Aboriginal Councils and Associations Legislation Amendment Bill 1994
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Aboriginal Councils and Associations Legislation Amendment Bill 1994

Date Introduced: 30 June 1994
House: Senate
Portfolio: Aboriginal and Torres Strait Islander Affairs
Commencement: Royal Assent

Purpose

The major amendments proposed by this Bill are to the Aboriginal Councils and Associations Act 1976 (the AC&A Act). The amendments have two major effects.

(1) Replace the Office of Registrar of Aboriginal Corporations with a new statutory authority, the Australian Indigenous Corporations Commission.

(2) Strengthen the financial accountability provisions imposed by the AC&A Act on Aboriginal and Torres Strait Islander councils and incorporated associations.

Background

The AC&A Act provides for the establishment of two forms of entity - Aboriginal and Torres Strait Islander councils and incorporated associations.

Aboriginal and Torres Strait Islander councils are envisaged as geographically based elected bodies which may undertake a variety of services. These functions, which are set out in section 11 of the AC&A Act, include the provision of:

* housing;
* health;
* education or training;
* relief work for unemployed persons; and
* welfare.

For a council to be constituted, section 11 of the AC&A Act requires a minimum of ten adult Aboriginal or Torres Strait Islanders living in a particular area to apply.
to the Registrar of Aboriginal Corporations (the Registrar) for the establishment of a council. As at 30 June 1993, no councils had been constituted under the AC&A Act, although it is reported that applications have been lodged on behalf of two communities in the Northern Territory.¹

The AC&A Act provides for the incorporation of Aboriginal or Torres Strait Islander associations. While corporations may be formed for any purpose, incorporation will only be granted by the Registrar if he/she is satisfied of certain matters, including:

* the corporation will have at least twenty-five members, except where it is being formed principally to hold title to land or engage wholly in business, in which case at least five members are required; and
* that the corporation's rules by which its affairs are to be regulated are unreasonable or inequitable, or do not make sufficient provision to give members effective control over the running of the corporation.

A total of 298 associations were incorporated in 1992-93.² This figure represents an increase of 30% on the 230 corporations formed in 1991-92 and brings the total number of incorporations under the AC&A Act to 1,772.³

The Registrar is statutory office holder appointed by the Minister for Aboriginal and Torres Strait Islander Affairs. Part II of the AC&A Act (sections 4-9) confers a range of functions and powers on the Registrar, including:

* advising Aboriginals and Torres Strait Islanders on the procedures for the establishment of councils and associations;
* processing applications for incorporation;
* arbitrating in disputes within corporations; and
* monitoring corporation documents, initiating investigations into the operations and affairs of corporations, and petition for the winding up of corporations.

A number of amendments were made in 1992 to the AC&A Act by the Aboriginal Councils and Associations Amendment Act 1992. The amendments, for the most part, were designed to improve the level of accountability of corporations. The amendments largely originated from a review of the AC&A Act, undertaken in 1989-90, by an independent consultant. The review was primarily concerned with finding ways of ensuring appropriate standards of accountability for Governing Committee's of corporations to their members, and to those with whom a corporation has financial dealings.⁴ The review found evidence that some corporations had failed to comply with the requirements of the AC&A Act. The review canvassed a number of options for amending the AC&A Act, including:

* clarifying the requirements concerning the preparation and lodgment of financial statements;
* providing time limits within which statutory obligations should be met;
* increasing the penalties for breach of the statutory obligations of members of governing committees and public officers;
* expanding the Registrar's functions and powers, including power to direct an association to modify its rules in certain circumstances; and
* providing the Administrative Appeals Tribunal with jurisdiction to hear appeals from the Registrar's decisions.⁵
The more significant amendments to the AC&C Act made by the *Aboriginal Councils and Associations Amendment Act 1992*: 

* tightened eligibility requirements for membership of governing committees of corporations - corporations are required to exclude bankrupts and, in certain circumstances, persons sentenced to a term of imprisonment from membership of governing committees;  
* required that members of governing committees of a corporation who have a direct or indirect pecuniary interest in a matter being considered, or about to be considered by the committee, disclose the nature of that interest at a meeting of the committee;  
* provided the Registrar with the power to arbitrate in disputes between members of a corporation;  
* provided the Registrar with the power to apply to the courts for an injunction requiring members of a governing committee of a corporation not to contravene the AC&A Act, the Regulations, or the corporation's rules;  
* enhanced the financial reporting requirements of corporations by requiring a corporation to prepare each financial year a report consisting of:
  - a statement that the corporation has complied with the obligations imposed by the AC&A Act, the regulations, and the corporation's rules;  
  - a balance sheet;  
  - an income and expenditure statement; and  
  - a list of members of the governing committee of the corporation; and  
* gave the Registrar power to inspect the accounts and records of corporations. 

