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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2006

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Mal Brough, MP
Minister for Families, Community Services and Indigenous Affairs)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES
TO THE BILL AS INTRODUCED

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2006

1. Outline

Purpose

1.1. The Corporations (Aboriginal and Torres Strait Islander) Bill 2006 replaces the *Aboriginal Councils and Associations Act 1976* (the ACA Act) to improve governance and capacity in the Indigenous corporate sector.

1.2. While the Bill aligns with modern corporate governance standards and corporations law, it maintains a special statute of incorporation for Aboriginal and Torres Strait Islander peoples that takes account of the special risks and requirements of the Indigenous corporate sector.

Background

1.3. The ACA Act was envisaged as an incorporation statute to provide a simple and flexible means for incorporating associations of Indigenous people and was reserved for the use of Indigenous people.

1.4. In February 2001 the Registrar commissioned the most recent review of the ACA Act. The final report of the review was presented in December 2002.

1.5. The major finding of the review was that the special incorporation needs of Indigenous people should be met through a statute of incorporation tailored to the specific incorporation needs of Indigenous people. The review recommended a thorough reform of the ACA Act by enactment of a new Act. The review recommended that the new act provide Indigenous people with key facilities of a modern incorporation statute such as the Corporations Act. The review also recommended that the new Act provide special forms of regulatory assistance to support contemporary standards of good corporate governance.

1.6. The review also concluded that the ACA Act was out-of-date and suffered from a large number of technical shortcomings to the point that the ACA Act itself had become a source of disadvantage for Indigenous people.

1.7. The Bill implements the key recommendation by retaining a special incorporation statute to meet the needs of Indigenous people. The Bill introduces a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.

Financial impact statement

1.8. There is no financial impact.

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2. Abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACA Act	<i>Aboriginal Councils and Associations Act 1976 (Cth)</i>
ACT Chief Minister	Australian Capital Territory Chief Minister
AGM	Annual General Meeting
ADI	Authorised Deposit-taking Institution
ALRc	Australian Law Reform Commission
APRA	Australian Prudential Regulatory Authority
ARC	Administrative Review Council
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
ATSIC	Aboriginal and Torres Strait Islander Commission
CDEP	Community Development Employment Projects
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
CATSI Bill	Corporations (Aboriginal and Torres Strait Islander) Bill 2006
CATSI corporation	Corporation registered under the proposed Corporations (Aboriginal and Torres Strait Islander) Bill 2006
DIMIA	The Department of Immigration, Multicultural and Indigenous Affairs (Commonwealth)
GM	General Meeting
Legislative Instruments Regulations	<i>Legislative Instruments Regulations 2004</i>
Native Title Act	<i>Native Title Act 1993 (Cth)</i>
NIRS	National Indigenous Radio Service
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Body Corporate
PBC Regulations	<i>Native Title (Prescribed Body Corporate) Regulations (Cth)</i>
Registrar	Registrar of Aboriginal and Torres Strait Islander Corporations
Review	Review of the <i>Aboriginal Councils and Associations Act 1976</i>
RNTBC	Registered Native Title Body Corporate

3. Notes on Clauses – Overview

The ACA Act

1.1. The ACA Act was envisaged as an incorporation statute to provide a simple and flexible means for incorporating associations of Indigenous people and was reserved for the use of Indigenous people. The ACA Act is currently administered by the Registrar of Aboriginal Corporations who is supported by departmental staff engaged under the *Public Service Act 1999* (the Office of the Registrar of Aboriginal Corporations or ORAC).

1.2. Since it began, the ACA Act has become a significant vehicle for incorporating a broad range of Aboriginal and Torres Strait Islander corporations. Currently there are approximately 2800 Aboriginal and Torres Strait Islander corporations incorporated under the ACA Act. Many of these have been formed to hold land or deliver essential services, and 60 per cent are located in areas classified as remote or very remote according to Australian Bureau of Statistics (ABS) classifications.

1.3. The ACA Act was last amended in 1992. These amendments focused mainly on increasing external accountability. Since 1992 there have been several reviews of the ACA Act and two Bills proposing legislative reform which lapsed. There have also been significant external developments in that period. Most notably, the corporations law in Australia has been fundamentally changed through the introduction of the *Corporations Act 2001* (Corporations Act). The ACA Act is now inconsistent with modern corporations law in Australia. This disadvantages Indigenous people using the ACA Act as a means of incorporating as the ACA Act corporate form has inadequate protection for members, rigidity of corporate design and insufficient third party protection which makes securing credit more difficult.

1.4. Another major development since 1992 has been the enactment of the *Native Title Act 1993* (Native Title Act). Once a determination that native title exists has been made under the Native Title Act, the Federal Court must determine a prescribed body corporate to hold or manage the native title and fulfil the functions required by the Native Title Act and regulations. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) require a prescribed body corporate to be incorporated under the ACA Act. As the ACA Act has been used as the compulsory incorporation regime for native title, the deficiencies that exist in the ACA Act also affects this important sector. The interaction between functions and duties conferred on corporations by the Native Title Act and the ACA Act is also unclear producing some uncertainty in the native title sector.

1.5. The substantial amount of public money that is provided to ACA Act corporations has also highlighted the Act's deficiencies in its accountability framework. For example, entities that are connected to ACA Act corporations such as trusts and other associations to some extent fall into a 'regulatory gap' where scrutiny by the Registrar, the Australian Securities and Investments Commission (ASIC) or state regulators is limited.

1.6. The ACA Act has also been criticised for the amount of red tape associated with regulating ACA Act corporations. For example, the reporting requirements for small

corporations can be more onerous than if the same corporation were incorporated under the Corporations Act.

The review

1.7. In February 2001 the Registrar commissioned the most recent review of the ACA Act. The review was led by law firm Corrs Chambers Westgarth and the review team included specialists Senatore Brennan Rashid, Mick Dodson, Christos Mantziaris and Anthropos Consulting. The final report of the review was presented in December 2002.

Consultations

1.8. The review team conducted extensive consultations centring on two major rounds of consultations in April and May 2001 and in March and June 2002. A key workshop was held in Alice Springs on 3 and 4 May 2001. A second workshop was also held in Alice Springs on 9 and 10 April 2002. Questionnaires were developed and sent to all ACA Act corporations, as well as to 345 Indigenous organisations incorporated under other Commonwealth, state and territory legislation.

1.9. Advertisements were placed in Indigenous publications, including the *Koori Mail*, *National Indigenous Times*, *Yamatji News* and the *Torres Strait News*, noting the release of the consultation papers and calling for submissions and comments. Advertisements noting the review and the consultation papers were also run on the National Indigenous Radio Service (NIRS) network during March and April 2002. NIRS can broadcast to over 120 Indigenous radio stations Australia-wide. Details of the review and copies of the consultation papers and the questionnaires for Indigenous corporations were made available on the ORAC website. Information sheets on the review and a copy of a summary consultation paper were also distributed to all participants at the Indigenous Governance Conference held by Reconciliation Australia on 3 and 5 April 2002.

1.10. Consultation papers were sent to key stakeholders seeking submissions. Separate briefings were provided to members of six ATSIC Regional Councils. The ATSIC Board was briefed at its Board meeting in February 2002. Board members were updated on the progress of the review and were given advance copies of the consultation papers.

Recommendations

1.11. The major finding of the review was that the special incorporation needs of Indigenous people should be met through a statute of incorporation tailored to the specific incorporation needs of Indigenous people. The review recommended a thorough reform of the ACA Act by enactment of a new Act. The review recommended that the new act provide Indigenous people with key facilities of a modern incorporation statute such as the Corporations Act. The review also recommended that the new Act provide special forms of regulatory assistance to support contemporary standards of good corporate governance.

1.12. In making these recommendations the review observed that Indigenous people possess a range of socio-economic and cultural characteristics, which differ from those of other Australians, that may disadvantage them using statutes of general incorporation such as the Corporations Act or the state and territory associations incorporation legislation.

1.13. The review also concluded that the ACA Act was out-of-date and suffered from a large number of technical shortcomings to the point that the ACA Act itself had become a source of disadvantage for Indigenous people.

1.14. The review also noted that, in the context of racial discrimination law, the new Act would be a 'special measure'. The Act would therefore be a temporary form of 'positive discrimination' based on race aimed at enabling Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities (and attendant socio-economic benefits) that incorporation can confer.

Implementation

Implementation of key recommendations

1.15. The Bill implements the key recommendation by retaining a special incorporation statute to meet the needs of Indigenous people. The Bill introduces a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.

Implementation of specific reform proposals

1.16. The review made a number of specific reform recommendations which have been implemented as summarised below.

1.17. The review recommended enhancing the capacity of funding bodies and creditors to take a more proactive role in protecting their interests. This is implemented by aligning with the external administration provisions of Chapter 5 of the Corporations Act and through a number of transparency measures such as allowing observers and enabling consolidated reporting for groups of corporations.

1.18. The review recommended providing means for the Registrar to assist with the protection of members' rights, where members are unable to or lack the capacity to take action themselves. This is implemented by aligning with the members' remedies of Part 2F of the Corporations Act and allowing the Registrar to seek these remedies on behalf of members. The Bill also has numerous provisions which strengthen members' capacity to participate in managing the corporation, such as being able to request information about director remuneration and approving related party transactions. In many of these areas the Registrar can intervene to support members.

1.19. The review recommended ensuring that Indigenous people are able to design corporate structures and rules which best suit their specific needs, whether by reference to cultural practices or otherwise. This is implemented by allowing rules to implement, subject to some restrictions, structures and processes reflecting the traditions and circumstances of Indigenous people. The Bill also adopts a framework of 'replaceable rules' similar to the Corporations Act which allows corporations to readily adopt good governance procedures or tailor their internal governance framework to their particular circumstances.

1.20. The review recommended ensuring that reporting requirements match the size and activity level of the corporation. This is implemented by streaming corporations into small, medium and large for reporting purposes. Maximum flexibility is built into the reporting requirements to ensure that reporting can be tailored to the circumstances of particular corporations or classes of corporations.

1.21. The review recommended enhancing the standard of management of Indigenous corporations by applying directors' duties to senior management, and ensuring appropriate duties apply to both directors and senior management. This is implemented by aligning with the director, officer and employee duties in Part 2D.1 and the disqualification provisions of Part 2D.6 of the Corporations Act. The definition of 'officer' from the Corporations Act is also used so that managers who participate in decision making that affects a substantial part of the business of a corporation are also subject to these important duties.

1.22. The review recommended promoting the certainty of internal corporate processes and transactions with third parties (thereby enhancing the functionality of Indigenous corporations and removing commercial disincentives for dealing with them). This is implemented by adopting the provisions in Part 2B.2 of the Corporations Act which provide for the assumptions that people are entitled to make when dealing with corporations. A number of other provisions also ensure that transactions will not be void merely because particular procedural requirements have not been met.

1.23. The review recommended removing unnecessary technical barriers to the effective and efficient operation and regulation of Indigenous corporations. This is implemented by giving the Registrar maximum flexibility to exempt corporations from certain procedural requirements in the Bill, such as those relating to reporting or the conduct of meetings. The Bill also allows regulations to be made in a number of instances to tailor the operation of the Bill to particular corporations or classes of corporations.

1.24. The review recommended alignment with modern corporations law where equitable, appropriate and practical in the circumstances. This is implemented through significant alignment with the Corporations Act provisions related to directors' duties, external administration, the examination of the affairs of connected entities and on technical matters such as the jurisdiction of courts and offences.

1.25. The review recommended minimising incompatibility with requirements for corporations established pursuant to the Native Title Act. This is implemented by tailoring a number of provisions of the Bill to ensure that proper compliance with the Native Title Act does not contravene the Bill. Regulations can also deal with specific inconsistencies that may not have been foreseen. Decision making by the Registrar

can also take into account the need for consistency with the Native Title Act. Native title matters are specifically discussed below.

Proposals not implemented

1.26. The review recommended providing a transitional mechanism for appropriate corporations to move to the Corporations Act and enter mainstream corporate practice. This will be implemented in a further bill to be brought forward, the Corporations (Aboriginal and Torres Strait Islander) Miscellaneous and Transitionals Bill.

1.27. The review recommended that membership of corporations be restricted to Indigenous people. This has partly been implemented by providing that a majority of members (and directors) must be Indigenous. This improves flexibility for corporations to permit non-Indigenous membership which is often important to ensure that services can be provided to non-Indigenous people or adopted children. As some corporations are the only providers of essential services in some communities it also ensures that non-Indigenous members of such communities are not disadvantaged.

1.28. The review recommended that corporate members should not be permitted. The Bill does permit corporate membership which improves the flexibility of corporate design to allow for resource agencies and peak bodies.

1.29. The review also recommended that particular regulatory powers under the current ACA Act should not be retained. For example, the review suggested that instead of the Registrar being able to appoint an administrator, the Registrar should apply to court for appointment of a receiver under the court's equitable jurisdiction. This recommendation has not been implemented but the appointment of an administrator by the Registrar (called a 'special administrator') has been improved to address a number of the reasons why the review considered that Registrar-appointed administrators were problematic. A key improvement is that a decision to appoint a special administrator is a reviewable decision.

Specific issues

Native title

1.30. A key aim of the Bill is to ensure that there is appropriate interaction between this Bill and native title legislation. The Bill removes the current uncertainty of how the Native Title Act and regulations are to interact with the ACA Act through tailored provisions for registered native title bodies corporate (RNTBCs) or in relation to an application made for the purposes of becoming an RNTBC where necessary.

1.31. Many of these provisions are intended to operate to ensure that a duty conferred upon a corporation or individual by native title legislation does not put the corporation or individual at risk of breaching provisions in the Bill. For example, where the Bill requires a director or officer of a corporation to meet statutory directors' duties that may place the individual in breach of the requirement to give effect to statutory requirements of the native title legislation, the Bill provides that the individual does not breach the Bill if they act in good faith with the belief that the

action is necessary to ensure that the corporation complies with a native title legislation obligation.

1.32. The Bill defines ‘native title legislation obligation’ in a way that is consistent with the obligations prescribed by the PBC Regulations to consult with, act to give effect to the directions of, or obtain the consent of common law holders of native title.

1.33. The Bill also ensures that statutory members’ rights provisions cannot be used to frustrate decisions of an RNTBC made in accordance with obligations under the native title legislation. This is achieved by clarifying that a court cannot grant orders on the grounds that the corporation is acting in a way that is oppressive to the members as a whole or oppressive to, or discriminatory against, a member or members if the action is done in good faith with the belief that it is necessary to ensure that the corporation complies with a native title legislation obligation.

1.34. The Bill also contains provisions designed to recognise the unique nature of native title rights and interests. For example, the Bill requires an RNTBC to use the term ‘registered native title body corporate’ or the abbreviation ‘RNTBC’ to signal to third parties that the corporation holds or manages native title rights and interests. In addition, it clarifies that native title rights and interests are to be disregarded when determining the value of the assets of an RNTBC for reporting purposes under the Bill.

1.35. Specific provisions for regulations to be made concerning RNTBCs ensures that future modifications to the Bill made by regulations do not conflict with native title legislation and that specific guidance can be given in regulations to cater for appropriate functions and duties of external administrators that may be appointed to an RNTBC.

Legislative matters

Commencement

1.36. The Bill has a commencement date of 1 July 2007. This date takes account of reporting provisions and record keeping requirements which are tied to the financial year. It also allows for an awareness raising campaign to be conducted with corporations and other stakeholders.

Reviewable decisions

1.37. In determining the discretionary decisions of the Registrar which are to be reviewable under the Bill and therefore subject to possible merits review by the Administrative Appeal Tribunal (AAT), regard has been given to the relevant principles established by the Administrative Review Council (ARC). These include the primary principle that an administrative decision that will, or is likely to, affect the interests of a person should normally be subject to merits review. Merits review by the AAT of decisions made by the Registrar is currently not available under the ACA Act. The 1989, 1996 and 2002 reviews of the ACA Act all supported making at least some of the Registrar’s decisions reviewable by the AAT.

Delegation of functions

1.38. Delegation by the Registrar of his or her powers or functions under the Bill is limited to a Deputy Registrar, an SES employee in the Department or an APS employee within the Registrar's office who has the expertise appropriate to the function or power delegated. The power of a Deputy Registrar to sub-delegate is similarly limited to an SES employee in the Department or an APS employee within the Registrar's office who has the expertise appropriate to the function or power delegated. The Registrar may appoint one or more persons as Deputy Registrars who are to be persons engaged under the *Public Service Act 1999*. This power has not been similarly circumscribed to allow some flexibility in the administrative arrangements within the Registrar's office which is a small agency of approximately 30–40 staff. The Registrar would only appoint a person within ORAC as a Deputy Registrar who had the appropriate expertise.

Strict liability

1.39. The Bill contains a large number of strict liability offences. Many of these offences are based on equivalent offences in the Corporations Act which are also strict liability. Consistent with the objective of the reforms to align the Bill to modern corporations law, strict liability has been retained for these provisions to ensure that these offences in the Bill remain closely aligned with their counterpart offences in the Corporations Act. Consistency is also important to ensure that persons who may be subject to the regulatory requirements of both the Bill and the Corporations Act, for example auditors, are not subject to a criminal sanction under the Bill which is lesser or greater than if the same conduct had been committed with regard to the Corporations Act. In light of this, future amendments may be made to the Bill to align these criminal offences to any amendments made to the relevant criminal offences of the Corporations Act. Table 1 lists these proposed offences in the Bill, the offence in the Corporations Act upon which they are based, and its maximum penalty.

1.40. Table 1: Strict liability offences in the Bill based on Corporations Act offences

Proposed subsection	Maximum penalty	Corporations Act
69-20(1)	5 penalty units	subsection 136(5)
69-20(2)	5 penalty units	subsection 136(5)
72-5(1)	5 penalty units	subsection 139(1)
72-5(5)	5 penalty units	subsection 139(1)
85-15(4)	10 penalty units	subsections 153(1),(2)
88-1(2)	5 penalty units	subsection 157(2)
88-5(2)	50 penalty units or 12 months or both	subsection 158(2)
112-5(5)	5 penalty units	subsection 142(1)
112-5(6)	5 penalty units	subsection 142(1)
112-5(7)	5 penalty units	subsection 142(2)
112-10(2)	5 penalty units	subsection 143(1)

112-15(2)	10 penalty units	subsections 144(1),(2)
115-5(4)	5 penalty units	subsection 142(1)
115-5(5)	5 penalty units	subsection 142(2)
144-10(5)	5 penalty units	subsection 168(1)
144-10(8)	5 penalty units	subsection 168(1)
150-10(3)	5 penalty units	subsection 168(1)
150-15(3)	5 penalty units	subsection 168(1)
166-15(3)	50 penalty units or 12 months or both	subsection 235(1)
172-1(4)	5 penalty units	subsection 246B(3)
172-10(7)	5 penalty units	subsection 246D(6)
175-10(3)	50 penalty units or 12 months or both	subsection 247C(1)
180-1(2)	10 penalty units	subsection 168(1)
180-10(2)	10 penalty units	subsection 168(1)
180-20(1)	10 penalty units	subsection 172(1)
180-25(5)	10 penalty units	subsection 173(3)
201-30(1)	5 penalty units	subsection 249K(1)
201-100(6)	5 penalty units	subsection 250A(5)
201-145(1)	10 penalty units	subsection 250N(1)
201-150(1)	10 penalty units	subsection 250N(2)
201-155(3)	10 penalty units	subsection 250P(3)
201-155(4)	10 penalty units	subsection 250P(4)
201-165(1)	5 penalty units	subsection 250S(1)
201-170(1)	5 penalty units	subsection 250T(1)
220-5(1)	10 penalty units	subsection 251A(1)
220-5(3)	10 penalty units	subsection 251A(2)
220-5(4)	10 penalty units	subsection 251A(2)
220-5(5)	10 penalty units	subsection 251A(2)
220-5(7)	10 penalty units	subsection 251A(3)
220-5(8)	10 penalty units	subsection 251A(4)
220-5(9)	10 penalty units	subsection 251A(5)
220-10(3)	5 penalty units	subsection 251B(1)
220-10(5)	5 penalty units	subsection 251B(3)
220-10(6)	5 penalty units	Subsection 251B(4)
246-10(1)	10 penalty units	subsection 201D(1)
246-10(2)	5 penalty units	subsection 201D(2)
249-10(3)	5 penalty units	subsection 203D(3)
249-10(5)	5 penalty units	subsection 203D(5)
249-15(3)	5 penalty units	subsection 203D(5)
249-15(7)	5 penalty units	subsection 203D(3)
249-20(2)	5 penalty units	subsection 203D(3)
252-5(1)	5 penalty units	subsection 202B(1)
252-5(2)	5 penalty units	subsection 202B(1)
257-5(3)	5 penalty units	subsections 204A(1),(2)

257-15(1)	5 penalty units	subsection 204C(1)
257-15(2)	5 penalty units	subsection 204C(1)
257-15(3)	5 penalty units	subsection 204C(2)
265-40(1)	5 penalty units	subsection 188(1)
268-1(1)	10 penalty units or 3 months or both	subsection 191(1)
268-20(1)	5 penalty units	subsection 195(1)
279-1(1)	50 penalty units or 12 months or both	subsection 206A(1)
290-5(1)	5 penalty units	subsection 218(1)
290-20(1)	5 penalty units	subsection 221
290-25(1)	5 penalty units	subsection 222
290-40(3)	5 penalty units	subsection 225(3)
290-40(4)	5 penalty units	subsection 225(4)
290-40(5)	5 penalty units	subsection 225(5)
304-5(1)	10 penalty units	subsection 205B(1)
304-5(3)	10 penalty units	subsection 205B(2)
304-5(5)	10 penalty units	subsection 205B(4)
304-5(6)	10 penalty units	subsection 205B(5)
304-10(1)	10 penalty units	subsection 205C(1)
304-10(2)	10 penalty units	subsection 205C(2)
304-15(4)	5 penalty units	subsection 205D(3)
307-1(2)	10 penalty units	subsection 205E(2)
322-10(1)	25 penalty units or 6 months or both	subsection 286(1)
322-10(2)	25 penalty units or 6 months or both	subsection 286(2)
322-15(1)	25 penalty units or 6 months or both	subsection 288(1)
322-20(1)	25 penalty units or 6 months or both	subsection 289(2)
322-20(2)	25 penalty units or 6 months or both	subsection 289(2)
330-10(1)	25 penalty units or 6 months or both	subsection 319(1)
339-35(2)	50 penalty units	subsection 307A(1)
339-35(3)	50 penalty units	subsection 307A(2)
339-40(1)	50 penalty units	subsection 308(1)
339-40(3)	50 penalty units	subsection 308(3)
339-40(4)	50 penalty units	subsection 308(3A)
339-40(6)	50 penalty units	subsection 308(4)
339-50(2)	10 penalty units	subsection 307C(1)
339-50(4)	10 penalty units	subsection 307C(3)
339-55(2)	50 penalty units	subsection 307B(1)
339-55(4)	50 penalty units	subsection 307B(3)
339-65(2)	10 penalty units	subsection 324BB(2)
339-70(3)	10 penalty units	subsection 324BC(3)
339-95(1)	25 penalty units or 6 months or both	subsection 312(1)
342-5(1)	10 penalty units	subsection 314(1)
342-5(2)	10 penalty units	subsection 314(1)

345-1(1)	25 penalty units or 6 months or both	subsection 323(1)
345-10(1)	25 penalty units or 6 months or both	subsection 323B(1)
348-1(1)	25 penalty units or 6 months or both	subsection 319(1)
348-5(1)	10 penalty units	subsection 322(1)
348-5(2)	10 penalty units	subsection 322(2)
376-1(2)	5 penalty units	subsection 1300(1)
376-1(3)	10 penalty units	subsection 1300(2A)
376-1(5)	5 penalty units	subsection 1300(3)
376-5(1)	5 penalty units	subsection 1304(1)
376-5(2)	5 penalty units	subsection 1304(2)
376-5(3)	5 penalty units	subsection 1304(2)
407-5(3)	50 penalty units or 12 months or both	subsection 1274(9)
407-10(3)	50 penalty units or 12 months or both	subsection 1274(15)
410-1(4)	50 penalty units or 12 months or both	subsection 1274(11)
496-10(1)	25 penalty units or 6 months or both	subsection 437C(1)
526-20(6)	5 penalty units	subsection 491(2)(a)
546-20(5)	5 penalty units	subsection 601AD(5)
576-20(11)	25 penalty units or 6 months or both	subsection 1323(9)

1.1. A relatively small number of strict liability offences are unique to the Bill. In determining that these provisions should be strict liability, regard has been given to similar provisions contained in the Corporations Act, as well as to provide consistency with similar provisions in the Bill.

1.2. Proposed subsection 115-15(4) provides that a corporation commits an offence if it does not comply with a direction by the Registrar under proposed subsection 115-15(1) to change its document access address. Contravention of this provision is a strict liability offence with a penalty of 5 penalty units. Broadly, the document access address will be the equivalent to a registered office for small and medium Indigenous corporations. Most of these corporations will be in very remote areas of Australia. The power of the Registrar to direct a corporation to move its document access address to an area specified in the direction is a very important regulatory tool to ensure that the officers of a corporation do not deprive their members from accessing the corporation's registers, documents etc. In light of this, a strict liability offence is justified here to ensure compliance. The provision can also be distinguished from section 143(1) of the Corporations Act in that, unlike that provision, the proposed section 115-15 requires a corporation to undertake a positive action, that is, find a new document access address in the area specified.

1.3. Proposed subsection 150-10(3) provides that a corporation must remove a member's name from the register of members within 14 days of receiving a notice of resignation. Contravention of this provision is a strict liability offence with a penalty of 5 penalty units. Difficulties with Indigenous corporations maintaining accurate registers have proven to be a significant problem in the past. In light of this, the strict liability offence, with a penalty of 5 penalty units, is justified here to provide a strong incentive for a corporation to maintain the accuracy of its register of members. In terms of this penalty, section 168(1) of the Corporations Act is the appropriate comparator as it relevantly requires a Corporations Act company to 'set up and maintain' a register of members.

1.4. Proposed subsection 150-25(4) provides that if a membership is cancelled on the basis that the person is not contactable, the directors must send the member a copy of the resolution at the last known address of the member, as soon as practicable after the resolution has been passed. Contravention of this provision is a strict liability offence with a penalty of 5 penalty units. There being no equivalent provision in the Corporations Act this provision is also drafted in the style of section 203D of the Corporations Act, which deals with the removal of directors by members of a public company. Strict liability is also justified here to provide a strong incentive for the directors to inform a member that their membership has been cancelled on this basis. This would also make the provision consistent with the procedural requirements of proposed section 150-20.

1.5. Proposed subsection 150-30(4) provides that if a membership is cancelled on the basis that the person is not an Aboriginal and Torres Strait Islander person, the directors must send the member a copy of the resolution as soon as practicable after the resolution has been passed. Contravention of this provision is a strict liability offence with a penalty of 5 penalty units. There being no equivalent provision in the Corporations Act this provision is also drafted in the style of section 203D of the Corporations Act, which deals with the removal of directors by members of a public company. Strict liability is also justified here to provide a strong incentive for the directors to inform a member that their membership has been cancelled on this basis. This would also make the provision consistent with the procedural requirements of proposed section 150-20.

1.6. Proposed section 180-30 provides that the corporation must make the register available for inspection by members at the AGM and ask each member attending the AGM to check the entry for that member in the register and inform the corporation of any corrections that need to be made to that entry. Contravention of this provision is a strict liability offence with a penalty of 10 penalty units. There is no equivalent provision in the Corporations Act to this provision, although it forms part of a group of provisions based on Chapter 2C of the Corporations Act (Registers). Strict liability is also justified here to provide a strong incentive for the corporation to use the AGM as an opportunity to update its register of members. Difficulties with corporations maintaining accurate registers have proven to be a significant problem in the past. Strict liability would also make the provision consistent with similar strict liability offences contained in proposed Part 4-5 of the Bill (for example proposed subsections 180-1(1), 180-10(1) and 180-20(1)).

1.7. Proposed subsection 180-35(1) provides that the registrar may at any time request the corporation to give him or her a copy of the register of members, and the corporation must comply with the request within 14 days or such other period as the Registrar specifies. A contravention of this provision is a strict liability offence with a penalty of 10 penalty units. There is no equivalent provision in the Corporations Act to this provision, although this provision was drafted in the style of a group of provisions based on Chapter 2C of the Corporations Act (Registers) which are also strict liability offences, see, in particular, section 178A of the Corporations Act which attaches strict liability to proprietary companies failing to notify changes to their register of members. Strict liability is also justified here to ensure that the Registrar is provided with an accurate register of members. As mentioned above, difficulties with corporations maintaining accurate registers have proven to be a significant problem in

the past. Strict liability would also make this provision consistent with similar strict liability offences contained in proposed Part 4-5 of the Bill.

Regulatory powers

1.8. The Bill retains and modernises the Registrar's existing power to appoint a suitably qualified person to examine a corporation's affairs. Like the existing examination power it does not require grounds, therefore enabling 'healthy organisation checks' as a preventative measure. This power has been retained to allow early identification of problems and for problems to be solved by corporations themselves. The scope of the power includes the examination of issues broader than financial management to support dispute resolution and improved effectiveness. The Bill also modernises the Registrar's power to examine books and ask people questions in certain circumstances, including the power to seek a warrant from a magistrate when books asked for have not been produced. Warrants may be applied for in person or by telephone or other electronic means. These provisions reflect equivalent provisions in the ASIC Act and other modern regulatory schemes and provide greater procedural safeguards than currently exist under the ACA Act.

Legislative instruments

1.9. No exceptions have been sought from the operation of the *Legislative Instruments Act 2003*. Provisions in the Bill which contain determinations, specifications or approvals in writing by the Registrar that are not legislative instruments are noted within the Bill for the convenience of readers.

However, provisions that are covered by an exemption in the *Legislative Instruments Regulations 2004* (Legislative Instruments Regulations) are not considered to be legislative in nature and are therefore not noted in the Bill. For example, approvals under proposed section 404-10 would be covered by the exemption under item 3 of Part 1 of Schedule 1 to the Legislative Instruments Regulations, so they would not be legislative.

Regulation-making powers

1.10. The Bill contains a number of provisions which allow regulations to modify provisions of the Bill, or certain provisions of the Corporations Act which are otherwise applied to CATSI corporations, namely in the areas of the registration of transferring and amalgamated corporations, external administration, financial reporting, statutory Indigenous land trusts and registered native title bodies corporate.

1.11. Proposed section 42-40 of the Bill provides that regulations may modify proposed part 2-5 of the Bill, 'Effects of registration', for a CATSI corporation registered under proposed part 2-3 after applying under proposed section 22-1. The proposed section is based on section 601BS of the Corporations Act. Proposed part 2-5 of the Bill contains a single offence (proposed paragraph 42-25(3)(a)). This power is necessary to ensure that the application of these provisions is appropriate with respect to the special circumstances of bodies corporate that transfer their registration to the CATSI regime. Proposed subsection 42-40(2) expressly provides that these

regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any offence.

1.12. Proposed section 42-50 of the Bill provides that regulations may modify proposed Part 2-5 of the Bill, 'Effects of registration', for an amalgamated corporation registered under proposed part 2-3 after applying under proposed section 23-1. The proposed section is also based on section 601BS of the Corporations Act. Proposed part 2-5 of the Bill contains a single offence (proposed paragraph 42-25(3)(a)). This power is necessary to ensure that the application of these provisions is appropriate with respect to the special circumstances of amalgamated corporations. Proposed subsection 42-50(2) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any offence.

1.13. Proposed paragraph 45-1(2)(b) of the Bill provides that the arrangements and reconstructions provisions of the Corporations Act apply to CATSI corporations with any modifications as set out in the regulations. These provisions include a number of offences. This power to modify these arrangements and reconstructions provisions is necessary to ensure that their application is appropriate with respect to the special circumstances of CATSI corporations. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 45-1(3) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.14. Proposed subsection 339-75(2) of the Bill provides that the auditor independence provisions of the Corporations Act apply to CATSI corporations with any modifications as set out in the regulations. These provisions include a number of offences with a term of imprisonment. This power is necessary to modify the auditing requirements of the Corporations Act with respect to smaller corporations for which these onerous auditing requirements are not appropriate. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 339-75(3) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.15. Proposed section 368-1 allows the regulations to modify the application of proposed parts 7-2 and 7-3 of the Bill (which deal with record keeping and reporting requirements) in relation to a specific corporation or in relation to all corporations of a specified kind. These parts contain a number of offences. Proposed section 368-1 is based on section 343 of the Corporations Act which allows the regulations under that Act to modify Chapter 2M of the Corporations Act which also deals with financial reports and audit. This chapter of the Corporations Act also contains a number of offence provisions. This provision is an important measure to ensure that maximum flexibility is built into the reporting requirements so that reporting can be tailored to the circumstances of particular corporations or classes of corporations.

1.16. Proposed paragraph 499-10(3)(b) provides that the provisions of the Corporations Act which apply to CATSI corporations under special administration apply with any such modifications as specified in the regulations. These provisions include a number of offences. This power to modify these provisions is necessary to ensure that their application is appropriate with respect to the special circumstances of

CATSI corporations. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 499-10(4) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.17. Proposed paragraph 516-1(2)(b) provides that the receiver provisions of the Corporations Act apply to CATSI corporations with any such modifications as specified in the regulations. These provisions include a number of offences. This power to modify these receiver provisions is necessary to ensure that their application is appropriate with respect to the special circumstances of CATSI corporations. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 516-1(2A) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.18. Proposed paragraph 521-1(2)(b) provides that the administration provisions of the Corporations Act apply to CATSI corporations with any such modifications as specified in the regulations. These provisions include a number of offences punishable by terms of imprisonment. This power to modify these external administration provisions is necessary to ensure that their application is appropriate with respect to the special circumstances of CATSI corporations. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 521-1(3) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.19. Proposed paragraph 526-35(2)(b) provides that the winding up provisions of the Corporations Act apply to CATSI corporations with any such modifications as specified in the regulations. These provisions include a number of offences. This power to modify these winding up provisions is necessary to ensure that their application is appropriate with respect to the special circumstances of CATSI corporations. In light of this, any regulations are likely to limit the relevant applied offence provisions. However, proposed subsection 526-35(2A) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

1.20. Proposed subsection 546-45(1) provides that the regulations may modify the provisions dealing with the deregistration of a CATSI corporation if it holds land for the benefit of Aboriginal persons or Torres Strait Islanders under certain laws, including the *Aboriginal Land Act 1991* (Qld). This regulation-making power will allow the prescribing of the process to be followed if winding-up proceedings are initiated for a CATSI corporation holding land in trust granted under the *Aboriginal Land Act 1991* (Qld). The regulation making power is also broad enough to cover other state and territory land rights schemes if necessary in the future, for example, the *Torres Strait Islander Land Act 1991* (Qld). Proposed subsection 546-45(2) will provide that any regulations made to modify these provisions must not increase the maximum penalty for any offence or widen the scope of any offence.

