

1992

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ABORIGINAL COUNCILS AND ASSOCIATIONS
AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Aboriginal and Torres Strait Islander Affairs,
the Honourable Robert Tickner MP)

ABORIGINAL COUNCILS AND ASSOCIATIONS AMENDMENT BILL 1992

OUTLINE

The Aboriginal Councils and Associations Act 1976 provides a mechanism whereby Aboriginal and Torres Strait Islander groups may incorporate as Councils or Associations in a relatively uncomplicated and inexpensive manner. Associations can be formed for a wide variety of purposes including business enterprises. No Councils have been incorporated to date, however, the Councils' provisions are intended to provide for community services for Aboriginals and Torres Strait Islanders living within specific Council areas. As incorporated bodies, these groups are eligible for funding from the *Aboriginal and Torres Strait Islander Commission* and from other Government agencies.

Since the Act came into operation in 1978 there has been considerable non compliance with the accountability provisions of the Act. The proposed amendments are directed at increasing the level of accountability and the overseeing of the affairs of incorporated bodies.

Amendments to Part 111 of the Act

The amendments to Part 111 of the Act apply to Aboriginal Councils and are designed to complement some of the changes described below made in respect of Associations.

Amendments to Part 1V of the Act

The amendments to Part 1V of the Act are designed to enable the Registrar to have greater control over incorporation, Rules, financial records, meetings, and conduct of Associations; to impose certain obligations (eg honesty and diligence) and prerequisites for membership on members of Associations and to enable the Registrar to arbitrate in disputes between Associations and their members. These amendments will also require that Associations formed for non business purposes have a larger minimum number of members.

Amendments to Part V of the Act

The amendments to Part V of the Act will provide for the appointment of Administrators at the instigation of the Registrar of in lieu of the previous system of judicial management. The Registrar is to have the power to investigate to apply to the Federal Court for an injunction and to petition the Court for a winding up.

FINANCIAL IMPACT STATEMENT

It is expected that the functions and jurisdiction of the Office of the Registrar will expand in relation the Registrar's investigatory and arbitration roles. This will require increased resources but will be offset by better efficiency of operations.

NOTES ON CLAUSES

Clause 1 - Short title

This clause would provide that the Act may be cited as the Aboriginal Councils and Associations Amendment Act 1992.

Clause 2 - Commencement

This clause would provide that the Act will commence on the day on which it receives the Royal Assent, with the exception of clause 13, which would commence on a day to be fixed by Proclamation or otherwise on the first day after the expiration of six months after the date of Royal Assent.

Clause 3 - Functions and powers of Registrar

This clause would provide that section 5(1)(c) of the Principal Act (which limits the arbitration function of the Registrar to corporations which have provided for this function in their Rules) refer to Aboriginal Councils not to Aboriginal Associations. This is consequential upon the insertion (effected by clause 13) of section 58A in the Principal Act.

Clause 4 - Delegation by Registrar

This clause would extend the class of person to whom the Registrar may delegate his powers from a "Deputy Registrar" to a "person". The reason for this extension is because of the remote geographical location of many Aboriginal corporations.

Clause 5 - Accounts, records and financial statements

This clause would omit subsections (2) (3) and (4) of section 38 of the Principal Act. It would substitute subsections (2), (3) (4), (5), (6), and (7), thereby compelling an Aboriginal Council to indicate its compliance with the Act.

The new subsection 38(2) would require an Aboriginal Council to prepare a Council's Report setting out (a) a statement that the Council has complied with its obligations, (b) a balance sheet, (c) an income and expenditure statement and (d) an updated list of members.

The new subsection 38(3) would require a person authorised by the Registrar to (a) examine (i) whether the Council has complied with its obligations under the Act, Regulations and Rules (ii) whether the balance sheet and expenditure statement are based on proper records and to (b) draw the attention of the Council to any irregularities.

The new subsection 38(4) would require that a copy of the Council's and Examiner's Report be filed with the Registrar as soon as practicable.

The new subsection 38(5) would require that the Council must (a) if so required make the accounts and records of the Council available to the Registrar and (b) make a copy of the Council's Report and the Examiner's

Report available for inspection at all reasonable times by adult Aboriginals in the area.

The new subsection 38(6) would extend the date of compliance for those Councils established within three months of the end of the financial year.

The new subsection 38(7) would provide a penalty of a fine of up to \$200 for non-compliance with section 38 without reasonable excuse.

The new subsection 38(8) would provide a defence against non compliance if a person could prove he did not aid, abet or was not knowingly a party to the contravention.