In June 1993, the Government endorsed a further set of amendments to the AC&A Act. The proposals are said to originate from three sources: the 1989-90 review of the AC&A Act, the findings of recent internal audit reports, and the experience of the Registrar in administering the AC&A Act. The major proposals, which are reflected in the amendments proposed by the Bill, include: 

* the establishment of a new statutory authority, to be known as the Australian Indigenous Corporations Commission, to administer the AC&A Act;  
* the addition of two new functions: 
  - the promotion of understanding, acceptance of, and compliance with, the AC&A Act; and  
  - power to take action following breaches of the AC&A Act and the prosecution of instances of fraud and dishonesty; and  
* a provision allowing the Australian Indigenous Corporations Commission to institute proceedings against members of a corporation in relation to misappropriation of assets or funds of the corporation. 

The most significant change proposed by the Bill is the replacement of the present Office of the Registrar with the Australian Indigenous Corporations Commission. The rationale for the replacement given in the Second Reading Speech is to: 

"remove the confusion that has existed as to the roles of the Registrar of Aboriginal Corporations and ATSIC. It will also remove any potential for conflicts of interest that could have arisen while the Registrar was an ATSIC officer."
The rationale given by the Registrar for the replacement is that:

"[A]lthough the position of Registrar is a Ministerial appointment there has always been some confusion about its independence. This stems from the fact that the Registrar and his staff are employees of the major funding agency, ATSIC. Apart from the potential conflict of responsibilities, the administration of the Act from within the ATSIC structure has been a source of confusion to both clients and staff, and has contributed to a lack of understanding about the role of the Registrar." 8

Outline

The Bill can be broken down into three parts.

(1) Provisions dealing with the proposed new statutory authority, the Australian Indigenous Corporations Commission. For the most part these provisions are contained in clause 6 of the Bill.

(2) Provisions which strengthen the financial accountability provisions imposed by the AC&A Act on Aboriginal and Torres Strait Islander councils. For the most part these provisions are contained in clauses 7-12 of the Bill.

(3) Provisions which strengthen the financial accountability provisions imposed by the AC&A Act on Aboriginal and Torres Strait Islander incorporated associations. For the most part these provisions are contained in clauses 13-32.

Main Provisions

Australian Indigenous Corporations Commission

Part II of the AC&A Act is repealed by clause 6 and a new Part II (proposed sections 4-9R) inserted. Proposed Part II contains provisions dealing with the Australian Indigenous Corporations Commission (the Commission). Proposed section 4 establishes the Commission as a statutory corporation. Proposed sections 5 and 6 confer a range of functions on the Commission, including:

- to administer the AC&A Act, as amended; and

- to prosecute:
  * contraventions of the AC&A Act;
  * contraventions of other laws relating to fraud or dishonesty by corporations or their members; and
  * contraventions of other laws relating to fraud or dishonesty by councils.

Proposed section 7 provides for the Commission to consist of a Commissioner. The Commissioner is to be appointed by the Governor-General, for a term up to five years, hold office on a full-time basis, and on such terms and conditions as provided for under the AC&A Act or as determined by the Minister.
The Commissioner is given responsibility for managing the day-to-day administration of the Commission by proposed section 8.

Proposed section 9E provides that the Commissioner must notify the Minister if he/she acquires any interest in any corporation, or any matter being dealt with by the Commission. The Commissioner is prohibited from taking part in any matter being dealt with by the Commission in which he/she has or acquires an interest, unless otherwise directed by the Minister.

