Output 5.5
Business as Separate Legal Entities

National Program Management: Office of the Registrar of Aboriginal Corporations

The Aboriginal Councils and Associations Act 1976 (the Act) establishes the Registrar of Aboriginal Corporations, an independent statutory office holder who is appointed by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister). Ms Laura Beacroft, a solicitor, was appointed to the position from 1 August 2002 for 3 years. Mr Joe Mastrolembo was acting Registrar until 31 July 2002.

The Registrar is responsible for the administration of the Act. The Act has been subject to major review over the last two years and may be amended in the near future.

Currently the Act provides some scope for flexible incorporation in line with cultural practices while ensuring appropriate monitoring and regulation of Indigenous corporations. A wide range of integrated services are offered to corporations associated with the Act including: pre-incorporation, incorporation, monitoring and examination, regulation, dispute assistance, members’ complaints services, searches of the Public Register and training. Incorporation under the Act is largely voluntary; however, some corporations—e.g. the Prescribed Bodies Corporate set up under the Native Title Act—are required to incorporate under the Act.

Number and characteristics of corporations

At 30 June 2003 there were 2861 corporations incorporated under the Act. After rapid growth in Indigenous incorporations under the Act in the early nineties, the numbers of new incorporations have remained steady for some years—see Table A. It is estimated that there are at least as many Indigenous corporations incorporated under other legislation.

Corporations vary in size, from unfunded corporations through to corporations with millions of dollars of income and assets. The functions of these corporations are diverse, ranging from providing services through to non-operating land holding corporations. Many are multi-functional. The majority under the Act are located in remote areas—see Tables B, C and D and Figures 1 and 2. Most are funded by public funds. However, some generate significant private income e.g. corporations linked to mining compensation or the Indigenous arts industry. Many hold significant community assets that were funded publicly but are now held privately by corporations under the Act.

The major known funding bodies of corporations under the Act are ATSIC (funding 411 corporations for approximately $369m, which represents approximately 41.5 per cent of ATSIC grant funds in 2002-03) and the Office of Aboriginal and Torres Strait Islander Health (OATSIH), Department of Health and Ageing (funding 75 corporations for approximately $68.3m in 2002-03). Other sources of funds include a wide range of Australian Government agencies and State/Territory agencies especially in Western Australia and Queensland.

Powers of the Registrar
The Act vests powers to intervene with the Registrar, similar to those exercised by the Australian Securities and Investments Commission (ASIC). Some of the Registrar’s powers require ministerial approval before they can be exercised. The Registrar as a Statutory Officer is not under direction for decisions they make under the Act. The Registrar aims to exercise their powers and functions in accordance with the Act, in a manner that responds to requirements and risks of Indigenous corporations and which builds independence and capacity of Indigenous individuals, groups and corporations.

External scrutiny
Some decisions made by the Registrar and Administrators appointed by the Registrar are subject to various processes for scrutiny, including that available through the Commonwealth Ombudsman, the Privacy Commissioner, *Freedom of Information Act 1982* (FOI Act), *Administrative Decisions (Judicial Review) Act 1977* and an appeal to the Administrative Appeals Tribunal. No applications for review were received during the year. There were two applications under the FOI Act.

Relationship to ATSIC-ATSIS
Although not under direction for statutory decisions, the Registrar is subject to performance management and review. The Registrar has a performance agreement as part of an Australian Workplace Agreement with the CEO of ATSIC-ATSIS. The Registrar was supported by 23 staff at 30 June 2003, in the Office of the Registrar of Aboriginal Corporations (ORAC). These were ATSIC staff and are now ATSIS staff. Funding for the office (approximately $3.98m for 2002-03) was within the ATSIC appropriation and not quarantined. The Registrar is a member of the ATSIC (from 1 July, ATSIS) Corporate Leadership Group for the purposes of participating in decisions on administrative matters. Various arrangements are in place, including a formal agreement, to enable ORAC and ATSIC-ATSIS to manage possible tensions and conflicts in its placement within ATSIC-ATSIS.

Annual report
Although the Act does not require it, ORAC publishes an Annual Report, in addition to contributing to the ATSIC Annual Report each year. Since 2001-02, the Minister has tabled the ORAC Annual Report in accordance with standard practice for government agencies.

