



Australian Government

Office of the Registrar of Indigenous Corporations

Submission No.	36
Date Received	

RECEIVED  
29 JUL 2008

BY: ATSLA

The House of Representatives Standing Committee on Aboriginal  
and Torres Strait Islander Affairs

Inquiry into developing Indigenous enterprises

July 2008

## **Table of contents**

## **Page**

---

Introduction	2
The role and function of the Registrar	2
The CATSI Act and supporting Indigenous enterprises	3
Supporting enterprise development	3
Facilitating commercial growth	4
Maximising certainty for third parties	5
Enhancing corporate transparency	6
ORIC programs and services	6
Advice, information and support	6
Corporate governance training	7
Dispute resolution and mediation	7
Examinations	7
Appointment of special administrators	8
Prosecutions	8
Indigenous enterprises registered with ORIC	8

## Introduction

The Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into developing Indigenous enterprises.

The Registrar's submission outlines the direct support the Registrar provides to Indigenous enterprises through the administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). This support includes:

- Supporting enterprise development
- Facilitating commercial growth
- Maximising certainty for third parties
- Enhancing corporate transparency.

The Registrar recognises the strong link between economic development and self determination of Indigenous communities. Strong, well governed Indigenous enterprises are fundamental to this economic development.<sup>1</sup> The Australian Government advocates a whole-of-government approach to Indigenous economic development. As a statutory authority within the Department of Families, Housing, Community Services and Indigenous Affairs, the Registrar shares the commitment to this approach.

The Registrar's submission addresses the inquiry's term of reference one, which seeks information in relation to:

*Whether current government, industry and community programs offering specific enterprise support programs and services to Indigenous enterprises are effective, particularly in building sustainable relationships with the broader business sector.*

## The role and function of the Registrar

The Registrar is the independent statutory office holder who administers the CATSI Act. The CATSI Act replaced the *Aboriginal Councils and Associations Act 1976* (ACA Act) which was administered by the Registrar of Aboriginal Corporations.

The Office of the Registrar of Indigenous Corporations (ORIC) provides support to the Registrar in administering the CATSI Act through a range of services (see ORIC services). ORIC regulates approximately 2600 Indigenous corporations, ranging in size, function and location, with 58 per cent of corporations operating in remote parts of Australia.

---

<sup>1</sup> J Hunt & DE Smith, *Building Indigenous community governance in Australia: preliminary research findings*, working paper 31, Centre for Aboriginal Economic Policy Research (CAEPR), 2006, p. ix.

The key functions of the Registrar are:

- advising individuals and groups on the registration process
- registering new corporations
- assisting corporations to transition from the ACA Act to the CATSI Act
- providing training for directors, members and key staff in good corporate governance
- monitoring the legislative compliance of corporations and assisting corporations to maintain compliance
- providing advice and information to corporations
- assisting with the resolution of disputes within and between corporations
- intervening in the operation of corporations and taking regulatory action when required

## **The CATSI Act and supporting Indigenous enterprises**

The CATSI Act is a flexible piece of legislation which is tailored to meet the diverse requirements of contemporary Aboriginal and Torres Strait Islander corporations. Central to the design of the CATSI Act is to support Aboriginal and Torres Strait Islander people forming corporations for native title and commercial purposes, as opposed to corporations which are non-profit and receive government funding for the sole purpose of delivering community services.

Specific characteristics of the CATSI Act which directly support Indigenous enterprises and the capacity of such enterprises to build sustainable relationships with the broader business sector are as follows:

### **Supporting enterprise development**

The CATSI Act contains a range of measures which facilitate the development of Indigenous corporations by delivering maximum flexibility in corporate design. This aligns with international observations that commercial success and corporate governance are both enhanced when groups are permitted to select corporate design arrangements which best facilitate their needs.<sup>2</sup> The CATSI Act includes a framework of replaceable rules which enables groups to simultaneously tailor their corporate structure and meet the requirements of the Act.

- The CATSI Act enables the registration of small enterprises by allowing a corporation to have less than five members and directors, including single membership and directorship, in circumstances considered appropriate and reasonable by the Registrar.

