes a very broadly permissive approach to Rules).

3.61 There is anecdotal evidence that a number of Indigenous corporations which would otherwise have chosen to incorporate under the ACA Act, have instead chosen to incorporate under the Corporations Law, solely because of the rigidity prescriptive requirements of the ACA Act. This is despite the fact that other aspects of the Corporations Law may be regarded as less than ideal.

3.62 In some cases, however, alternative incorporation regimes are not available. This is the case with respect to corporations created for the purpose of holding native title. Delays in obtaining approval by the Registrar have led to the suspension of arrangements for the management of native title that has been found to exist by a court for a period of four years in one case.[31]

3.63 However, if a permissive approach were adopted, it would resolve most of the problems relating to whether rules mandated for the corporate constitution by the NT Act or the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)* are consistent with the requirements for the corporate constitution imposed by the ACA Act. This would resolve one of the fundamental problems in the relationship between the ACA Act and the Native Title Act and Regulations. (These issues are discussed further in Chapter 5 of this paper).

E. HOW SHOULD THE ACA ACT ADDRESS "CULTURAL APPROPRIATENESS" AND ABORIGINAL CUSTOM?

Issues

3.64 In the past, a number of critics of the ACA Act have argued that the ACA Act is not "culturally appropriate" for Indigenous people.

3.65 Should the ACA Act be made more appropriate to the cultural circumstances of those applying for incorporation, or allow Indigenous corporations themselves to be more "culturally appropriate", by reference to Aboriginal custom?

Options

3.66 The issue of the "cultural appropriateness" of the ACA Act cannot be addressed through one single reform proposal. Instead, it may be necessary to consider how a range of different parts of the ACA Act could be modified to make it more suitable for the Indigenous context.

3.67 There are three main areas where "cultural appropriateness" can be addressed in relation to the ACA Act. The first of these is an overarching consideration – whether the ACA Act should make reference to "Aboriginal custom" in relation to corporate governance at all. The second two address possible reform to particular aspects of corporate governance to make it more "culturally appropriate". These are:

- By removing the amorphous and problematic concepts of 'cultural appropriateness' and 'Aboriginal custom' from corporate governance under the ACA Act, and instead making the mode of service delivery provided by Indigenous corporations the focus of 'cultural appropriateness' where that service is to Indigenous communities.

- By adopting a more permissive approach to certain aspects of the Rules and the ACA Act. Key areas to be addressed where Indigenous people and previous reviews have criticised the ACA Act as being culturally inappropriate include the following:

  - *voting and representation* – allowing voting and election of directors by reference to "family", "clan" or "tribal" sub-groups;

  - *decision-making* – allowing decision-making by reference to "Aboriginal custom" or, for example, by reference to "elders committees"; and

  - *membership* – allowing membership to be defined by reference to more flexible criteria than written membership lists.

- By changing the scope and standard of director's duties.

3.68 These options are not necessarily mutually exclusive. For example, the express reference in section 43(4) allowing the Rules of an association to be based on Aboriginal custom could be removed, but other specific amendments to provisions relating to the Rules and director's duties still could make the ACA Act more "culturally appropriate".

3.69 It is also arguable that different regulatory approaches should apply to different kinds of Indigenous corporation, for example small corporations with the sole purpose of holding land, as opposed to large, publicly funded, service-providing corporations.

Discussion

Introduction

3.70 Before discussing the options, it is necessary to give broader consideration to the issue of "cultural appropriateness" and the role of "Aboriginal custom" in Indigenous corporations.

3.71 The criticism that the ACA Act is "culturally inappropriate" is too diffuse. At one level, the critique may attach to any of the features of the ACA Act, as the idea of a corporation, the rights and obligations it creates, and the decision-making procedures it requires are all foreign to traditionally-oriented Indigenous groups. In the case of less traditionally oriented groups, the critique raises the difficult question of what model would be more "culturally appropriate".

3.72 It could in fact be argued that the concept of "cultural appropriateness" is a convenient ticket-of-leave from a more rigorous analysis of the characteristics that Indigenous corporations require to effectively operate within the wider Australian legal, economic and political system.[32]

3.73 The focus of the Fingleton Review's recommendations on this matter lay on providing a less legalistic incorporation process, and on enabling corporate governance to be conducted in ways held to be "culturally appropriate".

3.74 However, it can be argued that real problems will be encountered in attempting to reflect law and custom in the formal instruments of corporate governance, most particularly the Rules.

3.75 Nonetheless, there may be specific issues that can be addressed to make the ACA Act more "culturally appropriate".

Background

3.76 As discussed in Chapter 2, the original development of the ACA Act reflected the concern of government at the time for a flexible, simple, and "culturally appropriate" incorporation statute to facilitate Indigenous self determination. This concern to accommodate the cultural differences of Indigenous people, arising in part through the influence of the Council of Aboriginal Affairs in the 1970s, may be seen as a product of attempts to reflect traditional or "classical" Indigenous cultural practices in statutes, particularly the *Aboriginal Land Rights Act (Northern Territory) Act 1976* and the ACA Act.[33]

3.77 Sections 23(3) and 43(4) are the only provisions of the ACA Act which formally attempt to enable the adoption of traditional law and custom in corporate decision-making and other procedures. Section 43(4) of the ACA Act reads:

> (4) The Rules of an association with respect to any matter may be based on Aboriginal custom.[34]

3.78 Only two clauses of the Model Rules provided by ORAC refer to custom, one enabling the corporation to give notices to the members in a manner according with Aboriginal custom and the other enabling the Governing Committee to be elected by processes in accordance with Aboriginal custom.[35]

3.79 As noted in the previous Section, the prescriptive nature of the ACA Act (including its administration by the Registrar) has restricted the scope for Indigenous people to design what they consider to be "culturally appropriate" corporations. Requirements of the ACA Act which have caused difficulty include limitations on the minimum number of members, disqualification criteria for membership, and most importantly the centrality given to control of the corporation by its members through the general meeting. Another aspect of the ACA Act which has caused difficulties is the requirement for governance by a board which has been delegated managerial powers and must operate in accordance with the fiduciary principle.

3.80 These requirements are all centred around concepts underlying Western organisational and political culture, rather than those commonly observed within Indigenous groups, whether "traditionally oriented" or otherwise.[36]

"Aboriginal Custom"

3.81 If there is to be meaningful discussion about the role of Aboriginal custom in corporate governance, it is important to attempt to clarify what kinds of matters might be encompassed by Indigenous "custom" or "tradition" in so far as it applies to the operations of a corporation. While there is not general agreement as to precisely what is meant by customary law,[37] for the purposes of this Review, it could usefully be defined in the following terms:

> *Aboriginal custom* refers to those norms, values, understandings and practices broadly accepted within the relevant Indigenous group or community, which inform such aspects of group or community life as personal and group identities, relationships and behaviours between individuals and between groups of people, differential rights and entitlements such as those relating to traditional country and to access to resources, and the distribution of authority within the group and the matters to which it pertains.

This definition would therefore encompass the particular values and practices that Indigenous people bring to bear on the place of their corporations within the Indigenous polity, making decisions within their corporations and in seeking to gain access to its resources. It would also encompass the bases on which differentiation within an Indigenous group or community is established, for example in terms of "families" or "tribes".[38]

Problems with the concept

3.82 There are considerable difficulties confronting attempts to provide systematic accounts of Indigenous custom or law, for example in the clauses of corporate constitutions. A number of broad problems can be identified.[39] Firstly, there will inevitably be distortions arising from attempts to write down or codify a body of practices which have their origins within Indigenous cultures in which oral forms continue to have primacy.

3.83 Secondly, it may not be feasible to reduce Indigenous "law" or custom to sets of readily ascertainable rules. The complexity and diversity of contemporary Indigenous cultures do not allow for reference to a homogenous and historically prior notion of "culture" that would assist in the formulation of institutional rules and practices. In many cases, the content of law and custom will be unclear.[40]

3.84 Thirdly, there are no formal overarching political or religious institutions within Indigenous groups or communities which have the capacity, or authority, to state the precise terms of law and custom. There may be disputation within the group or community as to the terms of the relevant area of law and custom. Corporations can be vulnerable to instrumental behaviour by individuals which is legitimated in terms of being in accordance with Aboriginal custom, despite the fact that not all behaviour by Indigenous people in relation to their participation in corporations can be simply referable to law and custom or other manifestations of "culture". The problems with the requirement for "effective control by members" because of the significance of meetings within the Indigenous polity is discussed further in the next Section.

3.85 Despite such difficulties, the Fingleton Review argued strongly that the ACA Act failed to enable culturally sensitive and appropriate forms of incorporation.[41] However, the main criticisms provided by Fingleton arguably relate more to what is held to have been an overly legalistic administration of the ACA Act than to an examination of what the principles of a "culturally appropriate" Indigenous corporation might be. The criticisms by peak Indigenous bodies which are quoted in Fingleton also relate more to the administration of the ACA Act at the time than to establishing alternative principles for "culturally appropriate" incorporation.[42]

3.86 Nonetheless, there can be little doubt that the notion of "culturally appropriate" forms of incorporation have broad currency amongst Indigenous people, their advisers, and in reviews of pertinent legislation.[43]

Option 1 - "Aboriginal Custom" in corporate governance

3.87 Indigenous people of course will bring their own particular values, understandings and practices to their participation in the activities of their corporations, whether as clients or constituents, members, or directors. The key question is whether these matters should be formally brought into corporate governance, and whether the incorporation statute should specifically facilitate this.

3.88 It is of course desirable that Indigenous corporations be designed in such a way as to accommodate the particular political, social and economic context of the relevant Indigenous group or community. Such accommodation is at the very least necessary to

ensure the legitimacy of the organisation within that group. However, unless the organisation can establish an effective "interface" with the wider Australian legal, economic and administrative system, it cannot fulfil the functions required by its constituents or clients.

3.89 In the contemporary situation, the important issue is arguably not the degree of "traditionalism" or otherwise of Indigenous corporate governance structures, it is the degree of *control* Indigenous people have over the *design and operation* of their own governance structures. The permissive approach adopted by contemporary statutes of general incorporation arguably should be counterbalanced by the public interest in the exercise of some prudential corporate supervision in favour of a racial group which is largely unfamiliar with the cultural underpinnings of the corporate form and which suffers undeniable socio-economic disadvantage.

3.90 For those Indigenous organisations which are formed largely to reflect and represent the interests and identity of a particular group or community, and which do not receive significant public funds to deliver services for a wider constituency, it would seem appropriate that corporate governance could be undertaken in a largely informal manner, in accordance with the values and practices of the group including those pertaining to law and custom, as desired by the group.

3.91 However, as discussed in Chapter 2 of this Paper, a significant number of Indigenous organisations receive public funding, in many cases substantial, to deliver services to the Indigenous community. Such organisations are accountable for their use of this funding, including for the outcomes achieved in their service delivery. An informal approach to corporate governance would probably *not* be appropriate for such organisations. The reasons for this are explored in more detail in Chapter 3, Section I.

3.92 For such organisations, it is suggested that the primary focus for "cultural appropriateness" should be in the mechanisms and processes through which Indigenous organisations undertake their services, rather than in corporate governance mechanisms themselves.

3.93 The suggestion of different degrees of permissiveness towards the design of corporate governance in different kinds of corporations again lends itself to either a tiered approach, or a highly permissive ACA Act specifically catering for small corporations, but which might still include a role for the Registrar's office in assisting corporations incorporated under other legislation.

Option 2 – Addressing Aboriginal custom through the Rules of Association

3.94 As noted at the outset, there are three areas where a more permissive approach to the Rules could result in a more "culturally appropriate" ACA Act:

- *voting and representation* – allowing voting and election of directors by reference to "family", "clan" or "tribal" sub-groups;
- *decision-making principles* – allowing the Rules to specify decision-making by reference to "Aboriginal custom" or, for example, by reference to "elders committees"; and

- *defining membership* – allowing membership to be defined by reference to more flexible criteria than written membership lists.

Voting & Representation

3.95 The first area relates to the desire to express differentiation within the membership of the corporation which reflects that within the Indigenous group or community from which the membership is drawn.

3.96 In order to minimise the potentially destabilising consequences of competition between groups for control of a corporation, Indigenous people have sought to have board representation based on sub-groups such as "families", "clans", or "tribes".

3.97 A criticism of the ACA Act and its previous administration has been that the strong (prescriptive) emphasis on control of the corporation through equality of voting at the general meeting. (This stems from the requirement that the Registrar refuse to accept Rules which are "unreasonable" "inequitable" or do not give members "effective control", discussed further in the previous Section.) That prescriptive nature of the ACA Act has made it difficult if not impossible to establish mechanisms acceptable to the Registrar whereby board representation could be guaranteed to defined sub-groups of the corporation's membership. (Although, as noted above, the Registrar's office has recently become more flexible in this regard.)

3.98 One solution may simply be to adopt a more permissive approach to the requirements for the Rules of Association. A permissive system of regulation may meet the Indigenous demand for "culturally appropriate" rules. If members of a corporation have the freedom to select the rules that govern the legal obligations between the members, the members and the corporation and the corporation and its directors and officers, they have the freedom to choose rules which they regard as "culturally appropriate" to their situation. This removes the need for the regulator to consider what is "culturally appropriate".

3.99 This also removes the need for the regulator to consider whether a particular rule is based on "Aboriginal custom". In many Indigenous settings, a rule which is considered to be "culturally appropriate" may not necessarily be a rule which has a basis in traditional law and custom.

3.100 The provisions of the Corporations Law, in which membership classes can be established with differentiated voting rights, including those relating to nomination of board representation, can be seen as offering another alternative.

3.101 However, corporate membership classes are of necessity mutually exclusive; in contrast, membership of most relevant categories of Indigenous grouping are not mutually exclusive. In many instances, Indigenous groupings may be more accurately characterised as fluid in structure and composition rather than as discrete and bounded entities with mutually exclusive memberships. For example, while an Indigenous individual may primarily identify with a particular "family" and traditional country and language, he or she will also typically be affiliated through descent with other "families" and traditional countries.

3.102 Such attempts to reflect the principles of differentiation within an Indigenous group in corporations' rules illustrate the broader difficulties in reflecting law and custom in the formal instruments of corporate governance.

Decision-Making Principles

3.103 The second area relates to the use of rules to express principles of decision making, for example, by "consensus", through granting "elders" a particular role, or by reference to "Aboriginal custom".

3.104 Problems with incorporating "Aboriginal custom" in decision-making and corporate governance (and suggested approaches) are discussed above. However, there is no reason that adoption of *express* principles of decision-making, such as requiring "consensus" or granting a defined role to "elders" or "elders committees" could not be accommodated if the ACA Act were to adopt a more permissive approach to the Rules of Association. Again, this will depend on the overall structural model adopted for a reformed ACA Act.

Membership Lists

3.105 The third area relates to the current requirement under section 58 of the ACA Act, that membership be defined by reference to a register of members maintained by the public officer.

3.106 This requirement has caused particular difficulty for many corporations for a number of reasons, for example:

- There may be confusion between membership of particular groups or sub-groups (such as "families"), and formal membership of the corporation itself. Such problems may arise for technical reasons, for instance the corporation failing to maintain adequate membership records.

  This confusion can also have more complex origins, however, in that the corporation may have been assimilated into the particular Indigenous polity to the extent that it is effectively identified with the particular Indigenous group or community. Membership of the corporation therefore may not be differentiated from membership of the group.

- The corporation may be unresourced, and the board and public officer may have limited formal education, training or experience with corporate management. In such cases, records are often not maintained and are easily lost. Further, formal requirements in the ACA Act and Rules of Association relating to eligibility for membership or requiring endorsement by the Board may not be followed.

3.107 A number of corporations have attempted to address this by defining membership by reference to more flexible criteria, such as all Aboriginal people living within a defined area at a given time, or all members of a particular group or groups.

3.108 There are some difficulties with these approaches because of the potential uncertainty about who the members are. There may be ways to address some of this uncertainty– for

example, through more detailed descriptions of the group and the basis of membership of the group (as has been done for addressing the requirements for registration of native title applications under the NTA), or by defining with more clarity the requirements to be considered "resident" in an area.

3.109 However, in the case of corporations where the members participate in the income and/or are liable for its debts, a more prescriptive requirement for membership by reference to a register should probably be maintained.

3.110 The issue will therefore depend to a large extent on the broader policy issues under the first two headings in this Chapter.

Option 3 – Scope and Standard of Director's Duties

3.111 The third option relates to the capacity of Indigenous directors to comply with the obligations and requirements imposed on them as directors. This issue is explored in detail under Chapter 3, Section G below. In essence, the issues and possible solutions to make the ACA Act more "culturally appropriate" are as follows:

- Indigenous directors are often nominated to the board not because of their particular experience or skills, but because of the politics of representation within Indigenous society.
- Many Indigenous people are disadvantaged in terms of education and experience, making it difficult to meet the standards required of directors of corporations. This can create an imbalance in power with educated and skilled management staff, making the board vulnerable to abuse by dishonest managers.
- Further, many of the obligations on directors, such as the fiduciary duty to the corporation, are culturally alien to many Indigenous people.
- A solution might be to extend the scope of director's duties to management staff (as is now the case under the Corporations Law) and reduce the standard of care required of the board by making it subjective, while maintaining an objective standard for management staff.

F. SHOULD THE ACA ACT RETAIN ITS EMPHASIS ON CONTROL BY MEMBERS THROUGH THE GENERAL MEETING?

Issues

3.112 The ACA Act currently prescribes an "associational" model for corporations – ie corporations are required to be an association of natural persons, who control the corporation through General Meetings. The question is whether this approach, and in particular, the current emphasis on control by members through the General Meeting, is appropriate.

Options

3.113 Some of the problems with the associational model could be addressed by adopting a less prescriptive approach to the Rules of corporations, and in particular the requirement that the Rules give the members effective control over the running of the association. In particular, allowing differentiation of voting rights would go some way to addressing the problem.

3.114 Another option would be to remove the requirement that only natural persons can be members of ACA corporations, and allow other corporations to become members.

Discussion

3.115 This section examines certain issues for Indigenous corporations which arise because of conflict between principles of standard corporate governance and those typically encountered in the Indigenous polity. Most of these conflicts potentially arise in Indigenous corporations irrespective of the statute under which they are incorporated. However, it is argued here that the exclusive reliance of the ACA Act on a model of an association of natural persons, and on control of the corporation by the membership through undifferentiated voting at the general meeting, renders ACA Act corporations particularly vulnerable to failure.

3.116 They may be less vulnerable if the association has been formed primarily to reflect and represent the interests and identity of a particular group or community, receives little public funding and thus has few administrative or accountability requirements. However, where the corporation receives significant public funding to provide services, conflict and competition within the wider Indigenous constituency which the organisation serves (including conflict and competition over control of the organisation and its resources) can be brought into corporate governance through members' attempts to control the organisation through the general meeting. Attempts to make such organisations accountable by having large memberships may therefore paradoxically lead to instability.

3.117 Associations with large memberships may also be inappropriate vehicles for conducting commercial activities, since the requirement for delegation of managerial responsibility to enable effective commercial decision making in accordance with the dictates of the market

may conflict with the desire of the corporation's members to directly control its activities through the general meeting.

Difficulties with the associational model and the general meeting[44]

3.118 The corporate governance structure of the incorporated "association" or "company" is based on two organising principles: (i) the significance accorded to the general meeting, and (ii) governance by the board according to the fiduciary principle. These principles are based on the values and practices of Western organisational culture and English law, which both have a particular historical development, and which are quite foreign to the values and practices of Australian Indigenous societies. Consequently, there is the potential for a significant disparity between the formal legal model of a corporation, and the understandings and practices which Indigenous people bring to their participation in it.

The general meeting in corporate governance

3.119 The formal legal model of the corporation is based on a division of corporate power between two decision-making organs – the general meeting of the corporation's members and the board of directors. The associational model of the ACA Act places particular importance on the general meeting of members.

3.120 Decision-making in the general meeting is governed by the ACA Act and the organisation's rules. It is also supported by the common law of meetings, a body of law that has emerged in the context of decision-making within civic associational and public political institutions.[45] The formal legal model of the general meeting is based on a deliberative process based on the principles of majority voting.[46]

3.121 The ACA Act, like most general incorporation statutes, makes provision for regular meetings, the right of members to call a special meeting, the right of members to be notified of meetings, the specification of a meeting quorum, and the appointment and use of proxies. At meetings, motions are put, points of order and procedural motions may be made, elections of office-holders are conducted, minutes are kept, and resolutions of the general meeting are held to bind the meeting until altered by another resolution.[47] The legitimate expression of dissent through debate in the general meeting and the binding character of its resolutions are foundational assumptions of the model.

The significance of meetings within the Indigenous polity

3.122 One reason associational forms of corporation (such as those established under the ACA Act) have been so widely accepted by Indigenous groups and communities is that the principle of control by the membership through the general meeting resonates strongly with certain widespread principles of Indigenous political culture.

3.123 Indigenous people are often very reluctant to delegate or mandate consent to others. It is well illustrated by the insistence heard in many parts of Australia, that "no one else can speak for my country".

3.124 Indigenous political culture is typically characterised by a high degree of "localism", with a strong emphasis on the autonomy of individuals, and on the rights and identities of local

groupings, particularly those established through kinship.[48] In many, if not most, regions of Indigenous Australia, groupings of people called "families" are of considerable importance. Such "families" are defined through shared common descent from specific ancestors, are typically associated with particular surnames, have connections to defined traditional "country" and language, and play a central role in defining and organising social, economic and political relations within Indigenous society.[49] They are therefore not to be seen as straightforward equivalents to the extended families of non-Indigenous groups.

3.125 In their participation in meetings, Indigenous people bring to bear world-views, life histories and personal and social identities which are intensely grounded in such particular connections as those to "family", language, and traditional country. There may be deep mistrust of those from other groups, despite the objective existence of commonalities through shared histories and experience as Indigenous residents of a community or region. Meetings can often provide forums for expressing competitive political relations between individuals and groups such as "families", rather than means of arriving at consensus on particular proposals.

3.126 While obviously writing and other forms of the wider society have now become of great significance to Indigenous social and political life, orally based processes remain of central importance. This is not simply a matter of the relatively lower levels of literacy amongst Indigenous people, but of fundamental principles of social action with strong links to the past, in which political relations between people, and between groups of people, are established and maintained through both private and public speech.[50] In such circumstances, public meetings continue to constitute core elements of political process, and of the production and reproduction of social and political relations within Indigenous societies.

3.127 The general emphasis within Indigenous societies on the autonomy of individuals, and of locally based groups, can hinder the use of meetings as effective means for producing resolutions that participants consider to be binding on them, even if a meeting apparently arrives at a mutually agreed outcome. Participants will typically reserve the right to subsequently act in accordance with their own interests or those of their particular group or family.

Implications for general meetings of Indigenous corporations

3.128 In relation to those meetings which are specifically general meetings of an Indigenous corporation, there may be confusion between membership of particular groups or sub-groups (for example, "families"), and formal membership of the corporation itself.

3.129 Considerable effort may be expended by individuals and sub-groups in ensuring that members of their own group are on the board. Individuals may adopt strategies to maximise participation by those from their own group who can be expected to support them, or conversely to minimise participation by those from other groups. Supporters may be transported in to the meeting, or the meeting held in a location or at a time which prevents potential opponents from attending. Consequently, many Indigenous corporations are characterised by corporate histories in which competing factions alternate in their control of the board, or fission off to form new organisations.

3.130 In such circumstances, associations can be highly vulnerable to having competitive political relations within the wider Indigenous group or community brought into the forum of the general meeting, and thus destabilising corporate governance.

3.131 The factors discussed above mean that while in theory the exercise of the members' common law voting power in the corporation's general meeting provides a mechanism for monitoring the activities of directors and disciplining aberrant behaviour, in practice this may not be the case. The contribution of general meetings to high quality corporate governance may be diminished due to:

- the problematic nature of such meetings as decision-making forums within the Indigenous polity; and
- their use for collateral social or political purposes not directly related to the business of the corporation.[51]

3.132 These problems may result in technical breaches of the requirements of the corporation's rules, or those of the ACA Act. Such factors can often be exacerbated by the logistical difficulties which Indigenous organisations, particularly those in remote and rural Australia, face in conducting meetings and in gaining the necessary quorum.

3.133 Consequently, frequently encountered problems in ACA Act corporations include the failure to conduct annual general meetings,[52] low attendance at meetings and non-satisfaction of quorum requirements,[53] a lack of "meaningful participation",[54] poor understanding of minutes procedures,[55] procedural irregularities in the conduct of meetings and elections of the board,[56] and confusion between the memberships of corporations operating in the same area leading to the purported exercise of corporate rights (usually voting rights) by non-members.[57] In many corporations poor education levels and lack of familiarity with the technical requirements of corporate governance renders the annual general meeting's approval of the financial statements of the corporation a largely fictional exercise.[58]

The Associational Model and Service-Delivery Corporations

3.134 A further problem with the associational model arises where the corporation is engaged in the delivery of publicly funded services. This is particularly the case where the constituents to whom the corporation is providing services are a broader group than the membership. This is because there may be tensions between the wishes of the members and the obligations under grant conditions to provide services impartially to non-members. Similarly, there may be increased suspicion by the non-member constituents of the corporation and it's capacity to provide impartial services. (This stems largely from the "politics of representation" discussed under the previous subheading, *Implications for general meetings of Indigenous corporations.*)

G. WHAT SHOULD THE SCOPE AND STANDARD OF DIRECTORS DUTIES BE?

Issues

3.135 What should be the scope and standard of director's duties under the ACA Act?

3.136 What are the long-term implications of varying the scope and/or standard of director's duties? (Is there a risk of "ghetto-ising" Indigenous corporations?)

Options

3.137 There are several policy options for consideration here. These are not necessarily mutually exclusive alternatives, although the fourth option includes a combination of elements from the previous three.

(1) Expressly extend directors duties to all persons engaged in the management of the corporation.

(2) Reduce the standard of the duty of care and diligence applied to directors of ACA corporations – for example by a adopting a subjective standard – to take account of the director's literacy, ability to read and comprehend financial statements, and corporate and commercial experience.

(3) Bring the statement of the director's duties in the ACA Act into line with the Corporations Law, in order to take advantage of the certainty in the interpretation of these duties.

(4) Extend the scope of director's duties to management staff or "officers". At the same time, reduce the standard of care required of corporation's directors by making it *subjective*, while maintaining an *objective* standard for officers.

3.138 Depending on the broader policy approach adopted, there would be implications for a range of issues which would have to be addressed, including the following:

- the duty of honesty;
- duties of disclosure and conflicts of interest;
- related party transactions;
- duties relating to accounts, records and financial statements;
- duties relating to insolvent trading;
- the indirect duty (from section 63(2)) to refrain from acting "in their own interests rather than in the interests of the members as a whole or in any other manner whatsoever that appears to be unfair or unjust to other members"; and

- penalties and consequences for breach of duties.

Discussion

Option 1 - Extending Directors Duties to Management

3.139 One of the main functions of director's duties is to ensure that directors, being persons who have control over the affairs of the corporation, are accountable for their actions. However, it is not unusual for persons other than the validly elected directors of a company to have real influence in the affairs of the corporation. In principle, such persons should be subject to the same duties to the corporation as that owed by directors.

3.140 This is arguably even more the important with Indigenous corporations, where there is more likely to be an imbalance in experience, skills and knowledge between management and directors.

3.141 Under the ACA Act as it stands, the scope of the director's duties is limited to validly elected directors, and does not expressly extend to de-facto directors, shadow directors or other officers. The general law is likely to operate such that senior executive officers, and possibly even shadow-directors, *will* be held to account for their actions in respect of ACA Act corporations. However, this is not certain, and is something which should arguably be dealt with through express legislative provisions.

3.142 By contrast, the Corporations Law extends the application of director's duties to persons other than validly elected directors who exercise a real influence over the affairs of the corporation. The statutory duties under the Corporations Law, apply to a "director" and often to "officers" as well. The definition of "director" in section 9 of the Corporations Law, extends beyond directors validly appointed and includes "de-facto" directors[59] and "shadow" directors. [60] "Officer" is also widely defined and includes the concept of a "shadow" officer.

Option 2 – Adjusting the duty of care and diligence

Background - Difficulties with the fiduciary principle

3.143 The fiduciary principle introduces difficulties for Indigenous corporations and their boards. The principle may be stated as follows:

> A fiduciary:
>
> (a) cannot misuse his [or her] position, or knowledge or opportunity resulting from it, to his [or her] own or to a third party's possible advantage; or
>
> (b) cannot, in any matter falling within the scope of his [or her] service, have a personal interest or an inconsistent engagement with a third party –
>
> unless this is freely and informedly consented to by the beneficiary or is authorised by law.[61]

3.144 The office of corporate director is a fiduciary office.[62] The director of a corporation has a duty to act "bona fide in the best interests of the corporation as a whole" and not in the

interests of particular members or groups of members.[63] Despite the problems presented by this formulation,[64] the law has been extremely reluctant to recognise a direct fiduciary duty owed by the director to a member of the corporation. Rare exceptions to this rule have emerged in the context of family companies, a context which may, in given circumstances, be of relevance to some Indigenous corporations.[65] Furthermore, a director must not act at the direction of others in the exercise of his or her fiduciary duties, even if these persons are members of the corporation.[66] The law has not given effect to the purported duty of the nominee director to act in accordance with the interests of, or directions issued by, his or her appointor.[67]

3.145 The fiduciary principle assumes that the director's office has a scope that may be delimited[68] from the broader social or economic interactions of the director and from which he or she may be released only through a process of informed consent. The assumption that social relations can be segmented in this fashion is generated by the cultural context within which the fiduciary principle was formulated. English law was responding to the need to regulate the conduct of persons in whom "trust" and "confidence" was reposed in *specific, culturally bounded, social situations* – for example, the conduct of the person entrusted with minding the infant's option to purchase, of the person in receipt of real property under promises made between family members (sometimes in an attempt to reduce liability to taxation on land transfers), or of the person entrusted with the management of other people's money.[69] The principle has sometimes been carried over into the judicial construction of the duties of persons holding public office.[70] Moreover, the principle was shaped by the peculiar jurisdiction of the Court of Chancery and its procedures which addressed *the conscience* of the fiduciary in the execution of its office.[71]

3.146 It is clear that the fiduciary principle is informed by the particular set of cultural experiences and the socio-economic conditions that underpin such experiences. These experiences may appear remote to Indigenous people whose values have been formed under sometimes radically different conditions. Individuals within Australian Indigenous societies are typically embedded in a system of social relations that knows no overarching political institutions and which gives primacy to allegiances based on kinship and the representation of particularistic interests.[72] The capacity for the particular form of internal role differentiation which the fiduciary principle presupposes within the individual, may not be as easily presupposed for Indigenous office-holders in Indigenous institutions, who are typically subject to great pressure to be accountable to particularistic "constituencies" which cut across legal abstractions such as "the corporation as a whole".[73]

3.147 The dependence of the corporate governance model on the fiduciary principle undermines its efficacy in the Indigenous context. For this reason, it is sometimes argued that institutional structures that do not rely on the fiduciary principle as an accountability technique are more likely to succeed in the Indigenous context.[74]

3.148 The director's duty of care and diligence has now become one of the main pillars of corporate governance.[75] Yet standards of reasonableness in the degree of care and diligence are pegged to a variety of social, economic and moral expectations formed within particular societies.[76]

Lowering the Duty of Care

3.149 The director's duty of care under both the ACA Act (expressed as an obligation to act "diligently" in section 49C of the ACA Act) and the general law, is an *objective* duty. The courts are unlikely to adjust this duty of care downwards. This raises some concerns in the Indigenous context where many Indigenous Australians holding office may face cross-cultural problems and disadvantages in respect of skill and experience.[77]

3.150 It may be argued that the ACA Act "duty of care and diligence" should be amended to ensure that a court would take into account the following factors:[78]

- poor standards of education within Australian Indigenous society;
- poor opportunities for the development of managerial skills and poor understanding of financial concepts;
- that election to the board may reflect the judgement by the corporate membership as to the directors authority and position within the Indigenous polity rather than a judgement about the person's ability to perform the duties of the position;
- that in corporations serving the need of Indigenous groups dispensed in a wide geographical region, the ability of directors to convene board meetings and exercise oversight of the affairs of the corporation may be more limited;
- that in the case of Indigenous corporations, it may be that the corporation has been formed in response to the requirements of the *Native Title Act 1993* ss 55-57 rather than on a voluntary basis, so that board members may have accepted appointments under conditions where to refuse would have occasioned hardship for the Indigenous group served by the corporation.

3.151 At one level, it would seem that such an approach would recognise some of the disadvantages faced by Indigenous participants in corporations. The contrary view may be that this is a paternalistic attitude which is indistinguishable from the attitudes underlying the welfare policies to date that have recently been criticised for creating a culture of "welfare dependence" amongst Aboriginals. Adjustment of the standard may result in a culture of complacency and apathy in relation to the running of Indigenous corporations.

3.152 There may be other benefits and disadvantages of this approach. They should be considered carefully in determining whether any reforms lowering the standard should be proposed. In particular, while lowering the standard for Indigenous director's duty of care may reflect their relative disadvantage in terms of skills and knowledge, it may also prejudice the rights and expectations of the corporation's Indigenous clients or constituency, who themselves are most likely to be disadvantaged, and run counter to broad principles of equity and transparency in publicly funded service delivery. For this reason, proposals to lower the duty of care requirements may not be widely supported by Indigenous people.

Option 3 – Alignment with the Corporations Law

3.153 Like most of the associations incorporations acts of each of the States and Territories[79], the director's duties sections of the ACA Act are outdated. They have not kept up to step with the developments of general law standards of fiduciary obligations and duties of care (eg *AWA v Daniels; Byrnes Hopwood*) to the offices of directors. These standards have been formed through the interpretation of the reformed Corporations Law provisions.

3.154 If the statement of the ACA Act duties were harmonised with the text of the Corporations Law, interested parties could take advantage of the more settled jurisprudence on the meaning of these sections and the jurisprudence which is likely to evolve from the recent CLERP amendments.[80]

3.155 The *Commonwealth Companies and Authorities 1997* has been amended consistently with the Corporations Law for precisely this reason. The director's duties contained in the *Commonwealth Companies and Authorities Act* are almost identical to those provided in the Corporations Law.

3.156 The approach taken will depend on the broader policy direction taken for reform of the ACA Act. If the purpose of the ACA Act is to provide a very simple incorporation statute, then arguably, duties could be stated in a very simple fashion, and there may not be a need for adoption of the more comprehensive but more complex Corporations Law formulations. (The counter-argument would be that simplified statements of the Corporations Law formulations would be legally uncertain (being a departure from the main body of the law) and the clarification of these provisions will only be achieved through costly litigation.)

3.157 Alternatively, if the ACA Act is to keep a broader role for a broader range of corporations, consistency with the corporations law may be desirable.

Option 4 – Split Standards for Directors and Officers

3.158 The fourth option would vary the standard of care required of directors, to make it subjective. This responds to the common circumstance that persons are commonly elected onto the board of Indigenous corporation without the requisite experience or skills – as a consequence of both the Indigenous politics of representation, but also the lower levels of education and management experience within the Indigenous community generally (as discussed above). However, it acknowledges that without this form of representation, the corporation fails to achieve legitimacy in the eyes of the Indigenous group it is intended to serve.

3.159 However, director's duties would be extended to "officers" involved in management of the corporation. The standard of care required of those officers would *not* be lowered, and would remain objective. This would avoid some of the concerns about director's duties being lowered at the potential expense of members. It would also help to avoid the risk of "rogue managers" taking advantage of a lower standard of care.

H. WHAT SHOULD THE REGISTRAR'S FUNCTIONS AND POWERS BE?

Issues

3.160 What should be the role of the Registrar under a reformed act?

3.161 Should the Registrar's role remain exclusively that of "corporate policeman", vetting rules conducting investigations and appointing administrators? Or should there be more of an educative, capacity-building, role – to enable assistance and mediation before imposed intervention becomes necessary?

3.162 Should some of the current discretions be "structured" by reference to clearer and more precise grounds for their exercise?

3.163 Should greater emphasis be placed on the members' ability to protect their interests through legal remedies rather than relying on the Registrar's intervention? (ie should members be given access to a statutory derivative action and an oppression remedy?)

Options

3.164 Structuring and limiting the Registrar's discretions in the exercise of the Registrar's powers.

3.165 Adding further functions and powers to allow for (or mandate) assistance to be provided to corporations before imposed intervention becomes necessary.

3.166 Providing for better legal remedies for members to protect their own interest, rather than relying on intervention by the Registrar.

Discussion

Background – Current Functions and Powers, and their Exercise by the Registrar

3.167 The Registrar has a range of functions and powers under the ACA Act. These typically include very broad discretions.

3.168 The relevant functions of the Registrar that are specified in the ACA Act include:[81]

- to maintain a Register of Incorporated Aboriginal Associations; and
- to advise Indigenous Australians on the procedures for the incorporation of ACA Act corporations.

3.169 Important powers of the Registrar include the following:

- the power to approve, or refuse to approve, the proposed objects or rules of an association that wishes to incorporate under the ACA Act, or proposed amendments to the objects or rules of existing associations;[82]
- the power to require a corporation to provide an up-to-date list of the names and addresses of all the members of the corporation;[83]
- the power to arbitrate in disputes between a corporation and one or more of its members (or in disputes between members, if those members request the Registrar to do so);[84]
- the power to call a special general meeting of the members of a corporation if, in the opinion of the Registrar, there is a need to do so;[85]
- the power to require that documents of a corporation be made fully and freely available to the Registrar or a nominee of the Registrar, and that "any person" answer questions asked by the Registrar or Registrar's nominee;[86]
- the power to appoint an administrator, including in circumstances where (1) the Registrar is satisfied that the association has been trading at a loss for at least 6 of the last 12 months, (2) the governing committee has not complied with the ACA Act or the corporation's rules, without satisfactory explanation, (3) the governing committee has acted in their own interests or in a way that is unjust or unfair to other members; or (4) appointment of an administrator is otherwise in the public interest;[87]
- the power to conduct an election for membership of the governing committee of a corporation, once the Registrar has decided that administration is no longer necessary;[88] and
- the power to petition the Federal Court for a corporation to be wound up, either on the advice of an administrator or where, in the Registrar's opinion, winding up would be in the interests of the members of the corporation.[89]

3.170 In addition, the Registrar has the incidental power to do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of his functions including, but without limiting the generality of the foregoing, power to act as agent for an Aboriginal corporation.[90]

3.171 While a number of these powers and functions reflect those under other incorporation regimes, the functions and powers under the ACA Act are on the whole more interventionist and less circumscribed than the functions and powers of regulators under the Corporations Law (including the *Australian Securities and Investments Commission Act 1989* (Cth), and various State and Territory association incorporation legislation.

3.172 This in part reflects a somewhat paternalistic philosophy behind the original establishment of the ACA Act, and the more recent emphasis on "accountability" (which is discussed further below, under Chapter 3, Section I), introduced through recent amendments to the ACA Act.

3.173 The exercise of the discretions attaching to the powers and functions has in the past also been highly interventionist. As has been noted above, the previous Registrar's view was

that his role was to use the ACA Act to protect Aboriginal company members from exploitation by their Aboriginal boards.

Registrar's role in approval of Rules of Association

3.174 Problems with the nature and structure of the Registrar's obligation to scrutinise applications for incorporation and attached Rules, before deciding whether or not to accept the, are discussed in detail under Chapter 3, Section D above. The imprecise nature of the discretion is a source of some difficulty for staff of the Registrar's office – for example, is the requirement that Rules not be "inequitable" or "unjust" an objective standard, or is it subjective in accordance with the Aboriginal custom of the group involved? If the latter, then the staff of the Registrar's office arguably lack the qualifications to determine the issue.

Registrar's power to require production of membership lists

3.175 Difficulties with the power to require production of up-to-date lists of names and addresses of members are well known. Further, members of the staff of the Registrar's office have noted that this power is largely meaningless, as they are not in a position to verify the lists or do anything with them – even if they were accurate and up to date.

Registrar's power to arbitrate disputes

3.176 The Registrar has the power to arbitrate disputes referred to the Registrar under a company's rules. However, the power is inflexible, in that there is no scope for mediation or other forms of dispute resolution; and the Registrar's role is limited to whatever may be provided for in the corporation's Rules.

Registrar's role in administrations

3.177 In the circumstances of most ACA Act corporations, events such as administration and winding-up are experienced as external interventions in the Indigenous polity and are, in the main, strongly resented.

3.178 As an example, note the steps taken by Goolburri Aboriginal Corporation Land Council in an attempt to avoid the appointment of an administrator by the Registrar.[91] These actions led to the litigation in *Kazar v Duus* (1998) 88 FCR 218.

3.179 It is also noted that the Registrar may appoint an administrator for any reason in s71 of the ACA Act, including that the board has failed to comply with the ACA Act. This means a non-financial default could still place a corporation at risk of administration. This is very different from the purpose of the appointment of an administrator under insolvency regimes in the Corporations Law. (See also discussions of "accountability" under heading Chapter 3, Section I and discussion of "consistency with the corporations law" under Chapter 3, Section J below.)

Registrar's role in winding-up

3.180 The Registrar also has the power to wind-up corporations, on a number of grounds. These include where it is "just and equitable" to do so. There is also a power to wind-up the corporation where board members have acted in their own interests rather than the interests of the corporation, or "otherwise in a way that appears to be unfair or unjust".

3.181 These discretions are extremely broad. Similar provisions either do not exist under the Corporations law and state/territory associations incorporation legislation, or there is more structure to their exercise. For example, ASIC can only take action to wind up a company on the grounds of "public interest" following an investigation in accordance with Division 1 Part 3 of the ASIC Law.[92]

3.182 The "public interest" ground is capable of wide administrative interpretation. An example of the broad exercise of this discretion was seen with the winding-up of the National Indigenous Advisory Group Aboriginal Corporation ("**NIAG**"). NIAG's objects included the provision of decision-making advice and training to Aboriginal organisations. NIAG organised several conferences. The Registrar's *Annual Report* states that '[A] winding up order was made on various grounds including that it was not in the public interest to allow it to continue to exist as it was a mere shell of an organisation'. Such reasoning would threaten most corporations in Australia with winding-up.[93]

Registrar's role in deregistration

3.183 The Registrar can initiate deregistration of an Aboriginal Corporation. This is done via Regulation 18 of the ACA Regulations, which incorporates relevant provisions of the Corporations Law.

3.184 Commentators have noted that the threat and practice of de-registration has been used by the Registrar to enforce compliance with reporting obligations under the ACA Act. This is problematic given the onerous nature of these obligations and the practical difficulties many Indigenous corporations and their members face in meeting such (eg poor reading, writing and numeracy skills, lack of familiarity with the corporate form and corporate roles).[94]

3.185 In the 1998-9 *Annual Report*, the Registrar noted that:

> [A] high proportion of corporations did not comply with the reporting requirements of section 59 of the Act for the three consecutive years to 30 June 1997. In the previous reporting period, the Registrar sought legal advice on how to deal with corporations that continually fail to file annual returns. The advice indicated that continuing breaches of section 59 of the Act, subsequent to reminder notices and letters requesting the submission of annual returns, provide sufficient grounds for the Registrar to proceed with action to wind-up the corporations. Solicitors were . . . instructed to write to the governing committees of 446 corporations, which, for the three years to 30 June 1997 had failed to file their returns, and require them again to do so. The letters informed the governing committees of the corporations which were in breach that failure to submit outstanding returns, within a specified period, would result in the Registrar initiating winding up proceedings. As a result of these actions, 44 corporations were wound up and 274 corporations were deregistered . . . As at 30 June 1999 action with respect to the balance was still pending.[95]

3.186 The practice of deregistration for non-compliance with the reporting requirements is a good indicator of the health of either the corporations operating under the ACA Act or the corporate reporting system itself. If 274 corporations out of a total of 3,000 corporations were deregistered in one year, the proportion of corporations deregistered for failure to comply is close to 10% of the total number of corporations. This figure is very high. Many would argue that it is unacceptable.

The Reform Options

3.187 The reform options adopted will be in significant part be determined by the answers to the first 3 policy issues outlined above - ie whether there is a need for special incorporation legislation for Indigenous people; if so, which corporations the ACA Act should be aimed at; and whether it should it adopt a prescriptive or a permissive approach to regulation.

3.188 These options are not mutually exclusive, and could (depending on the overall policy direction adopted for the ACA Act) be complementary.

Option 1 - Structuring and limiting the Registrar's discretions in the exercise of the Registrar's powers

3.189 This option is relatively self-explanatory. It would tie-in well with steps taken to make the ACA Act more permissive – and could in fact form one mechanism for doing so. An example of how this could be done is discussed under Chapter 3, Section D above.

Option 2 – Additional functions and powers – facilitation, assistance, education, mediation

3.190 As has been discussed previously, lack of formal education, poor opportunities for management experience and cultural differences, all make compliance with the provisions of the ACA Act very difficult for Indigenous corporations and their members and directors. Experience has shown that many corporations do not comply, and encounter a range of difficulties as a result. This provides a very strong argument that there should be a role for the Registrar in providing assistance to Indigenous corporations.

3.191 At present, however, the powers of the Registrar to actually assist Indigenous corporations are very limited. For example, under section 5, the Registrar can (only):

> (b) advise adult Aboriginals on the procedures for the constitution of Aboriginal Council areas and the establishment of Aboriginal Councils and for the incorporation of Aboriginal associations.

3.192 This is a very narrow function, technically only allowing advice on the "*procedures*" for incorporation – not more detailed assistance in the form of advice about the most appropriate structures or form of Rules for any particular corporation.

3.193 Further, there is very little scope for assistance to be provided once the corporation is up and running. Instead, the focus of the ACA Act is on more drastic measures, such as appointment of administrators, or taking action to wind-up or deregister corporations. As discussed previously, because of the prescriptive nature of the ACA Act, the Registrar and staff of the Registrar's office are currently technically obliged to take such drastic action

where breaches of the ACA Act occur. (The first option in this section, discussed above, could remedy that problem.)

3.194 As noted above, one power the Registrar *does* currently have to "assist" established corporations is the power to arbitrate disputes as provided by the Rules. However, this is inflexible, and limited in its application.

3.195 In addition to the problems this limited scope for assistance (as opposed to intervention) causes for Indigenous corporations, staff of Registrar's office have expressed frustration with the limitations it places on them.

3.196 There are a range of additional powers and functions which could be granted to the Registrar to make the ACA Act more facilitative and lees interventionist. These might include the following:

- Granting the Registrar an express power to provide advice/assistance to Aboriginal Corporations on matters relevant to the operation of the ACA Act and Regulations, and compliance by Corporations with them. (This might be limited to where advice has been requested).

- Granting the Registrar the power to mediate disputes between members, between members and the board, or between board members.

- Including education and training as a statutory function of the Registrar.

- Giving the Registrar the power to alter unworkable rules or to exempt corporations from the operation of unworkable rules, on application. (A typical example of unworkable rules is where the rules provide for a quorum which is impossible to meet, and no "fall back" provisions. In these circumstances, the corporation is in a "catch-22": it cannot obtain quorum to amend the rules to lower the quorum. It also cannot meet the requirements for AGMs, and will therefore soon be in breach of the ACA Act.).

- Giving the Registrar the power to Remedy inadvertent errors in official documents issued by the Registrar, such as typographical errors in the official name of a corporation.

3.197 Other, more specific amendments could also be introduced to require "intermediate" action prior to appointing an administrator, winding-up or deregistering. These will depend largely on the broader policy direction adopted for the ACA Act, and the nature of corporations at which it will be targeted. But they might include, for example, a special voluntary administration procedure, which:

(a) allows a Manager to be appointed to assist corporations with asset or debt levels above a certain ceiling amount [to be ascertained] prior to insolvency;

(b) requires corporations above the ceiling amount to use the Voluntary Administration procedure; and

(c) allows a Manager to be appointed by the Registrar to corporations under the ceiling amount to wind up the affairs of the corporation.

3.198 Where however, the corporation is in difficulty, but not yet insolvent, corporations above the ceiling should be entitled to request the Registrar to appoint a Manager to assist the management of the corporation.

3.199 The Manager would have the combined powers currently provided for authorised persons under section 39 and Administrators under section 71 but would act pursuant to guidelines. The guidelines will outline the assistance to be given by the Manager to the corporation and the steps to be taken.

Option 3 – Members' Remedies

3.200 Under this third option, the Registrar's powers to intervene would be curtailed or more closely prescribed, and the members would be provided with increased capacity to take action.

3.201 This option would probably be more suited to an act which attempts to cater to all kinds and sizes of Indigenous corporation than to an ACA Act focussed on small and "simple" corporations.

3.202 Under the ACA Act as it stands, members' remedies are currently either based on the general law or are achieved by seeking the intervention of the Registrar (see eg sections 60A). Under the general law, members' rights and remedies are currently unclear (largely because of the rule in *Foss v Harbottle*).

3.203 In order to increase the capacity for members to take action on their own behalf, rather than relying on the Registrar, it would therefore be necessary to provide for specific statutory remedies.

3.204 Possible statutory remedies are suggested by those which have introduced into the Corporations Law, specifically to overcome the problems with the general law. These include the following:

- a statutory oppression remedy;
- a statutory injunction remedy; and
- a statutory derivative action for members (introduced by the CLERP reforms to provide express exceptions to the rule in *Foss v Harbottle*.)

I. WHAT SHOULD THE APPROACH TO ACCOUNTABILITY AND FINANCIAL REPORTING BE?

Issues

3.205 What should be the focus of Accountability under the ACA Act?

3.206 What is an appropriate level of financial reporting?

3.207 Can some of the different types of financial reporting required (a) under this ACA Act or (b) under this ACA Act and under loan contracts, grants or native title legislation be harmonised?

3.208 What role should the ACA Act play in ensuring accountability of Indigenous Corporations? Should financial reporting for corporate governance purposes be made simpler for all corporations, while allowing financial reporting for corporations involved in particular purposes of projects to be superadded, being determined by the particular purpose or project (eg NTRB, CDEP scheme, health services corporation in receipt of Health Dept funding)?

Options

3.209 With respect to focus of accountability, there are three logical options:

- focus on internal accountability, that is, the accountability of the corporation to its members;
- focus external accountability, that is, the accountability of the corporation to creditors, funding bodies and other bodies external to the ACA corporation; or
- focus on both internal and external accountability.

3.210 The issue as to the appropriate level of financial reporting depends on the direction which will be taken in respect of the policy issue addressed in Section B of this chapter, that is, the question of who the act is aimed at. If it is aimed at simple corporations, many of the current requirements can be scaled back. If the preference is to have tiers of regulation, it will be necessary to determine how the each tier will be defined.

3.211 The development of a reporting regime under the ACA Act will require consideration of the technical reporting requirements imposed on ACA Act corporations by public finance providers such as ATSIC, State and local government bodies.

Discussion

The meaning of "accountability"

3.212 The term "accountability" has been used a great deal in conjunction with the ACA Act, and has been the source of much discussion and debate. Unfortunately, it is a problematic term in that it means different things to different people.

3.213 It is therefore necessary to define what is being discussed here. Accountability is a term used to denote processes of "giving account", "answering" and "responding" for an institution's performance to a variety of persons or other institutions who are affected by the activities of the institution held accountable.[96] Two broad types of "accountability" in relation to ACA corporations may be distinguished:

- **external accountability** – the requirement that the corporation be accountable for its performance to external parties such as regulatory authorities, funding agencies, Parliament and the wider public; and

- **internal accountability** – the requirement that the corporation be responsive to the interests of its members.[97]

Focus of Accountability of Indigenous organisations

3.214 Indigenous organisations must, of necessity, operate in the complex intercultural zone between the Indigenous and non-Indigenous domains.[98] In this zone, the accountability of an organisation may be contested on the basis of the potential incompatibility of principles and values deriving from each of the two domains.

3.215 Nevertheless, despite the possibility of conflict between the demands of internal and external accountability, these two dimensions of accountability can be linked through appropriate organisational structures and procedures. Indigenous organisations that have developed effective participatory, decision-making and service delivery mechanisms that maximise internal accountability have been observed to demonstrate higher levels of external accountability. This has manifested itself in more effective use of resources, good financial management and reporting, and higher levels of regulatory compliance.[99]

3.216 Corporations which operated solely on the basis of informal arrangements in accordance with law and custom would be unlikely to satisfy the requirements of either public accountability or of accountability to their Indigenous constituents.

3.217 This aspect of internal accountability is achieved through corporate governance mechanisms rather than through external reporting requirements. However, it is external accountability which has been the focus of most attention, particularly where public monies are involved.

3.218 The focus on the use of the ACA Act as a means of achieving external accountability has resulted in increasingly complex and onerous financial reporting and accountability provisions in the ACA Act. These now include the provision of balance sheets and expenditure and income statements, which must in effect be audited by an "examiner".

These requirements apply irrespective of the size or nature of the corporation. The specific accounting standards required for audited financial statements under the ACA Act are currently unclear, and there is also some confusion about other aspects of the reporting requirements (such as whether it should extend to trusts or entities administered by the corporation).[100]

3.219 The requirements under the ACA Act are overlaid by a potentially bewildering array of financial reporting requirements required under funding agreements or other legislative regimes which may apply to some corporations (such as the reporting requirements for NTRBs under the NT Act). These reporting requirements are often inconsistent with the reporting requirements under the ACA Act because they adopt different accounting standards or requiring reporting of different financial indicia.

3.220 The resulting multiplicity of financial reporting requirements can be very complex, costly and inefficient. NTRBs may have to prepare different kinds of financial reports using different accounting standards to meet ACA Act requirements, NT Act requirements, ATSIC grant requirements, and the requirements of other State-based funding agencies.

3.221 Specific assessment of compliance costs has not been possible under the present review, but a submission prepared by Ernst & Young for the Fingleton review estimated the annual costs of compliance with the ACA Act's audit requirements alone to be "in the order of $20 million."[101]

The rationale for and focus of financial reporting

3.222 Should the focus of the ACA Act's financial reporting requirements remain external accountability, or should it be aimed at internal accountability?

3.223 In the Corporations Law context, the rationale for the disclosure of financial information is that all persons dealing with the corporation will be better able to protect their interests. In practice, however, the disclosure of corporate information is in fact to protect the members of the corporation, rather than the interests of creditors or to satisfy the regulator's curiosity. Creditors can protect their interests more effectively through contractual means. Ford, Austin and Ramsay, the authors of the leading work on Australian corporate law, discuss the gap between the theory and the practice of disclosure for Corporations Law companies in the following terms:

> As an instrument of creditor protection, public disclosure of corporate information is a blunt weapon. Trade creditors, frequently small business enterprises, are unlikely to consult ASIC's records, and those records will be of only historical interests for most purposes. Lenders and other major creditors will use their position of strength to obtain up-to-date financial information about the borrower, and will protect themselves by taking security over corporate assets and (where appropriate) personal guarantees from principal shareholders and directors.[102]

3.224 The Fingleton Review considered the question of external accountability at length. It also concluded that the emphasis on financial reporting mechanisms in the ACA Act was misplaced, and that a more appropriate focus for external accountability measures should be through the grant conditions or service agreements under which service delivery organisations receive funding.[103]

3.225 If this rationale is adopted, it can then be said that the appropriate level of financial reporting is the level required to allow a member to adequately protect his or her interests. Broadly speaking, this may require:

(a) the maintenance of proper accounts and financial records;

(b) preparation of financial reports and directors reports; and

(c) compulsory audits of the financial reports.

3.226 However, the design of an appropriate financial reporting regime will depend in large part on the types of corporations a reformed ACA Act will be aimed at. At present, the corporations incorporated under the ACA Act vary enormously in size, function, financial turnover and source of funding (some are publicly funded, others raise their own income through the provision of goods and services).

3.227 For small ACA corporations, it may only be necessary to impose requirement (a) above, as is the case for small proprietary companies under the Corporations Law. For large complex corporations with high revenues on the other hand, a more detailed set of financial reports may be required, in order for a member to be able to protect its interests. Adopting a tiered approach to regulation would be one way to address this.

3.228 Currently, under the ACA Act, there is a "one size fits all approach". All corporations, except the small number which have been provided with exemptions, are required to comply with the same reporting requirements. These requirements are more onerous than those imposed on small proprietary companies under the Corporations Law. Therefore, small bodies which are not exempted from the reporting requirements under the ACA Act and would otherwise qualify as a small proprietary company under the Corporations Law are faced with heavier reporting requirements under the ACA Act than would be the case under the Corporations Law.

3.229 If the ACA Act is to continue to cater for all sizes of corporations, and formal tiers of regulation are not adopted, an alternative approach may be to provide for broader exemptions to the more onerous reporting requirements of the ACA Act. This might include "blanket" exemptions (ie without the requirement to expressly apply for an exemption) for certain classes of corporations. Consideration would need to be given to the criteria for calculating these exempt classes, but should probably be based on "ceiling" levels of:

- number of employees;
- annual gross operating revenue; and
- value of gross assets (possibly excluding the value of *inalienable* land, such as native title land or land held under certain State/Territory land rights legislation).

Harmonisation of financial reporting obligations of ACA corporations

3.230 As noted above, there is much inconsistency and duplication between the reporting regimes for the purposes of financial accountability to governmental creditors or grantors and the those under the ACA Act.

3.231 Unless there is a good reason for the creation of separate and incompatible reporting regimes, it might even make sense to provide that financial statements prepared for the purposes of creditor or grantor reporting could also serve as financial statements for the purposes of the ACA Act corporate reporting provisions.

3.232 It would also be useful to attempt to harmonise the accounting standards adopted by various major creditors – especially ATSIC and relevant State government agencies. Detailed recommendations of this kind unfortunately fall outside the scope of this Review.

J. WHAT SHOULD BE THE DEGREE OF CONSISTENCY WITH THE CORPORATIONS LAW?

Issues

3.233 There are two aspects of the issue of whether the ACA Act should be consistent with the Corporations Law which require attention. They are:

- Should the ACA Act be as comprehensive as the Corporations Law in terms of scope and detail? For example, the ACA Act has two core provisions relating to director's duties; section 49C (members to act honestly and diligently) and s 49 D (disclosure of pecuniary interests). On the other hand, in addition to provisions relating to these core duties, the Corporations Law contains host of other provisions regulating the behaviour of directors. Should the ACA Act attempt to cover all the duties provided for in the Corporations Law?

- In cases where there is a need to adopt a provision broadly similar to one existing in the Corporations Law, should identical language be used? Or, should a shorter or simplified version of the relevant Corporations Law provision be formulated?

Options

3.234 As to the first issue above there are two clear options available:

- Reform the ACA Act to be as extensive as the Corporations Law; or

- Only provide for the core or essential provisions in any given area in the ACA Act.

3.235 As to the second issue above, there are potentially three ways in which the relevant provisions of the Corporations Law can be adopted (of course, with the necessary changes being made). They are:

- Adoption of the Corporations Law by reference in the ACA Act to the relevant provision in the Corporations Law.

- Adoption by reproduction of the full text of the relevant Corporations Law provision in the ACA Act.

- Adoption of a shorter or simplified version of the relevant Corporations Law provision.

Discussion

An advanced incorporation statute

3.236 Since the 1970s the provisions of the Corporations Law and those of the State and Territories incorporation statues which many of the provisions of the ACA Act were based, have been improved to reflect contemporary thinking in the regulation of corporate activity. Some examples include:

- Clarification of the many uncertainties associated with the application of the general law. Examples include the removal of the doctrine of ultra *vires* and the clarification of whether the subjective or objective test should be used to assess the duty of honesty (which has been reformulated several times under the Corporations Law and its predecessors).

- The introduction of replaceable rules.

Comprehensiveness

3.237 As well as being the most advanced model for regulating corporate activity within Australia, the Corporations Law is also the most comprehensive in terms of scope and detail. For example:

- the Corporations Law contains a host of rules regulating the behaviour and activities of directors in addition to those that are contained in the ACA Act;

- director's duties under the Corporations Law extends to officers of the corporation; and

- the Corporations Law provides for a relatively extensive range of members remedies.

3.238 The question regarding whether the ACA Act should be as comprehensive as the Corporations Law depends to a large extent on the answer to the question: "Who should the ACA Act be aimed at?". In other words, the scope of the ACA Act will depend on the reform option which is adopted.

3.239 If the focus of the ACA Act is to provide a simple incorporation statute for smaller corporations then it is arguable that the comprehensiveness and the complexity of the Corporations Law should be avoided.

3.240 However, if the intention is for the ACA Act to properly cater for all types of Indigenous organisations, then it may be preferable to extend the scope of the provisions of the ACA Act in certain areas. At the same time, it is arguable that the inclusion of all the corporate governance rules provided by the Corporations Law are not necessary. Too much movement towards a Corporations Law equivalent would undermine the purpose of having a separate Act for Indigenous people.

Identical provisions

3.241 Harmonisation of the ACA Act provisions with the provisions contained in the Corporations Law would mean that interested parties can take advantage of the settled jurisprudence relating to the Corporations Law provisions. This would arguably lead to greater clarity and certainty. As discussed above in section G, the *Commonwealth Authorities and Companies Act 1997* ("**CAC Act**") has been kept in line with the Corporations Law for precisely these reasons.

3.242 The principal factor weighing against the wholesale adoption of the Corporations Law provisions is that such a step would arguably lead to a more complex ACA Act which most of its users would find too difficult to comprehend. A resolution of this issue requires reference, again, to the underlying policy question of: "Who is the ACA Act aimed at?". Arguably, if the ACA Act is to cater for complex corporations, there is some basis for adopting provisions which are identical to the Corporations Law provisions.

3.243 Further, again, there is the risk that the more the ACA Act replicates the Corporations Law, the more questionable will be the apparent need for a separate ACA Act.

3.244 If identical provisions were to be adopted, two approaches are available. One approach would be to simply reproduce the Corporations Law provisions in the ACA Act. This was the approach taken under the CAC Act.

3.245 An alternative to reproducing the provisions of the Corporations Law in the ACA Act would be to adopt the relevant Corporations Law provisions by reference in the ACA Act. This is already done in section 67 of the ACA Act which provides for the application of the Corporations Law provisions that relate to the winding up of companies to the winding up of ACA Act corporations.

3.246 The principal advantage of this approach would be that subsequent changes to the Corporations Law would automatically be incorporated in the ACA Act. This would avoid the need to amend the ACA Act each time amendments are made to the Corporations Law.

3.247 A foreseeable problem with such an approach is that certain amendments to the Corporations Law may not be appropriate for adoption in the ACA Act. If such amendments were automatically adopted in the ACA Act, inconsistencies could arise. This would undermine the integrity of the ACA Act. Therefore, the incorporation by reference provision would have to be drafted very carefully so as to avoid any doubt as to which parts of the Corporations Law have been introduced to the ACA Act.

Simplified provisions

3.248 There is some argument for the adoption of simplified Corporations Law provisions to be incorporated in the ACA Act.

3.249 The problem with the adoption of simplified provisions is that there are risks that the simplified formulations may be given different judicial interpretations to the original Corporations Law provisions. As a result, the certainty of the ACA Act could be undermined.

3.250 It would also mean that the ACA Act could fall behind developments and amendments to the Corporations Law unless the ACA Act is updated and amended when there are relevant changes to the Corporations Law – for example through consequential amendments.

K. HOW SHOULD THE ACA ACT ADDRESS SELF DETERMINATION AND SELF MANAGEMENT?

Issues

3.251 Self-determination and self-management were key issues underlying the passage of the original ACA Act.

3.252 Part IV of the ACA Act enables groups or communities of Indigenous people to form associations of natural persons. As discussed in Chapter 2, Indigenous Australians have taken full advantage of this Part of the ACA Act and there are currently some 3000 ACA Act associations serving a wide range of service delivery, economic, social, advocacy and other purposes.

3.253 As discussed in Chapter 3, Part D, the ACA Act and its administration have provided a quite prescriptive and relatively inflexible vehicle for Indigenous incorporation. Part III of the ACA Act, which provides for the creation of Aboriginal councils to fulfil a role similar to that of local councils, has been seen as providing one means by which Indigenous residents of a region could further their aspirations for a more extended form of self-determination than is currently available under Part IV.

3.254 As will be discussed in Chapter 5, Part III has become redundant for largely political reasons and Indigenous Australians have been forced to seek their self-determination aspirations either through the use of associations incorporated under Part IV or through means beyond the ACA Act.

3.255 The policy issue in this context is how the ACA Act should provide a vehicle for contemporary Indigenous aspirations for self-determination and self-management, and whether a revised Part III of the ACA Act would provide a realistic option for these aspirations.

Options

3.256 There are two obvious policy options:

- Repealing (or keeping dormant) Part III of the ACA Act.
- Attempting to promote a more expanded form of Indigenous self-determination by the use of ACA Act mechanisms by either:
    - developing a workable Part III; or
    - developing a mechanism under Part IV which empowers ACA Act corporations to perform activities in the pursuit of self-determination.

3.257 These options are discussed from a practical perspective in Chapter 5.

Discussion

Self-determination and self-management

3.258 In the broadest (international law) sense, self-determination refers to the right of Indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development. In the Australian context, Indigenous people have adopted the view that self-determination includes regional autonomy and Indigenous people, groups and communities having substantial control over decisions affecting them and their lands, while accepting that this takes place within the Australian nation state.

3.259 The current Government's official position has taken self-determination to mean the right to a separate state or secession, notwithstanding that the right of territorial integrity of sovereign (non-racist) states is already enshrined in international instruments, and despite the fact that Australian Indigenous people have never pursued a separatist policy.

3.260 Based on this interpretation, Australia's current approach has been to promote the limited form of decision making afforded by self-management, circumventing the deeper need for self-determination in the internationally recognised sense of that term.

3.261 This is apparent in the ambivalent role of ATSIC, standing as it does somewhere between government and Indigenous communities. ATSIC's position is important to this review, not only because it is necessary to consider whether ATSIC has effectively superseded the purposes of the original Part III by the institution of Regional Councils, but also because it cannot be ignored in any consideration of the theme of self-determination of Australia's Indigenous peoples. Indeed, at various times both ATSIC's elected representatives and the Australian government have indicated that ATSIC meets Indigenous Australian self-determination aspirations.

3.262 Despite such assertions, the Preamble to the ATSIC Act does not embrace the notion of self determination. Rather, it says:

> … it is appropriate to further the aforementioned objective [to overcome disadvantage and enjoy culture] in a manner that is consistent with the aims of **self-management** and **self-sufficiency** for Aboriginal persons and Torres Strait Islanders [emphasis added]

3.263 In the context of the ACA Act, self-determination is reflected in the underlying intention of Part III. However, as will be discussed in Chapter 5, there has been a lack of commitment by successive governments to Part III because of the political sensitivity of Federal/State relations.

3.264 In 2000, the Council for Aboriginal Reconciliation delivered its final report to the Commonwealth government. The *Indigenous Rights Document* was part of a bundle of proposals associated with the *Roadmap to the Future*. The stated objectives of the proposed document are:

- Formal recognition of the right of Aboriginal and Torres Strait Islander peoples to self-determination within the life of the nation.

- Improved political participation of Aboriginal and Torres Strait Islander peoples.

3.265 With regard to the ACA Act, it is clear that self-determination, in its more expanded sense, is an important theme which Indigenous people argue must be addressed. However, it may be that Indigenous peoples' aspirations for fuller self-determination are better served by means beyond any voluntary association statute, such as the ACA Act.

L. WHAT SHOULD THE BASIS OF MEMBERSHIP OF CORPORATIONS UNDER THE ACA ACT BE?

Issues

3.266 The ACA Act as it currently stands limits membership to natural persons who are Indigenous persons or their spouses. Should this be made more flexible, to allow for membership by non-Indigenous persons or corporations?

Options

3.267 Option 1 - Maintaining the ACA Act for associations of Indigenous natural persons, with associate membership for non-Indigenous persons.

3.268 Option 2 – Maintaining the ACA Act for associations of Indigenous natural persons, but allowing for the full membership of non-Indigenous persons, provided that control rests with an Indigenous majority.

3.269 Option 3 – Allowing corporations to become members of ACA Act corporations.

Discussion

Non-Indigenous membership

3.270 Originally, the ACA Act did not make provision for non-Indigenous persons to become members of ACA Act corporations. However, this position was changed in 1984 under the *Statute Law (Miscellaneous Provisions) Act (No.2) 1984 (Cth)*. The 1984 amendments operated to allow non-Indigenous spouses of Aboriginal persons to become full members (under s 3 – "definition of aboriginal") and for non-Indigenous persons generally to obtain certain membership rights (under s 49A – discussed below).

3.271 Section 49A of the ACA Act provides that where more than 75% of the membership of the corporation agrees, the corporate constitution may provide for the membership of persons other than Aboriginals and their spouses. Such persons cannot be given the right to vote or the right to stand for election to the board.[104] However, where provision for the liability of members is made in the constitution, they may become liable for the debts of the corporation.[105]

3.272 It is clear that the spirit of the ACA Act requires that the core membership of an ACA Act corporation be Indigenous. Section 49A attempts to achieve this objective by preventing non-Indigenous members from having a right to vote or for standing for election to the board.

3.273 Arguably, this leaves very few rights to which non-Indigenous members can be entitled, effectively making membership under s 49A largely inert - other than as a means for collecting revenue through membership fees or as a means of demonstrating political

support from the broader community (which alone may nonetheless be sufficient justification for retaining s49A in its present form).

3.274 In some cases, it may be desirable to have non-Indigenous board members, either because of the special skills they may be able to bring, or because of their perceived independence from any Indigenous sub-groups. There may also be situations where it is desirable to involve non-Indigenous community representatives as full members. However, the involvement of non-Indigenous persons in the control of Indigenous corporations will cause controversy as the expectation is that Indigenous organisations would be controlled by Indigenous people.

3.275 Some of these issues can probably be addressed through other mechanisms, such as employing people with required skills, and establishing consultative mechanisms with relevant non-Indigenous community organisations. However, these are not entirely satisfactory alternatives – many non-Indigenous charities rely on skilled businesspeople to effectively donate their time and skills to act as directors on the charity's board. Indigenous associations incorporated under the ACA Act are at present effectively prevented from accessing that resource.

3.276 If full membership were to be extended to non-Indigenous people, the concern would be to ensure that the effective control of a body is maintained by Indigenous members. This could be achieved through a number of mechanisms, such as requiring Indigenous majorities at both the membership and the board levels.