Other agency contributions
ORAC’s primary clients are individuals, groups and corporations linked to the Act and also users of the Public Register maintained by ORAC on Indigenous corporations under the Act. ORAC has close working relations with agencies with interests in funds and/or assets held by corporations e.g. ATSIC-ATSIS and OATSIH. In recent years ORAC has developed a relationship with the ASIC and the State/Territory incorporation and regulation agencies to foster better coordination nationally of incorporation and regulation services and responses. During 2002-03 ORAC had a focus on identifying and targeting key systemic issues for Indigenous corporations and built closer relationships with the following agencies for this purpose: Australian Taxation Office, agencies linked to aged care, agencies linked to the COAG whole-of-government trial sites, and State/Territory government agencies in Queensland, Northern Territory and Western Australia regarding initiatives for Indigenous people in those jurisdictions.
Performance in 2002-03
ORAC has a three-year Corporate Plan and Service Charter in place until the end of 2003-04. In summary, they establish ORAC’s performance priority as providing quality services in line with its statutory functions under the Act. A summary of ORAC’s performance follows.

Accessibility and responsiveness
The majority of corporations under the Act are located in remote areas, which demonstrates the success of the Act in meeting the needs of some of the most disadvantaged communities in Australia. ORAC provides a personal service to clients. Much of the initial communication with ORAC is through the toll free telephone service, which has averaged over 12 000 calls per year. ORAC is encouraging use of its website, and electronic communication with corporations is increasing. Where necessary, ORAC will work on site with clients. During the year the foundation was laid for enhancing ORAC’s communication with remote communities through language initiatives, case coordination and case management, where appropriate, and expanded field work.
ORAC staff have ongoing training on quality service to Indigenous clients, and during the year began development of a Guide to Good Practice for ORAC. A complaints system is in place at ORAC to ensure that client issues are responded to. During 2002-03 one verbal complaint was received and dealt with.

Pre-incorporation and post-incorporation assistance
New incorporations have remained steady, largely driven by requirements of funding agencies (averaging 180 per year for the last three years – refer Table E and Figure 3). Pre-incorporation and post-incorporation requests for information support and referrals doubled from the previous year as a result of ORAC expanding its support to try to resolve problems earlier. Members’ complaints and dispute resolution assistance remained steady in number (123 in 2002-03). However, due to the increasing complexity of complaints and disputes and the serious consequences they can have for corporations if unresolved, ORAC is devoting more resources to assist with these matters. Changes to constitutions remained steady in number; however, ORAC is devoting more resources to this service as part of its new focus on preventing problems through better designed corporations.

Monitoring, examination and regulation
Under the Act all corporations are required to submit certain documents to ORAC which are placed on the Public Register, including a list of members and financial reports (reports), unless the corporation is exempted by the Registrar. Approximately 24 per cent of corporations have provided key reports under the Act for 2000-01 and 2001-02 (note that reports are not due yet for 2002-03). Compliance is set out in Table F and Figure 4. The rate of compliance with the Act for ATSIC and OATSIH funded corporations is higher than the average. There has been a significant increase in the number of corporations obtaining exemptions from some reporting requirements, in recognition of their lack of capacity to report i.e. if they are not funded an audited financial statement would not normally be required and an exemption would be granted.
However, the majority of corporations (76 per cent) remain non-compliant with reporting requirements under the Act. During the year ORAC analysed non-compliance and has developed a plan for appropriate follow up. Many of the non-
compliant corporations are not funded at all, hold land only and have no capacity to even apply for an exemption. Reforms to the Act will enable more streamlined exemptions for some reporting i.e. exemptions for audited financial statements where warranted. Arrangements with funding bodies have been enabling ORAC to establish which corporations are technically non-compliant but have in fact submitted reports required under the Act to funding bodies and are operating well. Avoiding duplicate reporting by corporations is an aim of the reformed Act. Corporations that should be compliant under the Act are being targeted for regulation such as formal follow-up and examination. Non-compliant corporations that are no longer operating are being targeted for de-registration.

In 2002-03 ORAC initiated 34 examinations of corporations which is consistent with previous years. Corporations for examination were selected in response to evidenced problems or as part of a program of rolling examinations responding to risk analysis involving criteria such as size, purpose, time since last examination, compliance status and history of member or other complaints. In summary, of the 34 examinations initiated, at the time of writing the Registrar had instigated the following follow-up:

- 1 or 3 per cent are operating well and require no further action;
- 3 or 9 per cent remain under consideration for further action;
- 19 or 55 per cent required rectification of less serious matters, involving the issue of a Section 60A Notice under the Act;
- 8 or 23 per cent raised serious matters and have been required to advise why an Administrator should not be appointed, involving the issue of a Section 71 Notice under the Act. Of these 8, 5 Administrators were subsequently appointed, and 3 Section 60A Notices were subsequently issued;
- 2 or 6 per cent required a liquidator to be appointed (these were both corporations where funding had been withdrawn by the relevant agency and where significant liabilities still existed);
- 1 or 3 per cent required the Registrar to convene a Special General Meeting under Section 58 of the Act.