---

<sup>2</sup> A Modern Statute for Indigenous Corporations: Reforming the *Aboriginal Councils & Associations Act 1976* (Cth). Final report of the Review of the *Aboriginal Councils & Associations Act 1976* (Cth). December 2002. By Corrs Chambers Westgarth with Anthropos Consulting, Mick Dodson, Christos Matziaris, Senatore Brennan Rashid. Page 58. Report commissioned by the Off of the Reg of Ab Corps.

- The CATSI Act allows Indigenous corporations to make a choice as to whether to allow non-Indigenous members and directors, so long as a majority of Indigenous members and directors is maintained. This provides flexibility in terms of corporate structure and delegates decision making power regarding corporate structure to Aboriginal and Torres Strait Islander groups. In the case of appointing directors, this provision enables Indigenous corporations to utilise the skills and expertise of a director, for example lawyers, accountants and doctors, to discharge their directors' duties and to fulfil their obligations.
- The CATSI Act allows for corporate membership of Indigenous corporations. This facilitates direct engagement between Indigenous corporations and other corporate entities, assisting Indigenous corporations to benefit from the experience and input of other corporations, and enhancing the transparency of the internal operation of Indigenous corporations for creditors and corporate partners.
- The CATSI Act allows Indigenous corporations to set up for profit purposes and provides for flexibility in internal governance rules relating to how these profits are dealt with by the corporation and its members.

### **Facilitating commercial growth**

The CATSI Act minimises barriers to the commercial growth of Indigenous corporations:

- As a Commonwealth legislation, the CATSI Act enables national registration, which facilitates national commercial development and minimises impediments of state-based legislative frameworks.
- The CATSI Act permits the amalgamation of Indigenous corporations, opening the door for corporations to exercise this option in order to maximise growth and capture increased market share.
- The CATSI Act reduces the administrative burden on corporations. This has great significance for Indigenous commercial enterprises, for which the demands of administration can seriously interfere with the capacity to generate profit. Under the Act a corporation is classified as small, medium or large according to its income, assets and number of employees. The reporting requirements of a corporation are determined according to its size classification. Small corporations with a consolidated gross operating income of less than \$100,000 are required to submit only a general report. This minimises the administrative burden on small commercial enterprises, a strong barrier to commercial growth.
- The CATSI Act aims to reduce reporting requirements for medium (and some small) corporations through the provision that a financial report which is based on reports to government funding bodies, will be accepted by ORIC in lieu of an audited financial report.

- Where Indigenous corporations form part of a larger consolidated entity the CATSI Act requires the larger entity to submit a consolidated annual report. This promotes transparency in the reporting of the larger entity.
- The CATSI Act permits the Registrar a high degree of flexibility to exempt corporations from certain record keeping, reporting and governance requirements which are considered by the Registrar to be excessive or to place an unreasonable burden on a corporation.<sup>3</sup>

### **Maximising certainty for third parties**

Low levels of commercial and legal certainty have been barriers to a broader business sector engaging commercially with Indigenous enterprises. The CATSI Act provides commercial and legal certainty to third parties engaged in activities with Indigenous corporations.

- The CATSI Act strengthens commercial certainty for third parties by clarifying the assumptions that third parties are entitled to make when dealing with Indigenous corporations.
- The CATSI Act validates certain procedural irregularities, so that a proceeding or resolution is not automatically invalid because of a procedural irregularity.<sup>4</sup> For example, a resolution passed at a directors meeting to enter into a particular contract is not invalid simply because the directors meeting did not have quorum. The resolution may only be invalidated if the person affected detrimentally by the procedural irregularity takes the matter to Court. The onus is on the person affected to seek from the Court an opinion that the irregularity has caused or may cause substantial injustice (that cannot be fixed by a court order) or an order that the proceeding is invalid.
- The application of directors' duties to corporation officers and senior management provides greater commercial certainty to the broader business sector regarding dealings with Indigenous corporations, by increasing the liability of a person who exerts a significant influence on an Indigenous corporation, despite the fact that the person is not a corporation member.
- Certainty for third parties and their subsequent willingness to enter into commercial transactions and sustainable relationships with Indigenous corporations is further strengthened by the external administration provisions in the Act which enable third parties to take a proactive role in protecting their interests.<sup>5</sup>

---

<sup>3</sup> CATSI Bill (2006) *Explanatory Memorandum*, p.10.  
<http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/16100602.pdf>. Accessed 10 July 2008.

