



Meenangu Wajarri Aboriginal Corporation (ICN 7878)

*Engaging, empowering and investing in Wajarri Yamatji
People's future*

***Report to
Meenangu Wajarri Aboriginal Corporation Board:
Voting for MWAC Directors at 2020 AGM, 14
November 2020***

20 November 2020

**Marcus Holmes
Independent Director**

1. Introduction

1.1 The matter for investigation by the Independent Director

- a. This report updates an initial report dated 18 November 2020.
- b. The Independent Director was appointed to the MWAC Board in November 2019 and received an extension of term at the 2019 MWAC AGM on 14 November 2020.
- c. At the 15 November MWAC Board meeting for the newly appointed Board, it was raised by a director that the initial director voting ballot paper was replaced, prior to the vote, with a paper that included all six of the 2020 AGM director candidates.
- d. At the suggestion of Independent Director Bruce Fielding, and in accordance with a Board resolution then passed (see the terms of the resolution at part 1.2 below), Marcus Holmes was directed to investigate this matter and to report back to the Board.

1.2 The Board's Resolution on 15 November 2020

The Board's resolution was as follows:

The Board resolves that: regarding the late alteration to the 2020 AGM voting forms Marcus Holmes, in his capacity as Independent Director, is instructed to investigate the situation, including interviewing the staff involved and what their understanding was of the situation, review all board nominations to ensure they are all validly made in accordance with the Rule Book and CATSI Act, and report back to the board.

1.3 The Process for the investigation

Noting the above resolution, the Independent Director has investigated the situation through interviewing staff involved and getting their description of events and has also noted various directors' views. The investigation has considered documents tabled at the meetings, and included a review of the director nomination forms that were required to be with MWAC 14 days before the AGM. The investigation has also considered relevant rules of the MWAC constitution and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The Independent Director was also present at the relevant meetings so has direct knowledge from what was seen, read and heard.

2. Key Facts applicable to the investigation about the directors' forms, facts from the 13 November Board meeting and the 14 November 2020 AGM

2.1 Key facts about the directors' forms

All of the director consent to be a director/nomination forms were properly completed and received by the MWAC office 14 days or more before the AGM. This accords with the requirements of rule 10.6(a) of the MWAC constitution. The directors nominating were:

- ❖ Anthony Dann-forms received by MWAC on 28 October 2020;
- ❖ Juliet Jones-forms received by MWAC on 1 October 2020;
- ❖ Jennylyn Hamlett-forms received by MWAC on 30 October 2020;
- ❖ Robin Boddington-forms received by MWAC on 12 October 2020;
- ❖ Des Mongoo-forms received by MWAC on 29 October 2020; and
- ❖ Noeleen Hamlett-forms received by MWAC on 23 October 2020.

2.2 Key facts from the 13 November Board meeting

- a. The Board was given a detailed review of the proposed AGM agenda by MWAC staff, principally Daryl Smith, the CEO.
- b. The review included an explanation of the voting process to be used for the two AGMs, including the use of different coloured bands to distinguish between the two elections of directors held at both AGMs.
- c. There was no formal review by directors of any of the 2019 AGM and 2020 AGM director candidates. If the outgoing Board had developed any "criteria" for evaluating candidates, and we understand that at this stage it has not, Rule 10.6 requires that that criteria be applied to determine the suitability and merit of the candidates. In the absence of any such criteria, that did not occur and was not required to be done at this Board meeting. ***However, it is recommended that going forward, outgoing Boards develop such criteria, in consultation with members and executive staff, to apply in the future to director candidates. Rule 10.6 also allows the Board to make a resolution to recommend the most suitable director nominees for appointment by resolution by the members at their meeting. This is not mandatory and did not occur on this occasion. Again, it is recommended that in future such a process be applied by the outgoing Board members.***

2.3 Key facts from the 14 November 2020 AGM

- a. The 2019 AGM director nomination votes were counted individually by MWAC staff.
- b. Ms Jennylyn Hamlett (Ms Hamlett), who had nominated for appointment as a director for decision at the 2019 AGM was not voted in.
- c. As reported at part 2.1, Ms Hamlett had also applied to be a director at the 2020 AGM, and, alike to all the other director candidates, had lodged her forms by the due date and time.
- d. During the lunchbreak following the close of the 2019 AGM director voting, Daryl Smith notified the candidates of the result.
- e. Jennylyn Hamlett confirmed that she wished to be put up as a director candidate for the 2020 AGM.
- f. On the Corporation Secretary then checking the 2020 AGM director ballot paper, she noted that it omitted to include Ms Hamlett as one of the candidates.
- g. Daryl Smith was informed and briefed staff members Sharon McGuire with Keanu Hurkala to return to the MWAC office to correct the ballot paper to refer to all 6 of the director candidates.
- h. That was done and the updated form was returned to the custody of the Corporation Secretary ready for issue when voting commenced. The initial forms, that referred to 5 candidates, had not been issued or shown to any MWAC members and were kept in a box covered over with other documents.
- i. At the 2020 AGM, a resolution from members sought that five directors be appointed (bringing the total of Wajarri Yamatji directors to 8 as allowed by Rule 10.1 of the MWAC constitution. That resolution was passed. However, note the opinion and recommendation regarding that members' resolution.
- j. At the AGM, a PowerPoint slide was used by the Corporation Secretary that showed the 6 director candidate nominees, that is, including Ms Hamlett.
- k. Given the members resolution referred to above, the Corporation Secretary, who had the function of explaining the director voting process for both AGMs, explained to all members at the meeting that although the ballot paper referred to nomination of up to 2 candidates, the resolution now allowed that up to 5 out of the 6 director candidates could be nominated by voting members.
- l. The ballot papers were issued to members and the voting done. The counting was done twice and both counts were identical in their results. The staff involved in this were Daryl Smith, Madelaine Fisher, Sharon McGuire and Keanu Hurkala.
- m. The results of the vote were announced to members.
- n. By way of recommendation, it may have been appropriate for the CEO or the Corporation Secretary to announce to the members at the meeting that an earlier version ballot paper had erroneously***