Clause 6 - Examination of documents

This clause would repeal section 39 of the Principal Act and substitute a new section 39. The new subsection 39(1) would allow the Registrar to cause a person so authorised for the purposes of the section to examine the documents of an Aboriginal Council and to report to the Registrar on the results of that examination. This will considerably widen the inspection powers of the Registrar since the term "document" is defined in the new subsection 39(7) as including any document relating directly or indirectly to the operations of the Council.

The new subsection 39 would also (2) allow the authorised person to have full access to the documents of the Council; (3) allow him to make copies; (4) allow him to require a third party to answer questions or produce documents; (5) provide for a penalty not exceeding \$200 for failure to comply with a requirement under subsection (4); (6) provide for a penalty not exceeding \$1500 for knowingly providing a false or misleading statement case under subsection (4); (7) require a person to answer incriminating questions but disallow the use of that response in evidence other than proceedings for an offence against that section; and (8) require production of authority of the authorised person.

Clause 7 - Registrar may require compliance with the Act

This clause would repeal section 40 of the Principal Act and substitute a new section 40 which would provide that the Registrar may serve a notice on the public officer of a Council to require that Council to take action for the purpose of compliance with the Act, Regulations or Rules if the Registrar suspects on reasonable grounds that (a) an Aboriginal Council has failed to comply with a provision of the Act, regulations or Rules or (b) there has been financial irregularity in the affairs of the Council.

Clause 8 - Applications for incorporation of Associations

This clause would amend section 43 of the Principal Act by inserting a new paragraph 43(3)(ea) which will require an application for incorporation of an Association to state the matters for which the Rules are to provide in relation to meetings of the Association.

Clause 9 - Power of Registrar to issue certificate of incorporation

This clause would omit subsection 45(3) of the Principal Act and insert a new subsection 45(3) which will allow the Registrar to refuse to issue a certificate of incorporation if the Rules of the Association are (a)

unreasonable or inequitable or (b) do not make sufficient provision to give members effective control over the running of the Association.

This clause would insert a new subsection 45(3A) which would retain the present required minimum number of 5 people only in the case of Associations which are formed wholly for business purposes or which are formed principally for the purpose of owning land or holding a leasehold interest in land. All other Associations will be required to satisfy the Registrar that they will have at least 25 members.

Clause 10 - Rules of Incorporated Aboriginal Associations

This clause would add a new subsection (2) to section 47 of the Principal Act. This new subsection would have the effect of creating contractual obligations between (a) the Association and each member; (b) the Association and the public officer; (c) the Association and each member of the Governing Committee, and (d) between all members. This new subsection is modelled on the *Corporations Law*.

Clause 11 - Disqualification from membership of the Governing Committee

This clause would insert several new subsections which would impose new duties upon members of the Governing Committee and disqualify certain persons from membership.

The new subsection 49B(1) would provide that a person cannot be elected or continue to hold membership of a Governing Committee if convicted of an offence and sentenced (a) in cases of fraud or misappropriation of funds to imprisonment for 3 months or longer or (b) in any other case to imprisonment for one year or longer. The new subsection 49B(2) would exempt a person from this requirement if (a) at least 5 years have elapsed since conviction and (b) the person is not serving a term of imprisonment. The new subsection 49B(3) would allow the Registrar to declare that subsection 49(1) does not apply in a particular case. The new subsection 49B(4) would allow an appeal to the Minister if the Registrar declined to exercise his power under subsection 49B(3). The new subsection 49B(5) would require the Minister to consider the appeal and either declare that subsection 49(1) does not apply to the person or refuse to make the declaration.

The new subsection 49C would impose the requirement upon members of Governing Committee to act honestly and diligently.

The new subsection 49D would require (1) disclosure of pecuniary interests; (2) the recording of such disclosure in the minutes and (without approval from the Committee) the absence of a person who has disclosed pecuniary interests from any Committee deliberations concerning that disclosure, or the taking part in any decision of the Committee on that matter.

The new subsections 49E(1) and (2) would require a member of the Governing Committee to cease holding office on bankruptcy or insolvency unless the Registrar otherwise declares.

Clause 12 - Register of members

This clause would increase the penalty for non compliance with section 58 of the Principal Act from \$50 to \$200 and would add new subsections

(3) - (6) to that section. These new subsections would require (3) notification after each 30 June and before each 31 December by the Governing Committee to the Registrar of a list of names and addresses of all members of the Association; (4) compliance on the part of the Governing Committee with a request by the Registrar at any time to produce an updated list of names and addresses of members; (5) Failure to comply with this requirement without reasonable excuse would constitute an offence (6) unless a member of the Governing Committee could prove he did not aid or abet, or otherwise was not a party to that contravention.

