

## THE EVOLUTION OF INDIGENOUS CORPORATIONS: WHERE TO NOW?

### ABSTRACT

Since 1976, Indigenous Australians have been able to provide for the constitution of Aboriginal councils and the incorporation of associations of Aboriginals under the *Aboriginal Councils and Associations Act 1976* (Cth). The introduction of these business structures sought to provide Indigenous Australians with the power to adopt and pursue culturally appropriate businesses structures and practices. While the legislation marked a step forward in the empowerment of Indigenous Australians, the criticism of the Act led to its eventual repeal and the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). In light of Australia's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, this article considers the evolution of Indigenous corporations in Australia and assesses the extent to which Indigenous business structures have enabled Indigenous Australians to operate their businesses in a manner commensurate with their culture and traditions.

### I INTRODUCTION

After decades of negotiations, on 13 September 2007 the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* ('UN Declaration') by an overwhelming majority.<sup>1</sup> Even though the UN Declaration is non-binding and aspirational, it presents, for the first

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<sup>1</sup> *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup>, plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). The UN Declaration was adopted by a majority of 144 votes in favour of the declaration, 4 against it and 11 abstentions: United Nations, 'General Assembly Adopts Declaration on the Rights of Indigenous Peoples: Major Step Forward Towards Human Rights For All, Says President' (Press Release, 13 September 2007) <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>>. The States who voted against the UN Declaration were the United States, Canada, Australia and New Zealand. However, each of these nations has subsequently reversed its position: United Nations Permanent Forum on Indigenous Issues, 'Declaration on the Rights of Indigenous Peoples' <<http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>>.

time, a comprehensive list of rights of Indigenous peoples.<sup>2</sup> These rights cover a range of matters such as the vocational and educational needs,<sup>3</sup> spiritual<sup>4</sup> and social<sup>5</sup> concerns, and economic<sup>6</sup> and land<sup>7</sup> rights of Indigenous peoples. The *UN Declaration* also acknowledges the right to self-determination of Indigenous peoples.<sup>8</sup> This right is the pillar on which all other rights in the *UN Declaration* rest as it allows Indigenous people to take control of their future.<sup>9</sup> However, in order to placate States' concerns about issues of 'sovereignty and territorial integrity',<sup>10</sup> it is important to note that the right of Indigenous peoples to self-determination in the *UN Declaration* was limited to aspects of self-determination internal to a state.<sup>11</sup>

Australia initially voted against the adoption of the *UN Declaration*, but on 3 April 2009 the Australian Federal Government endorsed the *UN Declaration*.<sup>12</sup> Jenny Macklin, Minister of Families, Housing, Community Services and Indigenous Affairs, asserted that this endorsement was a step towards closing the gap between Indigenous and non-Indigenous Australians as it acknowledges the need to nurture a new relationship with Indigenous Australians based on trust and respect.<sup>13</sup> Since the European colonisation of Terra Australis, Indigenous Australians have been subject to various degrees of political, economic and legislative disenfranchisement. For example, in 2009 the rate of unemployment for Indigenous Australians was three times higher than the rate of unemployment for all

<sup>2</sup> Viniyanka Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations' (2008–09) 9 *Chicago Journal of International Law* 297, 297.

<sup>3</sup> See, eg, *UN Declaration*, UN Doc A/RES/ 61/295, art 14.

<sup>4</sup> *Ibid* art 12.

<sup>5</sup> *Ibid* art 9.

<sup>6</sup> *Ibid* art 20.

<sup>7</sup> *Ibid* art 10.

<sup>8</sup> *Ibid* art 3.

<sup>9</sup> Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9 *Melbourne Journal of International Law* 439, 458; Michael Dodson, 'Voices of the Peoples — Voices of the Earth: Indigenous Peoples — Subjugation or Self-Determination' in Robert Gottlieb (ed) *Liberating Faith: Religious Voices for Justice, Peace, and Ecological Wisdom* (Rowman & Littlefield, 2003) 296, 299.

<sup>10</sup> Davis, above n 9, 460.

<sup>11</sup> See, eg, *UN Declaration*, UN Doc A/RES/61/295, art 14.

<sup>12</sup> Australian Government, *International Indigenous Issues — Declaration on the Rights of Indigenous Peoples* (27 October 2010) <<http://www.fahcsia.gov.au/sa/Indigenous/progserv/engagement/Pages/InternationalIssues.aspx>>; Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (2 April 2009) <[http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un\\_declaration\\_03apr09.aspx](http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx)>.

<sup>13</sup> Jenny Macklin, *Closing the Gap Between Indigenous and Non-Indigenous Australians* (12 May 2009) <[http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09\\_10/Indigenous/Documents/ClosingTheGap/closingthegap.pdf](http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/Indigenous/Documents/ClosingTheGap/closingthegap.pdf)>.

Australians<sup>14</sup> and, in 2006, the median individual income of Indigenous Australians was 59 per cent of the median individual income of non-Indigenous Australians.<sup>15</sup>

One way to improve the position of Indigenous Australians is to allow them to take control of their economic futures.<sup>16</sup> In 1991 the Royal Commission into Aboriginal Deaths in Custody recommended that Indigenous organisations should be the vehicle of policies aimed toward benefiting Indigenous Australians.<sup>17</sup> The endorsement of this recommendation may assist to fulfil one of the aspirational rights — the economic right — of Indigenous peoples as recognised by the *UN Declaration*. Allowing Indigenous Australians to take control of their economic futures could be achieved by providing Indigenous people with the opportunity to run, in their communities, their own businesses based on their culture and traditions. Steps in this direction have already been taken as Indigenous Australians are able to manage their own businesses either in the form of mainstream corporations<sup>18</sup> or in the form of Indigenous corporations.<sup>19</sup> Indigenous corporations, in particular, have played an integral role in Indigenous social, political and economic action in a number of instances.<sup>20</sup> Ultimately, encouraging

<sup>14</sup> Creative Spirits, '*Aboriginal Economy*' <<http://www.creativespirits.info/aboriginalculture/economy/>>.

<sup>15</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, (28 July 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8E4A1018AFC6332DCA2578DB00283CCE?opendocument>>. For more complete data regarding the ratio of Indigenous to non-Indigenous socioeconomic outcomes from 1971–2006, see John Altman, Nicholas Biddle and Boyd Hunter, 'Prospects for "Closing the Gap" in Socioeconomic Outcomes for Indigenous Australians?' (2009) 49 *Australian Economic History Review* 225.

<sup>16</sup> Janet Hunt, 'Looking After Country in New South Wales: Two Case Studies of Socioeconomic Benefits for Aboriginal People' (Working Paper No 75/2010, Centre for Aboriginal Economic Policy Research, 2010) 1.

<sup>17</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 26 [27.4.31].

<sup>18</sup> The term 'mainstream corporations' refers to corporations registered under the *Corporations Act 2001* (Cth) or the Associations Incorporation Acts in each of the states and territories.

<sup>19</sup> These Indigenous corporations were initially registered under the *Aboriginal Councils and Associations Act 1976* (Cth) ('*ACA Act*'); this legislation has now been replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('*CATSI Act*').

<sup>20</sup> Corrs Chambers Westgarth Lawyers, 'Review of the *Aboriginal Councils and Associations Act 1976*: Policy Options' (Discussion Paper, October 2001) 63. For instance, Maari Ma Health Aboriginal Corporation provides primary health care services in the far west of New South Wales. One of its objectives is 'to improve the physical and mental health and well being of Aboriginals at the individual, family and community level'. In seeking to achieve this objective Maari Ma Health Aboriginal Corporation works closely with a number of government and non-government agencies to close the gap between Indigenous and non-Indigenous children in its region: Maari Ma Health Aboriginal Corporation, *Maari Ma Welcomes Document Launch by Federal Minister* (September 2009) <<http://www.maarima.com.au/>>; Office of the Registrar of Indigenous Corporations, *Maari Ma*

the development of viable Indigenous corporations in Indigenous communities may lead to greater employment opportunities for Indigenous Australians.<sup>21</sup>

In light of Australia's endorsement of the *UN Declaration*, this article considers the evolution of Indigenous corporations in Australia and assesses whether this business structure enables Indigenous Australians to run their businesses in a manner commensurate with their culture and traditions. Part II of this paper discusses the reasons behind the introduction of Indigenous corporations in Australia. Parts III and IV trace the evolution of the *ACA Act* from its beginnings as legislation empowering Indigenous Australians to its end as a rigid and unbending piece of legislation. Part V of this paper discusses the introduction of the *CATSI Act* to replace the *ACA Act* in 2007. Lastly, Part VI assesses the extent to which this latest legislation allows Indigenous Australians to engage freely in 'all their traditional and other economic activities' for the benefit of their communities.<sup>22</sup>

## II MOTIVATIONS BEHIND THE ADOPTION OF INDIGENOUS CORPORATIONS BY THE *ACA ACT*

Well before the adoption of the *UN Declaration* by the United Nations General Assembly in 2007 the need to permit Indigenous Australians to run businesses based on their own traditions and culture had been recognised in Australia. For example, in 1973 Justice Woodward stated:

Since unincorporated associations, co-operatives and trustee arrangements all have clear defects in the Aboriginal situation, there is an obvious need for provisions for incorporation. Further, laws relating to incorporation under the Companies Acts are inappropriate for most Aboriginal purposes.<sup>23</sup>

### A *The Origin of the ACA Act*

Discussion regarding the creation of Indigenous corporations in Australia is historically linked to the discussion of traditional land rights. The origin of the first Indigenous corporations legislation, the *ACA Act*, can be traced to the 1971 release of the *Report of the Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory*.<sup>24</sup> This report was silent on the

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*Health Aboriginal Corporation: Consolidated Rule Book* (3 May 2010) [3.1] <<http://www.oric.gov.au/document.aspx?concernID=102570>>.

<sup>21</sup> Boyd Hunter, 'Revisiting the Relationship Between the Macroeconomy and Indigenous Labour Forces Status' (2010) 29 *Economic Papers* 320, 331.

<sup>22</sup> *UN Declaration*, UN Doc A/RES/61/295, art 20.

<sup>23</sup> Aboriginal Land Rights Commission, *First Report July 1973* (1973) [166] ('*First Report*').

