

## EXPLANATORY STATEMENT

### Corporations (Aboriginal and Torres Strait Islander) Determination 1 / 2014

#### Summary

The Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) makes *Corporations (Aboriginal and Torres Strait Islander) Determination 1/2014* (the determination) under subsection 353-10(1) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the Act).

The determination exempts certain classes of Aboriginal and Torres Strait Islander corporations and their directors affected by the uncertain legal efficacy of the registration of their auditors from certain reporting provisions in the Act and the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2007* (the Regulations) to the extent that the corporations and their directors would not otherwise comply.

#### Background

The revised explanatory memorandum of the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (the Bill) indicated that chapter 7 of the Bill implemented review recommendations that the Registrar be able to exempt classes of corporations from the reporting requirements. Chapter 7 enables flexible and responsive administrative practices. Reporting requirements can be adjusted for individual corporations or classes of corporations. Exemptions from the operation of the chapter can be given for specific corporations or classes of corporations.

The revised explanatory memorandum stated that section 353-10 of the Bill is based on section 341 of the *Corporations Act 2001* and provides the Registrar with the power to relieve classes of corporations (or their directors or auditors) from the record keeping and reporting requirements of the chapter, including any regulations made for the purposes of chapter 7 of the Bill.

The Act and Regulations require certain Aboriginal and Torres Strait Islander corporations to obtain and lodge an auditor's report of their annual financial reports from a registered company auditor, audit firm or authorised audit company. Such audit firms and authorised audit companies must, among other things, include registered company auditors as members.

The Australian Securities and Investments Commission (ASIC) is responsible under Part 9.2 of the *Corporations Act 2001* for the registration of auditors. ASIC has advised that the legal efficacy of some registrations are uncertain because the instrument by which it approved the auditing competency standard (issued by CPA Australia and The Institute of Chartered Accountants in Australia) was not lodged for registration under the *Legislative Instruments Act 2003*. The auditing competency standard is likely to have been repealed on 1 October 2006. ASIC has been registering auditors in reliance on the

auditing competency standard since that date. The legal efficacy of those registrations is uncertain.

Section 1299B of the *Corporations Act 2001* specifies criteria that must be met in order for a company to be registered as an authorised audit company under section 1299C of the *Corporations Act 2001*. These include requirements that particular persons associated with the company must be registered company auditors. Given the uncertainty surrounding the registration of persons as registered company auditors since 1 October 2006, there is also uncertainty about the legal efficacy of certain registrations of authorised audit companies since that date.

ASIC advised that, in light of this legal uncertainty, ASIC Class Order [CO 14/757] was made to give prospective relief to the extent possible, so that acts and things that must be done by registered company auditors and authorised audit companies under the *Corporations Act 2001* may also be done by auditors whose registration may have been adversely affected.

ASIC announced in the Explanatory Statement to the class order that the Government will also be introducing remedial legislation to ensure the validity of the registration of auditors in reliance on the standard since 1 October 2006, with effect from their purported registration.

ASIC Class Order [CO 14/757] and its Explanatory Statement are available from the Federal Register of Legislative Instruments (F2014L01082).

The Registrar's exemption determination provides similar relief to the extent possible to Aboriginal and Torres Strait Islander corporations and their directors so that acts and things that must be done by registered company auditors, audit firms with at least 1 registered company auditor or authorised audit companies, under the Act and the Regulations may also be done by auditors whose registration may have been adversely affected.

### **Explanation of the provisions**

Clause 1 specifies the legislation under which the Registrar makes the determination.

Clause 2 specifies the title of the determination.

Clause 3 sets out commencement information for the determination. The determination commences on the later of: the date it is registered under the *Legislative Instruments Act 2003*, and the date of its gazettal.

Section 353-10(4) of the Act requires notice of the making of the determination to be published in the *Gazette*.

Clause 4 contains an exemption under section 353-10(1) of the Act that exempts specified classes of Aboriginal and Torres Strait Islander corporations and their directors from the provisions of Part 7-3 of the Act and

Part 7-3 of the Regulations. The exemption applies to the extent that one or more provisions would not otherwise be satisfied merely because:

- a person is an affected auditor or an affected audit firm or an affected audit company rather than a registered company auditor or an audit firm that has at least 1 member who is a registered company auditor who is ordinarily resident in Australia or an authorised audit company; or
- an act, matter or thing is done by such a person, rather than by a registered company auditor or an audit firm that has at least 1 member who is a registered company auditor who is ordinarily resident in Australia or an authorised audit company.

The effect of the exemption in clause 4 is to allow the provisions of Part 7-3 of the Act and Part 7-3 of the Regulations to be complied with from commencement of the determination as if affected auditors (including affected auditors in affected audit firms) and affected audit companies had been validly registered by ASIC.

Although it operates prospectively, the determination applies regardless of whether the circumstances giving rise to it arose before or after commencement of the determination.