1.21. Proposed subsection 633-1(2) provides that any regulations made under the Bill cannot make provision for penalties exceeding 50 penalty units for contraventions of the regulations. This would include proposed subsection 339-80(3)(b).

1.22. As discussed above, proposed subsection 633-5(1) provides that the regulations may modify any of the provisions of this Bill (except proposed subsection 633-5(8)) as they relate to an RNTBC. The purpose of this regulation-making power is to address any potential conflicts between the obligations imposed by the Bill and the native title legislation with respect to RNTBCs (which will also be corporations registered under the Bill). The regulations, among other things, will be used to relieve corporations and other persons from liabilities that may arise from the conflict of these two legislative schemes. Proposed subsection 633-5(8) will provide that any such regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope, of any offence.

Reversal of onus of proof

1.23. The following proposed subsections provide defences that impose an evidential burden of proof on the defendant: 175-10(2), 183-1(2), 265-25(2), 268-20(2), 279-1(3), 279-1(4), 304-5(7), 339-55(6), 339-65(4), 339-70(5), 376-35(3), 447-5(3), 453-5(7), 456-10(10), 456-10(12), 461-1(2), 496-10(2) and 546-20(6). These provisions mirror equivalent provisions in the Corporations Act and the ASIC Act, which also reverse the onus of proof, or are based on other legislative provisions which also reverse the onus or proof. For example, proposed subsection 453-5(7) is based on subsection 54AA(9) of the *Veterans' Entitlements Act 1986* which also imposes an evidential burden of proof on the defendant. These provisions may be recast or removed in the future if any changes are made to equivalent provisions of the Corporations Act, the ASIC Act or other relevant legislation.

4. Notes on clauses - chapter summaries

Chapter 1 Introduction

1.1. Chapter 1 of the Bill provides for the preliminaries of the proposed Act including the preamble, the objects of the Act and an overview. The objects provide for the Registrar of Aboriginal and Torres Strait Islander Corporations as well as the functions and powers of the Registrar. They clarify that the Bill provides for the incorporation, operation and regulation of bodies registered under the Bill and for duties of officers and their regulation. The Bill's objects also expressly provide for the incorporation of bodies incorporated for the purpose of becoming a registered native title body corporate.

1.2. 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.

Chapter 2 Aboriginal and Torres Strait Islander corporations

1.3. Chapter 2 of the Bill provides for the registration of Aboriginal and Torres Strait Islander corporations, clarifies what is required to make an application, and provides

the legislative basis for the Registrar to decide an application for registration. It also provides the legislative basis for a corporation registered under the Bill to come into existence on registration and clarifies its powers.

1.4. This chapter establishes the requirements for the content of an application for registration as an Aboriginal and Torres Strait Islander corporation, including the registration of an existing body corporate and the registration of an amalgamated corporation. The Bill requires evidence that the corporation is ready to incorporate. This has been done deliberately to encourage registration of corporations that will be sustainable.

1.5. In addition, the Bill provides for differential corporate reporting requirements. This is consistent with recommendations of the review which highlighted the importance of reporting requirements better targeted to the corporation's circumstances, particularly size. The review used the following example: a small, passive land-holding body undertaking little or no activity is unlikely to have the capacity or the need to meet complex reporting requirements; however, a large, well funded corporation should be able to recruit appropriate qualified personnel to enable it to deal with more comprehensive reporting requirements. The Bill provides for corporations to be 'streamed' as small, medium or large. This is similar to provisions in the Corporations Act that allow for small and large proprietary companies to have differential reporting requirements. The specific standards to be set for financial reporting will be determined in regulations to ensure that sufficient flexibility exists for the standards to change over time should this prove necessary, and to maintain alignment with mainstream corporate governance standards.

1.6. Chapter 2 also applies the arrangements and reconstructions provisions of the Corporations Act to Aboriginal and Torres Strait Islander corporations with appropriate substitutions. Aboriginal and Torres Strait Islander corporations will be able to use these provisions to enter into a compromise or arrangement with its creditors or members. They will also be able to use these provisions to bring about a voluntary amalgamation of CATSI corporations.

Chapter 3 Basic features of an Aboriginal and Torres Strait Islander corporation

1.7. This chapter provides for the basic features of a corporation, and clarifies the powers a corporation has. Consistent with the Corporations Act, it provides for a system of replaceable rules and for the matters a corporation is required to cover in its constitution and other documents relevant to internal governance. These documents are critical to the successful operation of corporations as they form the contract between members and directors of the corporation, and provide guidance on how the corporation should operate.

1.8. Requiring corporations to cover or deal with a number of matters in their constitutions and other internal governance documents is deliberate as it compels the corporation to focus on important matters that are often difficult to resolve if there are no clear rules to guide a corporation and its members. In addition, these requirements encourage responsible incorporation practices and provide for the registration of corporations that are likely to succeed and be sustainable.

1.9. This chapter establishes requirements for changing a constitution, and gives the Registrar the power to change a corporation's constitution. This power supports members as it can be used if the corporation acts in a way that is contrary to the interests of the members as a whole or is oppressive to a member or group of members. This power will be used in circumstances when members do not have the capacity to access the statutory members' remedies.

1.10. Consistent with the Corporations Act this chapter states the requirements for corporation names and how a name may be changed. It also establishes the requirement for a corporation to have a registered office or a document access address to ensure that the corporation is accessible to members and third parties, and clarifies how a corporation may be serviced with documents as well as the assumptions third parties are entitled to make when dealing with the corporation.

Chapter 4 Members and observers

1.11. This chapter sets out some rules for membership of an Aboriginal and Torres Strait Islander corporation and some rules about cancelling membership. Aboriginal and Torres Strait Islander corporations have members (as opposed to shareholders) and they may also have persons who observe the operation of the corporation's meetings, called observers.

1.12. This chapter deals with the protection of the rights and interests of members of the corporation. The ACA Act provides very few bases on which members can protect their rights. One provision the ACA Act relies on is the principle of effective control by the members in general meetings. This requires the Registrar to refuse incorporation if satisfied that the constitution is unreasonable or inequitable or does not allow the members effective control in running the association. This provision has been problematic as it is unclear what effective control means and is not an obvious indicator of good governance for Aboriginal and Torres Strait Islander corporations. It also does not provide adequate protection of members' rights in all circumstances. Members' remedies under this Bill are therefore brought into line with the more extensive statutory provisions available under the Corporations Act.

1.13. Membership and the rights and remedies attaching to members are a critical feature of the Indigenous corporate sector as they allow for participation in the corporation's affairs. By bringing the Bill in line with the Corporations Act the rights and responsibilities of members are clarified and eligibility criteria are established. This is designed to increase transparency and minimise disputes which have in the past occurred because of the high degree of uncertainty in some corporations about eligibility for membership.

1.14. This chapter also deals with the register of members and the register of former members that a corporation is required to keep.

Chapter 5 Meetings

1.15. This chapter deals with the kinds of meetings that Aboriginal and Torres Strait Islander corporations may have and sets out requirements for how these meetings are

to be conducted. There are two kinds of meetings held by corporations—directors’ meetings and general meetings.

1.16. The current section 58B of the ACA Act deals with general and special meetings. The requirement to hold an annual general meeting (AGM) in section 58B is unclear. There is no express requirement for an AGM to be held every year, as it is possible that a corporation’s rules might not provide for the holding of AGMs. The Bill clarifies meeting rules, as per the review recommendations, so that it is clear that an AGM must be held every year, with the Registrar able to exempt a corporation from the requirements of the chapter. The Registrar is likely to use this power to exempt small corporations from holding a meeting every year when there is no need or capacity to do so. This brings the Bill into line with the requirements for small proprietary companies under the Corporations Act.

1.17. The review also recommended that there should be an express provision allowing meetings to be held by telephone or videoconference as the ACA Act does not make express provision for this. While there is nothing preventing the use of technology in the holding of a meeting, using communication technologies may be particularly important for Indigenous corporations—especially, but certainly not exclusively, those in remote areas. There are two principal reasons for this. First, membership of Indigenous corporations and their boards of directors may be highly dispersed. The costs of physically bringing members and directors of such corporations together for meetings can be prohibitive—particularly if the corporation has few resources, or if those resources are tied up in grant funds which do not cover the high costs of administration of some Indigenous corporations. This may make it impossible for such corporations to meet quorum for meetings. The second reason is that oral communication is particularly important when the directors of a corporation may not be able to easily read or write English. The reforms address this in proposed section 201-65.

1.18. This chapter also sets out rules governing the use of proxies and how voting is to be conducted during meetings. These provisions largely reflect the Corporations Act provisions.

Chapter 6 Officers

1.19. Chapter 13 of the review considered in detail the application of directors’ duties in the context of CATSI corporations. The review noted at paragraph 873 that only the core general law directors’ duties have been provided for in the ACA Act. The duties of directors are set out in sections 49C of the ACA Act (members to act honestly and diligently) and 49D of the ACA Act (disclosure of pecuniary interests). The statutory duties in the ACA Act are based on the general law duties but do not replace these duties.

1.20. In summary, the review team concluded that the provisions relating to directors and directors’ duties in the ACA Act should be modernised and brought into line with the Corporations Act, with some modification for the circumstances of CATSI corporations. Proposed Chapter 6 of the CATSI Bill implements these review findings.

1.21. The review recommended that the scope of relevant directors' duties under the ACA Act should be extended to include 'officers' as is the case under the Corporations Act (but expressly including the public officer). Proposed Chapter 6 achieves this, but does not extend the obligation to contact persons who have a more limited role than the ACA Act public officer.

1.22. The review recommended the statutory directors' duties under the ACA Act should generally be brought into line with the Corporations Act. These duties include the duty of care, the duty of honesty, the duties of disclosure and to avoid conflicts of interest, and a duty not to trade while insolvent. Proposed Chapter 6 achieves this with some modifications relating to the Native Title legislation obligations. The duty not to trade while insolvent is not included in this proposed chapter but is instead incorporated by reference at proposed section 531-1. Consideration was given to including the provisions relating to insolvent trading on the face of the proposed CATSI Bill but the technical complexity of achieving this undermined any advantage in comprehensibility that may have been gained.

1.23. The review also recommended adopting a range of civil and criminal penalties, similar to the approach adopted in the Corporations Act, particularly regarding cases of dishonest or bad faith actions. The review highlighted the need to protect the members of CATSI corporations from the actions of 'rogue' directors or officers. In recognition of the special circumstances of many Indigenous directors, the review suggested that there should be significant judicial discretion in considering and calculating any penalties. The CATSI Bill achieves this range in proposed Chapter 6 in combination with other offences: proposed provision 376-35 dealing with falsification of books; proposed Chapter 8 civil consequences of contravening civil penalty provisions; and proposed Chapter 13 general offences. Proposed section 658-5, aims of the Registrar, supports the flexible application of these provisions.

1.24. The review recommended that provisions prohibiting exemptions, indemnities or insurance for actions of directors done in bad faith should be included based on sections 199A and 199B of the Corporations Act. The CATSI Bill has not specifically implemented this recommendation but has instead adopted an approach creating a default position that remuneration of directors is not allowed unless the corporation's constitution provided otherwise. This allows the Registrar to scrutinise constitutions that permit remuneration, and to examine the capacity to indemnify and insure. Reasonable travel expenses are payable to directors even if the corporation's constitution is silent on remuneration. Members are supported by the adoption of equivalents to sections 202A and 202B of the Corporations Act relating to the obtaining information about the remuneration of directors.

1.25. The review recommended repealing section 49B of the ACA Act to be replaced with provisions equivalent to those contained in Part 2.6D of the Corporations Act. Section 49B of the ACA Act potentially disadvantaged directors of ACA Act corporations. Proposed Chapter 6 implements this recommendation.

1.26. Also, proposed Chapter 6 deals with internal governance aspects of directors, including their appointment, cessation and powers. Some of these internal governance rules are replaceable allowing flexibility in corporate design. Other internal governance rules relating to directors have been made substantive provisions of the CATSI Bill to avoid disputes, for example, the grounds on which directors can be

removed by other directors are restricted and are not replaceable. The information about directors which is available to the public is also included here.

Chapter 7 Record keeping, reporting requirements and books

1.27. Chapter 7 aims to provide maximum flexibility for the Registrar to apply reporting requirements which are appropriate to the corporation's circumstances, particularly size. The review (at paragraph 1126) observed that the current one-size-fits-all reporting requirements in the ACA Act do not sit comfortably with the diversity of corporations incorporated under the Act. Under section 59 of the ACA Act, all corporations are required to submit the same information, including:

1.28. a statement that the governing committee and corporation have complied with Act and rules

1.29. a balance sheet setting out assets and liabilities

1.30. an income and expenditure statement

1.31. an examiner's (i.e. auditor's) report prepared by a company auditor

- the names and addresses of members.

1.32. The review argued that these reporting requirements were too complex for small corporations and not comprehensive enough for large corporations, particularly those providing essential community services. The review recommended (at paragraphs 1347 to 1365) reducing the reporting requirements for small corporations and increasing them for large corporations. Chapter 7 implements the review recommendations by 'streaming' corporations into small, medium and large and developing size-specific reporting for the different sizes of corporations in the regulations.

1.33. The review noted (at paragraphs 1166 to 1168) that small corporations under the ACA Act are required to meet much heavier reporting requirements than would be the case if they were incorporated as small proprietary companies under the Corporations Act. The review recommended minimal reporting for small corporations. Under Chapter 7 it is planned that small corporations will only have to meet the general reporting requirements which do not include audited financial statements.

1.34. The review proposed that large corporations meet the standards of general purpose financial reports required of reporting entities under the Corporations Act, including full compliance with all Corporations Act accounting standards, and full disclosure by directors. The review recommended that large corporation reports would be audited by a registered company auditor. Under Chapter 7 it is planned that large corporations will have to at least meet the reporting requirements recommended by the review. Chapter 7 also has the flexibility to require standards of reporting in line with public companies. Large corporations often have complex corporate structures with groups of CATSI corporations and Corporations Act corporations. An important point of modernising the reporting requirements in line with accounting standards and the approach taken in the Corporations Act is the capacity to require consolidated financial reports.

1.35. The review proposed three categories of corporation for reporting purposes, exempt, small and large. Chapter 7 relies on slightly different categories being small, medium and large. Section 59A of the ACA Act allows the Registrar to provide individual exemptions from the reporting requirements. The review (at paragraph 1178) recommended extending this exemption power so that the Registrar will also be able to exempt *classes* of corporations from the reporting requirements. Chapter 7 implements this recommendation and will rely on class exemptions to implement where appropriate the review's proposal for a category of exempt corporations. The medium category is introduced to provide an intermediary step between the large and small reporting requirements, for example medium corporations could be required to lodge financial statements but may be able to have these audited by their accountant rather than a registered company auditor.

1.36. Chapter 7 enables flexible and responsive administrative practices. Reporting requirements can be adjusted for individual corporations or classes of corporations. The specific content of the reports and related obligations will largely be prescribed in regulations allowing for the reporting requirements to be modified and updated quickly as the circumstances of corporations change over time. Exemptions from the operation of the chapter can be given for specific corporations or classes of corporations. This flexibility may assist with making reporting requirements more consistent with the reporting requirements of funding bodies and reducing duplication.

1.37. The review also recommended shifting the focus from external to internal accountability. In practice most CATSI corporations (small and medium) will have reduced reporting requirements compared with the current ACA Act requirements. This reduces the emphasis on external accountability. Chapter 7 also provides for increased internal accountability through the introduction of reporting to members, upon request, for corporations that are required to prepare financial or directors' reports.

1.38. Chapter 7 also deals with the general requirement to keep proper financial records and includes general provisions relating to books kept by a corporation.

Chapter 8 Civil consequences of contravening civil penalty provisions

1.39. This chapter creates a civil penalty scheme based on Part 9.4B of the Corporations Act. As in the Corporations Act, the proposed civil penalty regime will provide appropriate sanctions for serious contraventions of the Act, including breaches of directors' duties. Including a civil penalty scheme in the Bill is appropriate considering that civil penalties have traditionally been directed against corporate wrongdoing if imprisonment is either not available or is inappropriate. The civil penalty scheme will also provide a strong financial disincentive against corporate wrongdoing and is an appropriate non-criminal alternative in the context of regulating Indigenous corporations.

1.40. Like other such schemes, the proposed civil penalties will be enforced by civil proceedings that are subject to the procedures and rules of evidence in civil cases. Proof will be on the balance of probabilities. Similar to the Corporations Act, the civil penalty provisions apply to contraventions of certain specified sections (such as the

duty on directors to prevent insolvent trading). If a person has contravened these provisions, the Court can make the following orders:

- a declaration that the person has contravened the provision (declaration of contravention)
- an order disqualifying the person from being a director or officer of a company for such period as it thinks fit (proposed section 279-15)
- if the contravention is serious, a pecuniary penalty payable to the Commonwealth of an amount up to \$200 000.

1.41. The Court will also be able to order a person to compensate a CATSI corporation for damage suffered by the corporation if the person has contravened a civil penalty provision in relation to the corporation and the damage resulted from the contravention.

1.42. Only the Registrar will have standing to apply for a civil penalty, although an affected CATSI corporation will also be able to apply for a compensation order and may intervene in civil penalty proceedings in certain circumstances. For example, a CATSI corporation will be able to seek compensation from a director who has breached his directors' duties, including any profits the director may have made from the contravention.

Chapter 9 Lodgments and registers

1.43. This chapter sets out provisions relating to lodgment of information by Aboriginal and Torres Strait Islander corporations and registers of information maintained by the Registrar. The lodgment and retention of information on publicly searchable registers aims to provide transparency in the affairs of Aboriginal and Torres Strait Islander corporations. The chapter clarifies the information that will be on the publicly searchable registers. Readily available information about corporations is a critical tool in promoting good corporate governance.

1.44. Under this chapter the Registrar is required to keep certain registers, but may also keep others, as considered necessary. The current requirement of section 5(1)(a) of the ACA Act to maintain a public Register of Incorporated Aboriginal Associations leaves the content of the register unclear. The Bill will clarify the content of the public register.

1.45. The principal register will be the Register of Aboriginal and Torres Strait Islander Corporations. Any documents lodged or filed with the Registrar will be public documents but the Registrar will be able to control public access to any personal information contained in these documents.

Chapter 10 Regulation and enforcement

1.46. Chapter 10 of the Bill contains provisions dealing with the regulation of CATSI corporations and enforcement powers. These provisions modernise the regulatory and enforcement schemes currently contained in the ACA Act as well as address existing problems arising from deficiencies in the existing legislative regime.

1.47. Under Part 2 of the Bill the Registrar has a power to call a meeting of interested persons to deal with matters affecting one or more CATSI corporations. This power reflects the fact that many problems relating to the sustainability of Indigenous corporations require a coordinated approach involving numerous government agencies and funding bodies, at both Commonwealth and state levels, as well as other creditors and corporations.

1.48. Furthermore, under Part 2 the Registrar's current power to call special general meetings in circumstances when the corporation cannot or will not call such meetings will be expanded to include AGMs. Significant disputation builds up when there is community and member concern about meetings not being held, so this power will be available to minimise disputes. In addition, the power will be available when corporations are not able to call or run the meeting. The Registrar's power to issue compliance notices will also be retained. Compliance notices have proven to be a useful diagnostic tool under the ACA Act and have often been used to provide directors with information about their obligations and a means to ensure compliance. Compliance notices will also be able to be issued for CATSI corporations which are at risk of being placed under special administration.

1.49. Part 3 retains and modernises the Registrar's existing power to appoint a suitably qualified person to examine a corporation's affairs. Like the existing examination power it does not require grounds, therefore enabling 'healthy organisation checks' as a preventative measure. This power has been retained to allow early intervention and problem solving. The scope of the power will include the examination of issues that are broader than financial management to support dispute resolution and improved effectiveness of corporations. Part 3 also deals with the Registrar's power to examine books and ask people questions in certain circumstances, including the power to seek a warrant from a magistrate when books asked for have not been produced. Warrants may be applied for in person or by telephone or other electronic means. These provisions reflect equivalent provisions in the ASIC Act and other modern regulatory schemes and provide greater procedural safeguards than currently exist under the ACA Act.

1.50. Part 4 contains some offences relating to these regulatory and enforcement powers and deals with the privilege against self-incrimination. These provisions are based on the equivalent provisions in the ASIC Act.

1.51. Part 5 establishes a framework which is designed to encourage employees, officers, contact persons and subcontractors engaged by a CATSI corporation to report suspected breaches of the Act to either the Registrar or internally within the corporation. The provisions will prohibit employers from victimising employees, officers, contact persons or subcontractors when they report a suspected breach in good faith and on reasonable grounds. Further, the provisions provide the relevant employee, officer, contact person or subcontractor with qualified privilege in relation to a protected disclosure of information. These provisions are based on the equivalent whistleblower provisions in the Corporation Act.

Chapter 11 External administration

1.52. Chapter 11 of the Bill provides for CATSI corporations to be placed under 'special administration' and a 'special administrator' appointed. The chapter also

applies parts of the Corporations Act that relate to administration and winding up. The chapter makes it clear how the provisions of the Corporations Act and the CATSI Bill interact in relation to administration.

1.53. Sections 62 and 67 of the ACA Act currently apply the provisions of the Corporations Act that relate to compromises and arrangements with creditors, and winding up respectively. Exactly which provisions of the Corporations Act are applied by section 62 and 67 has been somewhat unclear. Chapter 11 removes this uncertainty. This implements the review proposal at paragraph 1300 to make it clear that funding bodies and other creditors can take advantage of the Corporations Act provision relating to appointment of receivers and provisional liquidators.

1.54. One particular area of uncertainty relates to the interaction between an administrator appointed under section 71 of the ACA Act and an administrator appointed under the Corporations Act. This uncertainty has been the subject of litigation in *Kazar v Duus* (1998) 88 FCR 218 and *Re Deeral Aboriginal and Torres Strait Islander Corporation* (1996) 70 FCR 229.

1.55. Chapter 11 of the Bill removes this uncertainty by establishing the priority that placing a CATSI corporation under special administration takes over the various forms of administration in the Corporations Act. Broadly, special administration is given priority over voluntary administration and receivership, but a CATSI corporation cannot be placed under special administration once winding up has commenced or a liquidator is appointed. This addresses the uncertainty that was raised in *Kazar v Duus* where voluntary administration was entered into after notice was given that a section 71 administrator would be appointed. The Court held that the voluntary administration was suspended for the duration of the administrator's appointment by the Registrar. The approach taken in chapter 11 is consistent with the approach of the court in *Kazar v Duus*. In addition, flexibility is maximised by allowing the Registrar to approve the appointment of a voluntary administrator during special administration.

1.56. The review proposed at paragraph 1317 that section 71 be replaced by an alternative approach in which the Registrar would have the express power to apply to the court to have a receiver appointed under the court's equitable jurisdiction. Chapter 11 retains the capacity for the Registrar to appoint an administrator but addresses a number of the deficiencies identified by the review as well as incorporating some of the advantages it proposed.

Chapter 12 Transfer of registration, deregistration and unclaimed property

1.57. The ACA Act relies on the deregistration process set out in chapter 5A of the Corporations Act. This is achieved by virtue of section 67 of the ACA Act which incorporates relevant provisions of the Corporations Act by reference. For the proposed Act, the Corporations Act provisions continue to operate, however specific reference to deregistration is made, setting out grounds and procedures for voluntary and Registrar-initiated deregistration and for deregistration following transfer to another system, amalgamation or winding up.

1.58. The proposed chapter also sets out circumstances where an Aboriginal and Torres Strait Islander corporation can be re-registered, what happens to property of a deregistered corporation and how the Registrar must deal with unclaimed property.

Chapter 13 Offences

1.59. Chapter 13 is based on similar provisions of the Corporations Act. Part 1 of Chapter 13 contains two general offences dealing with the provision of false or misleading statements and information. Proposed section 561-1 deals with false or misleading statements made about documents required by or for the purposes of this Bill or lodged with or submitted to the Registrar. Proposed section 561-5 deals with false or misleading information given by an officer or employee of a CATSI corporation to directors, auditors and members.

1.60. Part 2 of Chapter 13 contains a number of mainly ‘machinery’ type provisions dealing with offences and related matters in the Bill. These include provisions dealing with the ‘corporate multiplier’ for a body corporate convicted of an offence, the operation of continuing offences, a five-year time limit for instituting criminal proceedings, the privilege against self-incrimination for a body corporate in criminal proceedings, and the Registrar’s power to seek the assistance of certain person in prosecutions.

1.61. Part 2 also provides for the operation of a penalty notice scheme. Under this scheme, the Registrar will be empowered to give a notice alleging an offence to a suspected offender providing that the suspected offender pays a specified penalty to avoid prosecution. The proposed penalty notice scheme, like other infringement notice schemes, is intended to provide an efficient and cost-effective alternative to pursuing criminal sanctions against a potential defendant. Using infringement notice schemes in appropriate circumstances received support in ALRC Report 95: *Principled Regulation*. A penalty notice scheme is also an appropriate non-criminal alternative in the context of regulating Indigenous corporations.

1.62. All the proposed sections in Chapter 13 (including the proposed penalty notice section) are based on equivalent provisions in the Corporations Act.

Chapter 14 Courts and proceedings

1.63. Chapter 14 deals with courts and proceedings. The chapter closely mirrors Part 9.5 of the Corporations Act. This Part relies on the definition in section 9 of the

Corporations Act of ‘Corporations legislation’. This is defined broadly to include the Corporations Act, the ASIC Act and court rules made for provisions of the Corporations Act. Chapter 14 replaces ‘Corporations legislation’ with ‘Aboriginal and Torres Strait Islander Corporations legislation’ which is defined including the Bill and court rules made for provisions of the Bill.

1.64. The effect of this replication and substitution is to confer jurisdiction on exactly the same courts as are conferred jurisdiction under the Corporations Act. This is important as it avoids jurisdictional uncertainty for groups of corporations that have a mix of Corporations Act corporations and CATSI corporations. This will also reduce difficulties with transferring proceedings between courts as any court that a matter can be transferred to will clearly have jurisdiction to hear the matter. This also ensures that the courts experienced with Corporations Act matters will be able to apply this experience to CATSI corporations and the substantial amounts of the Corporations Act that are incorporated by reference, adopted or modified in the Bill.

1.65. The broad range of courts that jurisdiction is conferred on also promotes access to justice for CATSI corporations, their members and creditors. CATSI corporations and their members in regional and remote areas will benefit from being able to access state courts including the lower courts. Under the ACA Act, the Federal Court had jurisdiction which was comparably inaccessible for many ACA Act associations and members. As in the Corporations Act, the Family Court is also given jurisdiction which, for example, is important for family law property settlements involving corporation-held property.

1.66. Other than jurisdiction, the chapter also deals with the powers of courts, injunctions and procedural matters such as transfer of proceeding and costs. One important procedural matter that is replicated is the power for the Registrar to intervene in proceedings. This is an important way that the Registrar can support the protection of members.

Chapter 15 Administration

1.67. This chapter deals with protected information and its use and disclosure. Provisions dealing with protected information aim to bring the Registrar in line with other regulatory agencies and operate consistently with the *Privacy Act 1998*. Because of its age, the ACA Act is silent on the protection of information. These provisions in the Bill support the Commonwealth policy on protecting personal information and the privacy of individuals.

1.68. Consistent with the ASIC Act, the chapter also protects from liability the Registrar, Minister and other persons acting with the authority of the Registrar as long as they are acting in good faith. It also provides for administrative review of decisions and brings the Bill in line with the Commonwealth’s policy on ensuring appropriate review of administrative decisions.

1.69. This chapter also provides for fees to be paid for services provided for in this Bill, for regulations to be made and for approved forms, specifying how information is to be provided to the Registrar in some circumstances. There is a general power to make regulations, consistent with the Corporations Act, as well as a specified power to make regulations to ensure that the Bill interacts appropriately with the Native Title

Act. This regulation-making power provides that regulations that modify the operation of the Bill may not be modified to the extent that they are inconsistent with the native title legislation to support the protection of native title. In addition, specific provision is made for regulations to be made that specify the duties, functions and powers of an administrator, special administrator, receiver or liquidator appointed to an RNTBC.

1.70. This measure is designed to ensure that, should it prove to be operationally necessary, regulations can be made providing guidance to an external administrator appointed to an RNTBC about the statutory functions required of the corporation by the native title legislation. The Registrar will use a range of administrative procedures to ensure that an external administrator appointed to an RNTBC is aware of the special circumstances and statutory duties of RNTBCs, such as appropriate terms of reference and guidelines.

Chapter 16 Registrar and Deputy Registrars of Aboriginal and Torres Strait Islander Corporations

1.71. This chapter provides for the appointment of the Registrar and Deputy Registrars and also for the Registrar's functions and powers. The functions of the Registrar are based on similar functions expressed in the ASIC Act and are designed to support the Registrar's incorporation, monitoring and regulatory functions with a range of capacity building measures which focus on building the capability of corporations. For example, the express function of providing public information about corporations registered under the Bill is designed to increase transparency and support the accessibility of information available to members and other stakeholders.

1.72. Conducting research and public education campaigns about good corporate governance for Aboriginal and Torres Strait Islander corporations is an important tool to support the development of improved corporate governance standards in corporations.

1.73. Assisting with disputes is a very high area of demand for the Registrar. While the Registrar will not have a direct role in conducting mediation or other formal dispute resolution services, the Bill clarifies that the Registrar has a role in relation to providing assistance with the resolution of disputes and complaints.

1.74. This chapter also confirms that the Registrar must aim to administer the Bill in a way that contributes to the effectiveness and efficiency of corporations, and in a way that has regard to the particular traditions and circumstances of Aboriginal and Torres Strait Islander persons. These provisions confirm the operation of the Bill as a special measure.

Chapter 17 Interpreting this Act

1.75. This chapter sets out the meaning of important concepts used in the Bill, specifically directors and officers, associates and subsidiaries and control. The chapter also provides interpretation of other expressions and a dictionary defining words and terms used in the Bill.

1.76. This chapter is designed to give guidance to readers on the operation and intention of provisions of the Bill.

5. Notes on clauses - chapters in detail

Chapter 1 Introduction

Preamble

1.1. The preamble provides that the constitutional basis of the proposed Act is section 51(xxxvi) of the Constitution (the race power).

1.2. The preamble also provides that the Act is a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*. Article 1(4) of the International Convention limits special measures to those which:

- have as their sole purpose, securing the advancement of certain groups;
- are necessary; and
- are “catch-up” measures which must be dropped when they have served their purpose of advancing a disadvantaged group.

Part 1-1 Preliminary

1.3. Proposed section 1-1 is a formal provision specifying the short title of the Bill. The reference to Aboriginal and Torres Strait Islanders in the title makes it clear that the Bill includes the two Indigenous races of Australia.

1.4. Proposed section 1-5 sets out the commencement information of the Bill. The Bill will commence on 1 July 2007.

1.5. Proposed section 1-10 establishes the jurisdiction of the Bill.

1.6. Proposed section 1-15 extends the proposed Bill to the external territories.

1.7. Proposed section 1-20 provides that the proposed Bill applies regardless of residence, place of formation etc. This section reflects the equivalent provision (section 5(7)) of the Corporations Act.

1.8. Proposed section 1-25 sets out the objects of the Bill and is drawn from the *Australian Securities and Investments Commission Act 2001*. The objects of the Bill include provision for the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, the Registrar’s functions and powers, and the incorporation, operation and regulation of bodies covered by the Bill.

1.9. The objects also specifically provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of being registered under the *Native Title Act 1993* as a native title bodies corporate. Most native title bodies are required by the Native Title Act to be incorporated under ACA Act for the purpose of registration as a native title body. Provisions throughout the Act

specifically provide for registered native title bodies to enable them to meet the requirements of native title legislation obligations.

1.10. The objects further specifically provide for the duties and the regulation of officers of Aboriginal and Torres Strait Islander corporations. The ACA Act replicates the wording of corporations law from the 1970s regarding duties, which has created legal uncertainty about the meaning and remedies for breaches. Also, the ACA Act provides very few remedies against individual governing committee members and officers that breach duties—the key remedies are against the corporation. The proposed Act clarifies and modernises the duties of officers and brings them in line with current corporations law.

1.11. Proposed section 1-30 establishes the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations located within the department. The proposed Bill relies on section 19A of the *Acts Interpretation Act 1901* which provides that a reference in an Act to a department means a Department of State administering the legislation.

1.12. Proposed section 1-35 provides that the interpretative provisions are contained in the dictionary in Chapter 17.

Part 1-2 Overview of Act

1.13. Proposed section 6-1 states the overview of the Bill, that the primary purpose is to provide for the incorporation and regulation of Aboriginal and Torres Strait Islander corporations.

1.14. Proposed section 6-5 sets out an overview of Chapter 2, which deals with registration, that is the process of incorporation, of an Aboriginal and Torres Strait Islander corporation.

1.15. Proposed section 6-10 sets out an overview of Chapter 3, which deals with basic features of an Aboriginal and Torres Strait Islander corporation. For example, names, registered office, internal governance framework, powers that they can exercise and assumptions people can make.

1.16. Proposed section 6-15 sets out an overview of Chapter 4, which deals with members and observers of an Aboriginal and Torres Strait Islander corporation.

1.17. Proposed section 6-20 sets out an overview of Chapter 5, which deals with meetings of an Aboriginal and Torres Strait Islander corporation.

1.18. Proposed section 6-25 sets out an overview of Chapter 6, which deals with officers and contact persons of an Aboriginal and Torres Strait Islander corporation.

1.19. Proposed section 6-30 sets out an overview of Chapter 7, which deals with reporting requirements and the books of an Aboriginal and Torres Strait Islander corporation.

1.20. Proposed section 6-35 sets out an overview of Chapter 8, which deals with civil consequences of breaches of the Bill.

1.21. Proposed section 6-40 sets out an overview of Chapter 9, which deals with lodgment of information by Aboriginal and Torres Strait Islander corporations and

registers required to be maintained by the Registrar such as the Register of Aboriginal and Torres Strait Islander Corporations.

1.22. Proposed section 6-45 sets out an overview of Chapter 10, which deals with regulatory and enforcement powers of the Registrar of Aboriginal and Torres Strait Islander Corporations.

1.23. Proposed section 6-50 sets out an overview of Chapter 11, which deals with external administration of an Aboriginal and Torres Strait Islander corporation.

