



Australian Government

Registrar of Aboriginal Corporations

Response by the Office of the Registrar of Aboriginal Corporations to the Review of ATSIC

The Office of the Registrar of Aboriginal Corporations (ORAC) has had the opportunity to review the recommendations of the independent Review of the Aboriginal and Torres Strait Islander Commission (ATSIC) that was presented to the Government in November 2003. ORAC's response is below.

Further information about the Review of ATSIC can be found at www.atsicreview.gov.au

Response to Recommendations 50 and 51:

ORAC understands that the reason that the Review recommended that ORAC not do training and capacity building is that there "is potential for a conflict of interest to arise if ORAC continues with both roles" i.e. trainer and regulator (refer to page 37 Review Report). Therefore the Review recommends that ATSIC (and other training bodies) do this work (refer to recommendation 51).

ORAC is aware of the potential for conflict of interest in relation to its regulation work and some activities, and avoids these activities i.e. conflict mediation. However there is no potential for conflict of interest to arise in training since the training program does not provide advice to corporations or individuals associated with corporations about specific corporation matters. The training program educates participants as individuals about best practice corporate governance and tests individuals for their competencies in corporate governance.

Where specific corporation matters arise during training, they are referred to the appropriate ORAC officer for follow up according to the Act. A senior ORAC officer attends all training to support the trainer and provide participants with access to accurate information.

It should be noted that many regulators are acutely aware of the need to work on preventing non-compliance and do substantial training for this reason. For example the Australian Taxation Office, other corporate regulators and the Australian Consumer and Competition Commission all conduct training. Several of these agencies are exploring the possibility of conducting coordinated training arrangements with ORAC.

The Review Report notes that feedback to the Review indicated that ORAC's training (which was piloted in Queensland and the Torres Strait during 2003, and will be conducted in the Northern Territory and Western Australia, and all capital cities

during 2004) is well received and supported (refer to pp 37 and 68 in the Review Report).

The need for training and capacity building is so great that ORAC welcomes a recommendation for Aboriginal and Torres Strait Islander Services (ATSIS) to also do more – provided it has the funds available.

It should be noted that ORAC's training is a small but highly targeted program which is meant to complement the very large program funded by the Commonwealth through the States. ORAC's training is required to be evaluated in mid 2005, and ORAC will ensure that the issue of conflict of interest is covered in the Terms of Reference for this review.

Response to Recommendation 52:

The issue of whether the *Aboriginal Councils and Associations Act 1976* (ACA Act) should be phased out and corporations currently under it moved elsewhere was considered in the recent independent Review of the ACA Act. The review found that at this stage a reformed ACA Act is required to ensure the appropriate level of regulation and support for many Indigenous corporations, particularly those in remote areas. This finding has been endorsed by the Australian Government.

In its submission to the Review of the ACA Act, the Australian Securities and Investments Commission (ASIC) expressed reluctance for Indigenous corporations to be transferred to the *Corporations Act 2001* if they required any special assistance.

Indigenous corporations under the ACA Act largely fall “under the radar” of ASIC due to their relatively small size. However appropriate regulation and support is required since the collapse of Indigenous corporations can have devastating consequences for the communities that these corporations serve out of proportion to their net worth. Most state and territory regulating bodies do very little regulation due to funding and statutory issues.

Changes to the ACA Act include provisions to enable the Registrar to refuse to incorporate e.g. where a corporation is more appropriately incorporated with another Act due to its size and/or purpose. ORAC works closely with the National Forum of incorporating agencies and is in the process of developing a Memorandum of Understanding with ASIC to facilitate a coordinated and integrated approach to Indigenous corporations in Australia.

Recommendation 52 may be partly underpinned by a misconception that ORAC promotes incorporation and has caused the unsustainable numbers of Indigenous corporations. ORAC agrees that rationalisation of the number of Indigenous corporations is required. There will always be a legitimate need for Indigenous corporations; however, the current number in some regions and sectors is unsustainable.

ORAC is currently in the process of identifying inactive corporations for de-registration and expanding its pre-incorporation services to assist groups in

considering alternatives to incorporation where appropriate. However, groups can easily incorporate elsewhere under other state and territory incorporations regimes.

ORAC's experience is that government and funding bodies' policies and programs have historically driven the high number of corporations - the monthly tracking of applications for incorporations tends to follow funding cycles of the big funding agencies. Governments, including central agencies, audit offices and funding bodies need to change their focus on requiring incorporation for every group and sub-group receiving public funds.

There are many alternatives to the status quo e.g. by enabling small groups to receive funds through capable and responsive resource or regional agencies. It is proposed that ORAC's new legislation offer pathways for rationalising the number of corporations such as easy amalgamations and more support for regional corporations, which are able to service and support non-incorporated groups.

In addition, ORAC is proposing that it have the power to call conferences to facilitate solutions to systemic issues such as the growth in Indigenous corporations, reporting back to the Minister and through ORAC's Annual Report.

Response to Recommendation 53:

During the conduct of the Review, ORAC investigated issues related to 'business turnaround'. Associations linked to this approach were contacted and they indicated that the Indigenous sector may not be able to sustain commercial business turnaround work.

In order to enable 'business turnaround' ORAC understands that there is some interest in pursuing legislative change in the Corporations Act to enable a compulsory moratorium on calling in unsecured debts in certain circumstances. Amendments to the Corporations Act of course need to be raised with Commonwealth Treasury, which administers the Corporations Act. An issue relevant to reforming the Corporations Act and the ACA Act will be the relative cost and benefit of potentially expensive and widespread commercial 'business turnaround' to the corporate sector.

The issue that has been raised with ORAC is whether the ACA Act should create a compulsory moratorium on unsecured debts in certain circumstances. This proposal is of less relevance to corporations under the ACA Act than mainstream corporations. In practice most 'big' creditors of Indigenous organisations are government agencies, which are usually ready to agree to such a moratorium where the community can benefit. Where cost/benefit justifies it, ORAC would initiate an Administration, the primary purpose of which is to achieve 'business turnaround'; otherwise liquidation would probably be the available option. An added issue is that if Indigenous corporations under the ACA Act were the only ones which limited unsecured creditors' rights, this may jeopardise those corporations' access to credit. Therefore ORAC's view is that any statutory change to the ACA Act for supporting improved business turnaround would be best done at the same time as any such change to the Corporations Act.

15 January 2004