Attachment 1 contains a list of corporations where examinations were initiated during 2002-03 and a record of the follow-up action taken by the Registrar at the time of writing, not necessarily during 2002-03. Attachments 2 and 3 show the corporations which were issued with a Section 60A Notice or Section 71 Notice respectively during 2002-03. Note that some of the actions in these attachments are follow up by the Registrar to examinations conducted during 2001-02.

There continued to be a strong emphasis on requiring the corporation to rectify matters of concern rather than appointing an Administrator. Administrators are appointed only as a last resort. Only eight administrations were initiated in 2002-03, as set out in Attachment 4, which is similar to the previous year and half of the highest annual number of 17 in 1998-99. It should also be noted that administrations are usually positively received once arrangements are settled because they offer an alternative to liquidation and aim to achieve turnaround for a struggling corporation. ORAC started the year with 65 liquidations in progress, reduced this number to 44 and is continuing to aim to reduce the time that liquidations take. Refer to Attachment 5. Attachment 6 details the liquidations finalised during 2003-03. De-registrations continued to be initiated, and 115 were completed during the year, as set out in Attachment 7.

Information and training
ORAC delivered 46 information and training sessions, an increase from 35 in the previous year. During the year the information and training program was expanded to include the following governance training:

- three-day workshops which are targeted at highest need sites and groups. Entry is by application, participants sign up to learning agreements and the workshop is highly interactive. The workshop focuses on big issues known to be facing most Indigenous committee members such as managing conflict of interest, meeting duties of governing committee members and requirements of incorporation. The workshop aims to allow participants to ‘bridge’ into accredited training, including the Certificate IV in Business (Governance); and
- Certificate IV in Business (Governance), which is a nationally recognised training package developed specifically for Indigenous people who wish to attain recognised skills in corporate governance and management. It is a competency-based training program which requires participants to demonstrate that they are competent in a range of skills relevant to corporate governance.

Reform of the ACA Act
The issue of whether there should be a special incorporation regime for Indigenous groups was considered during the year. ORAC’s view is that there should be a modernised regime to respond to special requirements and risks facing Indigenous corporations such as:

- supporting the rationalisation of the number of Indigenous corporations;
- strengthening and streamlining the incorporation, monitoring, examination and regulation of Indigenous corporations;
- increasing protection for income and assets held by Indigenous corporations;
- building capacity through enhanced support and training;
- developing integrated and targeted whole-of-agency solutions to systemic issues through the use of a conferencing power;
- lifting accountability standards through increased alignment with key elements of the Corporations Act 2001 (Corporations Act) such as Governing Committee duties and penalties for breaches; and
- enabling a special focus on Indigenous corporations in high-need remote areas where mainstream regulatory services and responses are limited.

The reforms have been developed following two years of extensive consultation, research and collaboration with clients and stakeholders. They are also in line with Government policy, including a commitment to modernise the Act. They respond to issues raised to date in the ATSIC Review (see below), and will streamline services and functions. An up-to-date summary of the proposed reforms can be found at www.orac.gov.au.

At the time of writing the Government was considering its position on the package of reforms to the Act.

Other law reform submissions
The Registrar was invited to provide comments on two law reform projects during 2002-03. The projects were the Queensland Community Governance Green Paper and the review of the New South Wales Associations Incorporation Act 1984. The Green Paper raised a number of key governance issues relevant to the principles of effective governance in Indigenous communities, in particular Deed of Grant in Trust (DOGIT) communities in Queensland. ORAC emphasised that private
corporations such as those under the Act would be a feature of the Indigenous corporate landscape and need to be considered in any reform work. Any improvement in governance requires commitment and cooperation between a range of parties including the Governing Committee members, community members, creditors, auditors, funding agencies and regulators.

The review of the New South Wales Associations Incorporation Act 1984 focused on whether that Act could be improved to better respond to the needs of organisations incorporated under the legislation. ORAC presented comments on how to respond to the needs of corporations that are not-for-profit, largely volunteer-managed and either publicly funded or not funded at all.

**Review of ATSIC**

ORAC submitted a preliminary submission to the Government-initiated Review of ATSIC and, following the release of the *Review of ATSIC Public Discussion Paper, June 2003* (Discussion Paper), a further submission. The issue of direct relevance to ORAC raised in the Discussion Paper was the need to ‘rationalise’ the number of Indigenous corporations. ORAC agreed that rationalisation of the number of Indigenous corporations is required, within the law e.g. the anti-discrimination legislation needs to be respected. 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 incorporate elsewhere.

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 eg by enabling small groups to receive funds through capable and responsive auspicing resource or regional agencies.