1.24. Proposed section 6-55 sets out an overview of Chapter 12, which deals with the transfer of an Aboriginal and Torres Strait Islander corporation's registration to another system, the deregistration of an Aboriginal and Torres Strait Islander corporation and any unclaimed property of a deregistered corporation.

1.25. Proposed section 6-60 sets out an overview of Chapter 13, which deals with general offences under the Act.

1.26. Proposed section 6-65 sets out an overview of Chapter 14, which deals with jurisdiction of courts under the Act.

1.27. Proposed section 6-70 sets out an overview of Chapter 15, which deals with general administrative matters of the Act.

1.28. Proposed section 6-75 sets out an overview of Chapter 16, which deals with the appointment of the Registrar and Deputy Registrars.

1.29. Proposed section 6-80 sets out an overview of Chapter 17, which deals with interpretative provisions and definitions.

Chapter 2 Aboriginal and Torres Strait Islander Corporations

Part 2-1 Introduction

1.30. Proposed section 16-1 sets out what the chapter is about.

1.31. Proposed section 16-5 establishes the meaning of ‘Aboriginal and Torres Strait Islander corporation’ as a corporation registered under the Bill.

Part 2-2 Applications for registration of an Aboriginal and Torres Strait Islander corporation

1.32. Like section 117 of the Corporations Act, proposed section 21-1 sets out the information required for an application under Division 21 to be registered as a new Aboriginal and Torres Strait Islander corporation. In addition to the proposed name and contact details of persons who consent to be a member, directors, contact person or corporation secretary, the application must also contain information identifying whether the corporation is expected to be a small, medium or large corporation. This will allow corporations to be streamed for reporting purposes and will allow for differential treatment of corporations based on size and risk.

1.33. Proposed section 21-1(3) will result in the contact details of directors of Aboriginal and Torres Strait Islander corporations being aligned with the Corporations Act.

1.34. Proposed section 21-5 establishes the type of information that must be provided with an application for registration, under Division 21, as an Aboriginal and Torres Strait Islander corporation.

1.35. Proposed section 21-10 provides a power for the Registrar to seek further information to allow the Registrar to determine an application. This will allow the Registrar to seek additional information if that information has been overlooked or omitted. This avoids the Registrar having to refuse an application and the applicant having to recommence from the beginning. This proposed section is designed to reduce administrative burdens on the applicant.

1.36. Proposed section 22-1 sets out the information required when an existing body corporate applies, under Division 22, to be registered as a CATSI corporation. As well as the information required for a standard application for registration under Division 21, the application must contain certain information about the transferring corporation, including its current name, its ACN or Australian Company Number (if any), its ARBN or Australian Registered Body Number (if it is a registered body within the meaning of the Corporations Act) and the law under which it is currently incorporated. The references in this proposed section to registration ‘under Part 2-3’, which are not made in proposed section 21-1, distinguish this process of registration under the CATSI Bill from the body corporate’s registration under the law of its place of origin.

1.37. Proposed section 22-5 establishes the information that must be provided with an application for registration under Division 22. This includes evidence of the resolution under the pre-transfer of registration requirement in proposed section 29-

17, that the corporation is not externally administered, that there is no current application to wind it up or for a court to approve a compromise or arrangement with the corporation, that under the law of its place of origin the transfer of its incorporation is authorised, and that it has complied with any requirements of that law in transferring its incorporation. The evidence lodged under this section must be satisfactory proof to the Registrar of these matters. This proof requirement is based on subsection 601BC(9) of the Corporations Act.

1.38. Proposed section 22-10 is based on proposed section 21-10 and provides a power for the Registrar to seek further information to be able to determine an application under Division 22.

1.39. Proposed section 23-1 sets out the information required when a CATSI corporation applies to the Registrar to register under Part 2-3 an amalgamated corporation to replace two or more existing CATSI corporations. As well as the information required for applications made under Division 21, the application must contain the names and ICNs of the amalgamating corporations and the name the amalgamated corporation proposes to adopt. Like Division 22, the references in this proposed section to registration ‘under Part 2-3’, which are not made in proposed section 21-1, distinguish the registration of the amalgamated corporation from the original registration of the amalgamating corporations.

1.40. Proposed section 23-5 establishes the information that must be provided with an application for registration under Division 23. This includes evidence that the amalgamated corporation will meet the creditor notice requirements of proposed section 29-18, that none of the amalgamating corporations are externally administered, that no current application exists to wind up any of the amalgamating corporations or for a court to approve a compromise or arrangement with any of amalgamating corporations. This last requirement means that an amalgamating corporation can not apply for amalgamation under Division 23 if it is also the subject of a Court supervised amalgamation under the applied provisions of Part 5.1 of the Corporations Act. The evidence lodged under this section must be satisfactory proof to the Registrar of these matters. This proof requirement is based on subsection 601BC(9) of the Corporations Act.

1.41. Proposed section 23-10 is based on proposed section 21-10 and provides a power for the Registrar to seek further information to be able to determine an application under Division 23.

Part 2-3 Decisions on application

1.42. Proposed section 26-1 provides a power for the Registrar to decide an application for registration and establishes the grounds on which the Registrar can grant an application. These grounds are designed to give clear guidance for the decision-maker. Proposed paragraph 26-1(2)(e) provides that the Registrar may grant an application on the ground that the Bill provides the most appropriate incorporation regime for the proposed corporation. This proposed section is designed to allow the Registrar to refuse an application in circumstances including where a proposed corporation would operate as a very large trading corporation with complex subsidiary arrangements, and would be more appropriately registered under the Corporations Act.

1.43. Proposed subsections 26-1(3)-(5) will only apply to an amalgamation application under proposed section 23-1. Proposed subsection (4) provides that the Registrar must not grant an amalgamation application if a substantial creditor has objected to the proposed amalgamation under proposed subsection 29-18(3) and not withdrawn it. Proposed subclause (5) sets out some additional matters that the Registrar may consider in deciding whether to grant an amalgamation application. These proposed subsections support the distinction between amalgamations which are appropriate for the Registrar to process administratively and those which are more appropriately conducted under the supervision of a Court. If the Registrar decides not to grant an amalgamation application, the applicants may still apply to a Court for amalgamation of the CATSI corporations under the applied provisions of Part 5.1 of the Corporations Act. Both the administrative amalgamation process and the Court supervised process are only available to groups of CATSI corporations. Groups comprised of both CATSI corporations and corporations registered under the Corporations Act will first need to ensure that they are all registered under the same legislation before applying to amalgamate. This can be achieved using the transfer provisions.

1.44. Proposed section 26-5 allows for the Registrar to grant an application for registration even if the application is incomplete. This section is designed to be used in circumstances where an application contains minor technical errors or omissions and supports the aim of reducing the administrative burden on the applicant.

1.45. Proposed section 26-10 provides that the Registrar may grant an application in some circumstances, even if some of the basic requirements have not been met. The Registrar will not be able to grant an application if the application does not meet the critical requirements of Indigeneity, internal governance rules or the name. Without the Indigeneity requirement, the Bill may not fulfil the requirement to come within a constitutional head of power. A clear and sound internal governance framework and a name are essential to a functioning corporation.

1.46. Proposed section 26-15 sets out the kinds of bodies that cannot be registered. These include a body that is a trade union, which is consistent with section 116 of the Corporations Act, and a body providing financial services. This recognises the Corporations Act as the appropriate incorporation regime for financial service providers. A regulation-making power allows for other bodies that may not be registered to be prescribed, should this be necessary in the future.

1.47. Proposed section 29-1 provides that a corporation meets the minimum number of members requirement if it complies with proposed section 77-5.

1.48. Proposed section 29-5 establishes that the Indigeneity requirement is met if the corporation ensures that it has the requisite number or percentage of Aboriginal and Torres Strait Islander persons as members. As the Bill is a special measure for Aboriginal and Torres Strait Islander peoples, corporations will always have to have at least a majority of members who are Aboriginal or Torres Strait Islanders or Aboriginal and Torres Strait Islander persons. This ensures that the Bill remains supported by the constitutional head of power. The constitution of any corporation will determine what the actual percentage of Indigenous membership must be, not being less than a majority.

1.49. Proposed section 29-10 sets out that a corporation meets the age of members requirement if each member of the corporation, who is a natural person, is at least 15

years of age. The current ACA Act restricts membership to persons over the age of 18. Given that young people are a significant and growing demographic component of the Aboriginal and Torres Strait Islander population, this allows for membership of younger persons to support earlier access to participation in corporations, and leadership opportunities. The age of 15 was determined because this is when people are eligible to participate in the Community Development Employment Projects (CDEP) program, one of the Commonwealth's major funded programs for Indigenous people. In addition, corporations providing CDEP services form a significant class of current ACA Act corporations. A specific age at which people are eligible for membership was also required to support legal certainty. Nothing in the Bill prevents a corporation from having an advisory committee of 'children' i.e. persons under 15 to assist them on relevant matters.

1.50. Proposed section 29-15 establishes the pre-incorporation requirement for an application made under Division 21. This requires a substantial majority of persons listed on the original application for registration to consent to a number of requirements, including that the applicant is authorised to make the application and what the internal governance rules are. In the case of a small or medium corporation, the application must state who the contact person for the corporation is or in the case of a large corporation, who the corporation secretary is. The contact person provides third party access to a corporation, while the corporation secretary has additional responsibility for contraventions of the Bill listed in section 265-40. The purpose of the pre-incorporation requirement is to allow the applicant to demonstrate 'readiness' for incorporation. Poor design of Aboriginal and Torres Strait Islander corporations is a significant problem and can lead to corporate failure and communities at risk of being left without essential services. Measures such as the pre-incorporation requirement aim to build better designed and sustainable corporations.

1.51. Proposed section 29-17 establishes the pre-transfer requirements for a body corporate seeking to transfer its registration to the CATSI Bill. It requires the members of the transferring body corporate to have passed a resolution, by at least 75 per cent of the eligible votes and after 21 days notice, authorising the application and approving the proposed constitution and internal governance rules. The resolution must also nominate the persons who will become the directors upon registration and, depending on the corporation's likely size, the person who will become the secretary or contact person. Proposed clause 29-17 is based on proposed section 29-15 which establishes the pre-incorporation requirements for new CATSI corporations.

1.52. Proposed section 29-18 establishes the creditor notice requirements that an amalgamated corporation must satisfy to be registered under Part 2-3 of the Bill. It protects the interests of a substantial creditor of an amalgamating corporation who may be materially prejudiced as a result of the amalgamation. A substantial creditor of an amalgamating corporation will be a person who is owed an unsecured debt, or debts, by an amalgamating corporation that exceeds an amount which will be prescribed in the regulations. The Registrar must not grant an amalgamation application if a substantial creditor has objected to the proposed amalgamation under proposed subsection 29-18(3) and has not withdrawn it. However, the amalgamation could still be achieved by the amalgamating corporations applying to a Court under the applied provisions of Part 5.1 of the Corporations Act.

1.53. Proposed section 29-19 establishes the pre-amalgamation requirements for CATSI corporations seeking to amalgamate by applying under proposed section 23-1.

It requires the members of each of the amalgamating corporations to have passed a resolution, by at least 75 per cent of the eligible votes and after 21 days notice, authorising the application and approving the proposed constitution and internal governance rules of the amalgamated corporation. The resolution must also nominate the persons who will become the directors upon registration and, depending on the corporation's likely size, the person who will become the secretary or contact person. Proposed section 29-19, like proposed section 29-17, is based on proposed section 29-15 which establishes the pre-incorporation requirements for new CATSI corporations.

1.54. Proposed section 29-20 establishes that a corporation meets the internal governance rules requirement if the corporation's constitution complies with requirements proposed in section 66-1.

1.55. Proposed section 29-25 establishes that a corporation meets the internal governance rules requirement if the corporation's constitution complies with the name requirement proposed in section 85-1.

1.56. Proposed section 32-1 provides that an application for registration that has been successful will result in the corporation and the constitution being registered and a certificate of incorporation issued. This is consistent with section 118 of the Corporations Act.

1.57. Proposed section 32-5 requires the Registrar to notify an unsuccessful applicant in writing of the decision not to grant an application and invite the applicant to make changes that would remove the grounds for refusal. This proposed section aims to provide a greater level of support and advice to applicants

Part 2-4 Registration of an Aboriginal and Torres Strait Islander corporation as a small, medium or large corporation

1.58. Proposed section 37-1 requires that the corporation be registered as a small, medium or large corporation. This provision provides for differential and targeted corporate reporting.

1.59. Proposed section 37-5 provides that the corporation's registration size can be altered after registration. This allows for the changing circumstances of corporations to be accommodated.

1.60. Proposed section 37-10 deals with the classification of all CATSI corporations into small, medium and large corporations by virtue of their income, assets and employees. This is based on the Corporations Act provisions relating to how small and large proprietary companies are determined. The specific amounts to apply to categories of corporations will be determined by regulations. This will enable the standards to change to accommodate changing circumstances relevant to Aboriginal and Torres Strait Islander corporations, as well maintain alignment with changing mainstream standards. Proposed section 37-10(4) tailors the provision for RNTBCs and ensures that native title rights and interests are not to be counted towards the values of assets of an RNTBC. This section is designed to remove uncertainty as at the present time, there is no clear process for determining the value of native title rights and interests.

1.61. Proposed section 37-15 provides that, in deciding whether a not a corporation controls an entity for the purposes of determining a corporation to be small, medium

or large, the accounting standards that are in force by virtue of section 334 of the Corporations Act will be applied. Section 334 of the Corporations Act allows for the Australian Accounting Standards Board to make accounting standards that apply for the purposes of the Corporations Act. This proposed section allows the Bill to align with mainstream accounting standards.

1.62. Proposed section 37-20 provides that regulations may be made to prescribe one or more methods for counting employees. This level of flexibility is required to ensure that the Bill can accommodate changing definitions of employees. An example of the need for this occurs in corporations providing CDEP services where CDEP participants might ordinarily be regarded as employees and often make up the majority of the membership. Proposed section 246-5(4) prevents a majority of the Board being employees which might adversely affect the eligibility of CDEP participants who are members to be elected to the Board.

1.63. Proposed section 37-25 allows for mainstream accounting standards to be applied to corporations.

Part 2-5 Effects of registration

1.64. Proposed section 42-1 mirrors section 119 of the Corporations Act and provides that for a CATSI corporation, registered as a result of an application made under Division 21, the new corporation comes into existence on the day it is registered.

1.65. Proposed section 42-3 provides that the registration of a body corporate which transfers to the CATSI Bill after applying under proposed section 22-1 does not create a new legal entity or affect the body's existing property, rights or obligations (except as against its members in their capacity as members). The registration also does not render defective any legal proceedings by or against the transferring body or its members. This proposed section is based on section 601BM of the Corporations Act.

1.66. Proposed section 42-4 deals with the effect of the registration of an amalgamated corporation under Part 2-3. Proposed subsection 42-4(2) provides that the registration of an amalgamated corporation, after applying under proposed section 23-1, creates a new CATSI corporation which comes into existence as a body corporate with perpetual succession at the beginning of the day on which it is registered.

1.67. Proposed subsection 42-4(3) provides for a seamless transition and continuity between the amalgamating corporations and the amalgamated corporation. It provides that the assets and liabilities of the amalgamating corporations become the assets and liabilities of the amalgamated corporation and the amalgamated corporation becomes the successor in any proceedings to which an amalgamating corporation was a party. Any ongoing investigation in relation to an amalgamating corporation or any other act or thing done, or omitted to be done, is inherited by the amalgamated corporation. References in documents to the amalgamating corporation are also to be read as references to the amalgamated corporation.

1.68. Proposed subsection 42-4(4), however, has the effect that if an amalgamating corporation is in special administration at the time of the amalgamation the amalgamated corporation is not taken to be in special administration. Any decision to put the amalgamated corporation into special administration will require a new

determination by the Registrar under proposed section 487-1. Proposed subsection 42-4(5) puts beyond doubt that the amalgamated corporation inherits any asset subject to any charge on the asset.

1.69. Proposed subsections 42-4(6)-(7) provide for a simplified procedure to register land vested in an amalgamated corporation as a result of the amalgamation. The Registrar signs a certificate identifying the land (see the definition of ‘land’ in proposed subsection 42-4(14)) and stating that it has become vested in the amalgamated corporation under this proposed section. The certificate is lodged with a relevant state or territory land registration official (such as the Registrar of Titles). This official may register the matter in the same or a similar way as other dealings in land of that kind and give effect to the Registrar’s certificate.

1.70. Similarly, proposed subsections 42-4(9)-(10) provide for a simplified procedure to register assets other than land vested in an amalgamated corporation as a result of the amalgamation. The Registrar signs a certificate identifying the asset (see the definition of ‘asset’ in proposed subsection 42-4(14)) and stating that it has become vested in the amalgamated corporation under this proposed subsection. The certificate is lodged with a relevant state or territory official responsible for the registration of the asset (the ‘asset official’ as defined in proposed subsection 42-4(14)). This official may deal with the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind and make such entries in the register as are necessary under this proposed section.

1.71. Proposed subsection 42-4(10) provides that stamp duty and other state or territory taxes will not be payable for the vesting of an asset or liability under this proposed section, or the operation of this proposed section in any other respect (an ‘exempt matter’). The Registrar will also be able to certify in writing that a specified matter is an exempt matter or that a specified thing was connected with a specified exempt matter. In all courts and for all purposes (other than for criminal proceedings), the Registrar’s certificate would be prima facie evidence of the matters stated in it.

1.72. Proposed section 42-5 provides that the name of a corporation on registration is that specified in the certificate of registration.

1.73. Proposed subsection 42-10(1) deals with which persons become members on registration of the corporation. With registrations under proposed subsection 22-1, the persons named and who have consented in the application to register, become members upon registration (proposed paragraph 42-10(1)(a)). With registrations under either proposed sections 22-1 and 23-1, the person is a member upon registration if they are a member of the transferring body corporate or the amalgamating corporation immediately beforehand. This gives those members who do not wish to remain a member of the transferred or amalgamated corporation the opportunity to resign their membership before registration. It also reflects the fact that such applications for registration, unlike those made under proposed section 22-1, do not require the consent of all potential CATSI corporation members to proceed.

1.74. Proposed subsection 42-10(1A) provides that a person becomes a director, corporation secretary or contact person upon registration if the person consents to it in the application under proposed section 22-1, 22-1 or 23-1.

1.75. Proposed subsection 42-10(2) serves to ensure that if no contact person is named in the application for a small or medium corporation then the applicant

becomes the contact person for the corporation on registration. This section is designed to overcome what has been a significant problem of non compliance under the ACA Act where there is no contact person named in the application, and the corporation does not notify of a contact person at a later date. Proposed subsection 42-10(3) provides that if the Registrar becomes aware that a contact person has been named in an application without his or her consent, the Registrar may determine that the applicant is the contact person. Like proposed subsection 42-10(2), this is designed to reduce non compliance with the Bill.

1.76. Proposed section 42-15 clarifies that the address a large corporation specifies in an application as being the corporation's registered office will become the address of the corporation's registered office on registration.

1.77. Proposed section 42-20 clarifies that the address a small or medium corporation specifies in an application as being the corporation's document access address will become the corporation's registered document access address on registration.

1.78. Proposed section 42-25 mirrors section 123 of the Corporations Act and provides that the corporation may have a common seal.

1.79. Proposed section 42-30 clarifies that any personal property held on trust for the corporation before it is registered, vests in the corporation once it is registered. Proposed section 42-30(3) imposes a duty on any person who holds an interest or estate in land on behalf of the members of the corporation must do all things necessary to ensure that the estate or interest is transferred to the corporation on registration.

1.80. Proposed section 42-35 deals with the liability of a member upon the winding up of a CATSI corporation if it has transferred from another system and if the member ceased to be a member before the transfer. The proposed section is based on section 601BN of the Corporations Act.

1.81. Proposed section 42-40 allows regulations to modify proposed Part 2-5, 'Effects of registration', for a CATSI corporation registered under Part 2-3 after applying under section 22-1. The proposed section is based on section 601BS of the Corporations Act.

1.82. Proposed section 42-45 deals with the liability of a member upon the winding up of a CATSI corporation, if it is an amalgamated corporation and if the member ceased to be a member before the registration of the amalgamated corporation. The proposed section is also based on section 601BN of the Corporations Act.

1.83. Proposed section 42-50 allows regulations to modify proposed Part 2-5, 'Effects of registration', for an amalgamated corporation registered under Part 2-3 after applying under section 23-1. The proposed section is also based on section 601BS of the Corporations Act.

Part 2-6 Arrangements and reconstructions

1.84. Proposed Part 2-6 will apply Part 5.1 of the Corporations Act to CATSI corporations, with appropriate substitutions. CATSI corporations will be able to use these provisions to enter into a compromise or arrangement with its creditors or members. They will also be able to use it to bring about an amalgamation. This Court

supervised process may be more appropriate for complex amalgamations or those where creditors are at greater risk of material prejudice than an administrative amalgamation made under Division 23. CATSI corporations may also apply to a Court for amalgamation orders under these provisions if the Registrar has decided not to grant a Division 23 application for the registration of an amalgamated corporation. However, under subsection 411(17) of the Corporations Act, as applied by proposed section 45-1, the Court must not approve a compromise or arrangement unless the Registrar has no objection to it. This power is in addition to the requirement to notify the Registrar of any proposed compromise or arrangement, including the draft explanatory statement, and to give the Registrar the opportunity to make submissions to the Court on the proposed compromise or arrangement and the draft explanatory statement (subsection 411(2) of the Corporations Act, as applied by proposed section 45-1). These provisions will help the Registrar and the Court ensure that the outcome of any such compromise or arrangement, including an amalgamation of CATSI corporations, is consistent with the CATSI Bill.

1.85. Proposed paragraph 45-1(2)(a) provides that the Corporations Act arrangements and reconstructions provisions only apply to the extent that they are able to apply to a CATSI corporation. Under proposed paragraph 45-1(2)(b) the application of these arrangements and reconstructions provisions can be modified by regulations. This recognises that the application of these provisions may be complex and require clarification if any unforeseen circumstances arise. However, these regulations cannot increase the maximum penalty for any offence or widen the scope of any offence (proposed subsection 45-1(3)).

1.86. Proposed subsection 45-1(4) determines the specific Corporations Act arrangements and reconstructions provisions that apply to a CATSI corporation. Some provisions of Part 5.1 of the Corporations Act are not applied because they are not relevant to CATSI corporations. For example, the provisions that relate to debenture holders or shareholders are not applied, given that CATSI corporations cannot issue debentures or shares.

Chapter 3 Basic features of an Aboriginal and Torres Strait Islander corporation

Part 3-1 Introduction

1.87. Proposed section 52-1 sets out what the chapter is about.

Part 3-2 Rules dealing with the internal governance of corporations

1.88. Proposed section 57-1 sets out what the Part is about.

1.89. The Bill provides for a system of replaceable rules consistent with the replaceable rules regime of the Corporations Act. Replaceable rules are identified throughout the Bill, and provide a framework of internal governance rules to apply to a corporation. A corporation can adopt all the replaceable rules, or replace the replaceable rules with their own provisions, adopt some of the replaceable rules and replace some. The replaceable rules will apply to a corporation whose constitution does not cover the matters provided for in the replaceable rules. The replaceable rules are intended to establish a minimum standard for corporate governance.

1.90. Proposed section 57-5 provides a list of internal governance rules. This list includes the replaceable rules and the other main provisions in the CATSI Bill that deal with the internal governance of CATSI corporations. Including a single list of all the rules relating to their internal governance in the Bill will help people understand the requirements of the Bill. Division 60 deals with the operation of the replaceable rules.

1.91. Proposed section 60-1 provides that the replaceable rules apply to corporations registered on or after the section commences and to corporations registered under the ACA Act.

1.92. Proposed section 60-5 allows a corporation to modify or replace the replaceable rules through their constitution.

1.93. Proposed section 60-10 provides that the constitution, and any rules that apply to the corporation, operate as a contract between the corporation and each member, the corporation and each director and corporation secretary, and between members. This proposed section is consistent with section 140(1) of the Corporations Act.

1.94. Proposed section 60-15 mirrors section 135(3) of the Corporations Act and provides that a failure to comply with the replaceable rules is not of itself a contravention of the Bill, and therefore provisions about criminal and civil liability and injunctions do not apply.

1.95. Proposed section 60-20 provides that regulations may modify the replaceable rules or set out new replaceable rules to apply to a specified corporation or a class of corporations. This section provides flexibility should existing replaceable rules prove problematic in their operation to one corporation or to a class of corporations, or if new rules are required. Providing flexibility is a key objective of the Bill, and supports good corporate governance practices in Aboriginal and Torres Strait Islander corporations.

1.96. Proposed section 63-1 establishes the meaning of the term ‘internal governance rules’ to include the replaceable rules that apply to the corporation, the rules of the corporation’s constitution that modify or replace some or all of the corporation’s rules and any other rules in the constitution that relate to internal governance.

1.97. While the Corporations Act does not require a corporation to have a constitution, the Bill requires all corporations to have a constitution written in English because it has proven to be a critical tool in supporting transparent governance practices in corporations and providing clear guidance to the corporation and its members on the rules by which the corporation must operate. As the constitution has legal force as a contract it is a requirement for the constitution to be written in English to support legal certainty. Consistent with the ACA Act, the Bill will provide that the corporation will be required to lodge the constitution with the Registrar, resulting in the constitution being a public document. This will allow funding bodies and other stakeholders access to the constitution, and supports transparency in internal governance.

1.98. Proposed section 66-1 sets out and defines the internal governance rules requirements. This section requires the corporation’s constitution to cover the matters that are provided for in the replaceable rules. It also requires the internal governance rules of a corporation that is an RNTBC, or is seeking registration for the purposes of becoming an RNTBC, to be consistent with the Native Title legislation. Providing consistency with the Native Title legislation was a key recommendation of the review.

1.99. Proposed subsection 66-1(3A) states that the constitution of an Aboriginal and Torres Strait Islander corporation must provide for resolution of internal disputes relating to the corporation’s operation. This encourages transparent dispute resolution processes, a clear aim of the Bill. This provision is required in all constitutions, highlighting its importance.

1.100. Proposed section 66-5 establishes the meaning of ‘cover the matters provided for in the replaceable rules’. This provision is satisfied if all of the replaceable rules apply, or have been replaced, or if some of the rules apply, and some have been replaced. Consistent with the review recommendation to support flexible design of constitutions, a corporation can adopt other rules through the constitution which can be tailored to suit its individual needs and circumstances. Regulations may be made which prescribe further matters to be covered in the replaceable rules to ensure that they remain relevant and support good governance.

1.101. Proposed section 69-1 establishes that the constitution of an Aboriginal and Torres Strait Islander corporation is the constitution registered for the corporation.

1.102. Proposed section 69-5 provides an overview of the ways in which a constitution may be changed. It provides that a constitution can only be changed by special resolution which requires 75 per cent of the votes cast by members who are entitled to vote on the resolution.

1.103. Proposed section 69-10 defines the meaning of ‘constitutional change’ to include the repeal and replacement of a part or the whole of the constitution, the addition of a provision or the modification of an existing provision.

1.104. Proposed section 69-15 allows corporations to set up additional requirements for making changes to the constitution, and makes it clear that changes only take

effect once these additional requirements have been complied with. This provision supports the ability of corporations to tailor their constitutions to their individual circumstances.

1.105. Proposed section 69-20 provides that a corporation is required to lodge a copy of the constitutional change, including supporting evidence that the change was validly made. Supporting evidence is required to ensure that changes to the constitution are consistent with the provisions of the Bill, and encourages transparent decision making in corporations. Proposed subsection 69-20(4) provides that the Registrar may direct a corporation to lodge a consolidated copy of the constitution as it will reflect the constitutional change. This provision is similar to section 138 of the Corporations Act.

1.106. Proposed section 69-25 makes it clear that a special administrator who changes a corporation's constitution under proposed section 499-5 is obliged to lodge a copy of the change with the Registrar. Chapter 10 deals with special administrators.

1.107. Proposed section 69-30 provides that the Registrar must decide whether or not a constitutional change should be registered, and provides for a process as well as grounds for reaching such a decision. Consistent with proposed section 66-1, the Registrar must not register a change if it does not meet the internal governance rules requirement.

1.108. Proposed section 69-35 provides that the Registrar can change a constitution on the Registrar's own initiative, and sets out grounds for such action. This provision provides the Registrar with a power to assist corporations that are unable or unwilling to change their constitution. Many corporations experience difficulty in holding meetings, getting sufficient attendance to meet quorum requirements, and therefore to make changes to their constitution. Proposed subsection 69-35(3) provides that the Registrar may change a constitution on the grounds that it is oppressive or contrary to the members as a whole, or to a member or group of members. Proposed subsection 69-35(5) prevents the Registrar from changing the constitution of an RNTBC where the corporation, an officer or employee is acting in good faith with the belief that the action is necessary to ensure that the corporation complies with a Native Title legislation obligation. This ensures that Registrar cannot change a corporation's constitution in circumstances where an RNTBC is acting to give effect to obligations under the Native Title legislation, or believes in good faith that they are doing so.

1.109. Proposed section 69-40 provides that the constitutional change takes effect on the date the change is registered. This supports the operation of the public register as the definitive repository of valid documents and information. This is a response to overcome problems experienced by many corporations to keep records, including the current constitution. Proposed subsection 69-40(b) is an exception to this provision as it concerns court-ordered changes. These take effect on the date the order is made, or a date specified in the order.

1.110. Proposed section 72-1 provides that the Registrar may direct a corporation to lodge a copy of its constitution. This power will be used in circumstances including when a corporation has voted to change its constitution but not provided a copy to the Registrar.

1.111. Proposed section 72-5 establishes rules for making the constitution and other material concerning the internal governance of the corporation available to members

and officers. This section aims to provide accessible information to members and officers about the corporation's operations.

1.112. Proposed section 72-10 mirrors section 125 of the Corporations Act.

Part 3-3 Minimum number of members of Aboriginal and Torres Strait Islander corporations

1.113. Proposed section 77-1 sets out what the Part is about.

1.114. Proposed section 77-5 provides the requirement for a corporation to have a minimum number of members, or to make an application for an exemption from this requirement. The current ACA Act requires that corporations have a minimum number of 25 members other than corporations established to hold land or to operate as businesses. The requirement for 25 members only applies to the application for incorporation so once incorporated the corporation's membership can fall below this number to five. The review recommended that the membership requirement be reduced to five, consistent with other incorporation statutes.

1.115. Proposed section 77-10 allows the Registrar to exempt a corporation from the minimum number of members requirement. The types of corporations to which the Registrar may grant an exemption include RNTBCs, businesses trading for profit and corporations formed as a result of land grants to fewer than five persons.

1.116. Proposed section 77-15 provides that the Registrar may determine a number higher or lower than requested. This provision will be used in situations where, for example, an application is made as result of a court order that specifies the number of members while the application contains the incorrect number.

1.117. Proposed section 77-20 ensures that a later exemption given to a corporation after registration automatically revokes the earlier exemption.

1.118. Proposed section 77-25 provides that the Registrar must notify applicants of the outcome of an application for an exemption.

Part 3-4 Names

1.119. Proposed section 82-1 sets out what the Part is about.

1.120. Proposed section 85-1 sets out the requirements concerning the corporation's name. This section is consistent with Part 2B.6 of the Corporations Act. It also requires an RNTBC to use the words 'registered native title body corporate' or the abbreviation 'RNTBC' as part of its name to provide a signal to third parties that the corporation manages native title rights and interests.

1.121. Proposed section 85-5 sets up when a name is available to a corporation and provides a process whereby the Registrar can consent to a name being available. This mirrors section 147 of the Corporations Act.

1.122. Proposed section 85-10 provides a table of acceptable abbreviations that can be used in a corporation's name. While the abbreviations are relevant to the Bill, this proposed section is based on section 149 of the Corporations Act.

- 1.123. Proposed section 85-15 provides that corporations must use their name and identifying number on documents and is based on section 153 of the Corporations Act.
- 1.124. Proposed section 85-20 provides that a corporation does not have to set the expression ‘Indigenous Corporation Number’ on a receipt that sets out information recorded in the machine that produced the receipt. This mirrors section 154 of the Corporations Act.
- 1.125. Proposed section 85-25 provides that regulations may exempt a corporation or class of corporations from the requirement to set out information on documents. This mirrors section 155 of the Corporations Act.
- 1.126. Proposed section 88-1 sets out how a corporation’s name is changed.
- 1.127. Proposed section 88-5 provides that the Registrar may direct a corporation to change its name and mirrors section 158 of the Corporations Act.
- 1.128. Proposed section 88-10 provides that if a corporation becomes an RNTBC it must notify the Registrar. This allows for the corporation’s name to be changed on the register. This provision also allows the Registrar to change the name of a corporation is the Registrar becomes aware that it has become an RNTBC. This provision is designed to allow the Registrar to implement cooperative administrative arrangements with the National Native Title Tribunal to change a corporation’s name and will result in a reduction of the documentation a RNTBC has to provide to the Registrar.
- 1.129. Proposed section 88-15 provides that a corporation that ceases to be an RNTBC must not use the words ‘registered native title body corporate’ or the abbreviation ‘RNTBC’ as part of its name and provides a process for the Registrar to change the corporation’s name to reflect the change in status of the corporation. This ensures an accurate signal to third parties.
- 1.130. Proposed section 88-20 provides legislative power for the Registrar to issue a new certificate of incorporation if a corporation’s name changes.
- 1.131. Proposed section 88-25 mirrors section 161 of the Corporations Act and provides that a change of name does not create a new legal entity or change the corporation’s existing rights, obligations or property.

Part 3-5 Corporation powers and how they are exercised

- 1.132. Proposed section 93-1 sets out what the Part is about.
- 1.133. Proposed section 96-1 establishes the legal capacity and powers of a corporation and mirrors section 124 of the Corporations Act.
- 1.134. Proposed section 99-1 mirrors section 126 of the Corporations Act and allows an agent to act on behalf of a corporation.
- 1.135. Proposed section 99-5 mirrors section 127 of the Corporations Act and provides a process for execution of documents without using a common seal.

Part 3-6 Assumptions people dealing with Aboriginal and Torres Strait Islander corporations are entitled to make

- 1.136. Proposed section 104-1 mirrors section 128 of the Corporations Act and establishes that a person dealing with the corporation is entitled to make certain assumptions.
- 1.137. Proposed section 104-5 mirrors section 129 of the Corporations Act and sets out the kinds of assumptions a person is entitled to make.
- 1.138. Proposed section 104-10 mirrors section 129 of the Corporations Act and provides that a person is not taken to have information about a corporation merely because this information is on the public register.