Proposed section 9L makes it an offence, punishable by a maximum term of imprisonment of 12 months, if Commission staff, consultants etc., who have or acquire an interest that could involve a conflict of interest with their duties, do not notify the Commission of that interest.

Commission moneys may only be applied:

- in the payment of obligations incurred by the Commission in the performance and exercise of its functions and powers;
- in the payment of any remuneration, allowances or benefits payable under the AC&C Act; and
- in relation to the Commissioner's superannuation (proposed section 9O).

Proposed section 9P requires the Commission to prepare estimates of its receipts and expenditure each financial year, and any other period specified by the Minister. The estimates are to be in such form as directed by the Minister and be given to him/her within such time as directed. The Commission's money is to be spent only in accordance with estimates approved by the Minister.

The Commission will be subject to the Audit Act 1901 (proposed section 9Q), and the Commission's annual report and financial statements must describe:

- the specific goals the Commission pursued, and priorities it followed, in performing its functions during the year; and
- any matter adversely affecting the Commission's effectiveness during the year (proposed section 9R).

Council accounts, records and financial statements

Clause 9 amends section 38 of the AC&A Act which deals with the keeping of financial records and financial reporting. Overall, the amendments set higher reporting requirements for councils. Subclause 9(1)(a) requires a council each financial year to provide the Commission with financial statements, in a form approved by the Commission, consisting of:

* a balance sheet;
* an income and expenditure statement; and
* notes, forming an integral part of the financial statements.

The effect of proposed subsection 38(2A), which will be inserted in the AC&A Act by subclause 9(1)(b), will be to make council financial statements subject to Corporations Law accounting standards.
**Aboriginal Councils and Associations Legislation Amendment Bill 1994**

**Subclause 9(1)(d)** inserts a new subsection 38(3A) requiring auditor's reports [subsection 38(3) requires council financial statements to be audited] to state certain matters, including:

* whether in the auditor's opinion a council has complied with the obligations imposed by this proposed Act, the regulations and rules of the council;
* whether in the auditor's opinion a council's financial statements are based on proper accounts and records and are in agreement with those accounts and records; and
* whether in the auditor's opinion a council's financial statements give a true and fair view of the financial transactions and the state of affairs of the council.

**Subclause 9(1)(d)** also inserts a new subsection 38(3B) in the AC&A Act which requires an auditor, where he/she is of the opinion an irregularity has been disclosed by the audit, to give the Commission a copy of his/her report at the same time as it is given to the Council.

**Examination of council documents**

**Subclause 10(a)** amends subclause 39(1) by substituting the Commission for the Registrar, and widening the scope of the Commission's power to examine a council's documents by allowing the examination of "all documents relating to the affairs of an Aboriginal Council" rather than merely "the documents of an Aboriginal Council."

**Subclause 10(b)** inserts new subsections 39(4A) and 39(4B) allowing an authorised person to examine on oath, or affirmation, a person required to answer questions or produce documents. Such an oath or affirmation is one that the statements the person will make will be true.

**Offence for obstructing or hindering an examination**

**Clause 11** makes it an offence, punishable by a maximum penalty of 15 penalty units (currently $1 500), for a person without reasonable excuse to obstruct or hinder a section 39 examination. Section 39 deals with the examination of council documents.

**Offence for fraudulently appropriating etc., council money and property**

**Clause 12** makes it an offence, punishable by a maximum penalty of 7 years imprisonment, for a councillor or public officer of a council to steal, fraudulently misappropriate, or fraudulently convert any council money or property.

**Application for incorporation**

Section 43 of the AC&A Act sets out the requirements for applying for incorporation. New subsections 43(1) and 43(2) will be inserted in the AC&A Act by **clause 13**. The major differences between current and proposed subsections are that the proposed subsection provides that an association rather than its committee may apply for incorporation of the association, and a requirement that the application include the name and address of the persons who are to be the members of the Governing Committee of the proposed corporation. The new subsection sets out the number of association members who must sign the application for incorporation.
Aboriginal Councils and Associations Legislation Amendment Bill 1994

Disqualification from membership of Governing Committee

Clause 19 inserts new sections 49BA and 49BB into the AC&A Act which disqualify from membership of the Governing Committee of a corporation persons who have previously been a member of the Governing Committee of a corporation which was wound up, or had an administrator appointed. Disqualification will apply for a period of five years. Undischarged bankrupts and insolvents are also disqualified. However, the Commission may declare, on application, that a person is not disqualified. Where the Commission refuses to declare a person not disqualified, the person may appeal to the Minister who must consider the appeal, make a determination, and let the person know his/her decision.