<sup>24</sup> Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory, *The Report of the Committee to Review the Situation of Aborigines in Pastoral Properties in the Northern Territory* (Government Press, 1971) 75.

abuses surrounding the reservation system,<sup>25</sup> but it recommended the adoption of legislation designed to allow for the incorporation of an Indigenous business structure.<sup>26</sup> Following this report, Prime Minister William McMahon, while rejecting traditional ownership of land rights,<sup>27</sup> declared that his government would propose to ‘investigate ways of providing a simple, flexible form of incorporation for Aboriginal communities’.<sup>28</sup>

In protest against the Prime Minister’s denial of Indigenous land rights, an Indigenous delegation travelled to Canberra and set up the Aboriginal Tent Embassy on the parliamentary lawn.<sup>29</sup> Unlike the Prime Minister, the leader of the opposition, Mr Gough Whitlam, visited the Embassy and pledged that, if elected, the Labor Government would support ‘community ownership of land in the Northern Territory by identifiable communities or tribes by way of freehold title’.<sup>30</sup>

When the Whitlam Labor Government was subsequently elected in December 1972, it suspended the granting of leases and mineral licences on Indigenous reserves in the Northern Territory.<sup>31</sup> Further, Prime Minister Gough Whitlam announced his government’s intention to establish a judicial inquiry into Aboriginal land rights.<sup>32</sup> Accordingly, on 8 February 1973, Governor-General Paul Hasluck commissioned Justice Edward Woodward to report upon ‘the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land’.<sup>33</sup> This report was fundamental to the adoption of Indigenous corporations legislation.

### B *The Woodward Reports*

In the first report of the Aboriginal Land Rights Commission published in July 1973, Justice Woodward highlighted the need for the introduction of a special

<sup>25</sup> Coral Dow and John Gardiner-Garden, *Background Note: Overview of Indigenous Affairs: Part 1: 1901 to 1991* (10 May 2011) Parliament of Australia, 12 <<http://www.aph.gov.au/library/pubs/bn/sp/IndigenousAffairs1.htm>>.

<sup>26</sup> Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory, above n 24, 75.

<sup>27</sup> William McMahon, *Australian Aborigines: Commonwealth Policy and Achievements* (26 January 1972) National Museum of Australia, 6, 9 <<http://Indigenoustrights.net.au/files/f61.pdf>>; Philip Chartrand, ‘The Status of Aboriginal Land Rights in Australia’ (1981) 19 *Alberta Law Review* 436, 439.

<sup>28</sup> McMahon, above n 27, 9.

<sup>29</sup> Scott Robinson, ‘The Aboriginal Embassy: An Account of the Protests of 1972’ (1994) 18 *Aboriginal History* 49.

<sup>30</sup> Peter Rhodes, ‘The Report of the Australian Aboriginal Land Rights Commission’ (1974–75) 39 *Saskatchewan Law Review* 199, 205.

<sup>31</sup> *Ibid.*

<sup>32</sup> Robert Trumbull, ‘Australia Acts on Tribal Lands: Names Judge to Clear Way for Ownership Transfer’, *New York Times* (New York City), 17 December 1972, 5; Robert Trumbull, ‘Australia Acts to Save Aboriginal Culture’, *New York Times* (New York City), 15 December 1972, 5.

<sup>33</sup> *First Report*, above n 23, iii.

system of incorporation for Indigenous groups,<sup>34</sup> and recommended that a new system of incorporation for Aboriginal communities and groups be implemented immediately.<sup>35</sup> This recommendation was confirmed by the second report published by the Aboriginal Land Rights Commission in April 1974, where Justice Woodward stated that ‘no existing legal provisions [relating to business structures] are really satisfactory for Aboriginal purposes’.<sup>36</sup> Significantly, Justice Woodward recommended that any legislation relating to Aboriginal corporations should be simple, flexible, and make provision for Indigenous methods of decision-making.<sup>37</sup> Such legislation should also contain contingency planning in the event of corruption, inefficiency, or outside influences, and should be framed to avoid the taxation of any income allocated to community purposes.<sup>38</sup>

### C *The Move towards the ACA Act*

As a result of the recommendations of Justice Woodward’s 1974 report, the Aboriginal Councils and Associations Bill 1975 (Cth) was introduced in the Federal Parliament by the Honourable Les Johnson, then Minister for Aboriginal Affairs, on 30 September 1975.<sup>39</sup> However, the Bill lapsed as a result of the double dissolution of the Parliament in November 1975. The Bill was then tabled in front of the newly elected Parliament.<sup>40</sup> In his second reading speech on the Aboriginal Councils and Associations Bill 1976 (Cth), the Honourable Ian Viner, then Minister for Aboriginal Affairs, stressed that the proposed legislation would allow for Indigenous Australians to establish a recognised body corporate without the complexities of other legislation available. For example, he stated that:

One can well imagine the bewilderment of Aboriginal elders in remote tradition-oriented communities, who simply want to get on with their own projects, when faced by the immense amount of documentation necessary to enable them to act as a legally recognised corporate body.<sup>41</sup>

To deal with this problem he noted that the proposed new legislation would take Indigenous values and practices into account<sup>42</sup> and would make it simpler for Indigenous groups to ‘adopt structures relevant to their needs and to incorporate in an appropriate manner’.<sup>43</sup> In particular, Minister Viner made it clear that the

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<sup>34</sup> Ibid [166].

<sup>35</sup> Ibid [280].

<sup>36</sup> Aboriginal Land Rights Commission, *Second Report April 1974* (1974) [330].

<sup>37</sup> Ibid [332].

<sup>38</sup> Ibid [332].

<sup>39</sup> David Dalrymple, ‘The Forgotten Option—Part III of the Aboriginal Councils and Associations Act 1976’ [1988] *Aboriginal Law Bulletin* 32, 32.

<sup>40</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No 82 of 2006, 31 January 2006, 4.

<sup>41</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1976, 2946 (Ian Viner).

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 2947.

new incorporation procedure would assist Indigenous bodies to form an acceptable legal personality for the purpose of receiving government grants. The *ACA Act* was enacted in December 1976 and commenced operation on 14 July 1978 following amendments assented to on 22 June 1978.<sup>44</sup>

### III THE *ACA ACT*

Two types of Indigenous corporate bodies could be created pursuant to the *ACA Act*: Aboriginal councils and Aboriginal associations.

#### A *Aboriginal Councils*

Part III of the *ACA Act* permitted Aboriginal councils to be established as bodies corporate<sup>45</sup> that would be entitled to own property<sup>46</sup> and to sue and be sued.<sup>47</sup>

##### 1 *Positives*

The establishment of Aboriginal councils under the *ACA Act* aimed to meet the incorporation needs of Indigenous communities which provided government-type essential services.<sup>48</sup> Consequently, an Aboriginal council could do ‘all things necessary or convenient to be done for or in connection with the performance of its functions’.<sup>49</sup> Minister Viner stated in his second reading speech to the 1976 Bill that:

Councils are geographically-based bodies which may undertake a variety of functions on behalf of an Aboriginal community of the area, provided that these include the provision of at least one of the kinds of services listed in clause 11(3) such as housing, health, municipal and related services.<sup>50</sup>

This type of organisation was a step towards enhancing Indigenous Australians’ right to self-determination, as Part III of the *ACA Act* allowed ‘Aboriginal communities to incorporate without requiring registration of community membership, as in the case of associations. A council is in the nature of a community corporation based on a local Aboriginal social structure serving the special interests of that community’.<sup>51</sup> It was envisaged that such councils may, like their state and territory counterparts, carry out activities increasingly ‘para-

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<sup>44</sup> *Aboriginal Councils and Associations Amendment Act 1978* (Cth).

<sup>45</sup> *ACA Act* s 19(3)(a).

<sup>46</sup> *ACA Act* s 19(3)(c).

<sup>47</sup> *ACA Act* s 19(3)(e).

<sup>48</sup> Dalrymple, above n 39.

<sup>49</sup> *ACA Act* s 29.

<sup>50</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1976, 2947 (Ian Viner).

<sup>51</sup> *Ibid.*

governmental in nature'.<sup>52</sup> This would, in turn, empower Indigenous Australians to take control of their futures.

## 2 Negatives

Although a number of applications were made for the establishment of Aboriginal councils under pt III of the *ACA Act*, no Aboriginal council was ever created under this legislation. Table 1 lists the outcome of all applications made under pt III of the *ACA Act* between 1978 and 1989.

Date of application	Application	State/ Territory in which application made	Outcome
3 October 1978	Maningrida	Northern Territory	Application withdrawn due to opposition of the Northern Territory government. The organisation was incorporated in 1982 under the <i>Associations Incorporation Act</i> (NT).
13 March 1979	Jay Creek	Northern Territory	Application withdrawn due to opposition of the Northern Territory government.
10 September 1979	Warburton	Western Australia	Application withdrawn.
28 April 1987	Charters Towers	Queensland	Application withdrawn.
15 August 1988	Borroloola	Northern Territory	Application rejected with recommendation to register under the <i>Local Government Act</i> (NT).
22 April 1988	Belying	Northern Territory	Application withdrawn. The organisation subsequently registered under the <i>Local Government Act</i> (NT).
11 November 1988	Port Keats	Northern Territory	Application withdrawn with applicants advising Registrar of their decision that it was better to register under the <i>Local Government Act</i> (NT).
11 November 1988	Minjilang	Northern Territory	Application withdrawn.

Table 1: Applications for registration under Part III of the *ACA Act*<sup>53</sup>

<sup>52</sup> For example, Jon Altman and Mike Dillon observed that the Northern Territory Land Council's activities were 'increasingly para-governmental in nature': Jon Altman and Mike Dillon, 'Aboriginal Land Rights, Land Councils and the Development of the Northern Territory' in Deborah Wade-Marshall and Peter Lovedays (eds), *Contemporary Issues in Development* (Northern Australia Research Unit, 1988) 126, 126.

<sup>53</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Review of the Aboriginal Councils and Associations Act 1976*, Final Report (1996) 97–110 ('*Review of the ACA Act 1976* (1996)').



Due to the strong opposition of state and territory governments to the establishment of Aboriginal councils, none of the applications lodged with the Registrar of Aboriginal Corporations<sup>54</sup> led to the creation of Aboriginal councils. In 1996, the then Registrar of Aboriginal Corporations observed that ‘no action was taken by any of my predecessors to process the applications. ... [T]he Northern Territory Government is strongly opposed to the incorporation of Aboriginal Councils’.<sup>55</sup>

The state and territory governments feared that the establishment of Aboriginal councils would allow the Commonwealth to encroach on state and territory responsibilities for dealing with proposed or existing local government. This was exacerbated by the fact that an Aboriginal council registered under pt III of the *ACA Act* would be answerable to the Registrar of Aboriginal Corporations and not to the state or territory government. Further, since they would be established under Commonwealth legislation, Aboriginal councils may have been exempt from local and state or territory governments’ control.<sup>56</sup> In view of the states and territory governments’ opposition toward such provisions, pt III of the legislation was not used to establish Aboriginal councils.<sup>57</sup> Accordingly, the very reason that led to the introduction of pt III of the *ACA Act* — the empowering of Indigenous Australians — resulted in the disuse and the eventual abolition of these provisions.