Part 3-7 Registered office or document access address

- 1.139. Proposed section 109-1 sets out what the Part is about.
- 1.140. Proposed section 112-1 sets out the application of the division and establishes that a large corporation is required to have a registered office, which is based on section 142 of the Corporations Act. Small and medium corporations are prohibited from having a registered office. The registered office must be open to the public at certain times. Commensurate with the aim of streaming requirements and obligations for corporations based on their size and risk factors, small and medium corporations will not be required to have a registered office.
- 1.141. Proposed section 112-5 provides that a large corporation must have a registered office and establishes requirements for changing a corporation's registered address. This mirrors section 142 of the Corporations Act.
- 1.142. Proposed section 112-10 provides that the Registrar may change the address of a registered office to a director's address and mirrors section 143 of the Corporations Act.
- 1.143. Proposed section 112-15 requires a corporation to display its name at its registered office and mirrors section 144 of the Corporations Act.
- 1.144. Proposed section 112-20 provides that details of a corporation's address must specify sufficient detail to enable the corporation to be easily located. It also requires the consent of the occupier of the premises if the corporation is not the occupier. This is consistent with section 100 of the Corporations Act.
- 1.145. Proposed section 115-1 sets out the application of Division 3 to small and medium corporations.
- 1.146. Proposed section 115-5 requires a small or medium corporation to have a document access address. This functions as the address by which third parties can contact the corporation and members can inspect documents and other records. This proposed section also establishes a requirement for the corporation to notify of a change of document access address.
- 1.147. Proposed section 115-10 provides that the Registrar may change the address of a registered office to a director's address and mirrors proposed section 112-10 of the Bill and section 143 of the Corporations Act.
- 1.148. Proposed section 115-15 provides that the Registrar may direct a corporation to change the location of its document access address. This provision will be used in circumstances where a corporation's document access address is not located in an

area that provides appropriate access to members of the corporation, and ensures that a corporation cannot deliberately make its document access address in a place that excludes members for appropriate access.

1.149. Proposed section 115-20 provides that details of a corporation's address must specify sufficient detail to enable the corporation to be easily located. It also requires the consent of the occupier of the premises the corporation providing the address as its registered office to ensure that a corporation has permission to use the premises for this purpose.

Part 3-8 Service on Aboriginal and Torres Strait Islander corporations

1.150. Proposed section 120-1 clarifies how a notice, demand, summons, writ or other document or process may be served on a corporation.

Chapter 4 Members and observers

Part 4-1 Introduction

1.151. Proposed section 130-1 sets out what this chapter is about.

Part 4-2 Members

1.152. Proposed section 135-1 sets out what this Part is about.

1.153. Proposed section 138-1 sets out the meaning of member of an Aboriginal and Torres Strait Islander corporation and is based on section 231 of the Corporations Act.

1.154. Proposed section 141-1 sets out an overview of Division 3, 'Membership of Aboriginal and Torres Strait Islander corporations', encompassing proposed sections 141-5 to 141-25. The membership criteria align with the objective of the Bill as a special measure in that eligibility for membership requires a person to be an Aboriginal or Torres Strait Islander person (unless the corporation's constitution provides otherwise), and there are continuing obligations to meet the registration requirements of minimum number of members, Indigeneity and age of members as part of the consideration of membership applications.

1.155. Proposed section 141-5 establishes that an Aboriginal and Torres Strait Islander corporation must meet the minimum number of members requirement set out in proposed section 77-5 at all times.

1.156. Proposed section 141-10 establishes that an Aboriginal and Torres Strait Islander corporation must meet the Indigeneity requirement set out in proposed section 29-5 at all times, ensuring that there is a continuing obligation to meet this requirement. However, this section permits a corporation to increase the number or percentage of persons who are Aboriginal and Torres Strait Islander persons in the corporation's constitution, thereby increasing the Indigeneity requirement percentage.

1.157. Proposed section 141-15 establishes that an Aboriginal and Torres Strait Islander corporation must meet the age of members requirement set out in proposed section 29-10 at all times, ensuring that there is a continuing obligation to meet this requirement. However, this section enables a corporation's constitution to provide that the members may be older than 15 years for example to establish a corporation of elders.

1.158. Proposed section 141-20 sets out the eligibility requirement for membership of an Aboriginal and Torres Strait Islander corporation being that an applicant must be an individual of at least 15 years of age.

1.159. Proposed section 141-25 provides that the constitution of an Aboriginal and Torres Strait Islander corporation may have other eligibility requirements for membership, allowing the corporation flexibility to tailor membership to its particular needs and circumstances.

1.160. Proposed section 144-1 sets out how a person may become a member of an Aboriginal and Torres Strait Islander corporation. A person is required to apply, and if eligible, the application approved. The person's name is then entered on the register

of members and, at the time of entry on the register, they become a member. Additionally, for Aboriginal and Torres Strait Islander corporations that are RNTBCs, all members must be common law holders of native title under the Native Title (Prescribed Body Corporate) Regulations 1999 as the native title legislation requires the bodies to represent persons with native title interests.

1.161. Proposed section 144-5 provides that a person who wants to become a member of an Aboriginal and Torres Strait Islander corporation must apply to the corporation in writing, which provides a record of consent to membership.

1.162. Proposed section 144-10 provides that the directors are responsible for deciding applications for membership and sets out the process by which membership is determined. The policy basis for making directors responsible for deciding applications initially is to ensure that proper consideration is made by the elected representatives of the Aboriginal and Torres Strait Islander corporation. This aims to prevent or deter particular individuals or groups from stacking membership. Determination of membership may be delegated by the directors under proposed section 274-10 in Chapter 6.

1.163. The Indigeneity requirement (in proposed section 141-10) is specifically mentioned as part of the process of determining an application for membership while the requirement about minimum number of members is not. This is because the Indigeneity requirement involves a required number or percentage of members who are Aboriginal or Torres Strait Islander persons therefore requiring the directors to consider the state of the whole membership in making the decision to admit the member. The minimum number of members requirement, however, is a simple threshold test of whether there are enough members in total and therefore does not need to be considered in determining a membership application.

1.164. Proposed section 144-15 provides that an Aboriginal and Torres Strait Islander corporation must not impose fees for membership or being an observer unless the corporation's constitution provides otherwise. This ensures that fees are only imposed following agreement by 75 per cent of the members in passing the constitution by special resolution. If the charging of fees is provided for in the corporation's constitution then the amount of the fees is determined in a general meeting of the corporation. This ensures a majority of the members agree to the amount and it cannot be arbitrarily imposed.

1.165. Proposed section 147-1 provides that members of an Aboriginal and Torres Strait Islander corporation only have to contribute to the property of the corporation on winding up if the corporation's constitution requires them to do so. This ensures members' obligations are clear on application for membership.

1.166. Proposed section 147-5 enables an Aboriginal and Torres Strait Islander corporation's constitution to provide for other membership obligations. This is consistent with the key recommendation of the review in that it enables flexibility and is non-prescriptive thereby allowing corporations to develop constitutions which suit their particular needs and requirements.

1.167. Proposed section 147-10 provides that members and former members of an Aboriginal and Torres Strait Islander corporation are liable or not liable to contribute to payments for debts of the body, as set out in the corporation's constitution. This ensures members' liabilities are clear on application for membership.

1.168. Proposed section 150-1 sets out how membership ceases and when a person ceases to be a member. This ensures that it is clear how people enter and exit the corporation.

1.169. Proposed section 150-10 provides how a member of an Aboriginal and Torres Strait Islander corporation may resign.

1.170. Proposed section 150-15 sets out the grounds for cancellation of membership of an Aboriginal and Torres Strait Islander corporation as provided for in proposed sections 150-20 to 150-35. The basis for the grounds for cancelling membership is that corporations must be able to comply with the requirements of the Act and with the corporation's constitution. The grounds for cancelling membership also attempt to give the corporation some control over their membership and support active participation of members, while providing enough procedural safeguards to members whose rights and interests may be affected.

1.171. Proposed section 150-20 sets out how a membership of an Aboriginal and Torres Strait Islander corporation can be cancelled if a member is not eligible for membership such as for non-payment of applicable membership fees. This section is a replaceable rule.

1.172. Proposed section 150-25 sets out how membership of an Aboriginal and Torres Strait Islander corporation may be cancelled if a member is not contactable. A corporation may cancel the membership of a member who the corporation has not been able to contact, following two or more reasonable attempts to contact that member over a continuous two-year period. The membership may then only be cancelled by special resolution in a general meeting. This ensures that contact with the person in question is attempted (to provide them with notice and the opportunity to present their case) and also constrains the capacity of the directors in making such decisions, preventing possible abuse of power.

1.173. Proposed section 150-30 sets out how a membership of an Aboriginal and Torres Strait Islander corporation may be cancelled if a member is allegedly not an Aboriginal and Torres Strait Islander person, as required under that corporation's constitution (Indigeneity requirement). The membership may then only be cancelled by special resolution in a general meeting. This ensures that the person in question is given notice and the opportunity to present their case, and also constrains the capacity of the directors from making such decisions, especially if allegations of ineligibility for non-Indigeneity are used as a political tool to try to remove existing members.

1.174. Proposed section 150-35 sets out how a membership of an Aboriginal and Torres Strait Islander corporation may be cancelled if a member has misbehaved, being that the member has behaved in a manner that significantly interfered with the operation of the corporation or of the corporation's meetings. The membership may then only be cancelled by special resolution in a general meeting. This ensures that the person in question is provided with notice and the opportunity to present their case, and also constrains the capacity of the directors in making such decisions, preventing the possibility of abuse of power.

1.175. Proposed section 153-1 provides that an Aboriginal and Torres Strait Islander corporation's constitution may allow for different classes of members and for different rights to attach to them.

Part 4-3 Observers

1.176. Proposed section 158-1 sets out what this Part is about.

1.177. Proposed section 158-5 enables an Aboriginal and Torres Strait Islander corporation to have observers, who may attend a general meeting if provided for in the corporation's constitution. The corporation's constitution must then also provide the process, eligibility criteria, any obligations or rights and how an observer ceases to be an observer of a corporation. Observers are akin to associate members in the ACA Act and the Corporations Act. The concept of associate members is being retained but the terminology is being changed to 'observers' to better reflect the fact that they do not have membership rights.

Part 4-4 Protection of members' interests

1.178. Proposed section 163-1 sets out the rights and remedies that are conferred by this part to protect the interests of members of Aboriginal and Torres Strait Islander corporations. With the Bill changing the emphasis on the Registrar's powers from regulation and enforcement (and protection of members) to education and assistance, there is a need to better equip and empower members in taking action to protect themselves and resolve issues. This is done by providing equivalent rights and remedies as are available under the Corporations Act.

1.179. Proposed section 166-1 sets out the grounds on which the Court may make an order to protect the interests of members of an Aboriginal and Torres Strait Islander corporation. This is based on section 232 of the Corporations Act. However proposed subsection (2) provides that if the corporation is a RNTBC and an act or proposed act or omission from an act is done or not done in good faith and for the purpose of compliance with native title legislation obligation, then the Court cannot make an order. This provision ensures consistency with native title legislation and clarifies that officers and employees of those corporations are not penalised under this Act for compliance with native title legislation.

1.180. Proposed section 166-5 sets out the order that the Court can make in relation to an Aboriginal and Torres Strait Islander corporation. This is based on section 233 of the Corporations Act. However, 166-5(3) relating to changes to constitutions is broader than section 233(3) of the Corporations Act as for consistency with other provisions in the Bill it incorporates the Registrar's power under proposed section 69-35 to amend a corporation's constitution.

1.181. Proposed section 166-10 sets out who can apply for a Court order in relation to an Aboriginal and Torres Strait Islander corporation. This section is based on section 234 of the Corporations Act but is slightly broader as it enables the Registrar to apply for an order. This additional provision giving the Registrar standing to act for members or in the name of the corporation will allow the Registrar to protect members' rights and interests in circumstances where they are unable to protect their own i.e. in the case of an oppressed minority. It also takes into account the issue of capacity of some members, through enabling the Registrar to protect those members' rights and interests. This supports the operation of the Bill as a special measure.

1.182. Proposed section 166-15 sets out a requirement for the applicant to lodge a copy of the order with the Registrar. This is based on section 235 of the Corporations Act.

1.183. Proposed section 169-1 sets out when a person may bring or intervene in proceedings on behalf of an Aboriginal and Torres Strait Islander corporation. This section is based on section 236 of the Corporations Act but is slightly broader as it also enables the Registrar to intervene. This additional provision giving the Registrar standing to act for members or in the name of the corporation will allow the Registrar to protect members' rights and interest in circumstances where they are unable to protect their own, for example, in the case of an oppressed minority.

1.184. Proposed section 169-5 sets out how a person may apply for and be granted leave in proceedings. This is based on section 237 of the Corporations Act. However proposed subsection 169-5(6) provides that if the corporation is a registered native title body corporate and the corporation has decided to not bring, or not defend, or to discontinue, settle or compromise the proceedings, in good faith and for the purpose of compliance with a native title legislation obligation, then the Court cannot grant the application. The native title exception aims to ensure consistency with native title legislation.

1.185. Proposed section 169-10 enables substitution of another person for the person granted leave under proposed section 169-5. This is based on section 238 of the Corporations Act.

1.186. Proposed section 169-15 sets out the effect of ratification of members. This section is based on section 239 of the Corporations Act.

1.187. Proposed section 169-20 provides that leave of the Court must be given to discontinue, compromise or settle proceedings brought with leave under section 169-5. This reflects section 240 of the Corporations Act.

1.188. Proposed section 169-25 sets out the general powers of the Court. This reflects section 241 of the Corporations Act.

1.189. Proposed section 169-30 sets out the power of the Court to make costs orders. This reflects section 242 of the Corporations Act.

1.190. Proposed section 172-1 sets out how class rights of an Aboriginal and Torres Strait Islander corporation may be varied or cancelled. This is based on section 246B in the Corporations Act.

1.191. Proposed section 172-5 sets out how certain actions may be taken to vary members' rights of an Aboriginal and Torres Strait Islander corporation. This is based on section 246C of the Corporations Act.

1.192. Proposed section 172-10 sets out how variation, cancellation or modification of members' rights may be made without the unanimous support of a membership class of an Aboriginal and Torres Strait Islander corporation. This is based on section 246D of the Corporations Act.

1.193. Proposed section 172-15 sets out how variation, cancellation or modification of members' rights made by made with the unanimous support of a membership class of an Aboriginal and Torres Strait Islander corporation. This reflects section 246E of the Corporations Act.

- 1.194. Proposed section 175-1 sets out when a member may inspect the books of an Aboriginal and Torres Strait Islander corporation by Court order. This is based on section 247A of the Corporations Act.
- 1.195. Proposed section 175-5 enables a Court to make ancillary orders when making an order under proposed section 175-1. This reflects section 247B of the Corporations Act.
- 1.196. Proposed section 175-10 provides that a person who inspects books on behalf of an application under proposed section 175-1 must not disclose information acquired from that inspection. This reflects section 247C of the Corporations Act.
- 1.197. Proposed section 175-15 enables the Aboriginal and Torres Strait Islander corporation or the directors to allow members to inspect books. This reflects section 247D of the Corporations Act.

Part 4-5 Registers of members and former members

- 1.198. Proposed section 180-1 requires Aboriginal and Torres Strait Islander corporations to set up and maintain a register of members. This is based on section 168 of the Corporations Act. The current register of members in the ACA Act is a critical document supporting good corporate governance. The register of members ensures transparency and allows the corporation, members and others to know who has membership rights.
- 1.199. Proposed section 180-5 sets out what information is to be contained on the register of members of an Aboriginal and Torres Strait Islander corporation. This is based on section 169(1) of the Corporations Act. The register may also contain 'other names' for individuals which reflects that an Aboriginal and Torres Islander person may also use a traditional or 'skin name'. Proposed subsection 180-5(1A) deals with the information required of a body corporate member.
- 1.200. The register must also identify whether a member is not an Aboriginal and Torres Strait Islander person if non-Indigenous members are allowed by the corporation's constitution. This is the only practical way to show that the corporation meets Indigeneity percentages where non-Indigenous members are allowed. This provision supports the presumption that all members of a corporation will be Indigenous unless the constitution provides otherwise.
- 1.201. Proposed section 180-10 requires Aboriginal and Torres Strait Islander corporations to set up and maintain a register of former members to ensure that there is an historical record of membership. This provision allows for separation of the names of former members who are deceased to minimise the offence that the name of a deceased person may cause.
- 1.202. Proposed section 180-15 sets out what information is to be contained on the register of former members of an Aboriginal and Torres Strait Islander corporation. This is based on section 169(1) of the Corporations Act. The register may also contain 'other names' for individuals which reflects that an Aboriginal and Torres Islander person may also use a traditional or 'skin name'. Proposed subsection 180-15(2) deals with the information required of a former body corporate member.

1.203. Proposed section 180-20 sets out where an Aboriginal and Torres Strait Islander corporation's register of members and register of former members should be kept for inspection—that is, at the registered office of a large corporation and at the document access address of a small or medium corporation.

1.204. Proposed section 180-22 makes it clear that nothing in the Bill prevents the register of members and the register of former members being contained in one document.

1.205. Proposed section 180-25 provides a right to inspect and get copies of an Aboriginal and Torres Strait Islander corporation's register of members and register of former members. This is based on section 173 of the Corporations Act.

1.206. Proposed section 180-30 provides that an Aboriginal and Torres Strait Islander corporation must make the register of members available, free of charge, at the corporation's annual general meeting. The basis for this provision is that the AGM provides an ideal opportunity for corporations to confirm the details of members. This is especially useful for corporations whose members are located over a wide area and may not otherwise provide updated details when changes occur. This provision will also help reduce the likelihood of members becoming uncontactable and potentially being removed as members.

1.207. Proposed section 180-35 requires Aboriginal and Torres Strait Islander corporations to provide a copy of the register of members or the register of former members to the Registrar on request by the Registrar at any time.

1.208. Proposed section 180-40 enables a corporation or a person aggrieved to apply to the Court to have the register of members or register of former members corrected. This is based on section 175 of the Corporations Act.

1.209. Proposed section 180-45 provides for the evidentiary value of registers. This is based on section 176 of the Corporations Act.

1.210. Proposed section 183-1 sets out how information on the register of members or the register of former members may be used. This reflects section 177 of the Corporations Act.

Part 4-6 Exemption from operation of certain provisions of this Chapter

1.211. Proposed Part 4-6 contains proposed sections 187-1, 187-5, 187-10, 187-15 and 187-20. This Part permits the Registrar, either on his or her initiative or on application, to exempt a CATSI corporation and its directors, or a class of CATSI corporations and its directors, from the exemptible provisions of Chapter 4. These exemption provisions give the Registrar the flexibility to exempt a corporation when a provision could cause an excessive administrative burden on corporations. They also allow the Registrar to take into account the diversity and special circumstances of a corporation or a class of corporations. The following provisions of Chapter 4 will be exemptible under Part 4-6:

2. proposed subsection 144-10(8): no admission to membership before a general meeting has been held
3. proposed section 150-25: cancellation of a membership for not being contactable

4. proposed section 150-30: cancellation of a membership for not being an Aboriginal and Torres Strait Islander person
5. proposed section 150-35: cancellation of a membership for misbehaviour.

5.1. Proposed section 187-1 sets out what this part is about.

5.2. Proposed section 187-5 provides that a CATSI corporation, or the directors of the corporation, can apply for exemption from the requirements of a specified exemptible provision.

5.3. Proposed section 187-10 provides that the Registrar can issue a determination in writing even if the application seeking the exemption does not specify the provisions for which it is sought. It is designed to reduce the administrative burden on corporations if they have made a minor error or omission in their application.

5.4. Proposed section 187-15 gives the Registrar the power to issue determinations for an individual corporation or class of corporations. This allows the Registrar to give exemptions based on the circumstances of particular classes of corporations.

5.5. Proposed section 187-20 sets out the criteria that the Registrar must apply when making a decision about an exemption application and supports the reduction of procedural requirements imposed on corporations when appropriate, a key aim of the CATSI Bill.

Chapter 5 Meetings

Part 5-1 Introduction

5.6. Proposed section 193-1 sets out what the chapter is about.

Part 5-2 General meetings

5.7. Proposed section 198-1 sets out what the part is about.

5.8. Proposed section 201-1 is a replaceable rule providing that a director may call a general meeting of an Aboriginal and Torres Strait Islander corporation. This section reflects section 249C of the Corporations Act.

5.9. Proposed section 201-5 provides that the directors must call and arrange to hold a general meeting on request by members and sets out how this is done. This section is based on section 249D of the Corporations Act, however a request to an Aboriginal and Torres Strait Islander corporation must be made by the required number of members which differs from the number of members required by the Corporations Act. This takes into account that an Aboriginal and Torres Strait Islander corporation may have only five members.

5.10. The proposed section also differs from the Corporations Act in that when making a request a member is nominated as a contact member on behalf of the members making the request. This ensures it is clear who is to be contacted under notice provisions in proposed section 201-10.

5.11. Proposed section 201-10 enables the directors to consider the members' request for a meeting under proposed section 201-5. If the directors resolve that the request is frivolous or unreasonable or that complying with the request would be contrary to the interests of the members as a whole then a director may apply to the Registrar for permission to deny the request. The Registrar must then determine the application and notify in writing the director, the corporation and the nominated member of the outcome of the determination. This section aims to reduce conflict by providing an independent determination of the members' request and also minimise the risk of directors refusing members' requests arbitrarily or to prevent a general meeting being called.

5.12. Proposed section 201-15 sets out when a meeting requested by members must be held if there is no application to the Registrar under proposed section 201-10 or when an application has been made to the Registrar and the Registrar has determined that the ground for the application is not made out.

5.13. Proposed section 201-20 sets out the amount of notice to be provided when a general meeting is called, the amount of notice as a general rule, and how a meeting can be called on shorter notice or if shorter notice is not allowed. This section reflects section 249H of the Corporations Act.

5.14. Proposed section 201-25 sets out how notice is to be provided of a general meeting to members, officers and observers. This section is based on section 249J of the Corporations Act with a modification of that section, expanding the written notice

to also be provided to any corporation secretary or contact officer and to any observer entitled to attend the meeting. Also, unlike the Corporations Act, written notice need not be individually provided to members, directors, the corporation secretary or the contact officer, and observers. Providing individual notice may be onerous on corporations with limited resources and many members with no fixed or residential address. This gives a corporation greater flexibility to prescribe in their constitution how they may give notice to their members, for example, by using notice boards.

5.15. Proposed section 201-30 provides that if an Aboriginal and Torres Strait Islander corporation has an auditor then that auditor is entitled to notice of a meeting and other communications relating to a meeting that a member would receive. This section reflects section 249K of the Corporations Act.

5.16. Proposed section 201-35 sets out what a notice of a general meeting must contain. This reflects section 249L of the Corporations Act without subsection (2) of that provision as it relates only to listed companies, not Aboriginal and Torres Strait Islander corporations.

5.17. Proposed section 201-40 sets out how members may put resolutions at a general meeting. This section is based on section 249N of the Corporations Act, however a request to an Aboriginal and Torres Strait Islander corporation must be made by the required number of members which differs from the number of members required by the Corporations Act. This takes into account that an Aboriginal and Torres Strait Islander corporation may have only five members.

5.18. Proposed section 201-45 sets out how notice is to be provided of a members' resolution by an Aboriginal and Torres Strait Islander corporation and when the resolution is to be considered. This is based on section 249O of the Corporations Act.

5.19. Proposed section 201-50 provides that an Aboriginal and Torres Strait Islander corporation must distribute a statement to all members provided by the members making a request about a resolution to be moved at a general meeting or any other matter that may be properly considered at a general meeting if those members so request. The section sets out how this is done. It is based on section 249P of the Corporations Act but applies the required number of members criteria of an Aboriginal and Torres Strait Islander corporation instead of the criteria of the Corporations Act.

5.20. Proposed section 201-55 states that a general meeting must be held for a proper purpose. This reflects section 249Q of the Corporations Act.

5.21. Proposed section 201-60 states that a general meeting must be held at a reasonable time and place. This reflects section 249R of the Corporations Act.

5.22. Proposed section 201-65 enables an Aboriginal and Torres Strait Islander corporation to hold a general meeting at more than one venue using technology that allows members as a whole a reasonable opportunity to participate. This reflects section 249S of the Corporations Act.

5.23. Proposed section 201-70 establishes the requirements for meeting quorum and clarifies that quorum is required to be present at all times during the meeting. This proposed section establishes quorum for corporations with 11 or more members as being the lesser of 10 members or the greater of the number of members holding 10 per cent of the voting rights or two members. For corporations with 10 members or less the quorum is two members. These requirements operate as replaceable rules so

that corporations can tailor requirements to their individual circumstances and are consistent with section 249T of the Corporations Act.

5.24. Proposed section 201-75 establishes the requirements for chairing a general meeting and is designed to provide a clear process for ensuring that a replacement chair can be elected at the meeting when a chair previously elected by the directors is not available, or declines to act for the meeting or part of the meeting. This solves the problem of meetings being unable to run as called because a chair is unavailable. The cost of calling and running a meeting is a significant resource impact on Aboriginal and Torres Strait Islander corporations and measures such as these are designed to ensure that the legislation supports efficient administration.

5.25. Proposed section 201-80 provides that an auditor of a corporation is entitled to attend any general meeting of a corporation and to be heard at the meeting on business that concerns the auditor in his or her capacity as auditor. This reflects section 249V of the Corporations Act.

5.26. Proposed section 201-85 sets rules relating to adjourned meetings and reflects section 249W of the Corporations Act.

5.27. Proposed section 201-90 sets out rules for who may appoint a proxy. This reflects section 249X of the Corporations Act.

5.28. Proposed section 201-95 establishes the rights of proxies and reflects section 249Y of the Corporations Act. However proposed section 201-95(4) requires that a person must not exercise proxies for more than the number of persons prescribed in regulations. This distinction from the Corporations Act is necessary to ensure that there are limits on the number of proxies and to discourage a person exercising inappropriate control of a corporation through proxies. Prescribing the number of members on whose behalf a person can exercise proxies provides flexibility to alter the number over time catering to the changing needs and circumstances of Aboriginal and Torres Strait Islander corporations.

5.29. Proposed section 201-100 establishes requirements governing the use of proxies and reflects section 250A of the Corporations Act

5.30. Proposed section 201-105 establishes requirements for documents relating to proxies to be received by the corporation before a meeting and reflects section 250B of the Corporations Act.

5.31. Proposed section 201-110 establishes requirements for a body corporate to appoint an individual as a representative to exercise the body corporate's powers and reflects section 250D of the Corporations Act.

5.32. Proposed section 201-115 establishes rules governing how many votes a member has and is similar to section 250E of the Corporations Act. It differs from this provision by removing the reference to a corporation with and without share capital as this is not relevant to Aboriginal and Torres Strait Islander corporations.

5.33. Proposed section 201-120 establishes how objections to a right to vote can be made and reflects section 250G of the Corporations Act.

5.34. Proposed section 201-125 sets out how voting is to be carried out. This section reflects section 250J of the Corporations Act.

- 5.35. Proposed section 201-130 sets out matters on which a poll may be demanded and reflects section 250K of the Corporations Act.
- 5.36. Proposed section 201-135 sets out criteria for when a poll can be effectively demanded and reflects section 250K of the Corporations Act.
- 5.37. Proposed section 201-140 sets out when and how polls must be taken and reflects section 250M of the Corporations Act.
- 5.38. Proposed section 201-145 provides that a corporation must hold its first general within three months of registration. This provision encourages active corporations and allows the corporation to report to members at an early stage.
- 5.39. Proposed section 201-150 establishes rules for when a corporation must hold its first AGM and reflects section 250N of the Corporations Act.
- 5.40. Proposed section 201-155 provides that a corporation may apply for an extension of time to hold its AGM and reflects section 250P of the Corporations Act.
- 5.41. Proposed section 201-160 sets out the business of the AGM and reflects 250R of the Corporations Act.
- 5.42. Proposed section 201-165 clarifies that the chair of the AGM must allow a reasonable opportunity for members to ask questions about, or make comments on, the management of the corporation. This reflects section 250M of the Corporations Act.
- 5.43. Proposed section 201-170 provides that members may ask questions of the corporation's auditor at the AGM and reflects section 250T of the Corporations Act.
- 5.44. Proposed section 204-1 provides that a corporation may pass a resolution without holding a general meeting, and sets out the process to do this. This reflects section 249A of the Corporations Act.
- 5.45. Proposed section 204-5 provides that a corporation with only one member may pass a resolution by the member recording and signing the record. This reflects section 249B of the Corporations Act.

Part 5-3 Directors' meetings

- 5.46. Proposed section 209-1 sets out what this Part is about.
- 5.47. Proposed section 212-1 provides that the constitution of an Aboriginal and Torres Strait Islander corporation must specify how often directors' meetings are to be held. This gives the corporation flexibility in deciding how often directors will meet but also ensures that the frequency of directors' meetings is transparent and dictated by the constitution which governs the operation of the corporation.
- 5.48. Proposed section 212-5 is a replaceable rule setting out how a directors' meeting may be called. This reflects section 248C of the Corporations Act.
- 5.49. Proposed section 212-10 enables a directors' meeting to be called or held using any technology consented to by the directors as a whole. This reflects section 248D of the Corporations Act.

- 5.50. Proposed section 212-15 is a replaceable rule providing how a director may be elected to chair the directors' meetings. This reflects section s248E of the Corporations Act.
- 5.51. Proposed section 212-20 provides that a majority of directors is the quorum for a directors' meeting and that this quorum must be present at all times during the meeting. This reflects section 228F of the Corporations Act.
- 5.52. Proposed section 212-25 is a replaceable rule providing how directors' resolutions are to be passed by a majority of the votes cast with a casting vote by the chair if necessary. This reflects section 248G of the Corporations Act.
- 5.53. Proposed section 215-1 is a replaceable rule enabling an Aboriginal and Torres Strait Islander corporation to circulate and pass a resolution without a meeting. This reflects section 248A of the Corporations Act.
- 5.54. Proposed section 215-5 enables an Aboriginal and Torres Strait Islander corporation to pass resolutions and declarations by recording the resolution or declaration and signing the record. This reflects section 248B of the Corporations Act.

Part 5-4 Minutes of meetings

- 5.55. Proposed section 220-1 sets out what this Part is about.
- 5.56. Proposed section 220-5 sets out the rules concerning the recording, keeping and location of the minutes of an Aboriginal and Torres Strait Islander corporation's meetings. This is based on section 251A of the Corporations Act but is broader in that it specifically enables minutes to be kept either in writing or by means of an audio or audiovisual recording and the process for authenticating written minutes and audio or audiovisual recordings. Audio or audiovisual recording provides flexibility for Aboriginal and Torres Strait Islander corporations in making available an alternative to written minutes. This provision gives a corporation choices to make minutes more accessible to members.
- 5.57. Proposed section 220-10 sets out the requirements for members' access to the minutes of an Aboriginal and Torres Strait Islander corporation. This is based on section 251B of the Corporations Act however the provisions has been tailored to accommodate the document access address and registered office requirements which depend on the classification of the corporation as small, medium or large.
- 5.58. An Aboriginal and Torres Strait Islander corporation that is registered as a large corporation must make inspection available to members at its registered office each business day from at least 10 am to 12 noon and from at least 2 pm to 4 pm. An Aboriginal and Torres Strait Islander corporation that is registered as a small or medium corporation must make inspection available to members at its document access address within seven days of a member's written request.
- 5.59. The other departure from the Corporations Act provision is that the minutes and resolutions may be in a language other than English so the member may ask for an English translation if required under proposed section 376-5(3).

Part 5-5 Exemption from operation of this Chapter

5.60. Proposed section 225-1 sets out what this Part is about.

5.61. Proposed section 225-5 provides that the Registrar may exempt a corporation from the provisions of the chapter if an application is made seeking an exemption from specified provisions. This provision provides administrative flexibility to grant a corporation an exemption where provisions of the chapter would cause an administrative burden on corporations and take into account the diversity and special circumstances of a corporation or class of corporations.

5.62. Proposed section 225-10 provides that the Registrar is able to issue a determination in writing even if the application seeking the exemption does not specify the provisions for which the exemption is sought. This provision is designed to assist corporations if they have made a minor error or omission in their application, and to reduce the administrative burden on corporations in the event of such an oversight.

5.63. Proposed section 225-15 gives the Registrar the power to issue determinations in respect of a class of corporations to allow for exemptions to be given based on the circumstances of particular classes of corporations.

5.64. Proposed section 225-20 sets out the criteria that the Registrar must apply when making a decision about an application for an exemption and supports the reduction of procedural requirements imposed on corporations when appropriate, a key aim of the Bill.

Chapter 6 Officers

Part 6-1 Introduction

5.65. Proposed section 235-1 provides a general overview of the chapter.

Part 6-2 Appointment, remuneration and cessation of appointment of directors

5.66. Proposed section 240-1 provides an overview of the Part.

5.67. Proposed section 243-1 reflects the requirements in section 201A of the Corporations Act. The minimum number of members is adjusted to match the requirement at proposed section 29-1. Proposed subsection 243-1(3) will operate to ensure that, for example, a corporation with five members will have three directors.

5.68. Proposed section 243-5 sets a maximum number of directors and permits this number to be changed by regulation. There is no equivalent requirement in the Corporations Act. The proposed section avoids the development of unworkably large boards. Broad participation and representation in managing CATSI corporations can still be achieved through management committees and other structures, while the everyday running of the affairs of the corporation can be left to a more streamlined board.

5.69. Proposed subsections 246-1(1) and (2) adopts the Corporations Act eligibility standard in section 201B. Proposed subsection 246-1(3) makes it clear that persons who are not members or who are not Indigenous may not be directors unless the

corporation's constitution provides otherwise. This will permit a greater diversity of board members than currently permitted under the ACA Act and will give corporations the opportunity to engage independent directors from a broader pool of expertise. This is subject to the requirements proposed section 246-5.

5.70. Proposed subsection 246-5(1) sets out that a majority of directors must be Indigenous. This aims to ensure that the corporation remains Indigenous controlled. Proposed subsection 246-5(2) reflects the requirements in section 201A of the Corporations Act. Proposed subsection 246-5(3) sets out that a majority of directors must be members. This aims to ensure that members' interests are protected. This does not exclude corporate members having nominees on the board. Proposed subsection 246-5(4) sets out that a majority of directors must not be employees. This supports the presence of independent directors. Proposed subsection 246-5(5) sets out that a person who is performing a chief executive officer function does not also chair the board of directors. This reduces the risk that one person can gain control of a corporation and supports the protection of members' interests. The majority of directors requirements apply in relation to alternate directors because they are included in the definition of director.

5.71. Proposed section 246-10 is consistent with the requirements in section 201D of the Corporations Act that persons must not be appointed as a director without having consented. The offence is cast so that it is the corporation who contravenes the section rather than the individual who did not provide the consent. This consent must be kept.