Disqualified persons not to exercise powers etc., of member of Governing Committee

A new section 49E will be substituted into the AC&A Act by clause 20 prohibiting a person disqualified from membership of a Governing Committee of a corporation from exercising any power, or performing any function or duty, of a member of the Committee, or from being in any way concerned with or take part in the conduct of the corporation's affairs.

Power to grant mortgage

Clause 21 inserts new subsection 51(2) which provides that a corporation can only grant a mortgage if this is agreed upon in a special resolution of which 21 days notice has been given, and which is passed by at least three-quarters of the members at the meeting.

Filing an approval of alteration of rules

Subsection 54(2) of the AC&A Act provides that the Registrar shall allow an alteration of a corporations rules if satisfied the alteration would not be inconsistent with the AC&C Act, or, if not satisfied, refuse the alteration. Clause 23 substitutes a new 54(2) into the Principal Act providing that the Commission must approve the alteration of a corporation's rules where satisfied that the proposed alteration is reasonable, equitable, gives members effective control over the running of the corporation and is consistent with the AC&C Act. The Commission must refuse an alteration where it is not satisfied of any of the above matters.

Appointment of public officer etc

The principal amendments proposed by clause 24 prevent:

* a bankrupt or insolvent person being appointed, or holding office, as a public officer of a corporation; and
* a disqualified person from exercising any power, or performing any function or duty, of a public officer.
Register of members of Governing Committee

A new section 58AA will be inserted in the AC&A Act by clause 27. Its principal effect will be to require the public officer of a corporation to keep a register of:

* the name and address of every member of the Governing Committee of the corporation; and
* the day on which each person became, and ceased, to be a member of the corporation.

The public officer is required to ensure the register is open to the public. Each year, between 30 June and 31 December, or when required to by the Commission, each Governing Committee must give the Commission a list of the names and addresses of all members of the Committee. Failure to do so will constitute an offence. The penalty is a fine of two penalty unit (currently $200) for every member of the Committee. It will be a defence in a prosecution for failing to provide a list to the Commission, if the defendant can prove they did not aid, abet, counsel or procure the contravention, and were not in any way directly or indirectly knowingly concerned or a party to the contravention.

Public officer to act honestly and diligently

Clause 27 also inserts a new section 58AB in the AC&A Act which requires a public officer of a corporation to act honestly and diligently in exercising and performing his/her powers, functions and duties under the AC&A Act, the regulations and the corporation's rules.

General meetings

Clause 29 amends section 58B to require the annual general meeting of a corporation to be held between 1 July and 30 November each year, and require the Governing Committee to file a written record of the meeting with the Commission within 30 days of it being held.

Corporation accounts, records and financial statements

Clause 30 amends section 59 of the AC&A Act which deals with the keeping of financial records and financial reports by corporations. Overall, the amendments set higher reporting requirements for corporations. Subclause 30(1)(b) requires the Governing Committee of a corporation, each financial year, to provide the Commission with financial statements, in a form approved by the Commission, consisting of:

* a balance sheet;
* an income and expenditure statement; and
* notes, forming an integral part of the financial statements.

The effect of new subsection 59(2A), which will be inserted into the AC&A Act by subclause 30(1)(b), will be to make a corporation's financial statements subject to Corporations Law accounting standards.
Subclause 30(1)(g) inserts a new subsection 59(3A) which requires the auditor's reports to state certain matters, including:

* whether in the auditor's opinion a corporation has complied with the obligations imposed by the AC&C Act, the regulations and rules of the corporation;
* whether in the auditor's opinion a corporation's financial statements are based on proper accounts and records and are in agreement with those accounts and records; and
* whether in the auditor's opinion a corporation's financial statements give a true and fair view of the financial transactions and the state of affairs of the corporation.

Subclause 30(1)(g) also inserts a new subsection 59(3B) in the AC&A Act which requires an auditor, where he/she believes an irregularity has been disclosed by an audit, to give the Commission a copy of his/her report.