Clause 13 : Arbitration by Registrar; General and Special Meetings

This clause would insert new sections 58A and 58B. The new section 58A would (1) allow settlement of disputes between an Association and its members to be settled by arbitration; (2) allow the Registrar to arbitrate upon application by the parties in (2) a dispute between members or (3) a dispute between an Association and its members (4) the Registrar or his delegate to arbitrate (5) restrict liability of an arbitrator; (6) require arbitration to be conducted in accordance with the Regulations and (7) allow a party to an arbitration to initiate court action unless the court otherwise orders.

The new section 58B would (1) require the Governing Committee to call and conduct annual general meetings and special general meetings of the Association as provided for in the Rules; (2) allow an aggrieved member to request a special general meeting which must be called unless the Registrar considers the request to be frivolous, unreasonable or contrary the interests of members; (3) allow the Registrar to call a special general meeting if the same has not been held after 14 days of advertisement; (4) allow the Registrar to call a special general meeting if he is of the opinion that the same is necessary; (5) allow the Registrar to call a special general meeting if requested to do so by 5 or more members or not less than 10% of total membership; (6) give the Registrar the power to determine the periods of notice for meetings, having regard to the special needs of the Association; (7) disallow voting at a meeting called by the Registrar by a person who became a member after incorporation of the Association and whose name does not appear on the list supplied to the Registrar pursuant to subsection 58(3) or (4) unless the Registrar has otherwise determined; (8) require the Rules to make provision for (a) intervals between meetings, (b) quorums, (c) procedure and (d) voting by proxy; and (9) allow the Registrar to delegate his powers under this section.

Clause 14 - Accounts records and financial statements

This clause would omit subsections (2), (3) and (4) of s 59 of the Principal Act and would substitute new subsections (2), (3), (4), (5), (6) (7). These new subsections would provide more appropriate standards for Aboriginal Associations and would require the following: (2) a Report prepared by the Governing Committee which shows (a) compliance with the Act, Regulations and Rules, (b) a balance sheet, (c) an income and expenditure statement and (d) an updated list of members; (3) an authorised person to examine that Report in order to (a) ensure compliance with the Act, Regulations and Rules and (b) give the Governing Committee the results of that examination; (4) the filing of a copy of the Report with the Registrar at least prior to 31 December; (5) the making of a copy of the Report and the examiner's Report available at the next annual general meeting and for inspection by the Committee; (6)

that Associations incorporated within three months before the end of the financial year will comply before the end of the following financial year; (7) a penalty for non-compliance and (8) a defence against non compliance in the case of a person who did not aid, abet or knowingly non comply.

Clause 15 - Exemption from section 59 in certain circumstances

This clause would increase the penalty for non compliance with section 59 of the Principal Act.

Clause 16 - Examination of documents; compliance with the Act

This clause would repeal section 60 of the Principal Act and insert a new section 60 which would (1) allow the Registrar at any time to cause an authorised person to examine the documents of an Association and to report to the Registrar on the results of that examination; (2) entitle the authorised person to full access to all documents of the association at all reasonable times; (3) allow the authorised person to make copies and take extracts; (4) require information from third parties in possession of relevant information; (5) provide a penalty of up to \$200 for failure to comply without reasonable excuse; (6) provide a penalty of up to \$1500 for making a misleading statement; (7) require a person to answer incriminating questions but disallow the use of those responses as evidence in proceedings other than for an offence against that section; (8) require the authorised person to produce written authority from the Registrar and (9) define 'document' as any document relating directly or indirectly to the operations of the Association.

This clause would also insert new subsections 60A(1) and (2) which would allow the Registrar, upon reasonable suspicion that an Association has failed to comply with the Act, Regulations or Rules or, or that there has been financial irregularity, by notice served on the public officer to require the Governing Committee to take the action specified in that notice.

Clause 17 - Registrar may apply for injunctions

This clause would repeal section 61 of the Principal Act and insert new subsections 61 (1) (2) and (3) which would give the Registrar the power, after requiring the Association to show cause why such application should not be made to apply for an injunction requiring the member or members to cease contravening the provisions of the Act, Regulations or Rules.

Clause 18 - Winding up on petition of Registrar

This clause would insert a new section 62A which would allow the Registrar to petition the Federal Court for the winding up of an association if (a) so recommended by an Administrator or (b) if in the public interest.