5.72. Proposed section 246-15 is consistent with the requirements in section 201G of the Corporations Act. This is a replaceable rule so corporations can choose other means by which directors are appointed subject to the internal governance rules requirement at proposed section 29-20. The ACA Act has been interpreted to preclude rules which allow different tribal groups to appoint their own representative. Such arrangements have been recognised as encouraging good governance in some CATSI corporations. CATSI corporations will have greater flexibility to design their boards in ways best suited to their circumstances.

5.73. Proposed section 246-20 is consistent with the requirements in section 201H of the Corporations Act that directors appointed by other directors need to have their appointment confirmed at the next AGM. Proposed subsection 246-20(2) allows this to occur even when the total number of directors does not achieve quorum. This assists workability by avoiding the situation, for example, where a number of directorships have ceased leaving the remaining directors unable to call a general meeting to appoint new directors. This is a replaceable rule as provided for in proposed section 60-1 and subject to the internal governance rules requirement at proposed section 29-20.

5.74. Proposed section 246-25 sets out the rules relating to the term of appointment of directors. Proposed subsection 246-25(1) ensures that founding directors who are appointed for only one year remain as directors until the AGM after their term expires. This is a replaceable rule as provided for in proposed section 60-1 and subject to the internal governance rules requirement at proposed section 29-20.

5.75. Proposed subsection 246-25(2) ensures that directors are not appointed for more than two-year terms. This supports active member participation and reduces the opportunity for corporations to be 'captured' by non-member interests.

5.76. Proposed subsection 246-25(3) provides for reappointment of directors. This is a replaceable rule as provided for in proposed section 60-1 and subject to the internal governance rules requirement at proposed section 29-20. Proposed subsection 246-25(4) reduces the consequence if the appointments of all directors have expired before a GM can be held to appoint others. While proposed section 246-20 may be used to address such a situation it is more problematic if, for example, the appointments of all directors expire at the same time because they were appointed at the same meeting for the same term.

5.77. Proposed section 246-30 mirrors the requirements in section 201K of the Corporations Act regarding the appointment of alternate directors. Appointing alternate directors offers a flexible means to address circumstances where, for example, a director will be unavailable for a particular period of time due to travel or illness. This is a replaceable rule as provided for in proposed section 60-1 and subject to the internal governance rules requirement at proposed section 29-20.

5.78. Proposed section 246-35 mirrors the requirements in section 201M of the Corporations Act concerning the effectiveness of certain acts that are done by an invalidly appointed director. This ensures certainty of transactions that, for example, are entered into at a meeting that may have been invalidly called because the person who called it was not validly appointed as a director.

5.79. Proposed section 249-1 sets out the ways in which a person ceases to be a director. Proposed subsections 249-1(a) and (c) are not included in the Corporations Act but remove any doubt that a person does cease to be a director if they die or their term of appointment expires. Proposed subsections 249-1(b), (d), (e) and (f) provide that a person ceases to be a director under the other provisions referred to in the proposed subsections.

5.80. Proposed section 249-5 is consistent with the rule in section 203A of the Corporations Act that a director may resign. Proposed subsection 249-5(2) makes the requirement that the notice of resignation be in writing a replaceable rule. The Corporations Act makes the entire rule replaceable. In theory the rule could therefore be replaced by a rule that a director could not resign. Such a rule would be inconsistent with the requirement that a person consent to being a director. Therefore, in the absence of a convincing reason why proposed subsection 249-5(1) should be replaceable, only proposed section 249-5(2) was made replaceable which provides flexibility for corporations and directors.

5.81. Proposed section 249-10 is consistent with the requirements in section 203D of the Corporations Act that deal with the removal of directors by members in public companies. This governance standard is the same as for public companies in order to provide greater protection for members of CATSI corporations.

5.82. The material in subsection 203D(1) of the Corporations Act has not been replicated as CATSI corporations will not have debenture holders. The timeframe in subsection 203D(2) has been shortened to 21 days in proposed subsection 249-10(2) for consistency with other notice provisions in the CATSI Bill. The 1000 word limitation on directors' statements has not been replicated. This limitation recognises that public companies may have such large memberships that circulating larger statements would be inefficient. As CATSI corporations will not be dealing with the same large numbers of members there is less need to impose a word limit. This supports procedural fairness for directors.

5.83. Proposed section 249-15 is consistent with the rule in section 203E of the Corporations Act that directors cannot be removed by other directors. This rule has been modified to allow directors to be removed by other directors if they have not attended three consecutive directors' meeting without reasonable excuse. Possible abuse of this reason for removal is safeguarded by the objection process set out in proposed subsection 249-15(3)(c). Proposed subsection 249-15(6) ensures that if a director does object to their removal under proposed subsection 249-15(3)(c) then the director can only be removed by a resolution passed at a general meeting in accordance with section 249-10. This ensures a degree of procedural fairness for the director.

5.84. Proposed section 252-1 provides the general position that directors will not be remunerated unless this is enabled by the corporation's constitution. This ensures that members and the Registrar can consider any remuneration provisions. The constitution provision relating to remuneration will also be subject to public scrutiny as it is intended that the constitution will form part of the Register of Aboriginal and Torres Strait Corporations maintained by the Registrar. This will be an important transparency measure for members, creditors and funding bodies. Proposed subsections 252-1(2) and (3) are consistent with section 202A of the Corporations Act and recognise that because directors of many CATSI corporations may have to travel substantial distances reimbursement of travel expenses is appropriate to ensure they are not disadvantaged.

5.85. Proposed section 252-5 is consistent with section 202B of the Corporations Act requiring directors' remuneration to be disclosed to members if requested. Proposed subsections 252-5(1) and (7) provide for a lesser number of members to initiate the request than is provided for in subsection 202B(1) of the Corporations Act. This improves member protection and reflects the lower number of members that CATSI corporations are likely to have compared with Corporations Act corporations.

Part 6-3 Appointment of secretaries and contact persons

5.86. Proposed section 257-1 provides an overview of the Part.

5.87. Proposed section 257-5 sets out the requirements that large CATSI corporations must have a secretary while small and medium CATSI corporations must have a contact person. This replaces the role of the public officer under the ACA Act which has been problematic for several reasons, principally because it was poorly defined and inconsistently applied. For small and medium corporations, the role of contact person is essentially that of a contact point for correspondence and service. The contact person is not an officer and only has those obligations that are generally imposed on employees. This recognises that for small and medium corporations the board is best placed to manage compliance of the corporation and the compliance task will be less onerous because, for example, the corporation may not have employees. This also recognises that the contact person position may often be filled by a volunteer.

5.88. For large corporations, the compliance and administration requirements may be more complex, and the board is more likely to require assistance. The public officer will be replaced by one or more secretaries with an enhanced role in compliance and administration, in line with secretaries under the Corporations Act. These secretaries

should not be confused with current practices under the ACA Act of one committee member being elected as the secretary of the committee. Secretaries under the Corporations Act and the CATSI Bill are hold office separate from the board. The office of secretary is well understood in the Corporations Act context, and it is possible to engage professional company secretaries. Proposed subsection 257-5(1) is similar to section 204A of the Corporations Act.

5.89. Proposed section 257-10 is consistent with the eligibility requirements for secretaries in section 204B of the Corporations Act. These requirements are equally appropriate for contact persons and secretaries of CATSI corporations.

5.90. Proposed section 257-15 is consistent with the consent requirements for secretaries in section 204C of the Corporations Act. These requirements are appropriate for contact persons and secretaries of CATSI corporations.

5.91. Proposed section 257-20 is consistent with the appointment of secretaries in section 204D of the Corporations Act. Appointment by directors is appropriate for contact persons and secretaries of CATSI corporations.

5.92. Proposed section 257-25 allows the Registrar to nominate a director as the contact person if the contact person has not been contactable for 28 days or more. As small and medium corporations do not have a registered office it is important that an official contact point (other than personal service on directors) is available. In practice there has been low compliance with ACA Act provisions requiring maintenance of correct public officer contact details. Proposed section 257-25 ensures that when contact persons' details have not been correctly maintained a director's address can be substituted for purposes of contacting the corporation while the corporation arranges the appointment of a new contact person.

5.93. Proposed section 257-30 enables the principal obligation of the contact person to pass on communications to the corporation. Proposed subsection 257-30(b) ties the obligation to the person being listed as the contact person on the Register of Aboriginal and Torres Strait Corporations. This has important implications for contact persons resigning or retiring under proposed section 304-1 and the appointment of new contact persons under proposed section 304-5. For example, the obligations to pass on communications will continue after a contact person resigns if they have not been removed from the Register. This provides a strong incentive for contact persons to notify the Registrar of their resignation or retirement.

5.94. Proposed subsection 257-30(c) only requires the contact person to pass the communications on to one director. An obligation to pass the communications on to all directors was not included as this was too onerous and administratively the board will be able to delegate the function of receiving the communications to one of the directors. An option to narrow the range of communications was considered but not implemented as any discretion would place the contact person in a difficult position of deciding which communications were significant enough to warrant passing on to the directors and which were not.

5.95. Proposed section 257-35 ensures that the same obligation that is placed on contact persons is also placed on secretaries. As with proposed subsection 257-30(b), proposed subsection 257-35(b) ties the obligation to the person being listed as the secretary on the Register of Aboriginal and Torres Strait Corporations.

5.96. Proposed section 257-40 mirrors the requirements in section 204E of the Corporations Act with regard to the effectiveness of certain acts that are done by an invalidly appointed secretary. This ensures certainty of transactions that, for example, are entered into at a meeting that may have been invalidly called because the person who called it was not validly appointed as a secretary of a corporation which had delegated this function to secretaries.

5.97. Proposed sections 257-45 and 257-50 are consistent with the terms and conditions for secretaries in section 204F of the Corporations Act. Directors determining the terms and conditions of contact persons and secretaries is appropriate for contact persons and secretaries of CATSI corporations.

Part 6-4 Duties and powers of directors and other officers and employees

5.98. Proposed section 262-1 provides an overview of the Part.

5.99. Proposed section 265-1 mirrors the care and diligence obligations in section 180 of the Corporations Act. The reasonable person test is refined by proposed subsections 265-1(1)(a) and (b) by ensuring that the reasonable person is placed in the position of a director or officer in a CATSI corporation in the same circumstances as the CATSI corporation.

5.100. This is further refined by adopting the business judgment rule in proposed subsection 265-1(2) which mirrors subsection 180(2) of the Corporations Act. It is important to note that this rule is only available for the exercise of business judgments which are defined as relating to the business operations of the corporation. This is because the rationale underlying it is the protection of directors who have to make decisions in a business environment in which they are expected to take acceptable risks, make decisions quickly and take advantage of fleeting opportunities. The business judgment rule is not designed to protect directors whose working context, for example a corporation administering a trust, makes it appropriate for them to meet stricter standards of care and diligence. By replicating the Corporations Act rule here the same distinction applies so that the business judgment rule will be relevant primarily to decision by directors of CATSI corporations in the context of business operation as opposed, for example, to decisions relating to holding land on trust.

5.101. Proposed subsection 265-1(2A) clarifies that a director of a CATSI corporation, which is a registered native title body corporate, does not have a material personal interest simply because that person is a common law holder of the native title held in trust, or as an agent, by the registered native title body corporate. This provision further clarifies the relationship between the CATSI Bill and the Native Title Act and the PBC Regulations with respect to registered native title bodies corporate.

5.102. Proposed section 265-5 mirrors the good faith obligations in section 181 of the Corporations Act.

5.103. Proposed section 265-10 mirrors the use of position obligations in section 182 of the Corporations Act.

5.104. Proposed section 265-15 mirrors the use of information obligations in section 183 of the Corporations Act.

5.105. Proposed section 265-20 ensures that acts done in good faith with the belief that the act is necessary to comply with native title legislation will not contravene the care and diligence, good faith, use of position and use of information civil obligations. An example of where this native title exception might apply is where a director has been directed to take a particular action by common law holders of native title (who may not necessarily be members of the corporation) as required by regulations made under the Native Title Act. The direction might not be in the interests of the corporation or could cause detriment to the corporation in which case the director would, in the absence of any native title exception, be placed in the position that meeting an obligation under one piece of legislation may mean they are contravening an obligation under another piece of legislation.

5.106. Proposed section 265-25 mirrors the good faith, use of position and use of information criminal offences in section 184 of the Corporations Act. A specific native title exception is necessary because of proposed subsection 265-25(1)(c) which includes the best interest of the corporation test. The good faith element in proposed subsection 265-25(1)(c) is separate to the good faith element in proposed subsection 265-25(2)(b).

5.107. Proposed section 265-30 mirrors section 185 of the Corporations Act. Proposed subsection 265-30(2)(a) is necessary because the business judgment rule is a statutory rule that does not exist in common law. Proposed subsection 265-30(2)(b) is necessary because the native title exceptions are not part of the common law so that without the proposed subsection the general civil law could operate to defeat the exceptions. This is not required for the native title exception at proposed subsection 265-25(2) because proposed section 265-25 is a criminal offence created by this Bill and therefore not an existing general civil law.

5.108. Proposed section 265-35 mirrors section 187 of the Corporations Act which provides some capacity for directors of wholly-owned subsidiary corporations to act in the interests of the holding body corporate in certain circumstances.

5.109. Proposed section 265-40 is based on section 188 of the Corporations Act and provides for the responsibility of secretaries for particular contraventions by the corporation. These contraventions relate to the provision of information about the corporation. Placing this responsibility on secretaries is an important means of improving corporation compliance with reporting and keeping key information up to date.

5.110. Proposed section 265-45 mirrors section 189 of the Corporations Act which provides for circumstances in which a director's reliance on the advice of others is taken to be reasonable. Proposed subsection 265-45(2) clarifies that a person may be considered an expert in questions of traditional law and custom for the purpose of a directors' reasonable reliance on expert advice. These amendments further clarify the relationship between the CATSI Bill and the Native Title Act and the PBC Regulations with respect to registered native title bodies corporate.

5.111. Proposed section 265-50 mirrors section 190 of the Corporations Act which provides for a general rule that directors are responsible for the action of their delegates while setting out some circumstances in which this is not the case.

5.112. Proposed section 268-1 is based on section 191 of the Corporations Act which provides for the disclosure of material personal interests by directors. Subsection

191(2)(a)(vii) is not replicated as section 199A is also not replicated. Subsection 191(2)(b) is not replicated as the standard applying to proprietary companies does not provide sufficient member protection in the context of CATSI corporations. This has the effect that any indemnity would have to be disclosed.

5.113. Proposed section 268-5 ensures that a director of an RNTBC does not have to disclose native title interests which are managed or held in trust by the corporation. Members of an RNTBC will have to be common law native title holders of the native title that the corporation is responsible for. A majority of directors will have to be members under proposed subsection 246-5(3) and therefore will also be native title holders. Excluding a majority of directors from directors meetings at which native title matters are discussed would be unworkable for RNTBCs. In addition native title interest will be known to other directors of an RNTBC given that any director who is a member will be a native title holder.

5.114. Proposed section 268-10 mirrors section 192 of the Corporations Act which provides for standing notice of interests to be given by directors in certain circumstances.

5.115. Proposed section 268-15 is based on section 193 of the Corporations Act which provides for the interaction of the notice provisions with the general law and the corporation's constitution.

5.116. Proposed section 268-20 is based on section 195 of the Corporations Act which provides for the general rule that directors with a material personal interest must not be present when the matter is considered or vote on the matter. It also provides for the circumstances in which the director may be present and vote. Section 194 of the Corporations Act provides for a replaceable rule that applies a lower standard to directors of proprietary companies. The higher standard in section 195 applies to directors of public companies and is appropriate for directors of CATSI corporations to protect the interests of members and will act as a deterrent to nepotistic behaviour.

5.117. Proposed section 268-25 mirrors section 196 of the Corporations Act which provides for declaration that a particular director with a material personal interest may be present and vote on a matter and also provides for class orders to be made in relation to classes of corporations, directors, resolutions or interests.

5.118. Proposed section 271-1 is based on section 197 of the Corporations Act which provides for the liability of directors incurring liabilities on behalf of a corporation in its capacity as a trustee. Proposed section 271-1 aligns with section 197 in its proposed amended form subsequent to proposed changes in Schedule 1 of the Corporations Amendment Bill (No. 1) 2005. A native title exception is included to ensure that acts done by directors of RNTBCs in good faith with the belief that the act is necessary to comply with native title legislation will not result in the directors being personally liable for a liability incurred.

5.119. Proposed section 274-1 mirrors section 198A of the Corporations Act which is a replaceable rule providing for the exercise of powers by directors.

5.120. Proposed section 274-5 is based on section 198B of the Corporations Act which is a replaceable rule providing for the capacity of directors to execute negotiable instruments.

5.121. Proposed section 274-10 is based on section 198D of the Corporations Act which provides for the delegation of powers by directors.

5.122. Proposed section 274-15 is based on section 198F of the Corporations Act which provides for the directors right of access to the corporation's books. This section is modified to reflect the different requirements that CATSI corporations have in relation to registered offices and document access addresses.

Part 6-5 Disqualification from managing corporations

5.123. Proposed section 279-1 is based on the general rule that disqualified persons are not to manage corporations in section 206A of the Corporations Act. A native title exception is included to avoid the situation that a common law native title holder might breach the provision merely because native title legislation requires, for example, that the directors act on the instruction of the common law native title holder.

5.124. Proposed section 279-5 is based on the automatic disqualification rules in section 206B of the Corporations Act. Significantly, proposed subsection 279-5(5) ensures that persons disqualified under the Corporations Act are automatically disqualified from managing CATSI corporations. This ensures that the disqualification provisions under the proposed CATSI Bill and the Corporations Act are as closely aligned as possible. This is necessary because, for example, subsection 206B(1)(a)(i) of the Corporations Act is expressed to apply to a decision affecting the business of the corporation, which without proposed subsection 279-5(5), would limit the application of the section to corporations within the meaning of the Corporations Act.

5.125. Proposed section 279-10 is based on the application to extend the disqualification period in section 206BA of the Corporations Act. Proposed subsection 279-10(1)(b) is included to ensure that the Registrar can apply for an extension of the period of disqualification if the person is disqualified under the automatic disqualification provision of the Corporations Act.

5.126. Proposed section 279-15 is based on the court power of disqualification for contravention of civil penalty provisions in section 206C of the Corporations Act. Proposed subsection 279-15(1)(a)(ii) is included to ensure that the Court can consider contraventions of civil penalty provisions of the Corporations Act in addition to those in the proposed CATSI Bill. Similarly, proposed subsection 279-15(2)(a) enables the Court to consider conduct in relation to a Corporations Act corporation as well as conduct concerning a CATSI corporation.

5.127. Proposed section 279-20 is based on the court power of disqualification for insolvency and non-payment of debts in section 206D of the Corporations Act. Proposed section 279-20 is drafted to ensure that the Court can consider a person's involvement in a failed Corporations Act corporation as well as their involvement in a failed CATSI corporation. This ensures that a person can be disqualified if they are involved in two failed corporations, one of which is a Corporations Act corporation and the other a CATSI corporation. A person can also be disqualified if they are involved in two failed corporations both of which are Corporations Act corporations or CATSI corporations.

5.128. Proposed section 279-25 is based on the court power of disqualification for repeated contraventions of the Corporations Act in section 206E. Proposed section 279-25 is drafted to ensure that the Court can consider the person's contravention of either the Corporations Act or the CATSI Bill. A person could contravene the Corporations Act while an officer of a CATSI corporation in number of ways, for example, by being involved in a contravention by officers of a subsidiary Corporations Act corporation. Similarly, a person could contravene the proposed CATSI Bill while an officer of a Corporations Act corporation.

5.129. Proposed section 279-30 is based on ASIC's power of disqualification in section 206F of the Corporations Act. Proposed section 279-30 is drafted to ensure that the Registrar can consider a person being an officer of wound up Corporations Act corporations as well as wound up CATSI corporations. Under proposed subsection 279-30(7) the Registrar can also grant leave for a person to manage a CATSI corporation even when they been disqualified by ASIC from managing Corporations Act corporations. This is appropriate as the Registrar will be in the best position to evaluate whether the circumstances relating to a particular CATSI corporation and a particular disqualified person warrant granting leave. The circumstances relating to management of the CATSI corporation may be different from those that lead to the disqualification by ASIC. For example the CATSI corporation may be located in a very remote area where the availability of directors is limited.

5.130. Proposed section 279-35 is based on the Court power to grant leave to manage corporations in section 206G of the Corporations Act. Proposed section 279-35 is drafted to ensure that the Court cannot grant leave to a person disqualified by either the Registrar or ASIC.

Part 6-6 Member approval needed for related party benefit

5.131. Proposed section 284-1 is based on the member approval requirement for related party benefits in section 208 of the Corporations Act. Section 208 of the Corporations Act applies to public companies. This standard is appropriate for CATSI corporations to soundly protect the interests of members and recognises the large degree of public and essential services that are funded via CATSI corporations.

5.132. Proposed section 284-5 is based on the breach consequences in section 209 of the Corporations Act. Section 209 of the Corporations Act applies to public companies. This standard is appropriate for CATSI corporations.

5.133. Proposed section 284-10 provides that a CATSI corporation, or the directors of the corporation, can apply for exemption from the requirements of proposed Part 6-6.

5.134. Proposed section 287-1 is based on the exceptions to the member approval requirement for related party benefits in section 211 of the Corporations Act. Proposed section 287-1 provides exceptions for remuneration of officers and employees as well as the reimbursement of reasonable expenses incurred. Section 210 of the Corporations Act which provides an exception for benefits given on 'arms length terms' is not replicated. Similarly section 212 of the Corporations Act which provides an exception for payments which are for indemnities, insurance or legal

costs is not replicated. Section 213 of the Corporations Act which provides an exception for payments under \$2000 to directors or their spouses is also not replicated. Not replicating these provisions is important for the sound protection of members and will act as a strong deterrent to nepotistic behaviour.

5.135. Proposed section 287-5 mirrors the exception to the member approval requirement for related party benefits in section 214 of the Corporations Act. Proposed section 287-5 provides an exception for financial benefits given to closely-held subsidiaries.

5.136. Proposed section 287-10 mirrors the exception to the member approval requirement for related party benefits in section 215 of the Corporations Act. Proposed section 287-10 provides an exception for financial benefits given to a related party in their capacity as a member.

5.137. Proposed section 287-12 clarifies that member approval is not needed to give a financial benefit if it is given to the related party to comply with a Native Title legislation obligation. This amendment further clarifies the relationship between the CATSI Bill and the Native Title Act and the PBC Regulations with respect to registered native title bodies corporate.

5.138. Proposed section 287-15 mirrors the exception to the member approval requirement for related party benefits in section 216 of the Corporations Act. Proposed section 287-15 provides an exception for financial benefits given under a court order.

5.139. Proposed section 290-1 mirrors section 217 of the Corporations Act which clarifies the scope of member approval resolutions.

5.140. Proposed section 290-5 mirrors section 218 of the Corporations Act which requires corporations to lodge material that will be provided to members relating to member approval of financial benefits.

5.141. Proposed section 290-10 mirrors section 219 of the Corporations Act which sets out the requirements for explanatory statements that will be provided to members relating to member approval of financial benefits.

5.142. Proposed section 290-15 is based on section 220 of the Corporations Act. Proposed section 290-15 enables the Registrar to comment on the material lodged under proposed section 290-5. The Registrar providing comment is entirely discretionary and proposed subsection 290-15(4) makes it clear that any comments provided or not provided do not affect the exercising of any other power by the Registrar. This ensures that, for example, even though the Registrar has indicated that the explanatory material appears to cover the matters required by proposed section 290-10 the Registrar could later take action against an officer under proposed section 265-1 because errors in the explanatory statement were not avoided by the officer exercising proper care and diligence. Subsections 220(2) and (3) of the Corporations Act are not replicated as they relate to listed companies.

5.143. Proposed section 290-20 mirrors section 221 of the Corporations Act which sets out the requirements for notices convening meetings that will consider member approval of financial benefits.

- 5.144. Proposed section 290-25 mirrors section 222 of the Corporations Act which provides that material provided to member in relation to member approval of financial benefits must be the same as the material that is lodged.
- 5.145. Proposed section 290-30 mirrors section 223 of the Corporations Act which provides that the resolution for member approval of financial benefits must be the same as the proposed resolution lodged.
- 5.146. Proposed section 290-35 mirrors section 224 of the Corporations Act which sets out the general prohibition on interested related parties voting on the financial benefit and the limited circumstances in which this can be done, such as with the written approval of the Registrar.
- 5.147. Proposed section 290-40 mirrors section 225 of the Corporations Act which sets out the procedure for voting on the resolution to approve financial benefits.
- 5.148. Proposed section 290-45 mirrors section 226 of the Corporations Act which requires the resolution to be lodged within 14 days of it being passed.
- 5.149. Proposed section 290-50 mirrors section 227 of the Corporations Act which allows the Court to make a declaration that the requirements in the Division have been substantially complied with.
- 5.150. Proposed section 293-1 mirrors section 228 of the Corporations Act which provides for the meaning of the terms ‘related party’ and ‘related parties’. Proposed subsection 689-25(5) provides a native title exception to the meaning of control. This exception will apply to the operation of proposed section 293-1.
- 5.151. Proposed section 293-5 mirrors section 229 of the Corporations Act which provides for the meaning of the phrases ‘giving a financial benefit’ and ‘financial benefit is given’.
- 5.152. Proposed section 296-1 mirrors section 230 of the Corporations Act which provides for the interaction of this Part with other officer duties.

Part 6-7 Public information about directors, secretaries and contact persons

- 5.153. Proposed section 301-1 provides a general overview of what the Part is about.
- 5.154. Proposed section 304-1 mirrors section 205A of the Corporations Act which provides for notification of retirement by the officer retiring.
- 5.155. Proposed section 304-5 mirrors section 205B of the Corporations Act. Proposed section 304-5 provides for the CATSI corporations’ obligation to notify the Registrar of changes to officers of the corporation including new appointment, resignations and changes of address.
- 5.156. Proposed section 304-10 mirrors section 205C of the Corporations Act. Proposed section 304-10 imposes an obligation on officers to provide the required information to the corporation.
- 5.157. Proposed section 304-15 mirrors section 205D of the Corporations Act. Proposed section 304-15 provides the general rule that a director’s lodged address is normally their residential address and exception to this general rule relating to

circumstances including where publication of the person's residential address would put their personal safety at risk.

5.158. Proposed section 307-1 mirrors section 205E of the Corporations Act. Proposed section 307-1 enables the Registrar to require particular information about officers of a CATSI corporation.

Part 6-8 Exemption from operation of certain provisions of this Chapter

5.159. Proposed Part 6-8 contains proposed sections 310-1, 310-5, 310-10, 310-15 and 310-20. This Part permits the Registrar, either on his or her initiative or on application, to exempt a CATSI corporation and its directors, or a class of CATSI corporations and its directors, from the exemptible provisions of Chapter 6. These exemption provisions give the Registrar the flexibility to exempt a corporation when a provision could cause an excessive administrative burden on corporations. They also allow the Registrar to take into account the diversity and special circumstances of a corporation or a class of corporations. The following provisions of Chapter 6 will be exemptible under Part 6-8:

6. proposed section 243-5: maximum number of directors
7. proposed subsection 246-25(2): term limits for directors
8. proposed Part 6-6: member approval needed for related party benefits.

8.1. Proposed section 310-1 sets out what this part is about.

8.2. Proposed section 310-5 provides that a CATSI corporation, or the directors of the corporation, can apply for exemption from the requirements of a specified exemptible provision. This provision gives the Registrar the flexibility to exempt a corporation when these provisions would cause an administrative burden on corporations and takes into account the diversity and special circumstances of a corporation or class of corporations.

8.3. Proposed section 310-10 provides that the Registrar can issue a determination in writing even if the application seeking the exemption does not specify the provisions for which it is sought. It is designed to reduce the administrative burden on corporations if they have made a minor error or omission in their application.

8.4. Proposed section 310-15 gives the Registrar the power to issue determinations for an individual corporation or class of corporations. This allows the Registrar to give exemptions based on the circumstances of particular classes of corporations.

8.5. Proposed section 310-20 sets out the criteria that the Registrar must apply when deciding about an exemption application and supports reducing the procedural requirements imposed on corporations when appropriate, a key aim of the CATSI Bill.

Chapter 7 Record keeping, reporting requirements and books

Part 7-1 Introduction

8.6. Proposed section 317-1 provides a general overview of the chapter.

Part 7-2 Record keeping requirements

8.7. Proposed section 322-1 provides a general overview of the Part.

8.8. Proposed section 322-5 places an obligation on corporations to keep an up-to-date copy of their constitution and other records such as those relating to registered officers which would include, for example, consent from the occupier of the premises if the corporation is not the occupier. These record keeping requirements are broader than the Corporations Act requirements. This is partly because Corporations Act corporations do not require constitutions so a requirement to keep an up-to-date copy is unnecessary. The additional record keeping requirements also supports improved internal accountability and encourages better record keeping practices. There are no offences for failure to comply with these record keeping requirements. Proposed subsection 322-5(b)(iv) permits the regulations to prescribe other records that must be kept. This provides flexibility for the Registrar to support improved record keeping.

8.9. Proposed section 322-10 mirrors section 286 of the Corporations Act which requires financial records to be kept that would enable true and fair financial reports to be prepared. Proposed subsection 322-10(1) extends the financial record keeping requirement to transactions undertaken as trustee. This is a significant improvement on the current subsection 59 of the ACA Act which does not expressly require recording these transactions.

8.10. Proposed section 322-15 mirrors the physical format requirements for records in section 288 of the Corporations Act.

8.11. Proposed section 322-20 is based on section 288 of the Corporations Act which deals with the place that records must be kept. It is expected that most of the business of CATSI corporations will be conducted within Australia. To maximise internal accountability the records of CATSI corporations must be kept at their registered office or document access address, which must be an address within Australia. This is different from section 288 of the Corporations Act which allows corporations to keep some records outside of Australia, but gives ASIC the power to direct the provision of these records. The need for CATSI corporations to keep records outside of Australia is less than is the case for some Corporations Act corporations. Corporations proposing to engage in extensive business outside of this jurisdiction are more appropriately registered under the Corporations Act.

8.12. Proposed section 322-25 is based on the director access rights in section 288 of the Corporations Act. Section 288 provides for the right of director access to 'at all reasonable times'. The reasonable time element has not been replicated as proposed section 376-1 provides for the inspection of documents at registered offices and document access addresses. In particular a document access address may be a personal residence which would not be appropriate for directors to access at all

reasonable times and determining what ‘reasonable’ meant in these circumstances could be uncertain.

Part 7-3 Reporting requirements

8.13. Proposed section 327-1 provides an overview of the reporting requirements.

8.14. Proposed section 330-1 provides for the key reporting requirements that all CATSI corporations must prepare a general report each financial year. It is intended that this is the only report that small corporations will usually be required to prepare.

8.15. Proposed section 330-5 sets out what the general report must contain. This includes important contact information and also enables flexibility through prescribing other information in the regulations. Some of the information, such as directors’ addresses, should have been updated when they changed under proposed section 304-5. Including this information in the general report recognises that compliance with section 304-5 may be low and increases the chance that this information is updated at least annually. Proposed subsection 330-5(2)(c) enables the regulations to prescribe the manner in which the report is to be prepared. This could include flexible administrative practices aimed at improving compliance such as allowing corporations to report by returning updated particulars or confirming that the particulars have not changed.

8.16. Proposed section 330-10 requires lodgment of the general report and sets out the timeframe for lodgment. Proposed subsection 330-10(2)(b) gives flexibility for the regulations to prescribe a later time for lodgment.

8.17. Proposed section 333-1 provides an overview of the financial and other reports Division.

8.18. Proposed section 333-5 enables regulations to require other reports, including financial reports and directors reports. It is planned that the regulations will require all large corporations to provide a financial report and a directors’ report.

8.19. Proposed subsection 333-5(4) ensures that corporations registered between 1 January and 30 June do not have to prepare financial reports for a period shorter than six months. Proposed subsection 333-5(4A) provides that, for corporations registered as a result of an application made under Division 22, the first financial year includes the period of the financial year when it existed under its law of origin, immediately before it transferred into the CATSI system. A transferring body corporate will normally be obliged to have kept financial records and accounts under its law of origin and so will normally be able to account for this period. The first financial year is important for determining the size of the corporation for its registration under the CATSI Bill (see proposed section 37-1).

8.20. Proposed subsection 333-5(5) fixes the reporting year to the financial year after the corporation’s first report. This is different from the section 323D of the Corporations Act which allows directors to determine a financial year other than the standard 1 July to 30 June. This is appropriate for Corporations Act corporations that may, for example, simply be a branch office of an overseas company that has a different financial year. This is less likely to be the case for CATSI corporations. It is

planned that the Registrar will exempt schools from the financial year reporting period to reflect their calendar year operations.

8.21. Proposed section 333-10 enables regulations to specify the contents of proposed section 333-5 reports. Proposed subsections 333-10(2) and (3)(a)(ii) make it clear that the accounting standards can be incorporated into the regulations. The accounting standards can be modified which provides additional flexibility for their application to CATSI corporations. Proposed subsection 333-10(3)(b) makes it clear that the regulations can require reports dealing with entities or consolidated entities that the corporation is a member of.

8.22. Proposed section 333-15 enables regulations to specify the manner in which proposed section 333-5 reports are prepared. Proposed subsection 333-15(2) makes it clear that the regulations, among other things, may require financial reports to be audited. Proposed subsection 333-15(3) makes it clear that the regulations may require reports to be given to members, whether generally or on request.

8.23. Proposed section 333-20 provides that an auditor's report must be obtained for financial reports if the financial report must be audited. Auditor reports are provided for in proposed sections 339-40 and 339-45. This is consistent with section 301 of the Corporations Act.

8.24. Proposed section 336-1 enables the Registrar to determine that the reporting requirements should be increased for a particular corporation. This maximises flexibility by allowing, for example, the regulations to require minimal reporting for a class of corporations, while the Registrar can require specific corporations that are at risk within that class to provide additional reporting. Additional reports may be particularly useful for assessing the corporate health of corporations that are providing essential services. For example, a corporation that is providing aged care services in a remote community could be required to report on the outcome of an accreditation assessment. Alternatively, the additional reporting could provide information on a particular type of transaction, such as loans to directors, that may have been the basis of a complaint by a member.

8.25. Proposed section 336-5 enables the Registrar to determine that the reporting requirements should be increased for a particular class of corporation. This maximises flexibility by tailoring the reporting to particular corporate sectors, such as housing services, which may, for example, require additional reporting for real estate assets.