<sup>4</sup> CATSI Bill (2006) *Explanatory Memorandum*, p.10.  
<http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/16100602.pdf>. Accessed 10 July 2008.

<sup>5</sup> CATSI Bill (2006) *Explanatory Memorandum*, p.9.  
<http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/16100602.pdf>. Accessed 10 July 2008.

## **Enhancing corporate transparency**

The CATSI Act contains a number of provisions which seek to enhance the transparency of Indigenous corporations. These provisions increase the accountability of Indigenous corporations and promote transparent practices in the running and decision-making of corporations and best practice in corporate governance.

- The CATSI Act permits a corporation to admit observers, a class of person who can attend meetings but does not have voting or speaking rights. This enables Indigenous corporations to open their meetings to authorised external parties, without being obliged to admit these parties to participate in corporate decision making.
- Reporting requirements for medium and large corporations are significant, consisting of a general report, an audited financial report (or non-audited financial report, depending on corporation size) and a directors' report. Medium and large Indigenous enterprises which are required to report in this way under the CATSI Act maximise the transparency of their operations as perceived by the broader business sector, creditors, funding bodies and members.

## **ORIC services**

ORIC delivers a framework of integrated programs which offer specific services and support to Indigenous corporations registered under the CATSI Act.

### **Advice, information and support**

ORIC provides advice, information and support to Indigenous corporations, prior to and following registration, in relation to the registration process and corporate issues. This is a major component of the support services which ORIC provides and is strongly utilised by corporations, some of which are likely to have had minimal corporate governance experience. This service is central to developing the corporate knowledge of Indigenous corporations, and therefore their capacity to enter into negotiations and transactions with funding bodies and the broader business sector. A focus on ORIC's 'doorway service' helps Indigenous corporations before they are setup and ensures they are appropriately structured and aware of their requirements under corporations law on registration.

ORIC has developed a Rule Book (Constitution) Info Kit to help Aboriginal and Torres Strait Islander people develop an appropriate set of rules when they set up an Indigenous corporation. The Rule Book Info Kit provides information about some of the important matters groups needs to consider when setting up an Indigenous corporation, how to tailor their rules to suit their particular circumstances and provides some example rules that groups might want to include in their rules.

## **Corporate governance training**

A range of tailored training services are delivered through the ORIC training program and include:

- Regional workshops to assist corporations to transition to the CATSI Act
- Non-accredited governance workshops tailored to regional and remote Australia
- Post administration training, facilitated with individual corporations prior to the end of an administration
- Nationally accredited Certificate IV in Business (Governance) and the Diploma of Business (Governance).

Specific issues covered include:

- Financial management and budgets
- Strategic and business planning and manage assets
- Reporting requirements
- Secure funding and develop enterprise opportunities

## **Dispute resolution and mediation**

ORIC has recently taken on a role of dispute resolution and mediation between members of a corporation and between different corporations. Conflict between family and interest groups is a characteristic of some Indigenous corporations and has been a key factor contributing to a perception in the broader business sector, that Indigenous corporations are unstable and should therefore not be engaged with on a commercial basis. The decision by the Registrar to provide dispute resolution and mediation services to corporations makes a direct contribution to addressing this issue.

## **Examinations**

The CATSI Act permits the Registrar to authorise an examination of the books of an Indigenous corporation. ORIC implements a continual program of examinations, which is both rolling and reactive. Rolling examinations are those undertaken as a safeguard measure in regions across Australia, with a particular focus on corporations with large income and assets. Reactive examinations are undertaken in response to a corporation coming to the attention of the Registrar. The power granted to the Registrar by the Act to authorise examinations, and the associated program which is implemented by ORIC, increase the likelihood that operational or procedural problems within a corporation will be detected in the early stages.