3.277 If it is decided that non-Indigenous people should not be eligible for full membership, but should remain able to become associate members, then consideration should be given to also limiting the liability of associate members, given the fact that they have no formal role in the decision-making of the corporation.

Corporate membership

3.278 As noted above, membership of ACA Act corporations is currently limited to Aboriginals and their spouses. As the term Aboriginal is defined to mean a *person* who is a member of the Aboriginal race or a Torres Strait Islander, only natural persons can be members of ACA Act corporations and corporate membership is excluded.

3.279 However, it should be noted that the converse *is* possible; that is, an ACA Act corporation can be a member of a corporation that has been incorporated under another incorporation statute, for example, the Corporations Law.

3.280 There are a number of arguments for and against the case allowing corporations to be members of ACA Act corporations. The arguments in favour include:

- There is a strong demand amongst Indigenous groups to create umbrella organisations as a way of securing representation of local and corporatised interests in larger regional based corporations.[106]

- In a community context, the creation of a corporate group has been considered to be an attractive way of separating a community's business activities from other cultural activities or passive land-holding activities.[107]

3.281 The counter-arguments are as follows:

- Allowing for corporate membership is inconsistent with the associational model of the corporation, which forms the basis of the ACA Act as currently drafted.

- Proposals for nominee directorships (where directors are nominated by individual corporate members, and act in accordance with the instructions of the nominee) are problematic.

- Allowing for the establishment of corporate groups would need to be accompanied with requirements for corporate accounts to be prepared.

- The amendments required to enable effective corporate membership would make the ACA Act more complex, and remove it from the intent of providing a simple incorporation regime for Indigenous people.

- If groups seek to create corporate groups through corporate membership, then this can be sufficiently done using the Corporations Law.

3.282 If it is decided that the ACA Act should provide for corporate membership of associations incorporated under the ACA Act, an issue for consideration is whether this should be limited to membership by Indigenous corporations or any corporation, irrespective of whether they are Indigenous or not. If the latter, then consideration would need to be given to some of the issues raised in relation to non-Indigenous natural person members, discussed above.

CHAPTER 4 MODELS FOR STRUCTURAL REFORM

A. OVERVIEW

4.1 The decisions made in relation to the policy issues discussed in Chapter 3 will drive the overall shape and direction of the ACA Act. While there are a significant number of issues of varying degrees of detail discussed in that Chapter, the range of options point to four possible general structural models for a reformed ACA Act. These are as follows:

(1) Repeal the ACA Act altogether, and require Indigenous associations to incorporate under either State associations incorporation legislation or the Corporations Law. The Registrar's Office could be retained in a modified form. Its' role would be to provide education, training and specialist assistance to Indigenous corporations and associations wishing to incorporate.

(2) Return the focus of the ACA Act to providing a simple and flexible incorporation regime for smaller corporations. This would require larger and more complex corporations to incorporate under other incorporation legislation, chiefly the Corporations Law.

(3) Retain the ACA Act in its current form, which attempts to cater to all sizes and types of Indigenous corporations, but with a range of amendments, for example, to:

- make it more flexible for dealing with a broad range of corporations;
- enable it to better deal with larger and more complex corporations;
- provide the Registrar with a formal role in providing assistance, education and training; and
- address a number of technical difficulties with the current ACA Act.

(4) Return an ACA Act which caters for all sizes and types of Indigenous Corporations, but which does this by having different tiers of regulation, to allow specifically targeted approaches to the regulation of different corporations. This would involve a simple and flexible approach to smaller and more simple corporations, and a more sophisticated and rigorous approach to larger and more complex corporations.

4.2 Each of the four broad structural reform models, and relevant issues arising from them, are discussed in more detail below.

4.3 Certain reform options under the "policy issues for decision" discussed in the previous chapter will fit better under some of these models than others. Others could be adopted and applied whichever of the broad structural models outlined above is ultimately selected. This means that there is potentially a very high number of possible combinations of structural models and specific policy options.

B. MODEL 1 – REPEAL ACA ACT AND TRANSFORM REGISTRAR'S OFFICE

Overview

4.4 This Model would see the ACA Act repealed, and would require Indigenous associations to incorporate under either State associations incorporation legislation or the Corporations Law. However, the Registrar's Office could be retained in a modified form, which would see its role become one of providing education, training and specialist assistance to Indigenous corporations and associations wishing to incorporate.

Discussion

4.5 Arguments for and against repealing the ACA Act have already been considered under Section B in the previous Chapter. For the reasons discussed under that heading, it seems that this is not likely to be a viable option.

4.6 If this model were to be adopted, then the bulk of the policy considerations outlined in the previous Chapter would no longer be relevant and would not need to be considered, with the exception of the section on the *Registrar's Functions and Powers* and the issue of expanding the Registrar's functions to include education, training and mediation.

Other Considerations

Transitional Arrangements

4.7 If this approach were adopted, there would need to be extensive transitional arrangements put into place to provide for the transfer of corporations to other regimes. This would require transitional provisions in the ACA Act, as well as extensive resources to provide the necessary assistance to the 3,000-odd corporations currently incorporated under the ACA Act.

4.8 The transitional arrangements are likely to be complex. Some of the issues which will need to be considered in the development of appropriate transitional arrangements include:

- *Deregistration and Registration* – the process of deregistering corporations under the ACA Act and registering corporations under the relevant alternative incorporation statute will need to be determined.
- *Tax implications* – if ACA Act corporations will be required to transfer assets to the new corporation, there may be certain capital gains tax and stamp duty implications which will need to be identified and neutralised.
- *Exemptions* – Indigenous corporations may need temporary or permanent exemptions from certain Corporations Law and State and Territories association incorporation Act rules and penalties.

Role of the Registrar

4.9 During and after the process of transferring ACA Act corporations to other incorporation regimes, the Registrar's Office would have to be reformed so that it is no longer a regulator. Instead, it would be responsible for, among other things, providing corporate assistance to Indigenous organisations.

4.10 In fulfilling a new corporate assistance role, the new agency could provide a range of services and assistance to Indigenous organisations and incorporators (regardless of what incorporation regime they are, or wish to be, established under). These services and assistance may include the following:

- assisting new incorporators choose an appropriate incorporation statute and draft an appropriate corporate constitution;
- providing assistance regarding compliance with regulatory requirements under the relevant incorporation regimes; and
- providing information, education and "capacity building" assistance in relation to such issues as:
  - the duties of directors or committee members (in particular the concept and practice of fiduciary duties owed to the corporation, as opposed to duties to particular groups or families);
  - meeting procedures – for example, preparing meeting agenda and taking and distributing minutes;
  - the differences between being a member of the corporation and being a client or constituent of the corporation, including the means by which a corporation and its board are accountable to members, clients and constituents;
  - the nature of the board's role and its relationship to the corporation's management, and the functions and responsibilities of a corporation's public officer;
  - strategic planning, including developing a corporation's goals, vision and objectives and drafting strategies to achieve these;
  - establishing knowledge of basic management tools, skills and processes, such as book keeping, resolution of disputes within organisations, and when and how to seek professional advice (legal, accounting or other);
  - avoiding corporate crises such as insolvency and managing litigation.

C. MODEL 2 – SIMPLE INCORPORATION REGIME FOR SMALL CORPORATIONS

Overview

4.11 This Model would see the ACA Act pared back to provide a basic, simple and flexible incorporation regime for smaller corporations. Larger and more complex corporations would have to incorporate under other incorporation legislation, chiefly the Corporations Law, but also State and Territory associations incorporation legislation.

Discussion

4.12 It can be argued plausibly that the incorporation needs of the majority of Indigenous associations can be sufficiently addressed through the Corporations Law or State and Territory association incorporation legislation. (See discussion under Model 1, above.)

4.13 This argument applies most strongly in relation to corporations with a high turnover or established for commercial purposes or corporations in a setting in which the norm and values of deliberative decision-making in an associational context have been comfortably absorbed into Indigenous culture.

4.14 However, if there is a group of associations which does have special needs and which would have the most significant difficulties in complying with the requirement of "mainstream" incorporation legislation, that would arguably be small Indigenous corporations – especially those established simply to hold land, or for sporting, cultural or social purposes.

4.15 This Model would cater specifically for those associations, by providing a very simple and easy mechanism for incorporation. However, like under the State and Territory associations incorporation legislation, corporations would have to transfer to Corporations Law (or if applicable state/territory association incorporation legislation) if they perform certain functions, operate for profit, or exceed a certain size.

4.16 It is suggested that under this Model, the interaction with the various policy issues for consideration would probably be as follows:

- *Prescriptive/Permissive* – the ACA Act would on the whole be very permissive in relation to the rules of an association, and the decision-making processes under it. However, it might be prescriptive in some areas – such as requiring certain processes to be followed for the disposal of land.

- *Cultural Appropriateness* – the ACA Act would allow for "culturally appropriate" processes by taking a very permissive approach to the Rules and decision-making. Reporting and external "accountability" requirements would also be minimal, and there could be a reduced standard of care and diligence for directors.

- *Control by Members* – For simple and small corporations, it may be appropriate to continue with some degree of emphasis on control by members, in particular for

certain dealings, such as disposal of land. However, there should also be some flexibility to take into account the fact that members of such organisations may be widely geographically dispersed, and it may prove difficult to bring them all together for meetings – particularly because such corporations are likely to have very limited resources.

- *Director's Duties* – The small corporations which the ACA Act would aimed at are likely to be under-resourced. In these circumstances, it is unlikely that the corporation would have employees or "officers", and would be run by the Board and members directly. Extensive provisions extending directors duties to officers and shadow directors could simply be adding an unnecessary level of complexity to the Act. Nonetheless, there may be an argument that this protection would be desirable, to prevent exploitation by the occasional "rogue" manager. There are reasonable arguments for providing a subjective duty of care and diligence for directors of these companies (or a split approach if "officers" are also covered, attaching an objective standard to the officers).

- *Registrar's Functions and Powers* – Under this Model, the Registrar's functions and powers would be focussed on the provision of assistance to these smaller corporations, and possibly also to Indigenous corporations incorporated under other incorporation regimes (on a discretionary basis). Reflecting the permissive approach to such corporations, and their limited resources (and limited or non-existent public funding), the Registrar's role would be much less interventionist and much less focussed on "accountability". However, the Registrar would nonetheless retain a role in protecting minorities and mediation of disputes (which would require specialist skills in the Registrar's Office), given that individual members are less likely to have the resources or skills to be able to make effective use of members' remedies. The Registrar's Office would also probably need to retain a role in assisting corporations to transfer to other incorporation regimes if they cease to qualify for incorporation under the (amended) ACA Act.

- *Accountability and Reporting*- Because the corporations catered for under this model would be those with minimal resources, the need for extensive external accountability would be limited (as would the corporations' capacity for compliance with extensive reporting). The reporting requirements under the ACA Act could be greatly reduced, possibly providing for blanket classes of exemptions, and/or reducing financial reporting under the ACA Act to simple statements of income and expenditure. Where public funding is received, relevant reporting and accountability measures would be imposed via grant conditions relating to that funding.

- *Consistency with Corporations Law* –This Model proposes a very simple and basic incorporation regime. On that basis, the need for consistency with the Corporations Law on a wide range of matters would probably be very limited, as it would create unnecessary and undesirable complexity. There may nonetheless be certain areas where desirable clarifications to the Corporations Law could be adopted.

- *Membership* – In keeping with the philosophy of providing a simple incorporation regime, membership of corporations would probably remain limited to natural persons.

Other Considerations

Setting the threshold for corporations to be covered by the Act

4.17 The key issue with this Model will be determining the basis for identifying corporations that will be covered by the ACA Act. The two main ways in which corporations are distinguished in incorporation statutes usually:

- purpose (for example, profit or not-for-profit); or
- size (gauged by revenue, assets and/or number of employees).

4.18 In the past, purpose–based criteria in other incorporation statutes have proven to be ineffective. This is because the activities which a corporation undertakes may change over time in response to new opportunities and obstacles. It is very difficult to maintain regulatory oversight over such changes in purposes and activities.

4.19 If a purpose–based criterion is to be used, the most likely approach is the distinction between a "profit" and a "non-profit" organisation, a distinction which is employed under the State and Territories associations incorporation legislation. However, if this criterion is used, there is a risk the ACA Act could become indistinguishable from these statutes. It would exclude a great proportion of profit-making Aboriginal and Torres Strait Islander corporations from the potential benefits of the ACA Act.

4.20 Another issue which would need to be resolved in this context is whether Indigenous land holding corporations which simply act as conduits for the distribution of royalties would be considered profit-making organisations.

4.21 A "size" criterion based on gross operating revenue, the value of consolidated gross assets, and number of employees or some other objective accounting criterion might be a more useful purpose–neutral criterion. This would use some of the criteria employed by the Corporations Law for its distinction between small and large proprietary companies.[108]

4.22 If such an approach were adopted, it may be necessary to make special provision to cater for corporations in special circumstances, for example:

- *Land Holding Corporations* – Special provision may need to be made for exclusion in the calculation of the value of assets of land held by otherwise "simple" corporations established solely for landholding purposes. These corporations may have high value assets (in the land) but no actual income. Typically, in these cases, the land is inalienable (cannot be sold) and as a consequence cannot be used as security for loans.
- *Corporations which receive grant funding* - In cases where Indigenous corporations receive one-off grants for long term projects, it may be necessary to divide the

grant income by the relevant number of years to determine an appropriate figure for annual revenue.

4.23 Of course, Indigenous corporations which fall within the relevant ACA Act criteria should also have the option of transferring to other incorporation statutes.

Transition arrangements for companies going to Corporations Law and State Laws

4.24 As this Model will also involve the transfer of a large bulk of the current ACA Act corporations to other incorporation statutes, transitional arrangements similar to those discussed in relation to Model 1 will also need to be considered here.

Role of the Registrar's Office

4.25 Under this model, the Registrar would take on a simple registration and regulatory function. In addition, corporate assistance (similar to the assistance discussed in relation to Model 1) could be provided to Indigenous corporations by:

- the Registrar's Office; or
- a new agency which is formed under ATSIC.

4.26 If the Registrar's Office were to undertake both regulatory and corporate assistance functions the extent to which the Registrar's Office can assist Indigenous corporations will need to be carefully defined to ensure that conflicts of interest are avoided.

D. MODEL 3 – "MINIMALIST" MODEL - RETAIN ACA ACT IN CURRENT FORM, WITH NO TIERS

Overview

4.27 This approach would see the ACA Act being maintained in essentially its current form without major structural changes. The ACA Act would continue to provide a broad ranging incorporation regime under which any Indigenous association can incorporate, irrespective of size, complexity or nature.

4.28 Nonetheless, this Model could still involve a range of amendments to better enable the ACA Act to perform this broad-based role.

Discussion

4.29 The risks with this Model are that in attempting to be all things to all persons, the ACA Act will struggle to cater appropriately to the needs and requirements of any. This is essentially one of the main problems with the ACA Act in its present form.

4.30 If the ACA Act were to be retained in this form, then it would probably be necessary to take a "highest common denominator" approach to regulation – ie aim the ACA Act at the larger and more complex organisations to ensure that they can be effectively and appropriately dealt with.

4.31 However, it would also require making the ACA Act more flexible for dealing with a wide range of corporations, including smaller corporations which may struggle with higher level compliance requirements. In particular, this would necessitate a more permissive approach to rules, a broader range of exemptions from the more onerous reporting requirements for smaller corporations, and an enhanced education and assistance role for the Registrar's Office.

4.32 In more detail, the interaction with the various policy issues for consideration would probably be as follows:

- *Prescriptive/Permissive* – the ACA Act could be made more permissive in its approach to Rules of Association, without requiring any major structural changes. This approach would arguably make the ACA Act more flexible and better able to cater for a broad range of corporations.

- *Cultural Appropriateness* – the ACA Act could be made more "culturally appropriate" by taking a more permissive approach to the Rules and decision-making. Reporting and external "accountability" requirements could also be reduced and a reduced standard of care and diligence for directors could be adopted.

- *Director's Duties* – Under this model, director's duties should be extended to officers and "shadow directors". It may also be necessary to adopt a relatively high standard for director's duties, as the ACA Act would have to adopt a "highest common denominator" approach. However, a "split standard" between officers and elected directors may be appropriate.

- *Registrar's Functions and Powers* – The Registrar's functions and powers would need to be modified to enable the provision of assistance and education to Indigenous corporations, in particular the smaller corporations who may have difficulties complying with the more complex provisions necessitated by a "one size fits all" ACA Act.

- *Accountability and Reporting*- The reporting requirements under the ACA Act would need to be at the "highest common denominator" level, reflecting the standards appropriate for the largest and most complex corporations incorporated under the ACA Act. These requirements may nonetheless be lower than currently required, and there could also be some reform of the reporting requirements to ensure consistency with other reporting requirements and standard accounting practices. The ACA Act could possibly also provide for relatively broad blanket classes of exemptions.

- *Consistency with Corporations Law* –If the ACA Act is to cater for a broad range of corporations, it would arguably have to adopt a greater degree of consistency with the Corporations Law, to provide for greater certainty when dealing with larger and more complex corporations. This would unfortunately have the disadvantage of making the ACA Act relatively complex for use by smaller and more simple corporations.

- *Membership* – Membership under the ACA Act could either be kept to Indigenous natural persons and their spouses (as at present), or could be expanded to include either non-Indigenous persons and/or corporations.

E. MODEL 4 – RETAIN ACA ACT FOR ALL SIZES AND TYPES OF CORPORATION, BUT WITH TIERS OF REGULATION

Overview

4.33 This model is based on an ACA Act which caters for all sizes and types of Indigenous Corporations, but which does this by creating different tiers of regulation, to allow for a more targeted approach to the regulation of different corporations. This would involve a simple and flexible approach to "smaller" and more "simple" corporations, and a more sophisticated and rigorous approach to "larger" and more "complex" corporations.

Discussion

4.34 Under this model, approaches to the policy issues discussed in Chapter 3 can be adapted to suit the types of corporations which are expected to be regulated under each tier. So, for example, minimal accounting and reporting requirements can be imposed on simple corporations and detailed requirements on complex corporations.

4.35 This model however involves two substantial obstacles. The first and the most obvious is the fact that such an approach would involve significant law reform. It would essentially involve creating a mini-Corporations Law for Indigenous corporations.

4.36 The second major obstacle is finding the justification for a separate incorporation statute for Indigenous Australians. This issue is the policy issue discussed in Chapter 3, Section B: "Is there a need for a special incorporation regime for Indigenous people?"

Other Considerations

Determining the appropriate basis for the tiers

4.37 The determination of appropriate criteria to distinguish the tiers of any regulatory regime contemplated under this Model will require the consideration of the issues similar to those discussed above under the heading "Setting the Threshold for Corporations to be covered by the Act" in Section C of this Chapter.

CHAPTER 5 SPECIAL ISSUES

5.1 The focus of this Discussion Paper has been on issues associated with the bulk of Indigenous corporations, which are incorporated under Part IV of the ACA Act. There are, however, two discrete issues which must be addressed if a review of the ACA Act is to be complete. These relate to:

- The interaction between the ACA Act and the NT Act; and
- Aboriginal Councils and Part III of the ACA Act.

5.2 These two issues are considered in turn.

A. INTERACTION WITH THE *NATIVE TITLE ACT 1993*

Overview - the points of intersection

5.3 Native title was recognised as part of the common law by the High Court of Australia in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Soon after this decision, and after considerable political debate, the Commonwealth Parliament passed the *Native Title Act* 1993 (Cth) ("**the NT Act"**). The NT Act now defines much of the legal landscape for native title in Australia. Among other matters it establishes a statutory process by which native title can be claimed and a system for the management of native title.[109]

5.4 The ACA Act intersects with the NT Act at two critical points: in respect of Prescribed Bodies Corporate ("**PBCs**") and Native Title Representative Bodies ("**NTRBs").** The basics of the scheme are:

- The NTA establishes a framework for the holding and management of native title.
- It establishes a procedure for nominating and appointing a corporation (a PBC) that will act as the trustee or agent of the members of the native title group.
- NTRBs are corporations that have been appointed under the NTA to fulfil certain representative and managerial functions in respect of native title claims pursued by Indigenous people. Each NTRB is charged with duties in respect of a geographical area.
- Section 201B(1) of the NTA requires NTRBs to incorporate under the ACA Act unless otherwise authorised.
- Under the current *Native Title (Prescribed Bodies Corporate) Regulations 1995-99* (Cth) ("**the PBC Regulations**") all PBCs must be incorporated under the ACA Act. The PBC Regulations define the characteristics of the bodies.

5.5 The intersection of the NTA and the ACA Act is far from smooth. This has been acknowledged by the Federal Court, the National Native Title Tribunal and ATSIC.

5.6 At the time of writing, ATSIC is considering the revision of the *Native Title (Prescribed Bodies Corporate Regulations)* 1999 (Cth). A discussion paper that develops law reform options emerging from the analysis suggested by C Mantziaris and D Martin in *Native Title Corporations: A legal and anthropological analysis* (Federation Press, 2000) is currently being drafted by ATSIC.

Native Title Representative Bodies (NTRBs)

Background

5.7 The functions of NTRBs are set out in Part 11 Div 1 of the NTA. A body eligible to be a NTRB is described in section 201B:

> **201B Eligible bodies**
>
> (1) For the purposes of [Part 11], an *eligible body* is:
>
> (a) a body corporate, incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976*, the objects of which enable the body to perform the functions of a representative body under Division 3 of [Part 11]; or
>
> (b) a body corporate that is a representative body at the commencement of this section; or
>
> (c) a body corporate established by or under a law of the Commonwealth, a State or a Territory, or a part of such a law, prescribed for the purposes of this paragraph.
>
> However, a registered native title body corporate cannot be an eligible body
>
> (2) A regulation prescribing a law, or a part of a law, for the purposes of paragraph (1)(c) may be limited in its application to bodies corporate included in a specified class or classes of bodies corporate.

Policy issues

5.8 The major problem posed by the requirement that NTRBs be incorporated under the ACA Act is the tension between the statutory duties of the NTRB and the requirements under the ACA Act for:

(a) control by members; and

(b) appointment of the board from the membership.

5.9 The conflict in both areas stems from the politics of representation operating within the geographical area for which the NTRB is responsible, discussed in Chapter 3, Section E ("Cultural Appropriateness") above.

Control by Members

5.10 The recent change in NTRB boundaries resulted in the amalgamation of some areas, with the result that some NTRBs are now responsible for performing functions under the NT Act for an area which extends beyond the areas previously represented by the NTRB. Consequently, those NTRBs typically have a membership based only on their original NTRB area, but not the extended area.

5.11 The NT Act mandates that the NTRB functions be performed across the whole NTRB area and presumes that the functions will be performed in an "arms length" and impartial manner. The tensions arise because the ACA Act requires effective control of the corporation by its members. Yet in almost all cases, the membership only represents a sub-set of the wider constituency to whom the NTRB must provide its services. This (and the politics of representation) have the potential not only to make it difficult for the organisation to provide the "arms length" and impartial services required by the NT Act, but also has the potential to undermine the legitimacy of the NTRB in the eyes of those constituents not represented in the membership.

5.12 To some extent, these issues can be addressed by amending the constitutions of the corporations serving as NTRBs to extend the membership criteria to Indigenous people living in, or with native title connections to, the broader area.

5.13 However, the fundamental structural problem of imposing a quasi-statutory corporation regime upon a voluntary association would remain.

Appointment of Board from Membership

5.14 When formed as ACA Act corporations, NTRBs are forced to draw their membership and their board of directors from some of the native title groups whose claims the NTRB must facilitate.

5.15 Directors of an NTRB formed as an ACA Act corporation will typically be elected with an expectation that they will represent a particular Indigenous constituency. Loyalty to this constituency may interfere with the director's performance of (a) their duties to the corporation and (b) the corporation's performance of its statutory obligations as an NTRB.

5.16 These difficulties are potentially compounded where the elected directors will only be elected by a part of the membership.

Requirement for ACA Act corporations to be NTRBs

5.17 Is there particular any reason for restricting the incorporation of NTRBs to the ACA Act? If so, what is this reason?

5.18 The statutory functions and public accountability requirements of NTRBs can be met by corporations formed under a variety of incorporation statutes. There does not appear to be any necessary connection between the ACA Act and the performance of a corporation's functions as an NTRB. The only connection is that of race — ie that membership of ACA Act corporations is restricted to Indigenous persons and that native title claims can only be pursued by Indigenous people.

5.19 At the moment, there are several statutory corporations (the Northern Land Council and the Central Land Council) that function as NTRBs. Two official reviews of these entities have indicated that these have performed their functions well relative to some other NTRBs formed under the ACA Act.

Prescribed Bodies Corporate

5.20 Section 58 of the NT Act grants the Governor-General the power to make regulations defining the characteristics of bodies that are to manage the title obtained by native title groups that have succeeded in their claims under the ACA Act. This power has been exercised to create the *Native Title (Prescribed Bodies Corporate) Regulations* 1995-99 (Cth) ("the PBC Regulations"). These Regulations prescribe the characteristics of corporations which are eligible to fulfil this statutory role. These corporations are known as "Prescribed Bodies Corporate" ("**PBCs**"). Under the current PBC Regulations, all PBCs must be incorporated under the NT Act.

The Legislative Scheme

5.21 The PBC is a product of the interaction of three key pieces of legislation: the ACA Act, PBC Regulations and the NT Act.

5.22 The PBC is the vehicle offered by Australian law for holding and managing native title. A PBC must be incorporated under the ACA Act and serves functions under the NTA. The NTA also states that the PBC must enter into a statutory trust or agency with the native title group to fulfil those functions.

5.23 As a result of this PBC scheme, a native title holder will be the subject of the following rights and obligations:

- Those defined by traditional laws and customs, which may be enforced at common law;
- Rights and obligations created under the NTA or PBC Regulations;
- Rights as a member of an ACA Act corporation; and
- Statutory rights and obligations created as a "beneficiary" or a "principal" under the trust or agency relationship.

5.24 The native title holder may also be subject to:

- Fiduciary, common law and statutory obligations arising from holding a management position within the corporation; and
- Contractual rights and obligations, whether under agreements between members of PBCs or contracts with external parties.

General deficiencies in the PBC scheme

5.25 The number of legal relationships the scheme creates leads to an increase in the number of avenues that the parties may use to take legal action against one another. It may also lend itself to a complex array of rules regarding who may take action using which avenue and the associated remedies. Many of these legal relationships created by the PBC scheme are inconsistent with each other.

5.26 The legislative scheme provides very little guidance on what a PBC should look like and how they should fit into existing policy.

5.27 There is no indication how PBCs are expected to deal with existing organisations such as representative bodies, Land Councils, ATSIC Regional Councils and other PBCs.

5.28 It is unclear if the legal instruments that define the PBC will assist in defining and clarifying the effect of traditional law and custom on the native title rights and interests.

5.29 A more detailed examination of the interaction of the ACA Act and the native title legislation has been conducted by Christos Mantziaris and David Martin in *Native Title Corporations – A legal and anthropological analysis*.[110] This monograph was commissioned by the National Native Title Tribunal. Several of the main problems will be briefly outlined here for present purposes.

Problems with corporate constitutions under the ACA Act

5.30 Native title law is premised upon the idea that the distribution of native title rights and interests within a native title group is left to traditional law and custom. In any given group the distribution may be differentiated so that entitlements to the collective rights are unequal. Many native title determinations will give legal effect to a differentiated rights and interests within the native title claimant group.

5.31 Since 1997-98, quite a number of native title claimant group have sought to give effect to the internal differentiation within the group by embedding it in the rules of the PBC incorporated under the ACA Act- for example, by creating different rights to voting, income and capital. Sometimes this demand simply stems from the Indigenous politics of representation. In order for a corporation to function smoothly, it may be necessary to balance the interests of certain sub-groups or factions within the social group served by the PBC.

5.32 These needs, some of which stem from the native title legislation, and others which stem from the Indigenous polity, clash with the associational model idea of equality between all members of the corporation (see above).

5.33 In the past few years, the Registrar of Aboriginal Corporations has refused to incorporate PBCs that have proposed, among other matters, the following types of rules:

- Rules which depart from the formal equality of members' voting power;
- Rules which reflect the differentiated entitlements to the assets of the corporation;
- Rules which seek to reflect the existence of native title subgroups; and
- Rules which seek to impose restrictions on the discretion of directors.

5.34 As noted elsewhere in this Paper, the approach of the Registrar's Office has recently shown a great deal more flexibility in accommodating some of these types of structures. However, that flexibility is still constrained by the prescriptive nature of the ACA Act.

5.35 This has led to a bottleneck in the incorporation process. The *Hopevale* native title claimants have sought incorporation of a corporation under the ACA Act since the beginning of 1998. They have been refused incorporation due to the non-conformity of their proposed Rules of Association with the requirements of the ACA Act. Justice Beaumont of the Federal Court has remarked that law reform is required before the claimants can incorporate the corporation they require for the purposes of the determination.[111]

5.36 One of the concealed dangers of allowing the corporate constitution of a PBC to reflect the internal differentiation of the native title group is that it will allow issues of corporate governance and corporate control to be confused with issues of title management. Corporate law relationships relating to membership and corporate management might be improperly used to divert the corporation from the performance of its statutory title management duties. However, in many circumstances, if the structure of an Indigenous corporation is not allowed to reflect the internal differentiation of the group, it will lose the allegiance of the group it has been formed to serve.[112]

Problems regarding membership of ACA Act corporations

5.37 Whilst all members of a PBC must be members of the native title group, not all members of the native title group need be members of the PBC. However, there is an implicit assumption in the legislation that every member of the Indigenous community be a member of the PBC.

5.38 The size of native title groups will vary between claims. The native title legislation currently requires each native title group to form a PBC. No proper thought has been given to the aggregation of title management — that is, to the ability of one PBC to manage more than one instance of native title.

5.39 The interaction of the ACA Act's minimum membership requirements and the requirements of native title are problematic. Due to a mismatch in the language of the two Acts, the minimum corporate membership requirement may be as high as 25 members. This may cause a problem for small native title groups, or groups that desire only a small subset of the group to be members of the PBC.

The importance of an integrated approach to law reform

5.40 The interaction between the ACA Act and the NTA and the regulations made under it raises a series of complex problems. These cannot be resolved by reform to only one of these bodies of legislation.

5.41 An integrated approach to law reform of this area is necessary. A number of possibilities might be canvassed.

5.42 In the direction of native title law, a relaxation of the requirement that the incorporation of PBCs occur under the ACA Act will allow corporations with complex corporate constitutions and internal arrangements to seek incorporation under more suitable statutes

such as the Corporations Law. Similarly, a relaxation of the requirements regarding NTRBs may see a number of these bodies migrating from the ACA Act to other statutes.

5.43 In the direction of the ACA Act, the adoption of a permissive approach to the corporate constitution might resolve some of the problems currently experienced by incorporators who have lodged Rules of Association which deviate from what the Registrar considers appropriate under the ACA Act.

5.44 It is not possible to recommend any course of law reform until the first three key policy questions in Chapter 3 have been answered — specifically**,** the contemporary rationale for the ACA Act (Section B), the identification of its target audience (Section C), and the choice between a more prescriptive or more permissive system of regulation (Section D).

B. ABORIGINAL COUNCILS AND PART III

Issues

5.45 Part III of the ACA Act provides for the creation of Aboriginal Councils to fulfil a role similar to that of local government, but only in relation to Aboriginal and Torres Strait Islander communities. However, since the ACA Act came into force in 1978 no Councils have been established under its provisions.

5.46 The primary reason for the failure of Part III is strong opposition from State and Territory governments. This opposition stems from the perception that the Federal government is unreasonably intruding into State responsibilities for local government. As such, Part III of the ACA Act has become virtually (politically) redundant and more and more reliance has been placed on Part IV of the ACA Act which also allows for the incorporation of bodies for the purpose of providing local government-type services.[113]

5.47 Weighing against these political pressures is the policy of self-determination which relates to Aboriginal and Torres Strait Islander peoples right to negotiate their own political status and to pursue their economic, social and cultural development. Part III potentially provides a means by which a more expanded form of self-determination than that available under Part IV can be realised. However, given its non-use in the past, questions arise as to whether it should be removed from the ACA Act, or, if retained, how it might be made more workable.

Options

5.48 Based on the above, three main reform options can be identified:

- **Option 1 -** Repealing Part III. This would mean that Indigenous people will pursue their aspirations for self management and self determination either in a more limited sense through the use of associations incorporated under Part IV of the ACA Act, or through the use of mechanisms beyond the ACA Act.
- **Option 2** - Repealing Part III and specifically empowering Indigenous associations incorporated under Part IV to perform functions envisaged by Part III councils.
- **Option 3** - Replacing Part III with a local government model based on current State and Territory local government legislation.

Discussion

Self-determination and self management

5.49 The relevant policy issues relating to self-determination and self-management are discussed in Chapter 3, Section K (above) under the heading "How should the ACA Act address self determination and self management?"

Part III of the ACA Overtaken by History

5.50 Part III of the ACA Act, in its present form, is inoperable for three main reasons:

- It is politically impractical, since the powers of the Registrar and the Commonwealth Minister are the source of opposition by the States. Resistance to the implementation of Part III appears to stem more from the involvement of a Commonwealth official in State affairs of local government, than in fear of Aboriginal community control of service delivery.

- Although it began life as a potential measure for self-determination, Part III as it currently stands would arguably no longer be seen as achieving this outcome in any case. This is because the powers the ACA Act suggests be conferred on a Council are quite limited; and the extensive involvement of the Registrar in establishing the Council would now be considered excessive and paternalistic.

- The intention of Part III, so far as it is clear, has arguably been overtaken by developments since the ACA Act's inception in 1978.

Opposition by State and Territory Governments

5.51 It is clear from Fingleton's analysis of correspondence about the implementation of Part III[114] that the States felt the provisions not only interfered in their affairs by having the Councils answerable to the Registrar rather than the State regime, but were also contrary to principles of good governance.

5.52 There is some justification for this. Part III gives the power to make rules in the Council area that affect only the Aboriginal residents. In the original formulation of the ACA Act these could conflict with the powers and by-laws of present or future local government authorities in the same area. Even with the negotiated amendments that stipulated the Commonwealth Minister must consult with the relevant State or Territory Minister before declaring a Council area, there is still the power under the ACA Act to do so following consultation.

5.53 The States' fears seem to have been based on the understanding that the Aboriginal Council, established under Commonwealth legislation, which overrides State law wherever they are in conflict, would be exempt from local government and perhaps State authority in respect of its Aboriginal inhabitants. If this were the case it may leave non-Aboriginal residents of a Council area unrepresented in local government.

5.54 The governance provisions in Part III are so limited that they are likely to be unacceptable to most Indigenous communities in any case. Indigenous people require the ability to make by-laws that affect all residents of community land. It is an indication that the States were not, and are not, in fear of this in their opposition to Section III that, since 1978, many State based self-management regimes have been implemented that improve on this provision. These are among the changes that render Section III no longer appropriate.

Involvement of Registrar

5.55 It appears that the original intent was for a Council to oversee the operation of services for a community that remained undefined and constituted along lines of customary cultural authority. Nevertheless, the provisions for the establishment of a Council require the Registrar to be highly involved in establishing the rules and the electoral structure.

5.56 The ATSIC Native Title Branch submission to the Fingleton review under the following statement about:

> Sections 21 and 22 [of the ACAA] abrogate the rights of common law native title holders under Aboriginal custom to the Registrar. Elections are required where, in many cases, office is held by ascription under Aboriginal customary law. The number of Councillors and the electoral procedures are determined by the Registrar. Under s.22 the Registrar is able to rescind the rules of the Council passed at the first meeting and, if not satisfied that rules acceptable to him will be passed, declare the election of Councillors void....
>
> The potential for common law native title holders to have an Aboriginal Council area declared over their NT land with the Aboriginal Council as the Registered Native Title Body Corporate is initially appealing. However, scrutiny of the actual mechanism for doing this reveals its origins in a period when the meaning of Aboriginal self-determination was still to be grappled with. There is an overall encouragement of advice, guidance, intervention and ultimate control of the outcome of the application process that is incompatible with the free exercise of common law rights, respect for Aboriginal custom, and the enjoyment of the right to self-determination.

Part III superseded by other developments

5.57 It can be argued that the original purpose and intent of Part III of the ACA Act have been superseded by other developments since the ACA Act's enactment. These include:

- Several states have made provision for Aboriginal communities either to provide local government services or to exercise limited self-governance by the declaration of community-wide by-laws, or both. The Northern Territories' *Local Government Act* is leading example of this.
- Most large Indigenous communities operate municipal services using other forms of incorporation. There are, nevertheless, funding disparities with local government regimes that require consideration.
- Indigenous people in many regions are taking controlling, or influential, positions within "mainstream" local government councils.
- Since 1976, the establishment of ATSIC regional councils has allowed local Indigenous political representation as well as control over grant funding for the

provisions of special services for Indigenous people within ATSIC Council regions.

- There now exist networks of Aboriginal service organisations in the realms of health, education, media, welfare, legal services, accounting, and remote community support that give Indigenous control over more profound aspects of Indigenous life than conceived of under Part III.

- The recognition of native title in the *Mabo* decision and the subsequent enactment of the NT Act, makes any Part III declaration of a Council Area, which is controlled by residents rather than native title holders, problematic. For example, carrying out Council functions could require following a range of "future act" processes under the NT Act.

- Arguably, determinations of native title and the subsequent establishment of Registered Native Title Bodies Corporate establish the equivalent of "Councils" and "Council Areas" closer to the import of Minister Viner's apparent intent in the second reading speech of the ACAA than does Part III itself. However, it is noted that these are available only where native title survives.

- The underlying political implications of the recognition of native title have changed the political landscape such that State-wide negotiated settlements and a national treaty are now more likely to deliver "self-determination" in one form or another than can be achieved by an incorporation statute.

Reform Options

Option 1 – Repeal Part III

5.58 It is not suggested that the policy of self-determination, originally influential in the establishment of Part III of the ACA Act, is no longer of any consequence. On the contrary, it is arguable that Part III in its present form is in fact inappropriate as a vehicle for Indigenous aspirations for self-determination.

5.59 The one real advantage that Councils established under Part III could possibly confer is the same funding arrangements as a local government area. There has been for some time Indigenous dissatisfaction with disparities between the funding of local government through the Grants Commission and the funding of Aboriginal communities reliant on ATSIC. However, retention of Part III would not in itself resolve this problem, which would have to be pursued through other avenues.

5.60 It is suggested that if Part III were to be repealed, there would be other avenues to pursue greater involvement in local governance and therefore self-determination. In areas of significant non-Indigenous population, advances in self-management/self-determination at the regional level are most likely to occur in cooperation with State and Commonwealth government development of regional policies in general.

5.61 ATSIC itself could make a significant contribution by playing a lead role in coordinating existing Indigenous service organisations, such as health, employment, housing and

education, into functional regional networks with a full exchange of knowledge, information and support, leading to the development of regional Indigenous consensus positions.

5.62 This would put the Indigenous people of a region in a stronger position to develop partnership relations with existing "mainstream" local government bodies. Joint sittings of local government councils and ATSIC regional councils could be productive. Relations with local business councils, training institutions, regional development statutory bodies, and developers requiring the use of Indigenous land would all benefit from greater regional coordination.

5.63 In this view, the role of ATSIC at the regional, zone and national levels would evolve from its present concentration on the distribution of grant funding towards being a significant voice in negotiating cooperative governance models with non-Indigenous inhabitants at local and regional levels. Such an approach would replace reliance on associational models for Councils under the ACA Act.

5.64 It is not possible to discuss this model in further detail because it is arguably beyond the terms of reference of the present review, which is limited to a consideration of the ACA Act. (However, as noted below, it is possible that the roles suggested above for ATSIC Regional Councils could be incorporated into the Part III.)

Option 2 – Transferring Part III powers to Part IV corporations

5.65 The second option would involve expressly providing for some of the functions originally contemplated for Part III Councils to be performed by Part IV corporations. Whether this is feasible would depend on the broader policy direction taken for Part IV generally, as discussed in Chapter 4 of this Paper.

5.66 Arguably, such an approach is not in fact necessary anyway, as the services which sub-section 11(3) of the ACA Act contemplates would form the basis of a Council's functions, can be – and in fact are - performed by corporations incorporated under Part IV (or indeed, incorporated under any other incorporation regime). The geographic basis of Councils under Part IV can be reflected in Part IV (or other) corporations either through the way eligibility for membership is defined, or more appropriately, through the agreement providing funding for the provision service.

Option 3 – Retaining Part III in revised form

5.67 There are essentially two ways in which a reformed Part III could aim to deliver self-determination/self management. The first is through a non-exclusive role at a broader regional level. The second is at through an exclusive but more geographically limited community level. These are not necessarily mutually exclusive, as they take very different approaches.

5.68 At the broader, non-exclusive level, the model provided by the Torres Straight Regional Authority ("**TSRA**") may be a way forward. A simple way of viewing the TSRA model is the elevation of the ATSIC Zone from a simple electoral college to a body with political

and administrative functions. This is in effect the approach discussed under Option 1 above, but would be formalised.

5.69 Of course, a replacement Part III allowing for Council areas which function in much the same way as the TSRA would need to be suitable for areas where there are significant numbers of non-Indigenous people.

5.70 Such an approach has another significant policy advantage. This would be realising the economies of scale that administration of Aboriginal service delivery would achieve at the regional level. The present fragmentation of decision-making and grant funding is not only frustrating but is also inefficient. For this reason alone empowering Regional Authorities through a revision of Part III is a matter for serious consideration.

5.71 There then remains the question of self-management/self-determination for geographically discrete Indigenous communities or local areas, whether on a town, village or settlement level.

5.72 For such areas, Part III could be revised either by adopting an advanced model of local government acceptable to the States, or by accrediting State based regimes that meet minimum standards, much in the same way that the NT Act accredits State Tribunals. Such approaches would avoid the present stalemate between Part III and State and Territory governments.

ATTACHMENT A

OUTLINE OF WORK ON DETAILED ISSUES UNDERTAKEN BY CORRS TEAM TO DATE

OVERVIEW OF REGULATORY PHILOSOPHY

A. INTRODUCTION
B. THE SYSTEM OF CORPORATE GOVERNANCE
What is corporate governance?
The division of power between the board and the general meeting
C. CORPORATE GOVERNANCE IN THE CONTEXT OF THE INDIGENOUS POLITY
Difficulties with the associational model and the general meeting
The general meeting in corporate governance
The significance of meetings within the Indigenous polity
Implications for general meetings of Indigenous corporations
Difficulties encountered with the fiduciary principle
D. THE ROLE OF CUSTOMARY LAW IN CORPORATE GOVERNANCE
Problems with the concept
"Cultural appropriateness"
Accountability of Indigenous organisations
The focus for "cultural appropriateness"
THE BALANCE BETWEEN PERMISSIVE AND PRESCRIPTIVE REGULATION

REGISTRAR'S POWERS AND FUNCTIONS

A. INTRODUCTION
B. KEY POWERS AND FUNCTIONS
Key functions of the Registrar
Key powers of the Registrar
C. POWERS OF THE REGISTRAR
Rationale for considering some powers and not others
Chapters in which Registrar's powers are considered
Other powers which could be considered for reform
TABLE OF POWERS AND FUNCTIONS OF THE REGISTRAR

INCORPORATION AND THE CORPORATE CONSTITUTION

A. INTRODUCTION
B. LEGISLATIVE AND ADMINISTRATIVE PRESCRIPTION OF THE RULES OF ASSOCIATION
Is the ACA Act a "permissive" system or a "prescriptive" system?
The requirement for Rules of Association to be reviewed and approved by the Registrar
The Rules of Association and the Application for Incorporation
Grounds for the Registrar refusing to approve Rules of Association
Perceptions of the Registrar's role as "gatekeeper" of the Rules of Association
Scope for greater flexibility in the Rules of Association approved by the Registrar
How the current ACA Act limits the scope for greater flexibility
How the Corporations Law balances the protection of members and freedom of contract
Delays caused by the requirement for approval of Rules of Association by the Registrar
Information available to the Registrar when reviewing Rules of Association
Categories of unreasonable or inequitable Rules
Legal costs arising from the requirement for approval of Rules of Association by the Registrar
C. COMPARISON WITH THE SYSTEM OF REPLACEABLE RULES UNDER THE CORPORATIONS LAW
Replaceable rules under the Corporations Law
Replaceable rules v. model rules – a comparison
D. DIFFERENT RIGHTS AND OBLIGATIONS FOR DIFFERENT MEMBERS
Background – the statutory contract
Background – the three axes which define a member's rights
Registrar's practice regarding approval of Rules that provide for different members to have different rights
Whether members who make different contributions may have different rights
Members' obligation to contribute to debts of corporation (members' liability)
How the analysis in the rest of this Chapter is structured
E. VOTING RIGHTS
The current situation under the ACA Act

E. LAW REFORM
General principles
Need for fundamental analysis on the needs of the users of the ACA Corporation's financial information
Reporting obligations tailored to size and function of the corporation
Specific reforms
Native Title Representative Bodies
Public funding controls

TRANSACTIONAL RULES – LEGAL CAPACITY AND LEGAL AUTHORITY

A. INTRODUCTION
B. CORPORATE CAPACITY
Corporate capacity under the ACA Act
The doctrine of ultra vires
Corporate Capacity Under the Corporations Law
C. CORPORATE AUTHORITY
The indoor management rule
Corporations Law – assumptions which can be made about a company
Differences between the common law and Corporations Law ss 128-129
Adoption of the Corporations Law formulation?
Ratification of corporate acts beyond authority
Validity of acts of directors and secretaries invalidly appointed
Ratification of pre-incorporation contracts
Assent to a transaction through the common seal

CORPORATIONS IN DIFFICULTY

A. INTRODUCTION
B. APPLICATION OF THE CORPORATIONS LAW BY REFERENCE
The incorporation by reference provisions
Breadth of the provisions
Is possible ambiguity a sufficient reason for law reform?
Further reforms
C. EXTERNAL ADMINISTRATION
D. COMPOSITION OR ARRANGEMENT WITH CREDITORS
E. ADMINISTRATION
ACA Act Administration
How administration works
Voluntary Administration
The interaction of voluntary and Registrar-appointed administration
Statistics on Registrar-appointed administrations
Problems encountered under the current administration provisions
The perspective of creditors
The perspective of the corporation and its members
The perspective of the Registrar
Law reform
Appointment of managers on request by corporations that are solvent but in difficulty
Voluntary administration of corporations that are solvent but in difficulty
F. RECEIVERS AND CONTROLLERS
Current use of receivers
Would increased use of receivers alter governmental creditors' reliance on the Registrar?
Law reform
G. WINDING UP AND DEREGISTRATION
The distinction between de-registration and winding up
Compulsory Winding Up
Provisional Liquidation
The winding-up regime under the ACA Act
The grounds for winding-up
Criticism of the grounds for winding up
Criticism of the Registrar's practice regarding winding up
Law reform suggestions
The use of provisional liquidators
Native title and liquidation
The de-registration procedure under the ACA Act
Perceived advantages of the de-registration procedure

ATTACHMENT B

SUMMARY OF KEY POLICY ISSUES FOR DECISION & OPTIONS FOR RESPONDING

1 Is there a need for a special incorporation regime for Indigenous people?

Issues

- Incorporation under the ACA Act is restricted to associations comprising Indigenous people. Has the need for a special incorporation regime for Indigenous people changed since the inception of the ACA Act in 1976?
- Can such a legislative requirement be justified today?

Options

- Repeal the ACA Act, on the basis that there is no longer any need for a separate incorporation statute, as the needs of Indigenous people can be met through incorporation under existing "mainstream" statutes.
- Maintain a separate statute under which *any* association of Indigenous persons can incorporate for whatever purpose.
- Maintain a separate incorporation statute, but limit the types of association that may incorporate under it, by reference to a criterion of purpose, activity or size.

2 Who should the ACA Act be aimed at?

Issues

- If there is a need for a special incorporation statute for Indigenous people, what types of association should be eligible for incorporation and regulation under this ACA Act?
- Should *any* type of association be allowed to incorporate under the ACA Act? Or is the category of eligible associations to be more narrow? If so, what is the criterion of selection?

Options

- Smaller corporations - Returning the ACA Act to its original intent of providing a simple incorporation statute for smaller Indigenous organisations, and requiring larger and more complex corporations to incorporate under the Corporations Law or under State and Territory associations incorporation legislation (depending on their size and nature).
- All corporations, no tiers - Making the ACA Act more complex and sophisticated so that it can address the more complex issues relating to the requirements of all Indigenous corporations, including large multi-purpose organisations.

- All corporations, tiered - Adopting a "tiered" approach which distinguishes between different categories of corporation and applies different rules to the different tiers.

3 Should the ACA Act be Prescriptive or permissive in its approach to the corporate constitution?

Issues

- Should the act be prescriptive or permissive in its approach to the corporate constitution?

Options

- The principal question in considering whether an incorporation statute should be permissive or prescriptive is whether the respective rights and obligations of the corporation, the members, the board and other officers of the corporation should be:

  - left to the members to decide and agree among themselves (a permissive approach); or

  - prescribed by legislation or regulations or by the administrative discretion of a regulator such as the Registrar (a prescriptive approach).

- A possible compromise between permissiveness and prescription may be to amend the ACA Act to limit the range of matters the corporate constitution must address and to limit the Registrar's power to reject proposed Rules.

- Another possible approach to making the ACA Act more permissive, would be to amend the ACA Act to set out (perhaps in a schedule to the act) a number of "replaceable rules", similar to the replaceable rules under the Corporations Law.

- It is also possible that a combination of more or less permissive and prescriptive approaches could be adopted if a tiered approach to regulation is adopted.

4 How Should the ACA Act Address "Cultural Appropriateness" and Aboriginal Custom?

Issues

- Should the ACA Act be made more appropriate to the cultural circumstances of those applying for incorporation, or allow Indigenous corporations themselves to be more "culturally appropriate", by reference to Aboriginal custom?

Options

- The issue of the "cultural appropriateness" of the ACA Act cannot be addressed through one single reform proposal. Instead, it may be necessary to consider how a range of different parts of the ACA Act could be modified to make it more suitable for the Indigenous context.

- There are three main areas where "cultural appropriateness" can be addressed in relation to the ACA Act.

- by removing the amorphous and problematic concepts of "cultural appropriateness" and "Aboriginal custom" from corporate governance under the ACA Act, and instead making the mode of service delivery provided by Indigenous corporations the focus of "cultural appropriateness";

- by adopting a more permissive approach to certain aspects of the Rules and the ACA Act. Key areas to be addressed, where Indigenous people and previous reviews have criticised the ACA Act as being culturally inappropriate include the following:

    - *voting and representation* – allowing voting and election of directors by reference to "family", "clan" or "tribal" sub-groups;

    - *decision-making* – allowing decision-making by reference to "Aboriginal custom" or, for example, by reference to "elders committees"; and

    - *membership* – allowing membership to be defined by reference to more flexible criteria than written membership lists.

- by changing the scope and standard of director's duties.

- These options are not necessarily mutually exclusive. For example, the express reference in section 43(4) allowing the Rules of an association to be based on Aboriginal custom could be removed, but other specific amendments to provisions relating to the Rules and director's duties still could make the ACA Act more "culturally appropriate".

- It is also arguable that different regulatory approaches should apply to different kinds of Indigenous corporation, for example small corporations with the sole purpose of holding land, as opposed to large, publicly funded, service-providing corporations.

5 Should the ACA Act Retain Its Emphasis on Control by Members Through the General Meeting?

Issues

- The **ACA Act** currently prescribes an "associational" model for corporations – ie corporations are required to be an association of natural persons, who control the corporation through General Meetings. The question is whether this approach, and in particular, the current emphasis on control by members through the General Meeting, is appropriate.

Options

- Some of the problems with the associational model could be addressed by adopting a less prescriptive approach to the Rules of corporations, and in particular the requirement that the Rules give the members effective control over the running of the association. In particular, allowing differentiation of voting rights would go some way to addressing the problem.

- Another option would be to remove the requirement that only natural persons can be members of ACA corporations, and allow other corporations to become members.

6 What Should the Scope and Standard of Directors Duties Be?

Issues

- What should be the scope and standard of director's duties under the ACA Act?
- What are the long-term implications of varying the scope and/or standard of director's duties? (Is there a risk of "ghetto-ising" Indigenous corporations?)

Options

- There are several policy options for consideration here. These are not necessarily mutually exclusive alternatives, although the fourth option includes a combination of elements from the previous three.
  - Expressly extend director's duties to all persons engaged in the management of the corporation.
  - Reduce the standard of the duty of care and diligence applied to directors of ACA corporations – for example by a adopting a subjective standard – to take account of the director's literacy, ability to read and comprehend financial statements, and corporate and commercial experience.
  - Bring the statement of the director's duties in the ACA Act into line with the Corporations Law, in order to take advantage of the certainty in the interpretation of these duties.
  - Extend the scope of director's duties to management staff or "officers". At the same time, reduce the standard of care required of corporation's directors by making it *subjective*, while maintaining an *objective* standard for officers.

7 What Should The Registrar's Functions and Powers Be?

Issues

- What should be the role of the Registrar under a reformed act?
- Should the Registrar's role remain exclusively that of "corporate policeman", vetting rules conducting investigations and appointing administrators? Or should there be more of an educative, capacity-building, role – to enable assistance and mediation before imposed intervention becomes necessary?
- Should some of the current discretions be "structured" by reference to clearer and more precise grounds for their exercise?
- Should greater emphasis be placed on the members' ability to protect their interests through legal remedies rather than relying on the Registrar's intervention? (ie should members be given access to a statutory derivative action and an oppression remedy?)

Options

- Structuring and limiting the Registrar's discretions in the exercise of the Registrar's powers.

- Adding further functions and powers to allow for (or mandate) assistance to be provided to corporations before imposed intervention becomes necessary.

- Providing for better legal remedies for members to protect their own interest, rather than relying on intervention by the Registrar.

8 What Should The Approach to Accountability and Financial Reporting Be?

Issues

What should be the focus of Accountability under the ACA Act?

What is an appropriate level of financial reporting?

Can some of the different types of financial reporting required (a) under this ACA Act or (b) under this Act and under loan contracts, grants or native title legislation be harmonised?

What role should the ACA Act play in ensuring accountability of Indigenous Corporations? Should financial reporting for corporate governance purposes be made simpler for all corporations, while allowing financial reporting for corporations involved in particular purposes of projects to be superadded, being determined by the particular purpose or project (eg NTRB, CDEP scheme, health services corporation in receipt of Health Department funding)?

Options

- With respect to focus of accountability, there are three logical options:

  - focus on internal accountability, that is, the accountability of the corporation to its members;

  - focus external accountability, that is, the accountability of the corporation to creditors, funding bodies and other bodies external to the ACA corporation; or

  - focus on both internal and external accountability.

- The issue as to the appropriate level of financial reporting depends on the direction which will be taken with respect to the question of who the act is aimed at. If it is aimed at simple corporations, many of the current requirements can be scaled back. If the preference is to have tiers of regulation, it will be necessary to determine how the each tier will be defined.

- The development of a reporting regime under the ACA Act will require consideration of the technical reporting requirements imposed on ACA Act corporations by public finance providers such as ATSIC, State and local government bodies.

9 What Should Be the Degree of Consistency with the Corporations Law?

Issues

- There are two elements to the issue of whether the ACA Act should be consistent with the Corporations Law. They are:

  - Should the ACA Act be as comprehensive as the Corporations Law in terms of scope and detail? For example, the ACA Act has two core provisions relating to director's duties; section 49C (members to act honestly and diligently) and s 49 D (disclosure of pecuniary interests). On the other hand, in addition to provisions relating to these core duties, the Corporations Law contains host of other provisions regulating the behaviour of directors. Should the ACA Act attempt to cover all the duties provided for in the Corporations Law?

  - In cases where there is a need to adopt a provision broadly similar to one existing in the Corporations Law, should identical language be used? Or, should a shorter or simplified version of the relevant Corporations Law provision be formulated?

Options

- As to the first issue above there are two clear options available:

  - Reform the ACA Act to be as extensive as the Corporations Law.

  - Only provide for the core or essential provisions in any given area in the ACA Act.

- As to the second issue above, there are potentially three ways in which the relevant provisions of the Corporations Law can be adopted (of course, with the necessary changes being made). They are:

  - Adoption of the Corporations Law by reference in the ACA Act to the relevant provision in the Corporations Law.

  - Adoption by reproduction of the full text of the relevant Corporations Law provision in the ACA Act.

  - Adoption of a shorter or simplified version of the relevant Corporations Law provision.

10 How Should the Act Address Self Determination and Self Management?

Issues

- Self-determination is the theme underlying Part III of the ACA Act which provides for the creation of Aboriginal councils to fulfil a role similar to that of local councils. Part III has become redundant for largely political reasons and Indigenous Australians have been forced to seek their self-determination aspirations either through the use of associations incorporated under Part IV or through means beyond the ACA Act.

- The policy issue in this context is whether or not the ACA Act should provide a vehicle for self-determination.

Options

- There are two obvious policy options:

  - Abandon any attempt to provide for self-determination under the ACA Act. This would mean repealing (or keeping dormant) Part III of the ACA Act. However this option does not exclude the possibility of Indigenous people using associations incorporated under Part IV pursue their self-determination aspirations.

  - Attempt to promote self-determination by the use of ACA Act mechanisms byeither:

    - developing a *workable* Part III; or

    - developing a mechanism *under* Part IV which empowers ACA Act corporations to perform activities in the pursuit of self-determination.

11 Basis of Membership

Issues

- The ACA Act as it currently stands limits membership to natural persons who are Indigenous persons or their spouses. Should this be made more flexible, to allow for membership of non-Indigenous persons or corporations?

Options

- Maintaining the ACA Act for associations of Indigenous natural persons, with associate membership for non-Indigenous persons.

- Maintaining the ACA Act for associations of Indigenous natural persons, but allowing for the full membership of non-Indigenous persons, provided that control rests with an Indigenous majority.

- Allowing corporations to become members of ACA Act corporations.

12 Aboriginal Councils and Part III

Issues

- Should Part III of the ACA Act be repealed?

- If it is to be repealed, in what ways could the ACA Act promote self-determination?

- If it is to be retained, how might it be made more workable?

Options

- Three main reform options can be identified:

  - **Option 1 -** Repealing Part III. This would mean that Indigenous people will pursue their aspirations for self management and self determination either in

a more limited sense through the use of associations incorporated under Part IV of the ACA Act, or through the use of mechanisms beyond the ACA Act.

- **Option 2** - Repealing Part III and specifically empowering Indigenous associations incorporated under Part IV to perform functions envisaged by Part III councils.

- **Option 3** - Replacing Part III with a local government model based on current State' and Territory "best practice".

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[1] Registrar of Aboriginal Corporations, 1996, *Annual Report 1995-96*, p 28.

[2] Neate, G *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act, 1976*, 1989

[3] These changes are discussed in detail at paragraph 6.10 to 6.15 of the Fingleton Report. Fingleton, J. *Final Report Review of the Aboriginal Councils and Associations Act 1976* Volume 1, Australian Institute of Aboriginal and Torres Straight Islanders Studies, August 1996.

[4] Fingleton, Volume 1, p.1.

[5] Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth), s. 43.

[6] Aboriginal Councils and Associations Legislation Amendment Bill, s. 6.

[7] ibid., s. 10.

[8] ibid., ss. 18-20.

[9] ibid., ss. 34-36

[10] Registrar of Aboriginal Corporations, Annual Report 1995-96 ATSIC, Woden, ACT, p.1.

[11] ibid.; Registrar of Aboriginal Corporations, 1997, *Annual Report 1996-97*, ATSIC, Woden, ACT, pp.1-2.

[12] Examples are provided in Registrar of Aboriginal Corporations, *Annual Report 1995-96* pp 36-7, 43; *Annual Report 1996-97*, p 36; R Levitus, 'The Boundaries of the Gagudju Association Membership: Anthropology, Law and Public Policy' in J Connell & R Howitt (eds), *Mining and Indigenous People in Australasia* (Sydney University Press, Sydney, 1991 and allegations as to corporate practices made in *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA.

[13] For example, the facts of *Shaw v Wolf* (1998) 83 FCR 113 (election to ATSIC Regional Council); Registrar of Aboriginal Corporations, *Annual Report 1995-96*, pp 34-5 (election to board of corporation).

[14] This distinction was drawn in *Nyul Nyul Aboriginal Corporation v Dann* (unreported, WASC, Owen J, 2 August 1996) at 26–7.

[15] T Libesman & C Cuneen, 'Case Studies, NSW' in Fingleton et al, Vol 2, para 6.3 (role of ATSIC regional councils in resource competition); G Crough & D Cronin, 'Aboriginal Resource Centres in the Kimberley Region' in Fingleton et al, Vol 2, para 7.10; Registrar of Aboriginal Corporations, *Annual Report 1995-96*, pp 37-8 (use of campsite and corporate bus), p 49 (control of corporate vehicle); Registrar of Aboriginal Corporations, *Annual Report 1997-98*, pp 69-70 and *Annual Report 1998-99*, pp 32-3 (rent-free occupation of corporate houses by board members).

[16] For example, see *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* [1999] FCA 521. See also *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* (unreported, FCA, Perth, Nicholson J, 23 June 1995) and Registrar of Aboriginal Corporations, *Annual Report 1998-99*, pp 37–8; see also *Nyul Nyul Aboriginal Corporation v Dann* (unreported, WASC, Owen J, 2 August 1996, digested (1996) *Australian Current Law* [355 WA 10]).

[17] For example, see R Levitus, 'The Boundaries of Gagudju Association Membership: Anthropology, Law and Public Policy', in J Connell and R Howitt (eds), *Mining and Indigenous People in Australasia* Sydney University Press, Sydney, 1991; and allegations regarding corporate practices raised in the facts of *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA.

[18] Since 1993-94, all annual reports of the Registrar of Aboriginal Corporations provide examples of poor financial management in corporations which have occasioned regulatory intervention in the form of examinations, fraud investigations, the appointment of an administrator, or the winding up of the corporation.

[19] See Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p 5 & Appendix J.

[20] Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p 28.

[21] Registrar of Aboriginal Corporations, *Annual Report 1998-99*, p 21.

[22] The annual reports of the Registrar of Aboriginal Corporations disclose the following statistics on referrals to law enforcement agencies: 1993-94 (12 referrals); 1994-95 (23); 1995-96 (10) 1996-97 (21); 1997-98 (10); 1998-99 (3 investigations by contracted investigators).

[23] Source: Registrar of Aboriginal Corporations, *Annual Report 1999–2000*, p 6.

[24] Some organisations have no choice, for example prospective Native Title Representative Bodies (NTRBs and Prescribed Bodies Corporate are required to incorporate under the Act). These issues are dealt with separately under Chapter 4 of this paper. However, ATSIC no longer requires other Indigenous organisations to be incorporated under the Act as a prerequisite to funding.

[25] Informal estimate made by an employee of the Registrar's Office to the Review Team during consultation. Because of the nature of statistics kept by the Registrar's Office, it is impossible to provide a more accurate estimate.

[26] Aboriginal Councils and Associations Act 1976, s 45(1).

[27] Aboriginal Councils and Associations Act 1976, s 45(3).

[28] Corrs Chambers Westgarth, Interview with delegates of the Registrar of Aboriginal Corporations, 18 April 2001.

[29] Registrar of Aboriginal Corporations, *Annual Report 1996-97*, 1-2, quoted in Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* Sydney, The Federation Press, 2000, p 225, 229-230.

[30] Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* Sydney, The Federation Press, 2000, p 232.

[31] *Erica Deeral (on behalf of herself and the Gamaay Peoples) & Ors v Gordon Charlie & Ors* [1998] 723 FCA (1 June 1998).

[32] See the critiques of the *Fingleton Review's* use of 'cultural appropriateness' by C Mantziaris, 'Beyond the *Aboriginal Councils and Associations Act*?' (Part I) (1997) 4(5) *Indigenous Law Bulletin* 10; (Part II) (1997) 4(6) *Indigenous Law Bulletin* 7–13, 16; T Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) *American Behavioural Scientist*. J Fingleton's reply to Mantziaris appears as 'Back of Beyond: The Review of the Aboriginal Councils and Associations Act 1976 in Perspective' (1997) 4(6) *Indigenous Law Bulletin* 14; and Mantziaris and Martin, pp 286, 293–4.

[33] The term 'classical' has been adopted following P Sutton, 'Native Title and the Descent of Rights' (National Native Title Tribunal, Perth, 1998), p 60.

[34] Section 23(3) establishes the equivalent provision for Aboriginal councils.

[35] ORAC, 'Model Rules' 15(3)(c) and 17(1), available at http://www.orac.gov.au/publications/pdf/modrules.pdf. See also comments in Fingleton Volume 1, para 5.12.

[36] Mantziaris and Martin pp 187–94; see also Fingleton Volume 1 para 5:14.

[37] Law Reform Commission – Australia, *The Recognition of Aboriginal Customary Laws*, Report 31 AGPS, Canberra, 1986, vol 2, paras 99-100.

[38] Mantziaris and Martin, pp 71–7, 169–70.

[39] Mantziaris and Martin, pp 39–43.

[40] F Merlan, 'The Objectification of "Culture": An Aspect of Current Political Process in Aboriginal Affairs' (1989) 6 *Anthropological Forum* 105.

[41] Fingleton, Volume 1, pp 32–63

[42] For example, see Fingleton para 5.16–5.27.

[43] For example, compare J Fingleton et al, *Final Report: Review of the Aboriginal Councils and Associations Act 1976 (Cth)* (Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1996), vol 1; and J Reeves, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, 2nd edn (AGPS, Canberra, August 1998), ch 9.

[44] This section is drawn from Mantziaris and Martin, pp187-9.

[45] See, for example, AD Lange, *Horsley's Meetings: Procedure, Law and Practice*, 4th edn, Sydney, Butterworths, 1998; and ES Magner, *Joske's Law and Procedure at Meetings in Australia*, 8th edn, Sydney, LBC, 1994.

[46] For example, the Corporations Law distinguishes between ordinary and special resolutions: Corporations Law s 9 (the definition of 'special resolution'). For an exploration of the deliberative character of the corporate model, see S Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277.

[47] See generally, Ford et al (n 23), *Ford's Principles of Corporations Law*, 7.370–7.570.

[48] Mantziaris and Martin, pp 282-3; DF Martin and JD Finlayson, 'Linking Self-determination and Accountability in Aboriginal Organisations', Centre for Aboriginal Economic Policy Research Discussion paper No 116, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1996.

[49] P Sutton, 'Families of Polity: Post-classical Aboriginal Society and Native Title', in P Sutton, *Native Title and the Descent of Rights* (National Native Title Tribunal, Perth, 1998); Mantziaris and Martin, pp 169-79.

[50] Mantziaris and Martin, pp 41–3, 188.

[51] See discussions in Mantziaris and Martin, pp 188, 312-3.

[52] For example, Registrar of Aboriginal Corporations (n 98), *Annual Report 1997–98*, p 50 (corporation had not conducted an annual general meeting between 1991 and 1996); see also p 46.

[53] For example, Registrar of Aboriginal Corporations(n 98), *Annual Report 1997–98*, pp 78–9; Registrar of Aboriginal Corporations (n 85), *Annual Report 1998–99*, pp 49–51.

[54] For example, Fingleton et al (n 43), vol 1, paras 5.53–5.57.

[55] See, for example, *Aboriginal Land Rights (Northern Territory) Act 1976 and the Alcoota Land Claim No 146* [1998] 281 FCA at 30.

[56] Evidence of procedural irregularities in meetings is to be found in almost all of the summaries of 'administrations' provided in the annual reports of the Registrar of Aboriginal Corporations. See also the facts of *Baxter v Marra Worra Aboriginal Corporation* (1988) 5 SR (WA) 42 at 46–7; *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] 743 FCA; *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation*; (unreported, FCA, Perth, Nicholson J, 23 June 1995); *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* [1999] FCA 521.

[57] For example, Registrar of Aboriginal Corporations, *Annual Report 1997–98*, pp 86–7, 88; and the facts of *Walker v Daniel* [1996] FCA 1159; and *National Aboriginal and Islanders Legal Services Secretariat Aboriginal Corporation v Registrar of Aboriginal Corporations* [1998] FCA 743. Cf: *Kolotex (Hosiery) Australia Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 571 (non-members cannot vote).

[58] ACA Act s 59A(5)(a); R Richards, 'Financial Management and Related Matters: A Question of Accountability', in Fingleton et al, vol 2.

[59] Corporations Law s 9 (definition of "director"). A de-facto director also includes someone who acts as a director even if there has been no purported appointment and a person that describes himself as a consultant, where that person undertakes tasks that would typically be expected of a director: *Fords Principles of Corporations Law* para [8.020].

[60] Although a body corporate cannot be appointed as a director, it could be a shadow director: *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] AC 187 cited in *Ford Principles of Corporations Law* para [8.020].

[61] PD Finn, 'Fiduciary Law and the Modern Commercial World', in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* Clarendon, Oxford, 1992, p 9; and PD Finn, 'The Fiduciary Principle', in TG Youdan (ed), *Equity, Fiduciaries and Trusts* Carswell, Toronto, 1989, p 27. Compare *Chan v Zacharia* (1984) 154 CLR 178 at 198.

[62] *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592; *Mills v Mills* (1938) 60 CLR 150 at 164; PD Finn, *Fiduciary Obligations* (LBC, Sydney, 1977), ch 2.

[63] *Greenhalgh v Arderne Cinemas Ltd* [1951] 1 Ch 286; *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438; *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

[64] See LS Sealy, '"Bona Fides" and "Proper Purpose" in Corporate Decisions' (1989) 15 *Monash University Law Review* 265; LS Sealy, 'Director's "Wider" Responsibilities: Problems Conceptual, Practical and Procedural' (1987) 3 *Monash University Law Review* 164 and *Ford's Principles of Corporations Law* (n 24), paras 8.070–8.160.