8.26. Proposed section 339-1 provides an overview of the audit Division.

8.27. Proposed section 339-5 provides that the Division applies to audits that are required by the Bill. Corporations who are not required to have their financial reports audited under the Bill can still have their accounts audited but the requirement in this Division will not necessarily apply.

8.28. Proposed section 339-10 sets out the meaning of the phrase 'required to comply with the accounting standards'. For example, proposed subsection 339-40(2) only applies if the financial report is required to comply with the accounting standards. 'Accounting standard' is defined in proposed section 700-1 by reference to its meaning in the Corporations Act. The effect of this is to align the auditing requirements of the Bill with the Corporations Act where appropriate while maintaining maximum flexibility. For example, it is expected that the regulations under section 333-15 will require that large corporations have an audit conducted in

accordance with the accounting standards. In contrast, the Registrar might determine under proposed section 336-1 that a particular corporation must have its financial report audited, but not require that the audit be conducted in accordance with the accounting standards.

8.29. Proposed section 339-15 sets out the meaning of the phrase ‘required to comply with the auditing standards’. For example, proposed section 339-35 only applies if the financial report is required to comply with the auditing standards. ‘Auditing standard’ is defined in proposed section 700-1 by reference to its meaning in the Corporations Act. The effect of this is to align the auditing requirements of the Bill with the Corporations Act where appropriate while maintaining maximum flexibility. For example, it is expected that the regulations under section 333-15 will require that large corporations have an audit conducted in accordance with the auditing standards. In contrast, the Registrar might determine under proposed section 336-1 that a particular corporation must have its financial report audited, but not require that the audit be conducted in accordance with the auditing standards.

8.30. Proposed section 339-20 mirrors section 324AF of the Corporations Act which sets out the meaning of the terms ‘lead auditor’ and ‘review auditor’ for the Bill (not just for the Division). The term ‘lead auditor’ is used, for example, in proposed subsection 339-35(3) which places responsibility for the conduct of audits by audit companies on the lead auditor. The term ‘review auditor’ is used, for example, in proposed subsection 339-90(6) in Division 5 which provides that a review auditor is taken to be a person involved in the audit for the purposes of determining whether a person has attempted to mislead a person involved in the audit.

8.31. Proposed section 339-25 mirrors section 324AE of the Corporations Act which sets out the meaning of the phrase ‘professional members of the audit team’ for the Bill. This phrase is used, for example, in proposed subsection 339-90(6) in Division 5 which provides that professional members of the audit team are taken to be persons involved in the audit for the purposes of determining whether a person has attempted to mislead a person involved in the audit.

8.32. Proposed section 339-30 is based on section 307 of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements for audits. Proposed section 339-30 sets out what the auditor must form an opinion about in conducting the audit. Proposed subsection 339-30(e) enables the regulations to specify other matters to maximise flexibility for audits to be tailored to the circumstances of CATSI corporations.

8.33. Proposed section 339-35 is based on section 307A of the Corporations Act and provides for the responsibility of auditors to conduct the audit in accordance with the auditing standards if this is required.

8.34. Proposed section 339-40 is based on section 308 of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements for audits. Proposed section 339-40 sets out what the auditor must include in its report. Proposed subsection 339-40(5) enables the regulations to specify other matters to maximise flexibility for audits to be tailored to the circumstances of CATSI corporations.

8.35. Proposed subsection 339-45 enables the regulations to specify the manner the report must be prepared in. This ensures maximum flexibility for audits to be tailored to the circumstances of CATSI corporations.

8.36. Proposed section 339-50 is based on section 307C of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements for audits. Proposed section 339-50 provides for an auditor independence declaration, if required.

8.37. Proposed section 339-55 is based on section 307B of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements for audits. Proposed section 339-55 provides for audit working papers to be retained for seven years. Proposed subsection 339-55(9)(a) acknowledges that either the Registrar or ASIC may be inquiring into matters relating to the auditor.

8.38. Proposed section 339-60 is based on section 324BA of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements about the qualifications and experience of individual auditors. Proposed section 339-60 provides offences for individuals acting as auditors without the required qualifications or experience.

8.39. Proposed section 339-65 is based on section 324BB of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements about the qualifications and experience of audit firms and their members. Proposed section 339-60 provides offences for defendants acting as auditors without the required qualifications or experience.

8.40. Proposed section 339-70 is based on section 324BC of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to specify requirements about the registration of a company as auditor of a CATSI corporation. Proposed section 339-70 provides offences for defendants acting as auditors without the required registration.

8.41. Proposed section 339-75 provides that where an audit is required to be conducted by a registered company auditor or an authorised audit company then the Corporations Act auditor independence provisions apply. This ensures that the same standards apply to registered company auditors or authorised audit companies whether they are auditing a CATSI corporation or a Corporations Act corporation. This also ensures that ASIC remains the regulator of registered company auditors and authorised audit companies. This also has the consequence that the auditor independence requirements do not automatically apply to auditors who are not required to be registered company auditors or authorised audit companies.

8.42. Proposed section 339-80 makes it clear that proposed section 339-75 does not stop the regulations or the Registrar specifying requirements about auditor independence for auditors who are not registered company auditors or authorised audit companies.

8.43. Proposed section 339-85 mirrors section 310 of the Corporations Act and provides for the auditor's power to obtain information from the corporation or its officers. This governance standard is the same as for companies to provide greater protection for members of CATSI corporations and to improve internal accountability.

- 8.44. Proposed section 339-90 mirrors section 311 of the Corporations Act and provides for the auditor's obligation to report contraventions to the Registrar. This governance standard is the same as for companies to provide greater protection for members of CATSI corporations and to improve internal accountability.
- 8.45. Proposed section 339-95 mirrors section 312 of the Corporations Act and provides the obligation of officers to assist the auditor. This governance standard is the same as for companies to provide greater protection for members of CATSI corporations and to improve internal accountability.
- 8.46. Proposed subsection 339-100 enables the regulations to specify requirements about the appointment and removal of auditors. This ensures maximum flexibility for audit requirements to be tailored to the circumstances of CATSI corporations.
- 8.47. Proposed section 342-1 gives a general overview of the financial reporting to members Division.
- 8.48. Proposed section 342-5 ensures that a CATSI corporation which is required to prepare a financial report, a directors' reports or obtain an auditor's report must provide a copy of these reports to a member on request. If a member does request a report, the request must be made during the financial year or within 12 months after the end of the financial year. A corporation will still be required to lodge these reports with the Registrar and they will normally be laid before the corporation's annual general meeting.
- 8.49. Proposed section 342-10 provides the timeframe for providing a financial report, a directors' report or an auditor's report to a member who requests a copy. This must normally be within 14 days of a request unless the report is yet be lodged with the Registrar, under proposed section 348-1, in which case the report must be provided to the member within 14 days of lodgment.
- 8.50. Proposed section 345-1 is based on section 323 of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to require consolidated reporting. Proposed section 345-1 requires the provision of relevant information by officers of entities controlled by CATSI corporations that are required to prepare a consolidated financial report. Consolidated reporting is an important accountability measure.
- 8.51. Proposed section 345-5 is based on section 323A of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to require consolidated reporting. Proposed section 345-5 ensures that auditors can obtain information from entities controlled by CATSI corporations that are required to prepare a consolidated financial report.
- 8.52. Proposed section 345-10 is based on section 323B of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to require consolidated reporting. Proposed section 345-10 requires assistance be given to the auditor by officers or auditors of entities controlled by CATSI corporations that are required to prepare a consolidated financial report.
- 8.53. Proposed section 345-15 mirrors section 323C of the Corporations Act and provides for the application of proposed sections 345-1, 345-5 and 345-10 to entities that are no longer controlled by a CATSI corporation.

8.54. Proposed section 348-1 is based on section 319 of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to require reports. Proposed section 348-1 requires lodgment of reports that are required to be prepared. Lodgment of reports is an important accountability measure.

8.55. Proposed section 348-5 is based on section 322 of the Corporations Act with modifications to reflect the capacity for the regulations or the Registrar to require financial and directors' reports. Proposed section 348-5 ensures that any amended reports are also lodged and provided to members who request a copy.

Part 7-4 Registrar may exempt from record keeping and reporting requirements

8.56. Proposed section 353-1 provides a general overview of this Part.

8.57. Proposed section 353-3 is based on section 340 of the Corporations Act and provides the Registrar with the power to relieve directors, auditors or the corporation from the record keeping and reporting requirements of the chapter, including any regulations made for the purposes of the chapter. This is another important means by which reporting can be tailored to the circumstances of CATSI corporations.

8.58. Proposed section 353-5 enables the Registrar to provide the exemption even if the application does not specify the provisions about which the exemption is being sought. This is necessary as proposed subsection 353-3(2)(a) requires the application to specify the provisions. This subsection was included to discourage applications which seek a general exemption from the chapter as general exemptions are unlikely to be appropriate. For example, it is unlikely that an exemption from proposed section 322-25 'Director access' would be granted as director access to records is a fundamental right for directors without which the director would be unlikely to accept responsibility for managing the corporation.

8.59. Proposed section 353-10 is based on section 341 of the Corporations Act 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 the chapter. It is anticipated that it may be appropriate for some small corporations to be exempted from even the general reporting requirement in proposed section 330-1. For example, corporations that are essentially inactive because their sole purpose is to hold the title to communal land such as cemeteries may not need to prepare a general report. Another way in which this class exemption power could be used is, for example, to allow small corporations to prepare a general report every second year rather than annually.

Part 7-5 Criteria for determining level of reporting requirements

8.60. Proposed section 358-1 provides an overview of the Part.

8.61. Proposed section 358-5 is based on section 342 of the Corporations Act with modifications reflecting the circumstances of CATSI corporations. Proposed subsection 358-5(2) provides additional guidance to the test for what is appropriate in the circumstances which is not provided in the Corporations Act. These criteria reflect

the importance of many services that CATSI corporations provide in communities. The criteria apply to both determinations to increase or exempt from reporting requirements. This ensures consistent criteria are applied to decisions tailoring reporting to particular circumstances of CATSI corporations.

8.62. Proposed section 358-10 sets out the meaning of the phrases ‘current reporting obligations’ and ‘proposed reporting obligations’.

Part 7-6 Sanctions for contraventions of record keeping and reporting requirements

8.63. Proposed section 363-1 mirrors section 344 of the Corporations Act and provides for sanctions that apply to directors that fail to take all reasonable steps to ensure compliance with the record keeping and reporting requirements of the chapter.

Part 7-7 Modifications of record keeping and reporting requirements by regulations

8.64. Proposed section 368-1 mirrors section 343 of the Corporations Act and enables the regulations to modify the operation of the chapter for particular CATSI corporations or classes of CATSI corporations. This is another important means by which reporting can be tailored to the circumstances of CATSI corporations. The provision also enables the regulations under the Bill to keep time with developments in the Corporations Act regulations where appropriate.

Part 7-8 Books

8.65. Proposed section 373-1 gives a general overview of the books Part.

8.66. Proposed section 376-1 is based on section 1300 of the Corporations Act and provides for the inspection of books. The proposed section is modified to reflect the registered office and document access address requirements of CATSI corporations. Proposed subsection 376-1(5) permits copying of documents. This does not mean that, for example, the occupiers of document access addresses need to provide copying facilities such as photocopiers etc. ‘Copying’ can be done by manually transcribing information.

8.67. Proposed section 376-5 is based on section 1304 of the Corporations Act and provides for the translation of instruments and books. The proposed section is modified to allow flexibility for corporations to records minutes of meeting audio-visually and in language. Such minutes only have to be translated if the person inspecting the ‘book’ requests the translation. This ensures that, for example, if a member is happy to inspect the minutes in language and audio-visually then a translation is not required. More formal documents, such as legal instruments and documents that have to be lodged, will need to be translated. This is consistent with the Corporations Act.

8.68. Proposed section 376-10 is based on section 1303 of the Corporations Act and provides power for the Courts to compel inspection of books or the supply of a copy. The proposed section is modified to reflect the translation requirements in proposed section 376-5.

8.69. Proposed section 376-15 mirrors section 1305 of the Corporations Act and provides admissibility of books in evidence.

8.70. Proposed section 376-20 mirrors subsections 1306(1) and (2) of the Corporations Act and provides for the form that books may be kept in.

8.71. Proposed section 376-25 mirrors subsections 1306(3), (4) and (4A) of the Corporations Act and provides for the protection of books.

8.72. Proposed section 376-30 mirrors subsections 1306(5) and (6) of the Corporations Act and provides for the evidentiary value of books.

8.73. Proposed section 376-35 mirrors section 1307 of the Corporations Act and provides an offence for the falsification of books.

Chapter 8 Civil consequences of contravening civil penalty provisions

8.74. Proposed subsection 386-1(1) provides that if a Court is satisfied that a person has contravened one of the listed provisions, it must make a declaration of contravention. These provisions are the civil penalty provisions and are proposed subsections 265-1(1), 265-5(1) and (2), 265-10(1) and (2), 265-15(1) and (2) (officers' duties); proposed subsection 284-5(2) (related parties rules); proposed subsection 363-1(1) (requirements for reports); and subsection 588G(2) of the Corporations Act as applied by proposed section 531-1 of the Bill (insolvent trading). These civil penalty provisions follow the scheme established by the Corporations Act. Proposed subsection 386-1(2) provides what must be specified in a declaration of contravention. Proposed section 386-1 is based on section 1317E of the Corporations Act.

8.75. Proposed section 386-5 provides that a declaration of contravention is conclusive evidence of the matters that must be specified under proposed subsection 386-1(2). This is based on section 1317F of the Corporations Act.

8.76. Proposed section 386-10(1) provides that a Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200 000 if a declaration of contravention by the person has been made under proposed section 386-1 and the contravention materially prejudices the interests of the CATSI corporation or the interests of its members or materially prejudices the ability of the CATSI corporation to pay its creditors or is serious. Proposed subsection 386-10(2) provides that the penalty is a civil debt payable to the Commonwealth which may be recovered by the Registrar or the Commonwealth as if it were a judgment debt in civil proceedings. Proposed section 386-10 is based on section 1317G of the Corporations Act.

8.77. Proposed section 386-15 provides that a Court may order a person to compensate a CATSI corporation for damage suffered by the corporation if the person has contravened a civil penalty provision in relation to the corporation and the damage resulted from the contravention. The order must specify the amount of the compensation. Damages suffered by the corporation include profits made by any person resulting from the contravention. A compensation order may be enforced as if it were a judgment of the Court. Proposed section 386-15 is based on section 1317H of the Corporations Act.

8.78. Proposed section 386-20 provides for the persons who may apply for a declaration or order under this chapter. It provides that the Registrar may apply for a declaration of contravention, a pecuniary penalty order or a compensation order and that a CATSI corporation affected by the contravention of a civil penalty provision may apply for a compensation order. A CATSI corporation affected by the contravention of a civil penalty provision may also intervene in the circumstances described in proposed subsection 386-20(3). No person may apply for a declaration or order under this chapter unless permitted to do so by proposed section 386-20 (this does not exclude the operation of the *Director of Public Prosecutions Act 1983*). This is based on section 1317J of the Corporations Act.

8.79. Proposed section 386-25 provides that proceedings for a declaration or an order under this chapter may be started no later than six years after the contravention. This proposed section is based on section 1317K of the Corporations Act.

8.80. Proposed section 386-30 provides that the Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a declaration of contravention or a pecuniary penalty order. This is based on section 1317L of the Corporations Act.

8.81. Proposed section 386-35 provides that a Court must not make a declaration or order under this Chapter against a person for a contravention if the person has been convicted of an offence for conduct that is substantially the same as the conduct constituting the contravention. This reflects the double jeopardy principle that a person should normally not be penalised twice for the same, or substantially the same, conduct. This is based on section 1317M of the Corporations Act.

8.82. Proposed section 386-40 provides that proceedings for a declaration or order under this chapter are stayed if criminal proceedings are started, or have already been started, against the person for conduct that is substantially the same as the conduct alleged to constitute the contravention. The proceedings may be resumed if the person is not convicted of the offence, otherwise they are dismissed. This is based on section 1317N of the Corporations Act.

8.83. Proposed section 386-45 provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a declaration or order has been made against the person or the person has been disqualified from managing a CATSI corporation. This proposed section is based on section 1317P of the Corporations Act.

8.84. Proposed section 386-50 provides that evidence given or produced by an individual in a pecuniary penalty proceeding against the individual cannot later be used against the individual in criminal proceedings for the same, or substantially the same, conduct. This is based on section 1317Q of the Corporations Act.

8.85. Proposed section 386-55 provides for the circumstances in which the Registrar can require a person to give all reasonable assistance regarding an application for a declaration of contravention or a pecuniary penalty order or criminal proceedings for an offence against this Act. This is based on section 1317R of the Corporations Act.

8.86. Proposed section 386-60 provides for the circumstances in which a court may give relief from liability for contravention of a civil penalty, including certain proceedings for compensation. The main criteria for a court to consider in

determining whether to give relief is whether in contravening the civil penalty provision the person acted honestly and having regard to all the circumstances of the case the person ought to be fairly excused for the contravention. Proposed subsection 386-60(3) also lists some further criteria to be considered when determining whether a person ought to be fairly excused for a contravention of the insolvent trading provisions (as applied by proposed section 531-1 of the Bill). Nothing in this proposed section limits, or is limited by, proposed section 576-1 of the Bill. This is based on section 1317S of the Corporations Act.

Chapter 9 Lodgments and registers

Part 9-1 Introduction

8.87. Proposed section 396-1 explains what the chapter is about.

Part 9-2 Lodgments with the Registrar

8.88. Proposed section 401-1 sets out what this part is about. This part deals with the form that documents may be lodged in, the Registrar's powers regarding lodgments and the court's powers if documents are not lodged.

8.89. Proposed section 404-1 requires that documents are to be lodged with the Registrar in an approved form and sets out the meaning of 'document that has been lodged'.

8.90. Proposed section 404-5 provides that documents must be signed when lodged. Documents lodged by a body must be signed by a director or secretary and documents lodged by an individual must be signed by that individual.

8.91. Proposed section 404-10 sets out the only circumstances in which a document may be lodged electronically—that is, that the electronic lodgment must be by agreement, be a kind of document approved for electronic lodgment, or be a document of a kind for electronic lodgment by a particular class of Aboriginal and Torres Strait Islander corporation.

8.92. Proposed section 404-15 enables lost registered documents to be re-lodged as originally lodged. This provision is based on section 1275 of the Corporations Act.

8.93. Proposed section 407-1 provides the Registrar with the power to refuse to receive or register documents. This provision reflects section 1274(8) of the Corporations Act.

8.94. Proposed section 407-5 provides the Registrar with the power to require additional information. This provision is based on section 1274(9) of the Corporations Act.

8.95. Proposed section 407-10 enables the Registrar to request information from a person when information is kept on a register about that person. This provision is based on section 1274(15) of the Corporations Act. The proposed provision makes it an offence of strict liability for failure to comply with the Registrar's request for information. This section supports the Registrar in maintaining registers that have relevant and up-to-date information. The penalty ensures that the requests for information are complied with.

8.96. Proposed section 407-15 provides the Registrar with the power to correct errors or make changes to a detail on the public registers through telephone or email notice. The proposed section aims to rectify a problem with the current ACA Act which prevents the Registrar from having a simple process for correcting obvious or minor errors.

8.97. Proposed section 407-20 provides the Registrar with the power to destroy or dispose of documents lodged if they are no longer necessary or lodged more than 15 years before. This provision is based on section 1274(10) of the Corporations Act.

8.98. Proposed section 410-1 enables the Court to make an order for compliance with a requirement to lodge that has not been done by an individual or a body corporate. This provision is based on section 1274(11) of the Corporations Act.

Part 9-3 Registers

8.99. Proposed section 415-1 summarises what the part is about.

8.100. Proposed section 418-1 requires the Registrar to keep a Register of Aboriginal and Torres Strait Islander Corporations, a Register of Disqualified Officers and other registers as the Registrar considers necessary.

8.101. Proposed section 418-5 provides that the Registrar may keep registers in such form as the Registrar thinks fit. This provision is based on section 1274(1) of the Corporations Act.

8.102. Proposed section 418-10 provides that the information or documents to be included in the Register of Aboriginal and Torres Strait Islander Corporations are to be specified in the regulations. Such information could include details of the name of the corporation, date of incorporation, registered office or document access address, and names of directors.

8.103. Proposed section 418-15 sets out what information is on the Register of Disqualified Officers and what documents are contained on the register.

8.104. Proposed section 421-1 enables a person to inspect documents lodged with the Registrar, except for exempt documents, and notices, orders or permissions relating to the Register of Disqualified Officers. Proposed subsection 421-1(1A) will allow the Registrar to arrange for a person to inspect a document or register, or be given a copy of, or extract from, a document so that the person does not have access to personal information contained in the document or register. This provision has become necessary because of concerns some members of corporations have about the availability of their personal information from the Registrar. For instance, the Registrar will be able to remove personal information from the member's list of a corporation which runs domestic violence shelters or from the register when that person has expressly requested it. This provision addresses these legitimate concerns while maintaining general accessibility to these documents or registers.

8.105. Proposed section 421-5 provides that information relating to a document or certificate requested under proposed paragraph 421-1(1)(c) or 421-1(1B)(c) that is provided in writing is considered to be a copy or extract of the document or certificate. The section also provides for certification by the Registrar that may be admissible as prima facie evidence of the information contained in the document. This section is based on sections 1274(4B) and (4C) of the Corporations Act.

8.106. Proposed section 424-1 provides that copies or extracts lodged and certified by the Registrar are admissible as evidence and equivalent in validity to the original document. This is based on section 1274(5) of the Corporations Act.

8.107. Proposed section 424-5 sets out the use of documents issued by the Registrar in court proceedings and the evidentiary value of certificates and documents issued by the Registrar. This is based on sections 1274B and 1274(7A) of the Corporations Act however departs from the Corporations Act in that certificates issues are prima facie evidence rather than conclusive evidence. Certificates issued by the Registrar regarding an Aboriginal and Torres Strait Islander corporation that is also a registered native title body corporate cannot be conclusive evidence of their status as a registered native title body corporate.

8.108. Proposed section 424-10 enables the Registrar to certify that a person was a director, secretary or contact person of an Aboriginal and Torres Strait Islander corporation. This is based on section 1274C of the Corporations Act.

Chapter 10 Regulation and enforcement

Part 10-1 Introduction

8.109. Proposed section 434-1 provides a general overview of the chapter.

Part 10-2 Regulation of Aboriginal and Torres Strait Islander corporations

8.110. Proposed section 439-1 provides a general overview of Part 10-2 of this chapter.

8.111. Proposed section 439-5 provides that if the Registrar believes a particular matter affects a CATSI corporation, the Registrar may convene a meeting to discuss it. The proposed section also provides that the Registrar may inform the Minister of certain matters concerning the meeting, some or all of which may be included in an annual report for the *Public Service Act 1999* agency of which ORAC is part. This proposed section is designed to facilitate meetings between CATSI corporations and interested parties, such as funding bodies, to discuss issues of common concern. There is no sanction if an invited person declines to attend a meeting although the Registrar may inform the Minister of this fact.

8.112. Proposed section 439-10 provides that the Registrar may call and arrange to hold a general meeting (other than an AGM) of a CATSI corporation in certain circumstances. These include if the Registrar is satisfied that, in the circumstances of the corporation, there is a need to do so or that there has been a written request to do so by at least the required number of members of the corporation. Under subsection 439-10(2) the Registrar may call and arrange to hold the general meeting for any purpose relevant to the corporation that the Registrar thinks appropriate and, for a meeting already called for a particular day but not held within 14 days of that day, may include matters in the meeting notice that were not in the original notice of meeting. Proposed subsection 439-10(4) provides that the general meeting is to be chaired by the Registrar or an individual authorised by the Registrar. Other proposed subsections deal with the rules for a general meeting called under this provision, as well as observers and the meaning of ‘required number of members’. Subject to any regulations changing these figures, the required number of members means, in relation to a CATSI corporation, whichever is the greater of five members or 10 per cent of the members of the corporation. The capacity for members to request the Registrar to call meetings is necessary in circumstances where, for fear of retribution, members are unwilling to address the request to call a general meeting to the directors (see proposed section 201-5).

8.113. Proposed section 439-15 provides that the Registrar may call and arrange to hold an AGM of a CATSI corporation if the corporation has not held the meeting as required under the proposed Act (see proposed sections 201-150 and 201-155). Proposed subsection 439-15(2) provides that the general meeting is to be chaired by the Registrar or an individual authorised by the Registrar. Like proposed section 439-10, this proposed section also deal with the rules for an AGM called under this provision as well as observers. Both proposed sections 439-10 and 439-15 have been included in the CATSI Bill to address problems where Indigenous corporations have,

for a variety of reasons, become incapacitated and unable to call general meetings of any kind. These sections also address some problems identified with section 58B of the ACA Act which, while it presently allows the Registrar to call a special general meeting for a corporation, make no provision for calling an AGM and also does not make express provision for the Registrar to chair any such meeting.

8.114. Proposed subsection 439-20(1) provides that the Registrar may issue a compliance notice where he or she suspects on reasonable grounds that a CATSI corporation has failed to comply with a provision of this Act or the corporation's constitution or that there is some other irregularity in its affairs. The compliance notice, which may be given to the corporation or to each director, may require the directors to take particular action in a specified period to remedy the relevant non-compliance. This subsection is based on section 60A of the ACA Act. As noted by the review, compliance notices presently issued under this section are often used to provide directors information about their obligations under the ACA Act, as a means to ensure compliance with it. The review regarded this as a positive administrative process which is intended to achieve compliance with the Act through special regulatory assistance measures. This practice is expected to continue for compliance notices issued under proposed section 439-20.

8.115. Proposed subsections 439-20(3) and 439-20(5) provide that the Registrar may similarly issue a compliance notice when the Registrar suspects on reasonable grounds that in relation to a CATSI corporation circumstances exist that constitute or may constitute grounds for putting it into special administration or the Registrar suspects such grounds may develop in the future. The issue of a compliance notice under these grounds is intended to provide special regulatory assistance to a corporation which is otherwise at risk of being put into special administration.

8.116. There is no express sanction for failing to comply with a notice given under proposed section 439-20 although the issuing of a compliance notice does not prevent the Registrar from taking any other action under the Bill (see proposed subsection 439-20(7)). The decision by the Registrar to issue a notice under this proposed section will be reviewable under proposed section 617-1 of the Bill.

Part 10-3 Enforcement

8.117. Proposed section 444-1 provides a general overview of Part 10-3.

8.118. Proposed section 447-1 provides that the Registrar may appoint an officer or employee of the department, or any other suitably qualified person, as an authorised officer for the purposes of Part 10-3. In exercising powers or performing functions as an authorised officer, the officer must comply with any directions of the Registrar. The very remote location of many CATSI corporations makes it necessary for the Registrar to be able to appoint as an authorised office a suitably qualified person who may not be a Commonwealth, state or territory employee or official, such as a police officer. In such cases, it is anticipated that the person will be a suitably qualified professional such as a special administrator, auditor or accountant who has been contracted to the Registrar to carry out functions under the Bill. In exercising their functions as an authorised officer, the Registrar will ensure that the relevant contract of engagement will subject them to the same level of accountability as an ordinary APS employee.

8.119. Proposed section 447-5 provides that the Registrar must issue an identity to an authorised officer in the form prescribed by the regulations and for related matters.

8.120. Proposed section 450-1 provides the purposes for which a power conferred by Part 10-3 may be exercised. These include for the purposes of the performance or exercise of any of the Registrar's functions and powers under this proposed Act or for ensuring compliance with this proposed Act. A power under Part 10-3 may also be exercised regarding an alleged contravention or suspected contravention of this proposed Act, or a contravention of a Commonwealth, state or territory law by a CATSI corporation or related body corporate in certain circumstances. Proposed section 450-1 is based on section 28 of the ASIC Act which similarly provides when a power conferred by Division 3 of Part 3 of that Act (Inspection of Books) may be exercised.

8.121. Proposed section 453-1 provides that the Registrar may appoint an authorised officer to examine the books of a CATSI corporation, or a related body corporate, and report to the Registrar on the results of that examination, drawing attention to any or all of the matters described in sub-paragraphs (1)(a) to (e). The proposed section is based on section 60 of the ACA Act. Similarly, proposed section 453-1 will allow the authorised officer, at all reasonable times, to full and free access to the books of the corporation, or a related body corporate, of which he or she may make copies or take extracts. If thought necessary for the purposes of this proposed section, the authorised officer may also require persons to produce books which are in the possession of the person, or to which the person has access. The failure by a person to comply with such a request is a strict liability offence with a penalty of 10 penalty units (proposed subsection 453-1(4)). Unlike section 60A of the ACA Act, proposed section 453-1 does not allow an authorised person to require any person to answer questions. This is because the power to require a person to attend and answer questions relating to the affairs of a CATSI corporation is now contained in proposed section 453-5.

8.122. As noted, proposed section 453-1 is based on the existing examination provision contained in section 60 of the ACA Act. The power was explained by the Federal Court in *NAILSS v Registrar of Aboriginal Corporations* (1998) 54 ALD 55. The Court stated that the purpose of section 60 is to obtain information to enable the Registrar to carry out their statutory functions, including prudential supervision of the operations and financial affairs of incorporated Aboriginal associations. There is nothing which requires that the Registrar have any particular concern before exercising the power under section 60 to inspect documents and obtain a report. Nor is there anything which requires that, if there is a matter of concern, the exercise of the power under section 60 be limited to that concern. As the Federal Court noted, the concern might be the catalyst for a wider investigation into the operations and financial affairs of the corporation as disclosed by its documents. Consistent with Government policy, this power is often used by the Registrar, with the consent of corporations, to undertake diagnostic examination of corporations in difficulty. This 'special regulatory assistance' is also important in the context of 'capacity building' for these corporations.

8.123. Proposed subsection 453-1(4), the power to require the productions of books, which is based on subsection 60(4) of the ACA Act, has proven essential in a significant number of examinations where books have been destroyed or destruction has been threatened. In such cases, the notice to produce provisions of proposed section 453-5, which requires at least 14 days notice, would prove ineffective.

8.124. Proposed section 453-5 provides that the Registrar may by notice require persons, whom the Registrar believes on reasonable grounds to have some knowledge of the examinable affairs of a CATSI corporation to provide information, produce books or appear before the Registrar, or an authorised officer, to answer questions about the corporation or its examinable affairs. The proposed section also sets out the procedural requirements of any such notice, including that a person must not be required to provide the information, produce the documents or appear to answer questions less than 14 days after the notice is given. A person who fails to comply with such a notice commits a strict liability offence with a maximum penalty of 30 penalty units or imprisonment for six months, or both. Proposed section 453-5 is based on similar ‘notice to produce or attend’ provisions contained in other Commonwealth regulatory schemes (see, for example, the *Veteran Entitlements Act 1986*, section 54AA).

8.125. Proposed section 453-10 is similar to proposed section 511-1 and will provide for the remuneration of an authorised officer who examines the books of a CATSI corporation or a related body corporate. Proposed subsection 453-10(3) provides for the typical circumstance that the Commonwealth will normally pay for the authorised officer’s remuneration, charges and expenses. Proposed subsection 453-10(4) gives the Registrar the capacity to determine that the corporation or a related body corporate bear some or all of the costs of the examination. This might be appropriate, for example, if the CATSI corporation has requested the examination for diagnostic or other purposes. Proposed subsection 453-10(5) provides that this section does not apply to an authorised officer who is an APS employee or Commonwealth officer. This is because an APS officer or a Commonwealth officer will normally have their remuneration dealt with in other Commonwealth laws and instruments—for example, determinations made under the *Public Service Act 1999*. The definition of ‘Commonwealth officer’ in proposed subsection 453-10(6) is not intended to include persons who are retained by the Commonwealth as consultants or contractors.

8.126. Proposed section 456-1 provides that the Registrar or an authorised person may apply to a magistrate for a warrant to search particular premises if either has reasonable grounds to suspect that books, required under section 453-1 or 453-5 and not produced, may be on the particular premises within the next three days. This proposed subsection is based on section 35 of the ASIC Act.

8.127. Proposed section 456-5 provides for the granting of a search warrant if a successful application has been made under section 456-1. The proposed section provides for the issue and powers of any such warrant and related procedural matters. The proposed subsection is based on section 36 of the ASIC Act. Proposed subsection 456-5(5) clarifies that the function or power is conferred on the magistrate in a personal and voluntary capacity.

8.128. Proposed section 456-10 provides for the powers of an authorised officer with respect to books produced under sections 453-1 or 453-5 or under a warrant issued under this Division. The proposed section is based on section 37 and subsections 63(1)(d), 63(5) and 63(6) of the ASIC Act.

8.129. Proposed subsection 456-15(1) enables the Registrar or an authorised officer to apply for the issuing of a warrant by telephone, fax or other electronic means in an urgent case or if the delay caused by applying in person could frustrate the execution of the warrant. Urgency can arise if immediate action is needed or if the remoteness

of the location of the search involves unacceptable delay. Proposed subsection 456-15(2) provides that an application must include all the information that would be required in an ordinary application and, if necessary, the application may be made before the information is sworn. Proposed subsection 456-15(3) enables the magistrate to require communication by voice to the extent that is practicable in the circumstances and any further information. Proposed subsection 456-15(4) clarifies that the function or power is conferred on the magistrate in a personal and voluntary capacity.

8.130. Proposed subsection 456-20(1) enables a magistrate to complete and sign the same form of search warrant that could be issued under section 456-5 if satisfied that the warrant should be issued urgently, or that the delay which would occur if an application were made in person would frustrate its effective execution. The magistrate is required to inform the applicant of the terms of the warrant and the day and time at which it was signed by the appropriate electronic means. The applicant must complete a form setting out the substance of those terms and include information such as the name of the magistrate and the relevant date and time communicated by the magistrate. The applicant must, by the end of the day after the warrant expires, or by the end of the day after the warrant is executed, whichever event is earlier, give the magistrate the completed form of warrant and, if the information had not been sworn, the sworn information. Those documents must be attached by the magistrate to the form of search warrant completed by the magistrate. This provision is particularly necessary in remote areas or where for some reason a magistrate is not readily available.

8.131. Proposed section 456-25 provides that if the form of warrant signed by the magistrate is not produced in evidence in proceedings where it is material for a court to be satisfied that the exercise of a power under a search warrant issued under this Division was duly authorised, the court must assume that the exercise of a power under a search warrant was not duly authorised unless the contrary is proved.

8.132. Proposed section 456-30 provides that it is an offence for a person to state a name of a magistrate in a form of search warrant issued by telephone, fax or by other electronic means if the name is not the name of the magistrate that issued the warrant. This provision is based on subsection 3ZU(a) of the *Crimes Act 1914* and is intended to prevent abuses of telephone search warrants by authorised officers or others.