### B *Aboriginal Associations*

Part IV of the *ACA Act* allowed for the incorporation of Aboriginal associations. These associations were conceived to be convenient legal entities that could be used by Indigenous people to achieve different objectives. For instance, when the *ACA Act* was enacted, Minister Viner observed that ‘Aboriginal associations may be formed by a group of Aboriginals for any special or economic purpose, including the conduct of a business enterprise to obtain profit for its members’.<sup>58</sup>

On 14 September 1978, Minister Viner issued a statement encouraging the incorporation of Aboriginal associations.<sup>59</sup> However, it was not until 1980 that the first Aboriginal association was registered under the *ACA Act*. As Diagram 1 shows the number of associations incorporated under pt IV of the *ACA Act* steadily increased over the following decades.

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<sup>54</sup> Since 2007, the Registrar of Aboriginal Corporations has been referred to as the Registrar of Indigenous Corporations.

<sup>55</sup> *Review of the ACA Act 1976* (1996), above n 53, 102.

<sup>56</sup> *Ibid* 91, 94.

<sup>57</sup> *Ibid* 95.

<sup>58</sup> As cited in Graeme Neate, *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976* (Freehill, Hollingdale and Page, 1989) 11.

<sup>59</sup> *Ibid*.

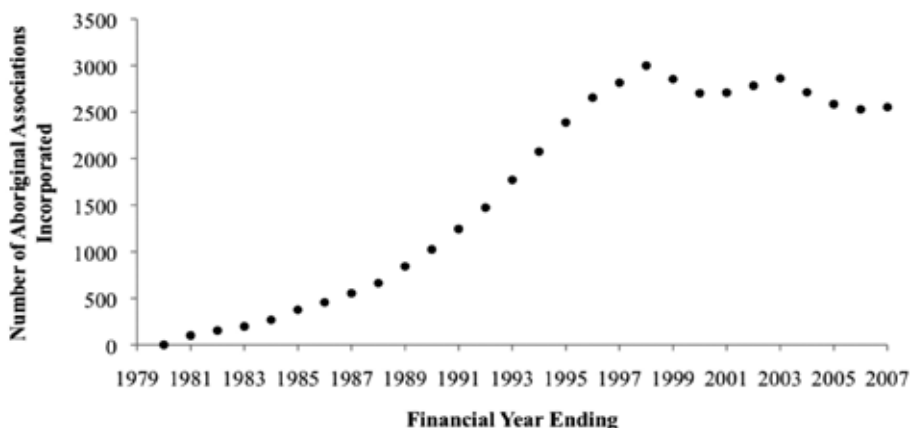


Diagram 1: Aboriginal associations incorporated under the *ACA Act* from 1978 to 2007

By 30 June 1989, the number of Aboriginal associations incorporated under Part IV of the *ACA Act* had risen to 843.

### C Recognition of Indigenous Culture

One of the main features of the *ACA Act* in its original form was that it was very flexible and non-prescriptive. This allowed Indigenous Australians to create their businesses in a culturally appropriate manner. The *ACA Act* allowed for Indigenous culture in the management of organisations incorporated under it by providing that the rules of an Aboriginal council or Aboriginal association could be based upon Aboriginal custom.<sup>60</sup> For example, s 43(4) of the *ACA Act* stated that ‘[t]he Rules of an association with respect to any matter may be based on Aboriginal custom.’

The incorporation of these rules in the legislation was a significant step towards the legal recognition and acceptance of Indigenous culture and values in the running of Indigenous corporations. From this perspective, even though the *ACA Act* predates the *UN Declaration*, the legislation achieved one of the aspirational goals of the *UN Declaration* as it recognised Indigenous customs as playing a role in the running of Indigenous associations. However, the *ACA Act* was subject to a number of criticisms that led to a shift in the way the legislation was administered.

## IV CRITICISMS AND ALTERATION OF THE *ACA ACT*

Although the number of Indigenous corporations registered under Part IV of the *ACA Act* continued to rise after the introduction of the legislation, as was illustrated in Diagram 1, concerns were raised regarding the application of a number of provisions in the legislation. This led to the alteration of the Act in 1992.

<sup>60</sup> *ACA Act* ss 23(3), 43(4).

## A *Criticisms of the ACA Act*

### 1 *Lack of Compliance: Issues Relating to Accountability*

One of the major concerns regarding the application of the *ACA Act* in its original form related to the fact that a number of Aboriginal associations failed to meet the statutory requirements.<sup>61</sup> For example, s 59(4) of the *ACA Act* required the public officer of an Aboriginal association to file with the Registrar of Aboriginal Corporations an annual balance sheet setting out the assets and liability of the organisation and an audited report of this balance sheet. The Department of Aboriginal Affairs observed that, as of 31 December 1988, 58 per cent of incorporated Indigenous associations had not filed the required financial reports for the 1986–87 financial year.<sup>62</sup>

Similarly, s 57 of the *ACA Act* required the governing committee of an Aboriginal association to provide the Registrar with written notice of the name and address of the association's public officer.<sup>63</sup> As of 31 December 1988, 16.4 per cent of incorporated Indigenous associations had not complied with this requirement.<sup>64</sup> Further, in 1992 a taskforce carried out a broad examination of the compliance of Indigenous corporations with the provisions of the *ACA Act*, examining 706 out of 1550 of the Registrar's files on Indigenous corporations registered in 1992. The taskforce found a 67.5 per cent non-compliance rate in the files examined.<sup>65</sup>

### 2 *Vague Provisions*

In addition to issues of accountability, some requirements in the *ACA Act* had not been clearly expressed and, as a consequence, it was difficult for the administrators of the Act to determine when a breach of the legislation had occurred.<sup>66</sup> For example, s 53(3) of the *ACA Act* provided that where an incorporated Aboriginal association changed its name to a new name approved by the Registrar of Aboriginal Corporations, the public officer of the association must serve on the Registrar a notice in writing of the change. However, the statute did not specify a time period during which this statutory obligation had to be fulfilled. As a result, it was not easy to determine if or when a breach of s 53(3) had occurred. Table 2 summarises the provisions of the *ACA Act* as originally enacted that did not specify a time limit for compliance.

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<sup>61</sup> Neate, above n 58, 5.

<sup>62</sup> Ibid.

<sup>63</sup> Referred to in the *CATSI Act* as the board of directors of an Indigenous corporation.

<sup>64</sup> Neate, above n 58, 6.

<sup>65</sup> *Review of the ACA Act 1976* (1996), above n 53, 22–3.

<sup>66</sup> Neate, above n 58, 5.

Sections in the <i>ACA Act</i> that do not have a time limit on compliance	Content of the section
53(1)	Governing committee to apply to Registrar for approval of proposed new name of association.
53(3)	Public officer of an Aboriginal association to serve on Registrar a notice of a change of name which has been approved by the Registrar.
56(4)	Governing committee to terminate the appointment of public officer if he/she becomes bankrupt or applies to take benefit of a law for the relief of bankruptcy or insolvent debtors or compounds with his/her creditors.
56(5)	Governing committee to obey the Registrar's directive to change official address or to notify the Registrar of a change of address.
59A(2)	Association to comply with Registrar's requirements as to the keeping of accounts and records, and the filing of reports and statements prepared from those accounts and records.
60(3)	Governing committee to ensure access to relevant statements by auditors appointed under s 60(1) of the <i>ACA Act</i> .

Table 2: Sections in the *ACA Act* that do not have a time limit on compliance<sup>67</sup>

As may be seen from Table 2, Aboriginal associations that had not filed the required financial reports at the end of the financial year could not be found liable for breaching s 59A(2) as there was no specification in the legislation as to when the report had to be lodged. Other sections of the *ACA Act*, such as s 59(3), required Indigenous corporations' compliance with reporting requirements 'as soon as practicable' after a balance sheet and expenditure statement had been prepared — but there was no clarification in the Act as to what was meant by 'as soon as practicable'. As such there was no clear time limit set on when the reporting obligation had to be met. This was problematic as it was then not clearly apparent when a corporation was in breach of the statute.

### 3 Low Penalties

Another criticism directed towards the *ACA Act* related to the penalties, or lack of substantial penalties, imposed by the legislation. To illustrate this point, Table 3 summarises the obligations imposed by the *ACA Act* as originally enacted on the governing committees and public officers of Aboriginal associations and the penalties, if any, that were to apply for breach of these provisions.

<sup>67</sup> These provisions are from pt IV of the *ACA Act*. Sections from pt III of the *ACA Act* are not listed here because no Aboriginal council was ever created under pt III of the *ACA Act*.

<b>Sections</b>	<b>Obligations</b>	<b>Penalties</b>
52(1)	Public officer to file a copy of the amendment to the objects of the association with the Registrar	\$50
53(1)	Governing committee to apply to Registrar for approval of proposed new name of association	No penalties*
53(3)	Public officer to serve on Registrar notice of a change of name which has been approved by the Registrar	\$50
54(1)	Public officer to file a copy of the amendment of the rules of the association with the Registrar	\$50
56(1)	Governing committee to appoint a public officer	No penalties*
56(4)	Governing committee to terminate the appointment of public officer if he/she becomes bankrupt or applies to take benefit of a law for the relief of bankruptcy or insolvent debtors or compounds with his/her creditors	No penalties*
56(5)	Governing committee to obey the Registrar's directive to change official address or to notify the Registrar of a change of address	No penalties*
57(1)	Governing committee to notify the Registrar of the appointment of a public officer	No penalties*
57(2)	Governing committee to notify a change of official address of the public officer to the Registrar	No penalties*
58(1)	Public officer to keep a register of members at the official address	No penalties
58(2)	Public officer to ensure register of members open for inspection by members of public	\$50
59(1)	Governing committee to keep proper financial records	No penalties
59(2)	Governing committee to prepare a balance sheet and income and expenditure statement for each financial year	No penalties
59(3)	Governing committee to have financial statements of the association examined by person authorised by Registrar	No penalties
59(4)	Public officer to file a copy of the balance sheet, income and expenditure statement and examiner's report with the Registrar	\$50
59A(2)	Association to comply with Registrar's requirements as to the keeping of accounts and records, and the filing of reports and statements prepared from those accounts and records	\$50
60(3)	Governing committee to ensure access to relevant statements by auditors appointed under s 60(1) of the <i>ACA Act</i>	No penalties
61(1)	Governing committee to provide the Registrar with a written explanation of failure to comply with obligations	No penalties*
61(2)	Governing committee to follow recommendations of Registrar to remedy a breach of the law	No penalties*
64(2)	Public officer to lodge with the Registrar a notice for voluntary winding up	\$50

Table 3: Penalties in the *ACA Act* applying for breach of obligations of governing committees and public officers<sup>68</sup>

<sup>68</sup> Although no penalties are specified in ss 56, 57 and 61, a breach of the sections could lead to the Registrar petitioning the Court for the winding up of the Aboriginal association: *ACA Act* ss 61(3), 61(4). Sections from pt III of the *ACA Act* are not listed here because no Aboriginal council were created under pt III of the *ACA Act*.