[65] In *Coleman v Myers* [1977] 2 NZLR 225 (CA), the court recognised a director's fiduciary duty to individual corporate members arising from a transaction between shareholders and directors. The court noted the family character of the company, the trust and confidence which other shareholding family members reposed in family members occupying the office of director, and the use, by these directors, of their position of trust and confidence and 'inside knowledge' to induce other shareholding family members to undertake the transaction. See also *Glavanics v Brunninghausen* (1996) 19 ACSR 204 and *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* (1996) 19 ACSR 483. Compare the orthodox position in *Percival v Wright* [1902] 2 Ch 421.

[66] Finn, *Fiduciary Obligations* (n 34), chs 6–7; G Thomas, *Thomas on Powers* (Sweet & Maxwell, London, 1998), pp 299–308; *Thorby v Goldberg* (1964) 112 CLR 597 at 605–6.

[67] The limited recognition of nominee director's duties to their appointors attempted by Jacobs J in *Levin v Clark* [1962] NSWR 686 and *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWR 1648 does not appear to have altered the orthodox position as expressed in *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) (NSW) 306; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 and *Harkness v Commonwealth Bank of Australia* (1993) 12 ACSR 165. See generally, RP Austin, 'Representatives and Fiduciary Responsibilities: Notes on Nominee Directorships and Life Arrangements' (1995) 7 *Bond Law Review* 19; and P Redmond, 'Nominee Director's (1987) 10 *University of New South Wales Law Journal* 164.

[68] *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3rd) 371 at 381–2; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 99–100. See generally, J Glover, *Commercial Equity-Fiduciary Relationships* (Butterworths, Sydney, 1995), ch 4.

[69] Constructive trustee of infant's property: *Keech v Sandford* (1726) SC 2 Wh & TLC 693; 25 ER 223. Family property and avoidance of taxes: FW Maitland, 'Trust and Corporation', in HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Cambridge University Press, Cambridge, 1911), vol III.

[70] See the reconstruction of this strand of jurisprudence by PD Finn, 'Public Officers: Some Personal Liabilities' (1977) 51 *Australian Law Journal* 313; and PD Finn, 'A Sovereign People, a Public Trust', in PD Finn (ed), *Essays on Law and Government: Volume 1 – Principles and Values* LBC, Sydney, 1995, ch 1.

[71] From the voluminous literature on the institutional history of equity, see the summary provided by W Holdsworth, *A History of English Law: Volume 1 – The History of the English Judicial System*, 7th edn, Methuen, Sweet & Maxwell, London, 1969, pp 445–76. In the specific context of equitable procedure and the fiduciary duty, see P Parkinson, 'Fiduciary Obligations', in P Parkinson (ed), *The Principles of Equity* (LBC, Sydney, 1996), paras 1009–1011 and, more generally, LS Sealy, 'Fiduciary Relationships' [1962] *Cambridge Law Journal* 69 and LS Sealey, 'Some Principles of Fiduciary Obligation' [1963] *Cambridge Law Journal* 119.

[72] See discussion in Chapter 2. An early exploration of this theme in relation to the operation of the ACA Act corporation is A-K Eckermann and LT Dowd, 'Structural Violence and Aboriginal Organisations in Australia' (1988) 27 *Journal of Legal Pluralism* 55.

[73] See Chapter 2, and Mantziaris and Martin, pp 319–20.

[74] Such arguments have been advanced in the context of the ACA Act by DF Martin and JD Finlayson, 'Conclusions and Recommendations', in J Fingleton et al, *Final Report: Review of the Aboriginal Councils and Associations Act 1976 (Cth)*, Vol 2 Australian Institute of Aboriginal and Torres Strait Islander Studies and the Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1996 ('*Fingleton Review*'); P Sullivan, 'The Needs of Prescribed Bodies Corporate under the *Native Title Act* 1993 and Regulations', in *Fingleton Review*, Vol 2; and C Mantziaris, 'Beyond the *Aboriginal Councils and Associations Act*? Part II' (1997) 4(6) *Indigenous Law Bulletin* 7, 16.

[75] See below, pp 204–5 (director's duties of diligence in the ACA Act corporation).

[76] The 'community standards' underpinning the duty of care in negligence will even differ between countries which share the common law tradition: *Invercargill City Council v Hamlin* [1996] AC 624. For an analysis of the factors that drive judicial formulations of the duty of care, see J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus', in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon, Oxford, 1998), ch 4.

[77] Mantziaris and Martin p 152 n 70.

[78] Mantziaris and Martin p 205.

[79] See *Halsbury's Laws of Australia* para [435-205].

[80] Mantziaris and Martin pp203-4.

[81] Aboriginal Councils and Associations Act 1976, s 5(1).

[82] Aboriginal Councils and Associations Act 1976, ss 45(1), 45(3), 52, 54.

[83] Aboriginal Councils and Associations Act 1976, s 58.

[84] Aboriginal Councils and Associations Act 1976, s 58A.

[85] Aboriginal Councils and Associations Act 1976, s 58B(4).

[86] Aboriginal Councils and Associations Act 1976, ss 60, 68, 70.

[87] Aboriginal Councils and Associations Act 1976, s 71.

[88] Aboriginal Councils and Associations Act 1976, s 77D.

[89] Aboriginal Councils and Associations Act 1976, s 62A.

[90] Aboriginal Councils and Associations Act 1976, s 5(2).

[91] Registrar of Aboriginal Corporations, *Annual Report 1998–99*, pp 11–13

[92] Corporation Law, section 461(1)(h).

[93] Annual Report 1996–97, p 35,

[94] Mantziaris and Martin, *Native Title Corporations*, p 208.

[95] Registrar of Aboriginal Corporations (n 85), *Annual Report 1998–99*, p 36.

[96] Mantziaris and Martin, p 317.

[97] Martin and Finlayson, 1996; Rowse, *Remote Possibilities*, p 72; Mantziaris and Martin, pp317-21.

[98] Rowse, *Remote Possibilities*; and P Sullivan, 'Aboriginal Community Representative Organisations: Intermediate Cultural Processes in the Kimberley Region, Western Australia', *East Kimberley Working Paper 22* Centre for Resource and Environmental Studies, Australian National University, Canberra, 1988.

[99] Martin and Finlayson, 1996.

[100] Written comments provided by Joe Mastrolembo of the Office of the Registrar of Aboriginal Corporations.

[101] Fingleton, p 82.

[102] HAJ Ford, RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* Sydney, Butterworths, para 10.010.

[103] Fingleton, paras 6.63–6.70.

[104] ACA Act s 49A.

[105] ACA Act s 49(2).

[106] Mantziaris and Martin p 198. See Fingleton et al Volume 1 p 48.

[107] Mantziaris and Martin p 199.

[108] Corporations Law s.45A.

[109] See Mantziaris & Martin *Native Title Corporations – A legal and anthropological analysis* (Sydney, Federation Press, 2000).

[110] (Sydney, Federation Press, 2000). The authors are also members of the current Review team.

[111] *Deeral (On behalf of Herself and Gamaay Peoples) v Charlie* [1998] FCA 723; *Deeral (On behalf of Herself and Gamaay Peoples) v Charlie* [1997] FCA 1408. See C Mantziaris and D Martin, *Native Title Corporations: A legal and Anthropological Analysis* (Federation Press, 2000), pp 108-9.

[112] This tension is analysed in C Mantziaris and D Martin, *Native Title Corporations: A legal and Anthropological Analysis* (Federation Press, 2000), pp 192-4, 303-6, 317-21.

[113] The Fingleton review extensively canvassed the history of Part III and the reasons it has not been used. It also analysed the applications made under the Councils section. It is the primary source for the following information.

[114] Fingleton Volume 1, para 7.3.

APPENDIX D

REVIEW OF THE ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976

SUPPLEMENTARY POLICY DISCUSSION PAPER FOR "OPTION 5"

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REVIEW OF *ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976*

DISCUSSION PAPER FOR "OPTION 5"

CONTENTS

A SUMMARY

1 Background

As part of its work on the current Review of the Aboriginal Councils and Associations Act 1976 ("**the ACA Act**"), the Review Team engaged by the Registrar's Office prepared a Draft Policy Options Discussion Paper ("**the Policy Options Paper**"). The purpose of the Policy Options Paper was to set out a number of fundamental policy issues, which require answering to move the Review forward. It also outlined four broad models for structural reform, which the various policy issues pointed towards, depending on how the policy issues were addressed.

On 15 August 2001, the Acting Registrar, Joe Mastrolembo, provided the Review Team with the Steering Committee's formal response to the Draft Policy Options Paper ("**the Response**"). The Steering Committee declined at that stage to respond to the various policy issues, but instead raised a number of additional issues to be addressed in the Policy Options Paper. This included a fifth possible model for structural reform, which the Steering Committee had discussed ("**Option 5**").

This Discussion Paper considers whether Option 5 is feasible and how it might work, and discusses a number of the issues raised by Option 5 which the Steering Committee and the Registrar's Office have asked the Review Team to explore in more detail.

This Discussion Paper is intended to *supplement* the Policy Options Paper, and should be read in conjunction with it. A number of these issues are in fact relevant to several of the structural reform models proposed in the Policy Options Paper. And while a number of additional policy issues are raised in this paper, they need to be addressed in the context of the broader range of policy issues raised in the Policy Options Paper.

2 Preliminary View

It is the Review Team's preliminary view that Option 5 is a feasible alternative for consideration with the four other Structural Reform Models proposed in the Policy Options Paper. However, and additional or supplementary regulatory role played by the Registrar under Option 5 would probably be limited.

There do not appear to be any legal impediments to Option 5, which would require it to be ruled out as an option. Nonetheless, there are several aspects of it which could make it difficult to achieve, including:

- The potential complexity of interactions with, and consequential amendments needed to, the Corporations Act 2001 ("**Corporations Act**") and the State and Territory association incorporation Acts (although some of these would be encountered with any Structural Reform Model which required closing off the ACA Act as an incorporation vehicle, whether in whole or in part).

- Political and rights issues and the need for Indigenous support for a proposal which would see the ACA Act being closed off as an incorporation act specifically for Indigenous people (this is a matter for consultation, and would also arise under Structural Reform Model 1).

- The need for amendment to regulations under the Native Title Act (if not the Act itself) to address the current requirement that NTRBs and PBCs be incorporated under the ACA Act.

This Discussion Paper also identifies a number of operational issues for Option 5, but which would need to be examined further if Option 5 is selected for Stream 3 consideration.

B DESCRIPTION OF OPTION 5

Under Option 5, a new Act and regulations would provide for a Registrar's Office (perhaps renamed to reflect its new role in development rather than policing) which would serve as a gateway to other incorporation regimes - initially perhaps the Corporations Act since it is a Commonwealth regime, and over time, State and Territory incorporation regimes.

Indigenous organisations would obtain benefits in using this gateway by way of, for example, subsidised fees for incorporation and lodgement of various documents and perhaps case management by the Registrar's Office through the incorporation process at ASIC and also in the case of issues or disputes with ASIC requirements. Subsidisation and assistance would be dependent on the organisation "registering" as an Indigenous organisation when applying for incorporation (those already incorporated other than under the ACA Act could "register" at a later date to enable eligibility for assistance).

Most importantly, the new Act would establish new statutory functions for the Registrar's Office, which would be consistent with developing Indigenous communities that use the corporate vehicle by tackling systemic problems and helping organisations build on successes. Over time, the Registrar's Office could perhaps become a knowledge-bank to assist other agencies particularly funding agencies with good governance matters, and indeed the Registrar could accredit or register bodies incorporated under the Corporations Act and other incorporation regimes. It may be that funding bodies such as ATSIC would designate the Registrar's Office as the preferred incorporation route for bodies they fund or even require bodies to be registered with the Registrar's Office in order to receive funding.

An Indigenous organisation could chose to go it alone with ASIC, as they do now, and there would be no penalty (subject to any view a funding body may have about preferred incorporation regimes).

The new Act would still need to retain some regulatory powers such as appointing an administrator for corporations in difficulty, and the Registrar would need to retain its independence from ASIC and other incorporation agencies to ensure it catered for issues specific to Indigenous organisations.

The broad principle is that bodies "registered" with the Registrar's Office would get access to assistance but might also be subject to regulation, as happens now, are regulated or in some modified form.

To ensure the refocus on development work could occur, there should be an incentive scheme to encourage bodies incorporated under the ACA Act to 'migrate' to the Corporations Act over a period of time; with the option for them to remain with the Registrar's Office and be 'grandfathered' over time. However, no new incorporations would be accepted except under the new gateway to the Corporations Act and other incorporation regime processes, other than those required to be incorporated with the Registrar under separate legislation such as NTRBs and PBCs.

C DISCUSSION OF ISSUES

The issues arising from Option 5 can be broken down into three broad headings:

- Do the Corporations Act and State Association Incorporation Acts provide a viable alternative to the ACA Act?
- Issues arising from the "gateway" or "accreditation" model; and
- Issues relating to the transfer of ACA Act corporations to other regimes.

These are considered in turn.

1 Do the Corporations Act and State Association Incorporation Acts provide a viable alternative to the ACA Act?

The Policy Options Paper currently includes a section titled "*Is there a need for a special incorporation regime for indigenous people?*" That section does not currently include a detailed discussion of the appropriateness of the Corporations Act and State and Territory association incorporation regimes as an alternative to the ACA Act.[1] That is now done here.

1.1 Appropriateness of Corporations Act

There are essentially two elements to this question:

- Are there any threshold legal impediments which would *prevent* any kind of Indigenous corporation from incorporating under the Corporations Act?;
- Are there any practical issues, which would make the Corporations, Act *inappropriate* for certain kinds of Indigenous corporation?

The first question can probably be answered relatively quickly, in that the flexibility of the Corporations Act means that there are very few limitations on the size, structure, constitution or purpose for which a corporation can be established. Therefore, it is likely that any corporation, which is or could be established under the ACA Act, could also be established under the Corporations Act.

The second, and more complex question, is how appropriate the Corporations Act is as an alternative. Answering this question in any detail is potentially a very large task, and is the focus of this section of this Discussion Paper.

A range of *legal* aspects of the Corporations Act and its appropriateness in the context of Indigenous corporations are already dealt with in the Policy Options Paper. It should be possible to draw some of these together (to give a centralised overview) relatively easily.

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[1] It was not considered to be cost-effective because of the Review Team's assessment at the time that the Steering Committee was unlikely to consider repealing the ACA Act as an incorporation regime, necessitating the transfer of all corporations to alternative incorporation regimes.

However, there are also a number of *practical* issues which would need to be considered, including costs, complexity, the nature of the reporting requirements, and how the Act is administered by ASIC.

(a) Legal issues affecting appropriateness of the Corporations Act

The Policy Options Paper includes consideration of various aspects of the Corporations Act, and in relation to many of them suggests that these provisions are probably *more* appropriate for Indigenous (or any) corporations than equivalent provisions under the ACA Act. (Although this is in part simply because the many provisions of the ACA Act are hopelessly outdated). Issues discussed in the Policy Options Paper in terms of bringing the ACA Act "into line" with the Corporations Act include:

- advantages of the permissive approach to company rules under the Corporations Act (see **Chapter 3, Sections D, E and F**);
- the comprehensiveness and certainty of the directors' duties under the Corporations Act (see **Chapter 3, Section G**);
- the greater capacity for members to take action against the corporation and/or its directors through various statutory remedies under the Corporations Act (see **Chapter 3, Section H**);
- the greater scope and detail of the Corporations Act generally (see **Chapter 3, Section J**).

The Corporations Act also has several other significant advantages over the ACA Act – most notably transactional certainty. The doctrine of *ultra vires* is expressly excluded by the Corporations Act, however, it still applies to the actions of ACA Act corporations. The compliance difficulties many Aboriginal corporations have means that a significant number of commercial transactions entered by ACA Act corporations are potentially unenforceable.

In addition to these general issues relating to "appropriateness", it is important to note that there are different eligibility requirements for different kinds of corporation under the Corporations Act. There are also different regulatory requirements, which apply to the different kinds of corporation. This may preclude certain ACA Act corporations from registering as certain types of Corporations Act corporation.

The types of bodies corporate, which can be registered under the Corporations Act, include the following:

- Proprietary companies (including small and large)
  - limited by shares
  - unlimited with share capital
- Public companies

- limited by shares
- limited by guarantee
- unlimited with share capital
- no liability

Under the Corporations Act, a proprietary company is a small proprietary company if it satisfies at least two of the following criteria (section 45(2)(A)):

- annual gross revenue of less than $10 million;
- annual gross assets of less than $5 million;
- fewer than 50 employees.

According to information provided by the Registrar's Office (see Tables 2 and 4 at paragraph 2.77 of the Policy Operations Paper) of the 464 corporations for which the Registrar's Office had records in the 1999/2000 financial year, only nine had assets valued over $5 million and only eight had incomes over $5 million. Using these figures is a rough guide, it can be said that approximately 98% of the ACA Act corporations are likely to fall in the small proprietary category if they were to become Corporations Act corporations.

A table outlining the general eligibility requirements and features of the different types of corporation under the Corporations Act is included in **Attachment A**.. As is also noted in this table, there is some flexibility under the Corporations Act for transferring between different types of Corporations Act corporation.

(b) Practical issues

Although the Corporations Act is flexible enough for any kind of ACA Act to be able to register under it, there are a number of reasons why the Corporations Act may not be an appropriate incorporation vehicle for some ACA Act corporations. These include the following:

(i) Complexity of the Corporations Act

The Corporations Act is very complex. The mere size of it is daunting – it is about 1400 pages long, with several thousand provisions, and that is not including the regulations or the Australian Securities and Investments Commission Act. The range of different companies under it, and the varying regulatory requirements (and associated forms) applying to the different company types can also be quite bewildering – again, see **Attachment A**.

Nonetheless, for certain company types (such as small proprietary companies) there are simplified rules; and the whole of Part 1.5 of the Corporations Act is a plain-English "Small Business Guide". Indeed, many small "corner-store" like businesses are incorporated under the Corporations Act and operate comfortably under the

Corporations Act regime although, admittedly, most "directors" are largely ignorant of most of the provisions of that Act.

Further, it should be noted that the ACA Act itself is deceptive in its size and complexity, as it incorporates large sections of the Corporations Act. Section 62 of the ACA Act provides for the application of the provisions of the Corporations Act relating to compositions with creditors and section 67 of the ACA Act provides for the application of the provisions of the Corporations Act relating to the winding up of corporations.

(ii) Costs

Incorporating under the Corporations Act can also be very expensive. The costs are both direct (fees) and indirect (legal and accounting advice).

Direct costs include registration fees ($300-$720 to register a company), and recurring fees (up to $900 per annum just for lodging the Annual Return; plus other regular fees – these are discussed in more detail in the next section).

Nonetheless, note that the fee for lodging an annual return for a "special purpose company" (essentially a non-profit company limited by guarantee) is only $36. A significant number of Indigenous corporations may fall into this category.

Further, for larger companies, the fees are likely to be nominal compared with the costs of the activities undertaken by the corporation. For example, a non-grant funding housing association, which is a common example, would probably ensure that the costs of such fees are recovered from rental income.

(iii) Reporting requirements, timeframes and consequences of failure to comply

The Corporations Act contains reporting requirements for a range of items, such as change in address of directors, etc. A table of some of the most common forms, and associated fees and timeframes is set out below.

Form	**Description**	**Fee**	**Late fees apply after**
203	Notification of change of address or principal place of business of one or more corporations. Notification of change of office hours.	Nil	14 days Must be notified prior to the change occurring, late fees apply thereafter.
205	Notification of resolution and minutes of alteration to company's constitution (s136(5))	Nil	14 days
304	Notification of change to office holders (Directors, Secretary)	Nil	14 days

316	Annual Return of a public company	$900	31 January
316	Annual Return of a proprietary company	$200	31 January
316	Annual Return of a special purpose company	$36	31 January
336	Application for relief from requirements relating to accounts and reports (s. 340)	$120	N/A
2501	Application for extension of time to hold Annual General Meeting (s.250N)	$30	N/A
Late lodgement fees – payable in addition to the prescribed fees			
	If lodged within 1 month after prescribed time		$60
	If lodged more than 1 month after prescribed time		$240

A more complete table of fees for commonly lodged documents (produced by ASIC) is included in **Attachment B**.

Two specific aspects of the reporting requirements need to be discussed – these relate firstly, to timeframes and penalties, and secondly, to annual returns and financial reports.

Timeframes and Penalties

Fairly tight timeframes apply to the lodging of many forms. Penalty notices for late fees for failure to lodge documents such as Annual Returns are automatically generated by computers within ASIC.

The late fees set out in the table above apply to *all* forms required to be lodged with ASIC where the relevant form is not lodged within the specified timeframes (including forms which themselves have no associated fees). If there are several breaches or failures to notify, the amounts can quickly add-up (the Corporations Act sets a maximum total of $25,000[2]). However, the penalties are not cumulative in the sense that they do not add-up for each month that the failure continues.

Many of the forms to be lodged cover matters that are also covered by the Annual Return. Therefore, the lodging of the Annual Return should effectively "regularise" and clear the breaches (but the late fees would still be payable).[3]

2 Section 1352

3 Section 345(4)

If a company has not lodged an Annual Return in two years, ASIC presumes that the company has ceased to operate, and will automatically take steps to deregister the company.

In addition to the late fees, there are penalties prescribed for offences relating to the failure to comply with various provisions of the Corporations Act (Schedule 3 to the Corporations Act lists all 24 pages of penalties). For example, failure to lodge an Annual Return within the prescribed time is an offence which can also result in a penalty of 5 penalty units ($550) being imposed – on top of the registration fees and any late fees.

Annual Returns and Financial Reports

All companies must lodge an Annual Return. The Annual Return is automatically generated by ASIC from records relating to the company, and sent out to the company for updating or simply signing and dating if it is up to date. The Annual Return contains details about the company's directors, shareholders/members, and principal place of business.

Financial reporting requirements vary depending on the type of company. For example:

- Small proprietary companies are generally not required to provide annual financial reports; and when they do, are exempted from compliance with the accounting standards.

- All public companies and large proprietary companies are required to prepare and lodge with ASIC a financial report and a directors' report each year.

The financial reports must be audited.

The annual directors' reports must cover a range of details about the company and its financial status (including dividends, shares, options, unissued shares, etc).[4] There are further special reporting requirements depending on whether the company is a public company or a listed company.[5]

Certain companies, known as "disclosing entities" are required to also prepare half-yearly financial and directors' reports. This is unlikely to apply to any corporations transferred across from the ACA Act, at least in the short term.

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4 See Part 2M.3 of the *Corporations Act*, in particular section 300.

5 Ibid, and section 300A.

(iv) ASIC's Role in Regulation

A final point to note about incorporation under the Corporations Act is that ASIC plays a much more "hands-off" role in regulating corporations than the Registrar under the ACA Act.

This is in part a resourcing issue: ASIC administers more than 1.2 million companies, and would not have the capacity to closely scrutinise the activities and status of all of them. However, it is also a philosophical position of non-interference in the market, except where it is in the public interest to "send a message" about particular types of behaviour or breach.

Instead, creditors and members are expected to take action on their own behalf to protect their respective interests.

This is different from the very interventionist role historically played by the Registrar's Office which has seen its role as being to "protect members from the directors".. Such an interventionist role is at odds with modern corporate regulatory philosophy and has been widely criticised. This is an issue which is discussed in more detail in the **Policy Options Paper in Section H of Chapter 3**.. As discussed there, it is arguable that the approach of ASIC under the Corporations Act is in fact much more appropriate than the role of the Registrar under the ACA Act. ASIC does not seek to regulate the internal affairs of the corporation, but instead deals with the relationship with third parties.

(c) "Umbrella" Companies

Umbrella companies can clearly be established under the Corporations Act.

(d) Conclusion

In conclusion, the Corporations Act would provide a viable alternative to the ACA Act for many Indigenous corporations currently incorporated under the ACA Act.

Many indigenous corporations are already incorporated under the Corporations Act. Figures for the success rates and compliance records, and information about the functions of these Corporations Act Indigenous corporations are not available, but their mere existence demonstrates that the Corporations Act as it stands, may be a viable alternative to the ACA Act for many Indigenous associations. This is especially the case in respect of large and profit generating Indigenous corporations.

However, given that we know very little about these corporations, it is difficult to say with any confidence that the Corporations Act can meet the objectives of all Indigenous organisations.

Nonetheless, it is clear that the Corporations Act is likely to prove too complex, expensive and onerous for a number of ACA Act corporations, such as, small cultural associations and passive land holding corporations. For some of these corporations, a State Association Incorporation regime may be more appropriate (see discussion at **1.2** below).

The suitability of the Corporations Act as an alternative incorporation vehicle to the current ACA Act would also depend in part on whether measures could be taken to provide relief to Indigenous corporations from some of the fees and reporting timeframes and requirements under the Corporations Act. (This concept is explored further under heading **2.3**, below.)

1.2 Appropriateness of State association incorporation acts

The scope and purpose of this task is again to consider the appropriateness of possible alternative incorporation regimes to the ACA Act. This is only done to a level of detail to inform the basic underlying question of feasibility. For the sake of efficiency, the Review Team has only considered the approaches taken under the *Associations Incorporation Act 1984* (NSW) ("**the NSW Act**"), the *Associations Incorporation Act 1987* (WA) ("**the WA Act**") and the *Associations Incorporation Act 1991* (ACT) ("**the ACT**") as a representative sample of the various State and Territory regimes.

There are certain restrictions placed on incorporation under the various State and Territories regimes. These restrictions are both legislative and policy-based. It is clear from these that the general intent behind these regimes is to provide a simple incorporation mechanism for small non-profit associations. This clearly limits the type of ACA Act corporation that would be able to incorporate under the State and Territories regimes.

Nonetheless, a significant number (if not the majority) of ACA Act corporations probably do fall into this category (see **Policy Options Paper, Chapter 2, Section B, paragraph 2.76**). As will be noted under the discussion of practical considerations (below), these State and Territory regimes are much more user-friendly for small organisations than the Corporations Act.

(a) Legislative Restrictions

Each of the State regimes examined places restrictions on eligibility for incorporation based on minimum membership and purpose. As will be discussed under the next subheading, there are also discretions to refuse registration based on size and nature of activities.

(i) NSW

Under section 7 of the NSW Act, to be eligible for incorporation under the Act, an association must have more than 5 members.

Further, an association is not eligible for incorporation if the association, amongst other things:

- is carried on for the object of trading or securing pecuniary gain for its members;
- has a capital divided into shares or stock held by members; or
- holds property in which the members have a disposable interest (whether directly or in the form of shares).

Section 4 provides that an association is *not* deemed to be trading or securing pecuniary benefit for its members by reason only that (amongst others):

- the association itself makes a pecuniary gain (unless it is divided among members);
- the association buys or sells goods or services, where the transactions are ancillary to the principal object of the association; or
- a member derives pecuniary gain by way of bona fide remuneration.

Further, it will not be deemed to be trading if the trade is engaged in for charitable purposes within the meaning of the *Charitable Fundraising Act 1991*.

(ii) WA

The WA Act also contains a lower limit of a minimum of five members. Further, an association is not eligible for incorporation under the Act unless it is carrying out one of the following legitimate purposes listed in section 4, including:

- a religious, educational, charitable or benevolent purpose;
- the purpose of promoting or encouraging literature, science or the arts;
- the purpose of sport, recreation or amusement;
- the purpose of establishing, carrying on, or improving a community, social or cultural centre, or promoting the interests of a local community;
- a political purpose; or
- any other purpose approved by the Commissioner.

In addition, any association formed for the purpose of trading or securing profit for its members is ineligible (irrespective of whether it also meets the other purposes specified in section 4).

(iii) ACT

The ACT Act, in sections 4 and 14, largely mirrors sections 4 and 7 of the NSW Act.

(b) Policy Discretions

Under each of the State Acts examined, the administrator of the Act has discretion to require incorporated associations to incorporate under the Corporations Act under certain circumstances.

- In NSW, the Minister may refuse to incorporate an association (and may require an existing incorporated association to register as a company under the Corporations Act or as a cooperative under the Cooperatives Act 1992) where its incorporation under the NSW Act would be "inappropriate or inconvenient". The Minister's assessment of whether it is "inappropriate or inconvenient" may be based on the scale or nature of the activities of the

association, the value or nature of the property of the association, or the extent or nature of the association's dealings with the public (sections 10, 56).

This is a broad discretion, and the NSW Department of Fair Trading does not have strict guidelines relating to its exercise. Instead, each case is "considered on its merits".. However, the Department indicated that as a *general* rule, associations with assets or income in excess of $500,000 would be considered inappropriate. The Department also indicated that if the association performs primarily a commercial (rather than social, charitable, sporting or religious etc) function, this might also be an indicator that it should not be incorporated under the State Act.

- In WA, there is a similar discretion. Where the Commissioner is of the opinion that the undertakings or operation of the association would be "more appropriately carried on by a body corporate incorporated under some other Act" (section 34).

  However, the Department of Fair Trading in WA appears to take an even more flexible approach than NSW and does not have any "general cut-off indicators".. For example, the Review Team was advised of a charitable association with in excess of $10 million worth of assets, which remained incorporated under the WA Act.

- Section 83 of the ACT Act is almost identical in terms to section 56 of the NSW Act.

(c) Practical Issues

The State and Territory association incorporation regimes are on the whole quite simple and user-friendly. The reporting and accountability requirements are less onerous than under ACA Act as it currently stands, and the legislation is much less complex than the Corporations Act.

There are nonetheless a range of reporting requirements, forms to be completed and penalties for failure to lodge forms in time or to keep proper records. Most of these penalties are relatively low, but are generally still higher than under the ACA Act.

A table outlining the various reporting requirements, forms and fees for the NSW Act (as an example) are contained in **Attachment C.**

Further, it should be noted that the State and Territory association incorporation regimes may offer incorporators greater flexibility in the way their organisations can be structured, particularly in terms of membership.

There are two issues related to membership which are of particular interest:

- the desirability of being able to establish classes of membership with differentiated voting rights (see **Policy Options Paper, Chapter 3, Section F**); and

- the demand for mechanisms which allow the establishment of corporate groups on umbrella bodies (see **Policy Options Paper, Chapter 3, Section L**).

Under the NSW Act (for example), both of these are possible:

- The NSW Act and Regulations do not place the prescriptive restrictions on equality of voting rights that exist under the ACA Act, leaving incorporated associations free to adopt rules which provide for different classes of membership (although the Model Rules themselves do not do this)[6]; and

- The NSW Act defines "member" as including a "person, body or organisation",[7] clearly leaving it open for corporate groups or umbrella bodies to be established. (But the structure and resulting company would still have to comply with the other restrictions on relating to purpose and non-distribution of profits, discussed above).

6 The Department of Fair Trading, which administers the Act, has advised that they do not scrutinise company rules (they only check for formal compliance), and that it is up to members to take action in relation to any unfairness or illegality in their rules.

7 *Associations Incorporation Act 1984* (NSW), s3

2 The "Gateway" or "Accreditation" Model

Option 5 as proposed by the Steering Committee and Registrar's Office contemplates a process whereby Indigenous bodies incorporated under other legislative regimes can access a range of benefits by registering as accredited Indigenous corporations under the transformed ACA Act.

There are a number of issues raised by this "gateway" or "accreditation" model, which are discussed in this section. They include the following:

- What is the feasibility of the "gateway" or "accreditation" model?
- What should the eligibility requirements be?
- How might the model address practical problems with the Corporations Act?
- What regulatory role would the Registrar play under this model (to supplement the role of regulators under the Corporations Act or relevant State and Territory association incorporation Acts)?
- What conflict of interest issues are raised where the Registrar has roles in both assistance and regulation?

These are dealt with in turn.

2.1 Feasibility of the "gateway" or "accreditation" model

The fundamental issue under this heading is whether it would be feasible to establish a "gateway" or "accreditation" model for voluntary access to the assistance, benefits (and, possibly, additional regulation) contemplated by Option 5.

In short, the answer is yes, although the details of such a scheme could become quite complex. There are precedents for such "gateway" or "accreditation" regimes in Australian law, for example, the scheme established by the *Superannuation Industry (Supervision) Act 1993* ("**the SIS Act**") and the relevant regulations.

Under the SIS Act, superannuation funds incorporated under the Corporations Act may take advantage of certain tax concessions, if they make an irrevocable election to become a regulated superannuation fund. This then makes the corporation subject to various additional regulatory measures contained in the SIS Act, and largely enforced by the Australian Prudential Regulatory Authority ("**APRA**").

A slightly more detailed overview of the regulation of superannuation funds by APRA and ASIC under the SIS Act is contained in **Attachment D**.

The issue which could potentially make Option 5 more complex is the fact that it would not just be sitting over the top of the Corporations Act, but also over the various State and Territory association incorporation acts as well. There would be an obvious need for the scheme to coordinate with both ASIC and the relevant State and Territory bodies, which could require amendment to the State and Territory Acts and the Corporations Act. Amendment to

the various State and Territory Acts is likely to require a great deal of political goodwill and co-ordination. It may be that the most realistic course is to accept the State and Territory Acts as they are and not to expect that any legislative amendments can be made.

Alternatively, a possible solution to the issue of State and Territory legislative obstacles may be to make the appropriate arrangements through memoranda of understandings and amendments to the regulations. Such a solution may well deserve further consideration.

A further issue relating to the feasibility of the gateway model is the lack of uniformity which may arise in the way in which Indigenous corporations may be regulated. The differences between the various State and Territory regimes may be significant in some areas and may therefore give rise to suggestions of unfairness and inequality.

2.2 Eligibility Requirements

Another issue for consideration is how an Indigenous corporation would qualify as an "Indigenous corporation" for the purposes of the scheme contemplated by Option 5.

One approach would be to simply carry across the membership requirements from the ACA Act. However, it should be noted that there have been a number of difficulties with those sections, in particular, the sections relating to non-Aboriginal members and corporate members. These issues and suggestions relating to them are covered in detail in **Section L of Chapter 3 of the Policy Options Paper**.

It may be preferable that a control criterion is used, that is, a criterion based on who controls the corporation. However, the concept of control is a complex issue.

In any case, an inclusive approach would be best to ensure that no legitimate Indigenous enterprise is excluded from the regime due to technicalities. The precise definition of "Indigenous corporation" is a matter which will need to be explored in Stream 3 of the Review if Option 5 is adopted.

It should be noted that the scheme contemplated by Option 5 should be voluntary and bodies will need to self-identify. Once they do so, they should be able to opt out of the regime after a certain period of time.

These issues can be given further consideration in Stream 3 if Option 5 is selected for further consideration.

2.3 Addressing problems with the Corporations Act and State association incorporation acts

As noted above, the Corporations Act in particular has the potential to prove to be too complex, expensive and onerous for many Indigenous corporations. The establishment of a role for the Registrar in providing assistance to Indigenous corporations would go some way to addressing this. However, this would not cover all the problems – particularly the costs, size of penalties, and timeframes imposed by the Corporations Law.

The scheme envisaged by Option 5 could also address some of these issues, although it may require further legislative amendments

(a) Fees, Late Fees and Penalties

An obvious aspect of the Corporations Law, which may be too onerous for many unresourced Indigenous corporations, is the cost of compliance. The Corporations Law could be made a more appropriate vehicle for incorporation for some Indigenous corporations if these costs were reduced.

There are two ways this could be done:

- by amending the relevant provisions of the Corporations Act and Regulations (possibly by inserting a separate Schedule to the Act for Indigenous corporations) to reduce the amounts payable by Indigenous corporations registered under the ACA Act; or

- by providing government subsidies to help meet those costs.

  The provision of subsidies has advantages and disadvantages. Advantages include the fact that such an approach would not require legislative amendments to either the Corporations Act or State association incorporation acts. The disadvantage is that (in the case of late fees or penalties) the Registrar's office or the Government would be seen as paying for or subsidising breaches by Indigenous corporations. In addition, the administrative costs are likely to be significant.

(b) Timeframes

The other benefit registration under the scheme proposed by Option 5 might provide Indigenous corporations is more flexibility with timeframes for lodging the various forms with ASIC.

There might be some room for achieving this through administrative or other arrangements with ASIC. For example, ASIC has discretion to extend the timeframe for lodgment of Annual Returns. At present this can only be done where there is an express agreement in writing between ASIC and the company concerned. The Registrar's Office might be able to develop a standard agreement relating to Indigenous corporations, which would automatically be signed by ASIC for extensions of up to (say) one month.

If such an administrative approach were not possible, it would require amendment to the Corporations Act and regulations. Again, this would probably best be done via a separate schedule dealing with registered Indigenous corporations.

2.4 What Regulatory Role should the Registrar Play?

One of the questions raised by the Steering Committee and Registrar's Office in relation to Option 5 relates to what regulatory role the Registrar's Office could or should play under Option 5.

The answer to this question is one for policy decision. To assist the Steering Committee in making that decision, this section compares the roles of the Registrar under the ACA Act as it

currently stands, with the roles of ASIC under the Corporations Act and the relevant State and Territory regulators under State and Territory associations incorporation legislation. It then goes on to briefly discuss some of the areas where there could be a supplementary role for the Registrar.

Note that the role of the Registrar under the ACA Act as it stands, and suggestions for change, are discussed in the **Policy Options Paper at Section H of Chapter 3**.. That discussion is relevant to the issues discussed in this section, and should be read in conjunction with it.

(a) Identifying "Gaps" in the alternative incorporation regime

A table comparing the legislative powers and functions of the different regulatory bodies under the ACA Act, the Corporations Law and the State and Territory associations incorporation Acts is included in **Attachment E**.. (If Option 5 is pursued, Attachment E will become a crucial reference document for the work which will need to be done in Stream 3, and to that end, will need to be more detailed).

Further detail on the powers and functions of ASIC and the State regulators is included in **Attachment F**.

The tables contained in **Attachment E** and **Attachment F** reveal a number of differences between the respective regulators' powers. Some of the more significant "gaps" between the powers of the Registrar under the ACA Act and the regulators under the other regimes are discussed below (although detailed examination of these issues would be part of Stream 3 or 4 if this Option 5 is to be considered further). They include:

- review of Objects and Rules;
- appointment of Administrators;
- assistance in the conduct of General Meetings; and
- arbitration of disputes.

However, it should also be noted that a significant difference between the operation of the Corporations Act and the ACA Act is in the way the powers available to the respective regulators are actually exercised. (This is also discussed under heading **1.1(b)(iv)**, above).

(b) Review of Objects and Rules

The **Policy Options Paper** already discusses in some length the problems with the current obligation on the Registrar to approve the rules and objects of any Aboriginal corporations incorporated under the ACA Act (see **Sections D, E and F of Chapter 3**). Clearly, it would not be desirable to simply carry those sections over into the new accreditation regime.

Nonetheless, it might be considered appropriate to have some minimal role in checking some aspects of the Rules (eg membership) for compliance with eligibility

requirements for the Option 5 scheme. It would need to be relatively non-prescriptive to avoid the problems with the current ACA Act.

(c) Appointment of Administrators

The question of whether the Registrar should retain a power to appoint an administrator under Option 5 is a highly sensitive and important issue and it is one for policy decision.

The role of the Registrar in appointing administrators and initiating winding-up actions, and suggestions for reform are set out in **Section H of Chapter 3 of the Policy Options Paper**.

In the Policy Options Paper, it was suggested that it would be best if a range of options were available to the Registrar to assist corporations in financial difficulty and that the Registrar's currently wide powers to appoint an administrator should be curtailed.

It was also noted that although there is a perceived need to ensure that the Registrar has the power to appoint an administrator to Indigenous corporations in difficulty, there is a clear and strong resentment to such interventionist attitudes by the Indigenous community.

Further, it is arguable that the 'insolvency' and "oppression of minority' provisions in the Corporations Act would provide far more sophisticated and flexible means for members/shareholders and third parties to take action to protect their position. It also provides further alternatives to funding bodies for taking action to prevent the dissipation of grant funded assets.

It should also be noted that providing for a power to appoint an administrator could prove very complex where regulatory powers would primarily lie with ASIC or the relevant State or Territory agency.

Without appropriate measures, this is also a function that could clearly give rise to potential conflicts of interest, if the Registrar were also providing a formal assistance role (see discussion below at 2.5).

In light of all the above, it is the view of the Review Team that it would not be appropriate or practicable for the power to appoint administrators to be carried across to the Registrar in its new role under Option 5.

(d) Assistance in the conduct of General Meetings

This is a function which is not discussed in detail in the Policy Options Paper, but which might be a function which could be carried across to the Registrar in its new role under Option 5, as it may provide a mechanism for assistance to be provided to Indigenous corporations.

However, it would be important to ensure that the power of the Registrar to be involved in the general meeting process was not interventionist in nature. It may be

therefore that it is only appropriate to allow the Registrar to assist or be involved in the general meeting process at the request of an Indigenous corporation or its members.

(e) Arbitration and Mediation of Disputes

Arbitration of disputes is also a function under the ACA Act, which ASIC does not have, and which may be useful to carry across to the Registrar in its new role under Option 5. As noted in the Policy Options Paper at **paragraph 3.196 of the Policy Options Paper**, it would probably be useful to extend this to mediation as well as arbitration.

One of the problems with mediation is that there are presently no models of mediation ideally suited to resolving indigenous disputes. Most in use are adapted from Western commercial or corporate models and hence meet with limited success.

Nonetheless, this might be a useful role that the Registrar could play under Option 5, in order to assist Indigenous corporations.

There does not appear to be any specific legal impediment to the Registrar's Office having a role in mediation as well as arbitration, with the possible exception of conflict of interest (see discussion below). However, this is largely a mechanical issue, which can be dealt with in Stream 3 or 4 as required.

(f) Conclusion

It appears that, in fact, the additional regulatory roles which could appropriately be carried across to the Registrar's office under Option 5, are probably quite limited – and a number of the "regulatory" roles discussed above are in fact better labelled "assistance" functions.

Other functions, such as audits, might also be contemplated; but these would probably be most effective as "no-penalty" exercises - to identify areas for Indigenous corporations to address, and to provide focus for the assistance to be provided.

2.5 The Registrar's Dual Role – Potential for Conflict of Interest

Several of the Structural Reform Models contemplate the Registrar's Office (in whatever form it will be) as playing both facilitative/assistance and some form regulatory roles. This clearly gives rise to the potential for conflicts of interest.

The extent of any potential conflict will depend entirely on the way in which the Registrar's role is cast. If the Registrar is to be an assistance provider only, with regulation to be left entirely to the relevant Commonwealth or State and Territory agency, then any conflicts will be limited to the transitional period. More specifically, it is only in respect of the corporations which the Registrar might be transferring from the old regime to the new regime that conflicts of interest may arise.

Nonetheless, in the view of the Review Team, the mere fact of the Registrar's Office both providing assistance and performing some regulatory role does not mean that there will necessary be an irreconcilable conflict of interest.

One approach would be to make the Registrar's Office's principal objective to obtain maximum compliance with the regulatory provisions of the Act, but with the flexibility to engage constructively with constituents, using enforcement/compliance powers as a measure of last resort. It would be up to the Registrar's office to decide on the best combination of assistance and regulatory enforcement to achieve the principal objective.

There is precedent, however, for a mixed role – it is essentially the approach taken by APRA, ASIC, the ATO and the ACCC. Each organisation has extensive regulatory powers, but in most cases relies on informal discussions and assistance to ensure compliance with their respective legislative regimes. To a limited extent, this approach has also been taken in the past by the Registrar's Office, but there would need to be a greater capacity (both legal and in terms of resources) for the Registrar to take a more active "assistance" role.

Some guidance may also be offered by the experience of the National Aboriginal & Islander Resource Centre within the Australian Taxation Office (ATO), which provides assistance to individuals in completing their income tax returns. And although ATO does not have a specific unit for dealing with Indigenous corporations, the different parts of the ATO have produced publications aimed at assisting indigenous corporations.[8]

At the opposite end of the spectrum from the relatively flexible approaches in APRA, ASIC, ATO and the ACCC would be to adopt a very formal and highly structured approach, which would effectively require the "assistance" and "regulatory" aspects of the Registrar's Office being split – possibly into separate institutions. Such an approach might provide the safest route in terms of potential conflicts of interest, but would arguably not have sufficient flexibility to be conducive to encouraging compliance, and as a result could have less success in achieving a high level of compliance.

The sort of arrangements that would be appropriate will depend on the exact nature of the Structural Reform Model selected, and will therefore have to be something which is revisited in Stream 3 or 4 of this Review.

Some of the issues for consideration in Stream 3 or 4 in dealing with a conflict of interest where the Registrar as a dual role might include:

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[8] See for example, *Common situations for Indigenous organisations (factsheet)*, 25 July 2001, published by the superannuation section (available at http://downloads.ato.gov.au/content/professionals/super/downloads_/24322052.rtf ; and *Tax Reform Handbook - Aboriginal and Torres Strait Islander businesses and community organisations and enterprises*, 28 April 2001 (available at http://www.ato.gov.au/content.asp?doc= /content/Tax_reform/nat3140.htm

1 Whether participant corporations should be provided with a guarantee that information which the Registrar's Office becomes aware of in the course of providing assistance should be "without prejudice" and could not be used by the Registrar's Office in its regulatory/enforcement provisions. Many indigenous bodies might not otherwise be willing to participate in the system and receive the assistance on offer if they are afraid of prosecution.

2 There might also be further steps to protect the relationship between the Registrar's Office and the Indigenous corporation concerned, for example:

- the Act could make it a defence to prosecution under the Act where the corporation can show that their breach was the result of relying in good faith on advice or assistance provided by the Registrar's Office (estoppel may already have this effect); and

- where the Registrar's Office provides advice or assistance, the corporation might be indemnified against action relating to advice or assistance provided by the Registrar's Office (although there may need to be limits on this indemnity – eg where there has been gross negligence).

Again, these are essentially issues, which would need to be considered in more detail in Streams 3 or 4, if the Steering Committee selects Option 5 as a preferred model for reform.

2.6 Practical issues

Finally, in addition to the issues discussed above, there are three practical issues which should also be noted in relation to a "gateway" approach as proposed by Option 5:

1. A gateway model will invariably mean that the Registrar's Office will lose some degree of oversight and control over Indigenous corporations as another body will be charged with the primary responsibility of regulation.

2. A gateway model will necessarily involve some administrative discretion as the Registrar cannot be expected or obliged to provide assistance to every Indigenous corporations which requests its assistance. Careful thought will need to be given to the scope of the administrative discretion involved.

3. Under a gateway model, the Registrar's staff will need to be familiar with the Corporations Act and each of the State and Territory regimes. Although this is not impossible, it represents a noteworthy challenge for the Registrar's staff.

3 Issues Relating to the Transfer of ACA Act Corporations to Other Regimes

Structural Reform Models 1, 2 and 5 all contemplate a situation where some or all types of indigenous association will no longer be able to incorporate under the ACA Act. This raises a number of questions which need to be considered by the Steering Committee, including:

- What are the rights issues raised by the shutting down of the ACA Act as a special incorporation regime for Indigenous Australians?
- What should happen to existing corporations currently incorporated under the ACA Act? Should they be "grandfathered" or forced to transfer to another incorporation regime?
- Is it possible to transfer ACA Act corporations to the Corporations Act or State regimes "in bulk"?
- What needs to be done to ensure the continuity of corporations being transferred out of the ACA Act?
- If ACA Act corporations are to be transferred across to other regimes, what capacity do those regimes have to deal with the increased volume of corporations?
- Would such a transfer process require amendment to other legislation, including the Corporations Act, the State and Territory Acts, and the Native Title Act?

This section attempts to address these questions briefly. More detailed answers to many of the questions would be more appropriate for Stream 3 or 4 of the Review.

3.1 Rights and Freedom of Choice

One of the fundamental issues to be addressed in considering the viability of Option 5 relates to the effect on Indigenous rights of closing off the ACA Act as an incorporation regime.

Whilst it is clear that many Indigenous people are frustrated with the ACA Act it is also the case that there are many who very much want to have their "own" incorporation regime.

As has already been noted in the Policy Options Paper, Indigenous people (with the exception of NTRBs and PBCs) are not *obliged* to incorporate under the ACA Act, and may incorporate under the Corporations Act or a State or Territory incorporation regime. Therefore, the option to incorporate under the ACA Act is an issue of freedom of choice as well. Closing off the ACA Act as an incorporation vehicle would remove that choice, and would mean that Indigenous people would no longer have their "own" incorporation vehicle.

This raises a couple of questions:

- First, would the closing off of the ACA Act as an incorporation vehicle breach the Racial Discrimination Act (RDA) and/or the Constitution?
- Second, would the "forced" migration of ACA Act corporations to the Corporations Act or a State regime breach the RDA and/or the Constitution?

- Third, even if there are no RDA or Constitutional issues, what are the policy implications shutting down the ACA Act

(a) Constitutionality of closing ACA Act to Indigenous corporations

In *Kartinyeri v Cth* (1998) 152 ALR 540 (also called "the *Hindmarsh Island Bridge Act case*") the full High Court (minus Callinan J, who absented himself) held by a 5:1 majority that legislation enacted by Parliament under s51 (xxv) of the Constitution (the races power) can also be amended or repealed by Parliament.

It seems fairly certain that this would also be the case with any amendment of the ACA Act, which saw it ceasing to function as an incorporation vehicle for indigenous corporations.

It is important to note that the Court did *not* address the issue of whether legislation enacted under the races power must be "beneficial".. Only Gaudron and Kirby JJ discussed the issue, in obiter. Gaudron J argued that it could be used for detrimental as well as beneficial legislation; Kirby J argued that it could only be used for beneficial purposes, in keeping with Australia's international law obligations.

In any case there is, in the Review Team's view, a reasonable argument that amendments contemplated under any of the Options outlined in this paper are "beneficial". This is because they are all aimed at ameliorating the position of indigenous people and corporations - because the ACA Act is out of date and there have been a number of problems with it, such that it could even be argued to disadvantage Indigenous corporations in some key areas. In relation to Option 5 specifically, the closure of the Act as a (problematic) incorporation vehicle would also see a range of special measures put in place to provide assistance to indigenous corporations, which do not exist at present.

(The reason this "beneficial legislation" argument is relevant is that the Registrar's Office and ATSIC, as members of the Steering Committee, may not wish to be put in a position where they have to rely on the "what Parliament enacts Parliament can repeal" argument, as this may not be consistent with their general policy positions on the races power.)

We have included an outline of the issues and judgments in *Kartinyeri* in **Attachment G**.

(b) Constitutionality of "forced" migration

If "forced" migration to other incorporation regimes is only as a consequence of the closing of the ACA Act as an incorporation regime, then the constitutional issues would be as outlined above.

This is because this approach would simply be closing down the ACA Act. ACA Act corporations would still be free to choose which of the Corporations Act or various State regimes to incorporate under (within the limitations set by that legislation – this is discussed further below).

However, if all ACA Act corporations were obliged to transfer to (for example) the Corporations Act, and had no choice in incorporation vehicle, this *could* be in breach of the *Racial Discrimination Act* (" **the RDA**"). It would also possibly go beyond a mere "amendment/repeal" of the original ACA Act and may then be subject to challenge on the issue of whether or not it is "beneficial" legislation under the races power. This is because it would be forcing a group of organisations to a single incorporation regime, solely on the basis of the race of the organisations' members; and as discussed elsewhere in this paper, the Corporations Act may not necessarily be the most appropriate incorporation regime for many Indigenous corporations.

Arguably, the choice of incorporation legislation (and whether or not to submit to the proposed "gateway" regime for assistance and potential regulation by the Registrar) should therefore be left open to the individual ACA Act corporation concerned.

(c) Rights Issues and Policy Implications

Even if there are no RDA or Constitutional issues, serious consideration will need to be given to the concerns of individuals and corporations who want to maintain the ACA Act as a unique Indigenous incorporation regime, and who don't want to be forced to transfer to another regime. Whilst not necessarily a legal issue, actions which affect peoples' rights (and perceived rights) is not something that should be lightly done.

Indigenous people are not likely to be receptive to changes, which they perceive to be externally imposed, even if the benefits may be apparent to those proposing the changes.

This is probably an issue to be addressed through consultation, and by ensuring that there are real benefits to Indigenous associations in any alternative to the ACA Act as it presently stands.

For present purposes, suffice to note that this is an issue, which the Steering Committee should bear in mind in making its policy decisions.

3.2 "Grandfathering" vs transfer out of the ACA Act

"Grandfathering" is a relatively common mechanism adopted to minimise disruption to existing organisations or their established commercial relationships, where there is a change in a regulatory scheme. Essentially, it involves exempting existing organisations from the provisions of the new regime, and preserving the operation of the old regime in relation to those pre-existing organisations. New organisations have to comply with the new regime.

For present purposes, there are two central questions:

- Should existing ACA Act corporations be grandfathered on a permanent basis (ie allowed to remain permanently under the ACA Act as it currently stands) or only on a temporary basis as part of transitional arrangements?

- How would/should grandfathering arrangements work?

(a) Permanent or Temporary Grandfathering?

As noted above, the purpose of grandfathering would be to protect and minimise disruption to existing ACA Act corporations as a consequence of major changes to the Act.

Unfortunately, grandfathering arrangements can also lead to a range of difficulties, which may mean that the costs outweigh the benefits. Some of these issues were canvassed in the Parliamentary Joint Statutory Committee on Corporations and Securities *Report on Aspects of the Regulation of Proprietary Companies*, March 2001 ("**the PJSCCS Report**"), in the context of grandfathering provisions relating to accounting standards in the *First Corporate Law Simplification Act 1995*.

These include the following:

- The primary problem is the complexity and cost of running two parallel systems. This can be confusing for those being regulated. It can also prove very resource-intensive for the administrator. If part of the purpose of reforming the ACA Act is to free resources to allow the Registrar's Office to play a more active role in providing assistance and guidance, grandfathering arrangements have the potential to defeat that purpose.

- The existence of two parallel schemes can also raise questions of fairness; for example if grandfathered organisations enjoy benefits over non-grandfathered organisations or vice-versa.

- If changes were introduced to bring about improvements in the way organisations are regulated, grandfathering will also mean that the old problems will persist – at least in relation to the grandfathered organisations.

- In the specific context of the changed reporting standards under the *First Corporate Law Simplification Act 1995*, which was the subject of the PJSCCS Report, there were also concerns that the differing standards for grandfathered companies was leading to:

    - an uneven and anti-competitive playing field which advantaged grandfathered companies over non-grandfathered companies; and

    - a trade in grandfathered companies, resulting from the advantage which grandfathered companies had.

    Because of the nature of corporations under the ACA Act, it seems unlikely that either of these would be significant issues if ACA Act corporations were to be grandfathered.

For these reasons, it is suggested that grandfathering should only be a temporary measure, to "soften the blow" of transferring ACA Act corporations to other incorporation regimes. (Such transfers would therefore be required under each of Structural Reform Models 1, 2 or 5). However, it would probably need to be done in

tandem with a program of education, assistance and resourcing of existing ACA Act corporations, to minimise the impact on their operations of any transfer.

The one exception to this is NTRBs and PBCs, which may have to be grandfathered under the ACA Act as it stands, if it is not possible to amend or otherwise get around the incorporation requirements in the NTA or the NT (PBC) Regulations. (These issues are discussed elsewhere in this paper.)

(b) How would the grandfathering arrangements work?

The purpose of grandfathering provisions would be (with the possible exception of PBCs and NTRBs) to establish a transition period to allow organisations to prepare for any restructuring and changes required in order to enter a new incorporation regime.

It would also provide the administrators of the various incorporation regimes (ACA Act, Corporations Act and State Association Incorporation Legislation) time to process the transfers in an orderly fashion.

Consideration would need to be given to the length of the grandfathering period, and whether it should be staggered for different kinds or classes of ACA Act corporations (for example, based on turnover, purpose or membership). Alternatively, the "staggering" of grandfathered provisions might be based on different functions or requirements under the ACA Act (although this could be complex and unworkable).

The setting of the timeframes for the grandfathering arrangements would need to balance the advantages and disadvantages of grandfathering outlined above. As a rough suggestion, a period of 3 to 5 years might be appropriate. It may also be prudent to consider inserting a degree of flexibility in the timeframes, to allow exemptions or extensions for corporations with special circumstances; or to cater for larger than anticipated administrative workloads in carrying out the transfer processes.

However, these are all issues for consideration in Stream 3 or 4.

3.3 Mechanisms for Transfer

There are precedents for the transfer of organisations from one incorporation regime to another. Therefore, it is possible to answer the threshold question by stating that such a transfer is clearly achievable.

The basic mechanisms could be very simple. However there are likely to be a number of complicating factors which will need to be addressed. This is in part because the provisions will need to facilitate the transfer of a large number of corporations, in varying states of compliance with the ACA Act, to a range of different incorporation regimes.

The precedents considered by the Review Team involve:

- small numbers of corporations transferring, often on a voluntary basis, to one other incorporation regime – for example under State and Territory association incorporation acts, for transfer to the *Corporations Act*; or

- large numbers of corporations being transferred from one regime to one other regime – for example under Schedule 3 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No 1) 1999* ("**the FSR(ATP) Act**") which facilitate the transfer of building societies and credit unions to Corporations Act companies.

The detail of mechanisms by which such transfers from the ACA Act could best be structured is an issue for Stream 3 or 4.

Briefly, the process under the State and Territory Acts is a fairly simple process whereby an incorporated association passes a special resolution to register as a company limited by guarantee (which has many similar features to an incorporated association, including limited liability and a requirement that it be not-for-profit) under the Corporations Act. Other provisions then preserve the identity of the association, to ensure continuity. An outline of mechanisms for transfer to the Corporations Act under three State Acts is set out in **Attachment H**.

The process under the FSR(ATP) Act is more complex, as it automatically transfers a whole class of bodies corporate under the Corporations Act. Schedule 3 to the FSR(ATP) Act inserts a new schedule (Schedule 4) into the Corporations Act. It is titled "Transfer of financial institutions and friendly societies". The stated objective of the Schedule is:

> "to facilitate the registration of [various financial sector institutions such as building societies and credit unions] as Corporations Act companies with as little disturbance to the operations of, and as little conversion costs for, the bodies concerned as possible." (paragraph 2)

A brief outline of the way the Schedule works is included in **Attachment I.**

3.4 Continuity Issues

As can be seen from the examination of relevant transfer and transitional provisions above, it should be possible to ensure that there is full continuity of the ACA Act corporations as legal entities, even as they change their governing incorporation regime. It should also be possible to structure the transfer mechanisms such that there are no direct costs to ACA Act corporations transferring (such as registration fees under the new regime, taxes or duties, etc).

However, some transfer costs are likely, in particular, costs associated with the redrafting of constitutions which might be required to ensure compliance with the requirements of the corporation's new incorporation regime.

Special transitional provisions might have to be enacted to facilitate the amendment of ACA Act company constitutions (particularly given the difficulty that many ACA Act corporations seem to have in amending their constitutions – including because of lack of quorum). These measures might include, for example:

- special rules to make it easier to amend company constitutions, but only in relation to a limited number of topics necessary for compliance with the Corporations Act or State or Territory Act – for example by lowering quorum requirements for those limited purposes, or by providing the Registrar with the power to make the amendments upon application by a corporation.

- by legislatively providing for automatic application of certain "standard" rules wherever the Corporations Act or State Act is inconsistent with an ACA Act constitution.

It is worth noting that the FSR(ATP) Act allows the "grandfathering" of old constitutions, which can later be replaced with replaceable rules under the Corporations Act. This approach would provide some leeway for transferring associations, but would not address the difficulties in getting quorum to amend the constitutions.

Again, these are issues, which would need to be considered in more detail as part of Stream 3 or 4 of the Review.

3.5 Capacity of alternate regulators

Would the regulators of the incorporation regimes to which the ACA Act corporations would transfer, have the capacity to cope with the influx of new corporations?

(a) ASIC's Capacity

ASIC currently administers in excess of 1,200,000 corporations. In ASIC's view, the addition of 2,000 - 3,000 additional corporations should therefore not be excessively burdensome (bearing in mind that not all ACA Act companies would choose to incorporate under the Corporations Act). This will also depend on the timeframe over which companies are transferred. If it were to be staggered over a transitional period of a couple of years (through the use of grandfathering provisions) the impact would be relatively minor.

ASIC does not currently have any special measures in place for indigenous corporations – such as education and assistance, or "special treatment" of indigenous corporations. ASIC previously ran a small program to provide assistance to Indigenous housing corporations, run through their small business unit, but this program was shut down for lack of funding. The small business unit of ASIC does however provide a number of guides and services to small businesses generally.

Such special measures would therefore have to be provided for either by the transformed Registrar's Office as part of its assistance role, or through specific new administrative (and possibly legislative) arrangements relating to ASIC.

In this context, it is important to note that the Report of the Royal Commission into Aboriginal Deaths in Custody[9], among other reports, highlighted mainstream

9 *Royal Commission into Aboriginal Deaths in Custody, National Report,* Commissioner Elliott Johnson QC, 15 April 1991.

organisations' inability to deliver special measures and tendency to have a limited understanding of indirect discrimination and systemic discrimination. If ASIC is to be the main regulatory authority for Indigenous organisations, then it will need to be clear that ASIC will need to make adjustments and that special measures may require non-standard treatment of some Indigenous organisations - otherwise it may be subject to legitimate claims of discrimination.

(b) State and Territory Regulators' Capacity

The State and Territory AIA regimes are generally much smaller than ASIC, and therefore would have less capacity to absorb large numbers of transferred corporations. The size of the State and Territory AIA regimes is likely to vary around the country (the NSW Department of Fair Trading advises that 15,000 - 20,000 are incorporated under the NSW Act; the WA Department of Fair Trading advises that there are some 18,000 under their Act). The demand for transfer to incorporation to State and Territory regimes is also likely to differ in each jurisdiction.

Nonetheless, the number of associations to transfer would be divided between all the States and Territories, which should lower the impact of the transfers. This impact should be manageable if there is a staggered approach. However, some further analysis of the numbers of ACA Act corporations likely to want to transfer to a State or Territory AIA regime in each State and Territory may need to be undertaken.

There would also need to be liaison with the State and Territory governments to ensure that appropriate arrangements (legislative and administrative) are in place to enable a smooth transfer, and that appropriate resources are made available to the relevant State and Territory departments who would administer the transfer.

None of the State regimes examined currently have any "special measures" in place for indigenous corporations. Again, this would have to be provided for.

3.6 Requirement for legislative amendments - Corporations Act and/or State association incorporation acts

It is difficult to know at this stage exactly what kind of amendments might be required to the Corporations Act and/or State Association Incorporation legislation to implement Option 5. That would depend in part on the exact form Option 5 may take if the Steering Committee decides that it should be developed further as part of Stream 3 of this Review.

However, it seems likely that some kind of amendments would probably be necessary. Again, the FSR(ATP) Act provides a good model for how this could be done. It includes all the relevant amendments in a single schedule to the Corporations Act. This avoids messy amendments throughout the Corporations Act (which might not be relevant to other, non-Indigenous, corporations) and provides a convenient single location where all the provisions specific to the relevant bodies are located.

This schedule would be attached to the legislation amending the ACA Act – avoiding the need for separate Acts.

It is conceivable that a similar approach could be adopted for the State legislation. However, this would have to be negotiated on a State-by-State basis.

3.7 Requirement for legislative amendments - Native Title Act and Regulations

A significant issue for the viability of Option 5 is the status of NTRBs and PBCs. As outlined below, the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations* require NTRBs and PBCs to be incorporated under the ACA Act.

If the ACA Act must be retained as an incorporation vehicle for these two types of bodies, the increased costs and complexity of retaining and administering the ACA Act as an incorporation vehicle just for these bodies will seriously undermine the viability of Option 5.

There are two possible ways around this:

- If the NTA and Regulations can be interpreted in such a way that Option 5 would conform with them; or
- By amending the NTA and/or PBC regulations.

It is unlikely that there will be a way around this problem. Any, non-legislative solution is likely to be uncertain and messy and the only way to properly deal with this issue would be through appropriate legislative reform.

(a) Interpretation of the NTA and PBC Regulations

(i) PBC Regulations

There are two references to the ACA Act in the *Native Title (Prescribed Bodies Corporate) Regulations* ("the PBC Regulations") which would have to be addressed to enable "Option 5" to apply to PBCs, without amendment to the PBC Regulations themselves.

The first is in sub-regulation 3(1), which defines "Aboriginal association" by reference to the ACA Act. This could potentially provide a route for "Option 5" to be adopted without having to amend the Regulations. For example, if the ACA Act defined "Aboriginal association" as *any* incorporated association with an indigenous membership which is subject to regulation by the Registrar under the "gateway" or "accreditation" scheme, then that definition would also apply to the PBC Regulations.

Unfortunately, there is an additional requirement in sub-regulation 4(1) that the relevant Aboriginal association must also be "incorporated under" the ACA Act. Sub-regulation 4(1) states in full:

> (1) An Aboriginal association is prescribed for the purposes of paragraph 59(a) of the Act if it is incorporated under the *Aboriginal Councils and Associations Act 1976*:
>
> (a) after the commencement of these regulations; and

(b) for the purpose of being the subject of a determination under section 56 or 57 of the Act.[10]

The only way to properly resolve this issue would be to appropriately amend the PBC regulations.

(ii) NTRBs

Under section 203AD of the NTA, only "eligible bodies" may be recognised as representative bodies. The term "eligible bodies" is defined in section 201B:

> (1) For the purposes of this Part, an ***eligible body*** is:
>
> (a) a body corporate, incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976*, the objects of which enable the body to perform the functions of a representative body under Division 3 of this Part; or
>
> (b) a body corporate that is a representative body at the commencement of this section; or
>
> (c) a body corporate established by or under a law of the Commonwealth, a State or a Territory, or a part of such a law, prescribed for the purposes of this paragraph.
>
> However, a registered native title body corporate cannot be an eligible body.
>
> (2) A regulation prescribing a law, or a part of a law, for the purposes of paragraph (1)(c) may be limited in its application to bodies corporate included in a specified class or classes of bodies corporate.

Subsection 201B(1)(a) is very prescriptive. It would be difficult to mount an argument that a body corporate not actually incorporated under the ACA Act meets this requirement.

The implications of this are that under Option 5, any bodies, which are not already NTRBs, would be prevented from becoming an NTRB (as there would no longer be any bodies "incorporated under Part IV" of the ACA Act). In addition, there would be a risk that some existing NTRBs could have their status as NTRBs challenged (although section 203AH does not include ceasing to be an "eligible body" as grounds for the Minister withdrawing recognition).

Subsection 201B(1)(c) might provide a way around amending the NTA, but it would require new Native Title Regulations to be enacted. The Explanatory Memorandum to the *Native Title Amendment Bill 1997 (No 2)* explains (at paragraph 33.14) that 201B(1)(c):

> is intended as a contingency category to provide flexibility to the types of bodies that are eligible to apply to be representative bodies.

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[10] Section 59 of the NTA states:

> *The regulations may prescribe the kinds of bodies corporate that may be determined under section 56 [to hold native title on trust] or section 57 [to act as agent for the native titleholders].*

Subsection 201B(1)(c), in conjunction with 201B(2), would therefore allow the new Regulations to prescribe an additional class of bodies corporate that would be "eligible bodies".. This could include; for example, bodies corporate accredited under the ACA Act as amended.

In conclusion, there are three options for dealing with NTRBs under "Option 5":

- Maintain the ACA Act as an incorporation regime, solely for NTRBs.

  This would be very inefficient, and would also mean that many of the problems encountered with NTRBs under the ACA Act as it stands would not be addressed.

- Enact new regulations to prescribe bodies corporate accredited under the new "gateway" scheme as constituting "eligible bodies" for the purposes of s201B (1)(c) of the NTA.

  This could be done simultaneously with the amendments to the ACA Act, and any amendments to the PBC Regulations. It would also appear to be the least difficult approach – both technically and politically.

- Amend s201B (1)(a) of the NTA to refer to bodies corporate "accredited under" the ACA Act (instead of "incorporated under" it).

(b) Parallel review of the PBC Regulations

As the Steering Committee would be aware, there is currently a review of the PBC Regulations being conducted by ATSIC, which is giving further momentum to the push for reform of the PBC Regulations.

There is a reasonable chance that an amendment to the PBC Regulations will take place. There are a combination of reasons for this:

- The urgent need for a workable system of PBCs now that a number of native title determinations have been made;

- The fact that this is a largely technical and non-party political issue;

- The fact that there have been various calls for reform.

Unfortunately, the amendments to make the PBC Regulations workable go beyond just the issue of incorporation under the ACA Act, and encompass a range of very complicated technical legal questions. The complexity of these issues could mean that amendments to the PBC Regulations are held up for some time while these issues are resolved.

Despite this concern, there is a very good opportunity for the two reviews to complement each other and any such opportunities should be actively pursued.

D OVERSEAS PRECEDENTS FOR INDIGENOUS INCORPORATION REGIMES

The review of overseas precedents for incorporation of indigenous associations commenced as an exercise to see if there were overseas precedents for the "gateway" approach to indigenous corporations contained in Option 5. The absence of specific precedents in that area has resulted in a slightly different product – being a brief overview of the structure of indigenous incorporation regimes generally in several overseas jurisdictions.

1 Canada - Indian Acts[11]

There is no unique legislation in Canada dealing with indigenous corporations generally.

This is essentially because there is special legislation for land holding by indigenous groups. That legislation includes provisions relating to membership, governance (and self-governance) and representation within land-holding groups, as well as for the interface between traditional land-holding groups and mainstream Canadian law.

The main vehicle is the *Indian Act* [R.S. 1985, c. I-5], which performs these roles in relation to the more than 2000 Indian Reserves, for some 630 "Indian Bands" (commonly called "First Nations") recognised under that Act. There are also special legislative arrangements in place for a number of other specific Indian nations and communities across Canada – with the focus being on land ownership and self-governance.

The different constitutional, cultural, historical and legal frameworks in Canada means that these arrangements are likely to be of only limited assistance to this review.

A number of Aboriginal individuals, associations, and communities are incorporated under Part II of the *Canada Corporations Act* [R.S. 1970, c. C-32] (Part II deals with charities and non-profit organisations), or under Provincial societies or companies legislation. There are no special rules, which apply to these companies.

There are, nonetheless, various programs and policies in place to provide assistance to Indian Bands/First Nations, including:

- an Indian Taxation Advisory Board;
- tax rules equating Indian Bands to local municipalities;
- financial assistance and financial and business advice to Indigenous enterprises through Aboriginal Business Canada and the National Aboriginal Business Development Initiative;
- a project by the Assembly of First Nations and the Institute for Chartered Accountants to develop guidelines for First Nations accounting practices.