It is proposed that ORAC’s new legislation offer pathways for rationalising the numbers such as easy amalgamations and more support for regional auspicing corporations, which then 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, with report back to the Minister and through ORAC’s Annual Report.

**Improving corporate governance**

All of ORAC’s work is geared towards improved corporate governance in Indigenous corporations. During the year ORAC progressed the development of a framework and set of indicators for ‘healthy organisations’, based on evidence-based research from Australia and overseas. This framework will in time be used to broaden out the scope of examinations to cover and assess good governance practices and risks more comprehensively. ORAC proposes that over time report cards on the health of corporations, as measured by examinations against the ‘healthy organisation’ indicators, will be made available on ORAC’s Public Register to better support members of corporations and funding agencies.
People and systems
ORAC focused on building the skills of its staff to improve the quality of its service and in anticipation of reforms to the Act. An enhanced workflow and information management system—the Electronic Register of Indigenous Corporations (ERIC)—was implemented. This has provided smoother servicing for clients and enhanced management information, including the graphs in this report.
Another project initiated in 2002-03 is designed to measurably improve ORAC’s services, processes, systems and procedures. It will involve mapping and measuring the status quo and then identifying and implementing improvements and aligning them to a more modern Act. It will also identify key strategies for sustaining the improvements.
An audit by the Office of Evaluation and Audit (OEA) of the information and training program during the year and an OEA audit of operations in the previous year raised issues about record keeping, management and tracking. The operations audit also identified the need to follow up non-compliant corporations more effectively. All audit recommendations have been implemented or are in the process of being implemented including adopting improved records management systems and a program targeting non-compliant corporations as outlined above.
Output 5.5 Business as Separate Legal Entities: Performance information for outcome, 2002-03 Portfolio Budget Statements

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<thead>
<tr>
<th>Measure</th>
<th>Target in 2002-03</th>
<th>Performance</th>
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<tr>
<th><strong>Quantity</strong></th>
<th><strong>Training and awareness sessions</strong></th>
<th><strong>Examinations under section 60 of the Act, which give the Register power to examine key governance and financial records</strong></th>
<th><strong>Quality</strong></th>
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<tbody>
<tr>
<td>New incorporations</td>
<td>150</td>
<td>183 new incorporations were achieved in a timely manner and with a negligible refusal rate. ORAC is aware of its responsibility not to encourage unnecessary incorporation since it can place a burden on communities and so has also implemented strategies to ensure responsible incorporation in the interests of stronger communities.</td>
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<td></td>
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<td>46 sessions were held during the year. While meeting its target ORAC developed and made ready for pilot, new training options including a three-day workshop and accredited Certificate program.</td>
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<td></td>
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<td>34 examinations were conducted. While meeting its target, ORAC focused on aligning the examination program with risk analysis available from the new workflow and information management system on Indigenous corporations—ERIC.</td>
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<td></td>
<td>45</td>
<td></td>
<td>ORAC’s services and policy work are geared towards improving corporate governance of corporations under the Act in a measured way.</td>
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<td></td>
<td>30</td>
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<td>This target was met.</td>
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<td></td>
<td></td>
<td></td>
<td><strong>Quality</strong></td>
</tr>
<tr>
<td>Improved corporate governance practices by corporations incorporated under the Act</td>
<td>100 per cent</td>
<td>ORAC’s services and policy work are geared towards improving corporate governance of corporations under the Act in a measured way.</td>
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<td>Compliance with timeframes required advising the Minister on</td>
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<td>This target was met.</td>
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Outlook

As indicated above, the Government is considering the package of reforms to the Act developed by ORAC. The proposed reforms to the Act support an emerging new leadership role for the Registrar and ORAC in identifying and responding to opportunities and risks in the Indigenous corporate sector. About half of Indigenous corporations are incorporated under the Act. ORAC has extensive knowledge, skills and data on these corporations and associated systemic issues, coupled with unique statutory powers to assess and intervene where necessary and a growing capacity-building program including training. ORAC is in a unique position to share its knowledge, to identify opportunities and risks relevant to the Indigenous sector, and to deliver and facilitate coordinated and effective responses at local, State/Territory and national levels. ORAC is currently implementing many changes to its operations, processes, systems and relationships to perform this role.

ORAC will also deliver the next phase of training in Governance.

As mentioned above, in line with a Government election promise ORAC has developed accredited and non-accredited training for Indigenous Governing Committee members. Pilots have been conducted in Queensland during August and September 2003 and ORAC intends to roll out the next phase in the Top End and Central Australia from early 2004. This training program is supported by other ORAC initiatives such as the development of Guides to Good Constitutions and an enhanced website with tools and information for members and Governing Committee members. An evaluation will be completed in 2004 to support continuation of the information and training program.