8.133. Proposed section 456-35 provides that it is an offence for a person to state a matter in a form of search warrant issued by telephone, fax or by other electronic means if the matter departs in a material particular from the form authorised by the magistrate. This provision is based on subsection 3ZU(b) of the *Crimes Act 1914* and, as in the case of proposed section 456-30, is intended to prevent abuses of telephone search warrants by authorised officers or others.

8.134. Proposed section 456-40 provides that it is an offence for a person to execute or present a form of search warrant issued by telephone, fax or by other electronic means that has not been approved by the magistrate, or departs in a material particular from the terms authorised by the magistrate. This provision is based on subsection 3ZU(c) of the *Crimes Act 1914* and, as in the case of proposed sections 456-30 and 456-35, is intended to prevent abuses of telephone search warrants by authorised officers or others.

8.135. Proposed section 456-45 provides that it is an offence for a person to give to a magistrate a form of search warrant issued by telephone, fax or by other electronic means that is not the form of search warrant that the person executed. This provision is based on subsection 3ZU(d) of the *Crimes Act 1914* and, as in the case of proposed sections 456-30, 456-35 and 456-40, is intended to prevent abuses of telephone search warrants by authorised officers or others.

8.136. Proposed subsection 456-50(1) provides that, if a warrant concerning premises is being executed and the occupier of the premises (or another person who apparently represents the occupier) is present at the premises, the authorised officer executing the warrant must make available to that person a copy of the warrant. Proposed subsection 456-50(3) provides that the authorised person must identify himself or herself to the person at the premises. Proposed subsection 456-50(4) provides that the copy of the warrant need not include the signature of the magistrate or the seal of the court. That is to ensure that forgery or wrongful use of the warrant copy is prevented. It is based on subsection 3H(5) of the *Crimes Act 1914*, which was included at the specific request of the then ACT Chief Magistrate.

Part 10-4 Offences relating to regulatory and enforcement powers of Registrar

8.137. Proposed subsection 461-1(1) provides that a person must not engage in conduct that results in the obstruction or hindering of an authorised officer in the performance of the officer's powers under Part 10-3 or engage in conduct that results in the obstruction or hindering of a person who is executing a warrant under Division 456. However, this offence does not apply to the extent that the person has a reasonable excuse. Proposed subsection 461-1(3) provides that the occupier, or person in charge, of premises that a person enters under a warrant issued under Division 456 must not intentionally or recklessly fail to provide that person all reasonable facilities and assistance for the effective exercise of his or her powers under the warrant. Proposed subsections 461-1(1), 461-1(2) and 461-1(3) are based on section 65 of the ASIC Act.

Proposed subsection 461-1(4) provides that a person must not engage in conduct that results in the obstruction or hindering of the Registrar, or the Registrar's delegate, in the performance or exercise of any of the Registrar's functions and powers or engage in conduct that results in the disruption of a meeting called under sections 439-10 or 439-15. An offence constituted by a contravention of proposed subsection 461-1(4) is punishable on summary conviction. Proposed subsections 461-1(4) and 461-1(5) are based on subsections 66(1) and 66(3) of the ASIC Act.

8.138. Proposed subsection 461-5(1) provides that a person must not, in purported compliance with a requirement made under Part 10-3, give information or make a statement that is false or misleading in a material particular. It is a defence to this offence if it is proved that the defendant, when giving the information or evidence or making the statement, believed on reasonable grounds that it was true and not misleading. Proposed section 461-5 is based on subsections 64(1)(a) and 64(3) of the ASIC Act.

8.139. Proposed subsection 461-10(1) provides that if a request under section 453-1 or 453-5 has been made to produce a book, a person must not, in any case, engage in

conduct that results in the concealment, destruction, mutilation or alteration of the book or, if a book is in a particular state or territory, engage in conduct that results in the taking or sending of the book out of that state or territory or out of Australia. It is a defence to this offence if it is proved that the defendant did not intend to defeat the purposes of the Act. Proposed section 461-10 is based on section 67 of the ASIC Act.

8.140. Proposed subsection 461-15(1) provides that, for the purposes of Part 10-3, it is not a reasonable excuse for a person to refuse or fail to give information or to produce a book in accordance with a requirement made of the person on the basis that to do so might tend to incriminate the person or make the person liable to a penalty.

8.141. Proposed subsection 461-15(2) provides that subsection 461-15(3) applies when a natural person is, under subsection 461-15(1) (having made a claim of possible self-incrimination or exposure to liability for a penalty) deprived of that claim of privilege against self-incrimination as a reasonable excuse for not complying with a requirement to give information or produce a book for the purposes of Part 10-3. By confining the application of the subsection to natural persons the intention is expressed that corporations may not claim the benefit of any use or derivative use immunity in proceedings under the Bill, nor attract the provisions of proposed subsection 461-15(3). The application of proposed subsection 461-15(3) is also restricted to statements made. It does not extend to the production of books.

8.142. Proposed subsection 461-15(3) provides that, except in proceedings relating to the falsity of a relevant statement, a statement made by a natural person who has claimed potential self-incrimination is not admissible as evidence against that person in a criminal proceeding or a proceeding for the imposition of a penalty (use immunity). Such a person may no longer receive the benefit of any derivative use immunity in relation to information derived from information given.

8.143. Proposed section 461-15 is based on section 68 of the ASIC Act, which also restricts the provision of derivative use immunity and provides use immunity for answers to questions, not for documents produced. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties of corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities (1992) and by the 'Review of the Derivative Use Immunity Reforms' by John Kluver (1997). It was accepted that a full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences. In light of the Registrar's similar role as a corporate regulator, a limited immunity is also justified here. Proposed section 461-15, unlike section 68 of the ASIC Act, makes no references to signed records because the Bill has no equivalent to section 24 of the ASIC Act and related provisions.

Part 10-5 Protection for whistleblowers

8.144. Proposed section 466-1 provides for the circumstances in which a disclosure of information regarding a suspected breach of the Bill will be protected by Part 10-5. It is based on section 1317AA of the Corporations Act. It should be noted that any protected information provided to the Registrar will attract the application of the confidentiality requirements contained in proposed Part 15-2 of the Bill.

8.145. Proposed section 469-1 provides for the protections which will be afforded to a person reporting a suspected breach of the Bill including protection against criminal and civil liability, the enforcement of contractual remedies, liability for defamation, and termination of contract. Proposed section 469-1 is based on section 1317AB of the Corporations Act.

8.146. Proposed section 469-5 prohibits any actual or threatened detriment being directed against a person because of their disclosure. Where a person contravenes either proposed subsection 469-5(1), 469-5(2) or 469-5(3) they will commit an offence and may be subjected to a penalty of up to 25 penalty units and/or six months imprisonment. Proposed section 469-5 is based on section 1317AC of the Corporations Act.

8.147. Proposed section 469-10 provides that if a victim suffers damage as a result of a contravention of proposed subsection 469-5(1), 469-5(2) or 469-5(3), compensation may be available to the victim. Proposed section 469-10 is based on section 1317AD of the Corporations Act.

8.148. Proposed section 472-1 provides that persons who make certain disclosures of information, including information that qualifies for protection under Part 10-5 may be guilty of an offence. Proposed section 472-1 is based on section 1317AE of the Corporations Act.

Chapter 11 External administration

Part 11-1 Introduction

8.149. Proposed section 482-1 provides a general overview of the chapter.

Part 11-2 Special administration

8.150. Proposed section 487-1 allows the Registrar to put a CATSI corporation under special administration. The Bill differentiates between the Registrar placing a corporation under special administration and the Registrar appointing a person as a special administrator. In practice the two events will occur at the same time. Distinguishing between them is particularly important when determining when the special administration ceases. For example, if a special administration ceased when a special administrator died then any proceedings that were stayed under section 440D of the Corporations Act as applied by proposed section 499-10 would be recommenced. This carries some administrative risk that a corporation could be placed under special administration without a special administrator being appointed. On the other hand it addresses the more significant risk that a special administration could cease if a special administrator resigns or dies before a substitute can be appointed.

8.151. The term 'special' is used to distinguish administration under CATSI from administration under the Corporations Act. It also relates to the application of the CATSI Bill as a special measure for the advancement and protection of Aboriginal people and Torres Strait Islanders. Placing a corporation under special administration, appointing a special administrator and conducting a special administration will be

informed by the objects and aims of the CATSI Bill as opposed to an administration under the Corporations Act which is principally driven by the interests of creditors and the certainty of commercial transactions.

8.152. Proposed subsection 487-1(3) makes it clear that a corporation cannot be placed under special administration if the corporation is being wound up or a liquidator has been appointed. This ensures the interests of creditors are sufficiently protected. The subsection also makes it clear that a corporation can be placed under special administration even if the corporation is under administration under Part 5.3A of the Corporations Act.

8.153. Proposed section 487-5 sets out the grounds on which a corporation may be placed under special administration. The grounds are broader than insolvency or inability to repay a debt, which are usually the basis for appointing administrators or liquidators under the Corporations Act. The grounds include circumstances where disputes within the corporation are interfering with the conduct of the corporation affairs. Directors or members can request a special administrator be appointed. This achieves greater flexibility than the narrower circumstances provided for under section 71 of the ACA Act.

8.154. The decision to place a corporation under special administration is subject to merits review under proposed section 617-1.

8.155. Proposed section 487-10 is based on subsection 71(1) of the ACA Act and allows the corporation to show cause why the corporation should not be placed under special administration. Proposed subsection 487-10(2) allows the show cause notice procedure to be dispensed with in urgent circumstances. This addresses a significant deficiency in the section 71. Proposed subsection 487-10(2) sets out the matters that an urgent determination seeks to prevent. Given the large amount of public funding that is provided to CATSI corporations, proposed subsection 487-10(2)(b) recognises that intervention may be required to prevent the loss of public money. Proposed subsection 487-10(2)(d) recognises that many CATSI corporations provide essential services to communities and the potential disruption of these services might require urgent intervention.

8.156. Proposed section 487-15 provides for extending the period of the special administration. Administratively, the Registrar will ensure that a special administrator is appointed during an extended period of special administration.

8.157. Proposed section 487-20 provides for the Registrar to be able to determine when a special administration ceases. This discretion is left broad to ensure maximum flexibility. A broad discretion is appropriate as the decision to cease the special administration will not adversely affect the interests of corporations or creditors.

8.158. Proposed section 487-25 makes it clear when the special administration starts and finishes. This removes any doubt that the state of a corporation under special administration is not affected by the presence or absence of a special administrator.

8.159. Proposed section 490-1 provides for the appointment of a special administrator.

8.160. Proposed section 490-5 provides for the period of a special administrator's appointment and extension of this period. In normal circumstances this will be the same as the corporation's period of special administration, provided for under proposed sections 487-1 and 487-15. The alignment of these periods will be handled

administratively. It is possible that a special administrator might be appointed for a shorter period than the special administration if, for example, the administrator is only available for a certain period. Administratively, another special administrator would be appointed for the remainder of the period. Appointing a special administrator for a longer period than the special administration will also be avoided. Proposed section 505-1(g) ensures that the appointment of the special administrator ends if the special administration is terminated under proposed section 487-20.

8.161. Proposed section 493-1 provides for the notices that must be given in relation to the special administration and special administrators. This proposed section is based on section 450A of the Corporation Act. This is why section 450A is not applied by proposed section 499-10. Proposed subsection 493-1(2)(b) recognises that the Registrar may not be aware of all the receivers or chargees. There is a risk that some receivers or chargees may not receive a direct notice of special administration because they are not known to the Registrar. This risk is reduced by the publication of the notice in both the *Gazette* and a relevant newspaper. The consequence of direct notices not being received is also diminished given that a special administrator is appointed on grounds other than insolvency. ADI's (authorised deposit-taking institution's) are not disadvantaged because the normal operation of section 437D of the Corporations Act provides that the relevant notice is the *earlier* of the direct notice or the newspaper notice. Proposed section 496-15 is an equivalent of section 437D of the Corporations Act modified to apply to special administration.

8.162. Proposed section 496-1 is based on section 73 of the ACA Act. A contact person is not an officer of the corporation. It is unnecessary to vacate the position of contact person as they have no capacity to affect the position of the corporation. There may also be benefit in the contact person continuing to have a duty to pass on information to the corporation in case correspondence is sent to them instead of the special administrator. Under proposed section 120-1 documents can be served on either a contact person or a special administrator. Under proposed subsection 499-5 the contact person's appointment can be terminated by the special administrator.

8.163. The main defect of section 73 of the ACA Act is its inflexibility. Under the ACA Act offices were vacated in all cases making the appointment of an administrator a considerable imposition. This defect is remedied by proposed section 496-5. The CATSI Bill will allow officers to be retained to work with the special administrator during special administration. This recognises that directors may not be at fault when a ground for special administration exists, or that directors can be given opportunities through the support of the special administrator to correct the circumstances that led to the special administration. This may be especially useful when the directors have requested the appointment of a special administrator.

8.164. Proposed section 496-10 is based on section 437C of the Corporations Act. It provides that officers cannot exercise any powers without the consent of the special administrator. Note that the definition of 'officer' in proposed section 683-1 includes receivers and administrators. This sets up the priority that is given to special administrations. Proposed subsection 496-10(7) ensures transactional certainty for actions taken by receivers and administrators acting before notice is given of the special administration.

8.165. Proposed section 496-15 is based on section 437D of the Corporations Act and makes certain transactions void if they are entered into by persons other than the

special administrator or with written consent from the special administrator. A limited exemption is provided for Australian ADI's before notice is given of the special administration. In practice there should be no gap between the notice being provided under proposed section 493-1(3) and the start of the special administration except in the urgent circumstances contemplated in proposed subsection 487-10(2). Even in these circumstances the delay should be minimal.

8.166. Proposed section 496-20 is based on section 437E of the Corporations Act and provides for a person committing an offence under 496-15 to pay compensation to a person who has suffered damages because of the offence.

8.167. Proposed section 499-1 provides that the special administrator is responsible for the conduct of the affairs of the corporation. This removes doubt that the directors might be responsible for the conduct of the affairs when their offices have not been vacated under proposed section 496-5.

8.168. Proposed section 499-5 is based on sections 437A and 442A of the Corporations Act. The power to engage or discharge employees is implicit in the broader powers but proposed subsection 499-5(1)(d) is added to remove doubt. Proposed subsection 499-5(e)(iii) clarifies that the special administrator can do things that may be reserved for the members under the CATSI Bill. This is because the CATSI Bill places greater emphasis on member participation in decision making than the Corporations Act.

8.169. Proposed subsection 499-5(3)(a) provides for the special administrator to be able to change the constitution. This is necessary because, in the Registrar's experience, corporations can become deadlocked by constitutional provisions that require, for example, higher quorum than is available from the membership base. In such circumstance the special administrator can apply to the Registrar for the constitution to be changed to remove this impediment. The constitution change will not take effect unless it is registered by the Registrar under proposed section 69-30. This provides a safeguard against unilateral changes to the constitution proposed by the special administrator that may affect members' rights and interests.

8.170. Proposed section 499-10 applies Division 6, 7, 8, and 9 of Part 5.3A of the Corporations Act to special administrations. This ensures consistency between the proposed CATSI Bill regulatory framework and the Corporations Act regulatory framework. Section 440A of the Corporations Act is not applied because this could override proposed subsection 526-15(3) which provides that only the Registrar or the special administrator can apply for a winding up order when the corporation is under special administration. Section 442A of the Corporations Act is not applied because these powers are expressly provided for in proposed section 499-5. Proposed subsection 499-10(1)(e) ensures that supporting provisions, such as definitions in Part 1.2 and offence in Part 9.4, are also applied. An example of a relevant definition is the phrase 'decision period' which is used in section 441A of the Corporations Act.

8.171. Proposed section 502-1 provides for the Registrar to require reports from the special administrator. Such reports are exempt from inspection under proposed section 421-1(4). They can be inspected with the consent of the corporation. This recognises the reports of special administrators may contain information which supports the actions taken by the corporation and in such cases the corporation may want the reports to be inspected.

8.172. Proposed section 505-1 provides for the termination of a special administrator's appointment. Proposed subsection 505-1(1)(d) provides for termination on winding up. This subsection works together with proposed subsection 526-15(3) which provides that only the Registrar or the special administrator can apply for a winding up order when the corporation is under special administration. Proposed subsection 505-1(2) aims to give the Registrar ample time to find a replacement special administrator when a special administrator resigns. Proposed subsection 505-1(3) contemplates circumstances when a special administrator needs to resign more urgently such as for health reasons or when their personal safety is at risk.

8.173. Proposed section 505-5 adds to the broad discretion at proposed subsection 505-1(4). The criteria are additional and do not limit proposed section 505-1(4).

8.174. Proposed section 505-10 ensures that a corporation will not be left without a special administrator for an unreasonable length of time. This is important because if a corporation is under special administration and no special administrator is appointed then the affairs of the corporation cannot be conducted. Administratively, the Registrar has a panel of special administrators who can be called on at short notice to temporarily fill any gap created by an unexpected termination of a special administrator.

8.175. Proposed section 508-1 improves on processes established under the ACA Act for handing back control of a corporation to directors. Sections 77D and 77E of the ACA Act aimed to ensure that governing committee members were elected before an administrator's appointment was cancelled. One difficulty with this approach was that if an election could not be held, for example because quorum could not be achieved, then the administration could not be concluded. Proposed subsection 499-5(3) enables the special administrator to change the corporation's constitution to remove impractical election constraints or if necessary appoint directors. The office of directors may also not have been vacated under proposed section 496-5 which may be particularly beneficial for ensuring a smooth handover. Proposed section 508-1 places the obligation on the special administrator to ensure that before the special administration ends all the required offices are filled.

8.176. Administratively, election of directors remains the preferred option for appointing directors for the purpose of handing over control of the corporation at the end of a special administration. Elections ensure member participation in the running of the corporation. Proposed section 508-5 provides for the election of directors at the end of a special administration. An election does not have to be held. Under proposed subsection 508-5(2)(b) the election can be conducted by postal ballot. This may be useful to overcome the geographical remoteness of some corporations' membership bases and would apply regardless of a contrary rule in a corporation's constitution.

8.177. Proposed section 511-1 provides for the remuneration of a special administrator and is similar to proposed section 453-10. Proposed subsection 511-1(3) provides for the typical circumstance that the Commonwealth will pay for the special administration. Proposed subsection 511-1(4) gives the Registrar the capacity to determine that the corporation or a related body corporate bear some or all of the cost of the special administration. This is narrower than section 74 of the ACA Act which did not place any restriction on who might bear the costs of the administration, leaving it open in theory that an unrelated party could be directed to bear the costs.

Proposed subsection 511-1(5) provides that this section does not apply to a special administrator who is an APS employee or Commonwealth officer. This is because an APS officer or a Commonwealth officer will normally have their remuneration dealt with in other Commonwealth laws and instruments—for example, determinations made under the *Public Service Act 1999*. The definition of ‘Commonwealth officer’ in proposed subsection 511-1(6) is not intended to include persons who are retained by the Commonwealth as consultants or contractors.

Part 11-3 Receivers, and other controllers, of property of corporations

8.178. The review observed, at item G of chapter 17, that case law has partially clarified which parts of the Corporations Act are applied by sections 62 and 67 of the ACA Act. However, the review noted that the case law had still not fully clarified the position. The review recommended specifically applying those parts of the Corporations Act dealing with receivers and receivership, see paragraph 1262. Proposed section 516-1 makes it clear that the provisions in Part 5.2 of the Corporations Act relating to receivers and other controllers of property of corporations apply to CATSI corporations.

8.179. Proposed subsection 516-1(2)(a) provides that the Corporations Act receiver provisions only apply to the extent that they are capable of applying to a CATSI corporation. This is necessary to remove confusion that may be created by, for example, the application of provisions that relate to share capital given that CATSI corporations cannot issue shares (though they can own shares). Proposed subsection 516-1(2)(b) provides that the application of the Corporations Act receiver provisions can be modified by regulations. This recognises that the application of the provisions may be complex and require clarification for unforeseen circumstances that may arise. However, proposed subsection 516-1(2A) expressly provides that these regulations must not increase, or have the effect of increasing, the maximum penalty or have the effect of widening the scope of any applied offence.

Part 11-4 Administration with a view to executing a deed of corporation arrangement

8.180. The review recommended applying those parts of the Corporations Act dealing with administration, specifically including voluntary administration, see paragraph 1262. Proposed section 521-1 makes it clear that the provisions in Part 5.3A of the Corporations Act relating to administrators including voluntary administrators apply to CATSI corporations.

8.181. Proposed section 521-5 makes it clear that an administrator can exercise powers the corporation has as trustee.

8.182. Proposed subsection 521-10(1) makes it clear that an administrator cannot be appointed while the corporation is under special administration or the Registrar has issued a show cause notice in relation to the appointment of a special administrator. Proposed subsection 521-10(2) ensures that the Registrar can consent to an administrator being appointed regardless of proposed subsection 521-10(1).

8.183. Proposed section 521-15 is mainly a signpost provision to proposed section 496-10. Proposed subsection 521-15(3) allows a court to order that a Corporations Act administration ends. Under proposed section 496-10 the appointment of an administrator is not automatically terminated, but their powers cannot be exercised without the permission of the special administrator. This is appropriate as there may be benefits in the special administrator and the administrator working together. However, an administrator may have continuing obligations under the Corporations Act which may not be desirable to the administrator. Similarly the administrator may have entitlements under the Corporations Act, to remuneration for example, that may not be in the interests of the corporation to continue paying. In such cases the administrator, special administrator or the Registrar could apply to have the administration end.

Part 11-5 Winding up

8.184. Proposed section 526-1 provides that a court may order that a CATSI corporation be wound up and may only do so on the grounds set out in proposed section 526-5 following an application in accordance with proposed section 526-15. This simplifies the structure of the proposed Part and removes any doubt about the interaction of the Corporations Act winding up provisions and the proposed CATSI Bill provisions.

8.185. Proposed section 526-5 sets out the grounds on which a CATSI corporation may be wound up. This section is similar to section 461(1) of the Corporations Act. Proposed subsection 526-5(c) is an additional ground reflecting the ongoing requirements of the CATSI Bill, such as proposed section 141-5 minimum number of members requirement. The Corporations Act does not have similar ongoing requirements. Proposed subsection 526-5(d) is an additional ground reflecting the requirement that trade unions must not be registered. The Corporations Act does have a similar requirement but does not have this as a ground for winding up. Proposed subsection 526-5(d) does not replicate this possible uncertainty. Proposed subsection 526-5(i) integrates an equivalent of Corporations Act section 459A into this provision.

8.186. Proposed subsection 526-5(j) provides an alternative consequence for failing to comply with proposed section 439-20 notice other than placing the corporation under special administration. Proposed subsection 526-5(k) provides an additional consequence for failing to lodge required reports. Proposed subsection 526-5(l) supports the capacity of the Registrar to encourage corporations who may be more suited to registration under the Corporations Act to transfer to it. Proposed subsection 526-15(2) provides that the Registrar is the only person who can apply on the basis of the additional grounds for winding up in proposed subsections 526-5(j), (k) and (l).

8.187. Proposed section 526-10 ensures that a corporation will not be wound up on the basis of acts or omission done to comply with a Native Title legislation obligation. An example of such a situation would be where the corporation took into account the interests of common law native title holders who were not members of the corporation, potentially leading to a claim under proposed subsection 526-5(g)(iii) that the act was contrary to the interests of the members.

8.188. Proposed section 526-15 sets out who may apply for a corporation to be wound up. The proposed section is similar to section 462 of the Corporations Act. Proposed subsection 526-15(1)(c) gives standing to members. This addition is appropriate in the interests of strengthening member participation in CATSI corporations. Proposed subsection 526-15(3)(g) gives standing to a special administrator. This is probably not strictly necessary to specify as the special administrator has all the powers of the corporation, but is included to remove doubt. This section does not replicate the Corporations Act subsection 462(2A) which limits the grounds on which ASIC may apply for winding up. This is because in the case of CATSI corporations the Registrar may be the only party with the means to apply for winding up.

8.189. Proposed subsection 526-15(2) ensures that the Registrar is the only person who can apply on the basis of the additional grounds for winding up in proposed subsections 526-5(j), (k) and (l). This is because these grounds are added to support the regulatory functions of the Registrar.

8.190. Proposed subsection 526-15(3) ensures that no one other than the Registrar or the special administrator may apply for winding up while a corporation is under special administration. This gives special administrators an opportunity to prevent corporate failure before creditors can apply for winding up. This is important given the essential services that many CATSI corporations provide. In practice, special administrators will normally aim to pay debts to creditors as they fall due and in the event that a corporation is insolvent apply for winding up.

8.191. Proposed section 526-20 is similar to sections 490 and 491 of the Corporations Act providing for voluntary winding up. Proposed subsection 526-20(2) makes it clear that a corporation cannot wind up voluntarily while the corporation is under special administration or the Registrar has issued a show cause notice in relation to the appointment of a special administrator. Proposed subsection 526-20(3) ensures that the Registrar can consent to a voluntary winding up regardless of proposed subsection 526-20(2). Proposed subsection 526-20(5) allows a longer period for lodgment of the resolution than provided for in subsection 491(2) of the Corporations Act. Proposed section 526-20(8) places the obligation on the Registrar rather than the corporation to publish the notice in the *Gazette* as is the case under subsection 491(2) of the Corporations Act. This is similar to the current process under section 64 of the ACA Act.

8.192. Proposed section 526-25 is similar to section 65 of the ACA Act and provides for the distribution of surplus assets in winding up by a court. The requirement that the distribution be approved by two-thirds of all members has been replaced by a requirement for a special resolution which is consistent with other actions requiring a special resolution in the CATSI Bill.

8.193. Proposed section 526-30 is similar to section 65 of the ACA Act and provides for the distribution of surplus assets in a voluntary winding up. The requirement that the distribution be approved by two-thirds of all members has been replaced by a requirement for a special resolution. Unlike section 65 of the ACA Act, proposed sections 526-25 and 526-30 are two separate sections to make their independent operation clearer. Proposed section 526-30 has the additional proposed subsection 526-30(4) requiring the liquidator to apply to the court if they form the view that the distribution would not be just in certain circumstances. This was the operation of

subsection 65(3) of the ACA Act but proposed subsection 526-30(4) makes this clearer. Proposed section 526-30 may displace the operation of section 501 of the Corporations Act as applied by proposed section 526-35 to the extent that it is not capable of being applied to CATSI corporations.

8.194. The review recommended specifically applying those parts of the Corporations Act dealing with liquidation, including provisional liquidation, see paragraph 1262. Proposed section 526-35 makes it clear that the provisions in Parts 5.4, 5.4B, 5.5, 5.6, 5.7B, 5.8A and 5.9 of the Corporations Act relating to liquidators, provisional liquidators, and winding up generally apply to CATSI corporations. Part 5.7 is not applied as it is not relevant to CATSI corporations. The proposed subsection 526-35(3) also excludes the application of certain provisions which are specifically covered by proposed sections 526-1 to 526-25.

8.195. Proposed subsection 526-35(1) is expressed as relating to the winding up of a corporation. This means that the application of the Corporations Act winding up provisions is only triggered once a winding up has begun. However a number of provisions in Chapter 5 are drafted in a manner that means they are capable of applying regardless of any winding up proceedings, or can occur before a winding up order is made. For example, Division 2 of Part 5.4 provides for the important statutory demand procedures, however by their nature, statutory demands occur before winding up commences. Proposed section 526-40 ensures that such provisions in Chapter 5 apply to CATSI corporations.

Part 11-6 Insolvent Trading

8.196. The Corporations Act insolvent trading provisions are significant examples of provisions which operate independently of winding up. While part 5.7B is applied by proposed section 526-35 that application does not clearly ensure that these important provisions apply to CATSI corporations. Proposed section 531-1 ensures that the directors of CATSI corporations have a duty to prevent insolvent trading. This is not an obligation that existed under the ACA Act.

8.197. Proposed section 531-5 ensures, in the event of any conflict between the duty under section 588G of the Corporations Act to prevent insolvent trading and any duty that might arise under the Native Title legislation, the duty to prevent insolvent trading prevails. This makes it clear to directors that they must not trade while insolvent even if the action that would trigger insolvency was one which they would otherwise have an obligation to perform under the Native Title Act.

Part 11-7 Employees' entitlements

8.198. The Corporations Act employee entitlement provisions are another important example of provisions which operate independently of winding up. While part 5.8A is applied by proposed section 526-35 that application does not clearly ensure that these important provisions apply to CATSI corporations. Proposed section 536-1 ensures that the employees of CATSI corporations will have their entitlements protected. This obligation did not exist under the ACA Act.

Chapter 12 Transfer of registration, deregistration and unclaimed property

Part 12-1 Transfer of registration to another system

8.199. Proposed Part 12-1 deals with the transfer of a CATSI corporation to another incorporation system under a Commonwealth, state or territory law. This part consists of proposed sections 540-1, 540-5, 540-10 and 540-15. It is based on Part 5A.2 of the Corporations Act.

8.200. Proposed section 540-1 provides that a CATSI corporation may transfer its registration to one under a law of the Commonwealth, a state or territory by passing a special resolution stating its intention and complying with proposed sections 540-5 and 540-10. This proposed section is based on section 601AI of the Corporations Act.

8.201. Proposed section 540-5 provides that, to transfer its registration, a CATSI corporation must lodge an application with the Registrar with a copy of the special resolution authorising the transfer and a statement signed by the corporation's directors that in their opinion the corporation's creditors are not likely to be materially prejudiced by the change and setting out their reasons for that opinion. This proposed section is based on section 601AJ of the Corporations Act.

8.202. Proposed section 540-10 provides that the Registrar may make a transfer of registration declaration for a CATSI corporation under this proposed section if the Registrar is satisfied that the application complies with proposed section 540-5. The Registrar must also be satisfied that the corporation's creditors are not likely to be materially prejudiced by the transfer and that the relevant Commonwealth, state or territory law adequately provides for the corporation's legal personality after the transfer and the preservation of any rights or claims against the corporation (other than the right of a member as a member) that accrued while it was registered under the CATSI Bill. This proposed section is based on section 601AK of the Corporations Act.

8.203. Proposed subsection 540-15(1) provides that the Registrar must deregister a CATSI corporation if the Registrar makes a transfer of registration declaration for the corporation and the corporation is registered under the Commonwealth, state or territory law concerned. Under proposed subsection 540-15(2) proposed sections 546-20, 546-25, 546-30 and 546-35 do not apply to the deregistration of a CATSI corporation under this proposed section. This subsection retains the capacity of the Registrar to reinstate a corporation under proposed section 546-40. This addresses the situation, for example, where the registration under the new incorporations system is later found to be defective. This proposed section is based on section 601AL of the Corporations Act.

Part 12-2 Deregistration

8.204. Proposed section 546-1 deals with voluntary deregistration. The proposed provision sets out who may apply for deregistration, the circumstances in which application can be made and the procedure for deregistering an Aboriginal and Torres Strait Islander corporation. This section is based on section 601AA in the Corporations Act.

8.205. Proposed section 546-5 deals with Registrar-initiated deregistration. The proposed provision sets out the circumstances in which the Registrar may deregister and the procedure for deregistering an Aboriginal and Torres Strait Islander corporation. The Registrar may deregister a corporation if it is being wound up, or is wound up, under Part 5.4 of the Corporations Act as applied by section 526-35 of the proposed Act. This section reflects section 601AB in the Corporations Act.

8.206. Proposed section 546-10 deals with deregistration following amalgamation or winding up. The proposed provision provides that the Registrar must deregister a CATSI corporation if the Court orders the deregistration under an applied provision of the Corporations Act. Proposed subsection 546-10(3) also provides that the Registrar must deregister any amalgamating corporations upon the registration of an amalgamated corporation in an administrative amalgamation. Subsection 546-10(4) provides that proposed subsections 546-20(2) to (7) and proposed sections 546-25 to 546-40 do not apply to the deregistration of a CATSI corporation under proposed subsection 546-10(3). Unlike proposed subsection 540-15(2), the capacity of the Registrar to reinstate a corporation is unnecessary here as the Registrar will have control of the administrative amalgamation. This section reflects section 601AC in the Corporations Act.

8.207. Proposed section 546-15 provides that the Registrar must not deregister an Aboriginal and Torres Strait Islander corporation that is a registered native title body corporate. Such a corporation cannot be deregistered under the proposed Act because the native title legislation requires a registered native title body corporate to be registered as an Aboriginal and Torres Strait Islander corporation. If such a native title body is no longer a registered native title body corporate under the *Native Title Act 1993*, then the Registrar can deregister the corporation.

8.208. Proposed section 546-20 sets out the effect of deregistration. This section is based on section 601AD in the Corporations Act.

8.209. Proposed section 546-25 sets out what the Registrar is to do with property of a deregistered Aboriginal and Torres Strait Islander corporation. This section reflects section 601AD in the Corporations Act.

8.210. Proposed section 546-30 provides the Registrar with power to fulfil outstanding obligations of a deregistered Aboriginal and Torres Strait Islander corporation. This section reflects section 601AF in the Corporations Act.

8.211. Proposed section 546-35 enables a person to recover from an insurer of a deregistered Aboriginal and Torres Strait Islander corporation when the corporation had a liability to that person and was covered by an insurance contract before deregistration. This section reflects section 601AG in the Corporations Act.

8.212. Proposed section 546-40 enables registration to be reinstated by the Registrar and by Court order. This section reflects section 601AH in the Corporations Act.

8.213. Proposed section 546-45 provides that the regulations may modify the provisions dealing with the deregistration of a CATSI corporation if it holds land for the benefit of Aboriginal persons or Torres Strait Islanders under certain laws, including the *Aboriginal Land Act 1991* (Qld). The Queensland Government is currently reviewing the *Aboriginal Land Act 1991* (Qld). As part of this review, it proposes to amend this Act to permit the Queensland Government to grant land for the benefit of Aboriginal persons, in trust, to corporations which may be registered

under the CATSI Bill. Because of concerns about the fate of land held in trust by a deregistered corporation, this regulation-making power will allow the prescribing of the process to be followed if winding-up proceedings are initiated for a CATSI corporation holding land in trust granted under the *Aboriginal Land Act 1991* (Qld). The regulation making power is also broad enough to cover other state and territory land rights schemes if necessary in the future, for example, the *Torres Strait Islander Land Act 1991* (Qld). Proposed subsection 546-45(2) will provide that any regulations made to modify these provisions must not increase the maximum penalty for any offence or widen the scope of any offence. Subsection 546-45(3) provides that this proposed section does not limit proposed section 633-5 which deals with regulations for registered native title bodies corporate.