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11 The information in this section is largely based on personal communications with Professor Bradford Morse of the University of Ottawa (05.09.01).

However, there does not appear to be a single coordinated "corporate governance" assistance regime for the broader range of Indigenous corporations and Indian Bands (whether through a "gateway/accreditation" approach or otherwise) of the type contemplated in this paper. This may in part be because the Indian Act regime is not analogous to the situation in Australia.

2 Greenland – Home Rule

Inuit Greenlanders make up 80% of the population of Greenland. Greenland now has its own elected government which legislates (and administers legislation) on the majority of domestic issues, making it semi-autonomous within Denmark.

The Danish Government has informed us that because of this autonomy, there are no special measures for native Greenlander companies, although the Danish Government provides various measures to assist all small businesses.[12]

3 Norway, Sweden, Finland - Sámi Parliaments

Sámi Parliaments have been established in Norway, Sweden and Finland. However, their role is generally limited to "consultation" on laws, which may affect Sámi people. The Finnish *Sámi Act 1995* requires the Government to "*negotiate"* with the Sámi Parliament in relation to a range of matters within an established 'Sámi Homeland' (see below). The Swedish Sámi Parliament is also provided with some administrative functions, such as administering State funds for Sámi affairs.

Research conducted by the Review Team has not revealed any specific legislation or assistance programs for Sámi corporations in any of the three Scandinavian countries. At the time of writing, responses to queries have not been received from the Finnish or Norwegian Governments or the Sámi Parliament in Norway. The Swedish Government has advised that there are no special measures for Sámi corporations (by way of corporate governance or incorporation regimes), although the Swedish Government provides assistance to all small companies. There are also financial assistance programs for Sámi corporations.[13]

It may be worth noting that Sámi 'land rights' have generally not been recognised in the Scandinavian countries (although the Finnish Constitution now recognises a 35,000 km^2 'Sámi Homeland' in which they are ensured "cultural autonomy" – the focus appears to be on preservation of language). Generally, recognition of Sámi rights by the three Scandinavian national legal systems has been limited to certain basic usufructuary rights, if that. Court challenges by Sámi people are under way in all three countries.

This lack of any recognised land rights may indicate that specific Sámi incorporation regimes do not in fact exist, given that land-holding has been the driving force behind indigenous "incorporation" regimes in other jurisdictions such as the ACA Act in Australia and, to an

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12 E-mail from Morgens Moller Walsted, Greenland Home Rule Administration, 8 September 2001

13 E-mail from Jeanette Lund, Senior Administrative Officer, Swedish Ministry of Agriculture, Food and Fisheries, 10 September 2001.

extent, the Indian Act in Canada, as well as legislation in Papua New Guinea and South Africa.

ATTACHMENT A – TYPES OF COMPANY UNDER THE CORPORATIONS ACT

CORPORATIONS ACT

Types of companies (Section 112)

The following types of companies can be registered under the Corporations Law:

1 Proprietary companies;

(a) limited by shares; and

(b) unlimited with share capital,

2 Public companies;

(a) limited by shares;

(b) limited by guarantee;

(c) unlimited with share capital; and

(d) no liability company.

A *company limited by guarantee* means a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up.

A *company limited by shares* means a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them (s9).

An *unlimited company* means a company whose members have no limit placed on their liability.

Proprietary companies (Section 45A)

A proprietary company is a company that is registered as, or converts to, a proprietary company under the Corporations Law.

A proprietary company must be:

(a) limited by shares or be an unlimited company with share capital

(b) have no more than 50 non-employee shareholders (s113)

(c) no do anything that would require disclosure to investors under Chapter 6D (fundraising) (except if the offers of shares are to employee shareholders s113).

A proprietary company cannot invite the public to invest in shares with it.

Small proprietary company

A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

(a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than $10 million;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $5 million;

(c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

A small proprietary company generally has reduced financial reporting requirements (see subsection 292(2)).

Large proprietary company

A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

(a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is $10 million or more;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $5 million or more;

(c) the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

There are different financial reporting obligations on a proprietary company, depending on whether they are small or large propriety companies (s113, c/f s45A and Part 2M).

A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D, except for an offer of its shares to:

(a) Existing shareholders of the company; or

(b) Employees or the company or a subsidiary of the company.

If a company contravenes this section, ASIC may require it to change to a public company (s113).

A proprietary company must have at least one director. That director must ordinarily reside in Australia (s210A(1)).

Public Companies (Section 9, definitions section)

A public company means a company other than a proprietary company.

A public company must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia (s201A(1)).

No Liability Companies (Section 112(2))

A company may be registered as a no liability company only if:

(a) the company has share capital and;

(b) the company's constitution states that its sole objects are mining purposes (c/f s9 for definition of mining purposes and minerals); and

(c) the company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them.

A no liability company must not engage in activities that are outside its mining purposes/objects, and their directors are also limited as to their activities (c/f s112(4)).

Special provisions relating to non-liability companies can be found in s122(2).

Financial Reporting Requirements

Public and large proprietary companies have different reporting requirements to small proprietary companies (s292). A small proprietary company must prepare a financial and directors' report only in limited circumstances (at the direction of shareholders (s293) or ASIC (s294)). Large proprietary and public companies must prepare financial and directors' reports each year (s292). Specific information needs to be provided in the case of listed companies (s300A).

A company must have at least one member (Section 114)

Restrictions on size of partnerships and associations (Section 115)

A person must not participate in the formation of a partnership or association which has as an object gain for itself or for any of its members and which either:

(a) has more than 20 members; or

(b) has more than the number of members it is allowed to have under an application order made by the Minister (see Part 1.3);

unless the partnership or association is incorporated or formed under an Australian law.

Company Name (Section 148)

A company may use as its name an available name or the expression "Australian company number" followed by the company's ACN. The name must also include the words:

(a) "Proprietary Limited" if it is a limited proprietary company (unless s150-1);

(b) "Proprietary" if it is an unlimited proprietary company;

Public companies can only include "proprietary" in their name in limited circumstances: if they were a public company before the commencement of this section, and the word "Proprietary" (or an abbreviation of it) was included in its name before that commencement.

Exception to requirement for using "Limited" in name (Section 150)

ASIC may register a company limited by guarantee without "Limited" in its name, or alter the registration of a company of that type by omitting "Limited" from its name, if its constitution:

(a) requires the company to pursue charitable purposes only and to apply its income in promoting those purposes; and

(b) prohibits the company making distributions to its members and paying fees to its directors; and

(c) requires the directors to approve all other payments the company makes to directors.

The company must notify ASIC as soon as practicable if any of those requirements or prohibitions in its constitution are not complied with or if its constitution is modified to remove any of those requirements or prohibitions.

Changing Company Type (Section 162)

A company may change to a company of a different type as set out in the following table by:

(a) passing a special resolution resolving to change its type; and

(b) complying with sections 163 and 164.

A public company seeking to change to a proprietary company must comply with the requirements for proprietary companies (see above) (c/f s113). A public company limited by shares may only convert to a no liability company if it meets the requirements of a no liability company (see above).

The company must lodge a copy of the special resolution to change company types with ASIC within 14 days after it is passed.

A special resolution to change an unlimited company that has share capital to a company limited by shares may also provide that a specified portion of its uncalled share capital may only be called up if the company becomes an externally-administered body corporate.

	This type of company may change. . .	**. . . to this type of company**
1	Proprietary company limited by shares	Unlimited proprietary company Unlimited public company Public company limited by shares
2	Unlimited proprietary company	Proprietary company limited by shares *(but only if, within the last 3 years, it was not a limited company that became an unlimited company)* Public company limited by shares *(but only if, within the last 3 years, it was not a limited company that became an unlimited company)* Unlimited public company
3	Public company limited by shares	Unlimited public company Unlimited proprietary company Proprietary company limited by shares No liability company (see subsection (2))
4	Company limited by guarantee	Public company limited by shares Unlimited public company Proprietary company limited by shares Unlimited proprietary company
5	Unlimited public company	Public company limited by shares *(but only if, within the last 3 years, it was not a limited company that became an unlimited company)* Proprietary company limited by shares *(but only if, within the last 3 years, it was not a limited company that became an unlimited company)* unlimited proprietary company
6	Public no liability company	Public company limited by shares *(but only if all the issued shares are fully paid up)* Proprietary company limited by shares *(but only if all the issued shares are fully paid up)*

ATTACHMENT B – ASIC TABLE OF FEES FOR COMMONLY LODGED DOCUMENTS

[Please see attached "Information Sheet"]

ATTACHMENT C – TABLE OF FEES, PENALTIES AND REPORTING REQUIREMENTS UNDER STATE ASSOCIATION INCORPORATION ACTS

PROVISION	FEE	TIME FRAME	PENALTY
Section 21A Register of Committee Members	**Nil**		
1. Must keep register of committee members			$100
2. Kept at res. Of the public office of the inc assoc.			$100
3. Must record in reg. Any change in mem'shp			$100
4. Post cessation of incorp. Assoc, the public officer must retain records for 2yrs			$100
5. Register may be inspected by any person		2yrs	Nil
Section 23 Vacancy in Office of Public Officer			
1) If vacancy arises, the committee must a) give notice to the Comm. & b) appoint a new Public officer.		14 days	Each member will be liable for $200 each
2) A person is not eligible for appointment unless a) over 18yrs b) resident in the state			
3) Acts of the Public Officer are not invalid by reason of defective appointment			

PROVISION	FEE	TIME FRAME	PENALTY
Section 25 Address of Public Officer 1) Pub. Officer must notify Comm. Of appointment, name and address. 2) Must notify any Change of address	Prescribed Fee Prescribed Fee	14 days 14 days	$100 $100
Section 26 Annual General Meeting 1) AGM must be held < 6 mnths after end of Fin. Yr. 2) First AGM must be < 18mnths after Incorporation & < 6 mnths after end of Fin Yr. 3) Commissioner (upon receipt of application) may extend the above periods. 4) Assoc will not be in default, if extension is granted. 5) Application to comm. Must be made prior to expiration of above period. 6) At AGM, comm. must state income & expenditure, assets & liabilities, details of trust.	$17	< 6 mnths from Fin Yr < 18 mnths from incorporation & < 6 mnths from Fin Yr Apply for extension b/f the expiration of the above time periods	No more than $200 per member for failing to comply with any of these provisions.
Section 27 Lodgment of Statement regarding accounts 1) Pub. Officer shall a) lodge a statement with the Comm. Incl. particulars from s26(6) b) certificate signed by 2 authorised members, verifying submission of particulars to AGM. Copy of the passed resolutions concerning these particulars.	Prescribed fee (see above)	Within 1 mnth of AGM	Max $200
1A Commissioner may provide an additional form to be completed in respect of (1)			
1B Must complete the form and lodge in accordance with (1)			Max $200
(2) Comm may extend the relevant lodgment date.	1 **of 2 options, depending on date of lodgement –**		

PROVISION	FEE	TIME FRAME	PENALTY
	neither of which will exceed $200. **Or** **$15**		
(3) Application for extension may be outside the expiration date.			
(4) Comm. May exempt an officer from compliance			
(6) Comm. May waive or remit any payment in this section.			
Section 28 Keeping of Acct's and Minutes of Proceedings 1) Inc. Assoc must ensure that proper accounting records are maintained and minutes of all proceedings at meetings are recorded.			Max $500
Section 43 Return by approved insurers Approved insurer must notify the Comm. Of any lapse or cancellation of insurance.		Within 14 days after any insurance effected or renewed with the insurer by an incorp. Assoc. pursuant to s44.	Max $100

PROVISION	FEE	TIME FRAME	PENALTY
Section 44 Requirement to Insure 1) Assoc shall maintain insureance with an approved insurer as against liability as req. by the regs.			Max $500

ASSOCIATIONS INCORPORATION REGULATION 1999 (NSW)

PROVISION	FEE	TIME FRAME	PENALTY
Reg 9 – Application for Incorporation	**$85**		
Reg 13(2) – Application for reservation of name	**$32**		
Reg 14(3) Application for approval of change of name	**$41**		
Reg 20(2) Notice for Alteration of objects of Rules of incorp. Assoc. Public officer must notify the commissioner setting out the particulars of the alteration.	**$31**	1 mnth after alteration of objects	$100
Reg 26(3) Application for extension of period within which annual meeting is to be held.	**$17**		
Reg 27(1) Lodgment of Annual statement **a) < 1 mnth post AGM** **b) > 1 mnth post AGM but < 2 mnths** **c)> 2 mnth post AGM**	**$37** **$52** **$57**		
Section 27(2) Application for extension for lodging Annual St'mnt.	**$15**		
Section 46 Application for amalgamation of Inc. Assoc.	**$85**		
Section 48 Application for incorporation by Coy Ltd by guarantee or reg. Co-op.	**$85**		

Section 59(3)(a) Inspection of document lodged with the Dir-Gen	**$12.50**		
Section 59(3)(b) Issue of uncertified copy of document lodged with Dir-Gen. **a) if a fee has been pd for inspection of the document** **i) first pg** **ii) each add. pg** **b) if fee has not been pd for inspection of the document** **i) first pg** **ii) each add. Pg**	 **$Nil** **$1** **$12.50** **$1**		
Section 59 (3)(b) Issued of certified copy of document lodged with the Dir-Gen **a) first pg** **b) each add. pg**	 **$12.50** **$1**		

ATTACHMENT D – REGULATION OF SUPERANNUATION FUNDS UNDER THE *SUPERANNUATION INDUSTRY (SUPERVISION) ACT*

Establishment

A superannuation fund is established by governing rules which usually take the form of a trust deed for a private sector fund or an Act of Parliament or Ordinance for a public sector scheme. The fund is administered by a trustee who is appointed under the governing rules.

In order to be a public offer regulated superannuation fund, one of the conditions that must be met is that the fund must have a trustee who is a constitutional corporation. It is this constitutional corporation that is established under the normal provisions used for establishing a corporation under the Corporations Act.

The basis for supervision under the *Superannuation Industry (Supervision)* Act 1993 ("**the SIS Act**") is that funds and trusts are subject to regulation under the Commonwealth's power with respect to corporations and pensions (for example, because the trustee is a corporation). In return, these funds and trusts become eligible for tax concessions.

To qualify for tax concessions, a superannuation fund must make an irrevocable election to become a regulated superannuation fund and comply with the requirements of the SIS Act. It is relevant to note however that a large number of the prudential requirements under the SIS Act are common to all superannuation entities.

Regulation

The Commonwealth, pursuant to the corporations and pensions power has established a framework of legislative enactments which make provision for the regulation of the superannuation industry in Australia. The industry is regulated by a combination of three regulatory agencies:

- the Australian Prudential Regulation Authority ("**APRA**");
- the Australian Securities and Investment Commission ("**ASIC**"); and
- the Commission of Taxation.

From 1 July 1998, APRA (established under the *Australian Prudential Regulation Authority Act* 1998) has been given comprehensive powers to administer the prudential functions of the Reserve Bank of Australia, the former Investment and Securities Commission and, with the agreement of the States and Territories, the AFIC. APRA is responsible for prudential regulation to ensure financial safety in the deposit-taking, life and general insurance, and superannuation sectors, including the licensing of regulated deposit-taking and insurance institutions.

APRA has responsibility, to the extent that such responsibility is not conferred on the Commissioner of Taxation, for the general administration of the provisions of the SIS Act that deal with the approval of trustees; the appointment and removal of, and standards relating to, trustees, custodians and investment managers; the duties of trustees generally; notices about complying fund status; actuaries and auditors; equal representation; civil and criminal consequences of contravening provisions; financial assistance to certain funds; and the investigation of superannuation entities. APRA also has responsibility for the general administration of the provisions dealing with operating standards for superannuation entities and the governing rules of such entities to the extent that the administration is not conferred on ASIC or the Commissioner.

From the same date, ASIC (established under the *Australian Securities and Investments Commission Act* 1989 based on the former Australian Securities Commission) is responsible for regulating market integrity and consumer protection across the financial system, including the regulation of corporations, securities and futures markets, deposit-taking, life and general insurance, and superannuation. ASIC has been given broad framework legislation to enable it to adopt detailed codes or allow industry bodies to develop codes, and has a full range of enforcement options.

ASIC also has responsibility for the general administration of the provisions dealing with operating standards for superannuation entities, the governing rules of such entities, and the duty on trustees to keep reports, to the extent to which they relate to:

(a) compliance with the determinations of the Superannuation Complaints Tribunal;

(b) the trustee's duty to establish arrangements for dealing with inquires and complaints, and to keep minutes and records;

(c) prohibited conduct in relation to superannuation interests and

(d) public offer entities.

The Reserve Bank of Australia, which continues to be responsible for monetary policy, financial system stability and regulation of the payments system, is another agency that plays a key role in the new regulatory framework for the Australian financial system.

To prevent regulatory gaps, consumer protection regulation is complemented by the ACCC which retains its economy-wide jurisdiction under the *Trade Practices Act* 1974 .

ATTACHMENT E – COMPARISON OF REGULATORY POWERS UNDER DIFFERENT INCORPORATION REGIMES

ACA Act: *Aboriginal Councils and Associations Act 1976* (Cth)

ASIC: *Australian Securities and Investments Commission Act 2001* (Cth).

Corporations Act 2001 (Cth)

WA Act: *Associations Incorporation Act 1987* (WA)

NSW Act *Associations Incorporation Act 1984* (NSW)

	Indigenous	**ASIC**	**NSW Act**	**WA Act**
Issue of Certificate of Incorporation.	Section 45 gives the Registrar the power to issue a certificate of incorporation if satisfied that the rules are not unreasonable, inequitable, or not give members sufficient control.	Section 118 of the *Corporations Act* gives ASIC the power to register the company.	Section 10 gives the Director General the power to refuse to incorporate an association. This is a very broad discretion.	Section 9 empowers the Commissioner to incorporate if satisfied that the association is eligible under the act, its rules conform to the requirements, and the name is appropriate.
Alterations to name and objects of the Association.	Section 53 & section 52.	Section 157 of the *Corporations Act*.	Section 14 & section 20.	Section 18 & section 19.
Alteration to rules	Section 54. Registrar must approve.	Section 136. Must be lodged with ASIC.	Section 20.	Section 17.
Request production of an updated list of members.	Section 58.	Section 168 of the *Corporations Act* requires that a register of members must be set up and maintained.	No power. Section 21 requires that a register of committee meetings is maintained.	No power. Section 27 requires that a register of committee meetings is maintained.
Power of Arbitration.	Section 58A	No power.	No power.	No power.
Call a special general meeting.	Section 58B(3) & 58B(4.)	No Power. For who can call general meetings, see section 249C of the *Corporations Act*	No power.	No power.
Call and conduct a special meeting.	Section 58B(5)	No power.	No power.	No power.
Issue a notice requesting compliance with the Act, Regulation or Rules of the Association.	Section 60A.	Section 12A of the ASIC Act.	No power.	Section 31 enables the Corporation to be wound up if it failed to remedy a contravention of Act or the regulations.

	Indigenous	ASIC	NSW Act	WA Act
Apply for injunction where the Act, Regulation or Rules of the Association are not being followed.	Section 61.	Section 1324 of the *Corporations Act*.. ASIC can apply for an injunction when the Act is not being followed.	No power.	No power.
Appointment of Administrator.	Section 71(2).	No power.	No power.	No power.
Petition the Court to wind up a company.	Section 62A.	Section 462 and 464 of the Corporations Act 2001.	Section 51.	Section 31.
Power to examine documents.	Section 60.	Section 29 ASIC Act.	Section 67.	Section 39.
Power to investigate the affairs of the corporation.	Section 68(1).	Section 13 ASIC Act.	Section 67.	Section 39.
Power to require a person to answer questions or produce documents.	Section 68(2).	Section 19 ASIC Act.	Section 67.	Section 39.
Power to enter premises, examine, take possession of books relating to the affairs of the Corporation.	Section 70.	Section 6 of the ASIC Act gives ASIC the power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.	Section 67.	No power.
Power to extend the time within which an act or thing is required by the Act or Regulations.	Section 79.	Various sections throughout the Act gives ASIC the power to exempt and modify the application of provisions (for example, section 673 and 741).	Various sections enable the extension of time. For example, section 13 enables the extension of time to reserve a name by three months.	No power.

ATTACHMENT F – POWERS OF ASIC AND STATE INCORPORATED ASSOCIATION REGULATORS

A ASIC'S POWERS AND FUNCTIONS OF THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

1 Overview

The Australian Securities and Investments Commission ("**the Commission**") is governed by the *Australian Securities and Investments Commission Act* 1989 (Cth) ("**the Act**"). The Act provides the Commission with investigative, hearing and advisory powers and also has provisions relating to its structure and membership.

The Commission is established under Part 2 of the Act. It is a body corporate with perpetual succession and may sue and be sued in its corporate name. The Commission consists of between three and eight members, at least three of whom must be appointed as full-time members. Appointments are made by the Governor General on the nomination of the Commonwealth Minister responsible for company regulation (currently the Treasurer).

Section 11(1) of the Act provides that:

> *"The Commission has such functions and powers as are conferred on it by or under the following:*
>
> (a) the Corporations Act 1989;
>
> (e) the Corporations Law of the Capital Territory;
>
> *(f)* this Act (other than section 12A and Division 2 of Part 2)".

Section 11 (7) of the Act provides that:

> *"The Commission has any functions and powers that are expressed to be conferred on it by a national scheme of another jurisdiction"*..

The independence of the Commission in the exercise of its functions and powers is guaranteed in section 11(1B), which provides that "the Commission is not subject to any directions other than directions given under section 12". Section 12 enables the responsible Commonwealth Minister to give to the Commission a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under a national scheme law.

Section 1(2) of the Act provides that the Commission, in performing its functions and exercising its powers must strive to meet certain goals. For example section 1(2)(a) provides that the Commission must strive "to maintain, facilitate, and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy".

2 Policy Formulation

It is the role of the Commission to formulate policy with respect to the implementation and application of the Corporations Law so as to ensure that the objectives underlying the national scheme are effectively achieved. The Commission issues Media Releases, Practice Notes and Policy Statements which outline the Commission's policy with regard to the operation or effect of certain provisions of the Corporations Law. The Commission may also hold public hearings on areas where it perceives that the operation of the Corporations Law may need to be modified for a class of persons.

3 Exemptions

The Commission has the power to grant an exemption from compliance with, or modify the operation of, a provision of the Corporations Law upon request by an applicant. In some circumstances this power is subject to review by the Corporations and Securities Panel. For example the Commission has this power in relation to takeovers and auditing requirements (see below).

4 Investigations

The Commission is able to investigate suspected contraventions of the Corporations Law and, if appropriate, instigate prosecutions or civil actions.

The Commission may make such investigation as it thinks expedient where it has reason to expect that a contravention of a national scheme law or a contravention of a relevant law of the Commonwealth or of a State or Territory has occurred (section 13(1)).

The Commission may make such investigation as it thinks expedient where the Commission has reason to suspect that unacceptable circumstances within the meaning of Pt 6.10 Div 2 of the Corporations Law have occurred (such as in relation to a takeover or acquisition of shares) (section 13(2)).

Section 14(1) empowers the Minister to direct investigations where it is in the public interest.

4.1 Examination of Persons

The Commission may, as part of its investigation, examine anyone who it suspects can give it information relevant to the examination,. (see sections 19-26, 63-4 and 76-69). The examination must take place in private (section 22(1)) and the examinee's lawyer is entitled to attend (section 23(1)). Where a person fails to comply with a notice issued under section 19, the Commission may certify the failure to the Court and the Court may then inquire into the matter and may order that the person comply with the section 19 notice.

4.2 Production and Inspection of Books

The Commission has extensive powers to require the production of, and inspect books and records of a body corporate. "Books" is extremely widely defined, and includes registers, financial statements, financial records, banker's books and "any other record of information". In summary; these powers include:

- power to inspect books without charge (sec 29);
- power to require the production of books about the affairs of a body corporate (sec 30 and 33(a));
- power to require the production of books about securities (sec 31 and 33(b);
- power to require production of books about futures contracts (sec 32 and 33(b))
- power to take enforcement action where books are not produced in response to a direction from the Commission.

The power to require the production of books may be exercised for the purposes of an investigation; the performance of any of the Commission's functions or powers under a national scheme law; ensuring compliance with a national scheme law; or in relation to an alleged contravention of a national scheme law or a law of the jurisdiction concerning the management or affairs of a body corporate.

4.3 Power to Hold Hearings

The Commission may hold hearings for the purposes of the performance or exercise of any of its functions and powers under a national scheme law. The Commission's power to hold hearings is set out in Pt 3 Div 6 of the Act. A hearing cannot be held during the course of an investigation being carried out under Division One. Generally, the Commission has a discretion as to whether a hearing takes place in public or in private. In exercising its discretion the Commission must have regard to matters contained in section 52(2). The Commission has the power to summons a person to appear before the Commission at a hearing to give evidence and/or to produce specified documents. At the hearing the Commission may take evidence on oath or affirmation (section 58).

5 Disqualification of Directors

There are a number of situations in which a director of a corporation can be disqualified from managing Corporations under Pt 2D.6 of the Corporations Law. In most situations it is up to the courts or the Commission to determine whether a person should be disqualified. The Commission keeps a record of persons who are disqualified from managing corporations. A person who has been disqualified under Pt 2D.6 ceases to be a director from the time of disqualification and is prohibited from various forms of involvement in corporations.

The Commission is able to disqualify a person from managing a corporation under section 206F if within seven years before it notifies the person that they may be disqualified:

(b) the person has been an officer of two or more corporations; and

(c) while the person was an officer, or within 12 months after the person ceased to be an officer, each of the corporations was wound up and a liquidator lodged a report under section 533(1) about the corporation's inability to pay its debts.

The Court, upon the Commission's application, is able to disqualify a person from managing a corporation if there is a declaration that they have contravened a civil penalty provision. The Commission is also able to apply to the Court to disqualify for insolvency, reasons contained in section 206D, and for repeated breaches of the Corporations Law, 206E.

6 Winding-Up

Section 461 of the Corporations Law details the ground upon which a company may be wound up. The Commission, pursuant to section 464 of the Corporations Law is entitled to bring an application for winding up. Section 464 provides that:

> *"Where the Commission is investigating, or has investigated, under Division 1 Part 3 of the ASIC Law:*
>
> *(a) matters being, or connected with, affairs of a company; or*
>
> *(a) matters including such matters;*
>
> *the Commission may apply to the Court for the winding up of the company".*

Section 461(1) of the Corporations law sets out the grounds, other than that the company is insolvent, upon which a company can be compulsory wound up. Section 461(1)(h) provides that one ground is where the Commission "following an investigation of the company's affairs in accordance with Div 1 of Pt 3 of the ASIC Law, has reported that the company is unable to pay its debts and should be wound up or that it is in the interests of the public, the members or the creditors that the company be wound up".

7 Fundraising

Fundraising provisions are set out in Chapter 6D of the Corporations Law. The general proposition is that a person must not make an offer of securities that needs disclosure to investors until a disclosure document for the offer has been lodged with the Commission.

Section 739 gives the Commission the power to issue a "stop order", which effectively freezes the continued issue of securities pursuant to which a prospectus was lodged.

The Commission is able to exempt a person from a provision of Chapter 6D or make a declaration that Chapter 6D applies to a person as if the specified provisions were omitted, modified or varied as specified in the declaration.

8 Annual and Half-Year Reports

The Commission has the power to direct a company to prepare and lodge an annual report or a half year report. The Act specifies the particular nature that the request must follow (section 321(1)).

The Commission is able to grant exceptions to auditing requirements and is empowered to grant relief from the requirements relating to financial records (Pt 2M.2) and financial reporting. The relief may be specific relief meaning that any relief granted applies to a particular company (section 340(1)) or general relief meaning that the Commission may make an order in relation to a class of companies (section 341(1)).

ASIC Policy Statement 43 sets out the basis on which it will exercise its power to grant exemptions from the financial reporting and audit provisions of the Corporations Law.

9 Consumer Protection

These powers are distinct from the Commission's company law regulatory role. Extensive Consumer protection powers are contained in Pt 2 Div 2 of the ASIC Act. This makes the Commission responsible for regulating unconscionable conduct and consumer protection in relation to financial services. This covers investments, life and general insurance, superannuation and banking (except lending) in Australia.

B REGISTRARS FUNCTIONS AND POWERS UNDER STATE LEGISLATION

The relevant legislative provisions that relate to the functions and powers of the Registrar/Commissioner in the States and Territories are reproduced in full.

1 Western Australia – Associations Incorporation Act 1987 (WA)

1.1 Section 8 - Name of Association

(1) The Commissioner shall not incorporate an association under this Act by a name that in the opinion of the Commissioner is:

(a) offensive or undesirable;

(b) likely to mislead the public as to the object or purpose of the association;

(c) identical with the name by which an association in existence is already incorporated under this Act or the repealed Act or which resembles any such name in a manner likely to mislead the public; or

(d) identical with or likely to be confused with the name of any other body corporate or any registered business name.

1.2 Section 9 - Incorporation of Association

(1) If upon an application duly made in accordance with this Part the Commissioner is of the opinion:

(a) that the association is eligible to be incorporated under this Act;

(b) that the rules of the association lodged with the Commissioner conform to the requirements of this Act;

(d) that the name of the association is appropriate having regard to section 8; and

(e) that the time during which any request might be made under section 7 has expired and any request made under that section has been finally refused,

the Commissioner shall, subject to subsection (2), incorporate the association by the issue to the association of a certificate of incorporation.

(2) The Commissioner shall not incorporate an association under this Act if in his opinion:

(a) it is more appropriate for the activities of the association to be carried on by a body corporate incorporated under some other law; or

(b) the incorporation of the association is against the public interest.

(3) If the Commissioner refuses an application for incorporation under subsection (2), the applicant for incorporation may, within one month of receiving notice of the refusal:

(a) request the Minister to review the decision of the Commissioner; and

(b) make representations in writing to the Minister in support of the application.

(4) The Minister's decision on a review under this section shall be final and the Commissioner shall give effect to it accordingly.

1.3 Section 31 - Winding up by Court

(1) An incorporated association may be wound up by the Supreme Court if:

(h) the incorporated association has refused or failed to remedy a contravention of this Act or the regulations within a reasonable period after notice of that contravention has been given to the association by the Commissioner;

(2) An application to the Supreme Court for the winding up of an incorporated association shall be by petition presented by the incorporated association, a member of the incorporated association, the Commissioner, the Minister or, in the case of a petition based on subsection (1)(e), a creditor.

1.4 Section 33 – Distribution of Surplus Property

(3) Prior to the winding up of an incorporated association, the association may by resolution of the members authorise and direct the committee to prepare a distribution plan for the distribution of the surplus property of the association.

(4) A distribution plan shall be prepared in accordance with the provisions of the rules of the association relating to the distribution of surplus property upon a winding up (if any) or in accordance with such variation of those provisions as the Commissioner may approve in writing.

(5) If there are no provisions in the rules of the incorporated association relating to the distribution of surplus property or those provisions are impractical in the circumstances, the committee shall prepare a distribution plan in accordance with any directions given by resolution of the members of the incorporated association or, if there is no such direction, as the committee considers just and equitable having regard to the objects or purposes of the association.

(6) The committee shall lodge a distribution plan with the Commissioner and the Commissioner may give the committee directions as to the publication of notice of the distribution plan.

The provisions continue to detail more specifically the role that the Commissioner will play in the distribution of property where the committee fails to lodge a distribution plan.

1.5 Section 34 - Power of Commissioner to Require Transfer of Activities

(1) Where the Commissioner is of the opinion —

(a) that an incorporated association has ceased to be an association eligible to be incorporated under this Act; or

(b) that the undertaking or operations of an incorporated association are being carried on by a body corporate incorporated under some other Act, or would more appropriately be carried on by such a body corporate,

the Commissioner may give notice to the association under this section.

(2) If, within 3 months of the date of a notice under subsection (1), the incorporated association requests the Commissioner to transfer its undertaking to a body corporate specified in the request, the Commissioner may, by order published in the Gazette, order that the undertaking of the association be transferred accordingly.

1.6 Section 35 - Cancellation of Incorporation by Commissioner

(1) Where the Commissioner has reasonable cause to believe that an incorporated association —

(a) has been inoperative for the preceding 12 months;

(b) has fewer than 6 members;

(c) has no assets and the members have resolved to discontinue the activities of the association;

(d) has resolved to wind up but no person is prepared to act as liquidator; or

(e) has not, within 3 months of notice being given to it by the Commissioner under section 34, requested the Commissioner to transfer its undertaking to another body corporate,

the Commissioner may send, by certified post addressed to the association at the address which appears to the Commissioner to be the address of the association, and may, if he considers advertisement to be desirable, cause to be published in a newspaper circulating generally in the State, a notice stating the ground or grounds on which it is proposed to cancel the incorporation of the association and stating that, if a reply showing cause to the contrary is not received within 2 months after the date on which the notice is sent or published, whichever is the later, the incorporation of the association will be cancelled by the Commissioner under this section.

1.7 Section 36 - Vesting of Property on Failure to Implement a Distribution Plan or Cancellation

(1) Where the committee of an incorporated association fails to implement a distribution plan when required to do so under section 33(7)(b) or the Commissioner has made a declaration under section 33(10) or the incorporation of an incorporated association (not being an incorporated association the winding up of which commenced before the cancellation) is cancelled under section 35 —

(a) the property of the association vests in the Commissioner; and

(b) subject to subsection (3), the Commissioner may give such directions as he thinks just for or with respect to the payment of the debts and liabilities of the association, the distribution of its property and the winding up of its affairs and…

1.8 Section 37 - Lodging of Documents with Commissioner

(1) The Commissioner shall in such manner as the Commissioner thinks fit keep a copy of the rules of each incorporated association, every alteration of the rules and every other document required by this Act to be lodged with the Commissioner.

(4) The Commissioner may, if in his opinion it is no longer necessary or desirable to retain it, destroy or dispose of any document, and any copy or transparency of such a document, lodged in respect of an incorporated association that for not less than 15 years has been dissolved.

1.9 Section 39 - Investigation and Audit

(1) In this section, "records" includes —

(a) any document, and other record of information; and

(b) invoices, receipts, orders for the payment of money, bills of exchange, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up

however compiled, recorded or stored.

(2) The powers of the Commissioner under subsection (3) or (4) shall not be exercised except in circumstances that relate to a matter that constitutes or may constitute —

(a) a contravention of, or failure to comply with, a provision of this Act or the regulations; or

(b) an offence relating to an incorporated association that involves fraud or dishonesty or concerns the management of the affairs of the association.

(3) The Commissioner may at any time, by notice in writing, give a direction to an incorporated association or a person who is or has been a member of the committee of, or an agent, banker, solicitor, auditor, trustee or other person acting in any capacity for or on behalf of an incorporated association (including an incorporated association that is in the course of being wound up or has been dissolved),

requiring the production, at such time and place as are specified in the direction, of such records relating to the affairs of the association as are specified in the direction.

(2) The Commissioner may, at any time by notice in writing, give a direction to an incorporated association or to a person who is or has been a member of the committee of an incorporated association requiring the production and delivery to the Commissioner, within such period as is specified in the direction, of a statement of the financial position of the association as at the end of the last preceding financial year, or as at some other date specified in the direction, audited by a registered company auditor within the meaning of the Companies (Western Australia) Code 2.

2 New South Wales - Associations Incorporation Act 1984 (NSW)

2.1 Section 12 - Names

(1) Except with the consent of the Minister, an association shall not be incorporated under a name that is in the opinion of the Commissioner undesirable or is a name, or a name of a kind, under which the Minister has for the purposes of this Act directed the Commissioner not to incorporate an association.

2.2 Section 51 - Winding up by the Court

(2) An application to the Court for the winding up of an incorporated association may be made by the incorporated association or by a member or creditor of the incorporated association or by the Commissioner.

2.3 Section 53 - Distribution of surplus property

(2) In a winding up of an incorporated association, the surplus property of the association is to be distributed in accordance with a special resolution of the association.

(2A) Any such distribution of surplus property:

(a) must be approved by the Commissioner,

2.4 Section 54 - Cancellation of incorporation

(1) Where the Commissioner has reasonable cause to believe that an incorporated association:

(a) is not in operation;

(b) is engaged in trading or securing pecuniary gain for its members;

(c) is, as trustee, engaged in trading or securing pecuniary gain for members of the association;

(d) was incorporated under this Act by reason of fraud or mistake;

(e) has not during the preceding period of 3 years convened an annual general meeting in accordance with section 26; or

(f) is required to be insured in accordance with section 44 and is not so insured

the Commissioner may send by registered post addressed to the association at the address of the public officer of the association last notified under this Act to the Commissioner or (where there is a vacancy in the office of public officer) at the address which appears from the Commissioner's records to be the address of the association, and publish in a newspaper circulating generally in the State, a notice stating the ground or grounds for the proposed cancellation of the incorporation of the association and stating that, if a reply showing cause to the contrary is not received within 2 months after the date on which the notice is sent or published, whichever is the later, the incorporation of the association will be cancelled by notice published in the Gazette.

2.5 Section 59 - Register

(1) The Commissioner shall keep a register for the purposes of this Act in such form and containing such particulars as the Commissioner thinks fit.

(2) The Commissioner shall keep a copy of a certificate of incorporation granted under section 10, 14, 47 or 48 and a reference in this section to a document lodged with the Commissioner includes a reference to such a copy.

(6) The Commissioner may, if in the opinion of the Commissioner it is no longer necessary or desirable to retain it, destroy or dispose of: (a) any document lodged or registered in respect of an incorporated association that has been dissolved or has ceased to be registered for not less than 10 years, or (b) any document a transparency of which has been incorporated in the register kept under subsection (1).

2.6 Section 65 - Powers of Commissioner in Relation to Documents

(1) The Commissioner may refuse to register or receive a document submitted to the Commissioner for lodgment under this Act where the Commissioner is of the opinion that the document:

(a) contains matter contrary to law,

(b) contains matter that is false or misleading in a material particular,

(c) by reason of an omission or misdescription has not been duly completed,

(d) does not comply with the requirements of this Act or the regulations, or

(e) contains an error, alteration or erasure.

(2) Where the Commissioner refuses under subsection (1) to register or receive a document, the Commissioner may request that:

(a) the document be appropriately amended or completed and resubmitted;

(c) a fresh document be submitted in its place; or

(d) where the document has not been duly completed, a supplementary document in an approved form be lodged.

2.7 Section 67 - Production and Inspection of Records

(3) The Commissioner may at any time, by notice in writing, give a direction to:

(a) an incorporated association; or

(b) a person who is or has been an officer of, or an agent, banker, solicitor, auditor or other person acting in any capacity for or on behalf of, an incorporated association (including an incorporated association that is in the course of being wound up or has been dissolved), requiring the production, at such time and place as are specified in the direction, of such records relating to the affairs of the association as are so specified.

(4) A person authorised by the Commissioner for the purpose may, at any reasonable time, enter any premises or place in which the Commissioner or authorised person has reasonable cause to believe the association is acting in furtherance of its purposes or in which any records relating to the affairs of the association are kept, and may:

(a) require any person at that place or on those premises to furnish such information as the authorised person may reasonably require;

(b) search that place or those premises; and

(c) inspect, take and retain possession of, and take copies of, any records found in or upon that place or those premises relating to the affairs of the association.

2.8 Section 72 - Appeals from Decisions of Commissioner

A person aggrieved by the refusal of the Commissioner to incorporate an association or to register or receive a document, or by any other act, omission or decision of the Commissioner (other than an act or decision of the Commissioner that is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive or final), may within such period as may be prescribed by rules made under the Local Courts (Civil Claims) Act 1970, appeal to a Local Court, which may confirm, reverse or modify the refusal, act or decision, or remedy the omission, as the case may be, and make such orders and give such directions in the matter as the Local Court thinks fit.

2.9 Section 72A - Delegation by Commissioner

(1) The Commissioner may delegate any of the Commissioner's functions, other than this power of delegation.

3 Australian Capital Territory - Powers of the Registrar-General under the Associations Incorporation Act 1991 (ACT)

3.1 The Registrar-General ("RG") has very few powers under the Act.

3.2 The RG has no broad discretion to refuse registration, and must register an association if s/he "is satisfied that the association is, or would be, when formed, eligible for incorporation under this Act" (s19(b)).

3.3 The RG may make an application to the court to wind up the association (s89) for one of the grounds specified in s90.

3.4 In limited circumstances the RG can issue a notice to the association requiring it to lodge its rules with the RG (s33(3)).

3.5 The RG can refuse registration under a particular name, if "in the opinion of the Registrar-General" it is undesirable (s37(5)), or for various other, non-discretionary reasons.

3.6 The RG can require the public officer of an association to indicate their current residential address, and whether or not they continue to hold that office in the association (s66).

3.7 Under s82 the RG has power to grant or refuse to grant permission to an association to apply for incorporation under the Corporations Law, however, this is a non-discretionary power.

3.8 Section 83 allows the RG to cancel the registration of an association, after the serving of two notices, and subject to various other conditions if its continued incorporation "would be inappropriate or inconvenient because of the Registrar-General's assessment of —

(a) the scale or nature of the activities of the association;

(b) the value or nature of the property of the association; or

(c) the extent or nature of the association's dealings with persons who are not members or applicants for membership of the association"

3.9 Section 93 allows the RG to cancel the registration of an association if it is not in operation, has fewer than five members, was incorporated by fraud or mistake, has not had an AGM within 3 years or has not lodged an annual return in the last three years.

3.10 When an association is wound up or cancelled, any surplus assets are vested in the RG (ss92(1) & 94) subject to any trusts, the RG has the power to sell these assets (s95).

3.11 Section 97 allows the RG to do any administrative, non-discretionary act which by law or equity a defunct association was required to do.

3.12 The RG may make “such investigations as he or she thinks expedient for the due administration of this Act”. If the RG suspects that any provision of the Act has been breached, including the production of the books. (ss100 - 103).

3.13 The RG can commence any criminal proceedings arising out of the Act (s106).

ATTACHMENT G – OVERVIEW OF *KARTINYERI V COMMONWEALTH*

Kartinyeri v Cth (1998) 152 ALR 540 (High Court)

What was the case about?

The case concerned the validity of the *Hindmarsh Island Bridge Act* 1997 (Cth). The *Bridge Act* effectively removed the area surrounding the proposed Hindmarsh Bridge in South Australia from the scope of the *Heritage Protection Act* 1984 (Cth) which was designed to protect places of particular significance to Aboriginals. The High Court had to determine whether the *Bridge Act* was within the scope of s.51(xxvi) of the Constitution to determine its validity.

What were the key issues?

1. Was the *Bridge Act* to be properly classified as a partial repeal or amendment of the *Heritage Protection Act*, and if so could its validity be determined by reference to the provisions of the *Heritage Protection Act* which all parties accepted was a validly enacted law under s51(xxvi).

2. S.51(xxvi) provides amongst other things that the Parliament may make laws with respect to "the people of any race…". As the *Bridge Act* was a law with respect to the Ngarrindjeri people or only some of them, it was therefore a law with respect to a subgroup of a race. Was a law with respect to a subgroup of a race sufficient to satisfy the requirement that the law be with respect to "the people of any race"?

3. Did s51(xxvi) require that any law enacted in reliance upon it be for the benefit or advancement of the people of any race (or not detrimental or discriminatory against such people)?

What did the High Court decide?

The High Court upheld the validity of the *Bridge Act* by a 5:1 majority.

Brennan CJ & McHugh J

- They looked only at issue 1., deciding that the *Bridge Act* was validly enacted under s51(xxvi).
- "The Parliament exercised its powers under s51(xxvi) to enact the *Heritage Protection Act* and it has had at all times the power to amend or repeal the Act. As the *Bridge Act* has no effect or operation other than reducing the ambit of the *Heritage Protection Act*, s51(xxvi) supports it. Approaching the question of validity in this way, the *Bridge Act* is valid" (p13).
- "The Bridge Act can have no character different from, and must have the same validity as, the Heritage Protection Act" (p14).

Gaudron J

- Decided the case upon issue 1., finding that the *Bridge Act* was validly enacted. Found that s51(xxvi) "not only authorises the *Heritage Protection Act* but, also, authorises its partial repeal" (p28). The *Bridge Act* had the effect of operating as a partial repeal and was consistent with the maxim that "what Parliament may enact it may repeal".
- In *obiter* rejected issue 2., finding that a such a construction would conflict with the very nature of s51(xxvi)
- In *obiter* rejected issue 3., finding that "it is not possible…to treat s51(xxvi) as limited to laws which benefit Aboriginal Australians".. Furthermore, this position was not affected by the 1967 constitutional amendments which was simply an augmentation of the power to include Aboriginals. However, Gaudron found that for a law to satisfy the requirement that it be "special" under s51(xxvi), it need be "reasonably capable of being viewed as appropriate and adapted to the difference asserted". Given the difficult position of Australian Aboriginals, Gaudron found that prima facie, only laws "directed to remedying their (Aboriginals) disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances" (p26). Essentially, Gaudron's position is that it is difficult to conceive that s51(xxvi) could be used to support detrimental legislation. N.B This is *obiter*.

Gummow & Hayne JJ

- Decided the case upon issue 1., finding that the Bridge Act was validly enacted. The Bridge Act was found to merely curtail the operation of a previous law which was validly enacted under s51(xxvi).

- Rejected the idea in issue 2., that s51(xxvi) did not support legislation that was with respect to a subgroup of a race.

- Rejected the idea in issue 3., that s51(xxvi) only supported beneficial legislation, and found that the 1967 Referendum did not change this position.

Kirby J

- Decided the case upon issue 3., finding that the Bridge Act was Constitutionally invalid. Found that s51(xxvi) did not "permit special laws which adversely and detrimentally discriminated against the people of any race" (p80). This finding was based in no small part upon the 1967 Referendum. Kirby found that the overwhelming support for the Referendum should be interpreted as showing the support of Australia for the above position. "This court should take notice of the history of the amendment and the circumstances surrounding it in giving meaning to the amended paragraph" (p82).

- Found that there was ambiguity over s51(xxvi) and in such case, this could be resolved by looking at international custom and practice. As racial discrimination is universally condemned internationally, so too should it be in Australia. To find s51(xxvi) allows laws that are discriminatory and detrimental to any race would be contrary to the position at international law.

- Found that there was support for the maxim that what Parliament may enact it may repeal, but that this would not apply where that law being repeal / amended was detrimental or discriminatory to any race and therefore invalid under s51(xxvi).

- With respect to issue 1., found that s51(xxvi) extended to allow laws with respect to a subgroup of a race.

Callinan J

- Did not hear the case.

Conclusion

Given the decision in *Kartinyeri* it is difficult to imagine that the HCA would find legislation repealing / amending incorporation regimes for Aboriginals to be invalid under s51(xxvi). Such a case would be distinguishable from *Kartinyeri* as it is unlikely to be construed with the same degree of discrimination or detriment. The ratio that may be taken from *Katinyeri* is that where a law that has been validly enacted under s51(xxvi), it may be repealed or amended. In the case of incorporation regimes for Aboriginals, there appears to be even less of an argument to be made that it would be invalid under s51(xxvi) than was the case in *Kartinyeri*. Given that *Kartinyeri* was decided with a 5:1 majority in favour of the Cth position, it is virtually impossible to imagine that that HCA would not reach a similar conclusion in the case of the repeal / amendment of laws with respect to Aboriginal incorporation regimes. The Kirby position is the only one that would conflict with this conclusion.

ATTACHMENT H – TRANSFER TO CORPORATIONS ACT UNDER STATE ASSOCIATION INCORPORATION ACTS

MECHANISMS FOR TRANSFER TO CORPORATIONS ACT UNDER STATE ASSOCIATION INCORPORATION ACTS

New South Wales

In NSW section 56 of the *Associations Incorporations Act* 1984 (NSW) provides for the registration of incorporated associations as a company or cooperative. Section 56 states that:

1 An incorporated association, may, with the approval of the Minister and subject to such conditions as may be specified in the approval, become:

(a) registered as a company under the Corporations Act 2001 of the Commonwealth, or

(b) registered as a cooperative within the meaning of the Co-operatives Act 1992,

in the manner prescribed.

2. Where the Minister is satisfied that the continued incorporation of an association under this Act would be inappropriate or inconvenient:

(a) by reason of the Minister's assessment of:

(i) the scale or nature of the activities of the incorporated association;

(ii) the value or nature of the property of the incorporated association;

(iii) the extent or nature of the dealings which the incorporated association has with the public, or

(b) for any other reason which to the Minister appears sufficient, the Minister may, by notice to the incorporated association, direct the association to become:

(c) registered as a company under the Corporations Act 2001 of the Commonwealth, or

(d) registered as a cooperative within the meaning of the Co-operatives Act 1992,

within the period (being not less than 3 months) and subject to any conditions, specified in the notice.

Regulation 17 of the *Associations Incorporation Regulations 1999* (NSW) provides, in relation to the incorporation of an association as a company, that:

1. For the purpose of becoming registered as a company under the *Corporations Act 2001* of the Commonwealth, an incorporated association:

(a) must determine, by special resolution:

(i) to apply to become so registered, and

(ii) the name under which the association is to apply to become so registered, and

(iii) to adopt a memorandum of association or articles of association, or both, or to adopt neither a memorandum of association or articles of association, and

(b) must cause an application for registration of the association as a company to be lodged with the Director-General, and

(c) must, in all other respects, comply with the relevant provisions of the Corporations Act 2001 of the Commonwealth with respect to the incorporation of companies.

2. An application referred to in subclause (1)(b):

(a) Must be in the form required by the Director-General; and

(b) Must be executed under the common seal of the incorporated association; and

(c) Must be accompanied by a copy of the special resolution referred to in subclause (1)(a) and of any memorandum of association or articles of association to be adopted for the proposed company.

Whilst regulation 2(a) provides that an application for registration of the association as a company must be in the form required by the Director General, Steven Wood from the Department of Fair Trading (NSW) stated that there was no official set form, and that an application in writing would suffice.[14]

Western Australia

Section 34 of the *Associations Incorporation Act 1987* (WA) deals with the power of the Commissioner to require the transfer of activities. This section states that:

1. Where the Commissioner is of the opinion –

(a) that an incorporated association has ceased to be an association eligible to be incorporated under this Act; or

(b) that the undertaking or operations of an incorporated association are being carried on by a body corporate incorporated under some other Act, or would more appropriately be carried on by such a body corporate,

the Commissioner may give notice to the association under this section.

2. If, within 3 months of the date of a notice under subsection (1), the incorporated association requests the Commissioner to transfer its undertaking to a body corporate specified in the request, the Commissioner may, by order published in the Gazette, order that the undertaking of the association be transferred accordingly.

An incorporated association has ceased to be an association eligible to be incorporated under the *Associations Incorporation Act 1987* (WA) if it does not meet the requirements set out in section 4 of this Act. That is, if it has less than five members or is no longer carrying out one of the following legitimate purposes:

(a) a religious, educational, charitable or benevolent purpose;

(b) the purpose of promoting or encouraging literature, science or the arts;

(c) the purpose of sport, recreation or amusement;

(d) the purpose of establishing, carrying on, or improving a community, social or cultural centre, or promoting the interests of a local community;

(e) a political purpose; or

(f) any other purpose approved by the Commissioner.

Subsection 4(2) provides that notwithstanding subsection (1), an association for the purpose of trading or securing pecuniary profit to the members from the transactions of the association is not eligible to be incorporated under the Act.

The legislation does not explicitly state whether a person can apply to the Commissioner for a transfer to the Federal regime. However, the Department of Fair Trading in Western Australia indicated that in most instances this is how such a transferral occurs.

Australian Capital Territory

In the ACT, section 82 of the *Associations Incorporation Act 1991* (ACT) is the relevant provision that deals with the voluntary transfer of incorporation. Section 82 provides that:

1. An incorporated association may apply to the Registrar-General for permission to apply for registration of the association under the Corporations Law as a company limited by guarantee.

2. The Registrar-General shall give an incorporated association permission to apply for registration of the association under the Corporations Law as a company limited by guarantee – if

    (a) the association has, by special resolution, resolved to apply for registration of the association under that Law as a company limited by guarantee; and

    (b) an application lodged with the Registrar-General by the association pursuant to subsection (1) –

        (i) is in the approved form;

        (ii) is signed by the public officer and 2 members of the committee of the association;

        (iii) is accompanied by prescribed documents; and

        (iv) includes a statement to the effect that the special resolution referred to in paragraph (a) has been duly passed by the association.

Involuntary transfer of incorporation, on the other hand, is dealt with by section 82. Section 82 provides that:

1. Where the Registrar-General is satisfied that the continued incorporation of an association under this Act would be inappropriate or inconvenient because of the Registrar-General's assessment of –

    (a) The scale or nature of the activities of the association;

    (b) The value or nature of the property of the association;

    (c) The extent or nature of the association's dealings with persons who are not members or applicants for membership of the association;

    the Registrar-General may –

    (d) serve a notice on the association; and

    (e) publish a notice in relation to the association in a newspaper circulating generally within the Territory.

2. A notice referred to in paragraphs 1(d) and (e) shall –

    (a) Contain a statement to the effect that the incorporation of the association will be cancelled in accordance with this section unless, within 2 months of the date on which the notice was served or published, whichever is the later, the association –

        (i) obtains the Registrar-General's permission to apply for registration of the association under the Corporations Law as a company limited by guarantee; or

        (ii) by special resolution, resolves to implement an arrangement that, if approved of by the Registrar-General, will preserve the continued incorporation of the association under this Act; and...

THRESHOLDS FOR FORCED TRANSFERS

New South Wales

In New South Wales there is no official legal cut off point whereby an association must transfer to the Federal Corporations regime. Whilst there are examples of an association under the NSW legislation being forced to transfer to the Federal scheme, this has occurred only in extreme cases. Ultimately, the power conferred by the legislation is entirely discretionary.

There are no set guidelines used to determine whether an application to transfer to the Federal Scheme will succeed. However, Steven Wood of the Business Registration Branch, stated that each case is considered on its own merits. He indicated that in one instance only assets may be considered, whereas in another it may be a combination of assets and income. Steven provided the ballpark figure of $500,000 as a threshold in a case where assets or income are considered in isolation from one another. However, it was not clear whether a combination of assets and income that exceeded $500,000 would necessarily exceed the threshold.

Section 56(2)(a) refers to the extent or nature of the dealings which the corporation has with the public. Steven suggested that this may mean that if dealings are of a predominantly commercial nature rather than a charitable or sporting etc then the association may be registered under the *Corporations Act 2001*.. However, once again, the determining criteria here are entirely discretionary and there are no set principles (or even guidelines).

Western Australia

In Western Australia, an association must become a company if it no longer meets the eligibility criteria for incorporation as set out in section 4(1) of the *Associations Incorporation Act 1987* (WA) (see above) – for example if it no longer has 5 members or it no longer has a sporting/charitable/educational purpose etc.

Like NSW there are no official thresholds at which point an association is required to become a company. However in WA there is not even a guiding policy and a male officer of the Department of Fair Trading (WA) indicated that in recent weeks a charitable association under the Act had indicated that it had approximately 10 million dollars worth of assets and yet it was still not forced to transfer to the Federal *Corporations Act 2001*.

Australian Capital Territory

The Review Team has not been able to speak to anyone in the ACT in relation to policies or thresholds and there is nothing in the regulations that deals with this.

However, it is clear that the ACT and NSW legislative provisions are quite similar, and it would not be surprising if the two used approximately the same criteria to determine whether an association should transfer to the Federal regime.

EFFECT OF TRANSFER ON CONTINUITY

New South Wales

Section 57 of the *Associations Incorporations Act* 1984 (NSW) discusses the effect of a transfer to the *Corporation Act* or the *Co-operatives Act* 1992, upon the rights and liabilities of the transferring association. Section 57(3) provides as follows:

The transfer of incorporation by an incorporated association does not affect the identity of the association which shall be deemed to be the same body before and after the transfer of incorporation and no act, matter or thing shall be affected or abated by the transfer of incorporation and, in particular, any claim by or against the association subsisting immediately before the transfer of incorporation may be continued by or against the company or society formed by the transfer of incorporation in the name of the incorporated association or commenced by or against the company or society so formed in the name of the company or society.

The case *Gray v Australian Cancer Foundation for Medical Research* Estate Harold Boardman (No 2) [1999] NSWSC 725 is also relevant as it discusses the operation of this provision. In this instance, Justice Young held that:

“The matter is, however, quite clear in respect of an association originally incorporated under the Associations Incorporation Act 1984 (NSW) as s 57(3) of that Act specifies that the registration does not change the body’s identity.”

Clearly therefore the transfer does not effect the continuity of the association, and the company under the Federal scheme is deemed to have the same legal identity as the association under the State scheme.

Western Australia

Section 34(3) of the *Associations Incorporation Act 1987* (WA) deals with the effect of the transfer of status from an association to a company.

3 On the publication of an order under subsection (2) –

(a) the incorporated association is dissolved;

(b) the property of the association becomes the property of the body corporate referred to in the order; and

(c) the rights and liabilities of the association (whether certain or contingent) become rights and liabilities of the body corporate referred to in the order.

As in the case of NSW, this legislative provision indicates that the liabilities and rights of the association continue after its transfer to the Federal legislative regime.

Australian Capital Territory

Section 86 of the *Associations Incorporation Act 1991* (ACT) deals with the effect that transfer has upon the continuity of associations in the ACT. Section 86 states:

Upon the cancellation pursuant to section 85 of the incorporation of an association (in this section referred to as the "former association") that has been registered as a company –

(a) this Act ceases to apply in relation to the former association;

(b) the body corporate previously constituted by the former association shall be taken to be subsumed in the body corporate constituted by the company;

(c) any property or proprietary or other rights that were, immediately before the cancellation, vested in the former association shall be taken, subject to any trust affecting the property or part of it, to be vested in, and may be exercised or enforced by, the company;

(d) any liability, obligation or penalty that could have been enforced against or recovered from the former association immediately before the cancellation is enforceable against or recoverable from the company; and

(e) any investigation, legal proceeding or remedy that could, immediately before the cancellation, have been instituted, continued or enforced against the former association may be instituted, continued or enforced against the company.

Once again, the legislative scheme ensures that the legal identity of the association under the State scheme continues after transfer to the Federal scheme.

ATTACHMENT I – TRANSFER OF FINANCIAL INSTITUTIONS TO CORPORATIONS ACT UNDER SCHEDULE 4 TO THE CORPORATIONS ACT

OVERVIEW OF THE ACT

The purpose of Schedule 3 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1)* 1999 is to add to the Corporations Law a new Schedule 4.

The new Schedule 4 provides for the registration of financial institutions and friendly societies as companies and regulation of those entities under the Corporations Law by the Australian Securities and Investments Commission ("**ASIC**"). Schedule 4 also provides that registration of the transferring financial institutions under their previous governing legislation in the States and Territories is cancelled, and no new registrations under such legislation is permitted.

PART 2 – TRANSFER TO CORPORATIONS LAW REGISTRATION

Part 2 of Schedule 4 contains provisions regarding the transfer of entities to registration under the Corporations Law. The Part is Divided into Division 1, dealing with the transfer process, and Division 2 which deals with the consequences of the transfer.

Division 1 – The Transfer Process

Division 1 of Part 2 contains sections dealing with the process of registering transferring financial institutions as companies under the Corporations Law and other related administrative processes.

Section 3 Registration of transferring financial institution as company

Section 3 is a key provision of Schedule 4. It provides for the registration of transferring financial institutions as a company. Section 3 provides as follows:

3(1) Provides that every transferring financial institution of this jurisdiction is taken to be registered under the Corporations Law of this jurisdiction on the transfer date. The name remains the same.

3(2) Makes it clear that even institutions which are, immediately before the transfer date under external administration will become companies pursuant to 3(1).

3(3) There are three types of companies which a transferring financial institution may become on transfer:

- limited by shares;
- limited by shares and guarantee; and
- limited by guarantee.

This section sets out in tabular form a default setting for each kind of transferring financial institution and optional company types. The default settings have been selected with the intention that each class of transferring institution will have a default setting which best fits its structure.

For example, the following is an excerpt of this table from the Act.

Type of company that institution may be registered as

	Type of Institution	**Type of Company**
1	Building society with shares on issue	***** public company limited by shares and by guarantee public company limited by shares
2	Building society with no shares on issue	***** public company limited by guarantee. public company limited by shares and

		by guarantee public company limited by shares.

In the case of a Building society with shares on issue, the default setting would be a public company limited by shares and by guarantee. However, the society would have the option to become a public company limited by shares. In a Building society with no shares on issue the default setting would be a public company limited by guarantee. However, the society would have the option either to elect to become a public company limited by shares and by guarantee or a public company limited by shares.

3(4) Entities which do not wish to be registered as the company type specified in the default setting are entitled to elect any available company types under 3(3). This election must be agreed to by a resolution of the board of the institution, and is to be made by written notice to ASIC at least 7 days before the transfer date.

Note: Part 2B.7 of the Corporations Law includes facilities for companies to change type at any time by following various procedures . However, there are some limitations upon this.

3(5) Provides that, if a transferring financial institution does not make an election, it will be taken to be registered as the default company type specified in subsection 3(3), unless there is a regulation providing for the contrary.

Section 4 Documents to be lodged with ASIC by SSA

This section deals with the documents that must be lodged with ASIC following the transfer.

The State Supervising Authority (SSA) must transfer certain records and information about transferring financial institutions so that if can be recorded on the relevant part of ASICs information system. These documents are the name and registered office of each transferring financial institution under the previous Code immediately prior to the transfer date must be provided, together with a copy of the institutions rules in force at the time, and a copy of any entry in its register of charges.

If the institution is in external administration the SSA must give ASIC a notice setting out the type of administration and any other details prescribed in the regulations.

Section 5 Documents to be lodged with ASIC by transferring financial institution

Section 5 provides that transferring financial institutions must lodge a notice with ASIC in the prescribed form, within one month of the transfer date, setting out the personal details of directors and secretaries of the institution. Failure to comply with this provision is an offence. The personal details required are those required as if under section 242 of the Corporations Law being:

- given and family names;
- all former given and family names;
- date and place of birth; and
- address.

Section 6 Company to set up registers and minute books

Section 6 contains requirements relating to the establishment by transferring financial institutions of registers and minute books for the purposes of the Corporations Law.

Within 14 days of the transfer entities must set up:

- registers of members, debenture holders and option holders required by section 168 of the Corporations Law;
- registers of charges required by section 271 of the Corporations Law; and
- the minute books required by section 251A of the Corporations Law.

During the 14 days period for setting up the registers (etc.) 6(2) provides that entities need to comply with any request to allow a person to inspect and make copies of various registers and minute books.

Section 7 ASIC to complete formalities of registration

7(1) Provides that ASIC must take certain steps as soon as practicable after the transfer date to formally register transferring financial institutions under the Corporations Law.

This includes giving the company an ACN, keeping a record of the company's registration, issuing a certificate to the company stating the name, ACN etc.

7(2) Gives ASIC the power to change the company's name so that it includes the required words by altering the company's registration in case where the company is registered with a name that does not include Limited, or Proprietary Limited and in not exempt from this requirement.

Section 8 Registration of registered bodies

Section 8 provides that if a registered body becomes registered as a company under section 3 it ceases to be a registered body and ASIC must remove the body's name from the appropriate register.

Division 2 – The Consequences Of The Transfer

Division 2 comprises four subdivisions relating to the consequences of the transfer. Subdivision A contains some general provision. Subdivision B deals with the consequences for members and membership. Subdivision C deals with how share capital is to be treated. Subdivision D deals with charges over the property of Transferring Financial Institutions.

Subdivision A – General

Section 9 Effect of registration under clause 3

The purpose of section 9 is to clarify certain matters in connection with the transfer of entities registration to the Corporations Law.

9(1) Provides that registration as a company does not create any new legal institution or affect any of the institutions rights or obligations (except as members in their capacity as members). Legal proceedings are not affected by the transfer.

9(2) This provision carries forward many of the features that the institution had immediately before transfer. All members of the transferring institution immediately prior to the transfer become members of the company following the transfer. Similarly directors and secretaries continue to hold office following the transfer and the registered office of the institution becomes the registered office of the company. The rules as in force immediately before the transfer date become the company's constitution.

9(4) The standard set of replaceable rules described in section 135 of the Corporations Law does not apply to transferring financial institutions until such time as they choose to repeal their constitution.

Section 10 Provisions applying to company limited by shares and by guarantee

Some transferring financial institutions will be taken to be registered as companies limited by share and guarantee. This section makes section 1416 of the Corporations Law applicable to those companies so that provisions which that section preserves for the purposes of the grandfathered companies limited by shares and guarantee will also apply to transferring financial institutions which are taken to be registered as that company type.

Section 11 Transferring financial institution under external administration

This section applies to transferring financial institutions in the course of external administration proceedings at the transfer date.

Subdivision B – Membership

Subdivision B contains rules about how the various forms of membership of transferring financial institutions are translated when the entities become companies under the Corporations Law. There is a separate section for each company type a transferring institution may become.

Section 12 Institution becoming a company limited by shares

If an institution is becoming a company limited by shares, section 12 applies.

12(1)(a) Any shares in the institution on issue immediately before the transfer date (other than withdrawable shares) become shares of the company.

12(1)(b) Any withdrawable shares become redeemable preference shares.

Some transferring financial institutions which become companies limited by shares may have may have members who do not hold shares. It is a fundamental principle of company law that members of companies limited by shares alone hold at least one share. It is thus necessary to make provision for the issue to those person with a share in the company.

12(1)(c) In the case of building societies, each person who was a member immediately prior to the transfer date, other than by virtue of only holding shares in the company, is taken to have been issued with a membership share on the transfer date.

12(1)(d) In any case other than that of a building society persons who were members immediately prior to the transfer date and who did not hold any shares are taken to have been issued with a membership share in the company on the transfer date.

Membership shares are described in 12(3). They do not have any paid or unpaid amount attached to them, are personal to the member and are not capable of transfer, can be cancelled in the same circumstances that a member can be cancelled.

Section 13 Institution becoming a company limited by guarantee

If an institution is becoming a company limited by guarantee, section 13 applies. Companies limited by guarantee alone do not issue shares, but all members guarantee to contribute a certain amount in the event the company is wound up.

Section 13 provides that each person who was a member of a transferring financial institution immediately prior to the transfer date is taken to have given a guarantee. However this is only for the purpose of ensuring that members have status of a member of the company. Section 16 ensures that even if members have provided a guarantee that they are not liable to contribute to the company if it is wound up.

Section 14 Institution becoming a company limited by shares and guarantee.

If an institution is becoming a company limited by shares and guarantee, section 14 applies. The primary membership vehicle in such companies is the guarantee since all the members are required to provide the guarantee. This section is essentially the same as section 13, except for the additional sub-sections which provides that any shares before the transfer date become shares of the company and any withdrawable shares become redeemable preference shares of the company.

Section 15 Redeemable preference shares that were withdrawable shares

This sections provisions of the Corporations Law dealing with redeemable preference shares apply to redeemable preference shares that were withdrawable shares except that the share is redeemable on the same terms that the withdrawable share was withdrawable and the holder of the redeemable preference share continues to have the same rights and obligations that they had by holding the withdrawable share.

Section 16 Liability of members on winding up

The Corporations Law provides that members and past members of companies may be liable to contribute to the property of the company in the event the company is wound up. The object of section 16 is to clarify the position of certain members and past members of transferring financial institutions.

16(1) It provides that persons who ceased to be members of transferring financial institutions prior to the transfer date who had not held shares in the institution are not liable to contribute under the provisions.

16(2) Excludes the liability of persons under guarantees which they are taken to have given because they are, or become members of transferring financial institutions before the amount of the guarantee is determined. Persons who are taken to have given a guarantee under 13(1) or 14(1) are not liable under the provisions dealing with the liability of contributories generally, members of companies limited by guarantee, or members of companies limited by shares and guarantee merely because of the guarantee they were taken to have given. Such persons may be liable to contribute for other reasons.

Subdivision C – Share Capital

Subdivision C contains rules about how the share capital of the transferring financial institutions is to be treated, since those entities are transferring from a regulatory framework which will, on the transfer date, still recognise the par value concept.

Subdivision D – Charges

Under section 4, ASIC receives from SSAs details of charges over the property of transferring financial institutions which have been registered under the previous governing Codes. Subdivision D contains rules to preserve registered status of pre-existing charges following the transfer to Corporations Law.

Section 21 Registration of prior charges

The purpose of this section is to provide for a deeming mechanism which will, in combination with subsection 165(3) of the Corporations law ensure that charges registered under the previous governing Codes will be taken to have been registered under the Corporations Law from the time that they were lodged under the previous law.

21(1) If immediately before the transfer date a charge on property of a transferring financial institution was registered under 265 of the Corporations Law, ASIC is taken to have entered in the Australia Register of Company Charges the time, date and particulars entered in the register under the previous governing code.

PART 3 –TERMINATING THE APPLICATION OF THE CODES TO FINANCIAL INSTITUTIONS AND FRIENDLY SOCIETIES

Sections 22 and 23 ensure that after the transfer date the transferring financial institutions will no longer be subject to their previous governing Codes except insofar as transitional and savings provisions apply.

Section 22 Cancellation of Code registrations

Provides that, on the transfer date, the registration of each transferring financial institution under the relevant previous governing Code is cancelled.

Section 23 No new registrations under the Codes

Provides that after the transfer date, no more entities may be registered under the Codes.

PART 4 – THE TRANSITION PERIOD

The mechanism provided for in Schedule 4 is intended to provide for a simultaneous transfer of entities on the transfer date, with the least possible disturbance and cost for the entities concerned. However, the transition to the Corporations Law regulatory framework as companies, will involve some steps to be taken by the transferring financial institutions.

In particular, entities will be required to make some changes to their own constitutions to recognise the relevant form of membership vehicle (shares and/or guarantee). Part 4 provides for an 18 month transition period during which transferring financial institutions can take the required steps to modify their constitutions.

The situation is addressed in three ways:

1 During the transitional period there is a regulation making power which can be used to modify the operation of the Corporations Law as it applies to classes of transferring financial institutions or individual entities.

2 ASIC has powers to make orders which modify or exempt individual or classes of transferring financial institutions from compliance with parts of the Corporations Law.

3 The Court is given power to resolve transitional difficulties arising out of the application of the Corporations Law to transferring institutions, and the Courts orders have effect not withstanding the provisions of the Corporations Law.