In examining Table 3, it becomes apparent that the penalties imposed under the *ACA Act* prior to the 1992 reforms to deal with contraventions of the statute were either grossly inadequate — the standard penalty not exceeding \$50 — or non-existent.

### B *The 1989 Review and 1992 Reforms*

Due to the criticisms of the *ACA Act* outlined above, a review of the legislation was undertaken in 1989.<sup>69</sup> The 1989 review was centred on finding ways to ensure that the standards of accountability were in place, without necessarily assessing the cultural appropriateness of such standards.

#### 1 *The 1989 Review*

The summary of the 1989 report noted that ‘most of the options for amending the *ACA Act* are intended to provide clear ways of determining whether the requirements of the Act have been met and ensuring that the interests of the members of associations and others who have dealings with associations are satisfied’.<sup>70</sup> The main reforms proposed by the 1989 review were the following:<sup>71</sup>

- specifying the matters required to be included in the Rules of an Aboriginal association;<sup>72</sup>
- clarifying the requirements concerning the preparation and lodgement of financial reports;
- specifying time limits during which the obligations under the statute have to be complied with;
- increasing the penalties that will be imposed if a breach of the legislation occurs; and
- expanding the role of the Registrar so as to give the Registrar more powers regarding the investigation of Indigenous corporations registered under the Act and the enforcement of the provisions of the legislation.

Based on the 1989 report, amendments to the Act were passed by the Federal Parliament in 1992.

#### 2 *The 1992 Reforms*

The 1992 amendments increased the accountability required of Aboriginal associations. As a consequence of all the new changes, the number of sections in the *ACA Act* rose from 83 to 99 sections. However, the main structure of the Act remained the same as the amended legislation retained its six constituent parts.

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<sup>69</sup> Neate, above n 58.

<sup>70</sup> Ibid 2.

<sup>71</sup> Ibid.

<sup>72</sup> The Rules of an Aboriginal association play a crucial part in the management of the business, as these rules determine the principles on which the Aboriginal association is going to be run.

<b>Parts in the <i>ACA Act</i></b>	<b>1992 amendments</b>	<b>Implication</b>
Part I: Preliminary	Section 3A introduced, providing that Chapter 2 of the Criminal Code applies to all breaches of the <i>ACA Act</i> .	The legislation became criminal in nature. This led to a change in certain penalties imposed under the Act and the introduction of strict liability offences such as the s 54(1A) penalty.
Part II: Registrar of Aboriginal Corporations	No change.	Not applicable
Part III: Aboriginal Council Areas and Aboriginal Councils	Changed reporting requirements: ss 38, 39 and 40.	This amendment dealt with criticisms of the <i>ACA Act's</i> reporting requirements, and imposed more accountability on Aboriginal councils.
Part IV: Incorporated Aboriginal Associations	Provided Registrar with more power regarding the registration of Aboriginal associations: see s 45;	This amendment allowed greater interference by the Registrar in the affairs of an association
	Imposed more duties and regulation on members of governing committees: see ss 49B, 49C, 49D and 49E;	These amendments imposed a higher burden of accountability on the people running an association;
	Noted that the Registrar may settle disputes relating to an association: see s 58A;	More power was provided to the Registrar to interfere in affairs of an association;
	Established rules regarding members' meetings: see s 58B.	The section provided more rules regarding the running of an association;
	Changed regarding reporting requirements: see ss 59 to 61A.	These amendments deal with criticisms regarding non-compliance with the provisions of the <i>ACA Act</i> and impose a higher degree of accountability.
Part V: Investigation and Administration of Aboriginal Corporations (before the reform the part was entitled: Investigation and Judicial Management of Aboriginal Corporations)	This part changed drastically, with the Registrar given more power to interfere in the affairs of associations. The Registrar can now not only alter the rules of an association at his or her own initiative, but also appoint an administrator to take control of the affairs of an association when appropriate.	The expansion of the Registrar's powers related directly to the desire to impose higher accountability standards on Indigenous corporations.
Part VI Miscellaneous	No change.	Not applicable

Table 4: Changes to the *ACA Act* as a result of the 1992 reforms

As may be seen from Table 4, even though the structure of the *ACA Act* was subject to only minor changes, the reform consisted of amendments to the legislation that greatly altered the manner in which Aboriginal associations functioned. Because of the ‘one size fits all’ approach taken by the reform, a major characteristic of the legislation as amended was that it retained very little flexibility. For example, new proscriptive rules regarding the conduct of members meetings were imposed by the 1992 amendments on all types and sizes of corporations.<sup>73</sup> These rules regarding the conduct of meetings diminished the freedom of members to run the affairs of their associations in the manner of their choosing — and, rather than satisfying Indigenous cultural needs, may instead have restrained them by preventing members from running their associations in accordance with cultural practices. As Terry Libesman and Christopher Cunneen observed, ‘while obvious and taken for granted by many non-Aboriginal people, representative democracy has not been a part of traditional or in most cases contemporary Aboriginal culture’.<sup>74</sup> This meant that the amended *ACA Act* failed to fulfil the diverse needs of Indigenous groups and communities around Australia.<sup>75</sup>

In addition, to strengthen accountability in the *ACA Act* as amended, the reporting requirements imposed were the same for all Aboriginal associations, with an option for small Aboriginal associations to apply for an exemption from the requirements in certain circumstances.<sup>76</sup> Further amendments imposed new obligations on members of the governing committee of an association, for example, the requirement to act honestly and with due care.<sup>77</sup> The legislation also required the members of governing committees to avoid any conflict between their own interests and the interests of the organisations they manage.<sup>78</sup> The Registrar was given new powers to ensure the compliance of Aboriginal associations with the requirements of the *ACA Act*.<sup>79</sup> As a consequence, it may be said that the theme of the 1992 reforms was to enhance accountability under the *ACA Act*.

### *3 Reception of the 1992 Reforms: Two Opposite Perspectives*

From 1989 to 1996, the number of Aboriginal associations incorporated under the *ACA Act* continued to rise as illustrated in Diagram 1. It cannot be said that the 1992 amendments led to any drop in the number of Aboriginal associations.

However, the fact that the numbers of Aboriginal associations continued to increase may be deceptive.<sup>80</sup> It has been noted that that the main reason many Indigenous Australians relied on the *ACA Act* was to enable them to seek funding from the

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<sup>73</sup> See, eg, *ACA Act* s 58B.

<sup>74</sup> *Review of the ACA Act 1976* (1996), above n 53.

<sup>75</sup> *Ibid* 13–14.

<sup>76</sup> Neate, above n 58. See *ACA Act* s 59A.

<sup>77</sup> *ACA Act* s 49C.

<sup>78</sup> *Ibid* s 49D.

<sup>79</sup> See, eg, *ACA Act* s 60A.

<sup>80</sup> *Review of the ACA Act 1976* (1996), above n 53, 12.



Aboriginal and Torres Strait Islander Commission.<sup>81</sup> However, the Aboriginal and Torres Strait Islander Commission reported in 1996 that about half of the Indigenous organisations in Australia had used other legislation to meet their incorporation needs and, further, more than half of the Indigenous entities funded by the Aboriginal and Torres Strait Islander Commission at that time were not incorporated under the *ACA Act*.<sup>82</sup> The fact that such a large number of Indigenous corporations were not registered under the *ACA Act* must raise questions about whether the legislation was fulfilling the needs of Indigenous Australians. As a consequence, the 1992 reforms were criticised. While the government had wished to introduce more rules and regulations to ensure accountability, the general perception in the Indigenous community was that the *ACA Act* had become too prescriptive and rigid.<sup>83</sup>

(a) *The Move towards More Regulation*

The 1989 report,<sup>84</sup> the findings of internal audit reports,<sup>85</sup> and the experience of the Registrar of Aboriginal Corporations in administering the *ACA Act*, led in 1994 to the proposed introduction of still further amendments to the statute. The proposed amendments again sought to improve accountability, due to fears that serious deficiencies ‘in the operation, administration, and legislative framework within which the Registrar operates and a high level of non-compliance with the Act’ still existed.<sup>86</sup>

The proposed amendments aimed to establish, for example, an Australian Indigenous Corporations Commission to replace the existing Registrar of Aboriginal Corporations. In her second reading speech to the Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth), Senator Rosemary Crowley, then Minister for Family Services, noted that ‘[t]he new Commission will continue to improve the efficiency of the processes of incorporation, administration and regulatory procedures to ensure the public accountability of Aboriginal and Torres Strait Islander Corporations.’<sup>87</sup>

The Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth) also proposed to streamline and strengthen the powers available to the Commission

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 1, 12.

<sup>84</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 1992–1993* (Office of the Registrar of Aboriginal Corporations, 1993) 23.

<sup>85</sup> Office of the Registrar of Aboriginal Corporations, Submission to the Joint Committee of Public Account, *Review of the Auditor-General’s Reports Tabled during the 26<sup>th</sup> Parliament* (December 1992); Walter and Turnbull (Consultants) for ATSIC/OEA, *Internal Audit — Office of the Registrar of Aboriginal Corporations* (March 1993).

<sup>86</sup> Explanatory Memorandum, Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth) 4.

<sup>87</sup> Commonwealth, *Parliamentary Debates*, Senate, 30 June 1994, 2377 (Rosemary Crowley).

to arbitrate disputes between Indigenous corporations and their members, and to take action to ensure the compliance of such corporations with their obligations under the legislation.<sup>88</sup>

After the Bill was tabled in the Senate, the Honourable Robert Tickner, then Minister for Aboriginal and Torres Strait Islander Affairs, began a further round of consultations with Indigenous bodies about the proposed changes. The response highlighted the concerns of the Indigenous community over the proposed amendments. For example, Peter Daffen, a management consultant engaged to review the *ACA Act* in 1994, indicated that implementation of the Bill would require major additional funds.<sup>89</sup> A number of other criticisms were directed at the nature of the Act and the way it was administered.<sup>90</sup> For example, the Tasmanian Aboriginal Centre observed that:

The other major concern that we have with the Draft Bill is that it does not recognise nor allow rights of self-management by Aboriginal communities ... We strongly believe that Aboriginal organisations should be permitted to determine their own constitution membership requirements and procedures.<sup>91</sup>

As a result, the Board of Commissioners of the Aboriginal and Torres Strait Islander Commission advised Minister Tickner to defer the Bill until a review assessing the future of the *ACA Act* could be carried out. Minister Tickner announced in 1995 that he was commissioning the Australian Institute of Aboriginal and Torres Strait Islander Studies to conduct a review of the entire *ACA Act*. The 1996 review headed by Dr Jim Fingleton subsequently took place.