**Exemption from financial reporting requirements**

Section 59A of the AC&A Act allows the Registrar to exempt a corporation from the financial reporting requirements of section 59. Subsection 59A(1) allows such an exemption where the Registrar is satisfied it would be impractical for a corporation to comply with the reporting requirements, or the reporting requirements would be unduly onerous. The effect of clause 31 is to limit any exemption by requiring that the corporation still keep proper accounts and records as required by subsection 59(1), and by allowing the Commission the discretion to require the corporation to file reports and statements with the Commission in such form as the Commission thinks appropriate in view of the exemption. It will be an offence to fail to comply with these reporting requirements, punishable by a maximum fine of two penalty units (currently $200).

**Examination of corporation documents**

Subclause 32 amends section 60 by substituting the Commission for the Registrar and widening the scope of the power to examine a corporation's documents by allowing the examination of all documents relating to the affairs of a corporation rather than the documents of the corporation.

Subclause 32(c) inserts new subsections 60(4A) and 60(4B) allowing an authorised person to examine on oath or affirmation a person required to answer questions or produce documents. Such an oath or affirmation is one that the statements the person will make are true.

**Offence for obstructing or hindering an examination**

Clause 33 makes it an offence, punishable by a maximum penalty of 15 penalty units (currently $1,500), for a person without reasonable excuse to obstruct or hinder a section 60 examination. Section 60 deals with the examination of a corporation's documents.
**Winding up of a corporation by a court**

Clause 34 repeals sections 62A and 63 of the AC&A Act and inserts new section 63 and 63A. Basically, sections 62A and 63 provide the circumstances under which a corporation may be wound up. The principal effects of the proposed sections will be to extend the circumstances under which a court may wind up a corporation. The new circumstances include:

* the affairs of a corporation are being conducted in a way oppressive, unfairly prejudicial to, or unfairly discriminatory against, a corporation member, or would be contrary to the interests of the members of a corporation as a whole;
* the Governing Committee of a corporation has failed to comply with a Commission directive under section 60A (section 60A allows the Commission to give directives to a corporation where the Commission suspects the corporation has not complied with the provisions of the AC&A Act, the regulations, the corporation's rules, or there has been an irregularity in the financial affairs of the corporation); and
* the court is of the opinion that it is in the public interest, or the interest of members or creditors of a corporation, or otherwise just and equitable.

**Offence for fraudulently appropriating etc., corporation money and property**

Clause 37 makes it an offence, punishable by a maximum penalty of 7 years imprisonment, for a member or the public officer of a corporation to steal, fraudulently misappropriate, or fraudulently convert any corporation money or property.

**Investigation by Commission of corporation's affairs**

Section 68 of the AC&A Act gives the Registrar power to investigate the affairs of a corporation where he/she suspects on reasonable grounds that it has not complied with the AC&A Act, regulations or the corporation's rules, or there has been an irregularity in the corporations financial affairs. Clause 38 inserts subsections 68(2A) and (2B) which allow the Commission to examine persons on oath or affirmation.

**Offence for obstructing or hindering an investigation**

The effect of clause 39 is to make it an offence, punishable by 15 penalty units (currently $1 500), for a person without reasonable excuse to obstruct or hinder a Commission investigation.

**Monitoring compliance of AC&C Act**

Proposed sections 70-70I, which will be inserted in the AC&A Act by clause 40, are standard administrative provisions which will allow the Commission to monitor and enforce compliance with the AC&A Act. The proposed sections, which deal with such matters as the entry of premises by Commission authorised persons, identity cards, warrants by telephone or other electronic means and compensation for damage to equipment as a result of use during a search, have their corollary in other Commonwealth Acts, such as the *Agricultural and Veterinary Chemicals Code Act 1994* and *Primary Industries Levies and Charges Collection Act 1991*. 

-10-
Appointment of administrator

Section 71 of the AC&A Act allows the Registrar, where he/she considers there may be grounds for appointing an administrator to administer a corporation, to serve notice on the public officer of a corporation calling on the corporation to show why an administrator should not be appointed. After having considered any representations made by a corporation, the Registrar may appoint an administrator where satisfied of certain matters, including that the corporation has been trading at a loss for at least six months during the preceding twelve months, or the Governing Committee has failed to comply with the AC&A Act, regulations, its rules and failed to provide a satisfactory explanation.