Section 24 Modifications of constitution

24(1) Imposes a requirement on transferring institutions to modify their constitutions within the 18 month transition

period so that they:

- give effect to schedule 4;
- are consistent with the Corporations Law; and
- set out the rights and obligations attaching to each class of share, including shares that are taken to be issued pursuant to other provisions of the Schedule.

24(2) This section expressly clarifies that transferring financial institutions which have taken to have issued membership shares under section 12 may, rather than merely recognising those shares in its constitution:

- modify its constitution to change the rights and obligations attaching to any membership share on issue; or
- cancel any such shares and not provide for them in the constitution at all.

Section 25 ASIC may direct directors of company to modify its constitution

If a transferring financial institution does not comply with section 24(1) by making the required changes to its constitution by the end of the 18 month transition period, 25(1) gives ASIC power to direct that the institution take necessary or specified steps to modify its constitutions so that it does comply, or make such modifications as ASIC specifies, within a time limit which must be more than 28 days.

Failure to comply with such a direction amounts to a contravention, intentional or reckless contravention can result in 2 years imprisonment or 100 penalty units or both.

25(2) Permits the directors of a transferring financial institution to request ASIC to issue a direction prior to the end of the transition period so that they can take steps to make the required changes in accordance with the direction.

25(3) Excludes civil and criminal liability for actions taken by a director in accordance with such a direction.

Section 26 ASIC's power to make exemption and modification orders for the transition period

Under this section ASIC is given powers to make orders about how the Corporations Law and regulations apply to transferring financial institutions during the transitional period. The type of orders that may be made include (but are not limited to):

- orders which modify or omit various procedural requirements to permit entities to make changes to their membership structures to comply with the Corporations Law; and
- orders which relax or vary various other requirements which it would not be appropriate or necessary to immediately apply to transferring financial institutions.

Section 27 When certain modifications of a company's constitution under an exemption or declaration take effect

Although ASIC is given wide powers under section 26 to make orders to relax procedural requirements, in the case of modifications to company constitutions section 27 imposes another set of requirements that apply even if ASIC, by way of an exemption or modification order, overrides the usual provisions.

27(1) If a constitution is modified under an exemption or declaration made under section 26 and that modification varies or cancels, or allows the variation or cancellation of rights attached to shares in a class of shares, or rights of members in a class of members the following provisions apply.

27(2) Requires the company to lodge a copy of the modification with ASIC within 14 days of it being made.

27(3) If there is not agreement on the modification, or the members did not have an opportunity to vote or consent to the modification 10% or more of the members in the class may apply to the Court to have the modification set aside. The Court may set aside the modification if it is satisfied that it would unfairly prejudice the applications (27(7)).

27(5) Modification takes effect: if no application is made to the Court to have it set aside – 1 month after it is lodged. If an application is made to the Court to have it set aside – when the application is withdrawn or finally determined.

Section 28 Modification by regulations for the transition period

Section 28 allows regulations to be made which modify the operation of the Corporations Law (including the regulations made under it) with respect to individual transferring financial institutions or a specified class of those entities. These regulations may not create an offence with a penalty greater than 10 penalty units, increase the penalty for an existing offence, substitute for an existing offence an offence with a penalty greater than the penalty for the exiting offence, modify an obligation, contravention of which will result in committing an offence so as to make it more difficult to comply with.

PART 5 – DEMUTUALISATIONS

Many transferring financial institutions have a membership structure which is commonly described as mutual. Some characteristics commonly found in such organisations are:

- the organisation provides services only to its own members;
- members each have one vote; and
- members share equally in profits and/or rights to surplus reserves on winding up.

Part 5 establishes disclosure requirement to ensure that members are fully informed so they can make a sound judgement about whether the demutualisation proposal is in their best interests; and includes a prohibition on unconscionable and/or misleading and deceptive conduct relating to demutualisation, and various civil remedies and other enforcement mechanisms relating to the prohibition.

The requirements of Part 5 only apply to transferring financial institutions which do not have voting shares listed on a stock exchange, because such entities would not be mutual in character. Further, if ASIC is satisfied that a transferring financial institution does not have a mutual structure, it may exempt that company from the operation of the part.

PART 6 – CONTINUED APPLICATION OF FUNDRAISING PROVISIONS OF THE FRIENDLY SOCIETY CODE

Currently friendly societies which offers benefits in a benefit fund are subject to the disclosure obligations contained in the Friendly Societies Code. The disclosure obligations applying to an offer of a benefit in a friendly society benefit fund is to be transferred to the Corporations Law. Part 6 incorporates the relevant provisions of the Friendly Societies code into the Corporations Law.

PART 7 – TRANSITIONAL PROVISIONS

Part 7 contains provisions about how unclaimed money and other property relating to transferring financial institutions under the previous governing Codes is to be dealt with and regulations that may be made to deal with other transitional issues arising out of the application of the Corporations Law to transferring financial institutions.

Section 37 Unclaimed money

The unclaimed money provisions of the Corporations Law will apply without modification to unclaimed monies which arise after the transfer date and will be paid to ASIC in accordance with the usual Corporations Law procedures. Unclaimed monies which are paid to State or Territory authorities prior to the transfer will remain with those authorities or will be dealt with under the relevant State or Territory laws.

Section 38 Modifications by regulations

In addition to the power of section 28 which permits modifications to the Corporations Law in relation to transferring financial institutions during the transitional period, section 38 permits ongoing modifications to be made in relation to specified subject matters not only in respect of those institutions but also other classes of institutions engaged in financial business.

This power may be used to make modifications to the Corporations Law necessary or desirable due to the nature of the business of the entities concerned, their particular membership structure, or due to interaction with other regulations of the applying to institutions of a particular class.

Section 39 Regulations may deal with transitional, saving or application matters

39(1) Provides for a broad-based regulation making power to deal with matters of a transitional, application and saving nature connected with the transfer of financial institutions to the Corporations Law framework, or the consequential amendments to the Corporations Law made by this Bill.

Section 40 Court may resolve transitional difficulties

If notwithstanding the powers to modify the operation of the Corporations Law under regulations and ASIC administrative powers, transitional difficulties do arise, interested parties may apply to the Court under section 40 for an order to remove the difficulty. 40(2) provides that any such order has effect notwithstanding a provision of the Corporations Law.

APPENDIX E

REVIEW OF THE

ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976

CONSULTATION PAPER

JANUARY 2002

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REVIEW OF THE

ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976

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CONTENTS

A. INTRODUCTION/SUMMARY

Purpose of the Consultation Paper

The purpose of this Consultation Paper is:

1

- **to provide background information on the need for change to the ACA Act and outline the major issues for reform; and**
- **to get feedback on some key policy issues which will steer changes to the ACA Act.**

1 The Office of the Registrar of Aboriginal Corporations ("**ORAC**") started a review of the *Aboriginal Councils and Associations Act 1976* (Cth) ("**the ACA Act**") in late 2000. There are two stages to this review.

- The objective of the first stage of the review is to settle some broad principles for reform. These broad principles will then drive the second stage.
- The second stage will involve developing the technical details of the reform.

2 This Consultation Paper has been developed as the last step in the first stage of settling the broad principles for reform.

3 ORAC has been working with a government Steering Committee, which has provided input to the review, and which also provided some of the direction for this Consultation Paper. The Steering Committee includes representatives of the following:

- ORAC;
- The Office of the Minister for Immigration, Multicultural and Indigenous Affairs;
- The Aboriginal and Torres Strait Islander Commission ("**ATSIC**") – including a representative from each of the ATSIC Board, the ATSIC Legal Office, and ATSIC Executive;
- The Office of Aboriginal and Torres Strait Islander Affairs ("**OATSIA**" – formerly the Department for Reconciliation and Aboriginal and Torres Strait Islander Affairs, now part of the Department of Immigration, Multicultural and Indigenous Affairs, or "**DIMIA**");
- The Australian Securities and Investment Commission ("**ASIC**"); and
- The former Parliamentary Secretary to the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, the Honourable Chris Gallus MP,

also participated in some Steering Committee meetings. (There is currently no Parliamentary Secretary in the Indigenous Affairs Portfolio).

4 ORAC held a workshop in Alice Springs on 3 and 4 May 2001 with a number of ACA Act corporations and peak Indigenous bodies. In addition to this, separate visits and consultations with a range of ACA Act corporations took place following the workshop. This paper has also taken into account consultations undertaken in the course of previous reviews of the ACA Act, such as the Fingleton Review.

5 The Steering Committee members and the organisations with which consultations have taken place, agree in general terms on most of the key issues for reform of the Act. However, there are also a couple of very important issues which have not yet been settled. It was therefore decided that further consultation is necessary on those issues.

Outline of key issues

Settled Issues

6 As noted above, a number of the key issues for reform are generally agreed on, although there may still be some scope for discussion over the detail of how they will be implemented (which will be the second stage of the review). These include the following:

- The need to adopt a flexible approach to the corporations' rules and the design of corporations, and remove requirements for the rules to be scrutinised and approved by the Registrar under vague, arbitrary and restrictive criteria;

- Changing the emphasis in the ACA Act of the Registrar's role from "punitive" regulation to assistance and capacity building, and providing a role in mediating disputes;

- Increasing consistency with the *Corporations Act 2001 (Cth)* ("**the Corporations Act**") and modern corporate philosophy in key areas, such as:

  (i) the validation of technically invalid meetings, ratification of technically invalid decisions, and providing certainty to third party contracts which might otherwise be invalid because of technical non-compliance with the corporation's rules;

  (ii) extending directors duties to management and updating the statement of directors duties, and

  (iii) members' remedies;

- Simplifying/streamlining financial and other reporting requirements, and providing exemptions;

- Limiting membership to Indigenous natural persons (ie no non-Indigenous members or corporate members);

- Repealing Part III of the Act (Councils);

- Addressing a range of technical difficulties with the Act which currently affect the workability of the Act and disadvantage Indigenous corporations.

7 These issues are all explained and discussed in Part C of this Paper.

Issues to be settled

8 In addition to the "settled" issues outlined above, there are two fundamental questions which have not been settled. These are:

- Whether there is a need for a separate general statute of incorporation for Indigenous corporations, or whether Indigenous corporations should just use the Corporations Act or the various State and Territory association incorporation statutes ("**the State Association Incorporation Acts**"); and

- If there *is* a need for a separate specific Act for Indigenous corporations, whether it should just be limited to small, simple corporations; and large, complex corporations should incorporate under the Corporations Act.

9 These two issues will potentially have a major impact on the reform process. They are discussed in more detail in Part D of this Paper.

10 To help illustrate the ways in which these issues could affect the reform process, three example models are set out in Part E.

Where to from here?

11 An outline for the process for further consultation following this Paper, and leading up to the development of a draft bill, is set out in Part F.

B. THE NEED FOR REFORM

Original purpose of the ACA Act

12 The ACA Act was enacted to provide a simple and "culturally appropriate" way for Indigenous Australians to set up corporations. One of the driving forces behind the creation of the ACA Act in 1976 was the need for access to corporations, to enable Indigenous groups to hold land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Changing circumstances

13 A lot has changed since the ACA Act was put in place in 1976. Some of the key changes are outlined below.

Increased diversity in purposes of incorporation and corporation types

14 There are now many reasons why Indigenous people set up corporations, such as:

- to provide government services, such as health, housing, CDEP, legal services, and native title services;
- to hold land granted under land rights legislation or under native title;
- to run businesses;
- for cultural, sporting or social activities;
- for native title claims;
- to promote and represent the interests of their family, clan or tribe.

15 These corporations vary in size and complexity, from small unfunded corporations holding land, to large multimillion dollar corporations delivering a range of government and other services.

Change in Government policy in Indigenous service delivery

16 There has been a major shift in Government policy on Indigenous issues since 1976. One of the fundamental changes, which has had a major impact on the ACA Act, is the emphasis on delivery of government services to Indigenous communities through the funding of Indigenous corporations.

Change in position of Indigenous people in Australian society

17 The position of Indigenous people in Australian society has changed since 1976, in a number of complex and subtle ways. Significant events influencing this change have included the establishment of ATSIC, and the High Court's *Mabo* decision and the *Native Title Act 1993* (Cth). The *Racial Discrimination Act 1975* (Cth), which came into place just before the ACA Act, has also had a significant impact since 1976. As a consequence,

many aspects of ACA Act could be regarded as paternalistic and are simply not appropriate for Indigenous society today.

Change in fundamentals of company law

18 Many key aspects of company law have changed since 1976, including a number on which the ACA Act was based. The Corporations Act has undergone significant and continuous change in that time.

Problems with the ACA Act

19 While the ACA Act was originally intended as a special measure to assist Indigenous people, it has not kept up with the changing circumstances outlined above. In its current form, the ACA Act provides only limited benefits and suffers from many problems which prevent the ACA Act from properly meeting contemporary indigenous needs. Some may even argue that the ACA Act in fact disadvantages Indigenous people, particularly when compared with other modern incorporation statutes such as the Corporations Act and the State Association Incorporation Acts.

20 Some of the main problems with the ACA Act are outlined below.

The ACA Act is incapable of accommodating a broad range of corporations

21 The ACA Act is not flexible enough or properly designed to accommodate all the different kinds of corporation (in terms of purpose, size and function) that are set up under it

The ACA Act fails to promote accountability and good corporate governance

22 With the shift to delivery of government services by Indigenous corporations, there has been an increased emphasis by government on the need for "accountability". That resulted in some changes to the Act in 1992, which increased corporate reporting requirements and placed more emphasis on the Registrar adopting a "policing" role. The ACA Act has also been criticised for failing to in fact achieve increased "accountability". This failure is arguably in part because of the inflexible approach to corporations' rules, and in part because the largely "punitive" approach in the Act to non-compliance has resulted in corporations simply being shut down, rather than encouraging good corporate governance practices. It is also arguably a result of misplaced emphasis on the ACA Act as a means for delivering accountability to ACA Act corporations' creditors.

The ACA Act is overly complex and onerous for some corporations

23 Some of the changes aimed at increasing financial accountability have resulted in the ACA Act becoming complex and difficult for small corporations in particular to use. This problem is in part caused by the fact that the Act adopts a "one size fits all" approach for the diverse range of corporations incorporated under it. For example, the reporting requirements under the ACA Act are more onerous than those imposed on small proprietary companies under the Corporations Act.

The ACA Act is inflexible, culturally inappropriate and results in inappropriate corporations

24 The ACA Act as originally drafted arguably adopts what would now be regarded as a paternalistic approach to Indigenous corporations. This is particularly the case with the requirement for scrutiny and approval of corporate rules by the Registrar, and the criteria which the Registrar is required to apply.

25 At present, the Registrar is required to assess all proposed corporation rules and proposed amendments to rules, and must refuse to incorporate the corporation or make the amendments if the proposal or actual rules are:

- unreasonable or inequitable; or
- do not provide sufficiently for effective control over the running of the corporation by members through annual general meetings ("**AGMs**").

26 The general nature of these terms, and the obligation on the Registrar to refuse to register the rules if not satisfied these requirements are met, has meant that the Registrar has had to take a fairly limited view of what rules are acceptable. Although the ACA Act was originally intended to be "culturally appropriate" by allowing rules to operate by reference to "Aboriginal custom" (both problematic terms), the inflexibility of these requirements mean that the ACA Act is arguably in fact culturally *inappropriate*. For example:

(a) It has meant that the Registrar has had to require some detail about the content of the "Aboriginal custom" in question. This causes numerous problems, partly because it may be impossible to reduce a complex and dynamic oral system of beliefs, laws and practices to writing; but also because it may be contrary to that very "Aboriginal custom" to record it and make it publicly available.

(b) There are also questions about what concepts such as "Aboriginal custom" actually mean. This is currently a hotly debated issue in Australian courts and academic circles, with a great deal of uncertainty surrounding it.

(c) And finally, the requirements of the ACA Act mean that if the relevant "Aboriginal custom" could be perceived as "unreasonable or inequitable" by *Western* cultural standards, or does not provide for "effective control" by members through AGMs, the Registrar is effectively obliged to refuse to incorporate the corporation. This would seem to completely defeat the purpose.

27 This has serious practical implications, because it means that the ACA Act does not provide the flexibility for Indigenous groups to establish a range of tailored corporate structures that may encourage good corporate governance. It may also undermine the legitimacy of Indigenous corporations in the eyes of their members.

The ACA Act suffers from serious shortcomings in key areas of company law

28 There are several key areas of company law in which the ACA Act suffers from major shortcomings. These mean that the ACA Act arguably seriously disadvantages Indigenous corporations incorporated under it (as opposed to those incorporated under other laws). These issues are discussed in more detail in the next chapter.

The ACA Act suffers from a range of technical problems

29 There are also a number of technical problems with the ACA Act which prevent it from operating effectively and efficiently. These technical problems further disadvantage Indigenous corporations incorporated under the ACA Act.

The ACA Act is incompatible with Native Title Act requirements

30 As a final point, the ACA Act is currently incompatible (in different ways) with the requirements for Native Title Representative Bodies ("**NTRBs**") and Prescribed Bodies Corporate ("**PBCs**") contained in the *Native Title Act 1993 (Cth)* ("**the Native Title Act**") and Regulations, which are both required to be incorporated under the ACA Act by the Native Title Act and Regulations.

Purpose of reform

31 This Paper proposes changes to the ACA Act, to address the problems outlined above. The purpose of the reform can therefore be summarised as follows:

- to ensure Indigenous people are able to set up corporations for the broad range of purposes they require (and may require in the future), and in a way which is suitable to their circumstances;
- to better address root issues of non-compliance with appropriate accountability requirements, and actively develop and encourage good corporate governance in Indigenous corporations through an emphasis on capacity-building;
- to provide the flexibility to enable Indigenous people to establish appropriate corporate structures suited to their particular circumstances, and which encourage good corporate governance and internal accountability to members;
- to enable Indigenous corporations to act more effectively and with greater certainty in transactions with other parties;
- to ensure there are no unnecessary technical impediments to the effective operation of Indigenous corporations; and
- to ensure the ACA Act is not incompatible with requirements for NTRBs and PBCs.

C. "SETTLED" ISSUES

32 During the course of the review, a range of key policy issues were raised and assessed. Having considered those issues and the results of consultation undertaken, ORAC and the Steering Committee have agreed on a number of central issues which will drive the reform process. Most of these are non-controversial. The reasons behind ORAC and the Steering Committee's decisions on these issues are explained in this section.

33 It should be noted that while the general nature of these issues has been settled, there is still scope for flexibility in the details of how various proposals are implemented.

Adopting a permissive/flexible approach to rules and corporate design

34 As noted above, one of the major criticisms of the ACA Act as it currently operates is the inflexible approach it takes to the design of corporate rules. There is a little room for discretion, and the approach by different Registrars has varied. In the past it has been very narrow and restrictive. And although a more flexible approach has been adopted by the current Acting Registrar and his immediate predecessor, the scope for the Registrar to introduce more flexibility is still very limited by the ACA Act, and the Act itself remains highly inflexible.

35 There are a number of important reasons for changing this, which are outlined below.

Allowing diversity in types of corporation

36 As noted earlier in this Paper, the range of purposes for which Indigenous people want and need to establish corporations has expanded dramatically since the ACA Act was enacted, and in ways not foreseen at the time. The inflexibility of, and restrictions in, the ACA Act make it difficult to establish corporations which can meet all these diverse requirements. Making the Act more flexible would enable that to happen, by allowing Indigenous corporations to structure their rules in ways which are specifically suited to their functions and purposes.

Allowing and encouraging more appropriate corporate rules

37 The inflexible approach in the Act has also limited the capacity of Indigenous groups to design corporate rules which are appropriate for their circumstances.

38 If a flexible approach to corporations' rules were adopted, there would be no need for an express reference to the problematic concept of "Aboriginal custom". Indigenous people would instead be free to adopt rules suited to their particular circumstances – whether the rules were derived from their "customary" processes or not. (This is also more consistent with modern corporate philosophy, as discussed in paragraphs 47-49 below.)

39 By allowing the incorporation of corporations with rules which are more appropriate to the specific circumstances of particular groups, the Act is likely to encourage corporations that enjoy a higher degree of legitimacy in Indigenous society, which should also encourage better corporate governance (it will also allow for structures designed to improve corporate

governance). That in turn should result in corporations which are more accountable to both members and external credit providers.

40 The inflexible approach in the Act as it stands strangles innovation aimed at improving the design, and hence performance, of Indigenous corporations.

Increased efficiency and freeing of resources for capacity building

41 The Registrar receives approximately 200 applications for incorporation annually. The requirement on the Registrar to scrutinise all applications and attached rules is highly resource-intensive. In many cases, uncertainty over the nature of the prescriptive requirements and the scope of the Registrar's discretion have obliged the Registrar to seek legal advice. The Registrar has also had to expend resources on correspondence and consultation with applicants.

42 If the prescriptive approach of the Act and the requirement for approval of rules by the Registrar were removed, this would free up significant resources for the Registrar to provide assistance and capacity-building (which are discussed below at paragraphs 50-56).

43 From the perspective of Indigenous groups wanting to establish corporations, this approval process has in the past frequently resulted in frustrating and lengthy delays. It has also often required both the Registrar and the Indigenous group in question to seek expensive legal advice. This position has improved with the more flexible approach taken by the current and previous Acting Registrar, but the underlying inflexibility in the ACA Act itself means that it is still potentially a significant problem. This is a major deficiency in an incorporation statute.

44 A more flexible approach by the ACA Act, without a requirement for approval of rules by the Registrar, would greatly increase the efficiency of the administration of the ACA Act.

Addressing current problems with PBCs and NTRBs

45 The *Native Title (Prescribed Body Corporate) Regulations* currently require PBCs to be incorporated under the ACA Act. ATSIC is conducting a separate, detailed review of PBCs, with which this review will need to coordinate. However, a point to note is that adopting a flexible approach to corporations' rules under the ACA Act would go some way to addressing many of the current problems with PBCs.

46 NTRBs are also required to be incorporated under the ACA Act, by section 201B of the *Native Title Act*. The *Native Title Act* itself also imposes statutory functions on NTRBs and contains a number of requirements about how those functions may be performed. Some of those requirements conflict with the prescriptive requirements of the ACA Act (in particular the emphasis placed on control by members through general meetings). This puts NTRBs in an impossible position. A more flexible approach to the requirements for corporations' rules under the ACA Act would also go some way to addressing these problems.

Bringing the Act into line with modern corporate philosophy

47 The philosophy underpinning the Corporations Act is to provide corporations with freedom and flexibility to develop whatever internal arrangements (ie in drafting the corporation's rules) best suit their circumstances. The focus is instead on providing certainty for external relationships and transactions with third parties.

48 This can be contrasted with the prescriptive and inflexible approach to corporations' rules taken under the ACA Act. No other incorporation statute in Australia involves the degree of prescription and scrutiny seen in the ACA Act. Departure from modern corporate philosophy would be acceptable if there were good reasons for doing so. Such reasons may have been perceived to exist at the time the ACA Act was drafted. However, as noted above, the position of Indigenous people in Australian society has changed greatly since 1976. The level of prescription involved in the ACA Act no longer appears to serve any necessary purpose in relation to the contemporary incorporation needs of Indigenous people (if it ever did).

49 Not only is the approach adopted in the ACA Act outdated, it is also paternalistic: Indigenous people are not entrusted with the freedom to develop innovative approaches to their corporations' rules, and must also have their rules scrutinised and approved by an external (government) body.

Changing emphasis of Registrar's role from regulation to assistance and capacity-building

50 Under the ACA Act as it stands, the emphasis of the role of the Registrar is on regulation and policing. This can be seen from the requirement for the Registrar to approve proposed corporations' rules, the relatively detailed reporting requirements, and the high level of enforcement powers provided to the Registrar (including the appointment of administrators). The capacity for the Registrar's office to provide assistance under the Act is currently very narrow, being limited to advice on procedures for incorporation.

51 As noted above, the interventionist regulatory approach required by the ACA Act is outdated. In addition, it is resource-intensive, and has also arguably not been particularly effective. Non-compliance with the Act's complex "accountability" requirements is often in large part because the Indigenous corporations in question simply lack the necessary resources, skills or experience to comply with the requirements. The "punitive" approach to addressing the non-compliance does not address these underlying problems: in the past, administrators were appointed to such corporations, and in some cases they were simply wound up. Either way, the issues are taken out of the hands of the Indigenous people who set up the corporation. The current Acting Registrar has tried to take a less interventionist approach, only appointing administrators as a "last resort", but in some cases is compelled to do so by the ACA Act. Further, the tools provided by the ACA Act with which the Registrar can actually assist corporations in difficulty are very restricted, and there are only very limited resources for doing so.

52 Coupled with other reforms outlined in this Paper, the Steering Committee is of the view that the Registrar's office would be in a much better position to achieve good corporate governance practices and compliance with appropriate accountability/reporting requirements by adopting a facilitative, capacity-building approach to corporate regulation.

53 The assistance and capacity-building the Registrar's Office might be able to provide include some of the following:

- Development of general educational materials for Indigenous people issues such as the difference between the different incorporation statutes, directors' duties, members' rights, AGMs, etc;
- Training for governing committee members on directors' duties, conflicts of interest, corporate governance, etc, possibly including development of a guide to directors' duties, good corporate governance, meeting procedures, etc;
- Advising Indigenous associations on the most suitable incorporation statute for their needs;
- Advising Indigenous associations on corporate design and drafting of rules;
- Developing a database of precedent corporate rules that would be available to assist Indigenous associations develop their own rules;
- Assisting with the running of general meetings;
- Assisting with the conduct of elections for governing committees;
- Mediating and arbitrating disputes between members, between members and governing committee, between governing committee members;
- Assisting Indigenous associations to complete relevant regulatory compliance documents and application forms and to meet relevant statutory reporting requirements.

54 The capacity-building functions of a reformed Registrar's office need not be limited to Indigenous corporations incorporated under the ACA Act, and could be extended to Indigenous corporations incorporated under the Corporations Act or the State Association Incorporation Acts.

55 A more strategic approach by governments and government agencies is needed to address Indigenous governance issues generally, irrespective of the incorporation statute. ORAC is uniquely placed to do this because of its contact and experience with Indigenous corporations as well as with a range of government agencies, which would enable it to work within a whole of government framework (at both Commonwealth and State levels) to support good governance.

56 A shift towards capacity-building would also fit well with current ATSIC Board policy.

More consistency with Corporations Act and modern corporate philosophy in key areas (eg transactional certainty, statement of directors duties, permissive regulation, etc)

57 As discussed in Part B, there have been a number of major changes to core principles of company law in Australia since 1976. The Corporations Act itself is continuously revised and improved, and is a very different piece of legislation from the Company Codes of 1976. The ACA Act has not kept pace, and is now significantly outdated in several key areas.

58 This is not just a question of the ACA Act not keeping up with current "fashions" in academic corporate philosophy: the outdated aspects of the ACA Act in fact seriously disadvantage ACA Act corporations as compared with corporations incorporated under other modern incorporation legislation.

59 Three significant areas where this disadvantage can be demonstrated are discussed below. However, the ACA Act has not kept up with modern company law in a number of other areas as well, such as the approach to regulation and financial reporting. These are discussed elsewhere in this Paper.

Breaches of rules and transactional certainty

60 A major disadvantage of the ACA Act is the absence of processes for addressing breaches of corporation rules, and the effect this shortcoming can have on the validity of actions of the corporation (such as resolutions of Governing Committee meetings), and in particular the potential effect on contracts entered with outside parties.

61 Under the ACA Act, if there is any breach of the corporation's rules – no matter how apparently minor the breach – the resulting action will be invalid or void. That can have very serious consequences for ACA Act corporations and persons dealing with them.

62 For example, if at an Annual General Meeting ("**AGM**") at which a corporation's governing committee members were appointed,

- by mistake, only 13 days notice were provided instead of 14 days required by the rules for an AGM; or
- there was not proper quorum for the meeting,

then the AGM would be invalid, and so would all the governing committee member appointments. That would then have further flow-on effects: any contracts which were then entered into on behalf of the corporation by any of those invalidly appointed governing committee members (for example an ATSIC grant agreement, or a contract to buy a car for the corporation) would also be invalid.

63 For members, this can introduce uncertainty about the position of the corporation – where there is a generally accepted belief that certain governing committee appointments, corporation resolutions or contracts were valid, and they turn out to be void.

64 For third parties dealing with ACA Act corporations, it means that there is little security in entering contracts with ACA Act corporations. For example, if the contract were for a purpose that was outside the corporation's objects (or "*ultra vires*"), it would be void and unenforceable. The same would be the case for a contract executed by a governing committee member who was not properly appointed. This would be a major disincentive for third parties entering contracts with ACA Act corporations.

65 There is anecdotal evidence that a significant percentage of ACA Act corporations regularly fail to comply with a range of technical requirements of their rules (as opposed to requirements of the ACA Act itself). This potentially invalidates a significant number of meetings, appointments, resolutions and transactions. Many small corporations under the Corporations Act have similar difficulties.

66 However, unlike the Corporations Act, the ACA Act unfortunately does not provide for any specific means to address such invalidity. This places ACA Act corporations at a significant disadvantage as compared with Corporations Act corporations.

67 Under the general law, which would apply to ACA Act corporations, there may be some scope for ratification of certain invalid actions. For example, a validly appointed governing committee could probably ratify a contract executed by an invalidly appointed governing committee member, provided that they would otherwise have power to enter the contract (ie that the contract was not illegal, and the purpose of the contract was within the scope of the corporation's objects). However, this is potentially onerous if there are a large number of breaches, and the general law relating to ratification is quite complex.

68 This can be compared with the Corporations Act, under which:

- Contracts with third parties are automatically enforceable against the corporation, even if they were not validly entered from the corporation's perspective, unless the third party was aware of the internal invalidity. This is because a person dealing with a Corporations Act corporation is entitled at law to make certain assumptions that the rules have been complied with, that directors, officers and agents have been duly appointed, etc. This provides transactional certainty in dealing with Corporations Act corporations;

- Certain "procedural irregularities" are automatically validated under the Corporations Act. These "procedural irregularities" include lack of quorum for meetings or defects or deficiencies in notices or time for meetings. However, the validation will not have effect if the Court decides it would cause "substantial injustice" (for example to a minority or individual's rights).

- Other irregularities can be validated by the Court, on application by an interested party. Again, the Court must be satisfied that no substantial injustice is likely to be caused.

Directors' duties

69 The current statements of directors' duties in the ACA Act was inserted in 1992 (based on the 1981 *Companies Codes*), and have not changed since. The Corporations Act has changed significantly since the *Companies Codes*.

70 There are some advantages offered by the more complete approach to directors' duties in the Corporations Act:

(a) The primary issue relates to the scope of directors' duties. In ACA Act corporations, particularly in remote areas, there is often a significant knowledge/power imbalance between Indigenous directors (who are subject to express statutory directors' duties) and management (who are not). Directors duties should therefore be expressly extended to cover senior management, "shadow" directors and the public officer. (The Corporations Act extends directors' duties to a range of duties to "de-facto" and "shadow" directors, as well as "officers" and persons engaged in the management of a corporation generally.) This would allow members and creditors to deal more effectively with any "rogue" senior manager who effectively controls the corporation, and abuses their position.

(b) There may also be some benefits to reformulating the statement of directors' duties to be consistent with the Corporations Act for clarity and certainty. These would include:

(i) the duty of honesty;

(ii) the duty of disclosure and the duty to avoid conflicts of interest and duty (currently only "pecuniary" interests are dealt with under the ACA Act, whereas the Corporations Act extends to "material personal interests");

(iii) the duty of care (the Corporations Act includes the "business judgement rule", which would allow governing committee members to rely on advice from senior management);

(iv) the duty not to trade while insolvent; etc.

71 The exact way in which Corporations-Act-style directors' duties would be introduced, and the details of how they would work is a matter for later consideration.

72 The Steering Committee recognises that there are acknowledged cross-cultural difficulties with the concepts of conflict of interest and Indigenous directors owing fiduciary duties to the corporation as a whole. This is generally because of the primacy of obligations to

family, clan or other group, within the Indigenous cultural and social context, which may conflict with the duties to the corporation as a whole. In light of this, consideration was given to whether directors' duties for Indigenous corporations should be modified or lowered. However, there were no convincing alternatives, and the arguments against doing so are convincing. These include the fact that the purpose of directors' duties is to protect members' (not directors') interests, and that members' interests should not be compromised. Another concern is the risk that lowering directors' duties for Indigenous corporations could encourage a corporate culture of lower managerial standards. It is therefore not recommended that directors' duties be lowered for ACA Act corporations. The preferred alternative is for assistance to be provided to Indigenous directors/governing committee members, where appropriate, to help them understand and perform their duties.

Members' remedies

73 If the ACA Act is to be reformed to change the emphasis on the Registrar's powers from regulation and enforcement (and "protection of members") to education and assistance, there would be a need to better equip members to take action to protect themselves. The Corporations Act provides for a range of members' remedies that may provide appropriate models; and it would be appropriate that members of Indigenous corporations incorporated under the ACA Act should at least be provided with equal protection to that enjoyed by members of corporations incorporated under the Corporations Act. Unfortunately however, the remedies available under the Corporations Act generally require members to take legal action through the court system. It is acknowledged that some Indigenous people may not have ready access to or be comfortable with the court system, which also has the potential to be costly. Nonetheless, some special measures could be considered when examining the details of the proposed reform, to address these difficulties and ensure that the remedies are as accessible as possible to Indigenous people.

Inflexible/prescriptive approach to rules

74 This issue has already been discussed in some detail (see paragraphs 34-49 above).

Simplifying and streamlining reporting requirements

75 The focus of reporting and accountability under the ACA Act to date has been on "external accountability" – accountability to the Registrar, to funding agencies, Parliament and the wider public. To an extent, this focus has overshadowed and ultimately detracted from "internal accountability", which is to members of the Corporation, and achieved through good corporate governance practices.

76 This focus on external accountability has resulted in increasingly complex and onerous financial reporting and accountability provisions in the ACA Act. These now include the provision of balance sheets and expenditure and income statements, which must in effect be audited by an "examiner". These requirements apply irrespective of the size or nature of the corporation, and to that extent are much more onerous than the Corporations Act requirements for small companies.

77 The specific accounting standards required for audited financial statements under the ACA Act are unclear, and there is also some confusion about other aspects of the reporting requirements (such as whether they should extend to trusts or entities administered by the corporation).

78 The requirements under the ACA Act are overlaid by a potentially bewildering array of financial reporting requirements required under funding agreements or other legislative regimes which may apply to some corporations (such as the reporting requirements for NTRBs under the Native Title Act). These reporting requirements are often inconsistent with the reporting requirements under the ACA Act because they adopt different accounting standards or require reporting of different financial indicia.

79 The resulting multiplicity of financial reporting requirements can be very complex, costly and inefficient, draining badly needed resources from the core functions of ACA Act corporations. For example, a single NTRB may have to prepare multiple sets of financial reports, using different accounting standards, for each of:

- ACA Act requirements;
- Native Title Act requirements;
- ATSIC grant requirements; and
- the requirements of other State-based funding agencies.

80 The emphasis on the importance of the reporting and enforcement mechanisms in the ACA Act as a means of protecting creditors' (in particular, government funding agencies') positions also seems misplaced. Reliance on information from annual reports and the Registrar's powers to (for example) appoint an administrator, are clumsy and ineffective mechanisms for protecting creditors' rights (which may include enforcing the performance of contracts for the provision of basic services to an Indigenous constituency which is broader than the corporation's membership). Pre-contract due-diligence exercises and targeted contractual or grant conditions are a much more effective and appropriate way for creditors to achieve such protection. The 1996 Fingleton Review of the ACA Act, which considered the issue of "external accountability" at length, reached the same conclusions on this point.

81 The focus on external accountability under the ACA Act can be contrasted with the Corporations Act, where the focus of reporting is internal - to arm members with the information and mechanisms necessary to protect themselves, rather than relying on a regulator doing so.

82 There is also some evidence that Indigenous organisations that have developed better internal accountability mechanisms also demonstrate higher levels of external accountability.

83 If this rationale is adopted, the appropriate level of financial reporting is the level required to allow a member to adequately protect his or her interests. Broadly speaking, this may require:

(a) the maintenance of proper accounts and financial records;

(b) preparation of financial reports and directors reports, for provision to the Registrar; and

(c) compulsory audits of the financial reports.

84 Different reporting standards could then be applied to different corporations, depending on their size or turnover. For small ACA Act corporations, it may only be necessary to impose requirement (a) above, as is the case for small proprietary companies under the Corporations Act. On the other hand, for large complex corporations with high revenues, a more detailed set of financial reports would be required, in order for members to be able to protect their interests (a similar approach is adopted in some State Association Incorporation Acts).

85 In order to avoid the confusion and cost of compliance with multiple reporting requirements and accounting standards for larger Indigenous corporations, the reporting and accounting standards which apply under the ACA Act would be clarified. One suggestion would be to adopt an "either-or" approach to the reporting and accounting standards. The ACA Act would require Indigenous corporations to adopt relevant Australian Accounting Standards (AASs), as is the case under the Corporations Act. AASs should be sufficient to satisfy the requirements of major creditors such as Commonwealth and State government funding agencies .

86 However, in cases where major creditors have different specific reporting requirements (and which meet certain minimum standards), or there are other legislative reporting requirements which also apply to the corporation (such as under the Native Title Act), the Indigenous corporation could apply for the report prepared for the other purpose to be deemed to satisfy the ACA Act reporting requirements as well (and it would be lodged for those purposes). This would limit the number of different reports Indigenous corporations would be required to prepare.

Limiting membership to Indigenous natural persons (ie no non-Indigenous members or corporate members)

No non-Indigenous members

87 The ACA Act currently allows for non-Indigenous members where 75% of the Indigenous members agree, but non-Indigenous members do not get voting rights and are not eligible for appointment to the governing committee. It has been argued that this potentially provides a mechanism for fund-raising by collecting membership fees from a broad membership base, or demonstrating political support from the broader community. In practice, it appears that it is generally not used as a source of revenue; and in any case, there are other mechanisms for obtaining finance from the non-indigenous public.

88 There has been some discussion of whether the ACA Act should be amended to extend full membership rights to non-Indigenous persons. The Steering Committee was of the view

that they should not. Otherwise, a significant part of the justification for having a separate Indigenous incorporation statute is lost. It would also give rise to some very complex questions about whether there should be quotas for non-Indigenous members, or whether the issue should be control of the corporation, and if so, how to measure it.

89 The provisions of the Act allowing non-Indigenous spouses to become members would remain, and the issue would be left for a corporation's rules to decide. However, the relevant section might be amended for clarity.

No non-Indigenous directors

90 Much of the focus of the question about non-Indigenous membership has been on the issue of whether non-Indigenous persons should be allowed to become Governing Committee members – for example, where they might be able to provide skills and experience not otherwise available to the corporation (many non-Indigenous charities rely on skilled businesspeople donating their time and skills, as board members). However, the Steering Committee was of the view that there are other means by which such skills can be accessed – for example by standing invitation to attend and advise governing committee meetings, appointment as public officer, or employment/appointment to staff.

No corporate members – no "umbrella" corporations

91 There have been a number of calls to allow for corporations to be members of ACA Act corporations. This would allow "umbrella" corporations to be established, the members of which would all be other corporations.

92 The Steering Committee was of the view that this would potentially introduce an undesirable degree of complexity into the ACA Act, particularly with respect to corporate reporting requirements. And unless all the member corporations were themselves ACA Act corporations, there would be complex issues about whether and how the umbrella corporations would remain "Indigenous corporations".

93 It was also felt that the Corporations Act provides an appropriate alternative for groups of ACA Act corporations wishing to establish umbrella corporations. Such groups of corporations, if they are proposing to form such complex arrangements, are also more likely to have the capacity and resources to incorporate under the Corporations Act.

94 It is therefore not recommended to amend the ACA Act to provide for corporate membership of ACA Act corporations.

Repealing Part III (Councils)

95 There have been only 12 applications to establish Aboriginal Councils under Part III of the ACA Act. All the applications have failed, and it is to be expected that any future applications are likely to fail as well, for the reasons set out below. In any case, the original purposes behind Part III have arguably been superseded. There therefore seems little point in keeping Part III of the Act.

96 Part III of the ACA Act, in its present form, is inoperable for three main reasons:

1 It is politically impractical, because of the requirement for State or Territory approval of proposed Aboriginal Councils, and their reluctance to provide such approval. The powers of the Registrar and the Commonwealth Minister are the source of opposition by the States and the Northern Territory in particular. Resistance to the implementation of Part III appears to stem more from the involvement of a Commonwealth official in State/Territory affairs of local government, rather than fear of Aboriginal community control of service delivery.

2 Although it began life as a potential measure for self-determination, Part III as it currently stands would arguably no longer be seen as achieving this outcome in any case. This is because the powers the Act suggests be conferred on a Council are quite limited; and the extensive involvement of the Registrar in establishing the Council would probably now be considered excessive and paternalistic.

3 The original intent behind Part III has arguably been overtaken by developments since the Act's inception.

97 Specifically, Part III has arguably been superseded in the following ways:

- Several states have made provision for Aboriginal communities either to provide local government services or to exercise limited self-governance by the declaration of community-wide by-laws, or both. The Northern Territory's *Local Government Act* 1985 is a leading example of this.

- Most large Indigenous communities operate municipal services using other forms of incorporation. There are, nevertheless, funding disparities with local government regimes that require consideration.

- Indigenous people in many regions are taking controlling, or influential, positions on mainstream local government councils.

- Since 1976, the establishment of ATSIC regional councils has allowed local Indigenous political representation as well as control over grant funding for the provisions of special services for Indigenous people within ATSIC Council regions.

- There now exist networks of Indigenous service organisations in the realms of health, education, media, welfare, legal services, accounting, and remote community support that give Indigenous control over more profound aspects of Indigenous life than conceived of under Part III.

- Arguably, determinations of native title and the subsequent establishment of PBCs establish the equivalent of 'Councils' and 'Council Areas' closer to the concepts behind the of the original policy position than the enacted Part III does itself. However, it is noted that these are available only where native title survives.

- The underlying political implications of the recognition of native title have changed the political landscape such that negotiated Indigenous Land Use Agreements are now more likely to deliver "self-determination" in one form or another than can be achieved through Part III Councils.

98 If the ACA Act were to be reformed to provide for a more flexible and adaptable approach to corporate rules and structures, this would provide an even greater capacity for Indigenous self-management, and further undermine the need for Part III.

Technical issues

99 In addition to the fundamental issues discussed above, there is a range of technical difficulties with the ACA Act as it stands. These would also need to be addressed, to ensure its effective and efficient operation. These technical issues include:

(a) Clarifying interaction with Corporations Act provisions imported under sections 62 to 67 of the ACA Act;

(b) Expressly allowing meetings by telephone or videoconference;

(c) Providing for amalgamation of ACA Act corporations;

(d) Simplifying and coordinating the requirements for applications for incorporation and corporate rules;

(e) Reducing minimum membership numbers to five (5) persons, irrespective of the purpose of the corporation;

(f) Requiring the public officer to attend committee meetings;

(g) Streamlining and updating the winding-up and administration provisions of the Act;

(h) Giving the Registrar the power to remedy errors in the public register, issue duplicate certificates of incorporation, etc.

(i) A number of other miscellaneous technical issues.

D. REFORM ISSUES FOR CONSULTATION

100 As noted in the introduction to this Paper, there are still a couple of key issues which have not yet been settled. These issues could have a fundamental impact on the shape of a reformed ACA Act.

101 These reform issues for consultation all relate to the fundamental and very broad question of what is the most appropriate and effective way to deliver the special measures which are needed to promote the viability of Indigenous corporations. There are essentially three alternatives which are explored:

(a) whether a separate incorporation statute such as the ACA Act is in fact the most appropriate way to achieve these outcomes, or whether they can be better achieved by other means, such as providing assistance to incorporate and function under the Corporations Act or State Associations Incorporation Acts;

(b) whether the most appropriate approach would be to streamline and focus the ACA Act on smaller corporations, which are arguably the most in need of a separate incorporation statute; or

(c) whether the most appropriate approach is in fact to retain the ACA Act as a separate incorporation statute which specifically caters for all kinds of Indigenous corporations, but to introduce a number of reforms to address current problems with the ACA Act.

102 These issues were the subject of only limited discussion during the course of consultation, and met with varied responses. The Steering Committee has also expressed no preferences in relation to these issues. On that basis, it was felt that further consultation is necessary on these issues.

103 This Paper attempts to discuss these issues in a way that objectively considers the advantages and disadvantages of the different approaches to addressing them.

104 To help understand the impact that these issues may have on a reformed ACA Act, Part E of this Paper considers three possible examples of how the Act might turn out if the issues discussed in this Part were answered in different ways.

Is there a continuing need for a separate specific Indigenous incorporation statute?

105 A fundamental issue which still needs to be answered is whether there is justification for a separate **Indigenous incorporation statute**, or whether it would be better to effectively repeal the ACA Act, and Indigenous people would simply set up corporations under the Corporations Act or the State Association Incorporation Acts.

106 If it were decided that the ACA Act were no longer necessary and should be removed as a way to set up corporations, the Steering Committee is strongly of the view that ORAC (or a successor body) should still be kept to provide assistance and capacity-building for

Indigenous corporations incorporated under the Corporations Act and State Association Incorporation Acts.

107 There are some strong arguments either way about whether the Act should be kept. These are summarised in the table below:

Should the ACA Act be kept for setting up Indigenous corporations?	
NO	**YES**
The ACA Act is old and outdated and disadvantages Indigenous people.	That is not necessarily an argument for repealing the ACA Act. The ACA Act could instead be amended to update it and fix the current problems with it. (some specific proposals for how this could be done are discussed in Part D of this Paper).
Many of the amendments proposed to the ACA Act are to bring it in line with the Corporations Act, so why not just use the Corporations Act?	A reformed ACA Act could still be different from the Corporations Act in several ways. For example, it could be simpler and easier to use, cheaper for Indigenous corporations, and could have a regulator which is specifically focussed on Indigenous corporations and aware of the issues facing Indigenous people and corporations.
The Corporations Act and State Association Incorporation Acts are very flexible and Indigenous corporations could do anything under them that they can under the ACA Act. The ACA Act is just unnecessary duplication. The part of the Corporations Act relating to small business is relatively easy to use, and many Indigenous corporations would not have to refer to the more complex aspects of the Corporations Act. In addition, the replacement for ORAC could provide assistance to corporations to help them with compliance.	Yes, but the Corporations Act can be very complex, and has high application and filing fees, as well as high penalties. The State Association Incorporation Acts are generally only available to smaller non-profit corporations. Even if ORAC could provide assistance,

	ASIC and the State Association Incorporation Act regulators may not have the capacity to properly accommodate the disadvantages suffered by Indigenous corporations.
This is not necessarily an argument for maintaining the ACA Act as a separate incorporation statute – such problems could also be addressed through establishment of appropriate resources and capacity within these other regulatory bodies.	
	There is a continuing need for special measures for Indigenous corporations, to recognise the disadvantage that many Indigenous people face.
Again, this is not necessarily an argument for maintaining the ACA Act as an incorporation statute – such special measures could be provided by other means (such as assistance from a re-formed Registrar's office). There is also a risk that treating Indigenous corporations differently from the rest of the community by having a separate Indigenous incorporation regime with different standards will create "dependence" on the ACA Act, and discourage Indigenous people from adopting the standards expected of mainstream corporations. This could in the long run work to indigenous peoples' disadvantage, by preventing indigenous people from obtaining mainstream business skills.	The standards under a reformed ACA Act would remain high, and there would be provisions for transfer to the Corporations Act under certain circumstances. Indigenous corporations would therefore not be "locked into" the ACA Act and excluded from participating in the mainstream business community.
The ACA Act adopts a clumsy "one-size-fits-all" approach to Indigenous corporations, which means it is not ideally suited to any particular type of corporation. However, the combination of the Corporations Act and State Association Incorporation Acts provide	

for a variety of corporation types which are tailored to different corporate needs.	Reform of the ACA Act (such as introducing different financial reporting requirements for different sized corporations) could make the ACA Act better suited to different corporation types. And in any case, there is currently nothing stopping Indigenous associations incorporating under the Corporations Act or State Association Incorporation Acts if they feel those regimes are better suited to their particular needs.
It is estimated that as many as half of all current Indigenous corporations were set up under the Corporations Act anyway.	At least half of all Indigenous corporations were still set up under the ACA Act, and this number might increase if the Act were fixed-up.
There is in fact no legal "right" to a separate Indigenous incorporation statute under Australian law. Further, current problems with the ACA Act arguably mean that it disadvantages Indigenous corporations. Replacing the ACA Act with a range of other special measures aimed at assisting Indigenous corporations would therefore clearly be consistent with the Racial Discrimination Act and the races power under the Constitution. This is less likely to be an issue of concern where there is appropriate consultation about reform with Indigenous corporations and representative organisations. Extensive consultation is proposed, in addition to the consultation already undertaken (see paragraphs 3-5, 182-185).	Repealing the ACA Act means that Indigenous people will no longer have their "own" incorporation act. Indigenous people and their representative organisations may construe this as a rights issue. While perhaps not affecting legal rights, repealing the ACA Act would still be removing an incorporation option which Indigenous people currently have – even if that option is not ideal.
Many other countries such as Canada, Norway, Sweden, Finland and New Zealand do not have legislation	

specifically for Indigenous corporations. While specific legislative alternatives to corporations for land-holding purposes may exist in some of these countries, none have incorporation statutes also covering non-land related indigenous associations.	Other countries have different historical and constitutional backgrounds, resulting in different kinds of arrangements with Indigenous groups. Some of these include complex legislative land trust arrangements for land-holding bodies, which may be incorporated.
If Indigenous corporations were all transferred out of the ACA Act to the Corporations Act or State Association Incorporation Acts, that would free up resources for ORAC to focus on capacity-building. Some of those resources, for example those currently dedicated to assessment of rules, would become available immediately.	Although some resources might be freed up immediately, in the medium term (3-5 years), significant additional resources would probably be required to assist transfer existing Indigenous corporations to other incorporation statutes; and the other aspects of the current ACA Act would still have to continue to be administered during that time as well (for corporations that had not yet transferred).
The *Native Title (Prescribed Body Corporate) Regulations* are in need of	Repealing the ACA Act as an incorporation statute would require amending the *Native Title (Prescribed Body Corporate) Regulations*, and would also require either new regulations dealing with Native Title Representative Bodies or amendments to s201B of the Native Title Act. It may also possibly require some amendments to the Corporations Act or regulations and the State Association Incorporation Acts or regulations. At the least, it would require coordinating closely with ASIC and all the different State Association Incorporation Act regulators. Keeping but reforming the ACA Act could achieve desired outcomes without the need to amend any other legislation.

comprehensive reform in any case, and are already the subject of a major review by ATSIC. The Corporations Act is regularly updated, and any necessary amendments to it could possibly be made at the same time.	

108

109 If the ACA Act were to be repealed as an incorporation statute, it would probably necessitate transferring all existing ACA Act corporations across to the Corporations Act and State Association Incorporation Acts over the course of 3-5 years. "Grandfathering" existing ACA Act corporations (allowing them to continue to function under the ACA Act as it stands, but not letting any new corporations set up) on an ongoing basis would probably not be viable. This is because existing corporations would continue to operate under the unreformed ACA Act for an indefinite period, and the necessary changes to the Act would never be made. It would also mean ORAC would have to continue to devote substantial resources to its current role, and would not be able to dedicate those resources to capacity-building.

Should the ACA Act only be for small/simple corporations?

110 This second fundamental issue flows from the first: if it is decided to keep the ACA Act as a way to set up Indigenous corporations, should it just be targeted at smaller or more simple corporations?

111 This approach would see the ACA Act returning to its original philosophy of providing a simple and easy-to-use incorporation statute for small/simple Indigenous corporations. Larger and more complex Indigenous corporations would be required to incorporate under the Corporations Act.

112 This option could be seen as a compromise between reforming the current ACA Act, but keeping it as a "one-size-fits-all"; and closing it down entirely as an incorporation statute. Arguably, it is the smaller Indigenous corporations which are in greatest need of special measures.

113 If the ACA Act were to be abandoned as an incorporation statute, these smaller corporations would probably incorporate under the various State Association Incorporation Acts. However, these State Association Incorporation Acts vary from State to State. Lack of uniformity means that some small Indigenous corporations could be in a better position than others, simply because of their geographical location (but of course this is also the case with non-indigenous corporations incorporated under those State Acts). More importantly, the lack of uniformity would also make the provision of assistance and capacity-building resources less efficient and more difficult to coordinate. A nationally uniform ACA Act aimed at smaller/simpler Indigenous corporations could arguably fulfil this role more effectively and efficiently.

114 It would be necessary to set criteria for what qualifies as a "small" or "simple" corporation which could be incorporated under an ACA Act revised in this way. Relevant factors may include purpose, turnover, number of employees, etc. However, because of the diverse circumstances of Indigenous corporations, there would probably not need to be strict criteria – instead it would be a discretion for the Registrar, who would have to have regard to those issues in making a decision. This is very similar to the approach under the State Association Incorporation Acts. The Registrar would also have the discretion to require corporations to transfer to the Corporations Act if they reach a certain size or complexity such that it is no longer appropriate to remain incorporated under the ACA Act. This is also similar to the State Association Incorporation Acts.

115 If this approach were adopted, it would be necessary to transfer existing larger and more complex corporations to the Corporations Act. That would probably take place over 3-5 years. It could start with the introduction of procedures to allow such corporations to transfer "voluntarily", with compulsory transfers (again at the Registrar's discretion) taking place after certain timeframes.

116 Another advantage of the flexibility offered by this approach is that it would probably be able to accommodate PBCs and NTRBs in the medium term, without the need for amendment to the Native Title Act or regulations. Many PBCs would be likely to qualify as "small/simple" corporations, and fall under the ACA Act; and the discretionary nature of the provisions requiring transfer to the Corporations Act could be implemented in a way that would allow NTRBs and larger/more complex PBCs to remain under the ACA Act.

117 A disadvantage of this approach is that it would not see as many resources being freed up for capacity-building as would be the case if the Act were closed down entirely as an incorporation statute. However, it would free up more resources than maintaining an Act for all types of corporations. This is in part because there would be a smaller number of corporations incorporated under the ACA Act. However, it would also be because the permissive approach to corporations' rules and more limited reporting requirements would mean fewer ORAC resources would have to be dedicated to assessing rules and reports.

118 For more detailed discussion of how a Reformed ACA Act aimed at small/simple Indigenous corporations might work, refer to Example B in the next section.

Should the ACA Act be retained as an incorporation statute for all kinds of Indigenous corporation?

119 The third related issue is whether retaining a reformed ACA Act as an incorporation statute for a broad range of Indigenous corporations is in fact the most appropriate approach to addressing the contemporary needs of Indigenous corporations.

120 Most of the arguments for and against such an approach have been discussed in the context of the previous two issues above. However, a summary of the issues are included below:

121 Some of the advantages of this approach would include:

- it would result in an Act and regulatory body specifically designed with the needs and circumstances of Indigenous corporations in mind – available to all Indigenous corporations, irrespective of size or purpose;

- the ACA Act would be a simpler and easier to use incorporation statute than the Corporations Act;

- proposed reforms would address most of the current problems with the ACA Act – including changing the emphasis of the Registrar's role to assistance and capacity development (the "settled issues for reform" discussed in Part C of this Paper);

- there would be no requirement to transfer large numbers of Indigenous corporations to other incorporation statutes, making it a simpler and potentially less costly approach (and there would be no issues of rights being affected where corporations are forced to transfer);

- this approach would not require amendment to the Native Title Act or PBC Regulations to cater for NTRBs and PBCs.

122 Potential disadvantages might include:

- to cater for all kinds and sizes of Indigenous corporation, the ACA Act would need to become more complex and sophisticated in some areas, particularly in relation to reporting requirements – this could make it slightly less easy to use;

- there is a risk that the amended ACA Act would not keep up with changes in company law (in particular the Corporations Act), and could become outdated in the same way that the ACA Act is currently outdated;

- the same amount of resources would not be freed for assistance and capacity-building, as would be if the ACA Act were limited to small/simple corporations or ceased to function as an incorporation statute – although the proposed reforms would still free up some resources by making the ACA Act more efficient.

123 For a better understanding how a reformed ACA Act would probably work if this approach were taken, see Example C in Part E of this Paper.

E. EXAMPLE MODELS FOR A REFORMED ACT

124 To help illustrate the potential effect of decisions on the "Reform Issues for Consultation", this Part provides some examples of how the Act might operate, depending on the combination of settled and not-yet-settled issues. The three examples provided here should not necessarily be regarded as "alternatives", in that they are all based on the same core of settled issues, and because the areas where they differ are not all necessarily clearly delineated. In addition, much of the shape of the Act will also depend on how the detail for implementing the settled and yet-to-be-settled issues develops.

125 Nonetheless, these examples should provide a broad picture of how a reformed ACA Act might function, depending on how the yet-to-be-settled "Reform Issues for Consultation" are decided.

126 A table summarising and comparing the key features and policy principles underpinning each of these examples is included in **Attachment A**.

Example A - Replacing the ACA Act with assistance under the Corporations Act and State Association Incorporation Acts

127 This example outlines how the system for incorporation of Indigenous corporations might work if it were decided that there was not in fact a continuing need for the ACA Act as an incorporation statute. Under this example, Indigenous corporations would instead be incorporated under the Corporations Act or State Association Incorporation Acts. The issues surrounding that decision are discussed in detail in Part D of this Paper. The example provided below nonetheless still incorporates all the "settled" issues for reform as set out in Part C of this Paper.

Broad outline – Example A

128 The ACA Act would cease to operate as an incorporation statute, and all existing ACA Act corporations would be transferred to the Corporations Act or a State Association Incorporation Act. ORAC would be transformed into a body whose function would be to provide assistance, advice, and capacity-building to Indigenous corporations incorporated under those incorporation statutes. This might include acting as a "gateway" for Indigenous corporations to incorporate under the Corporations Act or State Associations Incorporation Acts.

129 To access the assistance provided by the new ORAC, corporations would have to qualify (and possibly register) as "Indigenous corporations". This would be a matter of choice for the Indigenous corporation concerned, although funding bodies may prefer to deal with "accredited" Indigenous corporations.

130 Details of how the reformed ACA Act would address each of the "settled issues" discussed in Part C are provided below.

Flexible approach to rules – Example A

131 The design of corporate rules would no longer be regulated by the ACA Act. Instead, it would be regulated either by the Corporations Act, which is very flexible, or the relevant State Association Incorporation Act. The State Association Incorporation Acts generally require the corporations to be not-for-profit, but are otherwise flexible in their approach to rules.

Registrar's role – Example A

132 ORAC would become an body whose primary purpose is to provide assistance and capacity-building to Indigenous corporations, irrespective of the legislation under which the Indigenous corporation was incorporated. The assistance might extend to ORAC becoming a registration agent for Indigenous corporations wishing to incorporate under the Corporations Act.

133 Regulation would be carried out by ASIC or the relevant State Regulator, depending on the regime under which the corporation was incorporated. However, because of its unique position and expertise, ORAC might have some role in case management and mediation or arbitration of disputes in Indigenous corporations, as part of its assistance and capacity-building function. It may also play a role in assisting other agencies such as funding agencies with matters relating to good corporate governance in indigenous corporations.

134 One possibility is that ORAC might also be provided with standing and a discretion to take or fund action on behalf of members against the corporation or directors, in circumstances where those members are not able to take action on their own behalf to protect their rights. Alternatively, the Registrar might retain the capacity to appoint an administrator. Consideration would need to be given as to how to avoid a conflict of interest if ORAC had also provided advice or played a role in mediation or arbitration of any disputes.

135 Counter to this is the view that Indigenous corporations should not be subjected to external intervention in circumstances where non-indigenous corporations would not be subject to similar intervention. There are concerns that such a powerful discretion could potentially allow a future Registrar to return to a highly paternalistic approach to intervention in Indigenous corporations' internal affairs. There is also concern that it could expose ORAC to being drawn into internal disputes which would be better resolved between members.

136 These are issues which would need to be considered in detail once the general approach to reform is decided. The details of the respective roles of the new ORAC, ASIC and the relevant State Regulators would also need to be carefully coordinated to minimise the scope for conflicts of interest and responsibility, and maximise the scope for positive interaction.

Consistency with Corporations Act and modern corporate philosophy – Example A

137 Because many corporations would in fact be incorporated under the Corporations Act, this would not be an issue. The State Association Incorporation Acts are also generally in-line

with modern corporate philosophy in most areas (certainly more so than the current ACA Act).

Reporting requirements – Example A

138 Reporting requirements would be in accordance with the Corporations Act or the relevant State Association Incorporation Act, depending on where the corporation was incorporated. In its new role, ORAC would be able to assist Indigenous corporations meet their reporting requirements, and would probably also play a role in coordinating with ASIC and the relevant State regulators.

139 Consideration might also be given to extending timeframes for reporting requirements and/or reducing non-compliance penalties under the Corporations Act in particular – to take into account the resource shortages, remoteness, and lower levels of training and experience that many Indigenous corporations suffer.

Membership – Example A

140 There are no race-based restrictions on membership under either the Corporations Act or the State Association Incorporation Acts. However corporations would have to meet certain minimum requirements to qualify as "Indigenous corporations" and qualify for the assistance to be provided by ORAC.

141 This would require appropriate definitions to be developed for eligibility, which could be based on general legal definitions of "Aboriginal" and "Torres Strait Islander", and "control". These sorts of issues are potentially quite complex and would have to be worked out in the next stage of the review.

Part III (Councils) – Example A

142 Part III would be repealed, along with much of the rest of the ACA Act.

Technical amendments to ACA Act – Example A

143 The technical amendments to the ACA Act would not be required, as the Act would no longer be used for incorporations.

Transitional arrangements – Example A

144 All existing ACA Act corporations would have to be transferred to either the Corporations Act or the relevant State Association Incorporation Acts. This would probably need to take place over 3-5 years. During that time, the ACA Act would continue to operate for existing ACA Act corporations, but no new ACA Act corporations would be incorporated. Existing corporations would be provided with the option to voluntarily transfer to the Corporations Act or a relevant State Association Incorporation Act at any point during the transition period. At the end of the transition period, all remaining corporations would be automatically transferred *en masse*, probably to the Corporations Act. The ACA Act

would then effectively cease functioning, with the exception of any provisions relating to the new capacity-building role for ORAC.

Overview of key legislative changes required – Example A

145 In addition to the ACA Act, this approach would require the following amendments:

- amendment to the *Native Title (Prescribed Bodies Corporate) Regulations* ("**the PBC Regulations**") to remove the requirement for PBCs to be incorporated under the ACA Act;
- either amending s201B of the Native Title Act, or making new Regulations under it, so that NTRBs are not required to be incorporated under the ACA Act; and
- possibly, amending the Corporations Act or Regulations, to provide more flexibility with reporting timeframes and/or reduced penalties for not meeting timeframes.

Example B – Streamlining the ACA Act to focus on incorporation of small/simple corporations

146 This second example is based on the premise that it is decided that there is a continuing need for the ACA Act as an incorporation statute, but only for small/simple corporations. The issues surrounding this decision are discussed in detail in Part D of this Paper. The example also incorporates all the settled issues discussed in Part C.

Broad outline – Example B

147 In this example, the ACA Act would be simplified and streamlined to cater only for small/simple Indigenous corporations. Other corporations would be transferred to the Corporations Act.

148 The approach to corporations' rules under the reformed ACA Act would be very flexible, and reporting requirements would be minimal.

149 ORAC would retain a regulatory role for the small/simple corporations incorporated under it, but the emphasis would be on assistance and capacity building. ORAC's assistance and capacity-building role would also be extended to Indigenous Corporations incorporated under the Corporations Act, in the way discussed under Example A, above.

150 Details of how the reformed ACA Act would address each of the "settled issues" discussed in Part C are provided below.

Flexible approach to rules – Example B

151 The amended ACA Act would place some broad guidelines for the size/type of corporation that could be incorporated, but would otherwise adopt a flexible approach to corporation

rules. Rules would only be subject to a very basic check to ensure they cover all required elements (eg must have provisions relating to AGMs, governing committee meetings, appointment and removal of governing committee meetings) etc. ORAC's discretion about whether it would be appropriate to incorporate an association under the ACA Act would probably depend more on the application form (which would include estimated turnover, etc) than scrutiny of the actual rules themselves.

152 PBCs and NTRBs could be expressly included under the amended ACA Act, even though they might not otherwise fit within the guidelines for the type of corporation that would normally be incorporated under the Act.

Registrar's role – Example B

153 ORAC's role would be shifted away from regulation towards providing assistance and capacity-building to Indigenous corporations. This assistance would not be limited to ACA Act corporations, and would be available to qualifying Indigenous corporations incorporated under the Corporations Act and possibly also the State Association Incorporation Acts. (Eligibility requirements would have to be set for non-ACA Act corporations, as discussed in the previous example).

154 However, ORAC would nonetheless retain a (less interventionist) regulatory role in relation to those corporations incorporated under it.

Consistency with Corporations Act and modern corporate philosophy – Example B

155 The ACA Act would be more flexible in relation to corporate rules (as discussed above), in line with modern corporate philosophy. Transactional certainty for third parties and measures for validation of "procedural irregularities" would also be introduced. Directors' duties would also be extended to senior management. The directors' duties contained in the ACA Act might be modified slightly, but adopting the full and relatively complex statements of directors' duties under the Corporations Act may not be necessary for an Act aimed at smaller, more simple corporations.

156 Indigenous corporations which do not qualify for incorporation under the ACA Act would probably be incorporated under the Corporations Act, in which circumstances this issue does not arise.

Reporting requirements – Example B

157 ACA Act corporations would be required to maintain proper accounts and financial records, but would not be required to prepare audited financial reports and directors reports. However, in its regulatory role, ORAC would retain powers to require provision of, or to access and review, accounts and financial records of ACA Act corporations, in certain circumstances.

158 If PBCs and NTRBs were still required to be incorporated under the ACA Act (in this proposed form), that might introduce the need for some slightly more complex reporting

requirements - possibly limited just to those types of corporations. An alternative would be to deal with such additional requirements under Native Title Act regulations, rather than deal with them in the ACA Act.

159 Those corporations which are transferred to the Corporations Act would of course be subject to the relevant reporting requirements under the Corporations Act, and would no longer be subject to the ACA Act reporting requirements.

Membership – Example B

160 Membership restrictions for ACA Act corporations would remain essentially as they currently are – limited to Indigenous natural persons.

Part III (Councils) – Example B

161 Part III of the ACA Act would be repealed.

Technical amendments to ACA Act – Example B

162 Most of the technical amendments to the ACA Act would still be required, to ensure it is workable.

Transitional arrangements – Example B

163 It would be necessary to have transitional arrangements in place similar to those described under example A, above. However, these would probably not have to be as extensive or complex, because fewer organisations would be transferred out of the ACA Act, and they would probably only be transferred to the Corporations Act (rather than a disparate range of incorporation statutes as under Example A).

Overview of key legislative changes required – Example B

164 This example could be achieved without requiring amendments to any legislation other than the ACA Act itself.

165 However, the amended Act would be much more straightforward and workable if PBCs and NTRBs were not required to be incorporated under the ACA Act. To achieve that, amendments would be required to the PBC Regulations, and either s251B would have to be amended or new regulations made under it.

166 Amendments to introduce flexibility with timeframes and lower penalties under the Corporations Act might also be considered, although the smaller corporations most in need of those measures would now be catered for under the ACA Act itself.

Example C – Keeping the ACA Act as a broad incorporation statute, but reforming it to make it more workable

167 The third broad example for a reformed ACA Act would be where the ACA Act is kept as an incorporation statute for all kinds of Indigenous corporations (irrespective of size/complexity), but where the ACA Act otherwise undergoes major reform in accordance with all the "settled" issues for reform discussed above. Although this is the general approach which results if the two major policy issues for consultation outlined above are answered in the negative, this should not be seen as simply the "default" position. It is a viable approach in its own right.

Broad outline – Example C

168 Under this example, the ACA Act would still be an incorporation statute for all Indigenous corporations. Existing Indigenous corporations would not be required to transfer to the Corporations Act or the State Association Incorporation Acts. However, the ACA Act would undergo major reform.

169 The ACA Act would adopt a flexible approach to corporations' rules. ORAC would remain as the regulator, but the emphasis of ORAC's role would shift to assistance and capacity building. Key aspects of the ACA Act would be brought into line with modern corporate philosophy, and a range of technical amendments would also be made, to make the Act more workable and to remove aspects which currently disadvantage Indigenous corporations incorporated under the Act. Different reporting requirements would be introduced for different kinds and sizes of corporations (with probably two sets or tiers of requirements), mainly to simplify the reporting requirements for small/simple corporations.

170 Details of how the reformed ACA Act would address each of the "settled issues" discussed in Part C are provided below.

Flexible approach to rules – Example C

171 The Act would adopt a flexible approach to the design of rules, and the Registrar would not be required to scrutinise rules in detail before agreeing to incorporate an ACA Act corporation. Rules would nonetheless probably be checked against a checklist, but simply to ensure that they cover the core topics that are required of corporate rules (as is the generally case under the State Association Incorporation Acts). An alternative might be to adopt a system of "replaceable rules", similar to the approach under the Corporations Act.

Registrar's role – Example C

172 The Registrar's role would be less interventionist and focussed on regulation. For example, the Registrar would not scrutinise rules in detail, and would play a less hands-on role in "protecting" members from abuse by Governing Committees. Instead, ORAC would focus its efforts for achieving compliance and encouraging good corporate governance by providing assistance and capacity-building.

173 This assistance and capacity-building role could be extended to Aboriginal corporations incorporated under the Corporations Act, and possibly also those incorporated under the various State Association Incorporation Acts.

Consistency with Corporations Act and modern corporate philosophy – Example C

174 The full range of amendments suggested in Part C of this Paper would need to be adopted, specifically:

- The Act would adopt a flexible approach to rules (as discussed above);
- Provisions would be made for transactional certainty for third parties and validation of "procedural irregularities"
- Directors' duties would be expressly extended to senior management, "shadow directors", and so on.
- A more comprehensive statement of directors' duties would need to be adopted, in line with the Corporations Act.
- Improved members' remedies would be provided, recognising the reduced role of the Registrar in protecting members.