(b) *The Move towards Less Regulation*

The 1996 review of the *ACA Act* found that the excessive regulatory requirements mandated by the 1992 amendments had resulted in considerable expense being exhausted in their implementation.<sup>92</sup> For instance, it was estimated that the annual cost of complying with the audit requirements under the *ACA Act* was around \$20 million.<sup>93</sup>

The 1996 review further noted that over-regulation was a significant contributor to the high levels of regulatory breach.<sup>94</sup> As a result, it recommended ‘changing the

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<sup>88</sup> Aboriginal Councils and Associations Legislation Amendment Bill 1994 (Cth).

<sup>89</sup> Peter Daffen, *Registrar of Aboriginal Corporations: Review of Human and Financial Resources Required for the New Australian Indigenous Corporations Commission* (Cooldari Pty Ltd, 1994).

<sup>90</sup> *Review of the ACA Act 1976* (1996), above n 53.

<sup>91</sup> Tasmanian Aboriginal Centre, Submission No 9 to the Aboriginal Councils and Associations Legislation Amendment Bill 1994, 1994, 2.

<sup>92</sup> *Review of the ACA Act 1976* (1996), above n 53, 16.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* 15.

basic thrust of the Act, back to the direction proposed for it in 1976'.<sup>95</sup> For example, it recommended that the requirements of membership of Indigenous corporations be more flexible. Similarly, it proposed that the accountability regime should be increasingly reliant upon the conditions and review mechanisms imposed by the funding agencies, rather than on the corporate governance model imposed by the 1992 amendments. Additionally, it called for the restriction and reduction of the role of Registrar of Aboriginal Corporations to one that was largely procedural. The 1996 review also stated that the Act should allow for greater freedom of constitutional adoption to encourage the increased provision of rules based upon customary law.<sup>96</sup>

Lastly, as the *ACA Act* was deemed to be 'far more demanding in its requirements for a group's incorporation and ongoing operation than mainstream legislation',<sup>97</sup> the 1996 review was in favour of remodelling the *ACA Act* to make it 'a federal version of an *Associations Incorporation Act*'.<sup>98</sup> It was believed that such a move would enhance the flexibility of the *ACA Act*, and allow it to meet the needs of Indigenous corporations since the *Associations Incorporation Act* of each state and territory was based upon a careful balance of the rights of members and those of third parties.<sup>99</sup>

### (c) *The End Result*

The 1996 review was considered by some as committing the reverse error of the 1992 amendments for its emphasis upon 'culturally appropriate incorporation' at the expense of accountability and good corporate governance.<sup>100</sup> It could be said that a schism arose between proponents of the 1992 reforms and the 1996 review, with the former deeming accountability to be crucial to the success of Indigenous corporations and the latter advocating increased freedom for Indigenous Australians in running their organisations so as to allow greater account to be taken of Indigenous culture and values.

The 1996 review was based on a number of case studies conducted by members of the review panel and undoubtedly has its merits — but its recommendation that the *ACA Act* become or be replaced by a federal version of an *Associations Incorporation Act* is problematic, since there is very little consistency between the associations incorporation legislation of the states and territories. Further, associations created under this legislation are to be non-profit organisations, while the *ACA Act* clearly states that an Indigenous corporation may 'be carried on wholly or partly for the purpose of securing pecuniary profit to its members'.<sup>101</sup> In such

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<sup>95</sup> Ibid 141.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 142.

<sup>98</sup> Ibid 143.

<sup>99</sup> Ibid.

<sup>100</sup> Christos Mantziaris, 'Beyond the Aboriginal Councils and Associations Act? Part I' [1997] 4 *Indigenous Law Bulletin* 7.

<sup>101</sup> *ACA Act* s 44.

instances, the rules of the corporation are required to make provision as to the manner in which the distribution of profits to its members will occur.<sup>102</sup>

The 1996 review coincided with a change in the political landscape of Australia with the election of the Howard Coalition Government. With the election of the new government, many institutional developments in Indigenous affairs over the previous years came under intense scrutiny, and the budget of the Aboriginal and Torres Strait Islander Commission was cut. The end result was that, despite all the issues raised by the 1996 review, reforms to the *ACA Act* were not introduced.<sup>103</sup>

## V THE MOVE TO NEW LEGISLATION

As the law remained unchanged, the concerns raised by the 1994 proposed amendments and the 1996 review of the *ACA Act* remained.

### A Accountability Still an Issue

As Diagram 2 illustrates, the 1992 reforms did not necessarily achieve their purpose in improving accountability, since the majority of Aboriginal associations remained non-compliant with the provisions of the *ACA Act*.

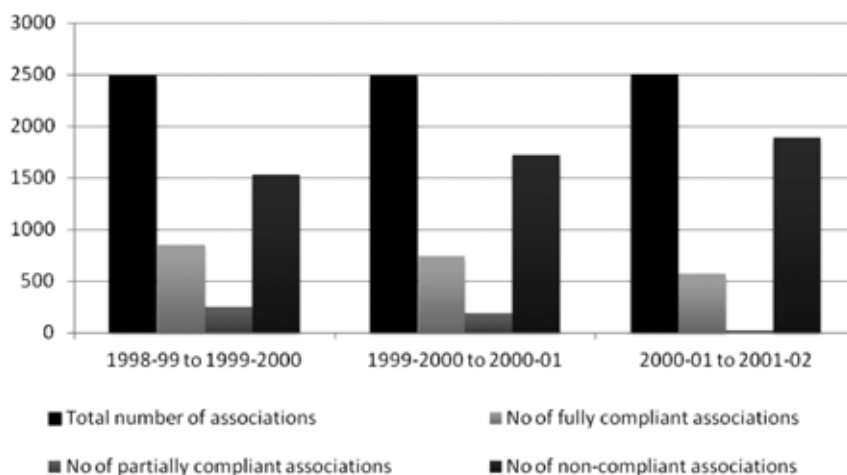


Diagram 2: Compliance of corporations by number of Aboriginal associations from 1998–2002<sup>104</sup>

<sup>102</sup> Ibid.

<sup>103</sup> Nicole Watson, 'The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth): Coming Soon to a Community Organisation Near You' [2006] 6 *Indigenous Law Bulletin* 32.

<sup>104</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 2002–03* (Office of the Registrar of Indigenous Corporations, 2003) 44.

The accountability of Aboriginal associations remained a major issue for the Registrar of Aboriginal Corporations as the number of non-compliant organisations continued to rise.

## B *Rigid and Out-of-Date Legislation*

### 1 *Rigid Legislation*

Since 1996, the *ACA Act* has been perceived to be very rigid legislation.<sup>105</sup> One reason for this was the fact that the Registrar had discretion in relation to determining how Aboriginal associations should be run. In 1996–97, the Registrar suggested that the *ACA Act* had changed its purpose from that of providing a means by which Indigenous Australians could run their businesses to a new purpose focused on the protection of minority rights.<sup>106</sup> The Registrar noted, for example, 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.<sup>107</sup>

Consequently, the Registrar took an active role in monitoring the way Aboriginal associations were run. This resulted in the Registrar restricting the right of Indigenous Australians to alter the Rules according to which their organisations were to function.<sup>108</sup> For example, Napranum Aboriginal Corporation sought to amend its Rules to allow its governing committee members three-year terms. The proposed amendment was rejected by the Registrar, who insisted on annual elections even though these were not required by the *ACA Act*.<sup>109</sup> As a result the organisation complained that 'the Registrar is inflexible and unwilling to change the Rules, even when this is in the interest of the corporation's efficiency'.<sup>110</sup>

In another example, Cape York Land Council wished to alter its Rules to achieve the following three objectives:<sup>111</sup>

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<sup>105</sup> *Review of the ACA Act 1976* (1996), above n 53, 12. Corrs Chambers Westgarth Lawyers and Anthropos Consulting Services, 'A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act (Final Report of the Review of the Aboriginal Councils and Associations Act 1976' (Cth), November 2002) 157 ('A Modern Statute for Indigenous Corporations').

<sup>106</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 1996–97* (Office of the Registrar of Indigenous Corporations, 1997) 1–2.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Review of the ACA Act 1976* (1996), above n 53, 58.

<sup>109</sup> *Ibid.* 59.

<sup>110</sup> As cited in *Review of the ACA Act 1976* (1996), above n 53, 59.

<sup>111</sup> *Ibid.* 59.

1. to enable the Council to have both a chairman and a chairwoman;
2. to enable the Council to have a working executive whose functions and powers would be delegated by the governing committee; and
3. to include a clause guaranteeing representation on its governing committee of the 18 Aboriginal communities on Cape York Peninsula.

While these objectives seem reasonable, and do not appear to contradict the *ACA Act*, the Registrar failed to approve the proposed changes. The proposal seeking to guarantee representation of all Aboriginal communities on Cape York Peninsula was rejected as being ‘inconsistent with the intention of the Act’.<sup>112</sup> The Registrar’s reasoning is unclear, however, as such representation would give members ‘effective control over the running of the association’, which is a statutory requirement under s 45(3A) of the Act. The Registrar rejected the proposal to allow the Council to have both a chairman and a chairwoman, as it considered that the relevant clause ‘may promote significant uncertainty’.<sup>113</sup> As for the proposal to have a working executive, the Registrar stated that ‘the notion of an executive operating within the committee is unacceptable.’<sup>114</sup> Although the Registrar did not point to any inconsistency between the two last-mentioned proposals and the Act, the proposed changes were nevertheless deemed to be unreasonable and were rejected as a consequence.