Section 71 will be repealed and a new section 71 substituted by clause 41. The major differences between the former and proposed section 71 include:

* removal of the requirement to serve notice on a corporation calling for it to show why an administrator should not be appointed; and

inclusion of additional grounds for the appointment of an administrator, including:

* where the affairs of the corporation are being conducted in a way that is oppressive, unfairly prejudicial to, or unfairly discriminatory against a member of the corporation, or is contrary to interests of the members of the corporation as a whole; and

* where disputes between members of the corporation, members of the corporation and the Governing Committee, or members of the Governing Committee are interfering with the proper conduct of the affairs of the corporation or the corporation meeting its objects.

Annual report

A new section 78 will be inserted in the AC&A Act by clause 43 which requires the Commission to provide the Minister annually with a report of its operations and financial statements. The financial statements are to be audited by the Auditor-General. Copies of the annual report, financial statements and the Auditor-General’s report are to be laid before Parliament.

Self-incrimination

A new section 79AA will be inserted in the AC&A Act by clause 44 providing that a person cannot refuse to produce a document or answer a question under section 39, 60 or 68 (the effect of these sections is outlined in the "Main Provisions" section of this Digest) because to do so might tend to incriminate them or make them liable to a penalty. However, an answer to a question or the content of a document will not be admissible in evidence in any criminal proceeding, or proceeding for the imposition of a penalty (other than proceedings for an offence under subsection 39(6), 60(6) and 69(6), where prior to the answering of a question or production of a document the person claims the answering or production might in fact, or tend, to incriminate them or make them liable to a penalty.

It is said in the Explanatory Memorandum that the above amendment “is designed to overcome restrictions on the effectiveness of the power to question and require...
production of documents. It brings the Act into line with the provisions of other Commonwealth Acts, such as section 68 of the Australian Securities Commission Act 1989."

Indemnity

Section 77B of the AC&C Act provides the Administrator with immunity from suit for anything he/she has done or failed to do in the course of exercising powers and functions under the AC&C Act.

A new section 79B will be inserted in the AC&C Act by clause 44 providing the Administrator, the Commission, the Commissioner, a delegate of the Commission or of the Commissioner, public service staff of the Commission, non-public service staff of the Commission, Commission consultants and authorised persons for the purposes of sections 39, 60 or 70 with immunity from suit for anything they have done or failed to do in the course of exercising their powers and functions under the AC&A Act.

Court may make order for compensation

A new section 79G will be inserted in the AC&C Act by clause 44 allowing a court to order a person to pay compensation to a council or corporation for any loss or damage suffered because of the commission of an offence under the AC&A Act.

Remarks

Like other Australians, Aboriginal and Torres Strait Islanders can form corporations of the kind regulated under the Corporations Law. Like other Australians, Aboriginal and Torres Strait Islanders can also form partnerships, trusts, and incorporate as an association under State law. It is an indisputable fact that Aboriginal and Torres Strait Islander corporations regulated under the Corporations Law are treated in the same way as any other companies. Evidence of this fact is the Australian Securities Commission's recent action against an Aboriginal Housing Company.9

As outlined in the "Background" section of this Digest, the AC&A Act provides a comprehensive corporate accountability regime. The accountability regime imposed by the AC&A Act is in large part an adaptation of the provisions of the Corporations Law. For example, the winding up process and striking off procedures are direct adoptions from the provisions of the Corporations Law. The reasons for a special law for the incorporation of Aboriginal and Torres Strait Islander association have their origins in the policies of the Liberal-National Party Coalition Government of 1976 and include a desire to provide Aboriginal and Torres Strait Islanders with a means to incorporate their associations which is relatively simple and flexible, meets a wide variety of community needs, and allows for rules based on Aboriginal and Torres Strait Islander customs.
Aboriginal Councils and Associations Legislation Amendment Bill 1994

Endnotes

3. Ibid.
5. Ibid., pp. 106 and 107.
7. Ibid., pp. 23 and 24.
8. Ibid., p. 24.

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