Reporting requirements – Example C

175 Reporting requirements would be changed to take into account the different sizes and kinds of corporations incorporated under the ACA Act. Reporting requirements would be tiered, so that small corporations would have only to keep accounts and financial records and would not have to provide audited reports. Larger corporations would have to provide audited financial reports and directors reports, but the accounting standards and reporting requirements would be coordinated with other reporting requirements, to avoid unnecessary duplication.

176 Because the registrar would retain a regulatory role, provisions relating to access to records would be retained. The Registrar would have a discretion to provide extensions and exemptions.

Membership – Example C

177 Membership restrictions would be maintained essentially as they currently stand, although possibly with minor clarifications.

Part III (Councils) – Example C

178 Part III would be repealed.

Technical amendments to ACA Act – Example C

179 The full range of technical amendments to the Act would be necessary.

Transitional arrangements – Example C

180 Transitional arrangements would be straightforward, as there would be no requirement to transfer corporations to other regimes. ACA Act corporations would not be required to change their rules, but would be free to do so, to take advantage of the more flexible arrangements. Reporting requirements for many corporations are likely to be lowered. However, there may need to be some short transitional arrangements for those corporations that would have to meet changed and/or increased reporting requirements, to give them time to adapt to the new arrangements.

181 Whilst not strictly a "transitional" arrangement, the reformed Act could also contain provisions enabling transfers from the ACA Act to the Corporations Act (similar to those under the various State Association Incorporation Acts). In addition, the Registrar might be provided with a discretion (to be exercised within certain broad criteria) to require ACA Act corporations to transfer to the Corporations Act, where the Registrar feels the Corporations Act would be more appropriate for their circumstances. This approach would facilitate and encourage the evolution of ACA Act corporations into mainstream Corporations Act corporations, where appropriate.

Overview of key legislative changes required – Example C

182 Only the ACA Act would require to be amended. No other legislation would have to be amended.

F. THE PROCESS FROM HERE

183 As noted at the beginning of this Paper, the purpose is to provide information and also to seek feedback on the future direction of the ACA Act. Feedback will be sought from a broad range of stakeholders over the next few months, including the ATSIC Board, relevant Commonwealth Government departments and agencies, Indigenous peak bodies and Indigenous corporations themselves. That will take place over the first several months of 2002.

184 The Steering Committee will then decide the issues for reform discussed in Part D of this Paper. In doing so, the Steering Committee will have regard to the feedback provided through the consultations with stakeholders.

185 Once the decisions on these remaining policy issues have been made by the Steering Committee, there will be a complete set of settled principles to drive the reform. From those, detailed recommendations for implementing the reform will then be developed. This stage of the review should be complete around mid-2002. There may also be further consultation of some kind on those detailed recommendations.

186 After the detailed recommendations have been settled, policy authority would be sought from the Cabinet for implementation of the recommendations. If that approval is obtained, the detailed recommendations would probably be used to form the basis of "drafting instructions" to the Office of Parliamentary Counsel ("OPC"). OPC would use those instructions to draft the Bill for implementing the reform. Provided the Bill gets all the required approvals, it is introduced into Parliament, and Parliament then votes on whether or not to pass the Bill and enact the reforms.

187 It should be noted that implementation of comprehensive legislative reform can be a complex and lengthy process. In the meantime, ORAC has restated its commitment to taking as flexible and facilitative approach to the administration of ACA Act corporations as the ACA Act currently permits.

ATTACHMENT A

Table summarising key policy issues/decisions under Examples Models A, B, C for reform of the ACA Act.

Policy Issue	Example A **Replacing the ACA Act with assistance under other incorporation statutes**	Example B **Streamlining the ACA Act to focus on small/simple corporations**	Example C **Keeping the ACA Act as a broad incorporation statute, but with major reforms**
Is there a need for a separate Indigenous incorporation statute?	**No** (although the ACA Act may be retained in some form, to set out the Registrar's new facilitation and assistance roles).	**Yes**	**Yes**
Should the ACA Act only be for small/simple corporations, or all?	(**N/A** – but assistance would be provided to corporations incorporated under other incorporation statutes)	**Yes** – although assistance and capacity building would be available to other Indigenous corporations	**All** – although there may be some discretionary "move-on" provisions for transfer to other incorporation statutes
Should the ACA Act adopt a permissive/flexible approach to rules and corporate design?	(**Yes** – but regulated by other incorporation Statutes)	**Yes**	**Yes**
What should the Registrar's role be?	• Education, assistance, capacity building – including mediation and arbitration	• Education, assistance, capacity building - available irrespective of incorporation statute.	• Education, assistance, capacity building - available irrespective of incorporation statute.

	• Liaison and coordination with regulators under other incorporation statutes and funding agencies. • Possibly a residual capacity to appoint an administrator or take action on behalf of members.	• Permissive regulatory approach, including permissive approach to rules, but with inspection and administration powers retained. • Liaison and coordination with funding agencies.	• Permissive regulatory approach, including permissive approach to rules. Inspection and administration powers retained, but more emphasis on members' remedies. • Liaison and coordination with funding agencies.
Should there be more consistency with the Corporations Act and modern corporate philosophy in key areas?	(**Yes** – but regulated under other incorporation Statutes)	**Yes** – although some of the more detailed and complex aspects (eg of directors' duties, members' remedies) may not be necessary or appropriate for a simple incorporation statute	**Yes** – in directors' duties, transactional certainty, members' remedies, etc.
Should reporting requirements be simplified?	(**Yes –** but regulated by other incorporation Statutes)	**Yes** – probably no formal annual reporting requirements, although records would have to be maintained	**Yes** – although differing requirements may need to be introduced for different sizes of corporation – from none up to provision of audited reports.
Should membership of corporations be limited to Indigenous natural persons?	(Will be regulated by other incorporation statutes, but "eligibility" criteria would be introduced.)	**Yes**	**Yes**
Should Part III of the ACA Act (Aboriginal Councils) be repealed?	**Yes**	**Yes**	**Yes**
Technical amendments to make the ACA Act more workable	**N/A**	A number would be required	All would be required

GLOSSARY

NOTE: This Glossary is intended to assist understanding the Consultation Paper. Definitions in this Glossary provide general meanings of terms *as used in the Consultation Paper*. These might not be the same as the ordinary meanings of the terms, and may also differ slightly from technical legal definitions.

ACA Act — ***A**boriginal **C**ouncils and **A**ssociations Act 1976* (Cth). An incorporation statute specifically established for the creation of corporations whose membership is restricted to indigenous people. For more discussion on the origins of the ACA Act and problems with it, see Parts A and B of the Consultation Paper.

Administration, administrator

Under the ACA Act, the Registrar may under certain circumstances directly appoint a person to take over the running of the corporation. This person is called the *administrator*, and they take over the positions of the **governing committee** and the **public officer**, and the existing governing committee and public officer are dismissed. Where an administrator has been appointed, the relevant corporation is referred to as being "under *administration*".

Under the ACA Act, the Registrar can appoint an *administrator* to take over the running of a corporation where the Registrar believes:

- the corporation has been trading at a loss for at least 6 months over the previous year;
- the governing committee has failed to comply with the ACA Act or the corporation's **rules**;
- the governing committee members have breached their **fiduciary duties** or acted in a way that is unfair or unjust to members of the corporation;
- it is necessary to protect members or **creditors**;
- it is necessary for the public interest.

Part IV of the ACA Act imports various parts of the Corporations Act, which also includes those parts relating to the appointment of *administrators*. These provisions allow "voluntary administration" – where the **board of directors** appoints the *administrator* (generally to avoid insolvent trading) – and appointment of an *administrator* by the Court, on application of a **creditor**. This duplication has caused some confusion under the ACA Act.

AGM

***A**nnual **G**eneral **M**eeting*. An *AGM* is the meeting of a corporation's members which must happen at least once each year. At the *AGM*, issues such as the corporation's finances are discussed and **governing committee** members are elected.

Arbitration

Where two or more parties to a dispute agree not to go to court, but to be bound by the decision of an independent person ("an *arbitrator*") who will hear their arguments and decide what should happen. Arbitration processes are usually less formal than court processes.

ASIC

***A**ustralian **S**ecurities and **I**nvestments **C**ommission*. *ASIC* is the government **regulator** for corporations incorporated under the Corporations Act 2001. *ASIC* also regulates financial services and a range of other activities undertaken by special types of corporation.

association

A group of people who have come together for a particular purpose. *Associations* may incorporate and become a **corporation**.

ATSIC

***A**boriginal and **T**orres **S**trait **I**slander **C**ommission*. *ATSIC* is an independent Commonwealth government statutory authority. *ATSIC*

advises and lobbies the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs on Indigenous policy issues. It is also responsible for the delivery of a number of national service programs for Indigenous people including housing, CDEP and native title. *ATSIC* has a Board of Commissioners who are elected from within the Indigenous community on a regional basis. **ORAC** is currently a part of *ATSIC*.

Bill — Draft legislation which has not yet been passed by Parliament and made into law.

board of directors — The committee of directors appointed under a corporations' **rules** or **constitution** to manage and govern a corporation. This term is used in the Corporations Act – see also "**governing committee**", which is the term used in the ACA Act.

capacity building — Helping and encouraging corporations to develop good practices and good **corporate governance,** for the long-term stability and success of the corporation. Capacity building might range from assisting and advising on the design of appropriate **corporate structures** and **rules** before a corporation is incorporated, to ongoing training for governing committee members on how to properly run a corporation. For a detailed description of what *capacity building* might involve, see paragraph 53 of the Consultation Paper.

CDEP — ***C****ommunity* ***D****evelopment* ***E****mployment* ***P****rojects*. CDEP is a "work for the dole" employment/training scheme for Indigenous communities, which is funded by the Commonwealth Government and administered by ATSIC through locally-based CDEP corporations.

conflict of interest — A *conflict of interest* exists where a person involved in making a decision has some other interest which could affect the way they make that decision. Governing committee members must act for the benefit of the corporation as a whole, and not for themselves or their families. They must not try to profit personally from their position, and they must declare any *conflict of interest*. For example:

- If a governing committee member makes a decision that the corporation enters a contract which he/she would personally make money from, or which a family member would make money from, there is a *conflict of interest*. (The governing committee member in this case has a **pecuniary interest** in the decision.)

- If a governing committee member makes a decision to use grant funds (for example to progress a particular native title claim over other claims) in a way that directly benefits his family or clan, that might also be a *conflict of interest.*

constituency — This is not a legal term, but it is used to describe a group of people, which may or may not include the formal members of the corporation, to whom the corporation provides services. The *constituency* is often determined by external requirements such as **grant conditions**, but may also be reflected

in the corporation's rules. For example:

- An Indigenous health corporation provides health services to all Indigenous people within an area [its *constituency*], rather than just the members of the corporation itself.

- An NTRB is required by the *Native Title 1993* (Cth) to provide services to all Indigenous people who hold or are seeking to claim native title within the NTRB's allocated area [its *constituency*]. Some NTRB regions have recently been joined under a single pre-existing NTRB whose members are only drawn from one of the regions. In such cases, the *constituency* (including all people who hold or may hold native title across both regions) is much broader than the membership (only some people from only one region).

constitution A corporation's *constitution* is the set of rules by which the corporation operates. "*Constitution*" is the term used in the Corporations Act. The ACA Act uses the term "**rules**".

corporate governance The processes by which a corporation is directed, controlled and made accountable to its members.

corporate philosophy The theory of how the government should regulate corporations.

corporate structure The way in which a **corporation** is organised under its **rules** or **constitution** – for example, the way in which **governing committee** members are appointed and decisions are made.

corporation A body created to recognise an **association** as a single legal entity, separate from its members. A corporation has a continuous existence and has rights, obligations, powers and liabilities distinct from those of its members. Corporations are often called "companies" (although "company" has a particular legal meaning), and include incorporated associations.

Corporations Act *Corporations Act 2001* (Cth)

creditor A person to whom money is owed. This might be a person who has provided funds to a corporation for a specific purpose, or to whom the corporation owes money for goods or services bought, or because it has been borrowed. For example:

- ATSIC is a *creditor* where it makes a grant of money for a specific purpose, such as money given to a CDEP corporation to run a CDEP program, or money given to an NTRB to run native title claims. The grant is a special type of contract which gives the money subject to certain conditions about how it can be used, called **grant conditions**.

- A supplier of goods or services is a *creditor* where money is owed

to them. For example:

- If a new photocopier is bought on lay-by, the person who sold it is a *creditor* until it is paid off.
- The landlord of an office rented by a corporation is a *creditor* if the corporation gets behind in rent payments.
- A bank is a *creditor* where it makes a loan.

DIMIA — *The **D**epartment **o**f **I**mmigration, **M**ulticultural and **I**ndigenous **A**ffairs.* DIMIA is the Commonwealth Government department responsible for Indigenous affairs.

fiduciary, fiduciary duty — A *fiduciary* relationship generally arises where one person is taken to have placed trust and confidence in another person. A *fiduciary* is under a legal obligation to act in the best interests of that person or body – this is their *fiduciary duty*. For example:

- a director/governing committee member of a corporation owes a *fiduciary duty* to act in the best interests of the corporation as a whole, and may not act in his/her own interest or in the interest of only one or a few members;
- a doctor owes a *fiduciary duty* to a patient, and must act in the patient's best interest, and cannot tell anyone else about the patient's illness unless the patient agrees;
- *fiduciary* relationships also arise between a lawyer and his/her clients, and between a trustee and beneficiaries of a trust.

governing committee — The committee of people appointed under a corporation's **rules** who manage and govern the corporation. The *governing committee members* have a **fiduciary duty** to act in the best interests of the corporation.

Governing committee is the term used in the ACA Act - see also **board of directors**, which is the term used in the Corporation's Act.

grant condition — When a government funding body gives a grant of money to an Indigenous corporation, the grant is subject to a range of conditions about the use of the money, and subsequent reporting and accountability requirements. For example:

- An ATSIC grant to a CDEP corporation will contain *grant conditions* that state that the money can only be used for CDEP purposes. It may also include rules about how the CDEP scheme must operate, and how the money can be used to buy equipment, office space, etc. The grant conditions will also require that the CDEP corporation keep financial records of how the grant money is spent, and requiring the CDEP corporation to provide financial reports to ATSIC.

incorporation	The process by which a **corporation** is formed and recognised under the law.
incorporation statute	A law under which a corporation may be formed. Generally, this statute will also regulates some of the activities of corporations formed under it.
insolvent	When a corporation is unable pay its debts when they become due and payable to its **creditors**.
interventionist	Taking a role of active involvement or interference in the affairs of a corporation.
mediation	A process where people involved in a dispute agree to appoint a neutral third person ("the *mediator*"), whose job is to try to help them reach agreement. Unlike an *arbitrator*, a *mediator* does not make a decision about what should happen (see **arbitration**).
Native Title Act	*Native Title Act 1993* (Cth)
NTRB	***N**ative **T**itle **R**epresentative **B**ody*. An NTRB is a corporation which has been given specific native title functions under the Native Title Act. These include making or helping people make native title claims, responding to "future acts" by government or developers, helping settle arguments between native title groups, and helping native title claimants make Indigenous Land Use Agreements (ILUAs).
OATSIA	*The **O**ffice **A**boriginal and **T**orres **S**trait **I**slander **A**ffairs.* OATSIA is the part of **DIMIA** responsible for Indigenous affairs, and provides support to the Minister for Immigration, Multicultural and Indigenous Affairs.
objects	The purposes for which the corporation is established. The ACA Act requires that ACA Act corporation includes a statement of the corporation's *objects*. An ACA Act corporation cannot lawfully do anything which goes beyond what its *objects* allow. For example, if a company's *objects* state that it is for education purposes, but it undertakes native title work, it is breaching its *objects*, and anything it does for native title purposes is **void**.
officer	An officer is any person who takes part in the management of a corporation. This may include employees such as senior staff.
ORAC	***O**ffice of the **R**egistrar of **A**boriginal **C**orporations* – ORAC is the office which supports the **Registrar** and is the Commonwealth **regulator** responsible for administering the ACA Act and regulating corporations incorporated under the ACA Act.
PBC	***P**rescribed **B**ody **C**orporate* – A specific type of Indigenous corporation which is incorporated under the ACA Act, for the purpose of managing a particular native title after a successful native title claim. The use of a PBC is required by the Native Title Act.

pecuniary interest An interest involving money; a financial interest. For example, if you stand to make money out of a deal, you have a *pecuniary interest* in the deal.

permissive Flexible; allowing the freedom to decide the best way to do things (opposite of **prescriptive**).

prescriptive Giving directions or determining the manner in which certain actions must be performed (opposite of **permissive**).

public officer A special position appointed by the **governing committee** of an ACA Act corporation. The public officer has certain roles he/she must perform, including maintaining the **register of members**. The position is similar to that of a company secretary under the Corporations Act. A *public officer* does not have to be a member of the ACA Act corporation or its governing committee.

punitive Focussed on punishment or penalties to address breaches in rules or laws – instead of being focussed on preventing those breaches in the first place.

quorum The minimum number of members of a **corporation** or **governing committee** required to be present for a meeting to be valid. For example,

- if a corporation's rules say that the quorum for an AGM is 25 people, then the AGM can only take place if more than 25 people show up.

ratify, ratification Confirming an act of the corporation which the corporation or a person acting on its behalf had no power or authority to perform. For example:

- if a governing committee member enters a contact on behalf of a corporation, and it later turns out that the governing committee member was not properly appointed, the other governing committee members can *ratify* the contract, so that it is valid.

register of members A list of all the current members of a corporation. Under the ACA Act, the **public officer** of a corporation must keep an up-to-date *register of members*, and the **governing committee** must provide ORAC with a copy every year.

Registrar *The **Registrar** of Aboriginal Corporations* – The Registrar is the person who is appointed to head the **ORAC** and has specific powers given to him/her under the ACA Act, as the **regulator**.

Regulations Laws which Parliament has allowed the government to make after establishing certain guidelines have been established. These are usually developed by a government department and then formally made by the Governor-General. *Regulations* can only be made where an Act of Parliament allows them to be made, and they are generally laws of an administrative nature (dealing with the details of how the Act works in practice). For example, the list of fees payable under the ACA Act are not

set out in the ACA Act, but are instead left to the *Aboriginal Councils and Associations Regulations*.

Regulator The person or body responsible for administering and ensuring compliance with an **incorporation statute**, for example:

- **ORAC** is the *regulator* under the ACA Act;
- **ASIC** is the *regulator* under the Corporations Act; and
- The NSW Department of Fair Trading (and the Minister of Fair Trading) is the *regulator* under the NSW *Associations Incorporation Act*.

rules A **corporation**'s *rules* are the rules by which the corporation operates. "*Rules*" is the term used in the ACA Act. The Corporations Act uses the term "**constitution**". Under the ACA Act, a corporation's *rules* must deal with certain issues, including:

- who is eligible for membership;
- how the **governing committee** is to be appointed and what its powers are;
- procedures for governing committee meetings;
- procedures for settling disputes between members of the corporation;
- how the corporations' funds are to be managed;
- how the *rules* can be amended or varied;
- how the **objects** can be altered.

shadow director Someone who effectively runs the corporation and tells it what to do, even though that person might not be a director/governing committee member or have an elected or formal role in the corporation.

special measure An action undertaken by the government to try to make up for a disadvantage suffered by a specific group of people. S*pecial measures* might include:

- State Aboriginal land rights Acts; and
- Equal employment opportunity ("EEO") Acts and programs which encourage and promote Indigenous people.

State Association Incorporation Acts The *State Association Incorporation Acts* are special State-based **incorporation statutes** which are mostly aimed at simple, non-profit corporations. They are generally cheap and easy to use compared with the Corporations Act, but can only be used for certain limited purposes. The *State Association Incorporation Acts* are the following Acts:

- ACT: *Associations Incorporation Act 1991*
- NSW: *Associations Incorporation Act 1984*

- NT: *Associations Incorporation Act 1963*
- Qld: *Associations Incorporation Act 1981*
- SA: *Associations Incorporation Act 1985*
- Tas: *Associations Incorporation Act 1964*
- Vic: *Associations Incorporation Act 1981*
- WA: *Associations Incorporation Act 1987*

Steering Committee The committee of representatives from government parliamentary bodies formed to guide and provide input into the current review of the *Aboriginal Councils and Associations Act 1976* (Cth), for which this Consultation Paper was prepared. The bodies represented on the Steering Committee are listed in the Consultation Paper at paragraph 3.

transaction A business dealing, which if legally valid, creates rights and obligations for the parties involved in it. For example a contract with an outside party to purchase or sell goods or services:

- where an Aboriginal health corporation buys some medical equipment, that is a *transaction*;
- where a CDEP corporation enters a contract under which it gets paid to run a rubbish collection and recycling service, that is a *transaction*.

transactional certainty This is a non-legal term which is used to describe the expectation that a **transaction** between a corporation and a person or organisation outside the corporation will be binding on and enforceable by both sides.

transitional arrangement If there is major reform of the ACA Act, it will take some time for all existing Indigenous corporations to adjust to the new law and legal requirements. To help make that adjustment, existing Indigenous corporations might be given some time (maybe 3-5 years – a "transition period"), and special legal arrangements might be put into place to help make the change. These are called *transitional arrangements*. Once the time is up for making the change to the new system, these arrangements finish, and all Indigenous corporations will have to comply with the reformed ACA Act.

umbrella corporation A corporation whose members are other corporations.

void Not legally binding or enforceable; having no effect.

winding up The process which is used to terminate a corporation. After it is wound up, a corporation no longer exists.

APPENDIX F

REVIEW OF THE ABORIGINAL COUNCILS AND ASSOCIATIONS ACT 1976 (Cth)

Summary of Consultations, Questionnaire Responses and Submissions

July, 2002

Contents

Figures

1 Overview of this paper

1 A central component of the Review of the *Aboriginal Councils and Associations Act* (1976) (Cth) ("ACA Act") has involved both disseminating information on the Review and on the various options for reform of the Act as they have been developed, and providing means by which stakeholders can have an input into the development of these reform options.

2 This paper summarises the views of the wide range of stakeholders consulted regarding possible reform options. These have included Indigenous corporations themselves (both ACA Act associations and those incorporated under other statutes), Indigenous peak bodies, Commonwealth, State and Territory government agencies, and a number of individuals who have been engaged as consultants at various times by ORAC to provide services in relation to ACA Act associations.

3 Stakeholders' views have been ascertained through a variety of mechanisms—written submissions to the Review, questionnaires sent to all contactable ACA Act corporations and a number of non-ACA Act Indigenous corporations, views expressed by participants at two workshops held in Alice Springs in May 2001 and April 2002, and field visits to a number of ACA Act associations.

4 This paper does not attempt to provide an analysis of the legal veracity or otherwise of stakeholders' views presented here, nor of the practicability of any policy options they advanced. Such analysis is left, where appropriate, to the final report of the Review team. The purpose of this paper rather is to provide a thematic summary of the views expressed by stakeholders.

2 Executive summary

5 A range of views was presented to the Review regarding appropriate reform options for the ACA Act. However, the overwhelming majority of those consulted supported the retention of the ACA Act and with it the incorporation and regulation functions of the Registrar. Also, the majority of stakeholders supported an incorporation model that caters for all sizes and types of organisations. Further, all those in favour of retaining the ACA Act and the Registrar supported the implementation of reforms to the Act that will ensure it is more flexible, is less regulatory, increases its consistency with the Corporations Act, and changes the focus of the Registrar's office to capacity building and assistance.

6 Section 2.1 below provides a summary of the views of stakeholders regarding the need for an Indigenous-specific incorporation statute. Section 2.2 then outlines the feedback from stakeholders regarding the principles that should underlie a reformed Indigenous-specific incorporation statute. Section 2.3 considers feedback on the proposal to repeal Part III of the ACA Act. Section 2.4 then summarises the feedback on the interaction between the ACA Act and the Native Title Act.

2.1 Is there a need for an Indigenous-specific incorporation statute?

7 The ACA Act was passed more than a quarter of a century ago, to address particular Commonwealth government policy concerns of that time primarily relevant to the Northern Territory. Given the availability of the Corporations Act and State and Territory Associations Acts for all sectors of the community, including Indigenous people, a basic question posed by the Review was whether there is still a valid policy rationale for an Indigenous–specific incorporation statute.

8 Almost all stakeholders consulted advanced reasons as to why there should continue to be a separate (but reformed) incorporation statute available for Indigenous people. Some of these reasons related to special characteristics of Indigenous corporations and the particular needs of Indigenous communities and groups. Others related to the perceived inappropriateness of alternative incorporation statutes for many Indigenous incorporators. These submissions are summarised at 2.1.1-2.1.4 below.

9 A number of submissions also advanced as a reason for retaining the ACA Act, the requirement under the *Native Title Act* (1993) (Cth) and its Regulations that Prescribed Bodies Corporate and (in general) Native Title Representative Bodies be incorporated under the ACA Act. These submissions are summarised separately at 2.4 below.

10 Alternative arguments were advanced in only two written submissions, from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the South Australian Department of State Aboriginal Affairs (DOSAA).

11 The AIATSIS submission argued that the ACA Act no longer serves its original policy objectives, that circumstances for Indigenous people have so changed that the Act is no longer necessary, and that the Act has been an instrument of oppressive oversight and interference in Indigenous self-government. It argued that ORAC should become a capacity building body only, with no regulatory powers.

12 The DOSAA submission expressed a preference for repeal of the ACA Act and the transfer of existing ACA Act corporations to other incorporation statutes, arguing that this would provide uniform legislation and regulation of all corporations, Indigenous

and non-Indigenous. Such a reform would allow ORAC to focus more on assisting Indigenous corporations, under whatever statutes, in their reporting and corporate compliance requirements.

2.1.1 The special needs of Indigenous groups and communities

13 At the workshops, in consultations with peak Indigenous organisations, and in many written submissions, reference was made to the particular disadvantage suffered by many Indigenous individuals and communities, including poor socio-economic status, low literacy rates, and relative lack of other skills relevant to corporate governance. It was argued that this disadvantage required an Indigenous-specific incorporation statute for two reasons.

14 The first reason related to the particular requirements of Indigenous incorporators for a straightforward and inexpensive means for incorporation, and to ongoing specialist support once incorporated. This is discussed at ¶¶16–18 below.

15 The second reason related to the particular vulnerability of Indigenous communities to the failure of Indigenous organisations funded to deliver essential services. Because there often are no alternative providers of such services, these submissions asserted that there is a need to maintain ORAC's capacity to intervene in ACA Act service-delivery associations at risk of failure, since such failures have significant adverse consequences for Indigenous people dependent upon those services.

2.1.2 The special characteristics of Indigenous corporations

16 Many submissions noted that the memberships and Boards of Indigenous service-delivery corporations are usually drawn from the same Indigenous communities to whom services are being provided, and suffer from the same relative socio-economic disadvantages. Consequently, many Indigenous organisations have great difficulty in complying with regulatory requirements without specialised assistance, such as that they can receive from ORAC. This specialised assistance for Indigenous corporations should not just be focussed on regulatory compliance, but on ongoing capacity building.

17 For equivalent reasons, many submissions noted that Members of Indigenous corporations are disadvantaged in terms of being able to use standard statutory remedies to protect their rights as Members. On that basis, it was argued that a specialist regime is required to assist in resolving disputes between Members, particularly where such disputes compromise the capacity of Indigenous organisations to deliver essential services.

18 The follow-on from this is that a national Indigenous-specific statute would provide consistency in the recognition of such distinctive requirements and needs of Indigenous corporations.

2.1.3 Transferring Indigenous associations to the Corporations Act

19 It was recognised that the Corporations Act offers a broad, flexible and modern incorporation statute, and that many Indigenous organisations have already chosen to incorporate under this statute for particular reasons, and will continue to do so.

20 However, the opinion amongst almost all stakeholders was that there were a number of philosophical and technical issues for Indigenous incorporators in utilising the Corporations Act, and that it would not therefore be appropriate that many or all existing Indigenous corporations be forced to transfer to the Corporations Act as a

consequence of the ACA Act's repeal. This view was shared by the corporate regulator, the Australian Securities and Investments Commission (ASIC).

21 ASIC and several other stakeholders noted that the underlying philosophy of the Corporations Act is that all corporations are treated alike and are subject to the same key legal provisions in the same way. Since it is in essence a collection of legal and other technical obligations, the Corporations Act was not seen as an appropriate vehicle to address specific Indigenous cultural and social needs. Nor was it seen as appropriate that these issues be dealt with through special provisions in the Corporations Act.

22 The regulatory regime under the Corporations Act was seen by many other stakeholders as potentially disadvantaging Indigenous corporations, since fees are higher than the ACA Act and penalties for reporting and other breaches are much more severe. At the same time, it was noted that the threshold at which ASIC as the regulator intervenes in the affairs of corporations is so high that it was felt likely that few if any Indigenous corporations would ever qualify for investigation. (As noted above, there is still a widely held view that appropriate intervention is needed in many cases.)

23 Furthermore, ASIC and other stakeholders alike were of the view that ASIC's corporate philosophy and statutory functions did not equip it as an institution to be able to deal with the special issues faced by Indigenous corporations.

24 ASIC also noted the costs and complexity involved with the wholesale transfer of whole classes of corporations, and problems that ASIC had had with "grandfathering" arrangements.

25 As noted under 2.1 above, only two stakeholders supported the full transfer of ACA Act corporations to the Corporations Act and/or associations incorporation acts.

2.1.4 Transferring Indigenous associations to associations incorporation acts

26 State and Territory associations incorporation acts were not seen by stakeholders, including their regulators, as offering viable alternatives to the ACA Act. One of the issues raised is the lack of consistency across jurisdictions which militated against their use to address on a national basis the particular needs of Indigenous corporations and their members and constituencies. It was noted that the regulators are inadequately resourced as is, and are not in any case equipped to provide specialist regulatory and assistance services to Indigenous associations.

27 Further, several submissions noted that many of the associations incorporation acts had not been amended in order to reflect the modern law of corporations and were themselves in need of major reform. In addition, a number of submissions noted that the majority of State and Territory associations incorporations acts are unable to be used for incorporating commercial entities, which would force many corporations to utilise the Corporations Act.

28 As noted under 2.1 above, only two stakeholders supported the full transfer of ACA Act corporations to the Corporations Act and/or associations incorporation acts.

2.2 Principles of a reformed Indigenous-specific incorporation act

29 The previous sections summarised stakeholders' views regarding the need for a specific Indigenous incorporation act. This section summarises the generally agreed position of stakeholders regarding certain key policy questions that must be considered in any reform of the ACA Act.

2.2.1 Modernising the ACA Act

30 There was virtually universal agreement amongst stakeholders that the ACA Act should be reformed so as to bring it into line with modern corporate law. This was seen as providing important advantages to Indigenous corporations in comparison with the existing ACA Act, including through assisting in improving their corporate governance.

31 There was general agreement that a reformed Act should adopt a more flexible approach to corporations' Rules and to their design, and should remove requirements for the rules to be scrutinised and approved by the Registrar under the current prescriptive and problematic criteria. Increased flexibility was seen as enabling incorporators to devise rules to better meet their particular needs. Some stakeholders however were of the view that the current requirement for the Registrar to scrutinise Rules provided a degree of protection for Members.

32 There was strong agreement with the proposal to increase the consistency of a reformed Act with the Corporations Act in certain key areas, such as the validation of technically invalid meetings and providing certainty to third party contracts (although some submissions expressed concerns in the specific context of PBCs, as discussed in 2.4 below). There was particularly strong support for updating the statement of directors' duties and extending those duties to senior management, given the high dependence of the directors of many Indigenous corporations on management.

33 Stakeholders who expressed views on the matter also supported reform to address a range of technical issues with the current ACA Act which disadvantage Indigenous corporations, such as expressly allowing meetings by telephone or videoconference, reducing minimum membership numbers to five persons irrespective of the purpose of the corporation, and clarifying interaction with Corporations Act provisions imported under sections 62 to 67 of the ACA Act.

2.2.2 Limiting membership to Indigenous natural persons

34 There was strong support for restricting membership to Indigenous natural persons. While some stakeholders saw the need to be able to establish "umbrella" type corporations with other Indigenous corporations as members, the general view was that such arrangements could be appropriately pursued under other statutes, particularly the Corporations Act. There was also support for the proposition that Directors should be limited to Indigenous persons, since other mechanisms exist whereby Indigenous boards can access expertise if required.

2.2.3 A broadly inclusive or limited incorporation statute?

35 A basic choice for a reformed ACA Act is whether it should be confined to certain corporations with particular characteristics and needs, such as small or simple associations, or whether it should remain broadly inclusive and be available for a wide range of Indigenous associations.

36 Most stakeholders favoured a reformed Act that would be available for a wide range of associations. This was for three broad reasons. First, as discussed above, many stakeholders including ASIC and some other State and Territory corporate regulators were concerned about the implications of significant numbers of Indigenous corporations having to move to other statutes and regulatory regimes. Secondly, it was felt that it would be very difficult to provide an appropriately defined threshold above which corporations would be obliged to reincorporate under another statute. Thirdly, some stakeholders were also of the view that a modernised Indigenous-specific act

would be appropriate for most Indigenous corporations, including those trading, and that in any event, such corporations already had a choice of statutes available to them.

2.2.4 The role of ORAC under a reformed ACA Act

37 This reform issue attracted more comment than any other canvassed during the Review. A strong theme, particularly in written submissions, was the special requirements and vulnerabilities of Indigenous corporations, and the advantages that accrue from having a specialist office dedicated to their support.

38 Accordingly, there was strong support for the proposal that ORAC's educative and capacity-building role should be enhanced. It was however noted that in the absence of detailed costings, it was difficult to be sure as to precisely what might be involved in 'capacity building', and that the Registrar may not be able to deliver much more than an expanded training program and reactive advisory service.

39 The potential advantages of enabling the Registrar to outsource capacity building and educative services to appropriate regionally-based peak Indigenous bodies or other organisations was noted by a number of stakeholders, as was the importance of linking and coordinating the Registrar's capacity building functions with those of other agencies, including ATSIC.

40 A number of stakeholders made the point that Indigenous communities are often completely dependent upon the services provided by ACA Act corporations, and that the capacity of the Registrar to intervene can be an important safeguard in these circumstances. Thus, while concerns were expressed at what were perceived as inappropriate and arbitrary interventions by the Registrar in the past, there was a widespread view, including among Indigenous corporations themselves, that it was important to maintain a capacity for the Registrar to intervene in the affairs of corporations in appropriate circumstances.

2.3 Repeal of Part III of the ACA Act (Councils)

41 Virtually all stakeholders who expressed a view on this question were of the opinion that Part III should be repealed. Some Northern Territory stakeholders had expressed concerns during the first round of consultations that Part III of the ACT Act, while possibly anachronistic, offered an important alternative to other community government schemes, and should be retained for that reason. However, those views were not repeated (or were in fact reversed) in their final submissions to the Review.

42 Those few stakeholders who did not directly support this proposal did not argue directly against it either. Instead, they either argued that the repeal of Part III would not be a true reform, and its continued existence in the statute would neither add to nor detract from anything; or that more consultation was needed before adopting such a policy position.

2.4 Interaction of the ACA Act and the Native Title Act

43 Certain corporations with prescribed functions under the *Native Title Act* (1993) (Cth) are required to be incorporated under the ACA Act. These are Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs), as well as (in general), Native Title Representative Bodies (NTRBs).

44 There were only a few submissions which specifically addressed the interaction of the ACA Act with the Native Title Act. However, these tended to be very technical and detailed submissions.

45 Some of these submissions noted that issues relating to PBCs are *sui generis*, and should be dealt with in the separate, ongoing review of the PBC regime under the Native Title Act. It was argued that the issues are of such complexity that to try to deal with them in the context of the review of the ACA Act would serve only to cloud the issues with respect to other corporations.

46 However, it was also noted that for the moment, the ACA Act is likely to remain the vehicle for the incorporation of PBCs, and that therefore it is essential that amendments to the ACA Act (and any consequential amendments of the NTA) should be directed at enhancing the functionality of these corporations, as well as accommodating the statutory requirements. On this basis, the proposed reforms to modernise the ACA Act were generally supported, since for example they would increase flexibility for native title incorporators.

47 However, it was argued that any proposed amendments to the ACA Act and Regulations must take into account the unique and non-voluntary relationship between a RNTBC and its constituents, and that this is done in a way that assists in the continued recognition and protection of native title rights and interests.

48 In the case of NTRBs, several submissions noted that the proposed reforms have the potential to improve corporate governance. However, it was also noted that many of the problems NTRBs face arise because of the of the way the Native Title Act imposes a requirement that what were in most cases originally grassroots community organisations act like statutory authorities. It was noted that this issue can only be partly addressed through reform of the ACA Act.

3 Review methodology—consultations with stakeholders

49 The Registrar's Office was concerned that the Review Team consult as broadly as possible in the conduct of the Review. Meetings with the Steering Committee constitute part of that consultation process. However, there have also been a range of other steps to consult more broadly, in particular with Indigenous corporations.

50 The consultations took place in two distinct rounds. The first round was intended to inform the Review Team of relevant issues (more of a research task); and the second to seek the views of stakeholders on proposals put forward by the Review Team following the first round of consultation.

3.1 April-May 2001 Consultations

51 As noted above, an initial round of consultations was undertaken in April and May 2001. The purpose of these consultations was essentially threefold:

- to update and supplement the research undertaken in the course of the 1996 Fingleton Review;
- to inform the Steering committee through first-hand feedback from ACA Act corporations about perceived problems with the ACA Act; and
- to start to develop and discuss with stakeholders some possible ideas for reform of the ACA Act.

52 These consultations consisted of a workshop in Alice Springs followed by field-visits to several ACA Act corporations, and were more limited and targeted than the second round of consultations in 2002.

3.1.1 Workshop in Alice Springs 3-4 May 2001

53 This workshop aimed to both inform participants of the background to the ACA Act and the need for reform, to outline preliminary reform options, and to obtain feedback on potential reforms. Attendees are listed below.

Organisation	Attendee
(Facilitator)	Murray Chapman
(ORAC)	Colin Plowman (Acting Registrar) & John Glynn
(Review Team)	BJ Kim (Corrs)
(Review Team)	Christos Mantziaris (Corrs)
(Review Team)	Dr David Martin (Anthropos)
(Review Team)	James Whittaker (Corrs)
(Review Team)	M Rashid (SBR)
ATSIC – Alice Springs Regional Council	Eileen Hoosan
ATSIC – Alice Springs Regional Office	Kevin Kerrin + 2
ATSIC – CDEP National Program Centre	Mike O'Ryan
ATSIC – Legal Office	Robert Goodrick
ATSIC – National Housing & Infrastructure	Richard Preece
ATSIC – Native Title & Land Rights Unit	Karen Touchie
ATSIC – Yapakurlangu Regional Council	Noel Hayes
Australian Government Solicitor	Richard Broughton

Batemans Bay Aboriginal Corporation	Rita Davis
Bungala Aboriginal Corporation	David Pearce
Cape York Land Council	Richie Ahmat
Central Land Council	Michael Prowse
Central Land Council	Vicki Gillick
Commonwealth Department of Health Office of Aboriginal and Torres Strait Islander Health	Roger Brailsford
Commonwealth Department of Prime Minister & Cabinet - Office of Aboriginal and Torres Strait Islander Affairs	Sue Meaghan
DeCastro Sullivan Accountants	Merv Sullivan
Goreta Aboriginal Corporation	Mrs Elaine Newchurch
Ipswich Regional ATSI Corporation for Legal Services	Mr Jim Roe
Mara Worra Worra Aboriginal Corporation	Jodie Bell
National Native Title Tribunal	Lilian Maher
Ngaanyatjarra Council Aboriginal Corporation	2 representatives
Ngurruntjuta-Pmara Aboriginal Corporation	Chris Pearson + 2
Northern Land Council	Bob Gosford
Saima Torres Strait Islander Corporation	Jack Gela
Sydney Regional Aboriginal Corporation for Legal Services	Grant Christian + one

3.1.2 Field Visits

54 It had originally been intended that field visits would be made to several Indigenous associations, comprising a sample in terms of purpose, complexity, and geographic location. In the event, a combination of time constraints and the unavailability of key personnel in some organisations meant that only five were ultimately included in field visits. However, a number of these organisations were associated with other corporate entities, both ACA Act corporations and others, so that it was possible to pursue enquiries as to the advantages and disadvantages of various incorporation statutes for Indigenous people.

55 Organisations with whom field visits were conducted were:

- Ngurratjuta/Pmara Ntjarra Aboriginal Corporation (Alice Springs, NT)
- Ngaanyatjarra Council (Aboriginal Corporation) (Alice Springs, NT)
- Bateman's Bay Aboriginal Corporation (Bateman's Bay, NSW)
- Bungala Aboriginal Corporation (Port Augusta, SA)
- Nyangatjatjara Aboriginal Corporation (discussions held in Adelaide, SA)

3.2 2002 Consultations

56 In the beginning of March 2002, the Consultation Paper and a Summary Consultation Paper were made public, and calls were made for submissions, to be received by 26 April. This process included the following steps.

3.2.1 Mail-outs to Indigenous Corporations

57 As part of the wider consultation process, basic questionnaires were developed and sent to all associations incorporated under the ACA Act, as well as to 345 Indigenous organisations incorporated under other Commonwealth, State and Territory legislation, including the Corporations Act and the State and Territory Association Incorporation Acts. The questionnaires were accompanied with a copy of the Summary Consultation report.

3.2.2 Advertisements in Indigenous Publications

58 Advertisements were placed in Indigenous publications, including the Koori Mail, National Indigenous Times, Yamatji News, and the Torres Strait News, noting the release of the Consultation Papers and calling for submissions and comments.

3.2.3 Radio Advertisements

59 Advertisements noting the Review and the Consultation Papers were run on the National Indigenous Radio Service (NIRS) network during March and April 2002. NIRS has the ability to broadcast to over 120 Indigenous radio stations Australia-wide, including the BRACS network in remote areas.

3.2.4 ORAC Web-site

60 Details of the Review, plus copies of the Consultation Papers and the questionnaires for Indigenous corporations were made publicly available on the ORAC website.

3.2.5 Reconciliation Australia Conference

61 Reconciliation Australia held an Indigenous Governance Conference on 3-5 April 2002. It agreed to include an information sheet on the Review and a copy of the Summary Consultation Paper on its website. Copies of the papers were also distributed to all participants at the conference.

3.2.6 Circulation of Consultation Papers to Key Stakeholders

62 In addition to the mail-outs to Indigenous corporations, a broad range of key stakeholders were written to, enclosing copies of the Consultation Papers, and seeking submissions. These stakeholders included the following:

- ATSIC – separate correspondence was sent to the Acting CEO, the ATSIC Chairperson, and ATSIC Regional Councils;
- The Torres Strait Regional Authority (TSRA);
- all Native Title Representative Bodies;
- various Commonwealth and State government departments and agencies which provide funding to, or work closely with, Indigenous corporations, including:
- Indigenous Business Australia,
- the Indigenous Land Corporation,
- Aboriginal Hostels Limited,
- NSW Aboriginal Housing,
- Office of Aboriginal and Torres Strait Islanders Health,

- Institute of Aboriginal and Torres Strait Islander Studies, and
- a range of State departments and agencies.
- The Australian Securities and Investments Commission (ASIC) and the various regulators of the State and Territory association incorporation acts;
- The Human Rights and Equal Opportunity Commission (HREOC);
- The National Native Title Tribunal (NNTT);
- Reconciliation Australia;
- The Australian Labor Party and the Australian Democrats; and
- A sample of consultants and legal service providers appearing on the ORAC consultants register.

3.2.7 ATSIC Briefings

63 In addition to the other steps noted above, the ATSIC Board was briefed at its Board meeting in February. Board members were up-dated on the progress of the Review, and provided with advance copies of the Consultation Papers. Separate briefings were also provided to members of six Regional Councils, some by video-conference.

64 ATSIC was also provided an extra month, until 26 May, to allow time for internal consultations to prepare a consolidated submission.

3.2.8 Workshop in Alice Springs 9-10 April 2002

65 A second workshop was held in Alice Springs, focussing on a more clearly defined set of reform options and involving many of the same organisations and individuals who had participated in the first workshop.

66 Participants at this workshop were:

Organisation	Attendee
(Facilitator)	Murray Chapman
(ORAC)	Garry Fisk (Director Corporate Relations)
(ORAC)	Joe Mastrolembo (Acting Registrar)
(ORAC)	Lea McEachern
(Review Team)	David Martin (Anthropos)
(Review Team)	James Whittaker (Corrs)
(Review Team)	Mamun Rashid (SBR)
(Review Team)	Serena Ashton (Corrs)
(Review Team)	Tig Pocock (Corrs)
Aboriginal Hostels Ltd	Russell Lanme
Aboriginal Lands Trust, WA	Mike Collins
ATSIC - Alice Springs Regional Manager	Kevin Kerrin
ATSIC – CDEP National Program Centre	Adrienne Gillam
ATSIC – Chairperson, Alice Springs Regional Council	Eileen Hoosan
ATSIC – Chairperson, Yapakurlangu Regional Council	Noel Hayes
ATSIC – Manager, Corporate & Commission	Jim Ramsay

Support	
ATSIC – National Network Manager	John Kelly
ATSIC – Native Title & Land Rights Centre	Karen Touchie
Batemans Bay Aboriginal Corporation	Tom Slockee
Bungala Aboriginal Corporation	Bill Bejah
Bungala Aboriginal Corporation	David Pearce
Bungala Aboriginal Corporation	Ken Larkins
Central Land Council	Michael Prowse
Commonwealth Department of Health, Office of ATSI Health	David Scholz
Consultant	Chris Marshall
Coreta Aboriginal Corporation	Raymond Wanganeen
DeCastro Sullivan Accountants	Merv Sullivan
DIMIA, Office of Aboriginal & Torres Strait Islander Affairs	Margaret Henderson
Indigenous Land Corporation	Bob Haebich
Kimberley Land Council	Thomas King
Kimberley Land Council	Tom Birch
National Native Title Tribunal	Lillian Maher
Ngaanyatjarra Council Aboriginal Corp	Anne-Sophie Deleflie
Ngurrutjuta-Pmara Aboriginal Corporation	Chris Pearson
Northern Land Council	Philip Van der Eyk/Solicitor
NSW Aboriginal Housing Office	Julie Morgan
NSW Department of Fair Trading	Anthony McCarroll
Saima Torres Strait Islander Corporation	Jack Gela
Sydney Regional Aboriginal Corporation for Legal Services	Grant Christian
Torres Strait Regional Authority	Francis Pearson

4 Consultation outcomes—preferred reform model

67 Consultations demonstrated that a significant weight of opinion supported substantial reform of the Act to create an Indigenous-specific incorporation statute for a wide range of Indigenous associations of natural persons. While widespread characteristics of Indigenous groups and communities and their organisations were generally seen as requiring a specialist regulatory regime, there was strong support for the reformed Act being consistent with modern corporate law in a number of key respects.

4.1 Alice Springs workshops

68 At the first workshop, held 3rd and 4th May, 2001, preliminary options developed to that point by the Review Team were discussed by participants. These options were:

- Option A; Tiers of Regulation;
- Option B; repeal the ACA Act and create an Office of Assistance for Indigenous corporations; or
- Option C; a combination of A and B.

69 While there was considerable discussion around reform issues for the Act, which provided the Review Team with valuable input into the process, no clear view was expressed from the workshop as to which of these general reform options might be the more appropriate.

70 However, a number of participants argued that any reform of the ACA Act should take into consideration the particular vulnerability of Indigenous communities to the failure of Indigenous organisations funded to deliver essential services. Because frequently there were no alternative providers of such services, there was the need to maintain ORAC's capacity to intervene in ACA Act service-delivery associations at risk of failure, since such failures had important consequences for Indigenous people dependent upon those services.

71 The second workshop was held 9th and 10th April, 2002, after a further set of more refined options had been developed. These were, broadly:

- Option 1; repeal the ACA Act and create an Office of Assistance for Indigenous corporations;
- Option 2; reform the ACA Act in accordance with the "settled" issues, but retain it only for smaller/simpler organisations; or
- Option 3; reform the ACA Act in accordance with the "settled" issues, and retain it for a large range of Indigenous associations.

72 After general presentations and discussions of the review process and of the issues on the first day of the workshop, a Review Team member presented the case for each of the reform options to the workshop on the second day. Following this, participants broke into three groups to discuss preferred options.

73 None of the workshop groups supported Option 1. Reasons advanced included the need for a national special incorporation statute, the complexity of incorporation under other statutes, particularly the Corporations Act, the risk that the whole concept of ORAC and its facilitative role may disappear, and the limited capacities and special needs of remote Indigenous communities in particular.

74 Views were divided between whether Option 2 or Option 3 provided the best reform pathway. Were Option 2 to be adopted, there would need to be consideration to threshold factors other than turnover, one suggestion being an amalgam of purpose, income, and other considerations. Were Option 3 to be adopted, one group argued that there may be the need for several sets of model rules, and that it would result in a complex piece of legislation. There was a general support for a move to a greater emphasis on capacity building by ORAC.

75 Attendees at both workshops not only favoured retention of the Act, but the retention of regulatory powers for the Registrar. They believed that the Registrar needed to retain the power to intervene, but that strong action such as appointment of an administrator should be an act of last resort.

76 The workshop facilitator, Mr Murray Chapman, suggested that while Option 1 was clearly not supported, there was a range of views regarding the desirability of Options 2 and 3, and that the model preferred by workshop participants most probably was an amalgam of these two options.

4.2 Other consultations

77 Field visits were made to a small number of ACA Act associations. These were conducted subsequent to the first workshop, in May and June 2001, and therefore were not based on the final reform options outlined in the Consultation Papers. The visits concentrated on assisting the Review Team members to establish a better 'on-the-ground' understanding of issues being faced by a range of ACA Act corporations. Nonetheless, there was support for maintaining the ACA Act as a distinct Indigenous incorporation statute.

78 **Ngaanyatjarra Council (Aboriginal Corporation)** is a large organisation based in Alice Springs and Perth, which delivers services to remote communities in Western Australia between Warburton and the South Australian border. It recently was recognised as the Native Title Representative Body for a wider region. Members of the association are the traditional owners of Ngaanyatjarra lands. There are a number of other related entities, including Ngaanyatjarra Health Aboriginal Corporation and Ngaanyatjarra Services Aboriginal Corporation which have identical boards and memberships, as well as a unit-trust based warehousing and transport corporation and a Corporations Act regional air services company.

79 The various communities in the region services by Ngaanyatjarra are separately incorporated, some under the ACA Act, others, for historical reasons, under the WA associations incorporations act.

80 Staff consulted argued that aspects of the ACA Act that make it preferable to use for Ngaanyatjarra Council include the limitation of membership to Indigenous people, the protective regulatory regime for Indigenous corporations, and the lower penalties for breaches than under other regimes.

81 However, they had experienced difficulties in getting ORAC to approve proposed changes to their constitution. This related to such matters as their attempt to reflect consensus decision making principles in the Rules, and to establish procedures whereby the different communities in their area of operations can each nominate their own representatives to the Governing Committee.

82 The Native Title Unit also noted a number of difficulties posed for PBCs and NTRBs under the ACA Act. In the case of PBCs, one issue is that of the minimum membership

requirement which in turn is dependent on whether a PBC can be seen to be 'holding land'.

83 Staff were of the view that the regulatory regime under the ACA Act should be more 'benevolent' with greater accountability. ORAC should be less prescriptive in its approach to reviewing rules. There should be defined stages in procedures for dealing with corporations in trouble, so that the appointment of an Administrator is just one of a flexible range of options available to the Registrar, and should only be used for substantial breaches.

84 Staff also noted that while people had an acute awareness of individuals' membership of the various Aboriginal social groupings, this did not necessarily translate into knowledge of who was, or was not, a formal member of a particular corporation. This was but one aspect of a range of differences raised between practices within the communities themselves and those formally required in corporate governance.

85 **Ngurratjuta/Pmara Ntjarra Aboriginal Corporation** is another large and successful regionally-based organisation, delivering a range of services to communities west of Alice Springs. There are several other entities associated with it, including Corporations Act companies operating various commercial ventures.

86 Management were of the view that unless there was a very good reason to do so, they would not recommend that a community or group incorporate under the Corporations Act. This is because it has much more onerous obligations, ASIC is not knowledgeable of or sympathetic to particular Aboriginal needs and circumstances, there are higher duties of care for Directors, and heavy penalties for failing to comply with the Act's requirements, for example failing to lodge returns etc.

87 While the Governing Committee does formally make decisions on commercial issues, it is heavily dependent upon management. A significant role of the board lies in dealing with members' issues, including resolving disputes that arise in the communities in the region. The board provides the cultural interface between the corporation and the membership.

88 Management of **Nyangatjatjara Aboriginal Corporation** (NAC) were of the strong view that 'community' or social and commercial purposes needed to be separated in organisational structures and practices. To this end, NAC, an ACA Act corporation with a large participatory membership from its region of operations in Central Australia, was used as the vehicle for social goals. NAC however was linked to a number of other trusts and Corporations Act companies, through which a range of commercial and other activities were conducted, such as a successful cultural tour operation at Uluru, and an accounting service. While Nyangatjatjara' management supported the ultimate Aboriginal control of the linked structures and trusts, they took the view that ACA Act corporations were not appropriate entities for successfully conducting commercial enterprises.

89 **Bungala Aboriginal Corporation** is a large and successful CDEP organisation based in Port Augusta. Management observed that the members and Governing Committee are drawn from CDEP participants, and therefore in general may not have the skills or education to direct the complex operations of a CDEP scheme encompassing over 300 participants, including those in 'satellite' schemes in towns over a very large region, as well as a significant commercial arm. It was stressed that management expertise and responsibility was crucial to the successful operation of that corporation.

90 While Bungala management saw no basic problems with the ACA Act as it currently stands, they observed that the model rules were not appropriate for them, and that it had taken them 6 months to negotiate a change of rules in 1997. Given the difficulties in getting quorums at meetings because of its huge area of operation, and that Bungala has entered into a number of significant commercial contracts as well as funding agreements in relation to its CDEP scheme, the issue of 'transactional certainty' is highly relevant to them.

91 **Bateman's Bay Aboriginal Corporation** is a small housing association based on the south coast of New South Wales. It has suffered in the past from a number of the problems facing such organisations, and felt that under ORAC's previous regime, they had not had appropriate advice and assistance.

4.3 Questionnaire responses

92 As part of the wider consultation process, basic questionnaires were developed and sent to 2005 associations incorporated under the ACA Act (of which 77 were returned by the Post Office), as well as to 345 Indigenous organisations incorporated under other Commonwealth, State and Territory legislation, including the Corporations Act and the State and Territory Association Incorporation Acts.

93 The questionnaires sought only basic information on corporations and their views regarding reform options outlined in the Discussion Paper. For those associations incorporated under the ACA Act, the questionnaire asked for details of the association's name, the State or Territory in which it operated, its purpose(s) or main functions, the range in which its annual turnover lay, and the ranges in which its membership and governing committee numbers lay.

94 Views of the three reform options outlined in the Discussion Paper were sought by means of five check boxes for each option, ranging from 'strongly agree' to 'strongly disagree'. For non-ACA Act corporations, two additional questions were asked; which statute the organisation was incorporated under, and whether, if the ACA Act had been reformed at the time they were incorporating in line with the 'settled issues' outlined in the Discussion Paper, they would have considered incorporating under the ACA Act. Provision was made for additional comments to be added to the questionnaire, including outlining reasons for strongly agreeing or disagreeing with any of the three reform options. Examples of the two types of questionnaire are attached at Section 7, page 71.

95 Of the 2005 questionnaires sent to ACA Act associations, only 106 (or 5.3%) were completed and returned to ORAC. Of the 345 questionnaires sent to non-ACA Act corporations, 24 (or 7.0%) were completed and returned. Responses were received from corporations in all States and territories except the ACT, and from both ACA Act and non-ACA Act corporations, as shown in Table 1 below.

Table 1 Total responses by State and Territory

Statute	QLD	NSW	VIC	TAS	SA	NT	WA
ACA Act	30	18	3	2	2	17	34
Other	5	1	3	1	3	9	2
Total	35	19	6	3	5	26	36

96 In many cases, the completed responses suggested that care had been taken to read the Discussion Paper and come to an informed view of the pros and cons of each of the outlined options, and the hierarchy of preferred reform options was clearly indicated. In others, the selected hierarchy of options was inconsistent with clear statements in the written comments provided on the questionnaires. In these cases, the selected options were adjusted to be consistent with the comments, and notations to this effect made on the questionnaires.

97 In some 50% of the returned questionnaires however, responses to the proposed reform options were such that no meaningful conclusions could be drawn from them as to a clear reform option preference. This was either because no preference was indicated for any of the reform options or the 'no view / preference' option was selected for all options, because 'strongly agree' or 'agree' was selected for all options, because 'disagree' was selected for all options, or because selected options were mutually inconsistent (eg, agreement with both options 1 and 2 or 1 and 3). The number of responses in each of these categories is shown in Table 2 below.

Table 2 Responses not included in analysis

Reason	No of responses
'No opinion' on any reform option	25
'Agree' or 'strongly agree' to all reform options	24
'Disagree' with all reform options	2
Internally inconsistent responses	15
Total	66

98 These questionnaires have not been included in the following analysis, since their preferences in terms of the reform options were either not stated or were inconsistent. The balance of 64 questionnaires (54 from ACA Act corporations and 10 from non-ACA Act corporations), forms the basis on which assessments of views as to appropriate reform options can be made. However, because this sample size is so small, meaningful statistical analysis can not be undertaken. Further, the 54 'valid' questionnaires represent only some 2.7% of the ACA Act corporations to whom questionnaires were sent. Consequently, the conclusions that can be drawn must necessarily be treated with caution.

99 The distribution between the States and territories of those questionnaires from which conclusions could be drawn on reform options preferences is shown in Table 3. It should be noted that there is a differential in the 'valid' response rate across the States and territories, although those at the extremes (TAS and SA) returned smaller numbers of questionnaires.

Table 3 'Valid' responses by State and Territory

Statute	TAS	NSW	NT	WA	VIC	QLD	SA
ACA Act	1	7	10	17	1	17	1
Other	–	1	2	–	2	2	3
Total	1	8	12	17	3	19	4
'Valid' response rate	33%	42%	46%	47%	50%	56%	80%

100 While as discussed, the relatively small sample size means that conclusions have to be carefully drawn, there is a general tendency for better resourced organisations (as measured by their annual turnover), to provide a higher proportion of internally consistent preferences regarding the preferred reform option, as shown in Table 4 below.

Table 4 'Valid' responses by turnover

Turnover	'Valid' response rate
$250,000 or less	46%
$250,000—$1,000,000	48%
More than $1,000,000	58%

4.3.1 Low return and validity rates

101 Despite every attempt being made to ensure that the materials sent to Indigenous corporations were both accessible and informative, there was an overall low completed return rate of the questionnaire, and a low 'validity' rate of those which were returned.

102 There are a number of possible explanations for the relative lack of success in eliciting informed responses. One relates to the capacity of many such organisations to deal effectively with paperwork of the kind sent to them for this review. The apparent general correspondence between turnover and valid response rate for returned questionnaires would lend some credence to this explanation. Another possibility, which cannot be directly tested, is that the matter of reform of the ACA Act is a 'second order' issue for most Indigenous corporations, given the scale and complexity of the broader issues that many of them are having to deal with.

103 The Review team was aware that there was a risk that the mail-out and questionnaire might not attract a large response. It was nonetheless considered necessary to undertake the mail-out, as one aspect of a broad consultation methodology to reach as many Indigenous corporations and peak bodies as feasible within the resources available. Other aspects of the consultation methodology have been discussed previously, on pages 2-13 above.

4.3.2 Reform option support

104 The following figures plot the support for each of the reform options for the 64 returned questionnaires which provided 'valid' responses as discussed above.

105 Figure 1 shows that two thirds of respondents disagree with Option 1, that is with abolition of the ACA Act and the consequent transfer of associations to other statutes. Only 20 percent of respondents agreed with this reform proposal, and just 13 percent had no option on it.

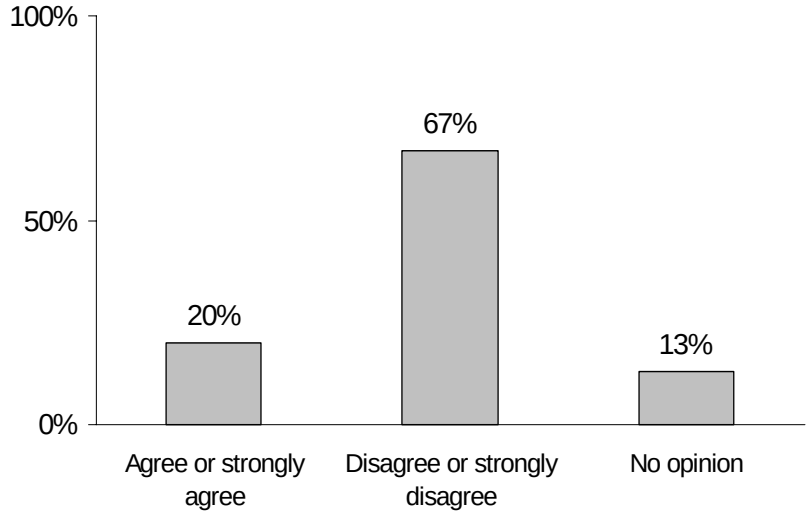

Figure 1: Support for Option 1

106 As shown in Figure 2, the results of the survey for Option 2 were at best neutral, with virtually identical numbers of respondents supporting it, opposing it, and having no opinion on it.

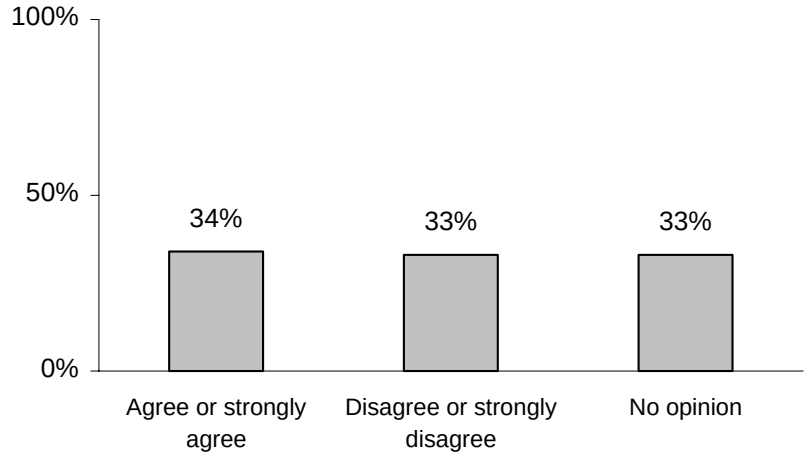

Figure 2: Support for Option 2

107 This is not unexpected. The advantages of Option 2 are arguably more technical in nature, and would not necessarily be as apparent to respondents from Indigenous associations. For example, it would still potentially require the migration of most larger Indigenous associations to other statutes.

108 Just under 60 percent of respondents supported Option 3, although over a quarter of respondents had no opinion on it. Just 16 percent opposed this option.

109 Again, this result is not unexpected. Option 3 would maintain a distinct but reformed and modernised Indigenous incorporation statute. It would not require the migration of existing associations.

110 It could also be argued that at a time when significant policy changes are being made in the Indigenous arena, Indigenous people may resist changes, particularly as in the case of the ACA Act where they involve a measure for which, as consultations indicated, there is a quite high sense of 'ownership'.

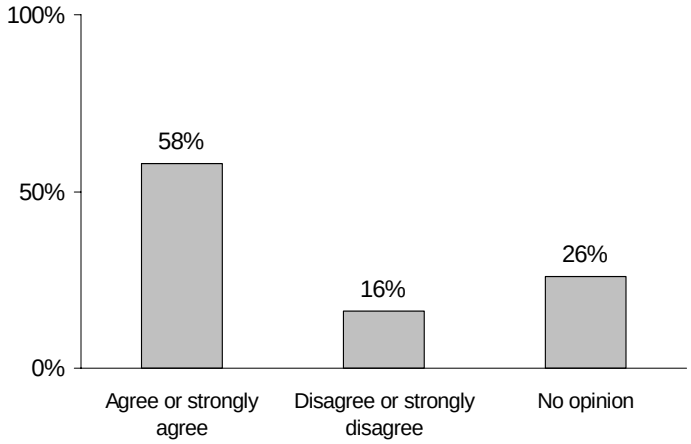

Figure 3: Support for Option 3

111 The small sample size of valid responses meant that meaningful results could not be obtained from a multivariant analysis of the responses to the three reform options. Nonetheless, since a substantial proportion (two thirds) of respondents opposed the abolition of the ACA Act, there is utility in examining the preferences of these respondents as between options 2 and 3. These are presented in Figure 4 below.

112 This figure indicates that, for those who indicated a view that the Act should be kept, 54 percent supported option 3 over option 2, while only 23 percent supported option 2 over option 3. The same percentage indicated no preference between these two options.

113 Although the sample size is small, responses were also examined to see if there were any meaningful differences between those of ACA Act associations, and those from other Indigenous corporations. Of the 54 ACA Act associations who provided 'valid' responses, 39 (or 61%) did not support option 1. As shown in Figure 5 below, just over half of these respondents supported option 3 over option 2.

114 Of the 10 non-ACA Act corporations who provided valid responses, 5 did not support option 1. Four of these corporations supported option 3 over option 2, and one expressed no preference between options 2 and 3.

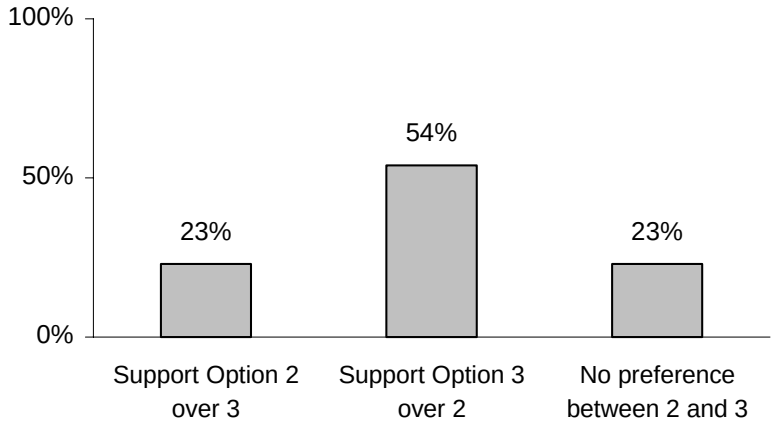

Figure 4: Relative support for Options 2 & 3: all corporations

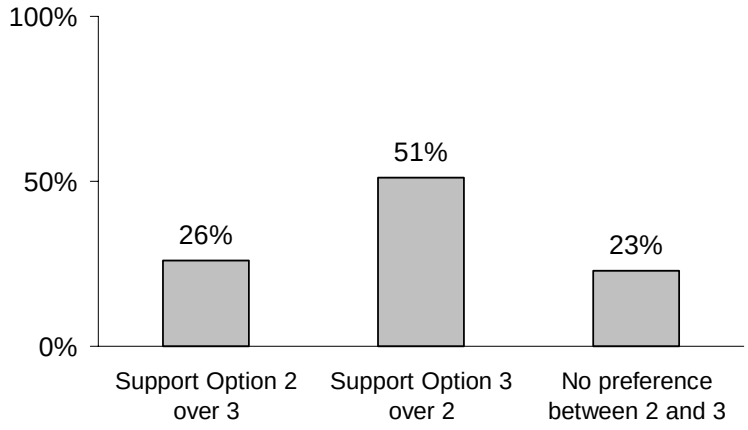

Figure 5: Relative support for Options 2 & 3: ACA Act associations

4.3.3 Conclusions drawn from questionnaire responses

115 A number of caveats have been provided in regard to the small sample size of returned internally consistent and valid responses to the questionnaire, and to whether it can be safely assumed that the responses constitute informed opinions as to the merits of the three reform options.

116 Within these limitations however, two general outcomes can be discerned. These are:

(a) a substantial majority (two thirds) of respondents supported the reform of the ACA Act rather than its abolition; and

(b) of these respondents, a majority supported option 3 over option 2.

117 It should be noted at this point, that the outcome from responses to the questionnaires is consistent with that from the other consultations and submissions discussed in the remainder of this report.

4.4 Written submissions to the Review

118 Thirty-one written submissions were made to the review, from a wide range of organisations and individuals, including the Australian Securities and Investments Commission (ASIC), Government agencies, Native Title Representative Bodies and Land Councils, the Aboriginal and Torres Strait Islander Commission (ATSIC), State and Territory Fair Trading agencies. Additionally, a number of submissions were received from individuals, most of whom had provided consultancy services to ORAC in relation to the discharge of its functions in relation to ACA Act corporations.

119 There was strong support for the advantages of an enhanced focus for ORAC on 'capacity building' for Indigenous corporations.

120 Only two submissions, from the Australian Institute of Aboriginal and Torres Strait Islander policy and the South Australian Department of State Aboriginal Affairs, supported the abolition of the ACA Act and the transfer of associations to other acts, as envisaged under Option 1. The overwhelming weight of opinion in the submissions supported either Option 2 or Option 3, with a greater level of support for Option 3.

4.4.1 ATSIC

121 At the time of compiling this summary of outcomes from consultations, ATSIC had not provided a finalised submission to the review, but only a draft electronic copy.

122 As discussed previously in relation to the consultation methodology, a number of steps were taken to enable input into the Review by the various levels of ATSIC. The CEO was a member of the Review Steering Committee. The Board of Commissioners was provided with copies of the Consultation Papers on the review of the Act, both ATSIC's General Counsel and a Board member are members of the Steering Committee, and Regional Councils were provided with copies of the Consultation Paper and a number were provided with briefings.

123 On 28 February, the Acting Registrar sent a letter and copies of both the *Consultation Paper* and *Summary Consultation Paper* to the Acting CEO, requesting a formal submission from ATSIC. In that letter, the Acting Registrar noted that it had been agreed that ATSIC would provide a single, unified submission to the Review.

124 The Acting CEO of ATSIC in turn wrote to Regional Council Chairpersons and all Managers, requesting that responses be sent to Jim Ramsay of the Corporate and Commission Support Office. A total of 15 responses were received from Regional Councils, Program Managers, and Network Offices.