Clause 19 - Winding up by Court

This clause would omit paragraph 63 (2)(f) and subsection 63(5) of the Principal Act. This amendment is consequential to clause 17.

Clause 20 - Heading to Part V

Clause 18 would replace the heading "Judicial Management" in Part V of the Principal Act with the heading "Administration".

Clause 21 - Investigation by the Registrar

This clause would repeal section 68 of the Principal Act and insert a new section 68 in its stead.

The new section 68 would provide that (1) the Registrar may investigate the affairs of an Aboriginal corporation if the Registrar suspects that (a) the corporation has failed to comply with a provision of the Act, Regulations or Rules or (b) there has been irregularity in the financial affairs of the corporation; (2) the Registrar may require the attendance of any person whom he believes to have knowledge of the affairs of the association and may require production of documents which are in the possession of the person or to which the person has access; and (3) a person is not excused from answering incriminating questions but those responses may not be used as evidence in any proceedings other than proceedings for an offence against that section.

Clause 22 - Offences

This clause would amend section 69 of the Principal Act by adding the offence of failure to produce a document and by increasing the penalty from \$50 to \$200. It would also substituting "68(2)" for "68(3)" in the Principal Act as a corrective measure.

Clause 23 - Administrator

This clause would repeal sections 71 to 77 of the Principal Act and insert new sections 71 - 77D. These are necessary measures which will enable the appointment of an Administrator to expeditiously ascertain the factual situation and run the Corporation until such facts are known.

The new subsection 71(1) would allow the Registrar to issue a notice to show cause why an Administrator should not be appointed in respect of the Corporation within a reasonable period of time.

The new subsection 71(2) would allow the appointment of an Administrator, with the approval of the Minister, if one of the following grounds have been established: (a) trading at a loss for 6 of the preceding 12 months; (b) failure of a member of the Governing Committee to comply with a provision of the Act, regulations or Rules, (c) action of members of the Governing Committee in their own interests or in a way that appears unjust or unfair to members, (d) the interests of members and creditors so require; (e) in the case of a Council, the interests of adult Aboriginals in the area so require or (f) the public interest so requires.

The new subsection 71(3) would require the Registrar to obtain the approval of the Minister before appointing an Administrator.

The new section 72 would require the Registrar to Gazette the appointment of an Administrator.

The new section 73 would provide that on the appointment of an Administrator: (a) the office of public officer of a corporation becomes vacant; (b) in the case of a Council all offices of Councillors become vacant and (c) in the case of an Association all offices of members of the Governing Committee become vacant.

The new subsection 74(1) would provide that the Registrar may determine the amount of remuneration of the Administrator.

The new subsection 74(2) would provide that the Registrar may direct the manner in which remuneration and charges of the Administrator are to be borne and charge the corporation for remuneration of an Administrator.

The new section 75 would provide that the Administrator is responsible for the affairs of the corporation and has the functions and duties of the public officer.

The new section 76 would provide that the Administrator may (1) cancel or vary contracts with the corporation after (2) having had regard to the principles of natural justice and giving due regard to representations made.

The new section 77 would allow a person to apply to the Administrative Appeals Tribunal for review of a decision under the new section 76. The new section 77A would (1) require the Administrator when making a decision under section 76 and giving notice in writing to inform that person that he may make application to the Administrative appeals Tribunal for review of that decision, provided that (2) failure to so notify would not affect the validity of the decision of the Administrator.

The new section 77B would indemnify an Administrator from actions or claims arising out of the exercise of his powers under the Act.

The new section 77C would require an Administrator to provide the Registrar with information as requested.

The new section 77D would require the Registrar to conduct an election to fill the offices of Councillors or Governing Committee if satisfied that it is no longer necessary for the Administrator to conduct the affairs of the corporation.

The new section 77E would provide that if the Registrar cancels the appointment of one Administrator and does not immediately appoint another then the conduct of the affairs of the corporation vests in the Council or the Governing Committee, and s 36 or 56 of the Act would apply as if the office of public officer had become vacant.

Clause 24 - Offences not to be daily offences

This clause would ensure that subsection 4K(2) of the Crimes Act 1994, which creates daily or continuing offences, does not apply to offences under this Act.

Clause 25 - Transitional

This clause would ensure that the amendment in section 45(3A) requiring 25 members in lieu of the 5 members previously required would not apply retrospectively.

Schedule

The Schedule to the Bill substitutes existing references to the Companies Act with references to the Corporations Law.

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