not included Ms Hamlett's name on it but that that ballot paper had not been issued and an updated ballot paper had been prepared and used at the meeting for the voting.

3. Opinion and Recommendations of the Independent Director

3.1 Opinion

The Independent Director's opinion is that although it would have been preferable that the ballot paper did not have to be corrected during the AGM with a varied ballot paper, the ballot paper used for the vote was correct and all of the director nominees listed on it had nominated before the close-off date set out in the constitution. This was so because of the the disclosure at the AGM of the six director candidates before the vote was taken, the fact that the correct ballot paper was issued to members before any voting began and the careful votes counting and recording process followed by the MWAC staff.

However, the members' resolution moved and passed at the 2020 AGM that proposed appointment of 5 directors rather than 2 directors did not comply with Rule 9.6 of the MWAC constitution and that should have been followed. As it was not followed, the voting for 5 directors out of the 6 nominees should not have been done. Rather, members should have voted for 2 directors from the field of 6 nominees, as was the formal resolution proposed for the AGM. It is noted that when this members' resolution was proposed, and before it was voted on, the CEO had pointed out that members' resolutions proposed at meetings need to have followed the constitution process. Despite this, the vote on the resolution proceeded. In addition, prior to the vote on this resolution, a member pointed out that a previous meeting had nominated a total of 5 Wajarri Yamatji directors so as to enable 3 other Wajarri Yamatji directors to join the Board in the event that MWAC is appointed by members as the native title PBC for the Wajarri Yamatji native title holders.

In summary, Rule 9.6 requires that members' resolutions need to be put into writing, pre-notified before a meeting and signed by 10% of the members before the resolution can be considered. It is noted that the CATSI Act at section 201-40 refers to this process but as an optional, non-mandatory process. Legal advice should be sought as to whether or not the rule 9.6 process is mandatory or not for MWAC and its members.

The Independent Director notes that, at law, even where there are procedural irregularities at a meeting, these will not be declared invalid by a court despite a breach of the constitution or the legislation unless they have been done dishonestly or there's a likely substantial injustice.

The High Court has confirmed that this is a “recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions made in relation to corporations be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties”. The Court did emphasise that care needs to be taken to ensure that proper procedures are followed, including in the conduct of meetings and in the way in which the corporation is governed. See the High Court decision in *Weinstock v Beck* (2013) HCA 14 dealing with section 1322(4)(a) of the *Corporations Act 2001*. That section applies to Aboriginal corporations through section 45-1 of the CATSI Act.

The Independent Director notes that the error in the initial ballot paper that did not include the name of Ms Hamlett was not done dishonestly and has not caused any injustice to any person.

However, the non-compliance with rule 9.6 may have caused injustice in that the vote result may have been different, including that the director candidate who was not appointed may have been appointed if just 2 candidates were being voted on. We won't ever know how voting may have been different. The appropriate way to remedy this is for the vote for 2 Wajarri Yamatji directors to be done again at a duly notified general meeting, with the same 6 director nominees on the ballot paper.

3.2 Recommendations

- 1. It is recommended that, going forward, outgoing Boards develop criteria for incoming director nominees, in consultation with members and executive staff, to apply in the future to director candidates.***
- 2. It is recommended that outgoing Boards make a resolution to recommend the most suitable director nominees for appointment by resolution by the members at their meeting.***
- 3. By way of recommendation, it may have been appropriate for the CEO or the Corporation Secretary to announce to the members at the meeting that an earlier version ballot paper had erroneously not included Ms Hamlett's name on it but that that ballot paper had not been issued and an updated ballot paper had been prepared and used at the meeting for the voting.***
- 4. The five directors appointed at the 2019 AGM (3 Wajarri Yamatji directors and 2 independent directors) operate as the interim Board until a further general meeting can be called to appoint 2 Wajarri Yamatji directors. One of the independent directors should appoint an interim alternate director who is a Wajarri Yamatji person so as to comply with rule 10.1(a)(i) of the MWAC***

constitution (that requires there to be a minimum of 4 Wajarri Yamatji directors), and with that independent director resuming as a director, and the alternate ceasing as a director, once the 2 additional directors have been appointed by the MWAC members.

- 5. This report be tabled with the MWAC Board (noting that the Board is as constituted under recommendation 4) and the Board seek urgent legal advice for MWAC from lawyers Jackson McDonald about this report and its recommendations and noting that ORIC's guidance and input will also likely be required.**

Marcus Holmes

Marcus Holmes
Independent Director

Date: 20 November 2020