125 Unfortunately however, given ATSIC's role as the lead agency in providing policy advice to the Commonwealth government, its submission to the Review does not constitute a single, unified response, but rather an unanalysed tabulation of the relatively few disparate responses from various Regional Councils, Managers, and Network Offices. However, a substantial submission from the Land Rights and Native Title Centre was included in the overall ATSIC submission. A separate submission was also received from ATSIC's Office of Evaluation and Audit, and this is discussed below.

126 ATSIC's submission stated that:

"The majority of the responses supported the retention of the Act, however, due to the complexity of the responses received, and the varying issues that were raised, particularly unresolved issues relating to Prescribed Bodies Corporate and Native Title

Representative Bodies, it is difficult to provide an uncomplicated analysis of the submission."

127 ATSIC also wished to reserve the right to develop a response and take it to the Board of Commissioners, once a preferred reform model had been adopted.

128 This report of consultation outcomes therefore is unable to summarise a coordinated ATSIC response to any of the settled issues, nor to any of the three broad reform options. However, while ATSIC did not provide a unified response, there was strong support recorded for retention of the ACA Act and the Registrar's incorporation and regulatory roles. Furthermore, the Land Rights and Native Title Centre's submission quite comprehensively deals with issues for Native Title Representative Bodies and Prescribed Bodies Corporate, and the views expressed in the submission are discussed at relevant sections in this report.

4.4.1.1 Regional Councils

129 The ATSIC submission contains short summaries of the views of eight Regional Councils, together with a brief summary of the views of the Regional Councils Chairs from Western Australia.

130 These Regional Councils supported the need for a separate, but reformed, Indigenous-specific incorporation statute. A number noted the problems associated with State association incorporation acts. Binjirru Regional Council was of the view that there were no fundamental issues excluding any of the three reform options from consideration, but also argues that the Act should be retained since it supports uniformity between the States and territories for Indigenous organisations, and enables Aboriginal people to progress self-determination.

131 Most Regional Councils appeared to favour Option 3, and with a shift in ORAC's role towards capacity building. Miwatj Regional Council however was of the opinion that no changes should be made to the current act, which should be available to all sizes of organisation. Nulla Wimila Kutja Regional Council suggested that there may need to be some discretionary 'move-on' provisions to other incorporation statutes in certain circumstances.

132 Wongatha Regional Council was of the view that repeal of the Act should not be given further consideration, since (a) Indigenous people are familiar with it, (b) it would be complex, time-consuming and expensive to transfer existing associations to other statutes, and (c) other statutes do not provide the support and regulatory functions that the ACA Act does. Wongatha Regional Council was also of the view that addressing the 'settled issues' in the Act would not of itself lead to improved corporate governance and financial accountability.

4.4.1.2 Administrative arm

133 **Customer Lending and Support Services** supported keeping the ACA Act as a broad incorporation statute, but with major reforms. The Act provides a relatively quick and simple registration process, pitched at a level that the vast majority of Aboriginal people can appreciate. Option 2 would be the least preferred one, as the transitional arrangements would be difficult to implement.

134 The **Victorian Network Regional Manager** strongly supported the retention of the Act, with a preference for Option 3. In their view, both ASIC and the State association act regulators had badly failed Indigenous corporations.

135 The **Perth Network Regional Manager** recommended that the ACA Act be maintained, simplified, and available for all corporations. This could provide major benefits in providing development of and education on more appropriate governance structures. ORAC should be better resourced for its education, support and monitoring roles.

136 The **Northern Territory State Policy Centre** was of the view that there is a continuing need for an Indigenous-specific incorporation statute, and that it should not just be for small, simple corporations.

137 The **CDEP National Program Centre** argued for the need for a separate incorporation statute, since the large number of State regimes vary in their ability to meet Indigenous needs. The State regimes lack the resources to assist Indigenous organisations. The Centre supported Option 2, suggesting that the threshold should be set according to organisational income, size, and function. The Act should be restricted to non-profit associations.

4.4.2 Office of the Registrar of Aboriginal Corporations

138 The views of ORAC staff were ascertained through an internal workshop held on 30 April, 2002. There was no support for Option 1, with reasons advanced including:

- the ACA Act's lower costs;
- the lack of support and training under other regimes;
- the more significant penalties for breaches under the Corporations Act;
- the ACA Act's provision of a nationally consistent incorporation regime; and
- its continuing relevance for Indigenous groups, particularly in remote areas.

139 There was strong support for updating the ACA Act to reflect contemporary Indigenous corporate needs.

140 There was a range of views in relation to Options 2 and 3, although a majority of staff favoured Option 3. A number of reasons were advanced for this, including that a range of Indigenous associations incorporate under the ACA Act because they have a sense of ownership of it, and that allowing any size of association to incorporate under the ACA Act preserves the right of choice, which would be reduced by a requirement that more complex or larger associations incorporate under other statutes.

141 The arguments put against Option 3 were that it would prove too complex and prescriptive (stated to be one of the main reasons to amend the current act), reporting categories could cause administrative complexities, and it would require too many resources.

4.4.2.1 Land Rights and Native Title Centre (LRNTC)

142 The LRNTC submitted that while a number of the proposals put forward in the Consultation Paper could be agreed to in principle, ATSIC's final position on the ultimate shape of reform (as it relates to PBCs and NTRBs) cannot be determined until more detailed proposals are put forward for consideration.

143 The submission therefore highlighted a number of areas where LRNTC believed further research should be undertaken before the Steering Committee makes any final decision on the detail of the settled reform issues or, more importantly, before coming to any preferred position on the shape of any structural reform.

144 The LRNTC submitted that they held serious concerns about the implications for both NTRBs and PBCs of any proposals involving the repeal of the ACA Act, and that further consideration should be given to enacting amendments to the ACA Act to provide for discrete Parts of that Act to govern the operations and accountability arrangements for NTRBs and PBCs respectively.

145 The LRNTC made a number of detailed submissions in relation to the three broad reform options outlined in the Consultation Paper.

Option 1

146 The Centre was of the view that insufficient information has been provided for groups to come to an informed choice about the merits of this proposal. Some of the concerns in relation to PBCs and NTRBs include:

- moving NTRBs to a model of incorporation which has the facility to be non-associational will not necessarily resolve the problems identified in the Consultation Paper as requiring resolution. Consequently, the Centre requires further information on how the Corporations Act would, in practice, address the identified difficulties of control by the membership and Governing Committee composition. As the Centre understands it, it may actually be easier for the membership to destabilise a Corporations Act corporation given that 5% of the membership can call a meeting of the corporation;
- the issue of late fees and penalties under the Corporations Act is of significant concern, particularly where there is evidence of existing high levels of non-compliance under the ACA Act. For this option to be workable a number of legislative changes would be required to the Corporations Act to make it more appropriate to the cultural circumstances and resource constraints affecting NTRBs and PBCs. The Centre would require further information on the feasibility of effecting such change;
- while there is theoretically a choice between the Corporations Act and State Association Incorporation Acts, many groups would be forced to incorporate under the Corporations Act either because they are not a "not for profit" organisation or they cross jurisdictions. The Centre would require further information on how the various State Association Incorporation Acts would regard native title organisations receiving payments from mining companies, etc for activities occurring on native title lands;
- it appears that there is only *one* type of company under the Corporations Act that would be suitable for NTRBs and PBCs (i.e. companies limited by guarantee). However, while companies limited by guarantee may be suitable in terms of structure and reporting for NTRBs, they would appear to be unsuitable for PBCs given the reporting requirements. Given the concerns expressed by the Centre, they would require further information on what types of companies the Review Team believes would be suitable for PBCs and NTRBs;
- the Consultation Paper seems to suggest that the preferred alternative for PBCs under Option 1 would be to incorporate as small proprietary companies under the Corporations Act. However, this proposal is unacceptable for two reasons. *Firstly*, while the reporting requirements for small proprietary companies may be suitable for PBCs, the structure of those companies is entirely unacceptable on the basis that they must have shares and those shares are then tradeable. *Secondly*,

to qualify as a small proprietary company the PBC must have fewer than 50 non-employee members. This would restrict one of the basic choices currently open to PBCs – that is, whether to have a representative or participatory membership. Native title groups wanting a relatively large membership (eg in a Miriuwung Gajerrong-type situation) would therefore have to use some other corporate vehicle, which would inevitably have much more onerous (and largely inappropriate) reporting requirements;

- Option 1 creates the possibility that NTRBs and PBCs may not be subject to a nationally consistent regime. The LRNTC is also concerned about the disruption and confusion that would result over the next 3-5 years as organisations are transferred to other incorporation regimes. From both an administrative perspective and from the perspective of protecting native title, these outcomes are highly undesirable.

147 It should be noted that whilst the PBC Options Paper countenances providing native title groups with a choice of incorporation vehicles *in addition to* the ACA Act, the Options Paper also explores the possibility of creating a specialist incorporation vehicle designed specifically for PBCs. A specialist regime could overcome a number of the difficulties with existing incorporation statutes and could be created simply by adding a new Part to the ACA Act.

Option 2

148 It is unclear whether PBCs and NTRBs would be required to transfer out of the ACA Act under this proposal.

149 The Consultation Paper itself states that PBCs and NTRBs would be allowed to remain under the ACA Act in the medium term and that, in any event, the discretionary nature of the provisions requiring organisations to transfer could be implemented in a way that would allow NTRBs and larger/more complex PBCs to remain under the ACA Act.

150 The LRNTC would consequently require clarification of the proposed treatment of NTRBs and PBCs under this proposal.

151 While reserving its final position until it receives clarification, the Centre's comments in relation to Option 1 also apply to Option 2, to the extent that all NTRBs and some PBCs would be required to transfer to other regimes. The LRNTC's comments in relation to the "settled issues" apply to the extent that NTRBs and PBCs would be allowed to remain under an amended ACA Act.

Option 3

152 As the LRNTC understands this alternative, no NTRBs or PBCs would be forced to transfer to other incorporation regimes *unless* an option was adopted of providing the Registrar with discretionary powers to require ACA Act corporations to transfer to the Corporations Act.

153 If that option were adopted as part of this proposal, then the LRNTC's comments in relation to Option 1 would apply to the extent that the discretion could be used to transfer NTRBs and PBCs. LRNTC also note that there may be possible *Racial Discrimination Act* 1975 issues if the transferred organisations are given no choice as to the incorporation legislation that they are to be subject to. Finally, LRNTC has some concerns about the scope of the Registrar's discretion under this (and the previous) proposal.

154 While the Centre appreciates that there are obvious difficulties in defining what is or is not a "small/simple" corporation, or the circumstances under which it is appropriate for an organisation to transfer out of the ACA Act, they would be reluctant to see an amended Act contain broad discretionary powers for the Registrar (particularly when Indigenous critiques of the Act have largely been focussed on the manner in which previous Registrars have exercised their discretions).

155 If, on the other hand, the proposal does not include a "transfer out" option, then the Centre's comments in relation to the "settled issues" apply. The proposal to introduce different tiers of regulation has merit, although LRNTC has some concerns about the complexity of the amended legislation, and would require further information on how many tiers of regulation are likely to be introduced.

156 As an alternative to having a number of different tiers, it may be preferable to have classes of exemptions. For example, NTRBs should be exempted from ACA Act reporting requirements given that they already exceed those requirements under other legislation. There may be other organisations who can be similarly exempted.

157 At the other end of the scale, LRNTC argues that PBCs should be exempted from having to comply with the full range of reporting requirements under the Act and that external accountability requirements should be limited to those imposed by (any) third party funding agencies via grant conditions (see paragraph 6(a)). There may be other organisations, in a similar position to PBCs, who could also be entitled to similar exemptions.

4.4.2.2 Office of Evaluation and Audit (OEA)

158 In a separate submission of 27 May 2002, OEA argued that the ACA Act should be retained as a nationally uniform statute, modernised to address the "settled issues", and targeted at smaller, simpler Indigenous corporations. It was argued that this would see the Act returning to its original philosophy of providing a simple, easy-to-use incorporation statute.

159 Option 2 (streamlining the Act to focus on the incorporation of smaller and simpler corporations) was thus favoured, with an important caveat. The Office disagreed with the statement at page 156 of the Consultation Paper that "ACA Act corporations … would not be required to prepare audited financial statements and directors reports." The view was expressed that all corporations should be required to provide such reports, but that possibly a discretionary power could be given to the Registrar to waive these obligations where a corporation does not hold assets or has not had significant transactions.

4.4.3 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

160 The submission from AIATSIS was drawn up by Dr Patrick Sullivan, who has played a role as a member of the Review Team in preparing certain material, largely in relation to Part III of the Act.

161 It expresses a strong preference for Option 1, with Option 2 as a second preference and Option 3 as a 'last resort'. Its fundamental reasons for this preference are:

- the ACA Act has failed in its original objectives;
- circumstances for Indigenous people have so changed that the Act is no longer necessary;

- registering under the Act has been complex for Indigenous groups;
- it has lead to duplication of reporting and accountability requirements;
- it has been the instrument of oppressive oversight and interference in Indigenous self-government;
- these problems are inherent in any Act for the incorporation of exclusively Indigenous organisations;
- retention of the Act in any form is unnecessary and would be a continuing source of conflict and disunity;
- The Act should be replaced by State, Territory or Commonwealth regimes, and ORAC's role be to empower Indigenous groups to govern themselves under these regimes.
- ORAC should be an enabling body only, with no regulatory powers. A regulatory role would conflict with and inhibit ORAC's role as enabler. As a relatively small body, ORAC is more subject to political pressures regarding Indigenous governance issues which may lead to inappropriate intervention. Other regulators have the statutory power and operate in a policy environment which enables them to respond in a non-discriminatory manner.
- Option 3 should be excluded, since an Act reformed in this manner would inevitably succumb to the same issues with ORAC's procedures which have caused considerable disruption in Indigenous communities and organisations.
- Option 2 is more acceptable, but unnecessary. Alternatives are already available under association incorporation acts. Were the ACA Act to remain in place, ORAC would continue to have a regulatory role which is not supported for reasons advanced above.

4.4.4 National Native Title Tribunal (NNTT)

162 The NNTT's comments were directed primarily to matters relevant to the creation of Prescribed Bodies Corporate (PBCs) and the functions of Registered Native Title Bodies Corporate (RNTBCs) under the *Native Title Act* 1993 (Cth) (NTA) and the Native Title (Prescribed Bodies Corporate) Regulations.

163 The NNTT noted that for the moment, the ACA Act is likely to remain the vehicle for the incorporation of PBCs, and that therefore it is essential that amendments to the ACA Act (and any consequential amendments of the NTA) should be directed at enhancing the functionality of these corporations, as well as accommodating the statutory requirements.

164 The submission from the NNTT is discussed further in the section on PBCs and NTRBs on pages 66-67 below. Attachment B to the submission provided brief responses to the "settled issues" in relation to their impacts on PBCs, which are discussed in the relevant sections below.

4.4.5 ASIC

165 ASIC provided a detailed submission to the review, which in summary supported the retention of the ACA Act as a general incorporation statute for Indigenous associations, with appropriate reforms to bring it generally into line with accepted principles of

modern corporate law, subject to the special requirements for Indigenous corporations outlined in the Consultation Paper.

166 The submission noted that under this approach, Indigenous corporations would retain the right to incorporate under the Corporations Act or State and Territory associations incorporation acts.

167 It was ASIC's view that, if amendments were made to the ACA Act, it would be desirable to set a future timetable for review (eg in five years) to ensure this legislation remains consistent with modern corporate theory and the needs of its stakeholders.

168 The submission noted that if the issue of transferring Indigenous corporations to the Corporations Act was revisited in the future, a more detailed consideration of the implications of such a transfer would need to be undertaken at that time. While it felt that the review effectively identifies some of these issues, there are many practical legal and administrative matters that would need to be considered more fully, including the resources involved in both the transfer to the Corporations Act regime and the ongoing management of Indigenous corporations under this regime.

169 Again, if any transfer were to be contemplated in the future, ASIC was of the view that special rules should not be created within the Corporations Act for Indigenous corporations and their members and management.

170 Finally, ASIC's submission noted that the review has usefully highlighted the potential areas of interaction between ORAC and ASIC. It proposed therefore that it might be worthwhile at the end of the review for the two organisations to consider a Memorandum of Understanding to facilitate future information sharing and assistance.

4.4.5.1 Reasons for ASIC support of Option 3

171 ASIC submitted that each of the three reform options operates on the premise that Indigenous corporations and their incorporators and management have special needs that have to be met if those incorporators and corporations are to participate satisfactorily and successfully in corporate and commercial life. The submission noted this premise involves complex and difficult questions of a social and cultural nature which fall outside ASIC's usual areas of expertise and responsibility. ASIC has therefore not sought to comment on these issues, but accepted the arguments put forward in the paper in favour of such an approach.

172 Given this approach, ASIC favoured Option 3, as the identified special needs are more appropriately dealt with by a body established to specifically address and provide funding, training and educational assistance to Indigenous corporations and their incorporators and management, outside of the legislative incorporation regime prescribed by the Corporations Act. Reasons for ASIC's not supporting either Option 1 or Option 2 are outlined below.

173 In favouring Option 3, ASIC agreed that the ACA Act should be retained as a broad incorporation statute, provided it is reformed to make it more aligned to modern corporate law. For those corporations for whom the ACA Act is not appropriate the Corporations Act and the State Associations Incorporation Acts still provide viable alternatives.

174 ASIC was also of the view that the ACA Act should be reviewed at a pre-determined time in the future (eg five years after any amendments are implemented) to ensure the Act remains current with changing circumstances. At this time it may be appropriate to again consider whether there is a need for a separate statute of incorporation for

Indigenous corporations, or whether to incorporate or transfer all Indigenous corporations to the Corporations Act or State legislation.

175 In ASIC's view, reforming the ACA Act in accordance with Option 3, would ensure that modern corporate philosophy in key areas, such as directors' duties, is implemented for ACA Act corporations. This is likely to lead to an improvement in the corporate governance and financial accountability of Indigenous corporations and their directors. ASIC supported the view in the Consultation Paper that directors' duties should not be lowered for Indigenous corporations, as this could encourage a corporate culture of lower managerial standards.

176 ASIC submitted that it was highly likely that Option 3 would be least costly for ASIC itself, although noting that it is difficult to cost any of the three options proposed in the Consultation Paper without a great deal of further information, due to the various possible approaches that could be taken and ASIC's unfamiliarity with dealing with ACA Act corporations. Options that involve the transfer of Indigenous corporations to the Corporations Act regime, and in particular those options that require significant changes to the Corporations Act, would be more costly.

4.4.5.2 Reasons for disagreement with Options 1 and 2

177 ASIC did not support either Option 1 or Option 2 for three broad reasons;

- The proposal for special provisions in the Corporations Act is inconsistent with the general philosophy underpinning that Act;
- There are very significant practical issues that would need to be more fully considered before adopting this approach; and
- There is a lack of clarity about the respective regulatory roles proposed for ASIC and ORAC

Special provisions under the Corporations Act

178 In summary, ASIC's submission did not support either Option 1 or Option 2. ASIC was of the view that if Indigenous corporations and their members and management have special cultural and social needs that need to be taken into account in the law, these should be addressed in a separate statute. ASIC stated that it would not be appropriate to deal with those issues through special provisions in the Corporations Act. The underlying philosophy of the Corporations Act is that all corporations are treated alike and are subject to the same key legal provisions in the same way. The Corporations Act is, in essence, a collection of legal and other technical obligations. It has not been used to pursue social and cultural objectives of this kind and, in ASIC's view, would not be a very suitable vehicle for that purpose.

179 As Option 2 is a compromise between Option 1 & 3, it suffers from the problems and difficulties of Option 1 and would require significant amendments to both the Corporations Act and the ACA Act. Option 2 also does not ultimately address the main issue of providing to Indigenous people a choice of a separate statute for all Indigenous corporations.

180 ASIC does not support amendments to the Corporations Act to create special rules for Indigenous corporations. The Corporations Act will rarely be an appropriate vehicle for the implementation of social or cultural policy objectives. While the Corporations Act is a broad and flexible statute that caters for a very broad variety of corporations, it does so by predominantly applying the same rules to all those corporations, large and small,

and whatever their nature or purpose, and irrespective of the nature or capacity of their incorporators, members or directors.

181 While ASIC has the power to exempt a person or class of persons from certain provisions of the Corporations Act and to modify the application of such provisions, the Corporations Act does not, and in ASIC's view should not, apply special rules to corporations based upon the nature or origin of the corporation or its incorporators, members or directors. Assuming Indigenous organisations have special needs, these needs should be met outside of the statutory requirements in the Corporations Act.

182 It is therefore quite outside the current philosophy of the Corporations Act to have special rules that apply only to Indigenous corporations and their incorporators and management. For example, if special rules are needed to make directors' duties less stringent for Indigenous corporations, that would not sit well with the general approach in the Corporations Act of applying the same rules to all corporations. Accordingly, any such special rules should not, in ASIC's opinion, be included in the Corporations Act as suggested in Options 1 and 2.

183 For similar reasons, ASIC would not support proposed amendments to the Corporations Act to include other special rules, including those of the following nature which the Consultation Paper suggests may be necessary:

(a) less onerous reporting requirements and more flexible reporting timeframes for Indigenous corporations; or

(b) lower penalties for regulatory breaches by such corporations; or

(c) a requirement that certain Indigenous corporations, which may also include proprietary companies, hold AGMs (whereas proprietary companies are currently not required to hold AGMs under the Corporations Act); or

(d) a requirement that membership of Indigenous corporations be limited to Indigenous natural persons, although it may be possible for issues of eligibility for membership to be dealt with in a corporation's constitution.

184 The Corporations Act in recent years has undergone significant amendments to simplify its provisions, in particular to build a simple guide for small businesses in Part 1.5 and to provide greater flexibility for companies in the structure of their constitutions and internal procedures, and there has been a simplification of corporate reporting requirements. However, this approach has not created special rules for any companies within the various classes of companies.

185 In addition, creating a separate chapter in the Corporations Act with special measures for Indigenous corporations runs the risk of discouraging Indigenous people from adopting the standards expected of other mainstream corporations under the Corporations Act. In particular, embedding such provisions in the Corporations Act runs the risk of creating a long-term disincentive for Indigenous corporations against obtaining mainstream business skills. Any special rules should be incorporated into a separate statute for Indigenous corporations, as envisaged by Option 3.

186 ASIC's view was that any migration of ACA Act corporations would involve costs that are currently unpredictable, significant and certainly outside budget. ASIC believes that more work would need to be done on this issue before such an approach was adopted.

Transfer of ACA corporations to the Corporations Act

187 ASIC made a number of comments in relation to the transfer of ACA corporations to the Corporations Act under Options 1 and 2 and the subsequent role of ORAC.

188 With regard to the proposal to transfer ACA Act corporations to the Corporations Act over time via "grandfathering" provisions to minimise disruption, ASIC submitted that while this may have merit it would need to consider further detail before meaningful comment could be provided.

189 ASIC did not support the Consultation Paper's suggestion that "registration" under the ACA Act be required as a "gateway" for Indigenous corporations to incorporate under the Corporations Act or the State Associations Incorporation Acts. This would act as a form of separate and additional incorporation procedure. If the incorporators of an intended company meet the requirements to incorporate that company set out in the Corporations Act, they should be allowed to do so. In ASIC's view no additional statutory requirements should apply to them on account of their origin, ethnicity or any such factor.

190 However, ASIC raised no objections to a system outside of the Corporations Act via which Indigenous corporations could apply to some body to obtain appropriate forms of assistance, such as training, education or subsidies for lodgement fees. ASIC is firmly of the view that the body administering such a system should not perform any regulatory role in respect of Indigenous corporations incorporated under the Corporations Act.

191 ASIC did not support ORAC's retention of a capacity to appoint administrators to "registered" or "accredited" Indigenous organisations incorporated under the Corporations Act under certain circumstances. In particular, ASIC agreed with the view that providing for a power to appoint an administrator could prove very complex where regulatory powers would primarily lie with ASIC or the relevant State or Territory agency.

192 ASIC did not support giving the Registrar of Aboriginal Corporations the same standing as a member/shareholder to be able to bring actions on behalf of members of "registered" Indigenous corporations incorporated under the Corporations Act, for the same reasons advanced above in relation to its opposition to the creation of special rules for Indigenous corporations under the Corporations Act.

Implementation and administrative problems

193 ASIC acknowledged that the Consultation Papers have raised some of the implementation problems involved in the proposed options. However, it was their view that there is a need for a substantially greater consideration of a number of issues before there is any transfer of ACA Act corporations to the Corporations Act, either now or at some time in the future. Some of the practical matters that need further consideration would include problems with amending the legislation, transitional difficulties, ongoing regulation of Indigenous corporations, and funding and resource issues.

194 ASIC submitted that it would not be a simple task to amend the Corporations Act following the referral of the legislation and the amendment power to the Commonwealth by the States in 2001. Apart from the fact that under Option 1 the Corporations Act would require complex wholesale amendments to incorporate some of the proposed special rules for Indigenous corporations, amendments of the kind required would need the support of three State Ministers on the Ministerial Council for Corporations (MINCO) in accordance with the Commonwealth–State arrangements which underpin the existing corporations legislation. Given that ORAC is currently a

Commonwealth agency operating under Commonwealth legislation, incorporating special Indigenous corporation rules into the Corporations Act which can only be amended with MINCO approval may raise issues for ORAC that need to be explored further.

195 Special transitional provisions would have to be implemented to assist with the compulsory migration of ACA Act corporations. For example, these may have to be something resembling Schedule 4 to the Corporations Act. Corporations that may not be ready to comply with the Corporations Act may require exemptions and modifications to allow them to maintain the status quo. ASIC's experience with transitional provisions has demonstrated that while such provisions may well be justified, they are inevitably complex, resource intensive, and time consuming both to develop and to operate in practice. This is inevitable when considering major reforms of this sort.

196 It is also the case that ASIC, as the regulator of the Corporations Act, does not currently have the expertise that would be necessary to apply the "eligibility criteria" needed to underpin such special statutory rules, such as the determination of whether or not a person is an Indigenous person.

197 Finally, the review has not considered the funding and resourcing issues if ASIC and/or state bodies assumed a greater role in relation to current ACA Act corporations.

Interaction between roles of ASIC and ORAC

198 ASIC's third category of concerns related to the roles envisaged for ORAC. The submission observed that the Consultation Paper had not clearly defined the precise roles of a revamped ORAC for all Indigenous corporations, whether incorporated under the ACA Act, the Corporations Act or State legislation. It observed that the various scenarios discussed in the Consultation Paper (particularly under Option A) need to be developed in much greater detail to enable ASIC to provide meaningful feedback and to fully explore any potential relationship between ASIC and a revamped ORAC.

199 ASIC's submission noted the proposals in the Consultation Paper under Option 1 for ORAC to focus on providing "assistance" and "capacity-building" to Indigenous corporations, including those incorporated under the Corporations Act, and also the suggestion that ORAC might be provided with standing to take action on behalf of members of Indigenous corporations.

200 ASIC is concerned that this may result in a duplication of regulation, which is not likely to be a progressive step. There is a danger that agencies covering the same field may give inconsistent advice or otherwise take action inconsistently. Further, to be an effective regulator ASIC needs to administer and enforce the Corporations Act in accordance with its own terms and not subject to the agreement of other agencies.

201 ASIC submitted that its roles and those of ORAC should be clearly distinguishable and should not overlap in any way in respect of the regulation of Indigenous corporations incorporated under the Corporations Act. There are potential hazards in one Commonwealth agency providing assistance or opinions on how to comply with the regulatory requirements of another Commonwealth agency. The assistance and capacity-building function proposed in the Consultation Paper should be limited to providing funding (including for the appointment of private professional advisers), education and training to Indigenous corporations.

202 Moreover, ASIC agreed with paragraph 134 of the Consultation Paper that Indigenous corporations should not be subject to external intervention in circumstances where non-Indigenous corporations would not be subject to similar intervention.

4.4.6 Other Government agencies

4.4.6.1 NSW Aboriginal Housing Office

203 The NSW Aboriginal Housing Office (AHO) argued that repeal of the ACA Act and transfer of associations to other statutes would have a significant impact on its work. It would require parallel amendments the Aboriginal Housing Act 1998 (NSW), and potentially necessitate the AHO undertaking a lot more monitoring of corporations' rules to ensure compliance with the eligibility requirement that they be controlled by Indigenous people. Furthermore, AHO relies quite heavily on ORAC's regulatory role and its capacity to provide timely advice under the Memorandum of Understanding between the two organizations, which enables AHO to take action to safeguard housing assets at risk through corporate failure.

204 AHO's position is that the ACA Act should be maintained, albeit reformed. It also argues that the act should encompass both simple and more complex corporations, since 'complexity' will be very difficult to define.

4.4.6.2 Office for Aboriginal and Torres Strait Islander Health (OATSIH)

205 OATSIH's submission argues that a key determinant of an organisation's success, irrespective of its incorporation statute, is management capacity and involvement of Board members. It expresses no definite preference between the three reform options. However, it does State that it sees no need for a separate specific Indigenous incorporation statute. While it suggests that there could be some advantages in retaining the ACA Act for a few smaller organisations, this would still entail significant amendments to the Act.

4.4.6.3 NSW Department of Aboriginal Affairs (DAA)

206 The DAA submission makes the point that many Aboriginal associations are established because funding agencies require them to. This requirement places unwieldy bureaucratic demands on groups and communities, and organizations generally have very limited skills in dealing with the complex administrative and legislative requirements of incorporation.

207 The submission argues that it is therefore important to maintain a separate incorporation statute for Aboriginal corporations, and a separate regulatory body to administer and regulate the legislation.

208 There may be benefits to streamlining the current system so that all Indigenous bodies incorporate under the Corporations Act or State or Territory legislation. However, these are outweighed by a number of disadvantages, in particular financial, administrative and legal requirements that would be unduly onerous for Indigenous organisations.

209 Furthermore, abolition of the ACA Act would create problems in the regulation of Indigenous organisations that are providing essential community services, whose failure can lead to flow-on effects for the community as a whole. For example, the DAA notes that the NSW Department of Fair Trading does not undertake any coordinated regulation of associations that fail to comply with the Associations Incorporation Act, and the triggers that may lead to intervention by ASIC are quite

different from those which may create a need for regulatory intervention in an Aboriginal corporation. Therefore, were Option 1 to be adopted, ORAC should retain some regulatory powers in relation to Indigenous corporations under other statutes.

210 Nonetheless, while the submission does not support the abolition of the ACA Act, it notes that none of the reform options would affect the way the DAA currently funds Indigenous organisations and monitors that funding. The submission does not provide any preference as between Options 2 and 3.

4.4.6.4 Aboriginal Lands Trust (Western Australia) (ALT)

211 The ALT favours Option 3, although it states that there are paternalistic and outdated features of the ACA Act, and expresses the wish that in the longer term the Act can be repealed and Aboriginal corporations can operate under mainstream legislation.

212 Option 1 is not favoured, since the States incorporation acts have a number of problems that would disadvantage Indigenous groups (see below). Option 2 is not favoured, since it would be very difficult to establish meaningful criteria to distinguish small corporations from more complex ones. Under both options 1 and 2, there would be problems occasioned by the need to transfer the property of existing associations (such as leases in land) when they become incorporated under the new regime. The adoption of either of options 1 or 2 could occasion considerable work for the ALT.

213 The submission argues that many Western Australian groups would be disadvantaged were they to have to incorporate under the Corporations Act or the current State Associations Incorporation Act (AI Act). Reasons advanced for this view include:

ALT comments on Associations Incorporation Act

214 The AI Act comes within the Associations section of the Department of Consumer and Employment Protection. This section is poorly resourced and there is little or no monitoring of associations or their compliance with the AI Act.

- There is no requirement under the AI Act for annual financial statements to be lodged;
- Many associations remain registered long after they are defunct;
- The AI Act provides few obligations on associations and does not adequately protect members in times of conflict or mismanagement;
- Resolution of disputes between members necessitates an application to the Supreme Court, a process which is probably out of reach for most members;
- The rights of members at common law under the WA AI Act are uncertain, and members have few rights that they can enforce;
- The AI Act contains detailed provisions as to what should be contained in an association's rules, but provides neither the Commissioner nor the members with means of enforcing those provisions.
- The AI Act, unlike the ACA Act, does not allow incorporation of profit-making associations;
- When an association's management breaks down, the AI Act provides no means of intervention and assistance, there is no power for the Commissioner to appoint an administrator, and only limited powers of cancellation of an association. Both the voluntary and Court-ordered winding up procedures are complex;

- The AI Act contains confusing and complex provisions relating to the distribution of property of associations that are wound up. In instances, a funding body has found that unexpended funds it provided to such an association cannot be returned to it, but must be distributed to another State incorporated association or for a charitable purpose;
- There is no requirement for members of an association to be limited to Aboriginal people;
- Associations that seek to carry on business outside their jurisdiction of incorporation must become Registered Australian Bodies under Part 4.1 of the Corporations Act and must comply with that Part.

ALT comments on Corporations Act

215 While the Corporations Act may be appropriate for more complex or business oriented purposes, it will disadvantage smaller groups or those forming non profit organisations;

216 The Corporations Act regime entails significant costs, both for incorporation and compliance;

217 Furthermore, Indigenous groups would struggle to comply with the complex requirements of the Act without the specialised assistance they receive from ORAC.

4.4.6.5 Department of Indigenous Affairs Western Australia (DIA)

218 DIA provided a similar response to the Aboriginal Land Trust, and favours Option 3. In their view however, it can be argued that there are paternalistic features of the ACA Act and in the long term DIA hopes that it can be repealed and Aboriginal corporations operate under mainstream legislation.

219 In the short term, there is a need to retain the ACA Act; many Aboriginal groups would be disadvantaged if they were forced to incorporate and operate under the existing Western Australian legislation or under the Corporations Act.

220 There are a number of benefits in incorporating under the ACA Act that are presently not available under the *Associations Incorporation Act* (1987) (WA) (the 'AI Act') or the Corporations Act. Reasons advanced by the DIA for this are identical to those advanced by the Aboriginal Lands Trust above. Were Option 3 to be adopted, DIA would support the extension of the Registrar's capacity building functions to Aboriginal organisations incorporated under other legislation.

4.4.6.6 Indigenous Land Corporation (ILC)

221 The ILC submission does not support Option 1, arguing that there is a strong perception amongst Indigenous people that the ACA Act provides something specific to their situations, needs and interests in the post-Mabo climate of a renewed emphasis on self-determination. There is also a need to provide for Indigenous-only membership, and to allow for directors to be appointed in accordance with (eg) traditional owner standing or family status, rather than in accordance with a requirement on management skills.

222 Furthermore, a national statute provides consistency in the recognition of the distinctive corporate body characteristics of Indigenous corporations, and ORAC provides an administrative body which is aware of Indigenous incorporation issues. Maintaining a reformed ACA Act would provide Indigenous people with wider incorporation choices.

223 The Corporations Act is too complex, most communities have simple and basic needs, and most corporations are formed for non-commercial land-ownership and community purposes.

224 The ILC does not support Option 2. Its submission states that larger Indigenous businesses have specialised development needs and would benefit from assistance provided by ORAC that provides a transition to other incorporation frameworks. Option 3 is the favoured reform route.

4.4.6.7 Department of State Aboriginal Affairs (SA) (DOSAA)

225 The submission from DOSAA expresses a preference for Option 1. This would provide uniform legislation and regulation for all corporations, Aboriginal and non-Aboriginal.

226 This would also allow ORAC to move to an approach based on assisting Aboriginal corporations in their reporting and corporate compliance requirements. This would provide greater consistency in comparison with Options 2 and 3. At the same time, the submission supports proposals in the Consultation Paper for giving consideration to extended deadlines and reducing non-compliance penalties for Indigenous corporations.

4.4.6.8 Australian Government Solicitor

227 This brief submission is provided from the perspective of work undertaken for ORAC by the Australian Government Solicitor relating to Freedom of Information requests. It makes no comment regarding the proposed reform options.

4.4.6.9 Torres Strait Islander Advisory Board (TSIAB)

228 TSIAB's submission supports the repeal of the ACA Act, seeing merit in Torres Strait Islander and Aboriginal people setting up corporations under the Corporations Act or the State and Territory association incorporation acts. The submission strongly supports ORAC adopting the role of providing assistance and capacity building for Indigenous corporations established under other legislation.

229 Reasons for supporting Option 1 are those provided in the Consultation Paper. Additional comments made in the submission are:

- It will still be necessary to have special measures to assist Indigenous corporations; these can be provided through specific amendments to the Corporations Act or State association incorporation acts;
- Keeping the ACA Act with different standards from mainstream corporations risks excluding Indigenous people from mainstream business and preventing them from acquiring mainstream business skills.
- Under Option 1, ORAC should have the legislative capacity to advocate on behalf of Indigenous corporations. It should be retitled the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, to further promote the principle of inclusiveness which is fundamental to community capacity building.
- Because of the smaller and more scattered Torres Strait Islander population on the mainland, they have had relatively few dealings with ORAC. Differing cultural needs from those of Aboriginal people have lead to TSI people setting up their own corporations.

- If the ACA Act were to be kept, but reformed, the TSIAB would support Option 2, keeping the ACA Act for smaller corporations. This would provide a 'uniform' alternative to the varying State and Territory association incorporation acts.

4.4.6.10 Aboriginal Hostels Limited

230 In its brief submission, Aboriginal Hostels offers support for retention of the ACA Act as a broad incorporation statute, i.e. Option 3. AHL believes that with reforms, the ACA Act would be brought into line with the contemporary incorporation needs of Indigenous people, and in turn provide these corporations with access to ORAC's assistance.

4.4.6.11 Department of Aboriginal and Torres Strait Islander Policy (Qld) (DATSIP)

231 This submission argues that Options 2 or 3 would better promote the recommendations of the Royal Commission into Aboriginal Deaths in Custody, relating to the need for governments to recognise the knowledge and expertise available within Indigenous communities. Indigenous people need to be involved in the processes of government in all their forms, not just as bystanders.

232 The ACA Act is the only legislation that promotes the 'special needs' of Indigenous people with regard to their incorporation needs, as the term is defined in the Racial Discrimination Act. Indigenous groups and communities have specific cultural requirements and issues which must be accommodated within the incorporation statutes available to them, including the flexibility to structure organisations in the most appropriate manner.

233 The ACA Act should therefore be kept, but with a more defined focus on assisting organisations to function rather than the current bureaucratic and punitive focus.

234 DATSIP supports reform Option 2, for the following reasons:

- ORAC resources would be freed up, to provide urgently needed assistance, additional education and training for Indigenous corporations;
- Since DATSIP is a major funding agency for Indigenous corporations in Queensland, and most of those it funds are ACA Act associations, improved organisational capacity of these associations would benefit DATSIP's functions;
- Because of the complexity of transferring all associations over to other statues, Option 1 would only marginally free up resources for ORAC to devote to capacity building.
- Were Option 1 to be adopted, there would be the potential for confusion of responsibilities between ORAC and the other regulators;
- Other regulators do not provide specific assistance in relation to disputes between members of associations, which if left unresolved have major implications for corporate governance and accountability;
- Options 2 and 3 would cause the least disruption among existing ACA Act associations, and in particular would minimise disruptions for the smaller associations who would have the least capacity and resources to deal with the changes. These options would have no substantive negative implications for DATSIP grant funding requirements.

- Providing additional resources for education and training through ORAC will assist in enhancing Indigenous ownership and corporate governance.
- Indigenous corporations should be protected from major external changes which would adversely impact on their ability to deliver services and acquit funds.

4.4.7 State Association Incorporation Act regulators

4.4.7.1 Queensland Office of Fair Trading

235 The submission of the Office of Fair Trading, within the Department of Tourism, Racing and Fair Trading, favoured options 2 or 3. It argued that it would not be appropriate to transfer existing ACA Act association to the *Associations Incorporation Act* 1981 (Qld) (AI Act) for a number of reasons:

- Associations Incorporation acts are different in each State and Territory and this may result in inequalities between transferring associations and disadvantage some members;
- Since there are no provisions to transfer such associations, they would have to be wound up and incorporated under the relevant act as unincorporated associations;
- There may be significant stamp duty considerations;
- The Queensland act provides no powers to conduct general investigations or to appoint administrators;
- Changes to rules have no force until they have been approved by the Chief Executive of the department before being put to the general meeting;
- Only not-for-profit bodies can be incorporated under the AI Act;
- Were the ACA Act to be repealed, and Queensland associations transferred to either the AI Act or the Co-ops act, there would be a significant pressure on the Office of Fair Trading's resources.

4.4.7.2 Department of Consumer and Employment Protection (WA) (DOCEP)

236 DOCEP prefers option 3, for the following reasons:

- The Western Australian *Associations Incorporation Act* (1987) is itself deficient in a number of respects, particularly in relation to accountability provisions. Transferring Indigenous associations to this legislation would not address accountability problems. In DOCEP's view, this is a fundamental issue that should preclude Option 1 from further consideration.
- In relation to Option 2, some small or simple Indigenous corporations undertake commercial activities, and therefore could not transfer to the associations act. This would limit the effectiveness of this option. It is acknowledged however that the retention of at least the small corporation jurisdiction under the ACA Act would provide more flexibility for smaller trading corporations.
- If ACA Act associations were transferred to State jurisdictions, some of the "settled" issues would not be addressed. For example, there is a recent trend in incorporated association jurisdictions towards increased regulation and review of the rules of such associations (see also submission of Aboriginal Land Trust).

- Option 1 would have potentially significant resource implications for Western Australia. Any benefit to DOCEP of ORAC adopting a supporting and capacity building role would be undercut if Option 1 were implemented because of its potentially 'enormous' resource implications. There are currently only 3 full-time equivalent staff servicing 18,000 incorporated associations.
- DOCEP is therefore in no position to provide the assistance needed by Aboriginal associations.
- If such a role were adopted for ORAC however with either Option 2 or 3, there would be benefits to DOCEP in terms of a reduction in the numbers of requests for assistance from Indigenous corporations under the WA associations incorporation act.
- It would be untenable for ORAC to retain a regulatory role under Option 1, as there would be significant potential for conflict between ORAC and DOCEP.

4.4.7.3 Department of Justice, Consumer and Business Affairs Victoria (CBAV)

237 This submission does not directly express a preference for any of the reform options. However, it notes that currently, there are only some 55 Victorian Aboriginal associations incorporated under the ACA Act. Currently, there are 42 Aboriginal cooperatives under the *Co-operative Act* 1996 (Vic) and 55 Aboriginal associations under the *Associations Incorporation Act* 1981 (Vic) registered with the department. While the impact of repealing the ACA Act would be less than in other States and territories, an increase of 60% over the existing Aboriginal associations regulated by the department would have a significant impact on its resources.

4.4.7.4 Department of Fair Trading (NSW) (DoFT)

238 DoFT expresses a preference for reform Option 2, with some attributes of Option 3. 'Financially large' associations should be transferred to the Corporations Act, which would be consistent with the policies of the Department in its administration of the associations incorporation act.

239 The State legislation is designed to service small community groups. An amended ACA Act could make provision for this category of group. The 'tiered' reporting requirements proposed under Option 3 could be an advantage to those groups incorporating for the sole purpose of holding land or for cultural activities.

240 Reasons advanced for not supporting Option 1 are:

- The NSW legislation takes no account of the particular features of Indigenous identity;
- It takes a one-size-fits-all approach;
- Trading is not permitted;
- This would lead to a fragmented approach whereby the roles of a Registry and that of support and development would be undertaken by two broadly different jurisdictions;
- This fragmented administration of functions would not be particularly suited to a special needs client base.

4.4.7.5 Registrar General's Office (ACT)

241 This submission outlines the role of the Registrar General's office in relation to the Territory's associations incorporation act. It notes that the office does not provide any supervision of the affairs of incorporated associations, and that if this were seen to be necessary and could not be provided by ORAC, incorporation under the Corporations Act would be more appropriate. Incorporation of existing ACA Act associations under the Territory legislation would therefore be unlikely to improve corporate governance.

242 There would be resource implications for the ACT Registrar General's Office if Option 1 were to be adopted, since the ACT receives a disproportionate number of incorporation applications due to the mistaken belief that the ACT provides some form of national incorporation, and the ACT is a convenient location close to government, lobbyists, etc.

243 On the other hand, the submission sees no conflict with the proposals under Option 1 for ORAC's role, which would complement that of the Office.

244 The submission States that there is no capacity within the office for 'non-standard' treatment of Indigenous associations.

4.4.8 NTRBs and Land Councils

4.4.8.1 Yamatji Land and Sea Council

245 Yamatji Land and Sea Council's submission focussed primarily although not exclusively on issues pertaining to Prescribed Bodies Corporate (PBCs). It argued for the retention of the ACA Act, suggesting that its primary utility as an instrument for incorporating PBCs lies in its limitation of membership to Indigenous people and the provision (under s 43) for flexible rules.

246 Even if the Act were repealed, amendment of the Corporations Act and the State association incorporation acts would be required, it suggests. These latter acts provide no more flexibility than the ACA Act in terms of decisions as to whether, and how, indigenous decision-making processes should be codified or not.

4.4.8.2 Northern Land Council (NLC)

247 The Northern Land Council provided a very detailed submission. In relation to the reform options, the NLC expressed a preference for Option 3, involving a substantial rewrite of the ACA Act to bring it into line with appropriate areas of modern corporate practice, the continuation of ORAC and the Registrar as the incorporator and regulator of the Act but in a substantially refocussed format and administering a modern scheme of company incorporation and regulation.

248 The NLC advanced a number of arguments as to why Option 1 was not supported.

- ACA Act corporations are prescribed for NTRBs and PBCs under the *Native Title Act* 1993 (Cth), and are referred to in several sections of the *Land Rights (Northern Territory) Act* 1976 (Cth) (eg sections 19, 25, 35, 54, and 74A). These sections refer to such matters as the grant of an interest in land by an Aboriginal Land Trust, and the payment of monies to 'royalty associations' under subsection 64(1) of the Act. Under Option 1, consequential amendments would be required to the NTA and the ALR(NT) Act.
- If the ACA Act were repealed, Northern Territory Aboriginal associations would have to reincorporate under either the *Associations Incorporation Act* (NT) or the

Corporations Act (Cth). There are problems for Aboriginal corporations under both these statutes.

NT Associations Act

- The NLC has experience with a number of Aboriginal associations under this Act. There are a number of large enterprises incorporated under the Act. The Act does have special features including the provision of extra accountability and processes for 'trading associations' or those carrying out local government-like functions. One feature which in the view of the NLC is aimed at Aboriginal incorporators is the provision for accounting for 'prescribed property', which is defined as effectively any property of the corporation obtained by direct or indirect grant from the Territory or Commonwealth governments. Strict rules apply as to the accountability and disposal of such property.
- The NT Associations Act is not a modern act, and proposals for its amendment have lapsed over the past decade. It is directed primarily at clubs and community organisations and has many of the technical shortcomings and defects identified in the 'settled issues' for reform of the ACA Act.
- Apart from the marginal technical suitability of the NT Associations Act, the NLC notes that the Registrar of Associations within the NT Department of Fair Trading is under resourced and has no mandate or will for capacity building or in providing any form of structured assistance to corporations. The Registrar is a part-time position, and does not have a developed educative, capacity building or outreach function, and nor should it be reasonably expected to. In addition, the Registrar maintains a low technology public information facility and has very limited resources to investigate complaints about associations.
- The NLC submitted that since former ACA Act associations are likely to reincorporate under the regime of "least resistance" and cost, which is likely to be the NT Associations Act, the lack of resources for assistance and of proactive monitoring under this act will be a step backwards in just about every aspect of Aboriginal advancement.

Unsuitability of the Corporations Act

- The NLC notes that there has never been an impediment to Indigenous incorporators utilising the Corporations Act, except where the ACA Act is prescribed by statute. The Corporations Act may be suitable in some circumstances, and the NLC has provided assistance in the creation and management of Indigenous Corporations Act corporations.
- However, the NLC submitted that there are a number of technical and philosophical difficulties with the Corporations Act and that, more importantly, its regulator is not equipped to deal with any special responsibilities it may have towards Indigenous corporations.

(i) Technical and philosophical difficulties

- Under Option 1 where a former ACA Act corporation elects to reincorporate under the Corporations Act, the doctrine of *ultra vires* will no longer apply to it. This may be a concern, for example, regarding native title prescribed bodies corporate, which are intended to be limited both by statute and in their internal rules regarding their activities. Former ACA Act corporations may lose their

Public Benevolent Institution tax advantages if they re-incorporate under the Corporations Act.

Management of the corporation

- The philosophy of the Corporations Act, reflected in the general law and in practical reality, is that corporations are managed by boards of directors and not by members. The governing committee of an ACA Act corporation is not a direct translation of a board of directors; for example, unless required by its constitution, a Corporations Act board member need not be a member of the corporation. In contrast, in many ACA Act associations in the NLC's area, management is by members to the practical extent possible and decision making by custom where practicable, which in practice often means by consensus or substantial majority.

The corporate form

- Unlike the ACA Act, the Corporations Act provides for many alternative forms of corporate form. However, the NLC submitted that no one form of Corporations Act corporation is appropriate for an Indigenous corporation.
- The most popular default form, the "small" proprietary company, is probably the most inappropriate form of incorporation unless the former ACA Act corporation can secure substantial professional assistance in drafting its rules. Such a corporation may end up being a high maintenance corporation requiring regular professional assistance concerning its governance. Furthermore, where Aboriginal land and its fixtures, or an interest in land) should not leave the control of the original incorporators or their group, the small proprietary form without a detailed constitution providing the necessary safeguards would be an unacceptable form of incorporation.
- The general law of directors duties has many cases where a director has acted in his or her own interests rather than the interests of the corporation, this constituting a breach of fiduciary duty and a voiding of the transaction. This kind of issue is unknown in the ACA Act scheme, because the statute itself provides the framework for this important point.
- A company limited by guarantee was the form used by many charities, clubs and non-profit associations in States which were slow to enact associations incorporation acts, and has been used by some Indigenous corporations.
- However, since it is a public company, apart from the more onerous reporting requirements to ASIC, guarantee companies do not benefit from the raft of advantages now enjoyed by small proprietary companies.

(ii) The Australian Securities and Investments Commission (ASIC)

- One result of the substantial reforms to the Corporations Act during the 1990s was an extremely permissive regime of incorporation and existence under a corporate form. This was balanced, in theory at least, by a regulator with an extensive array of civil, administrative and criminal remedies and increased standards expected of company officers.
- ASIC fees and penalties levied on companies are substantially higher than those under the ACA Act, even at the small proprietary company level.

- ASIC has an uncompromising regime of company deregistration and prosecution of company secretaries who are deemed to have been "knowingly concerned" where a company has failed to comply with a requirement such as submitting a return. If a company fails to submit a return and pay a penalty upon reminder, ASIC software will automatically commence deregistration proceedings, and all property held by the company at the moment of strike-off will be vested in ASIC.
- The NLC submitted that the Review ought to consider the severity of the regulatory regime and its suitability for Indigenous incorporators under the Corporations Act, notwithstanding the permissiveness of the legislative scheme itself.
- Revenues associated with the regulation of companies far outweighs the costs of regulation and substantial excess funds are repatriated to the States and Territories. The NLC submitted that this revenue feature of the regulation of the Corporations Act should be considered by the Review in terms of whether negotiation of wholesale exemptions or waivers for Indigenous corporations is achievable for former ACA Act corporations electing to re-incorporate under the Corporations Act.
- ASIC's company formation and regulatory roles form only a minor component compared for example to its securities and capital markets functions.
- ASIC is believed to have a very high threshold in its instituting investigations into company affairs, and the NLC submitted that this is in fact so high that it is unlikely that any current ACA Act association would ever qualify for investigation regardless of the conduct of its officers.
- While ASIC maintains a quality web page with a vast range of information for small corporations as well as a toll-free information line, it no longer conducts its "small business program", and has never provided an advisory service, let alone a capacity-building function. Such a function would be at odds with its own internal culture and corporate strategy.

(iii) Specific unsuitability for Indigenous land-holding corporations or PBCs

- The NLC doubted the efficacy of attempts to entrench ownership of a Corporations Act company's shares by particular members. In the case of corporations holding certain forms of interest in lands, there is a presupposition of the continued ownership of the land in question in perpetuity by a corporation whose members are natural Aboriginal persons of a defined class, the class as a rule being those Aboriginals and those yet to reach their majority and yet to be born, who have a legitimate claim to the land.
- The NLC submitted that corporations other than ACA Act corporations are unable to meet these requirements of Aboriginal people for land ownership.

249 The NLC submitted that while there may be merit in Option 2, there is little practical difference between Options 2 and 3. It made a number of points regarding the problems with Option 2.

- Option 2 presumes that either an objective test will be written into an amended ACA Act, or the Registrar will apply a subjective test for requiring an ACA Act corporation to reincorporate under an alternative incorporation statute of the corporation's choosing.

- An objective test will be fraught with difficulty. Not only will setting the threshold test itself be problematic, but the Registrar may have difficulty in enforcement as well. Since one of the reform proposals involves simplifying the reporting procedures under the ACA Act, the Registrar may have little data to work with.
- As well as the data problem, the process of directing an ACA Act corporation to reincorporate may be opposed by the corporation (for example, because of the tax benefits in being an ACA Act corporation), and result in a resource-intensive 'standoff'.
- It may be rare for an ACA Act corporation to be genuinely in a position where the ACA Act is no longer appropriate for it. There may be good commercial reasons why a large ACA Act corporation should remain so, for example if operating wholly within Aboriginal Land Trust land.
- In ASIC's regulatory regime, it has no means of detecting when a company moves from being "small" to "large" nor is it believed to be overly concerned with monitoring this aspect of the conduct of proprietary companies.
- An objective test in determining the point at which an ACA Act corporation must reincorporate under an alternative scheme is probably unworkable.
- Nonetheless, while the NLC does not support Option 2, it submitted that a reformed ACA Act should clearly include a discretion on the part of the Registrar to direct that an ACA Act corporation reincorporate under an alternative regime.

4.4.8.3 Central Land Council (CLC)

250 CLC provided initial comments on the review following the first workshop, together with a paper by Greg Crough on the Northern Territory's local government reform agenda. In relation to reforms (apart from proposals regarding Part III of the Act, discussed elsewhere) it was suggested that a 'tiered' incorporation approach should be adopted. With regard to Prescribed Bodies Corporate under the Native Title Act, it was submitted that this complex question should be dealt with in a separate review.

251 In its second and consolidated submission, CLC argues strongly for the need for a separate, Indigenous-specific incorporation statute. It argues that the need for incorporation is often thrust upon Aboriginal groups and communities, for example to receive funding or to hold property on behalf of members. In particular, many Aboriginal groups who have a traditional connection to land incorporate to hold title to that land. The ACA Act provides a convenient and inexpensive and relatively simple incorporation vehicle that attempts to be consistent with Aboriginal culture and customary law.

252 Additionally, the submission argues that a national statute serves Aboriginal interests in an analogous manner to that in which the Corporations Act serves commercial interests, and that a commonwealth statute which expressly provides for an exclusively Aboriginal membership is of value to Aboriginal incorporators. This may need to be recognised as a 'special measure' so as not to offend racial discrimination legislation.

253 At the same time, CLC States that the ACA Act can be updated and improved, and that the Consultation Paper has identified many of the means by which this can be achieved. The CLC however disagrees with the view expressed in the Consultation Paper that the ACA Act as it is currently constituted disadvantages Aboriginal people. Rather, it has

been the way in which the act was previously administered which caused the disadvantage.

254 The Corporations Act does not provide an appropriate incorporation vehicle for every purpose, whether in the form of a company limited by shares or a company limited by guarantee. Equally, State and Territory association incorporation acts vary considerably across jurisdictions, and are not always appropriate for Aboriginal incorporators.

255 The submission does not support Option 1 (the abolition of the ACA Act), but does support the concept of ORAC being an "Office of Assistance and Capacity Building".

256 The CLC submission 'tend(s) towards support' for Option 2, because it will tend to keep the statute focussed upon incorporations for those who have a 'special need', because of (a) the characteristics of the incorporating group, and (b) the special need for ongoing assistance and capacity building. It suggests that the ACA Act might usefully be limited to those cases in which both forms of 'special need' can be demonstrated, that larger Indigenous corporations with a broader perspective and base are more likely to either not need ongoing assistance and training or be in a position to provide it themselves.

4.4.8.4 Torres Strait Regional Authority Native Title Office (TSRA)

257 The TSRA submission argues that most of the ACA Act associations in the Torres Strait are unfunded, and that this needs to be reflected in the legislation and policy. TSRA would therefore support an approach which streamlines and focuses the ACA Act. Larger Indigenous corporations may be better served by other incorporation statutes.

258 TSRA considers that options 2 and 3 are most likely to result in improved corporate governance and accountability, so long as the 'settled' issues identified in the Consultation Paper are implemented.

259 The adoption of Option 1 is the least desirable outcome, and would cause considerable disruption in the Torres Strait.

4.4.9 Other submissions

260 A number of other submissions were received by the review, most being from persons or organisations who provide services to ORAC.

4.4.9.1 Minter Ellison Lawyers

261 Garry Hamilton of Minter Ellison (Brisbane) provided a submission based on his extensive experience in working for ORAC.

262 Mr Hamilton suggests that there are significant benefits in retaining an Indigenous-specific incorporation statute, and therefore does not support Option 1.

263 While no explicit preference is expressed as between Options 2 and 3, the tenor of Mr Hamilton's comments suggest that there are particular reasons why larger Indigenous corporations dependent upon public funding should still have the option of incorporating under the ACA Act, in particular because of the inappropriateness of the threshold levels set by the Corporations Act for small proprietary companies and the attendant lower reporting requirements.

Minter Ellison comments on association incorporation acts

264 The State and Territory incorporation acts vary widely. The substantive portion of the Queensland legislation is over 20 years old and itself contains significant problems including;

- The mandatory accounting and audit requirements follow the current section 59 of the ACA Act very closely;
- There are no fiduciary duties / conflict of interest / disclosure of pecuniary interest provisions of any kind in the statute;
- Redress for an infringement of a member's rights necessitates an application to the Queensland Supreme Court;
- There are no voluntary administration provisions;
- The statute is out of date with developments under the Corporations Act;
- The 'model rules' are more appropriate to sporting and other such entities than to Indigenous corporations;
- The legislation is administered by the Chief Executive of the Office of Fair Trading, and that regulator may not have the capacity to accommodate the disadvantages suffered by Indigenous corporations.

Minter Ellison comments on the Corporations Act

265 While a 'small' proprietary company under the Corporations Act does not need to prepare annual balance sheets or profit and loss statements, nor is required to be audited, the statutory thresholds under that Act for classification as a small proprietary company, are far too high for many Indigenous corporations.

266 Furthermore, most small proprietary companies are commercial enterprises which trade and generate profits. This is a very different situation from most Aboriginal corporations, which are publicly funded.

4.4.9.2 Michael Phelan

267 Mr Phelan indicates a preference for Option 3. He argues that Option 1 is not an acceptable alternative, since the special needs of Indigenous people will be 'lost in the corporate world'. There are difficulties with Option 2 in how to draw the line between small and large associations. If large associations are required to incorporate under the Corporations Act, their special needs will not be able to be addressed.

4.4.9.3 Yalurtja – Clarrie Isaacs

268 Mr Isaacs made a submission to the Review in his capacity as a private Indigenous individual, but his submission provides no preference regarding reform options.

4.4.9.4 Lindsay Roberts, Chartered Accountant

269 Mr Roberts indicates a preference for Option 3, arguing that ORAC's functions of capacity building and regulation should not be split, as many organisations require specialist attention and knowledge which may involve a combination of both regulation and capacity building. Both Options 1 and 2 would lead to problems of coordination between ASIC and other regulators on the one hand and ORAC on the other.

270 Many ACA Act incorporations provide for essential services and the well-being of Indigenous people in remote communities and towns, and are dependant upon

government grants. ASIC and the State act regulators are inadequate to assist with the problems faced by Indigenous corporations.

271 Many Aboriginal corporations reflect the interests of or serve whole communities, and those in such communities do not operate in ways which accord with the Corporations Act or State association incorporation legislation.

272 For these reasons, it is essential that the particular expertise and knowledge of ORAC is maintained and that whatever reform option is ultimately adopted, it remains a separate and autonomous unit.

4.4.9.5 Fong Richards Certified Practising Accountants

273 This submission does not offer a clear preference between reform options.

4.4.9.6 Mervyn Sullivan, De Castro & Sullivan

274 This submission supports the retention of a reformed ACA Act. It argues that the special disadvantages suffered by Aboriginal people, and the particular vulnerability of Aboriginal corporations, are such that it is necessary to maintain a distinct incorporation statute and regulatory and support regime.

275 Option 2 is not supported, because there would be difficulties in establishing a workable definition of 'small' associations, because all ACA Act associations are small anyway, and because corporations could move across the threshold from year to year.

276 Option 3 is supported, because this is the current situation in any event, and the ACA Act should provide an incorporation option for all Aboriginal associations

4.4.9.7 E.J. Pippet, Chartered Accountant

277 Mr Pippet's preference is for Option 3. There is a need to maintain a separate Indigenous incorporation statute, and ASIC and other regulators do not have the expertise, experience or cultural sensitivity to deal with the Indigenous community in the way ORAC does. He does not believe that there are a sufficient number of 'large' corporations to justify moving them to the Corporations Act and leaving the ACA Act for just 'small' corporations.

4.4.9.8 Regina Wagner, training consultant

278 This submission supports amendment of the Act in accordance with the 'settled' issues and retention for the incorporation of small and simply structured Indigenous corporations (Option 2).

279 Enterprises, umbrella bodies, and large regional or national corporations should be moved to the Corporations Act. Within broad parameters, including associations compelled by the Native Title Act to incorporate under the ACA Act, the Registrar should have discretion to accept or reject applications for incorporation under the ACA Act.

280 Option 1 is not supported, since it would lead to the demise of ORAC, which provides a valuable resource for Aboriginal corporations. In the absence of a statutory role as the regulator, it would be difficult to make a case for ORAC's continuing role as a semi-independent office. ORAC would be vulnerable to being subsumed as just another branch of ATSIC, and expose it to financial constraints and the current outsourcing policies.

5 Consultation outcomes—feedback on "settled" reform issues

281 Almost without exception, consultations supported the reform of the ACA Act in terms of the 'settled' issues outlined in the Consultation Paper. Written submissions provided strong support for amending the ACA Act to address the 'settled' issues. Details of responses in relation to the particular issues are provided in the relevant sections on pages 50-66 below. A number of individuals and agencies made general comments regarding the impact of address the 'settled issues' on corporate governance.

282 The Western Australian **Department of Consumer and Employment Protection** offered a word of caution in regard to the 'settled issues' generally, suggesting that the emphasis in the Consultation Paper ignores the common limited education, literacy and numeracy skills of members. The voluntary nature of membership also is likely to limit the capacity of members to ensure that corporations meet appropriate governance and financial accountability standards because of time constraints and other commitments.

283 **Regina Wagner** was of the view that adopting the 'settled issues' as a basis for reform is likely to improve corporate governance and accountability, but only if they are used to educate both governing committees and members in their respective rights and responsibilities. Reducing onerous financial reporting requirements for example should go hand in hand with raising Directors' awareness of their responsibilities to members and members' awareness of their rights.

284 The Questionnaires sought comments on the settled issues in question 13. Few respondents provided any comments on this matter. One association incorporated under the Corporations Act observed that the questionnaire was very complex, and queried whether other associations would be able to respond to it, and another observed that the Act should be repealed and organisations come under other legislation to improve their accountability.

285 Bugarrigarra Nyurdany Aboriginal Corporation stated that the settled issues appeared to suit the needs of Indigenous organisations whilst recognising the principles of modern incorporation laws. A similar view was also expressed by Wadja Wadja Aboriginal Corporation for Eduction.

286 Ngaanyatjarra Council Aboriginal Corporation was generally supportive of the reforms outlined in the 'settled' issues, but had a number of specific comments which are outlined in the relevant sections below.

287 In an attachment to its questionnaire response, Kombumerri Aboriginal Corporation made a number of points in relation to the 'settled' issues. These are detailed in the appropriate sections below.

288 Burringurrah Community Aboriginal Corporation argued that whatever changes are made to the legislation, a community education and information program will be essential.

5.1 Adopting a flexible approach to rules and design

5.1.1 Views from the workshops

289 While some participants were of the view that the current requirement for the Registrar to approve the Rules provides a degree of assurance that members' rights may be better protected in the organisation, most who provided views on this matter agreed that there should be more flexibility.

5.1.2 Views in written submissions

290 This was supported by almost all the written submissions that addressed this issue. Pertinent comments made in some of the submissions are:

291 The NSW **Aboriginal Housing Office** supported a more flexible approach, so long as members' rights and the accountability of Boards could be ensured.

292 ATSIC's **CDEP National Program Centre** agreed that a more flexible approach should be adopted, but was of the opinion that more guidance needs to be provided on rules for different organisations, rather than just having one set of model rules. Some sections should be mandatory since they go to the heart of monitoring corporate health. Also, there is a trade-off, since the more compliance is demanded, the more resources will need to be put into monitoring rather than into the clients' needs.

293 The **Aboriginal Lands Trust (WA)** noted that there is a particular need for financial and meeting requirements for smaller family-based organisations to be simplified.

294 The **Central Land Council** observed that many members of Aboriginal corporations in the area it serves are not literate and have a poor grasp of English. The complexities of the legal system and corporate governance are foreign, and in such circumstances it is often helpful to have procedures clearly established. However, this is not an argument for increased capacity for prescription, but one for relaxation of the Registrar's control over the rules to permit greater flexibility in devising rules to meet groups' particular needs.

295 The **Northern Land Council** argues that the original level of intervention and scrutiny of rules by the Registrar has been a serious impediment to the process of incorporation in its experience. This 'settled issue' is strongly supported by NLC, but it does not support a wholesale importation of procedural aspects of the Corporations Act into the ACA Act. For example, the capacity under the Corporations Act for certain forms to incorporate without a constitution and rely upon the "replaceable rules" may be too permissive in the context of a reformed ACA Act.

296 In the alternative, the NLC would support a regime whereby the ACA Act corporation lodges its rules which are not scrutinised by the Registrar (but may be 'check listed' in some simple way), and then become part of an electronic public register. A combination of replaceable rules and the corporation's rules may also be considered.

297 One advantage of having an ACA Act's rules on an easily accessible public register is that it may facilitate interaction with the wider business community.

298 However, **Mervyn Sullivan** of De Castro and Sullivan Chartered Accountants, expressed the contrary view that adopting a flexible approach might be well intentioned, but would be a 'recipe for disaster' for Aboriginal corporations, because of the lack of business knowledge, literacy and numeracy, management skills, and of a concept of the duty of care amongst their members.

299 The **National Native Title Tribunal (NNTT)** supported the adoption of a flexible approach to rules and design of ACA Act corporations, subject to the comments made in their submission regarding PBCs. These are further discussed on pages 66-67 below.

300 ATSIC's **Land Rights and Native Title Centre (LRNTC)** made a number of comments in relation to the proposed adoption of a flexible approach on PBCs and NTRBs.

LRNTC comments relating to PBCs

301 The LRNTC believes that this is a positive proposal, but that much will depend on the detail of its implementation.

302 However, if there are to be statutory criteria regarding matters which must be addressed by the Rules, they must be flexible enough to allow for Rules which depart from the formal equality of members' voting power; which can reflect differentiated entitlements to the assets of the corporation; which can reflect the existence of sub-groups; and which can seek to impose restrictions on the discretion of directors.

303 In deciding on what matters the statutory criteria stipulate must be addressed in the Rules, it should be borne in mind that not all members of the native title group will necessarily be members of the corporation and that the primary relationship between the native title group and the corporation will be the statutory trust or agency relationship under the NTA. Potential difficulties may arise if the statutory criteria are inappropriate to that context.

304 What also needs to be considered in relation to this proposal is that a number of decisions which are normally "corporate" decisions may actually be part of the determined native title rights (eg membership of the native title group), with the consequence that decisions as to corporate membership may be intimately linked to the exercise of native title rights (in circumstances where the decision-makers under traditional law and custom may not be coextensive with the corporate decision-makers).

305 Finally, given the anecdotal evidence that a number of PBCs may be experiencing difficulties meeting the costs of conducting AGMs, the LRNTC submitted that consideration should be given to whether it would be possible to exempt PBCs from any AGM requirements that may be contained in the statutory criteria.

LRNTC comments relating to NTRBs

306 A number of NTRBs have previously experienced difficulties in getting Rules approved which ensure the representation of sub-groups on the Governing Committee. Any amendments to the ACA Act should ensure that sub-group representation can be achieved in the composition of NTRB Governing Committees.

5.1.3 Responses from questionnaires

307 Management Advisory Services Aboriginal Corporation, and Wutuma Keeping Place Aboriginal Corporation supported this proposal. Wutuma noted that this would allow communities more flexibility to design organisations to meet their objectives, and to enable corporations to adapt to changing circumstances. Magabala Books Aboriginal Corporation noted that in remote areas particularly, association members do not have financial, legal and other relevant skills. Adopting a more flexible approach to the rules would reflect this fact.

308 On the other hand, Kombumerri Aboriginal Corporation suggested that this could actually weaken the roles of culturally specific, non-profit organisations, and render them vulnerable to takeover by dominant group corporations who are publicly funded to deliver services, but may lack the skills to address specific cultural needs of a community.

5.2 Changing the emphasis of ORAC's role

5.2.1 Views from the workshops

309 There was general support for the proposal to enhance ORAC's educative and capacity-building roles. In terms of the Registrar's capacity to intervene in the affairs of a corporation undergoing difficulties, a range of views were expressed at the two workshops. A point made forcefully by a number of participants, including some from ATSIC's administrative arm, is that Indigenous communities are often completely dependent upon the services provided by ACA Act corporations, and that the capacity of the Registrar to intervene can be an important safeguard in these circumstances.

310 The Alice Springs workshop attendees expressed a strong opinion that funding bodies needed to take more responsibility for their funding, and not rely on the Registrar to assist them when their funds where not being used in accord with their grant conditions. Attendees were of the view that funding bodies needed to strengthen their funding conditions to ensure that they can take any necessary remedial action.