Part 12-3 Unclaimed property

- 8.214. Proposed section 551-1 defines unclaimed property for the part.
- 8.215. Proposed section 551-5 provides how the Registrar is to deal with unclaimed property. Unclaimed money is to be held on trust and unclaimed property that is not money is to be held on trust until it can be sold or disposed of with proceeds to be held on trust.
- 8.216. Proposed section 551-10 states that the Registrar and Commonwealth are not liable to pay calls on shares when unclaimed property is or includes shares.
- 8.217. Proposed section 551-15 sets out how the Registrar may dispose of unclaimed money. Money that is unclaimed property or is proceeds of unclaimed property may be paid to a person entitled to that money.
- 8.218. Proposed section 551-20 establishes an unclaimed money account as a special account for unclaimed Aboriginal and Torres Strait Islander Corporations money.
- 8.219. Proposed section 551-25 provides that money that is unclaimed property or money representing proceeds of unclaimed property must be credited to the account.
- 8.220. Proposed section 551-30 sets out the purposes of the account to pay persons under proposed section 551-15 who are entitled to the unclaimed money and to debit money from the account six years if no payment has been made. The proposed section also enables a person to make a claim after six years have passed. In this case the money is then paid out of money appropriated by the parliament for this purpose.
- 8.221. Proposed section 551-35 provides that if unclaimed money has been paid in accordance with proposed section 551-15 to a person and another person claims to be entitled to that money then the Registrar is not liable to the person claiming to be entitled to the money. The person claiming to be entitled to the money may recover that money or an equivalent amount from the person who received the money under proposed section 551-15.
- 8.222. Proposed section 551-40 provides that the Commonwealth or Registrar is not liable for loss or damage suffered by a person resulting from powers under the part.

Chapter 13 Offences

Part 13-1 Offences about false or misleading statements etc.

8.223. Proposed section 561-1 deals with false or misleading statements made about documents required by or for the purposes of this Bill or lodged with or submitted to the Registrar. This proposed offence provision is based on section 1308 of the Corporations Act.

8.224. Proposed section 561-5 deals with false or misleading information given by an officer or employee of a CATSI corporation to directors, auditors and members. This proposed offence provision is based on section 1309 of the Corporations Act.

Part 13-2 General matters relating to offences

8.225. Proposed section 566-1 provides that if a body corporate is convicted of an offence against the Bill, the penalty that the court may impose is a fine not exceeding five times the maximum amount that, but for this section, the court could impose as pecuniary penalty for that offence. This is based on section 1312 of the Corporations Act. Like that provision, the proposed corporate multiplier here is broader in application than the corporate multiplier contained in subsection 4B(3) of the *Crimes Act 1914* in that it will allow a court to increase a penalty for a body corporate regardless of whether the offence provision in question relates to a corporation or a natural person. As, like the Corporations Act, most of the offences in the Bill are only capable of being committed by a corporation the broader corporate multiplier in proposed section 566-1 is required. This is because, consistent with the Corporations Act, the level of the penalties in the Bill have been drafted on the basis of the existence of proposed section 566-1. Penalty levels, which are not multiplied by the operation of proposed section 566-1, will still be relevant with respect to natural persons—for example, in some cases, a natural person who may be convicted of aiding and abetting a corporation to commit a primary offence.

8.226. Proposed section 566-5 provides for the operation of a penalty notice scheme. This is based on section 1313 of the Corporations Act. The proposed penalty notice scheme, like other infringement notice schemes, is intended to provide an efficient and cost-effective alternative to pursuing criminal sanctions against a potential defendant. Using infringement notice schemes in appropriate circumstances received support in ALRC Report 95: *Principled Regulation*. A penalty notice scheme is also an appropriate non-criminal alternative in the context of regulating Indigenous corporations. The regulations will prescribe offences in the Bill to which the penalty notice scheme applies.

8.227. Proposed section 566-10 deals with the circumstances where an act or thing is required to be done within a particular period or before a particular time and the failure to comply within this time is an offence under the Bill. The proposed section also deals with derivative offenders, persons who are, by act or omission, directly or indirectly knowingly concerned in or party to the failure to do an act which constitutes an offence under the Bill. This is based on section 1314 of the Corporations Act.

8.228. Proposed section 566-15 provides that despite anything in any other law, proceedings for an offence against the Bill may only be instituted within the period of five years after the act or omission alleged to constitute the offence; or with the Minister's consent, at any later time. This is based on section 1316 of the Corporations Act.

8.229. Proposed section 566-20 provides that, for criminal matters arising in a court proceeding, a body corporate is not entitled to refuse or fail to comply with a requirement to answer a question or give information; or to produce a book or any other thing; or to do any other act whatever, on the basis that to do so might tend to incriminate the body or make the body liable to a penalty. This is based on section 1316A of the Corporations Act.

8.230. Proposed section 566-25 provides that, if a prosecution regarding an offence against the Bill has been instituted, or the Registrar believes that such a prosecution ought to be instituted, the Registrar may require certain persons to give all reasonable assistance in the prosecution. The Registrar cannot make any such requirement of a defendant, or a potential defendant, or the lawyer of a defendant or potential defendant. If a person fails to give such assistance, the Court may, on the application of the Registrar, order the person to comply with the requirement within such time and in such manner as the Court orders. This is based on section 1317 of the Corporations Act.

Chapter 14 Courts and proceedings

Part 14-1 Powers of courts

8.231. Proposed section 576-1 is based on section 1318 of the Corporations Act and provides for the power of courts to grant relief. The section relies on the distinction between 'court' and 'Court' as provided for in proposed section 694-35. Proposed subsection 576-1(1) enables a 'court' (i.e. any court) to grant relief from certain civil proceedings which have been commenced. Proposed subsection 576-1(2) reserves to the 'Court' (i.e. a superior court such as the Federal Court or a State or Territory Supreme Court) the more complex power to grant relief to a person who apprehends that a claim will be made against them. Proposed subsection 576-1(4)(e) adds a special administrator to the list of persons that the section applies to. This may not be entirely necessary as a special administrator will be considered an officer of the corporation, but like receivers in proposed subsection 576-1(4)(d) it removes doubt that this is the case.

8.232. Proposed section 576-5 mirrors section 1319 of the Corporations Act and provides for the power of the Court to give directions about meetings convened by an order of the Court.

8.233. Proposed section 576-10 is based on section 1321 of the Corporations Act and provides for appeals from decision of external administrators of corporations. Importantly, proposed subsection 576-10(1)(a) allows decisions of special administrators to be appealed. This is an important protection for creditors, members, directors, employees and CATSI corporations generally.

8.234. Proposed section 576-15 is based on section 1322 of the Corporations Act and provides for the power of the Court in relation to determining whether procedural irregularities should invalidate the outcome of the proceeding. This is an important means of ensuring transactional certainty.

8.235. Proposed section 576-20 is based on section 1323 of the Corporations Act and provides for the power of the Court to stop transactions occurring in certain circumstances. This is an important means for creditors and members to protect their interests.

8.236. Proposed section 576-25 is based on section 1324 of the Corporations Act and provides for the power of the Court to grant injunctions to stop a person contravening the Bill or to require the person to comply with the Bill. This is an important means of enabling creditors and members to protect their interests. Significantly, the Registrar can apply for the injunction which allows the Registrar to protect member interests or otherwise require compliance. This is consistent with ASIC's capacity to apply for injunctions under subsection 1324(1). Subsections 1324(1A) and (1B) are not required as they relate to share buy-back schemes.

8.237. Proposed section 576-30 is based on section 1326 of the Corporations Act and ensures that proposed sections 576-20 and 576-25 will not be interpreted as being inconsistent with each other.

8.238. Proposed section 576-35 is based on section 1327 of the Corporations Act and ensures that the provisions of the Bill do not limit the power of the Court to punish for contempt of Court.

Part 14-2 Proceedings

8.239. Proposed section 581-1 mirrors section 1330 of the Corporations Act and provides for the Registrar's power to intervene in proceedings.

8.240. Proposed section 581-5 mirrors section 1331 of the Corporations Act and provides for civil proceedings to be continued if an offence is disclosed.

8.241. Proposed section 581-10 mirrors section 1332 of the Corporations Act and provides that the standard of proof is the balance of probabilities for proceedings that are not offence proceedings.

8.242. Proposed section 581-15 mirrors section 1333 of the Corporations Act and provides for court certificates as evidence that a contravention occurred.

8.243. Proposed section 581-20 mirrors section 1335 of the Corporations Act and provides for the court's discretion about the payment for the costs of proceedings and security to be given for these costs.

8.244. Proposed section 581-25 mirrors section 1336 of the Corporations Act and provides for the vesting of property by a court order or by force of the Bill.

Part 14-3 Jurisdiction and procedure of courts

8.245. Proposed section 586-1 mirrors section 1337A of the Corporations Act and provides for the operation of the Division. The proposed section provides an overview

of the Division and deals with the interaction of the Division with the *Judiciary Act 1903* and the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

8.246. Proposed section 586-5 mirrors section 1337B of the Corporations Act and provides for the jurisdiction of the Federal Court and State or Territory Supreme Courts for civil matters and judicial review of decisions under the Bill.

8.247. Proposed section 586-10 mirrors section 1337C of the Corporations Act and provides for the jurisdiction of the Family Court and State Family Courts for civil matters under the Bill.

8.248. Proposed section 586-15 mirrors section 1337D of the Corporations Act and provides for the jurisdiction of the Supreme Court of a State or Territory for proceedings related to the decisions of a Commonwealth officer prosecuting a person in a State or Territory court for an offence against the Bill.

8.249. Proposed section 586-20 mirrors section 1337E of the Corporations Act and provides for the jurisdiction of the lower courts for civil matters under the Bill subject to those courts' general jurisdictional limits. This is an important means of improving access to the courts.

8.250. Proposed section 586-25 mirrors section 1337F of the Corporations Act and broadly ensures that appeals from the decisions of courts will be heard by a court in the same court system. For example, an appeal from a Queensland court will generally be heard by a Queensland appeal court.

8.251. Proposed section 586-30 mirrors section 1337G of the Corporations Act and provides that the various courts will assist each other.

8.252. Proposed section 586-35 mirrors section 1337H of the Corporations Act and provides for the transfer of proceedings between the Federal Court and the State or Territory Supreme Courts.

8.253. Proposed section 586-40 mirrors section 1337J of the Corporations Act and provides for the transfer of proceedings between the Family Court of Australia and the State Family Courts.

8.254. Proposed section 586-45 mirrors section 1337K of the Corporations Act and provides for the transfer of proceedings between the lower courts and from the lower courts to the Supreme Court of the state or territory in which the lower court operates.

8.255. Proposed section 586-50 mirrors section 1337L of the Corporations Act and provides for the additional matters that courts must have regard to when transferring a matter.

8.256. Proposed section 586-55 mirrors section 1337M of the Corporations Act and provides that the transfer of proceedings can occur at any stage.

8.257. Proposed section 586-60 mirrors section 1337N of the Corporations Act and provides for the transfer of documents on the transfer of proceedings as well as procedural assumptions that the receiving courts must make.

8.258. Proposed section 586-65 mirrors section 1337P of the Corporations Act and provides for the rules of procedure and evidence that are to be applied by courts when they are exercising a jurisdiction that is conferred on the Federal Court or the Family Court for civil matters under this Bill or conferred on a Supreme Court for the review of decisions.

- 8.259. Proposed section 586-70 mirrors section 1337Q of the Corporations Act and provides for rights of barristers and solicitors to appear in a court that a proceeding has been transferred to.
- 8.260. Proposed section 586-75 mirrors section 1337R of the Corporations Act and provides that decisions relating to the transfer of proceeding, or which rules of evidence or procedure should apply to a transferred proceeding, cannot be appealed.
- 8.261. Proposed section 586-80 mirrors section 1337S of the Corporations Act and provides that the Federal Court can make rules of court for the purpose of the Bill.
- 8.262. Proposed section 586-85 mirrors section 1337T of the Corporations Act and provides that the Supreme Court of the Australian Capital Territory can make rules of court for the purpose of the Bill.
- 8.263. Proposed section 586-90 mirrors section 1337U of the Corporations Act and provides that the Supreme Court of the Australian Capital Territory can make rules of court for the purpose of the Bill.
- 8.264. Proposed section 589-1 mirrors section 1338A of the Corporations Act and provides that the Division operates to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903* in relation to the jurisdiction of courts for criminal matters arising under the Bill. Proposed subsections 589-1 (2) and (3) make it clear that the Division does not limit the operation of the *Judiciary Act 1903* (other than sections 68, 70 and 70A) for criminal matters. These subsections were included in the Corporations Act to make it clear that the reasoning of the majority of the court in *ASIC v Vis & ors* [2000] SASC 258 concerning the jurisdiction of courts to hear appeals from summary dismissals is not to apply.
- 8.265. Proposed section 589-5 mirrors section 1338B of the Corporations Act and confers jurisdiction for criminal matters under the Bill on the courts of each state and territory that have jurisdiction for criminal matters in those states or territories. The proposed section also makes it clear that the conferral of jurisdiction for appeals includes jurisdiction about an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.
- 8.266. Proposed section 589-10 mirrors section 1338C of the Corporations Act and makes it clear that the court is to apply the rules of evidence applied in criminal procedure in the state or territory in which the person is charged.

Chapter 15 Administration

Part 15-1 Introduction

8.267. Proposed section 599-1 sets out what the chapter is about.

Part 15-2 Protection of information

8.268. Proposed section 604-1 sets out what the Part is about. This proposed Part is, subject to appropriate modifications, based on section 127 of the ASIC Act.

8.269. Proposed section 604-5 provides that information given to the Registrar in confidence and in connection with the performance of the Registrar's powers and functions is protected information. It also provides for information that is given to another person or included in a document given or produced to a person for the purposes of the Bill to be protected information.

8.270. Proposed section 604-10 requires the Registrar to take all reasonable steps to protect protected information from unauthorised use or disclosure.

8.271. Proposed section 604-15 is an offence provision and extends the obligation to protect protected information to special administrators appointed to a corporation.

8.272. Proposed section 604-20 is an offence provision and extends the obligation to protect protected information to persons engaged as consultants under section 658-10.

8.273. Proposed section 604-25 establishes the conditions under which the Registrar can use or disclose protected information and creates authorised use or disclosure of protected information if the use or disclosure is made in a way that is consistent with the Bill or is required by a law of the Commonwealth, a state or territory. This provision allows the Registrar to share protected information consistent with the Bill or other laws, with ASIC, with Commonwealth, state or territory agencies providing funding to Aboriginal and Torres Strait Islander corporations, and provides that regulations may be made prescribing other agencies and bodies with which the Registrar may share protected information. This provision is designed to strike the right balance between ensuring appropriate levels of whole-of-government monitoring and regulation, the closure of regulatory gaps that have previously existed, and the protection of an individual's privacy. This is based on section 127 of the ASIC Act.

Part 15-3 Protection from liability for Registrar, Minister etc.

8.274. Proposed section 609-1 provides that the Registrar, the Minister, a special administrator and a person acting under the authority of the Registrar are protected from liability from civil proceedings for loss or injury, subject to the protected persons performing their functions in good faith. This provision is based on section 246 of the ASIC Act.

Part 15-4 Review of decisions

8.275. Proposed section 614-1 sets out what the Part is about.

8.276. Proposed section 617-1 provides a table of the decisions that are to be reviewable. In contrast to Part 9.4A of the Corporations Act, the table in proposed section 617-1 will identify all the specific discretions of the Registrar which will be subject to merits review rather than applying a 'catch-all' provision with specific exceptions. This model is consistent with the ASIC Act and other legislative schemes. This will provide greater certainty in the administration of the Bill and for affected persons as to which decisions are subject to merits review.

8.277. Proposed section 617-5 clarifies the timeframes under which an application for review of a decision is to be made.

8.278. Proposed section 617-10 provides that the decision maker who makes a reviewable decision must take reasonable steps to notify a person whose rights and interest are affected. This provision is consistent with the Australian Government policy on administrative review and is designed to make it clear that a decision maker is obliged to make a reasonable effort to notify affected persons.

8.279. Proposed section 620-1 provides that the Registrar can undertake an internal review of a reviewable decision on his or her own initiative. This provision is designed to provide appropriate procedural safeguards and to improve the quality of administrative decisions.

8.280. Proposed section 620-5 provides for a person whose interests are affected by a reviewable decision with the right to ask the Registrar to reconsider the decision. This provision supports greater access to internal review of decisions without first having to go to a third party review process such as provided by the Administrative Appeals Tribunal.

8.281. Proposed section 623-1 provides for the jurisdiction of the AAT in respect of reviewable decisions.

Part 15-5 Fees

8.282. Proposed section 628-1 provides that regulations can be made prescribing fees that are payable for services provided by the Registrar.

8.283. Proposed section 628-5 provides that if a fee is prescribed for the lodgement of a document and the document was submitted for lodgement without payment of the fee, the document is not taken to have been lodged merely because of non-payment of the fee. This provides an opportunity for the application to proceed and for the applicant to remit the fee at a later stage and ensures that an oversight such as this does not place an unduly onerous administrative burden on the applicant. This proposed section is based on section 1354 of the Corporations Act.

8.284. Proposed section 628-10 gives the Registrar the discretion not to do an act that is requested until the required fee is paid, and ensures that the Registrar is protected from acting, and then not being paid in accordance with requirements. This proposed section is based on section 1355 of the Corporations Act.

8.285. Proposed section 628-15 provides that proposed sections 628-5 and 628-10 are to have effect despite anything in another Part of the Bill. This proposed section is based on section 1356 of the Corporations Act.

8.286. Proposed section 628-20 provides that a prescribed fee is a debt due to the Commonwealth.

8.287. Proposed section 628-25 establishes that despite the payment of a fee, a person is not entitled to inspect a register or document unless a provision of another Part of the Bill or another law gives the person the right to do so. This provision is based on section 1362 of the Corporations Act.

Part 15-6 Regulations

8.288. Proposed section 633-1 provides a general power to make regulations that are required by the Bill to be prescribed as well as in circumstances which are necessary or convenient for the purposes of the Bill.

8.289. Proposed section 633-5 provides a specific regulation making power in relation to RNTBCs. This power will ensure that the Bill provides sufficient scope to support the administration of the Native Title Act and clarifies that regulations can be made to modify the functions or duties of a special administrator, administrator, liquidator or receiver appointed to a RNTBC. This section also makes it clear that regulations that concern RNTBCs cannot be inconsistent with the Native Title Act, a measure designed to make it clear that the Bill supports the operation of the Native Title Act, a key aim of the Bill as expressed in proposed section 1-25(d).

Part 15-7 Approved forms

8.290. Proposed section 638-1 provides that the Registrar may approve a form for any document or notice that is required to be provided under the Bill. This provision is designed to give administrative flexibility for the Registrar to tailor information and the form in which it is provided to a specific corporation or classes of corporations. It also allows for the form to change over time to suit changing administrative arrangements in Indigenous corporations, and allows for continuous improvement in the administration of the Bill.

Chapter 16 – Registrar and Deputy Registrars of Aboriginal and Torres Strait Islander Corporations

Part 16-1 Introduction

8.291. Proposed section 648-1 provides a general overview of the chapter.

Part 16-2 Appointment of the Registrar and Deputy Registrars

8.292. Proposed section 653-1 establishes the office of the Registrar of Aboriginal and Torres Strait Islander corporations. Consistent with the ACA Act, the Registrar is to be appointed by the Minister.

8.293. Proposed section 653-5 provides for the appointment of one or more Deputy Registrars by the Registrar. The role of the Deputy Registrar is to assist the Registrar in carrying out the functions and powers of the office, and is consistent with the current ACA Act.

Part 16-3 Registrar's functions and powers

8.294. Proposed section 658-1 establishes the functions of the Registrar. The approach of the proposed section draws on functions of ASIC established by the ASIC Act. The current statement of functions in section 5 of the ACA Act is extremely limited, which has caused difficulties for the Registrar in meeting policy objectives. The proposed section is purpose-based, linking to the objectives of the Bill as well as to specific functions set out in other parts of the Bill.

8.295. Proposed subsection 658-1(1)(c) aims to ensure transparency in the affairs of Aboriginal and Torres Strait Islander corporations by allowing information to be made available to the public. The provision of readily available information about corporations is a tool to promote good corporate governance and provide funding bodies, creditors and members with a more accessible way of gaining information about corporations.

8.296. Proposed subsection 658-1(1)(d) aims to enable the Registrar to provide non-binding factual and procedural advice about the registration of an Aboriginal and Torres Strait Islander corporation, the rules governing the internal management of the corporation and the operation of the corporation. This will assist corporations to resolve disputes or address uncertainty. The advice will be non-binding in effect. The basis for this function is that disputes and invalid actions within Aboriginal and Torres Strait Islander corporations often arise from, or are greatly exacerbated by, a misunderstanding or lack of awareness of the legislation and or a corporation's internal governance rules. Experience has shown that disputes can often be resolved through providing independent information and advice about a corporation's (or member's) position under the legislation or corporation's rules. Further, assistance of this kind can ensure correct procedures are followed to avoid potential invalid actions. Such assistance complements other pre-incorporation assistance, information material and ongoing training.

8.297. Proposed subsection 658-1(1)(e) aims to enable the Registrar to conduct public education programs about the operation of the Bill and about governance of Aboriginal and Torres Strait Islander corporations. The proposed subsection aims to address some of the underlying problems, including lack of awareness and lack of skills, that lead to disputes and invalid actions and to encourage good corporate governance. It is a key capacity building measure.

8.298. Proposed subsections 658-1(1)(f) and (g) aim to assist with the resolution of disputes and to provide complaints assistance. This will be achieved through providing specific assistance in resolving disputes, including providing advice, and by referring parties to independent mediation and arbitration services and also through investigating and responding to complaints made about corporations, for example, relating to corporate governance and compliance with the Bill. These functions are based on the use of, and therefore tie-in and coordinate with, other specific powers or functions of the Registrar including, for example, examination and investigation, compliance notices, amending unworkable constitutions, appointing administrators, winding-up and deregistration.

8.299. The proposed subsections are expressed broadly so as to tie-in with the specific provisions rather than setting out specific details of how they are to be exercised. The proposed subsections respond to the growing demand for assistance with complaints about corporations, which provides important information for monitoring and regulation priorities. It is not proposed that the Registrar conduct mediation or arbitration, but to have a role in referring parties to existing dispute resolution services to avoid duplicate services being established and to avoid any conflict of interest in the Registrar taking regulatory action.

8.300. Proposed subsection 658-1(1)(h) aims to enable the Registrar to conduct research into matters affecting Aboriginal and Torres Strait Islander corporations, thereby informing the work of the Registrar and broadly assisting in meeting the aims and functions of the Registrar.

8.301. Proposed subsection 658-1(1)(i) aims to enable the Registrar to develop policy proposals regarding Aboriginal and Torres Strait Islander corporations, again to inform the work of the Registrar and to broadly assist in meeting the aims and functions of the Registrar. The development of policy proposals may also be conducted in conjunction with other relevant government agencies within the whole-of-government framework.

8.302. Proposed subsection 658-1(1)(j) is intended to enable the Registrar to perform functions that may be conferred under other laws of the Commonwealth should the Parliament consider this necessary.

8.303. Proposed section 658-5 sets out the aims of the Registrar. The section draws on the equivalent section in ASIC Act requiring the Registrar to follow specified aims in performing his or her functions and exercising his or her powers under the Bill.

8.304. Proposed subsection 658-5(1)(c) provides that the Registrar must aim to consider Aboriginal and Torres Strait Islander tradition and circumstances in performing his or her functions and exercising powers under the Bill. This subsection aims to support corporations in situations where they may wish to apply or consider Aboriginal and Torres Strait Islander tradition and circumstances as part of the corporation's operation. The Registrar will be able to consider a corporation's

particular circumstances in sections of the Bill that provide the flexibility for tailoring to a corporation's particular situation. For example, this provision will support consideration of whether the internal governance rules are adequate and workable given the context in which the corporation operates as provided for in proposed subsection 66-1(5)(b). Another example of how this provision applies is assisting the Registrar to make a decision about an application for an extension of time under proposed section 201-155 to hold an AGM on the grounds that members of the corporation are unavailable at a particular time due to travel for cultural commitments.

8.305. Proposed section 658-10 is a broad provision establishing the power of the Registrar to do all things necessary or convenient for the performance of the functions of the office of the Registrar.

8.306. Proposed section 658-15 requires the Registrar to have an office seal as a means of identifying the authority of documents issued by the Registrar.

8.307. Proposed section 658-20 provides for judicial notice of matters, enabling recognition of the authority of the Registrar.

Part 16-4 Matters concerning the Registrar's and Deputy Registrars' appointments

8.308. Proposed section 663-1 sets out how the remuneration of Registrar is to be determined. The *Remuneration Tribunal Act 1973* applies in relation to determining the Registrar's remuneration. Allowing the Registrar's conditions of service to be determined by the Remuneration Tribunal provides greater statutory independence for the public office of Registrar.

8.309. Proposed section 663-5 sets how the Registrar and Deputy Registrar may resign their appointment.

8.310. Proposed section 663-10 establishes the grounds on which the Registrar's appointment may be terminated by the Minister.

8.311. Proposed section 663-15 establishes how a Deputy Registrar's appointment may be terminated by the Registrar, and how the appointment may also cease if the Deputy Registrar is no longer engaged under the *Public Service Act 1999*.

8.312. Proposed section 663-20 requires written notice of all interests that may conflict with the proper performance of the Registrar's functions.

8.313. Proposed section 663-25 provides the circumstances in which the Minister may appoint a person to act as the Registrar and Registrar may appoint a person to act as a Deputy Registrar. The proposed section also sets out the validity of actions undertaken by a person acting in those positions to ensure legal certainty.

8.314. Proposed section 663-30 sets out that the Registrar's leave entitlements are determined by the Remuneration Tribunal. The Minister may also grant a leave of absence on the terms and conditions that the Minister determines.

8.315. Proposed section 663-35 provides that the Registrar must not engage in paid employment outside the duties of the office without prior approval by the Minister.

Part 16-5 Delegation

8.316. Proposed section 668-1 enables the Registrar to delegate the Registrar's powers and functions in writing. This ensures the Registrar can effectively and efficiently carry out the duties of the office.

8.317. Proposed section 668-5 enables a Deputy Registrar to sub-delegate a function or power delegated to the Deputy Registrar by the Registrar.

Part 16-6 Staffing

8.318. Proposed section 673-1 provides that Departmental staff are to be made available to assist the Registrar and Deputy Registrar.

8.319. Proposed section 673-5 clarifies that the Registrar may engage suitably qualified persons as consultants to assist the Registrar perform in the administration of the Bill.

Chapter 17 – Interpreting this Act

Part 17-1 Meaning of some important concepts

8.320. Proposed section 683-1 defines who will be regarded as a ‘director’ or ‘officer’ of an Aboriginal and Torres Strait Islander corporation. This section is based on the definitions of ‘director’ and ‘officer’ contained in section 9 of the Corporations Act. It also provides that, with respect to an RNTBC, a common law holder of native title is not taken to be a director or officer of the corporation merely because of actions the corporation takes, or fails to take, to comply with a native title legislation obligation or, as a common law holder, the person’s capacity to affect significantly the corporation’s financial standing.

8.321. Proposed section 686-1 provides that a person is not an associate of the primary person except as provided in Division 686. This section reflects section 10 of the Corporations Act.

8.322. Proposed section 686-5 sets out when the reference to associate applies to a body corporate. This section reflects section 11 of the Corporations Act.

8.323. Proposed section 686-10 will include as an associate a person who proposes to act in concert with another and a person who is an associate under the regulations. It also includes a person who proposes to become associated in any other way and a person who has taken a step in order to become associated with another. This section reflects section 15 of the Corporations Act.

8.324. Proposed section 686-15 sets out where a person is not an associate because of the exclusions of this section. This section reflects section 16 of Corporations Act however it also provides that a common law holder of native title is not an associate of another person by virtue of proposed section 686-10, merely because of a native title legislation obligation.

8.325. Proposed section 689-1 defines a subsidiary for the purposes of the Bill. This section reflects section 46 of the Corporations Act.

8.326. Proposed section 689-5 defines control of a body corporate’s board for the purposes of the Bill. This section is based on section 47 of the Corporations Act.

8.327. Proposed section 689-10 sets out how to determine whether a body corporate is a subsidiary of another body corporate. This section reflects section 48 of the Corporations Act.

8.328. Proposed section 689-15 provides that references to subsidiaries in proposed subsections 689-1(b), 689-10(3)(b) or 689-10(5) includes a reference to subsidiaries by virtue of any other application or applications of this Division (sections 689-1 - 689-25). This section reflects section 49 of the Corporations Act.

8.329. Proposed section 689-20 defines when bodies corporate are related. This section reflects section 50 of the Corporations Act.

8.330. Proposed section 689-25 defines when an entity controls a second entity for the purposes of this Bill. This section reflects section 50AA of the Corporations Act however specifically provides that where the first entity is a common law holder of native title and the second entity is a registered native title body corporate then the

first entity does not control the second entity merely because the first entity complies with a native title legislation obligation.

Part 17-2 Interpretation of other expressions

8.331. Proposed section 694-1 defines what is covered by the term ‘giving information’ such as explaining a matter or answering a question. This section reflects section 6 of the ASIC Act.

8.332. Proposed section 694-5 defines the scope of doing an act or thing. This section reflects section 52 of the Corporations Act.

8.333. Proposed section 694-10 authorises the signing of something by an individual using a power of attorney from the person required to sign. This section reflects section 52A of the Corporations Act.

8.334. Proposed section 694-15 sets out what the business affairs of a body corporate include. This section reflects section 53AA of the Corporations Act.

8.335. Proposed section 694-20 sets out what the business affairs of a natural person include. This section reflects section 53AB of the Corporations Act.

8.336. Proposed section 694-25 sets out what the business affairs of a partnership include. This section reflects section 53AC of the Corporations Act.

8.337. Proposed section 694-30 sets out what the business affairs of a trust include. This section reflects section 53AD of the Corporations Act.

8.338. Proposed section 694-35 defines the meaning of court and Court. This section reflects section 58AA of the Corporations Act.

8.339. Proposed section 694-40 sets out what a reference to an ‘entity’ means, specifically excluding Part 6-6 of the Bill. This section reflects section 64A of the Corporations Act.

8.340. Proposed section 694-45 sets out when an entity (a body corporate, a natural person, a partnership or a trust) is connected with a corporation. This section reflects section 64B of the Corporations Act, but also specifically provides that a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

8.341. Proposed section 694-50 provides that where a power to extend a period for doing an act exists then an application to exercise the power may be made and the power exercised regardless that a period ended. This section reflects section 70 of the Corporations Act.

8.342. Proposed section 694-55 defines when a person has been involved in a contravention. This section reflects section 79 of the Corporations Act.

8.343. Proposed section 694-60 defines possession as when a thing is in a person’s custody or control. This section reflects section 86 of the Corporations Act.

8.344. Proposed section 694-65 defines what is a public document in relation to a body. This section reflects section 88A of the Corporations Act.

8.345. Proposed section 694-70 defines when a receiver of property of a body is also a manager. This section reflects section 90 of the Corporations Act.

8.346. Proposed section 694-75 defines what securities means generally and in relation to a body. This section reflects section 92 of the Corporations Act. Subsection 694-75(4) specifically applies the meanings of expressions used in this section from the Corporations Act.

8.347. Proposed section 694-80 defines when a person is solvent or insolvent. This section reflects section 95A of the Corporations Act.

8.348. Proposed section 694-85 defines the meaning of chief executive officer function. This section is based on section 295 of the Corporations Act.

8.349. Proposed section 694-90 provides that applications to the Registrar are to be in writing. This section reflects section 102 of the Corporations Act.

8.350. Proposed section 694-95 provides that certain acts, transactions, agreements, instruments, matters or things are not invalid merely because of certain contraventions of this Bill. This section is based on section 103 of the Corporations Act.

8.351. Proposed section 694-100 sets out the effect of provisions of the Bill empowering a person to require or prohibit conduct. This section reflects section 104 of the Corporations Act.

8.352. Proposed section 694-105 sets out how time is to be calculated. This section reflects section 105 of the Corporations Act.

8.353. Proposed section 694-110 provides that a reference to the Registrar in a provision of this Bill relating to a performance of a function or exercise of power includes a reference to a delegate. The section also provides that where a function or exercise of power has been sub-delegated by a Deputy Registrar then the reference also includes the sub-delegate. This section is based on section 106 of the Corporations Act.

Part 17-3 Dictionary

8.354. Proposed section 700-1 contains the definitions of terms used in the Bill. Many definitions are the same as those in the Corporations Act. Some of the terms defined in the Bill (with examples of their use) are set out below.

8.355. The definition of ‘Aboriginal and Torres Strait Islander person’ includes a body corporate prescribed by name, or as a class of corporations for the purposes of this Bill. A definition that includes bodies corporate is required to make operative the provisions of the Bill that provide for corporate membership. Prescribing a corporation or class of corporations that meet this definition will allow for recognition of corporations that have already demonstrated that membership is restricted to Indigenous persons (eg in the case of RNTBCs). A corporation that is controlled by Indigenous persons will also fall within this definition. The use of the term ‘controlled’ allows for the definition of control provided by 689-25 of the Bill to apply, and ensures that a corporation that controls an Aboriginal and Torres Strait Islander corporation will be eligible for membership.

8.356. To provide for appropriate interaction between the Bill and the Native Title Act, the Bill relies on the definitions of ‘native title’ and ‘registered native title body corporate’ by reference to the Native Title Act.

8.357. A definition of ‘native title legislation’ includes the Native Title Act and any regulations made under that Act as well as a prescribed law, or a prescribed provision of a law, of the Commonwealth or a state or territory.

8.358. A definition of ‘native title legislation obligation’ supports provisions of the Bill that have been tailored to ensure that conflicting duties are not imposed on registered native title bodies corporate by the Native Title Act and this Bill. This definition takes account of the statutory requirements imposed by native title legislation, for example the requirement for an RNTBC to consult with and obtain the consent of common law holders of native title before making a native title decision, as prescribed by regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

8.359. There are a number of definitions in this Part which support the application of modern corporate governance standards that apply to Corporations Act corporations, such as the use of ‘accounting standards’ to refer to the standards that apply by virtue of section 324 of the Corporations Act and the broad definition of ‘affairs’ of a body corporate. This broad definition allows for related entities to be examined through powers established under the Bill and closes the regulatory gap that existed between the Corporations Act and the ACA Act.

8.360. This provision also defines a number of terms that are particular to the Bill and includes ‘special administrator’ to refer to an administrator appointed by the Registrar. This term is used to distinguish a special administrator from an administrator appointed under Part 5.3 of the Corporations Act.

8.361. The terms ‘internal governance rules’ and ‘internal governance framework rules’ are also particular to the Bill and are used to define requirements established under chapter 3.