The examinations program also enhances the transparency of corporations. These outcomes provide grounds for increased confidence on the part of funding bodies and the broader business sector, that Indigenous corporations are relatively secure entities in which to invest resources.



## **Appointment of special administrators**

The CATSI Act grants the power to the Registrar to place a corporation under special administration and appoint a special administrator. A special administrator is an external administrator with the power to manage all or some of the affairs of corporation. (In practical terms this almost always will be all of the corporation's affairs.) Part of the work done during the special administration is to build the corporate governance capacity amongst the members which in turn promotes the long term sustainability of the corporation. The appointment of special administrators is taken in extreme cases of non-compliance when the appropriate grounds have been established. Appointing special administrators provides certainty to funding bodies and the broader business sector that resources and investments are secure while the appointment is in place.

## **Prosecutions**

Under the CATSI Act the Registrar has the power to investigate alleged corporate offences, to identify cases that are appropriate for referral as a prosecution, and to refer these matters to the appropriate prosecution agency. These investigation and referral powers enable the Registrar to respond when alleged corporate offences come to light, further increasing the transparency and security of Indigenous corporations for funding bodies and the broader business sector.

## **Indigenous enterprises registered with ORIC**

In the years since the passing of the CATSI Act, and prior to it, ORIC has collaborated successfully with Indigenous corporations to support their development and facilitate their commercial growth.

One clearly identifiable sector which has worked in strong partnership with ORIC to the commercial benefit of its corporations is the Indigenous arts sector. ORIC has work closely with these Indigenous corporations in designing their corporate governance structures and in the ongoing management of issues related to corporate governance. In this way ORIC makes an ongoing contribution to the health of this sector which is becoming a significant area for Indigenous enterprise, particularly in remote Australia.

For example, Yirra Yaakin Aboriginal Corporation in Western Australia is a successful arts corporation registered with ORIC. The corporation was the winner of the highly commended award in the 2006 Indigenous Governance Awards, which is hosted by Reconciliation Australia and BHP Billiton and recognises good practices in Indigenous Governance. Yirra Yaakin Aboriginal Corporation has been incorporated since February 2005. The corporation provides opportunities for Aboriginal Artists to tell the stories of Aboriginal communities through Indigenous performing arts. The corporation

is highly respected in the community, with a strong business plan and a well developed governance structure.<sup>6</sup>

The Indigenous Governance Awards also recognised the 'success stories' of Bungala Aboriginal Corporation in South Australia, which was the first established Indigenous Employment Centre in the area and Hunter Valley Aboriginal Corporation in New South Wales, which conducts various community programs to promote economic development in Indigenous communities.<sup>7</sup>

Another sector which works in close collaboration with ORIC to meet a broad range of complex needs, is the Native Title sector. Under Native Title legislation claimant registration support to many of the PBCs when they are forming and works closely groups holding native title are required to register with ORIC as Prescribed Bodies Corporate (PBCs). It is increasingly common for PBCs to articulate commercial goals and many of them are arranging their structures in ways which will facilitate future commercial development. ORIC provides with Native Title Representative Bodies and Land Councils on PBC corporate governance structure and design, which strengthens these outcomes considerably.

In 2008 ORIC specifically developed *A guide to writing good governance rules* for PBCs as a measure to support PBCs adopting best practices in corporate governance. This is in recognition that mining companies are increasingly engaging local Indigenous people to agree on economic benefits, land use and cultural issues. Improving the governance structures of Indigenous corporations is necessary to ensure greater implementation and monitoring of complex financial arrangements, such as native title land usage agreements for mining purposes (ILUAs).

---

<sup>6</sup> Reconciliation Australia and BHP Billiton, *Celebrating Indigenous Governance: Success stories of the Indigenous Governance Awards*, 2006, p. 18.

<sup>7</sup> Reconciliation Australia and BHP Billiton, *op. cit.*, 2006, p. 24.