Clause 4 is similar to clause 4 of ASIC Class Order [CO 14/757].

Clauses 5 to 8 set out interpretation provisions for the determination.

Clause 5 defines *specified class* in the determination. The exemption in clause 4 will apply to the specified class described in clause 5, namely to each of the following:

- Corporations registered under the Act and reporting under subdivision 333-A of the Regulations and obtaining an auditor's report under paragraph 333-15.01(2)(a), (b) or (c) of the Regulations from an affected auditor, affected audit firm or affected audit company.
- Corporations registered under the Act and reporting under subregulation 333-16.02(2) of the Regulations and obtaining an auditor's report under paragraph 333-16.02(3)(a) of the Regulations from an affected auditor, affected audit firm or affected audit company.
- The directors of corporations within the classes referred to in paragraph 5(a) or 5(b) of the determination.

Clause 6 defines *affected auditor* in the determination. The definition captures persons whose status as a registered company auditor is uncertain due to the likely repeal of ASIC's approval of the auditing competency standard. The definition excludes persons whose purported registration is purportedly suspended or cancelled. This clause is based on clause 37 of ASIC Class Order [CO 14/757].

Clause 7 defines *affected audit firm* in the determination. The definition captures firms whose status as an audit firm, that has at least 1 member who is a registered company auditor who is ordinarily resident in Australia, is uncertain due to the likely repeal of ASIC's approval of the auditing competency standard.

Clause 8 defines *affected audit company* in the determination. The definition captures companies whose status as an authorised audit company is uncertain due to the likely repeal of ASIC's approval of the auditing competency standard. The definition excludes companies whose purported registration is purportedly suspended or cancelled. This clause is based on clause 38 of ASIC Class Order [CO 14/757].

### **Legislative instrument**

The determination is made in relation to the specified class of Aboriginal and Torres Strait Islander corporations and directors defined in clause 5. It is a class determination. Accordingly, under section 353-10(5) of the Act, the determination is a legislative instrument.

### **Consultation**

The Registrar did not consult because the Registrar considers the making of the exemption to be of a minor and machinery nature and that does not substantially alter existing arrangements. It is unlikely to have any compliance costs on business, community organisations or individuals.

As set out above, the registration of certain auditors may have been adversely affected by the likely repeal of ASIC's approval of the auditing competency standard by the *Legislative Instruments Act 2003* (due to the inadvertent failure to register the instrument of approval).

The Government will be introducing remedial legislation to ensure the validity of the registration of auditors in reliance on the standard since 1 October 2006, with effect from their purported registration.

In the interim, this exemption provides remedial relief to the extent possible, so that acts and things that must be done by registered company auditors and authorised audit companies may also be done by auditors whose registration may have been adversely affected.

The Office of Best Practice Regulation (OBPR) was consulted about this determination and considered that it is minor and machinery in nature and no regulation impact statement is required (OBPR reference number 17656).

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights  
(Parliamentary Scrutiny) Act 2011*

### **Corporations (Aboriginal and Torres Strait Islander) Determination 1 / 2014**

The *Corporations (Aboriginal and Torres Strait Islander) Determination 1/2014* (the determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the determination**

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the Act) and the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2007* (the Regulations) require certain Aboriginal and Torres Strait Islander corporations to obtain and lodge an auditor's report of their annual financial reports from a registered company auditor, audit firm or authorised audit company. Such audit firms and authorised audit companies must, among other things, include registered company auditors as members.

The Australian Securities and Investments Commission (ASIC) is responsible under Part 9.2 of the *Corporations Act 2001* for the registration of auditors. ASIC has advised that the legal efficacy of some registrations are uncertain because the instrument by which it approved the auditing competency standard (issued by CPA Australia and The Institute of Chartered Accountants in Australia) was not lodged for registration under the *Legislative Instruments Act 2003*. The auditing competency standard is likely to have been repealed on 1 October 2006. ASIC has been registering auditors in reliance on the auditing competency standard since that date. The legal efficacy of those registrations is uncertain.

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ASIC advised that, in light of this legal uncertainty, ASIC Class Order [CO 14/757] was made to give prospective relief to the extent possible, so that acts and things that must be done by registered company auditors and authorised audit companies under the *Corporations Act 2001* may also be done by auditors whose registration may have been adversely affected.

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The Registrar's exemption determination provides similar relief to the extent possible to Aboriginal and Torres Strait Islander corporations and their directors so that acts and things that must be done by registered company auditors, audit firms with at least 1 registered company auditor or authorised audit companies, under the Act and the Regulations may also be done by auditors whose registration may have been adversely affected.

### **Human rights implications**

This determination does not engage any of the applicable rights or freedoms.

### **Conclusion**

This determination is compatible with human rights as it does not raise any human rights issues.

**Anthony Beven**  
**Registrar of Aboriginal and Torres Strait Islander Corporations**