As may be seen from these examples, the *ACA Act* did not appear to provide a flexible system under which Indigenous Australians may create and run their organisations. It did not ‘address the “special incorporation needs” of [Aboriginal associations]’.<sup>115</sup>

## 2 Out-of-Date Legislation

When the *ACA Act* was enacted in 1976, the structure of mainstream corporations law in Australia had not yet fully developed.<sup>116</sup> The *ACA Act* did not reflect — and continued not to take account of — key changes that have taken place since 1976 in the area of company law. This fact put Aboriginal associations incorporated under the *ACA Act*, their directors and members at a significant disadvantage.<sup>117</sup>

Nor was the *Native Title Act 1993* (Cth) yet enacted in 1976. As a consequence, certain provisions in the *ACA Act* were not compatible with the *Native Title Act*

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<sup>112</sup> Ibid 60.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 110.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

1993 (Cth).<sup>118</sup> In 1998 this led Beaumont J to call for legislative changes to the *ACA Act* to take into account the requirements of the *Native Title Act 1993* (Cth).<sup>119</sup>

### C *The 2002 Review and its Aftermath*

To remedy the above concerns, in February 2001, the Registrar of Aboriginal Corporations appointed a team led by Corrs Chambers Westgarth lawyers to review the *ACA Act*. The review team included Senator Brennan Rashid, Mr Mick Dodson, Mr Christos Mantziaris and Anthropos Consulting.<sup>120</sup> In appointing the review team the Registrar noted that the purpose of the review was, 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, [to] consider whether the Act remains an appropriate mechanism for this purpose’.<sup>121</sup>

The final report of the review team was published in December 2002. The review found that the *ACA Act* failed to address the needs of the Indigenous community.<sup>122</sup> It recommended that the *ACA Act* be replaced by legislation that would provide Indigenous Australians with the ‘key facilities of a modern incorporation statute such as the *Corporations Act [2001 (Cth)]*’ but that was tailored to meet the specific incorporation needs of Indigenous Australians.<sup>123</sup> The 2002 review also recommended that the role of the Registrar of Aboriginal Corporations should shift from focusing on compliance and enforcement to assisting Indigenous corporations to achieve good corporate governance through ‘special regulatory assistance’.<sup>124</sup>

As a result of the 2002 review, the Coalition Government announced on 15 January 2004 that it intended to introduce new legislation to reform the *ACA Act*.<sup>125</sup> The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (Cth) was subsequently introduced into the Australian Parliament on 23 June 2005. Consistent with the key recommendation of the 2002 review, in allowing for the creation of Indigenous corporations the Bill took into account the special incorporation needs

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<sup>118</sup> Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 108, 197.

<sup>119</sup> *Deeral (on behalf of herself and the Gamaay Peoples) v Charlie* [1998] FCA 723 (1 June 1998).

<sup>120</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 32.

<sup>121</sup> *Ibid* 1.

<sup>122</sup> *Ibid* 110.

<sup>123</sup> *Ibid* 2.

<sup>124</sup> *Ibid* 121.

<sup>125</sup> Office of the Registrar of Aboriginal Corporations, *Yearbook 2002–03* (Office of the Registrar of Indigenous Corporations, 2003) 60–1.

of Indigenous people.<sup>126</sup> The 2002 review had determined there were four main factors causing Indigenous corporations to have special incorporation needs:<sup>127</sup>

- *The general socioeconomic characteristics of the managers of Indigenous corporations had to be taken into account.* The review found that the business skills required to successfully manage a corporation were frequently found to be lacking in Indigenous organisations; and that members of Indigenous corporations were often unaware of their rights.<sup>128</sup>
- *Indigenous values and practices may impact the manner in which an organisation is run.* The review found that struggles between Indigenous groups and the emphasis certain Indigenous societies placed on individual autonomy may hinder the manner in which Indigenous corporations are managed. The review noted that such struggles may leave Indigenous corporations vulnerable to bad corporate governance practices.<sup>129</sup>
- *While corporations registered under the Corporations Act 2001 (Cth) and the state and territory Associations Incorporation Acts are voluntarily formed, the formation of Indigenous corporations may be involuntary.* For example, in order to hold land under the *Native Title Act 1993* (Cth), Indigenous groups were required to be registered under the *ACA Act*.<sup>130</sup>
- *Indigenous corporations may have an abundance of social, economic and political objectives to fulfil.* The review noted that the diversity of these functions may create some difficulties in accommodating the needs of Indigenous corporations. For example, measures established to accommodate one of a corporation's functions (such as exempting corporations engaged in passive landholding from financial reporting) may be inappropriate when dealing with the same corporation in a different context (such as imposing financial reporting on corporations providing medical services to a number of people in the community).<sup>131</sup>

In announcing the Bill, the then Minister for Indigenous Affairs, Senator Amanda Vanstone, observed that the Bill was 'an important part of the government's

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<sup>126</sup> Standing Committee on Legal and Constitution Affairs, Parliament of Australia, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005 [Provisions] and Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 [Provisions]*, *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006 [Provisions]* (October 2006) 6.

<sup>127</sup> 'A Modern Statute for Indigenous Corporations', above n 105, 4.

<sup>128</sup> Ibid 4–5.

<sup>129</sup> Ibid 5.

<sup>130</sup> Ibid 6.

<sup>131</sup> Ibid 6–7.



reforms and will ensure that Aboriginal people get a better deal and a better value for money'.<sup>132</sup>

## VI THE *CATSI ACT*

The *CATSI Act* was passed by the Australian Parliament in October 2006 and replaced the *ACA Act*. The new legislation commenced on 1 July 2007,<sup>133</sup> which coincided with the start of the financial year 2007–08. Existing Indigenous corporations were given a transition period of two years in which to comply with the new legislation.<sup>134</sup>

### A *Incorporation*

Like its predecessor, the *CATSI Act* allows Indigenous Australians to create Indigenous corporations.<sup>135</sup>

#### 1 *Aboriginal and Torres Strait Islander Corporations*

Unlike the *ACA Act*, the *CATSI Act* does not allow Indigenous Australians to incorporate in the form of Aboriginal councils. Although the 2002 review found that pt III of the *ACA Act* was superseded, impractical and no longer needed,<sup>136</sup> the removal of this option was criticised by some. For example, David Dalrymple stated that:

The absence from [the *CATSI Act*] of a statutory option of establishing an Indigenous self-governing body at the local level with features more akin to a local government council than to an incorporated association deprives Aboriginal communities of a choice which should have been retained in legislation.<sup>137</sup>

However, Indigenous Australians remain able to create Indigenous councils at the state and territory level.<sup>138</sup> Further, the inclusion of Indigenous councils in the *CATSI Act* may not have improved the legislation, as any such provision may have

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<sup>132</sup> Amanda Vanstone, 'New Bill to Benefit Thousands of Aboriginal Corporations' (Press Release, 23 June 2005).

<sup>133</sup> *CATSI Act* s 1-5.

<sup>134</sup> Office of the Registrar of Indigenous Corporations, *Yearbook 2006–2007* (Office of the Registrar of Indigenous Corporations, 2007) 2.

<sup>135</sup> *CATSI Act* s 42-1.

<sup>136</sup> Corrs Chambers Westgarth Lawyers, 'Part III of the ACA Act: Appendix G', x-xi.

<sup>137</sup> David Dalrymple, Submission No 2 to Senate Legal and Constitutional Legislation Committee, *Corporations (Aboriginal and Torres Strait Islander) Bill- Submission to Senate Legal and Constitutional Legislation Committee*, 10 October 2006, 1.

<sup>138</sup> See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

met similar problems to those arising from applications under Part III of the *ACA Act*.<sup>139</sup>

The *CATSI Act* allows only for the incorporation of Aboriginal and Torres Strait Islander corporations which are referred to in this article as ‘Indigenous corporations’. As these indigenous corporations were legislatively constituted prior to the Australia’s endorsement of the *UN Declaration*, it is essential to assess whether the *CATSI Act* is synchronous with the objectives of the *UN Declaration*. Where disparities in intent become too pronounced, a re-examination of the legislation may again be required. Like its predecessors, the Indigenous corporation aims to empower Indigenous Australians, and seems to fit with the objectives of the *UN Declaration* as it allows for corporations to be controlled by Indigenous Australians.

Under the previous legislation, control by Indigenous people over the affairs of Indigenous corporations was achieved by restricting membership of such corporations to persons who were Aboriginal or the spouse of an Aboriginal.<sup>140</sup> Although it was further provided that, if more than 75 per cent of the members of an Aboriginal association agreed, the Rules of the association could provide for the conferring of specified rights of membership on persons who were not otherwise entitled to become members of the association, such persons could not be entitled to vote or to be elected as directors of the Aboriginal association.<sup>141</sup> This meant that any such membership would be largely inert. It was intended that control of the association would remain in the hands of Indigenous Australians.

To ensure that no abuse of the above provisions occurred, the 2002 review recommended that the new legislation restrict membership of Indigenous corporations to Indigenous people. This recommendation aimed to ensure that Indigenous members were the ones in control of Indigenous corporations.<sup>142</sup> When enacted, the *CATSI Act* partially acted on this recommendation, providing that the majority of members of such corporations must be Indigenous. Under the *CATSI Act* non-Indigenous people are still able to be involved in an Indigenous corporation.<sup>143</sup> The Explanatory Memorandum to the legislation deemed that such involvement was important because some Indigenous corporations are the only providers of essential services in rural communities. To allow the representation of non-Indigenous people in Indigenous corporations thus ensures that non-Indigenous

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<sup>139</sup> As noted previously, Aboriginal councils were never created under the *ACA Act* due to the opposition of the States and Territories to such organisations.

<sup>140</sup> *ACA Act* s 49. A ‘spouse’ is defined under s 3 of the *ACA Act* as including ‘a person who, although not legally married to the Aboriginal, is living with the Aboriginal as the Aboriginal’s spouse on a permanent and bona fide domestic basis’.

<sup>141</sup> *ACA Act* s 49A.

<sup>142</sup> ‘A Modern Statute for Indigenous Corporations’, above n 105, 230, 232.