5.2.2 Views in written submissions

311 This question attracted more attention in written submissions than the other settled issues. A strong theme throughout the submissions was the special requirements and vulnerabilities of Indigenous corporations, and the advantages that accrue from having a specific Office dedicated to the support of Indigenous associations.

312 The **Northern Land Council** submitted that were the ACA Act to cease being an incorporation statute, it would be inappropriate for ORAC to retain discrete regulatory powers, either under its own act or with delegated powers by the remaining regulators. In either case, ORAC could be seen as an emasculated rival regulator, which would clearly not be sustainable.

313 The NLC argued that it is technically possible, but unworkable, that the Registrar be a delegate of ASIC and the various State and Territory Fair Trading departments. For example, since ASIC has high thresholds for investigation and intervention, it would clearly be repugnant to public policy to have a lower threshold for Indigenous corporations, and for the relevant regulator to develop a separate, and arguably discriminatory, set of guidelines for Indigenous corporations.

314 On the other hand, the ability of ASIC to 'stand in the shoes' of a corporation or its members or any member in civil proceedings may be a more appropriate role to delegate to the Registrar in a regime where the Registrar maintains an interventionist capacity. However, the Registrar may not have the expertise and resources to undertake such a role.

315 The NLC was very doubtful that a capacity building function for ORAC could be achieved under Option 1. It submitted that in the absence of a regulatory function, the proposed role of the Registrar in a purely capacity building and advisory function would be indistinguishable from the general training and extension functions undertaken by ATSIC, and the function is likely to be amalgamated and disappear.

316 In terms of ORAC's providing a capacity building function to corporations under other statutes (as envisaged in Option 1), NLC observes that there is less uniformity among State and Territory associations incorporation acts than is assumed by the Review. ORAC would be required to develop technical competence in the Corporations Act and its administration as well as all seven State and Territory schemes.

317 The NLC also notes that potential savings associated with releasing the Registrar's resources have not been quantified in the Review, and observes that even by the most optimistic estimates, the Registrar may not be able to deliver much more than an expanded training program and reactive advisory service.

318 The NLC was of the view that the Registrar already has the ability to emphasise a capacity-building role without legislative change, but supports such change to clarify the Registrar's role and create a separate funding source. It however notes reservations about the Registrar's capacity to extend his or her reach through administrative action.

319 The NLC submitted that ORAC has been handicapped in the administration of the ACA Act in the following ways:

- It has been under resourced;
- It has been unable to operate at arms length from ATSIC;
- It has never been regionalised; and
- It has adopted an overly legalistic interpretation of its role and boundaries to its operations.

320 The NLC noted however numerous administrative improvements in recent times, and proposals for improvements including a shift to capacity building, training, assistance and mentoring by administrative action, vastly improved access to the public record and proposals for an ASIC-style electronic public record.

321 NLC submitted that substantial progress can be made by administrative action alone, for example, to create an administrative environment separate to ATSIC and to delegate functions so as to selectively 'regionalise' ORAC and to better deliver ORAC services to the geographic regions.

322 A number of opportunities exist to streamline many areas of dissatisfaction, for example:

- Use of class orders or class exemptions. For example, all ACA Act land holding corporations (including PBCs limited to holding native title) should be exempted from submitting financial returns;
- Expanded use of creative policy statements and practice guidelines to extend its policy of 'transparency';
- Approve lower, or tiered, levels of accounts examiner qualifications under the ACA Act;
- Seek creative and commercially focussed legal advice as to the administration of the ACA Act.

323 The **Central Land Council** submitted that there is no reason for the Registrar to retain a broad supervisory capacity in respect to Aboriginal corporations. This was stated in the context where the CLC expected many of the provisions of the Corporations Act to be incorporated by reference and to apply to Indigenous corporations. CLC also submitted that it may be useful for ORAC to retain a capacity, if requested, to assist or mediate if an Indigenous corporation finds itself in difficulties with the law or with accountability or internal disputation. This would be consistent with a shift to the role of an "Office of Assistance". CLC agrees with the view in paragraph 157 of the

Consultation Paper that it still may be necessary for the Registrar to retain powers to require the provision of, or access to, reports, accounts and financial records.

324 The **National Native Title Tribunal** supported as a general proposition a changed emphasis in ORAC's role.

325 **Yamatji Land and Sea Council** acknowledged that ORAC has long experience in servicing Aboriginal corporations. However, it argued that in relation to Prescribed Bodies Corporate, there is a need for native title experience, and that parts of ORAC's functions could be absorbed by other agencies. NTRBs would be better placed to deliver corporate governance advice and capacity building for PBCs.

326 ATSIC's **Land Rights and Native Title Centre (LRNTC)** was of the view that changing the emphasis of the Registrar's role was a positive proposal, but as with the previous reform (providing for increased flexibility), submitted that much will depend on the detail of its implementation.

LRNTC comments regarding PBCs

327 The LRNTC submitted that any assistance and capacity building role in relation to PBCs will need to be focused and relevant and, as such, will require a detailed understanding of the corporate entity's obligations to the native title group as a whole under the NTA. For this proposal to be successful ORAC staff will first have to be provided with appropriate training on native title issues and the requirements of the NTA and PBC Regulations.

328 It should also be noted that, in the PBC context, dispute resolution may be a determined native title right with the consequence that, in some situations, the Registrar may be usurping determined native title rights by performing this function. This may be the case even in situations where the Registrar has the agreement of the PBC to mediate, given that such a decision may (arguably) be a "native title decision" within the meaning of the current PBC Regulations and therefore subject to the consultation and consent provisions.

329 The LRNTC was of the view that further information is required on the scope of the proposed mediation function. Consideration needs to be given to whether the Registrar will only be able to mediate certain types of complaints and whether, in the PBC context, the Registrar's role will also extend to complaints from the native title group members, irrespective of whether they are members of the corporation. This matter is addressed to some degree in the PBC Options Paper.

LRNTC comments regarding NTRBs

330 LRNTC submitted that any proposal for the Registrar to perform assistance and capacity building functions in relation to NTRBs must be coordinated with ATSIC's current capacity building program.

331 In addition, it was submitted that further consideration needs to be given to the possible interaction between the Registrar's proposed mediation role and the statutory functions of NTRBs in relation to dispute resolution (section 203BF of the NTA). Any new role for the Registrar should not impinge on NTRB statutory functions.

Additional comments from LRNTC

332 The LRNTC suggested that there is a potential conflict of interest in the Registrar performing both regulatory and capacity building functions. It suggested that in order to minimise the potential conflict, consideration ought to be given to minimising the

Registrar's discretion in regulatory matters and, instead, clearly establishing in the legislative regime the criteria by which the Registrar can exercise the range of regulatory interventions available to the Office and which interventions can be exercised in particular circumstances.

333 The **Indigenous Land Corporation** observed that there is a strong need for the accountability of Indigenous corporations to their memberships to be further developed and improved, and suggested that this is an area that could be serviced by ORAC. ILC submitted that the emphasis should be on balancing 'no-blame' assistance, guidance, mediation and training in day-to-day procedures against serious accountability issues. ORAC should develop an emphasis on its relationships with clients rather than on governance. Its capacity-building role should be extended to include non-ACA Act Indigenous organisations, and consideration should be given to ORAC to also be a funding source for organisations to apply for capacity-building assistance. Were Option 1 to be adopted, and ORAC retain some regulatory powers, it would result in confusion and conflict between its regulatory and capacity-building roles.

334 The **Aboriginal Housing Office (NSW)** stated that there is little evidence that other incorporation structures are more responsive to the needs of their members; on the contrary, the AHO's observation is that the role of ORAC is one of the potential strengths of the Aboriginal corporations sector, both in terms of protecting the rights of members and intervening in organisations in a 'supportive' manner. It argued that administration can be seen as supportive if it prevents the windup or collapse of an organisation, and that there is very little support or oversight available under other incorporation statutes.

335 AHO however questioned the appropriateness of ORAC moving into the role of training in governance and capacity building. While ORAC has experience with Indigenous corporations, it is centralised in Canberra. Training roles could be more effectively and efficiently provided through Registered Training Organisations. If ORAC were no longer monitoring organisations, it would not be able to determine which were in difficulty and needed training or other support. In the current situation where there is significant downsizing of public sector agencies, it is doubtful whether ORAC would attract resources if it did not have a regulatory role.

336 The lack of oversight and support capacity of State regulators was also noted in submissions by the various State and Territory associations incorporation act regulators. **Consumer and Business Affairs Victoria** submitted that if ORAC's role were to involve regulatory functions for Indigenous corporations under other statutes, this would impact on CBAV's functions under the Victorian legislation. There may then be a need for amendment to the Victorian legislation to minimise any potential conflict between the roles of the two regulators and to ensure proper liaison and consultation between them.

337 The **Department of Fair Trading (NSW)** agrees with the proposed changes to ORAC's role, and noted that it did not have the capacity to undertake such a role for Indigenous associations incorporated under the State legislation. The Department did not support the abolition of the ACA Act, but saw no conflict between its role and that proposed for ORAC under either Options 2 or 3. The Department sees value in ORAC improving its liaison with State registries.

338 The **Registrar General's Office (ACT)** view was that in their experience, incorporated associations are typically managed by inexperienced personnel who have

responsibilities forced upon them and subsequently rely upon the Office for advice and assistance. ORAC's provision of advice and expertise would be beneficial in this context. Were Option 1 to be adopted, the Office did not see any potential for conflict with ORAC and in fact felt that the proposed role for ORAC would complement that of the Office, since they do not willingly intervene in the internal affairs of associations.

339 The **Office of Aboriginal and Torres Strait Islander Health (OATSIH)** stated that the most important issue from their perspective is the need for greater capacity building in organisations. They supported ORAC having a greater focus on this area. However, if Option 1 were adopted, OATSIH does not believe that there would be any need for ORAC to retain regulatory powers, since these exist under other incorporation statutes, and such a role may conflict with ORAC's capacity to provide independent assistance to Indigenous corporations.

340 This view was also held by the **Department of Indigenous Affairs (WA)** and the **Aboriginal Lands Trust (WA)**, who agreed that the focus of ORAC should change from an interventionist, regulatory approach to assistance and capacity building and dispute mediation. Both argued that were Option 1 to be adopted, retention of a regulatory role by ORAC would be 'unnecessarily paternalistic', and would simply impose another level of administration and compliance upon Aboriginal corporations.

341 The Department of Indigenous Affairs argued that while there may be some justification for retaining ORAC's regulatory role for Aboriginal associations incorporated under the WA legislation since it provides so few regulatory powers, this deficiency should be remedied by altering the WA legislation, not by applying a 'bandaid' solution which only applies to Aboriginal corporations.

342 These themes from Western Australian agencies were repeated in the submission of the **Department of Consumer and Employment Protection (WA)**, who were of the view that any benefit to the Department of ORAC adopting a supporting and capacity building role would be undercut if Option 1 were adopted, because of its potentially significant resource implications to the Department. Were this broader role for ORAC to be implemented as part of either Option 2 or 3, there could be benefits for the Department as a consequence for reduced requests for assistance from those Indigenous associations presently incorporated under the associations incorporations act. The Department also stated that if ORAC's role were to include a regulatory function under Option 1, there would be a significant potential for conflict between it and ORAC in terms of the regulation of incorporated associations, and that it would be both paternalistic and inequitable to subject Indigenous corporations to a dual regulatory regime.

343 In contrast, as previously discussed, the **Department of State Aboriginal Affairs (SA)** supported the repeal of the ACA Act and the transfer of associations to the Corporations Act and State association incorporation acts. The Department supported the consequential move by ORAC to assisting Indigenous corporations. The Department was also of the view that it would be appropriate for ORAC to retain some regulatory functions in relation to Indigenous corporations as this could provide a safeguard to members of such corporations, for example the power to appoint an administrator or standing to take action on behalf of members.

344 The **Department of Aboriginal Affairs (NSW)** was also of the view that were Option 1 to be adopted, ORAC should retain some regulatory powers, because (in the NSW context), the Department of Fair Trading plays no substantial regulatory role for

associations incorporated under the *Associations Incorporation Act* (1984). While ASIC does have a clearly defined regulatory role in relation to corporations under the *Corporations Act*, in most cases this is limited to investigation of possible breaches of the Act and imposition of appropriate penalties. Quite different factors may require intervention in an Aboriginal association, and should be the province of an Indigenous-specific regulator such as ORAC with the appropriate experience and expertise.

345 The Department suggested that to maximize consistency across jurisdictions, consideration be given to the regime for the regulation of Aboriginal Land Councils under the *Aboriginal Land Rights Act* (1983) (NSW), since these bodies also deliver a wide range of services to Indigenous communities. Many of these will come into effect on July 1st 2002, with the enactment of the *Aboriginal Land Rights Amendment Act* 2001 (NSW).

346 The **Department of Aboriginal and Torres Strait Islander Policy (QLD) (DATSIP)** supports a move by ORAC to a more supportive role. Were Option 1 to be adopted, the Department does not support ORAC having a wider regulatory role, since the potential for a confusion of responsibilities is increased. It notes the relative lack of expertise of State regulators in dealing with the particular needs of Indigenous corporations.

347 The various comments from **ATSIC** Regional Councils and from sections of its administrative arm were supportive of a capacity building role for ORAC. However, the **CDEP National Program Centre** did not support ORAC becoming involved in capacity building and training for non-ACA Act corporations, since it does not have the expertise or capacity to deliver on broader community development roles. ORAC does have a role with regard to ACA Act corporations however.

348 The submission from the **Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)**, which provided strong support for Option 1 and for an educative and capacity building role for ORAC, also argued forcefully against ORAC having a regulatory role under this option. It would subject Indigenous corporations to the same duplication of oversight that they now find so debilitating. It argues that the level and content of regulation can and should be pitched appropriately according to the nature of the particular organisation and its particular incorporation statute, rather than simply because it is Indigenous. Also, ORAC's role as regulator would conflict with that of enabler. If ORAC does not have regulatory powers, it may usefully step in as an intermediary, facilitator and advocate when Indigenous organisations have problems. Thirdly, were ORAC to also have a regulatory role, it would inevitably be subject to adverse political pressures because of the particular sensitivity and profile of Indigenous issues, and would find it difficult to maintain its independence.

349 **Gary Hamilton** of Minter Ellison stated that if the ACA Act were repealed, it would be essential in his view for ORAC to retain a regulatory role. ASIC and the various Offices of Fair Trading are unable to assume proactive regulatory roles, and do not have the necessary experience in dealing effectively with the particular needs of Indigenous people. Mr Hamilton felt that the capacity of ORAC to appoint administrators should not be seen adversely as 'punitive' or 'interventionist', and while he supports the concept of ORAC adopting a 'capacity building' role, he is of the firm belief that whatever option is ultimately adopted, ORAC must retain some regulatory power. This view was also supported in the submissions of **Michael Phelan** and **E.J. Pippet**, Chartered Accountant.

350 **Lindsay Roberts** expressed the view that while providing ORAC with regulatory powers under Option 1 would in theory provide some level of expertise to address the problems of Indigenous organisations, the practical aspects of such a joint arrangement would prove unworkable.

351 **Regina Wagner**, training consultant, expressed similar views, arguing that while she agrees that ASIC and the State act regulators do not have the capacity to provide the specialist support needed by many Indigenous corporations, the solution does not lie with giving ORAC 'quasi-regulatory' powers for corporations incorporated under other legislation. This is likely to lead to confusion among corporations as well as to duplication between two regulators both attempting, or failing to attempt, intervention. Ms Wagner suggests that should Option 1 be adopted, MoUs between ORAC and the respective regulators be adopted, which oblige ORAC to document and report unsatisfactory developments within corporations discovered pursuant to its new supportive role. Formal action would be taken by the regulator, rather than by ORAC itself. This would also prevent ORAC finding itself in a conflict of interest as both educator and regulator.

352 **Mervyn Sullivan** of De Castro and Sullivan, Chartered Accountants, was of the view that changing ORAC's focus to assistance and capacity building would be of immense benefit to Aboriginal organisations. It would recognise the special need for the involvement of an external party in assisting Aboriginal corporations and resolving internal problems, which such organisations would otherwise be unable to resolve.

5.2.3 Responses from questionnaires

353 Kombumerri Aboriginal Corporation and Wutuma Keeping Place Aboriginal Corporation supported this proposal. Ngaanyatjarra Council was very supportive of a greater assistance and capacity building role for ORAC, but cautioned that this will be resource intensive, and to be effective will require appropriately skilled and resourced staff in regional offices. As well, a number of existing regionally-based or umbrella organisations already deliver 'capacity building' services, and ORAC should consider using such organisations to deliver its services.

5.3 Increasing consistency with the Corporations Act

5.3.1 Views from the workshops

354 Much of the discussion in relation to this issue centred on whether Directors' duties should be brought into line with those under the Corporations Act, and whether they should be extended to senior management. There was general agreement on both matters.

5.3.2 Views in written submissions

355 Almost without exception, submissions supported this reform proposal. There was particular support for extending Directors' duties to senior management, given the dependence of many Indigenous corporation Boards on advice from their management.

356 The **Aboriginal Housing Office (NSW)** supported the validation of technically invalid meetings and decisions, provided that there are sufficient safeguards against the abuse of these measures by errant individuals or committees. The Office concurred with extending Directors' duties to management and updating the statement of Directors' duties. In relation to the issue of members' remedies, the Office draws attention to the highly political nature of Indigenous corporations, and the risk individuals potentially

face of being denied access to critical resources (such as housing) through community politics being played out through organisations.

357 The **Northern Land Council** submitted that the raft of modern members' remedies is rarely used by members, and that Aboriginal members of corporations are even less likely to use such remedies.

358 The NLC submitted that the proper direction for reform would be to create the same linkages for the Registrar to stand in the shoes of and litigate on behalf of members as that of ASIC and Corporations Act members or as the case may be, to stand in the shoes of the corporation itself.

359 The NLC agrees with the proposal that the general law of directors duties should extend to the members of governing committees of Aboriginal associations. NLC is also very supportive, on the basis of experience in its area of operations, of extending the duties of directors to senior employees, shadow directors, and others. However, the NLC cautions that remedies attaching to the statutory duties of directors are only available to the relevant regulator.

360 The **Central Land Council** was of the view that provisions of the Corporations Act relating to transactional certainty should be incorporated into the ACA Act, and agreed that provisions relating to Directors' duties, including their extension to senior management, should be incorporated into the Act subject to the provision of assistance and capacity building. Members' remedies similar to those in the Corporations Act should also be adopted.

361 The various Regional Councils and centres within the **Aboriginal and Torres Strait Islander Commission** whose views were appended as part of its submission, were in agreement with increasing consistency with the Corporations Act. The CDEP National Program Centre strongly supported this proposal, and expressed the view that more information should be provided to larger organisations regarding the appropriateness of other incorporation options.

362 However, **Yamatji Land and Sea Council** argued that for Prescribed Bodies Corporate at least, it is entirely appropriate that the ACA Act reverses modern corporate structure, in that the association is controlled by its membership rather than by management, since this better ensures compliance with the consent and consultation provisions of the PBC regulations. With respect to remedies for third party contractors, the general law of corporations can be relied upon to access the same remedies as the Corporations Act affords.

363 While the Consultation Paper argues that the absence of a statutory indoor management rule is a disincentive to third parties to enter into contracts with ACA Act associations, for PBCs there are countervailing *incentives* such as the right to negotiate provisions of the Native Title Act and the certainty provided by the trust or agency relationship between the PBC and its membership. There is a further level of certainty provided by the consent and consultation provisions of the PBC regulations.

364 Previous reviews of the ACA Act have noted that non-compliance actually increased with amendment of the Act to reflect provisions of the Corporations Act, and Yamatji fails to see how a further reform of the Act in this direction would increase compliance with reporting requirements.

365 In relation to Directors' duties, Yamatji argues that the general law of directors' duties has always applied to ACA Act association governing committees. Nonetheless, in the

case of PBCs, it is unclear to whom the directors' duties are owed for the purposes of discharging or enforcing them. While the PBC regulations make it clear that the PBC occupies a relationship of trust or agent for the native title group members, it is unclear what relationship the members of the governing committee occupy in respect of the ordinary members of the association, nor the beneficiaries of the native title determination, nor what remedies might arise on breach of duties regarding these relationships.

366 Since Directors' duties are in part judged from a 'commercial best interests' perspective, instances may arise where for example allowing access to native title land by third parties creates a monetary benefit, then this money becomes a legitimate basis for overturning any rules of traditional law. An indoor management rule therefore would efface the traditional law upon which the native title determination was made, unless articulated in a way which was sensitive to the nature of the title.

367 Furthermore, Yamatji submitted that it is unclear how directors' duties would be extended to employees of the PBC in the absence of a specific membership category, since directors must be members of the association.

368 With regard to reporting requirements, Yamatji argues that it is difficult to see how increased internal legitimacy will in itself result in better corporate governance. For PBCs, the congruence of corporate process with customary laws underlying the native title will be paramount if the native title is to survive. While professional advice and services for economic, legal and other matters is crucial to the success of a PBC, internal and external legitimacy cannot be conflated with these requirements. While a single method of accounting for all monies handled by the PBC may be attractive, there should be a separation of reporting for requirements for public and private monies.

369 Yamatji submitted that there are good reasons why membership of PBCs should not be limited to Indigenous natural persons, but should be extended to include Indigenous corporate entities. This would allow for the better inclusion of the diverse interests, decision-making procedures under law and custom, etc of native title sub-groups.

370 The **National Native Title Tribunal (NNTT)** supported increased consistency with the Corporations Act, but noted in relation to Prescribed Bodies Corporate that any validation provisions would have to take into account Regulations 8 and 9 of the PBC regulations. Further, the effects of determinations of native title should also be considered.

371 ATSIC's **Land Rights and Native Title Centre (LRNTC)** was of the view that in general, this appears to be a positive proposal, but made the following points.

LRNTC comments regarding PBCs

372 While the Centre broadly supported the proposal that the standard of directors' duties should be the same as the standard applying to non-Indigenous directors, it should be noted that PBCs are not "voluntary" organisations, they may have a limited membership pool from which to appoint directors and, inevitably, those directors will always have a "material personal interest" in decisions taken by the corporation.

373 Extending directors' duties to senior management may not be relevant to the majority of PBCs who will not directly employ staff.

374 Any proposal to introduce a "statutory indoor management" rule for ACA Act corporations will need to be dovetailed with all provisions in the NTA or associated regulations which deal with the protection of native title. This also applies to NTRBs.

As an illustration of what could occur in the PBC context without such dovetailing, any amendment to introduce a statutory indoor management rule may impliedly overrule the "no effect" provisions in the current PBC Regulations regarding non-ILUA (Indigenous Land Use Agreement) agreements.

375 Revamping members' remedies may be of limited application in a PBC context where most members of the native title group are not members of the corporation. Further, members of such corporations may be less able or inclined to utilise such remedies as compared to members of mainstream corporations. In such a situation, any proposal to increase members' remedies *if* coupled with a proposal to decrease the Registrar's regulatory powers may effectively result in corporations being largely unaccountable.

LRNTC comments regarding NTRBs

376 Subject only to the potential impact of certain amendments on NTA provisions concerned with the protection of native title and the ability of members to fully utilise an expanded range of members' remedies, these proposals appear to be largely uncontroversial in the NTRB context. The LRNTC particularly supported the proposal to extend directors' duties to senior management.

5.3.3 Responses from questionnaires

377 Kombumerri Aboriginal Corporation argued that caution needs to be exercised before any changes are made to ratify technically invalid decisions of governing committees. It would be possible for organisations that fail to adhere to correct meeting and election procedures to manipulate the definition of 'minor technical breaches' to usurp members' rights. On the other hand, breaches such as late returns of committee reports should be resolved through discussions with ORAC.

378 Kombumerri Aboriginal Corporation and Ngaanyatjarra Council strongly supported updating directors' duties and members' remedies to be consistent with the Corporations Act, and extending the duties to senior management. On the other hand, Kombumerri noted management have little protection against governing committees, and ORAC's educative role should extend equally to employees.

379 Yirra Yaakin Noongar Theatre Aboriginal Corporation would welcome the ability to hold telephone and possibly videoconference meetings.

5.4 Simplifying reporting requirements

5.4.1 Views from the workshops

380 While there was discussion regarding the problems for some corporations of multiple reporting requirements, no firm views were recorded concerning this issue.

5.4.2 Views in written submissions

381 The **Aboriginal Health Office (NSW)** strongly agrees with the sentiment of paragraph 83 of the Consultation Paper, regarding appropriate levels of financial reporting being that required to protect the member's interests, but notes that this should include:

- Protection of the member's equity/corporation's accumulated funds;
- The ability of the member to know and have confidence in how funds have been expended; and

- The corporation's ability to continue to transact on behalf of members pursuant to the corporation's objectives.

382 To this end, AHO would support the application of Australian Accounting Standards to all corporations.

383 The **National Native Title Tribunal** supported the streamlining of reporting requirements as a general proposition.

384 The **Central Land Council** was of the view that under most circumstances, ORAC has no need to know of the internal affairs of a corporation, and accountability should be directed to funding acquittal and so forth.

385 The **Northern Land Council** argued that the current requirement under the ACA Act for audited annual financial returns to be provided to the Registrar is particularly onerous, even with the discretionary exemptions currently available to the Registrar. The NLC contrasts the ACA Act regime unfavourably with that under the Corporations Act for small proprietary companies.

386 The NLC submitted that if financial returns are required at all under a reformed ACA Act, the appropriate level may be that applying to Corporations Act "exempt proprietary companies" as small proprietary companies were known before 1996, which required unaudited pro forma returns of balance sheet and income statements.

387 The **Department of Consumer and Employment Protection (WA)** noted the major shift to service delivery by not-for-profit organisations, including in the Indigenous area, and argued that this means that accountability to the recipients of such services is a major issue which must be dealt with. Government bodies are subject to administrative law remedies and trading corporations are regulated by Fair Trading legislation, but there are no equivalent remedies for Indigenous corporations providing publicly-funded services. It could be construed from this submission that accountability to funding agencies should focus on both financial reporting and on outcomes.

388 The **Department of Aboriginal and Torres Strait Islander Policy (Qld) (DATSIP)** proposed that for corporations receiving substantial grants, that reporting should be based on accrual accounting, provided on a six-month basis, and that end-of-year reports should be certified by an independent external auditor. It was not clear whether these proposals would apply to reporting to ORAC, or to grant acquittals.

389 **Mervyn Sullivan** of De Castro and Sullivan on the other hand, submitted that the proposal to streamline and simplify financial reporting requirements under the Act demonstrated a lack of understanding of the difficulties faced by Indigenous corporations in meeting reporting requirements. The requirements under the Act are relatively straightforward and represent a minimum standard. The problems lie in the reporting requirements of the funding agencies, and if anything it is these which need streamlining.

390 ATSIC's **Land Rights and Native Title Centre (LRNTC)** made a number of comments with regard to the proposal to simplify and streamline financial and other reporting requirements.

LRNTC comments relating to PBCs

391 The Centre was supportive of any proposal to ensure that reporting requirements are appropriate and streamlined, although it noted that much of the detail of this proposal

still has to be worked out and will, to some extent at least, be dependent on a decision about structural reform issues.

392 The LRNTC noted that if the ACA Act is retained for "small" corporations (Example B in the Consultation Paper), those corporations would still be required to maintain proper accounts and financial records, but would not be required to prepare audited financial reports and directors reports. The Centre was of the view that this was a reasonable requirement in the PBC context, although it noted that the Consultation Paper goes on to state that some slightly more complex reporting requirements may be needed for PBCs and NTRBs, and suggested that further information is required in relation to this proposal.

393 The LRNTC observed that the PBC Options Paper takes the view that as native title rights are akin to private property rights there is a strong argument for limiting external accountability to any conditions imposed by (any) third party funding agencies via grant conditions.

LRNTC comments relating to NTRBs

394 In circumstances where reporting requirements under the NTA and the *Commonwealth and Authorities and Companies Act* 1997 ("**CAC Act**") exceed the reporting requirements under the NTRB's incorporation statute (whether that is the ACA Act or, ultimately, something else), the LRNTC is of the view that the NTRB should be exempted from reporting requirements under the incorporation statute.

5.4.3 Responses from questionnaires

395 Mumbultjari Aboriginal Corporation noted that their audit fees for an annual turnover of $200,000 were $3,500, and suggested that small incorporated bodies, with an annual turnover of less than $1 million, should not need a registered auditor. Qualifications could be that the auditor was a member of the Institute of Chartered Accountants or of the CPA. This view was also supported by Coongan Aboriginal Corporation.

5.5 Limiting membership to Indigenous natural persons

5.5.1 Views from the workshops

396 While some participants saw advantages in bringing broader expertise onto the Boards of Indigenous corporations, there was general agreement that this could be done by other means than opening up the association's membership to non-Indigenous people. There was discussion of the advantages and disadvantages of 'umbrella' organisational forms, but no clear consensus as to whether these should be allowed under the ACA Act.

5.5.2 Views in written submissions

397 The **National Native Title Tribunal (NNTT)** noted that limiting membership to Indigenous natural persons is in conformity with the scheme for Prescribed Bodies Corporate under the NTA.

398 The **Central Land Council** submitted that there is little point in having an Indigenous-specific incorporation statute, if non-Indigenous persons are able to be members. Membership should be restricted to natural persons; if a corporation desires to have other corporations as members, it should incorporate under the Corporations Act.

399 The **Northern Land Council** supported retaining the limitation of members to Indigenous natural persons. It argued that the advantages of retaining control of ACA Act corporations by natural Indigenous persons outweighs any disadvantages that may result from not being able to form group structures, and in any event, Corporations Act structures are always available for such purposes.

400 The **Aboriginal Housing Office (NSW)** supported the limiting of membership to natural Indigenous persons.

401 ATSIC's **Land Rights and Native Title Centre (LRNTC)** made a number of comments pertinent to PBCs and NTRBs in relation to this settled question.

LRNTC comments relating to PBCs

402 One of the issues raised in the PBC Options Paper for consideration is allowing for the appointment of non-native title group members to a limited number of (non-voting) PBC membership and/or Board positions. The rationale behind this proposal is to provide a facility for native title groups to augment their own skills with the management skills of others whom they trust. The proposal to limit ACA Act membership to Indigenous persons would obviously limit the pool of people that groups could turn to in the PBC context.

403 In relation to the issue of limiting membership to natural persons, the Options Paper does not advocate allowing corporate membership of PBC corporations. Instead, the Options Paper addresses the issue of building "regional" bodies by proposing changes to the regulatory regime that would allow for the amalgamation of PBCs.

LRNTC comments relating to NTRBs

404 The Centre reserved its comments on this issue pending an opportunity to review any NTRB submissions.

5.5.3 Responses from questionnaires

405 Management and Advisory Services Aboriginal Corporation did not support the proposal to prevent housing and other such associations from forming 'umbrella' type organisations (with corporate members) under the ACA Act.

406 The Bundaberg District ATSI Corporation Medical Centre supported limiting membership to Aboriginal or Torres Strait Islander persons.

5.6 Repealing Part III (Councils)

5.6.1 Views from the workshops

At the May, 2001 workshop, staff from the Central Land Council in particular expressed strong support for the retention of Part III, arguing that there was an imperative for an alternative to the Community Government program of the Northern Territory government. No other participants expressed these views, and in fact at the April, 2002 workshop, the issue was not raised as a matter of immediate concern. This was reflected in the final submission received from the CLC (see below).

5.6.2 Views in written submissions

407 Only one written submission supported retaining Part III of the Act, that of the **Northern Land Council**. The NLC submitted that Part III has been rendered ineffective in the Northern Territory through strong opposition by the Northern

Territory government and its ability to control funds to entities undertaking local government-like functions. It notes that to repeal Part III would not be a true reform, and its continued existence in the statute would not detract from or add to anything. For this reason, its continuation was preferred.

408 Also, while ATSIC's **Northern Territory State Policy Centre** did not submit any views regarding Part III, it was of the view that further discussion is needed prior to making any decision to repeal Part III.

409 A preliminary submission from the **Central Land Council** in 2001 argued a case for its retention, based on the organisation's concerns about the local government agenda of the then Northern Territory government. However, their final submission gives only brief attention to this question, stating that "Part III is redundant and should be repealed."

410 ATSIC's **Land Rights and Native Title Centre** offered no view on the merits of the proposal to repeal Part III of the ACA Act, given that it does not impact on either the PBC or NTRB regimes. However, it suggested that given the unique circumstances and requirements of both NTRBs and PBCs, further consideration ought to be given to enacting two new specialist Parts to the ACA Act to deal separately with NTRBs and PBCs, particularly if the Act is ultimately retained as a general incorporation vehicle (either for all sizes of corporations or simply for "small" corporations).

5.7 Addressing certain other technical difficulties with the current Act

5.7.1 Views in written submissions

411 There was general agreement in written submissions with the mechanisms proposed in the Consultation Paper to address technical problems with the ACA Act.

412 The **Aboriginal Housing Office (NSW) (AHO)**, the **Central Land Council**, and the **Department of Fair Trading (NSW)** and a number of the Regional Councils and centres whose views were noted in the **ATSIC** submission stated that they supported these proposals. However, AHO raised concerns about proposed changes relating to the minimum number of members, suggesting that this may result in the proliferation of small family-based corporations, which *inter alia* will exacerbate factionalism within Indigenous communities.

413 Also, the **Central Land Council** was of the view that the minimum membership could be reduced to five without difficulty, but further suggested that there are reasons why in some circumstances, the minimum number may legitimately need to be even fewer. One example could be where there are only one or two remaining members of a family group land-holding corporation.

414 The **National Native Title Tribunal** supported as a general proposition the proposal to address the range of technical issues identified in the Consultation Paper.

415 ATSIC's **Land Rights and Native Title Centre (LRNTC)** stated that while they have no in principle objection to any of these proposals, further information would be required before the Centre could reach a concluded view on the merits of these proposals in their totality. That being said, in the PBC context, the Centre would be supportive of provisions which:

- provided for the amalgamation of ACA Act corporations. As noted previously, one of the proposals in the PBC Options Paper is for the amalgamation of PBCs.

For this proposal to be implemented, changes would obviously be required to the ACA Act to allow for the amalgamation of the underlying corporate entities;

- explicitly provide for meetings to occur by telephone or videoconference. This would help to reduce corporate governance compliance costs for a number of PBCs; and
- reduced the minimum membership requirements to five persons.

5.7.2 Responses from questionnaires

416 Management and Advisory Services Aboriginal Corporation suggested that reducing the minimum membership size may assist those small corporations where participation is low to hold meetings where it is difficult to obtain the necessary quorum.

5.8 Particular issues for NTRBs and PBCs

417 There is an important interaction between the ACA Act and the *Native Title Act* 1993 (Cth) ("NTA"), through the latter's prescription of ACA Act corporations for two key categories of organisation; Prescribed Bodies Corporate (PBCs), and Native Title Representative Bodies (NTRBs).

418 Regulation 4.1 of the *Native Title (Prescribed Bodies Corporate) Regulations* 1999 ("**PBC Regulations**") currently requires PBCs to be incorporated under the ACA Act.

419 Under section 201B of the NTA, NTRBs are (generally) required to be incorporated under the ACA Act. The exceptions are the two Northern Territory Land Councils (which are statutory corporations established under the *Aboriginal Land Rights (Northern Territory) Act* 1976), the Torres Strait Regional Authority (which is a Commonwealth statutory authority established under the *Aboriginal and Torres Strait Islander Act* 1989) and the Aboriginal Legal Rights Movement in South Australia (which is established under the *Associations Incorporations Act* 1985 (SA)). In addition, native title services are currently being provided in New South Wales by the NSW Native Title Service, which is incorporated as a company limited by guarantee under the *Corporations Act* 2001 ("**Corporations Act**"). The NSW Native Title Service is not currently recognised as a NTRB.

420 A number of submissions to the Review addressed issues pertinent to PBCs and NTRBs, both in terms of the overall ACA Act reform option to be adopted, and in terms of the "settled" issues. These have been included in the relevant sections above. However, general comments in submissions are outlined below.

5.8.1 National Native Title Tribunal (NNTT)

421 The NNTT submitted that since the *ACA Act* is likely to remain the vehicle for the incorporation of PBCs, it is essential that any amendments to the *ACA Act* (and any consequential amendments to the *NTA*) should be directed at enhancing the functionality of those corporations.

422 The NNTT argued that it is crucial to note that rights under the NTA post-determination generally arise as a result of having such an incorporated body registered on the National Native Title Register. These corporations, regardless of whether they are acting as trustee or agent, have substantial responsibilities for the management of any dealings involving native title. The effective exercise and continued protection of native title rights and interests is largely dependent on having a functional regime both

for incorporation and for on-going management. This is also essential if native title holders are to negotiate and manage durable relationships with non-native title interests.

423 The NNTT noted that it is important to remember that, unlike other Indigenous groups, native title holders who wish to seek formal recognition of their native title rights and interests have no choice as to whether or not to incorporate. Post-determination, the Native Title Act requires them to incorporate in a prescribed manner. The PBC regulations require that they incorporate under the ACA Act and Regulations.

424 Within this context, the NNTT drew particular attention to several issues that have emerged as being of major concern in the effective establishment and operation of PBCs. These are:

1. the structure and composition of membership: that is, the ability of the corporate structure to reflect effectively the traditional law and custom of the native title holders;
2. relationships between the membership and the governing committee: that is, that the governing committee is seen by the members as being properly representative and responsive to the wishes of the members;
3. members' ability to exercise their responsibilities as members of PBCs in a way that is compatible with their responsibilities under traditional law and custom;
4. the consultation and consent provisions: that is, the need for flexible corporate structures that are no more prescribed by external requirements than is absolutely necessary;
5. the ability for members of the PBC to enforce the requirements of internal accountability as members of a native title holding community as well as their accountability to external corporate requirements.

425 It is the view of the NNTT that any proposed amendments to the *ACA Act* and Regulations must take into account the unique and non-voluntary relationship between a RNTBC and its constituents, and that this is done in a way that assists in the continued recognition and protection of native title rights and interests.

5.8.2 Land Rights and Native Title Centre (ATSIC) (LRNTC)

426 The LRNTC made a substantive submission with regard to the interaction between proposed reforms to the ACA Act and the regime under the Native Title Act for Prescribed Bodies Corporate (and Registered Native Title Bodies Corporate) and Native Title Representative Bodies. Detailed comments from LRNTC are provided in relation to the "settled" reform issues in each relevant section.

5.8.2.1 PBCs

427 The LRNTC noted that historically, there has been some dissatisfaction among native title claimants with this restriction on the choice of incorporation vehicle. In large part this would appear to be due to an unresolved tension between the expectations of native title group members and what is possible under the ACA Act, including the ability to develop Rules which:

- depart from the formal equality of members' voting power; and
- seek to reflect the existence of sub-groups within the broader native title group.

428 Recent flexibility in the administration of the ACA Act has minimised some of these difficulties, however concerns remain that these problems could re-emerge should there be a further change in the administration of the Act. However, this recent administrative flexibility will not be sufficient to address all corporate governance problems for PBCs. Anecdotal evidence suggests that some PBCs may currently be experiencing difficulties meeting reporting and AGM requirements.

429 ATSIC is currently conducting a review of the provisions relating to PBCs under the NTA and the PBC Regulations. In that regard, it has developed a draft paper outlining options for reforming the regulatory regime governing the formation and operation of PBCs. While this Options Paper focuses largely on possible amendments to the statutory trust or agency relationship between the corporate entity and the native title group members, it also contains some discussion of possible changes to the corporate law relationship. The submission noted that the PBC's membership may not be coterminous with that of the relevant native title group.

430 The LRNTC's comments offered on the ACA Act reform options consequently refer to discussion in the Options Paper, where relevant, although it noted that the Options Paper is still a working document and has not been the subject of any public consultation.

5.8.2.2 NTRBs

431 NTRBs are funded by ATSIC to perform the statutory functions set out in Part 11, Division 3 of the NTA. ATSIC also has statutory responsibilities under the NTA to supervise NTRBs' compliance with the NTA and to ensure they meet their accountability obligations.

432 The LRNTC has provided only limited comments at this juncture on how the proposed reforms may impact on NTRBs, on the understanding that comments on the Consultation Paper have been sought from NTRBs.

433 A key issue identified by the LRNTC is the conflict arising out of requiring community organisations operating under the ACA Act to act like statutory authorities under the NTA. As noted by the Consultation Paper, the major problem posed by the requirement that NTRBs must be incorporated under the ACA Act is the tension between the statutory duties of the NTRB and the requirements under the ACA Act for:

- control by the members; and
- appointment of the Governing Committee from the membership.

434 However, while the LRNTC agrees with this general statement of the problem, it is arguable that the current level of conflict arising from these requirements is exacerbated, and to some extent caused, by the historical fact of requiring what were originally grassroots community organisations to now act like statutory authorities under Federal legislation.

435 Consequently, it should not be assumed, as it seems to be in the Consultation Paper, that a brand new organisation set up under the ACA Act to perform NTRB functions cannot design its membership and Governing Committee composition in a way that avoids much of the politics of representation operating within the geographical area for which the NTRB will be responsible.

436 Equally, it should not be assumed that any existing problems with a NTRB's membership and Governing Committee composition would be eradicated simply by allowing the NTRB to incorporate under a different incorporation statute.

437 A further issue related to the lack of "fit" between whatever incorporation regime is ultimately chosen and the NTA NTRB regime, is the interaction between the powers of the regulator under the incorporation regime and the powers of, for example, Ministerial intervention under the NTA. While the Consultation Paper discusses in some detail the reporting requirements under different regimes and the powers of State, ACA Act and ASIC regulators, there appears to be little discussion of the conflicts (if any) between regulators' powers under the various incorporation regimes and the NTA. The LRNTC submitted that this is an issue which requires further research.

5.8.3 Native Title Representative Bodies

5.8.3.1 Northern Land Council (NLC)

438 The NLC submitted that while addressing the "settled" issue may appear to allow for greater flexibility in rule design and structure for PBCs, they will not go far in solving the inherent ongoing management problems that PBCs must face and which, in the NLC's view, will ultimately render them dysfunctional.

439 The NLC considers that there are serious difficulties in the current Prescribed Body Corporate regime in the NTA. It argues that a fundamental difficulty with the scheme is that the PBC is expected to perform the roles of land trust, land council, and royalty-receiving entity, in addition to whatever commercial roles may evolve concerning the land in question.

440 The NLC doubts that governance structures, in many cases, can deliver certainty under the current scheme. When, as is most likely to be the case, native title is recognised in remote areas, there will be little access to professional facilities or resources and a significant number of corporations will not even be able to comply with basic administrative requirements. The submission raises a number of other concerns with the current PBC regime.

441 Nonetheless, given the current scheme, the NLC makes a number of points:

- Although the NTA requires the Court to determine the membership of a native title group (and thus on one view, a definitive initial membership of the PBC), the developing judicial opinion on this point is that such a proposal may be unachievable. Membership of the group is bound to be incomplete at the time of the determination, and will certainly change over time;
- The PBC will in the first instance be an ACA Act corporation, but downstream it will need access to administrative assistance, anthropological and other expertise for its proper functioning. In that regard, there are strong arguments to the effect that PBCs should be limited to the narrow function of executing agreements, with commercial activities performed by another body;
- As with any corporations, ACA Act corporations can experience long periods of internal struggle between family and clan groups for control of the governing committee, which may involve abuse of rules and well as procedural misconduct by an entrenched governing committee. Such problems are well known to NLC and to ORAC. Where the single asset (native title) is one in which every member

has a direct and emotional interest, the preconditions for dispute are even more volatile, all the more so if revenue streams become available from the asset.

- ORAC is the sole regulator of PBCs. The NLC submits that ORAC is not resourced to carry out remote area administrative supervision in general, and even less so in the very remote areas where many PBCs and their members will be located.
- In particular, the Registrar is not resourced at all to provide advice on or to deliver a capacity building function in areas of anthropology or dispute resolution concerning traditional entitlements to land or cultural issues.
- However, NTRBs are so resourced, and likely to possess the memory, experience and documentation that preceded the relevant determination of native title. The NLC submits that at least for PBCs, the Registrar delegate his authority and proportional resources to the NTRB in whose area the determination of native title exists.

5.8.3.2 Central Land Council

442 The CLC submitted that issues relating to PBCs are sui generis, and should be dealt with elsewhere. They are of such complexity that to try to deal with them in the context of this review will serve only to cloud the issues with respect to other corporations.

5.8.3.3 Yamatji Land Council

443 Yamatji submitted that while the function of holding native title is established under the NTA, the decision-making function of PBCs may still reflect traditional law. If the distinction between form and content of native title is to be reflected in the title holding and management functions of PBCs, it is essential that the ability to utilise traditional decision making systems is facilitated by the ACA Act and its administration.

444 The Yamatji submission argued that certain inconsistencies between the ACA Act and modern corporate philosophy actually represents an advantage for PBCs; for example, the reliance under the ACA Act on control of the corporation by the membership rather than by management assists in compliance with the (consent and consultation) PBC regulations. For this reason, the ACA Act represents a convenient instrument for the incorporation of PBCs.

445 While acknowledging the current limitations of the ACA Act, the submission supports the retention of a separate incorporation statute for PBCs and NTRBs, whether in the form of a significantly reformed ACA Act or an entirely separate statute.

6 Submissions received

Written submissions to the review were received from the following agencies, organisations, and individuals:

Statutory regulatory authorities
Australian Securities and Investments Commission
Consumer and Business Affairs, Department of Justice (Vic)
Department of Tourism, Racing and Fair Trading (Qld)
Department of Consumer and Employment Protection (WA)
Department of Fair Trading (NSW)
Registrar General's Office (ACT)

Other Government departments and agencies
Aboriginal Housing Office (NSW)
Aboriginal Lands Trust (WA)
Australian Government Solicitor
Department of Aboriginal Affairs (NSW)
Department of Aboriginal and Torres Strait Islander Policy (Qld)
Department of Indigenous Affairs (WA)
National Native Title Tribunal
Office for Aboriginal and Torres Strait Islander Health (Cth)
State Aboriginal Affairs (SA)

Indigenous organisations
Aboriginal and Torres Strait Islander Commission
Aboriginal Hostels Ltd
Australian Institute of Aboriginal and Torres Strait Islander Studies
Central Land Council
Indigenous Land Corporation
Northern Land Council
Torres Strait Islander Board
Office of Evaluation and Audit (ATSIC)
Yamatji Barna Baba Maaja Aboriginal Corporation

Consultants to ORAC
E.J. Pippet, Chartered Accountant
Garry Hamilton, Minter Ellison Lawyers
Lyndsay Roberts, Chartered Accountants
Merv Sullivan, De Castro Sullivan Chartered Accountants
Michael Phelan
Regina Wagner, Training and Consulting

Individuals
Clarrie Isaacs

7 Questionnaires

Attached are examples of the questionnaires sent respectively to ACA Act corporations and non-ACA Act corporations.

APPENDIX G

PART III OF THE ACA ACT: ABORIGINAL COUNCILS

CONTENTS

A. INTRODUCTION AND OVERVIEW

1 This Appendix contains a detailed discussion of Part III of the ACA Act, which relates to Aboriginal Councils. The leading theme is to question whether Part III of the ACA Act remains appropriate and viable. This appendix also discusses why Part III is a dormant part of the legislation and the future of this Part of the Act. It begins with an outline of the provisions of the Act, considers the history of the operation of the Councils provision with reference to the Fingleton Review. It concludes that Part III has been overtaken by history and should be repealed.

B. OUTLINE OF THE OPERATION OF PART III

(1) Establishment of an Aboriginal Council

Application and approval process

2 An application to establish an Aboriginal Council in a particular area may be made by a group of ten adult Aboriginals living in that area[1] to the Registrar.[2]

3 The Registrar then convenes a meeting with adult Aboriginals living in that area[3] to discuss the functions[4] and area[5] of the proposed Aboriginal Council.

4 Following the meeting, the applicants may withdraw or vary their application.[6] However, the area to which the application relates cannot be extended.[7]

5 The Registrar considers various factors to determine whether the application will be approved.[8] These factors relate to the consent of the Aboriginal people living in the area[9], the capacity of the proposed Aboriginal Council to fulfil its functions[10], the physical area to which the application relates[11] and the proposed name of the Aboriginal Council area.[12]

6 If the Registrar approves the application, a notice must be published in the Gazette.[13]

7 If the Registrar decides not to approve the application, he/she must refer the application to the Minister for the Minister's direction.[14]

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[1] s11 ACAA
[2] s12 ACAA*A*
[3] s13 ACAA
[4] s13(b) ACAA
[5] s13(a) ACAA
[6] s15 ACAA
[7] s14 ACAA
[8] s16 ACAA
[9] s16(1)(A)(i) ACAA
[10] s16(1)(a) (ii) ACAA
[11] s16(1)(aa) and s16(1)(b) ACAA
[12] s16(1)(c) ACAA
[13] s16 ACAA

8 The Minister then consults and may make agreements[15] with other affected Aboriginal Councils and, if necessary, their creditors.[16] If the application is approved, the Minister directs the Registrar to publish a notice in the Gazette.[17]

9 If no direction is made, the Minister must provide reasons for his decision and direct the Registrar to refuse the application.[18]

Expansion or amalgamation of Aboriginal Council Areas

10 The Registrar may make a recommendation to the Minister that another area be added to an existing Aboriginal Council Area.[19]

11 The Registrar may also recommend to the Minister that two or more Aboriginal Council Areas be amalgamated.[20] A notice must be published in the Gazette when an amalgamation occurs.[21]

Status of Aboriginal Council

12 An Aboriginal Council is a body corporate[22] that may sue and be sued in its corporate name.[23]. It may acquire, hold and dispose of real and personal property[24] and have a common seal.[25]

Functions of Aboriginal Council

13 The functions of an Aboriginal Council are stated in the Gazette notice published when the Aboriginal Council was established.[26]

14 An Aboriginal Council may submit a request to the Registrar to alter the functions of the Council.[27] Approved alterations are published in the Gazette.[28]

Powers of Aboriginal Councils

15 An Aboriginal Council may do "all things necessary or convenient to be done for or in connection with the performance of its functions".[29] This power is subject to the ACAA itself and the *Commonwealth Authorities and Companies Act 1997 (Cth)* **(**CACA**)**

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[14] s16(4) ACAA
[15] s17)(2)(a) – (e) ACAA
[16] s17(2) ACAA
[17] s17(5) ACAA
[18] s18 ACAA
[19] s26 ACAA
[20] s27 ACAA
[21] s27(2) ACAA
[22] s19(3)(a) ACAA
[23] s19(3)(e) ACAA
[24] s19(3)(c) ACAA
[25] s19(3)(b) ACAA
[26] s20(2) ACAA
[27] s33 ACAA
[28] s33 ACAA

16 Moneys of an Aboriginal Council may only be applied in a certain way. Payments must be authorised by the ACAA or be for the payment or discharge of the expenses, charges and obligations incurred or undertaken by the Council in performance of its functions.[30]

17 An Aboriginal Council is empowered to make by-laws connected with its functions that are not inconsistent with any other laws in the area.[31] A by-law is effective once approved by the Minister[32] and a breach is punishable by a fine.[33]

(2) Composition of an Aboriginal Council

18 An Aboriginal Council is comprised of any staff required to enable it to perform its functions[34] and councillors.[35]

19 Councillors are elected soon after the establishment of the Council.[36] The Registrar determines how[37] and when[38] the election is to be conducted as well as the number of councillors to be elected.[39] To be eligible to vote or be a candidate a person must be over the age of 18 years[40], living in the area of the Council[41] and Aboriginal.[42]

20 An election for new councillors must be held three months before the councillor's terms expire.[43]

21 A councillor is entitled to be paid allowances in relation to his expenses. The amount is as provided in the Rules of the Aboriginal Council.[44]

22 Councillors are not required to contribute towards the payment of debts or liabilities of an Aboriginal Council.[45]

Operation of Aboriginal Council

23 As soon as possible after an election, the Registrar will preside over the first meeting of the Council.[46] A Chair of the Council will be elected[47]and the Rules of the Council will be adopted.[48]

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[29] s29 ACAA
[30] s31 ACAA
[31] s30 ACAA
[32] s30(4) ACAA
[33] s30(10) ACAA
[34] s42 ACAA
[35] s21 ACAA
[36] s21(1) ACAA
[37] s21(1)(c) ACAA
[38] s21(2)(d) ACAA
[39] s21(1)(b) ACAA
[40] s21(4)(b)(i) ACAA
[41] s21(4)(b)(ii) ACAA
[42] s21(4)(a) ACAA
[43] s25 ACAA
[44] s32 ACAA
[45] s41 ACAA
[46] s22 ACAA

24 The Registrar may rescind motions for the adoption of Rules that are inconsistent with the ACAA or the CACA.

25 The Rules must provide for certain matters relating to councillors[49], the conduct of Council meetings[50], the management of Council's funds[51], altering the Rules of the Council[52] and settling disputes between Councils and Aboriginal living in the area.[53]

26 A copy of alterations must be filed with the Registrar.[54]

27 Within three weeks of the first meeting of the Council, a public officer must be appointed[55] and notification of the appointment sent to the Registrar.[56]

Accountability of Aboriginal Council

28 Aboriginal Councils are obliged to provide the Registrar with a copy of the Council's annual financial year report.[57]

29 The Council must make their accounting records available for inspection by the Registrar upon the Registrar's request.[58] A copy of the Council's annual report must also be available for inspection at all reasonable times by Aboriginals living in the area.[59]

30 Failure to comply with the above requirements without reasonable excuse[60] is an offence.[61]

31 The documents of an Aboriginal Council may also be examined and copied at any time by a person authorised by the Registrar to do so. It is an offence to fail to provide access to documents without reasonable excuse [62] or to knowingly make a false or misleading statement in relation to the documents.[63]

32 The Registrar may serve a notice on a Council if there are reasonable grounds to suspect they have not complied with the ACAA or the CACA. The notice will require the Council to follow the steps set out in the notice and thereby comply with the legislation.[64]

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[47] s22(1)(b) ACAA
[48] s22(1)(a) ACAA
[49] s23(1)(a)-(c) ACAA
[50] s23(1)(d) ACAA
[51] s23(1)(e) ACAA
[52] s23(1)(g) ACAA
[53] s23(1)(f) ACAA
[54] s35 ACAA
[55] s36 ACAA
[56] s37 ACAA
[57] s9 *CACA* and s38 ACAA
[58] s38(5)(a) ACAA
[59] s38(5)(b) ACAA
[60] s38(8) ACAA
[61] s38(7) ACAA
[62] s39(5) ACAA
[63] s39(6) ACAA
[64] s40(1)(a) ACAA

33 If any irregularity exists in the financial affairs of the Council, the Registrar may issue a notice requiring steps to be taken to remedy the irregularity.[65]

34 In conclusion of this summary of the operation of Part III, the question arises whether the oversight of the internal operations of a Council by the regulatory authority (in this case the Registrar) is excessive. As discussed elsewhere in this report, the Review Team is of the view that the approach adopted is not in keeping with contemporary theories of corporate regulation.

C. THE CONTENTIOUS HISTORY OF PART III

35 Part III of the ACA Act provides for the creation of Aboriginal Councils to fulfil a role similar to that of local councils but only in relation to Aboriginal and Torres Strait Islander communities.[66] However, since the Act came into force in 1978 no Councils have been established under its provisions.

36 The primary reason is strong opposition to the Federal incorporation model for Indigenous Councils from State and Territory governments. This opposition stems from the perception that the Federal government is unreasonably intruding into State responsibilities for local government.[67] As such, Part III of the Act has become virtually redundant and more and more reliance has been placed on Part IV of the Act which also allows for the incorporation of bodies for the purpose of providing government-type services.[68]

Competing Policies of the Whitlam and Fraser Governments

37 At the time of the dismissal of the Whitlam government in 1975, the proposed Aboriginal Councils and Associations Bill had been introduced into Parliament but not yet passed. When the new Liberal government, led by Malcolm Fraser, reintroduced the bill in 1976 it contained amendments to Part III of the Act. The Fraser government's motivation for the addition of section 16(3) and section 17(4) to Part III stemmed from an attempt at curtailing rising discontent amongst the State governments in relation to Aboriginal Councils. The States were concerned that the establishment of Councils may conflict with the local-government services under State government control and undermine State power.[69] The original Bill reflected the Whitlam government's desire to give more power to local governments generally by bypassing State Governments. The Fraser government subsequently rejected this approach.

State and Territory Concerns

38 Fraser's Bill (as amended) was assented to on 15 December 1976. However proclamation was delayed until 1978 because of further concerns expressed by State and Territory

[65] s40(1)(b) ACAA

[66] Ley in Fingleton vol 2, page 2

[67] Sullivan in Fingleton vol 2

[68] The Fingleton Review extensively canvassed the history of Part III and the reasons it has not been used. It also analysed the applications made under the Councils section. It is the primary source for the following information.

[69] *Fingleton Review*, page 94, paragraphs 7.11-7.12

governments.[70] For example, in a telex to Prime Minister Fraser in 1977 Queensland Premier Bjelke-Petersen stated that he was concerned that the legislation:

> … cuts across the spirit of 'co-operative federalism' as well as being discriminatory. It provides for the establishment of a separate local authority for an Aboriginal group or area, which group could assume virtually all local authority functions.[71]

39 Whilst the West Australian government expressed similar concerns to those of Queensland,[72] and was also afraid that Aboriginal Councils may be formed within town areas,[73] opposition to Part III of the Act was particularly strong in the Northern Territory. The Territory government was concerned that:

> A substantial proportion of the NT land and of its population would be outside the NT local government system and responsible to a Commonwealth Minister.[74]

40 In response to these concerns, the Federal Minister for Aboriginal Affairs proposed the addition of two clauses that he believed would deal with concerns that Aboriginal Councils established under the Act might intrude into State responsibilities for local government.[75] Section 16(1)(aa) enabled the Registrar to constitute a council only where the application did not extend to an existing or proposed area of local government, and 17(4) ensured that if a local government area already existed, or was proposed for, the Council area application, the Federal Minister must consult with the State Local Government Minister.[76] The Legislation was eventually proclaimed on 14 July 1978.

41 Fingleton's file research revealed comments made by senior officers at the Department of Aboriginal Affairs at the time which predicted the fate of Part III. These officials held the view that the Councils provisions would never be used except for purposes other than they were intended:

> Although its seems unlikely that we will ever constitute an Aboriginal Council, retention of the "Council" provisions might be useful in arguments with State and Territory government over local government issues. (3 October 1979)[77]

D. THE FINGLETON REPORT'S CONCLUSIONS ON PART III

Lack of Commitment Due to Political Relations with the States

42 The Fingleton Review analysed the eleven applications made under Part III prior to that review.[78] The Report suggests that a lack of commitment by the Commonwealth Government to Part III, because of the political sensitivity of Federal/State relations, is the primary factor responsible for its failure.

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[70] *Fingleton Review*, page 94, paragraph 7.13

[71] *Fingleton Review*, page 95 paragraphs 7.14-15

[72] see for example *Fingleton Review* paragraph 7.13

[73] *Fingleton Review*, paragraph 7.18

[74] *Fingleton Review*, paragraph 7.17

[75] *Fingleton Review*, paragraph 7.19

[76] *Fingleton Review*, paragraph 7.20

[77] *Fingleton Review*, paragraph 7.22

[78] *Fingleton Review*, paragraph 7.23

43 For example, following the application for a Maningrida Council Area in the Northern Territory, the Department of Aboriginal Affairs was more concerned with the implications for relations with the Northern Territory Government than the wishes of the Aboriginal population. By adopting a passive position in relation to Part III of the Act, the Commonwealth strengthened the position of the Northern Territory Government and the apparent legitimacy of their opposition to the Act.

44 The then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, also questioned the extent of the Commonwealth's commitment to the legislation. He stated that "people who are making the choice should be aware of all the arguments for and against the various forms of incorporation and of all likely consequences" and indicated that without knowledge of options the legitimacy of choice is undermined. In support of the Commissioner's observations, the Fingleton Review found little evidence that the Commonwealth government has ever explained to the communities the type of incorporation options that they have.[79]

Funding Issues

45 Funding of Aboriginal Councils in order to ensure that they function efficiently and effectively is a key area of concern. An Aboriginal Council could be determined (with State approval) as an eligible local governing body for funding purposes.[80] One of Fingleton's key findings in relation to funding was that:

> funding arrangements are often not commensurate with the responsibilities of these organisations and frequently do not take sufficient account of the dependence of the local population on the services provided by these organisations in the absence of services provided by other levels of government.[81]

46 The Fingleton Review proposed that, before an Aboriginal Council is established, negotiations must occur between the Commonwealth government and other government agencies in the region (or the Commonwealth would need to assist the applicants to negotiate) in order to ensure that funding arrangements reflect the true responsibilities of each party.[82]

Insufficient Power

47 The Aboriginal and Torres Strait Islander Social Justice Commissioner, in its submission to the Fingleton Review, recommended that the Act be amended to provide flexibility in the by-law making power so that a Council could decide which people its by-laws should most appropriately apply to.[83] Part III of the ACA Act limits the application of by-laws to Indigenous people in a Council area. The Commissioner's submission further suggested that it is inappropriate that the Part III provisions make the by-law subject to State and Territory laws, that they do not provide scope to provide punishment and that they need to be approved by the Minister and tabled in both Houses of the Commonwealth Parliament.[84]

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[79] *Fingleton Review*, paragraph 7.589

[80] *Fingleton Review*, page 111

[81] *Fingleton Review*, Page 113

[82] *Fingleton Review*, page 119 paragraph 7.97

[83] *Fingleton Review*, page 112 paragraph 7.77

[84] *Fingleton Review*, paragraph, 7.78

The Central Land Council submitted that section 16(1)(a)(a) is "wholly inconsistent with the principle of self-determination for Aboriginal people".[85]

48 However, status as a local governing body, or as local government may not provide an Aboriginal Council with sufficient legal power given their prospective range of powers and responsibilities.[86] Whilst some activities could be the delegated legal responsibility of local government, others would need specific legal authority in order to ensure that a Council has a sufficient basis for their actions.[87]

State Alternatives

49 Ultimately, the the Fingleton Review concludes that for many Indigenous communities the provisions in the State legislation do not provide for effective, culturally appropriate regional or local governance.[88] It asserts that the Indigenous population has been forced into using inadequate antiquitated State and Territory frameworks because the States and Territories have ensured that Part III of the Commonwealth legislation could not be used.[89]

50 The present Review Team is not as certain of this argument as was Fingleton, and feels that State-based regimes require a second look.

51 Fingleton concluded that Part III should be repealed unless the Commonwealth government provided a commitment that it is prepared to[90]:

- support Indigenous communities using Part III to establish Councils;
- negotiate, or assist the negotiation of a clear division of responsibilities between the Aboriginal Councils, State and local government;
- introduce new specifically designed funding arrangements;
- negotiate appropriate funding arrangements with the States and existing local government where this is necessary.

E. PART III OF THE ACA ACT OVERTAKEN BY HISTORY

52 The preceding analysis of this Chapter shows that Part III of the ACA Act, in its present form, is inoperable for three main reasons:

- Although it began life as a measure for self-determination it is no longer appropriate since the intent inferred from the powers it suggests be conferred on a Council are quite limited, and involvement of the Registrar in establishing the Council would nowadays be considered excessive and paternalistic.
- Part III is politically impractical, since the powers of the Registrar and the Commonwealth Minister are the source of opposition by the States. Resistance to the implementation of Part III stems more from the involvement of a

[85] *Fingleton Review*, paragraph 7.78
[86] see *Fingleton Review*, pages 113 and 110
[87] *Fingleton Review*, paragraph 7.96
[88] *Fingleton Review*, Page 117
[89] *Fingleton Review*, Page 118
[90] *Fingleton Review*, paragraph 7.139

Commonwealth official in State affairs of local government, than in fear of Aboriginal community control of service delivery.

- The intention of Part III, so far as it is clear, has been overtaken by developments since the Act's inception in 1978.

53 These points will be elaborated. Marginally in it's favour, a Part III application could conceivably serve a useful purpose as the trigger for an Indigenous Land Use Agreement under the Native Title Act since it would impel discussion between Commonwealth and State Minister's and the applicant group. However, it is a crude trigger at best, and an Aboriginal Council is not, in the opinion of the Review Team, allowable under the PBC Regulations of the NTA to be appointed as a PBC,[91] and in many respects is incompatible with the implementation of native title rights.

54 From the start, the Part III provisions appear to be the result of muddled thinking about Aboriginal communities, or perhaps a change of course during development of the legislation. The second reading speech of Ian Viner seemed to indicate that a Council was intended to oversee the operation of services for a community that remained undefined and constituted along lines of customary cultural authority. Nevertheless, the provisions for the establishment of a Council require the Registrar to be extremely instrumental in establishing the rules and the electoral structure.

55 The ATSIC Native Title Branch submission to the Fingleton Review had this to say about Section III:

> 1.2 Sections 21 and 22 [of the ACAA] arrogate the rights of common law native title holders under Aboriginal custom to the Registrar. Elections are required where, in many cases, office is held by ascription under Aboriginal customary law. The number of Councillors and the electoral procedures are determined by the Registrar. Under s.22 the Registrar is able to rescind the rules of the Council passed at the first meeting and, if not satisfied that rules acceptable to him will be passed, declare the election of Councillors void....The potential for common law native title holders to have an Aboriginal Council area declared over their NT land with the Aboriginal Council as the Registered Native Title Body Corporate is initially appealing. However, scrutiny of the actual mechanism for doing this reveals its origins in a period when the meaning of Aboriginal self-determination was still to be grappled with. There is an overall encouragement of advice, guidance, intervention and ultimate control of the outcome of the application process that is incompatible with the free exercise of common law rights, respect for Aboriginal custom, and the enjoyment of the right to self-determination.

56 It is clear from Fingleton's analysis of correspondence about the implementation of Part III that the States felt the provisions not only interfered in their affairs by having the Councils answerable to the Registrar rather than the State regime, but were also contrary to principles of good governance. There is some justification for this. Part III gives the power to make rules in the Council area that affect only the Aboriginal residents. In the original formulation of the Act these could conflict with the powers and by-laws of present or future local government authorities in the same area. Even with the negotiated amendments that stipulated the Commonwealth Minister must consult with the relevant State or Territory Minister before declaring a Council area, there is still the power under

[91] The NT(PBC) Reg 4(1) requires an 'Aboriginal association'. Reg 3(1) says that 'Aboriginal association' has the same meaning it has under the ACA Act. In the ACA Act s 3 three terms are separately defined -- 'Aboriginal association'; 'Aboriginal Council' and 'Aboriginal corporation'. An 'Aboriginal corporation' is either an 'Aboriginal Council' (incorported under Part III - see definitions) or an 'Incorporated Aboriginal Association' (ie incorporated under Part IV - see defn in section 3)). Reference to 'Aboriginal association' in the NT Act PBC Regulations is to the latter.

the Act to do so following consultation. The States' fears seem to have been based on the understanding that the Aboriginal Council, established under Commonwealth legislation, which overrides State law wherever they are in conflict, would be exempt from local government and perhaps State authority in respect of its Aboriginal inhabitants. If this were the case it would leave non-Aboriginal residents of a Council area in an interesting legal limbo. It also brings into play a significant distinction between Councils and Corporations. The intention of Part IV is to bring rules into existence that govern the activities of individuals – the members. The intention of Part III is to bring rules into existence that govern behaviour within a territorially or geographically defined area.

57 These governance provisions are so limited as to be unacceptable to most Indigenous communities in any case.[92] Indigenous people require the ability to make by-laws that affect all residents of community land. It is an indication that the States were not, and are not, in fear of this in their opposition to Section III that, since 1978, many State based self-management regimes have been implemented that improve on this provision. These are among the changes that render Section III no longer appropriate. Such developments include:

- Several states have made provision for Aboriginal communities either to provide local government services or to exercise limited self-governance by the declaration of community-wide by-laws, or both. The Northern Territories' Local Government Act is leading example of this.

- Most large communities operate municipal services using other forms of incorporation. There are funding disparities with local government regimes, nevertheless, that require consideration.

- Indigenous people in many regions are taking controlling, or influential, positions on mainstream local government councils.

- The parallel establishment of ATSIC regional councils allows local Indigenous control over grant funding of a form that is not envisaged in Part III of the ACAA. Nevertheless, funding disparities with local government areas are a problem.

- There now exist networks of Aboriginal service organisations in the realms of health, education, media, welfare, legal services, accounting, and remote community support that give Indigenous control over more profound aspects of Indigenous life than conceived of under Part III.

- The recognition of the lawfulness of native title in the Mabo decision and subsequent Native Title Act 1993, makes any Part III declaration of a Council Area, which is controlled by residents rather than customary law land holders, problematic.

- Determinations of native title and the subsequent establishment of Registered Native Title Bodies Corporate establish 'Councils' and 'Council Areas' closer to the import of Viner's apparent intent in the second reading speech of the ACAA than does Part III itself. However, these are available only where native title survives.

[92] See the Aboriginal and Torres Straight Islander Social Justice Commissioner's submission to the Fingleton Review cited above.

- The underlying political implications of the recognition of the lawfulness of native title have changed the political landscape such that State-wide negotiated settlements and a national treaty are now more likely to deliver self-determination in one form or another than an incorporation statute.

58 Some of these points require elaboration in the context of the self-management, self-goverance, or self-determination policy intent underlying Part III of the Act, since removal of Part III of the ACAA could be seen as an attempt to deny an avenue for the legitimate pursuit of self-determination, as outlined above, considering present government ambivalence over future commitment to this policy.

59 It is not the intention of the current Review Team to suggest that the policy of self-determination, originally influential in the establishment of this Act, is no longer of any consequence. On the contrary, the position is that the present incorporation statute is inappropriate for Indigenous aspirations. This is true even of the one advantage that Part III could promise to confer, that is the same funding arrangements as a local government area. There has been for some time Indigenous dissatisfaction with disparities between the funding of local government through the Grants Commission and the funding of Aboriginal communities reliant on ATSIC. However, retention of Part III would not in itself resolve this problem, which could be pursued in other ways.

F. CONCLUSION

60 In light of the above, the Review Team has concluded that it is not viable to retain Part III of the ACA Act, and that Part III should be Repealed.