<sup>143</sup> *CATSI Act* s 29-5.

people living in these communities are not disadvantaged.<sup>144</sup> This approach was supported by the then Registrar of Aboriginal Corporations, Laura Beacroft.<sup>145</sup>

The move to permit the involvement of non-Indigenous Australians was still controversial, and attracted criticism. For example, the Central Land Council argued that ‘permitting minority membership of non-Aboriginal people will not be sufficient to ensure Aboriginal control’.<sup>146</sup> This is especially relevant because while s 49A of the *ACA Act* limited the powers of non-Indigenous members of Aboriginal associations, the *CATSI Act* allows non-Indigenous people to be involved in running Indigenous corporations.<sup>147</sup> This fact led David Dalrymple to state that ‘the opening up of membership eligibility to allow for non-Indigenous members will have the result that there is no appreciable substantive difference between incorporation under’ the *CATSI Act* and other federal, state and territory laws.<sup>148</sup> He further argued that:

The one point of difference between [the *ACA Act*] and equivalent “mainstream” legislation was the restrictions on voting membership contained in the [*ACA Act*] itself. It was possible under “mainstream” legislation to restrict membership to Aboriginal people by drafting the body’s constitution in a particular way, but that constitution could always be changed and undone. The attraction to the Aboriginal clients I dealt with was always that the [*ACA Act*] itself contained the restriction and therefore the protection and security. [The *CATSI Act*] in its present form has abandoned that feature of [the *ACA Act*], which is going to engender grave concerns for the many bodies that incorporated as associations under [the *ACA Act*] ...<sup>149</sup>

The new legislation may be viewed, rather, as providing more flexibility to Indigenous Australians in running their organisations — as they may choose either to limit membership of their organisation to Indigenous Australians, or to broaden the scope of membership of the organisation to include non-Indigenous people. However, as the concept of incorporation is a Western concept, a closer look at the legislation is required to determine whether the indigeneity requirement of members is the only Indigenous characteristic of corporations registered under the *CATSI Act*.

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<sup>144</sup> Revised Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) 11.

<sup>145</sup> Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Legislation Committee, 4 October 2005, 2 (Laura Beacroft).

<sup>146</sup> Central Land Council, Submission to the Senate Legal and Constitutional Committee, *Inquiry into the Provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, 5.

<sup>147</sup> *Corporations (Aboriginal and Torres Strait Islander) Regulations 2007* (Cth) reg 29–5.01.

<sup>148</sup> Dalrymple, above n 137, 1.

<sup>149</sup> *Ibid* 2.

## 2 *The Notion of Incorporation*

The desire to recognise the right of Indigenous Australians to a measure of self-determination was a major reason behind the introduction of Indigenous corporate legislation in Australia. However, although Indigenous self-determination was one of the aims underpinning the enactment of the *ACA Act* and the *CATSI Act*, the notion of incorporation, which is the basis of both these Acts, is itself foreign to Indigenous culture. This has raised a debate concerning the appropriateness of imposing such a business structure on Indigenous Australians. Basil Sansom, for instance, has observed that the fact that incorporation is a mandatory requirement for an Indigenous organisation to be recognised by the state as a legal entity constitutes a form of cultural coercion.<sup>150</sup> He stated that Indigenous people ‘who would make representations are coerced by a persuasive and perturbing imperative of Western political culture: the requirement that to have discourse with the state, an assembly of men must be made over into an entity’.<sup>151</sup>

Similarly, Tim Rowse has referred to this as a paradox, since the concept of Indigenous corporations aims to empower Indigenous Australians by imposing Western notions upon them.<sup>152</sup> The House of Representatives Standing Committee on Aboriginal Affairs also referred to this reality in its final report, *Our Future Our Selves*, observing that ‘it is ironic that Aboriginal communities are being asked to accept non-Aboriginal structures in order to have greater control over their own affairs’.<sup>153</sup>

Charles Rowley, however, argued that the incorporation of Indigenous organisations provides a means by which Indigenous Australians could negotiate with the government.<sup>154</sup> He further observed that incorporation offers advantages, as it establishes ‘a formally and legally uniform institutional model which meets the requirements of a single national strategy while offering the security of familiar community membership’.<sup>155</sup> David Martin, too, was also in support of the incorporation of Indigenous organisations, as he viewed Indigenous organisations as being ‘intercultural phenomena ... sites of the engagement and transformation of

<sup>150</sup> Basil Sansom, ‘Aborigines, Anthropologist and Leviathan’ in Noel Dyck (ed), *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (Institute of Social and Economic Research Memorial, University of Newfoundland, 1985) 67, 70.

<sup>151</sup> Ibid.

<sup>152</sup> Tim Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination* (North Australia Research Unit, Australian National University, 1992) 98.

<sup>153</sup> Commonwealth, *Our Future Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*, Parl Paper No 137/90 (1990) 25.

<sup>154</sup> Charles Rowley, *The Remote Aborigines: Aboriginal Policy and Practice- Volume III* (Australian National University Press, 1971) 169.

<sup>155</sup> Charles Rowley, *Outcasts in White Australia: Volume 2 of Aboriginal Policy and Practice* (Australian National University Press, 1971) 423.

values and practices drawn from both Aboriginal worlds and the general Australian society rather than as institutions within an autonomous Aboriginal domain'.<sup>156</sup>

For the incorporation of Indigenous organisations to lead to the empowerment of Indigenous Australians, therefore, it must reflect a compromise between Indigenous and Western concepts; that is, the incorporation must be an intermediate system acting as a conduit between the Indigenous and Western European cultures. As a consequence, the mere fact that the concept of incorporation is itself foreign to Indigenous culture does not automatically mean that the socioeconomic aims of the *UN Declaration* can not be fulfilled to a certain extent by the *CATSI Act*. Everything depends on the type of rules that must be complied with when running an Indigenous corporation.

### B *Flexibility of the Legislation?*

One of the main features of the *ACA Act* was that the legislation in its original form attempted to bridge the schism between Western notions, such as incorporation, and Indigenous notions. For instance, the legislation acknowledged that Aboriginal associations may be run based on Indigenous culture and traditions.<sup>157</sup> An examination of the *CATSI Act* reveals there are no equivalent references to Indigenous custom: the current legislation has moved away from this approach as the concept of 'cultural appropriateness' was deemed to be problematic. For example, attempts to write down Indigenous practices may have led to distortion of those practices.<sup>158</sup> It has also been observed that the concept of cultural appropriateness could be viewed a 'ticket-of-leave from a more rigorous analysis of the facilities that a [corporation] requires to operate within the Australian legal system'.<sup>159</sup> Further, this concept may be regarded as inappropriately assuming the existence of a domain where Indigenous corporations are independent from the legal, political and economic fields in which they are necessarily situated.<sup>160</sup> While this rejection of the concept of cultural appropriateness may be justified, the question of whether Indigenous corporations are flexible enough to represent a compromise between Indigenous and non-Indigenous cultures still remains.

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<sup>156</sup> David Martin, 'Rethinking Aboriginal Community Governance', in Paul Smyth, Tim Reddel and Andrew Jones (eds), *Community and Local Governance in Australia* (UNSW Press, 2005) 108, 118.

<sup>157</sup> *ACA Act* s 43(4).

<sup>158</sup> 'A Modern Statute for Indigenous Corporations', above n 105, 161.

<sup>159</sup> Mantziaris and Martin, above n 118, 293.

<sup>160</sup> David Martin, 'Governance, Cultural Appropriateness and Accountability' in Diane Austin-Broos and Gaynor MacDonald (eds), *Culture, Economy and Governance in Aboriginal Australia* (Sydney University Press, 2005) 189, 192.

## 1 *The Objectives of the CATSI Act*

The objects of the *CATSI Act* are akin to a streamlined *Corporations Act 2001* (Cth), and to a certain extent the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>161</sup> Section 1–25 states that the objects of the *CATSI Act* are to:

- (a) provide for the Registrar of Aboriginal and Torres Strait Islander Corporations; and
- (b) provide for the Registrar’s functions and powers; and
- (c) provide for the incorporation, operation and regulation of those bodies that it is appropriate for this Act to cover; and
- (d) without limiting paragraph (c)—provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate; and
- (e) provide for the duties of officers of Aboriginal and Torres Strait Islander corporations and regulate those officers in the performance of those duties.

While this section refers to ‘Aboriginal and Torres Strait Islander corporations’ and ‘native title body corporate’, it appears that ensuring such corporations take Indigenous culture, customs and traditions into account is not one of the objects of the Act. Rather, the section is modelled on the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>162</sup>

Due to the fact that the legislation is based on mainstream legislation, concerns may be raised that the new legislation is just window dressing, simply providing Indigenous Australians with the means to run Indigenous corporations along the same lines as mainstream corporations under rules based on those of the mainstream legislation. From this perspective, the legislation would fall short of a vehicle that could assist in delivering the socioeconomic goals of the *UN Declaration*.

However, the Explanatory Memorandum to the Act states that ‘these objects are designed to recognise that Aboriginal and Torres Strait Islander peoples in some circumstances have special needs for incorporation, assistance, monitoring and regulation which the *Corporations Act* is unable to adequately meet as it exists primarily to provide uniform incorporation and regulation of trading corporations’.<sup>163</sup> As such the success of the amalgamation of Western and Indigenous cultures will all depend on the manner in which the legislation itself influences the management of Indigenous corporations. Consequently, if the *CATSI Act* is to meet the needs of Australia’s Indigenous people, it is crucial that it differs

<sup>161</sup> Office of the Registrar of Indigenous Corporations, *About the CATSI Act* <<http://www.orac.gov.au/Content.aspx?content=CATSI-Act/default.htm&menu=catsi&class=catsi&selected>About%20the%20CATSI%20Act>>.

<sup>162</sup> Revised Explanatory Memorandum, above n 144, 34.

<sup>163</sup> *Ibid* 21.

from the *Corporations Act 2001* (Cth) so as to allow Indigenous Australians to run their organisations based on their own cultural values and practices, rather than on Western European legal values and practices.

A general overview of the *CATSI Act*, however, indicates that its corporate governance model is firmly based on that in the *Corporations Act 2001* (Cth), as in both instances the two decision-making bodies within a corporation registered under the legislation are the general members' meeting and the board of directors.

## 2 *Members' Meetings*

Although the 1996 review found that for Indigenous people general members' meetings are not usually a good forum for making informed decisions and setting policies,<sup>164</sup> the members' meeting was adopted by the *CATSI Act*. This fact not only appears to ignore the recommendation of the 1996 review, it also contradicts art 18 of the *UN Declaration*, which states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

Consequently, in imposing the type of representation that must be relied on within an Indigenous corporation, the *CATSI Act* is limiting the right to self-determination of Indigenous Australians to run their businesses in accordance with their own procedures. Further, reliance on democratic processes at members' meetings may be considered to be culturally inappropriate.<sup>165</sup>

However, a closer look at the provisions regarding members' meetings in the legislation reveals that the majority of the rules regarding members' meetings are replaceable rules.<sup>166</sup> This means that the constitution of an Indigenous corporation may alter the provisions regarding members' meetings so as to adapt them to the needs of the corporation. For example, the constitution of an Indigenous corporation may specify the manner in which a resolution is put to the vote at a members' meeting.<sup>167</sup> It may state whether a resolution at a general meeting should be decided through a simple majority,<sup>168</sup> or through consensus.<sup>169</sup> Further, the

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<sup>164</sup> *Review of the ACA Act 1976* (1996), above n 53, 51.

<sup>165</sup> *Ibid* 52.

<sup>166</sup> *CATSI Act* s 57-5.

<sup>167</sup> The provision in the *CATSI Act* relating to how voting is carried out is s 201–125, and it is a replaceable rule.

<sup>168</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Capital Development Aboriginal Corporation: Consolidated Rule Book* (2 July 2009), [4.10] <<http://www.oric.gov.au/document.aspx?concernID=393841>>.

<sup>169</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Women Beyond Today Aboriginal Corporation: Consolidated Rule Book* (8 July 2010), [4.10] <<http://www.oric.gov.au/document.aspx?concernID=536586>>.

provision relating to who may appoint a proxy is also a replaceable rule.<sup>170</sup> This means that if an Indigenous corporation does not consider proxies to be culturally appropriate, its constitution may provide that a member of the corporation may not appoint a person as the member's proxy to attend and vote for the member at a general meeting of the corporation.

Other provisions regarding members' meetings are partially replaceable. For example, the provision relating to the quorum for a meeting of the members of an Indigenous corporation is s 201–70. The section provides:

- (1) If an Aboriginal and Torres Strait Islander corporation has 11 or more members, the quorum for a meeting of the corporation's members is the lesser of:
  - (a) 10 members; or
  - (b) the greater of:
    - (i) the number of members holding 10% of the voting rights; or
    - (ii) 2 members.
- (2) If an Aboriginal and Torres Strait Islander corporation has 10 members or less, the quorum for a meeting of the corporation's members is 2 members.
- (3) The quorum must be present at all times during the meeting.
- (4) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.
- (5) A meeting of the corporation's members that does not have a quorum present within 1 hour after the time for the meeting set out in the notice of meeting is adjourned to the same time of the same day in the next week, and to the same place, unless the directors specify otherwise.
- (6) If no quorum is present at the resumed meeting within 1 hour after the time for the meeting, the meeting is dissolved.

Subsections (1), (2), (5) and (6) of s 201–70 are replaceable rules,<sup>171</sup> which means that an Indigenous corporation can tailor the quorum requirement in the *CATSI Act* to suit its own individual circumstances.<sup>172</sup> However, sub-ss (3) and (4) of s 201–70, requiring a quorum to be present at all times during a meeting and specifying how to determine if a quorum is present, are not replaceable.<sup>173</sup> Such provisions limit

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<sup>170</sup> *CATSI Act* s 201-90.

<sup>171</sup> *CATSI Act* ss 57-5, 60-1.

<sup>172</sup> See, eg, Office of The Registrar of Indigenous Corporations, *Acacia Larrakia Aboriginal Corporation: Registrar Initiated Rule Book: ICN 1470* (25 June 2009), [4.7] (quorum shall be five members) <<http://www.oric.gov.au/document.aspx?concernID=101470>>.

<sup>173</sup> *CATSI Act* ss 201-70(3), 201-70(4).



the extent to which a corporation may alter the way a meeting of its members is run.

In addition, in some instances problems may arise when an Indigenous corporation has decided to adopt the condensed rule book published by the Office of the Registrar of Indigenous Corporations without necessarily adapting it fully to suit its situation.<sup>174</sup> In such instances, the constitution of the organisation may contain internal contradictions. For example, in the context of members' meetings, a number of provisions in the constitution of Gold Coast Aboriginal and Torres Strait Islander Corporation for Community Consultation envisage the use of proxies,<sup>175</sup> while another provision in its constitution clearly states that proxies are not permitted.<sup>176</sup> Such contradictions are problematic, particularly as constitutions are enforceable.<sup>177</sup> They also illustrate the difficulty faced in the application of rigid legal principles to Indigenous corporations.

Consequently, the *CATSI Act* does not strip Indigenous Australians of their right to run members' meetings in line with their own values and traditions in certain instances while, in others, it does. All depends on whether the rule is replaceable or not.<sup>178</sup>

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<sup>174</sup> While the term 'rule book' does not appear in the *CATSI Act*, on its website the Office of the Registrar of Indigenous Corporations refers to 'all the relevant parts of the law that affect how an Indigenous corporation is run' as the rule book of the corporation: Office of the Registrar of Indigenous Corporations, *Rule Book*, <<http://www.oric.gov.au/Content.aspx?content=ruleBook/ruleBook.htm&menu=start&class=start&selected=Rule%20book>>. A corporation's rule book, therefore, includes law under the *CATSI Act* that the Indigenous corporation cannot change, any replaceable rules under the *CATSI Act* that the corporation has not changed, and the constitution of the corporation. Among other tools developed to assist Indigenous corporations to make a rule book which both complies with the *CATSI Act* and suits their needs, Office of the Registrar of Indigenous Corporations published a *Rule Book — Condensed* containing a set of rules it recommends for corporations with a small number of members or straightforward business. This condensed rule book covers the minimum required topics and incorporates rules Office of the Registrar of Indigenous Corporations considers will achieve good governance practice. It was promoted as requiring minimal tailoring, and does not point to all the options for tailoring existing under the *CATSI Act*. However, the condensed rule book does not always clearly state which rules are replaceable and so may be altered by an Indigenous corporation.

<sup>175</sup> Office of The Registrar of Indigenous Corporations, *Gold Coast Aboriginal and Torres Strait Islander Corporation for Community Consultation: Consolidated Rule Book* (18 May 2010), [7.4.4], [7.7.2], [7.14.2] <<http://www.oric.gov.au/document.aspx?concernID=393782>>.

<sup>176</sup> *Ibid* [7.14.1].

<sup>177</sup> *CATSI Act* s 60-10(1).

<sup>178</sup> For comment on meetings in Indigenous culture see Fred Myers, 'Reflections on a Meeting: Structure, Language, and the Polity in a Small-Scale Society' (1986) 13 *American Ethnologist* 430, 430–47.

### 3 Management

One of the issues raised by the 1996 review was that the management of Aboriginal associations registered under the *ACA Act* by a governing committee did not reflect the decision-making structure within the Indigenous community.<sup>179</sup> This issue was not addressed when the *ACA Act* was replaced by the *CATSI Act*. For instance, the board of directors of an Indigenous corporation registered under the *CATSI Act* may make decisions that go against the wishes of the majority of the members of that corporation. The majority of members are not in control of the board.<sup>180</sup> In *Nyul Nyul Aboriginal Corporation v Dann*,<sup>181</sup> a decision under the *ACA Act*, the court noted that the fact that a corporation is created to serve the interests of its Indigenous members does not change the fact that the members of the governing committee — under the *CATSI Act* now the board of directors — are in charge of the running of the organisation.<sup>182</sup> Consequently, even though an Indigenous corporation is created to serve the interests of the Indigenous Australians who are its members, members of the corporation may not have a say in its management.<sup>183</sup>

This provision is tempered by the fact that it is a replaceable rule.<sup>184</sup> The constitution of an Indigenous corporation may limit the power of the board of directors and empower members to have a say in the management of the business. For such a clause to be introduced successfully into the constitution of an Indigenous corporation, however, it must be approved by the Registrar of Indigenous Corporations.<sup>185</sup> The degree of flexibility in the application of this provision thus depends on whether the Registrar will approve or reject corporations' attempts to include alterations of the provision in their constitutions.

Further, like its predecessor, the *CATSI Act* imposes a number of directors' duties (akin to those in the *Corporations Act 2001* (Cth)) which are unknown in or inconsistent with Indigenous culture and practice. As a result, these duties have not been well understood by Indigenous office holders.<sup>186</sup>

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<sup>179</sup> *Review of the ACA Act 1976* (1996), above n 53, 53.

<sup>180</sup> Section 274-1 of the *CATSI Act* provides that the business of an Indigenous corporation is to be managed by or under the direction of the directors, who may exercise all the powers of the corporation except any powers that are required by the Act or the corporation's constitution to be exercised in general meeting.

<sup>181</sup> (1996) 133 FLR 359.

<sup>182</sup> *Ibid* 373.

<sup>183</sup> Mantziaris and Martin, above n 118, 202.

<sup>184</sup> *CATSI Act* ss 274-1, 60-1.

<sup>185</sup> *Ibid* ss 26-1 (new constitution), 69-30 (change to existing constitution). Here the *CATSI Act* differs from the *Corporations Act 2001* (Cth), which allows the members of a corporation to decide upon the internal governance rules that will apply to the corporation without requiring these to be approved by the Australian Securities and Investments Commission ('ASIC'), the corporate and financial services regulator under that Act.

<sup>186</sup> Mantziaris and Martin, above n 118, 206.

Through its introduction of the concept of replaceable rules, the *CATSI Act* has gone some way towards recognising that internal accountability in Indigenous corporations may be best achieved when members are permitted to incorporate their own concepts of membership, leadership and decision-making into the corporation. However, time will reveal whether in its application of the provisions of the *CATSI Act* Australia has achieved an appropriate compromise between Indigenous and Western cultures.

## VII CONCLUSION

Closing the socioeconomic gap between Indigenous and non-Indigenous Australians is crucial. Australian's endorsement of the *UN Declaration* is one step towards achieving this goal. However, the next step is to ensure that the themes of the *UN Declaration* are reflected in our laws.

The *CATSI Act* and its predecessor the *ACA Act* have both attempted to empower Indigenous Australians by providing them with a business structure specifically applying to Indigenous people. However, the two pieces of legislation have had different aims. While the objective of the *ACA Act* was to provide Indigenous Australians with a quick and flexible mode of incorporation, the *CATSI Act* has sought to modernise Indigenous corporations while continuing to take into account the specific needs of Australia's Indigenous people.<sup>187</sup> The Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) noted that the new legislation endeavours 'to improve governance and capacity in the Indigenous corporate sector'.<sup>188</sup> To achieve this, the new legislative framework maximises its alignment with the *Corporations Act 2001* (Cth) where possible while accommodating the specific cultural practices of Indigenous people.<sup>189</sup>

This approach has ensured the subordination of the Indigenous legal system to the Western legal system. The ongoing determination of what constitutes good governance within the Indigenous culture will necessitate continuing debate on values and cultural norms and desired social and economic outcomes. Where the differing values and traditions of Indigenous communities may be duly recognised and given expression within the constitutions of their Indigenous corporations, good governance should be accommodated in a fashion that does not undermine Indigenous cultural beliefs. Consequently, the *CATSI Act* should be reviewed to ensure that the legislation takes into account the principal aims of the *UN Declaration*.

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<sup>187</sup> Office of the Registrar of Indigenous Corporations, above n 161.

<sup>188</sup> Revised Explanatory Memorandum, above n 144, ii.

<sup>189</sup> *Ibid* [1.7].