

# Strengthening governance in PBCs

## Introduction

Good afternoon.

Firstly, I wish to acknowledge the traditional owners of the land on which we meet today and pay my respects to their elders, both past and present.

I'd like to further acknowledge the memory of Koiki Mabo, and fellow litigants in the native title high court case. Of course tomorrow is the anniversary of the 1992 historic decision.

It's a great pleasure to be here today. This is my third time addressing the Annual Native Title Conference as the Registrar of Indigenous Corporations – and I value the opportunity.

My topic is '**Strengthening governance in PBCs**'.

Some of you may have an understanding of my role as Registrar but for those who don't, I'll start with a brief overview.

As the Registrar of Indigenous Corporations I am an independent statutory office holder. My position is created under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, which is often referred to simply as the CATSI Act. The legislation came into force on 1 July 2007 and replaced the 30-year old Aboriginal Councils and Associations Act.

My role is to regulate and help keep compliant those corporations that have chosen to register under the CATSI Act. This is a big part of what I do – it is, if you like, my legal administrative arm. I apply the law.

The other main part of my job is providing support services to corporations and groups wanting to register – for example, corporate governance training, and mediation and dispute resolution. It is these two services I want to concentrate on today.

I have an office of about 70 staff to help me. This is ORIC – the Office of the Registrar of Indigenous Corporations. While most of my staff are based in Canberra I also have officers out-posted in Hobart, Alice Springs, Umuwa, Geraldton, Katherine, and Coffs Harbour.

I'd like to see many more out-posted officers and just now I'm exploring the feasibility of establishing an office in one of our regional areas.

I've long thought that if ORIC is to remain relevant, and if we are to continue to improve on our service delivery, we must place ourselves in easier reach of our client base. The majority of our corporations – at least 60 per cent are located in remote areas.

Altogether we have 2300 corporations registered under the CATSI Act. Although they are dotted all over the country, many are clustered around Alice Springs and operate in the Top End.

Under the Native Title Act prescribed bodies corporate – or PBCs – are required to incorporate under the CATSI Act. Because of this, we have a close relationship with PBCs.

## **Strengthening communities**

Our central aim at ORIC is strengthening communities. It underpins everything we do – it's what's most important.

Our vision statement is **strong corporations, strong people, strong communities**.

We know that many Aboriginal and Torres Strait Islander corporations perform vital functions in their communities – often they deliver, for example, healthcare services, and essential municipal services, such as water supplies or rubbish collections.

They are the guardians of cultural heritage and protect sacred sites. They also hold and manage native title land, interests and royalties. Communities look to their corporations for economic and enterprise development.

## **Strong corporations**

So what makes corporations strong?

A large part of the answer is sound corporate governance.

How a corporation is run is of the utmost importance.

There must be transparency, high standards of governance and accountability. This is why it is imperative that corporations take the trouble to set out their objectives clearly. They must write their rule books to fit their purpose – not only as they are now but as they see themselves in the future. And they must abide by those rules.

If they get this right, enormous benefits follow. By meeting high governance standards, corporations are providing certainty. They are effectively saying that they are functioning well and that they can deliver – that is, they are solvent and viable. And for government funding bodies and private funders, this is particularly attractive.

This being the case, inevitably it leads me to ask the converse question – why do some corporations fail? What are the main contributing factors?

### **[Why do some corporations fail?]**

I commissioned a study to find out. ORIC has recently published this research under the title, *Analysing key characteristics in Indigenous corporate failure*. The study looked at all registered corporations that have been examined by the Registrar between 1996 and 2008.

It is the first time such a comprehensive investigation into Indigenous corporate failure has been undertaken.

The study reveals – and this should come as no surprise – that Aboriginal and Torres Strait Islander corporations fail for exactly the same reasons as mainstream corporations. In short, because of poor management and poor corporate governance – these are the two leading causes for failure.

From my view, one of the benefits of the study is that we now have clear evidence-based research. This will be of great value to policy makers and regulators. This

research will help shape the way we support corporations, especially those exhibiting early warning signs of failure.

## **How we stop corporations from failing**

On the positive side, there are ways we at ORIC can help to prevent corporations from failing.

Providing training in corporate governance is an obvious area and ORIC offers a range of programs pitched at different educational levels and tailored to the needs and circumstances of individual corporations. Corporate governance training is a constant and vital part of what we do.

Yet one of the most interesting findings from our research – and one we’re developing further at ORIC – is the importance of offering early support. The research implicitly tells us that external intervention, at the start of when things go wrong – not at the middle or end – can really turn around a corporation’s outlook. The prognosis significantly improves.

The research also reveals that more than 70 per cent of corporations that were struggling and which were placed under special administration were subsequently restored to members’ control.

In other words, by stepping in and getting administrative functions back on track, many corporations today are in a much healthier and happier position. Their futures look good.

Although special administration is often seen as a last resort it’s a process that can also rescue corporations from going under. Directors and members can request the Registrar to appoint a special administrator – and some corporations have taken this option.

Of course, it’s a very serious matter, and I only decide to appoint a special administrator when there are sufficient grounds, and all other avenues have been explored.

Because of their special role it is particularly important to safeguard corporations established to hold and manage native title. Appointing a special administrator is one mechanism that I, as the Registrar, can use to help corporations through difficult times.

### **Third leading cause for corporation failure**

I'd now like to lead into the third most common factor in why corporations fail. The reason is conflict – that is, underlying disputes and conflicts within and between corporations.

When corporations start to turn bad it is often because relationships falter or breakdown. It is unfortunate – perhaps part of the human condition – but remedial action is possible.

ORIC very much believes this. It has responded by setting up a new mediation and dispute resolution service.

It's been running for about 22 months – we have staff who are able to provide expert assistance when tensions begin to mount, both within and between corporations.

Although we are constantly exploring new ways, in essence we work in partnership – and what we offer is objectivity and the tools for corporations to negotiate their way through a dispute.

If a dispute is managed well the outcome for a corporation can be very positive.

Through my office the mediation and dispute resolution team provides:

- **Advisory opinions.** These are formal letters written by the Registrar that give an opinion about a particular dispute.
- **Advice.** This can be by telephone, email or face to face. Often when a dispute is not too complex we are able to fix it quickly using one of these methods.
- **Conferencing.** ORIC can facilitate informal meetings between disputing parties.

- **Mediation.** This is a voluntary and confidential process. Accredited mediators help disputing parties find a solution.
- **A facility to attend meetings.** ORIC staff can attend corporation meetings as observers, they can present information that might clarify points around a particular dispute, or they can provide advice.

Since we have started offering assistance with disputes, we have observed that a disproportionately high number arise in the native title sector.

As we refine our data collection we will get a clearer breakdown of disputes by sector but, anecdotally, my mediation and dispute resolution team report that 30– 40 per cent of their work is in the native title and land management area.

Yet the sector only represents a small portion of our overall regulated population. In native title, we have also seen that the complexity of disputes is much higher. This is because of the involvement of numerous parties, the interplay of traditional laws, generations of tensions and, of course, interaction between two legislative frameworks.

I'm the first to admit that many dispute matters fall outside of ORIC's jurisdiction – but the fact is disputes do not neatly fall into purely 'governance' or purely 'native title' issues. There is a risk that without any one agency having jurisdiction over an entire dispute, no one will take responsibility and matters will fall through the cracks or get put in the too-hard basket.

This is why ORIC has initiated a partnership approach to responding to disputes, at least in the post-determination context.

### **The pilot**

Over the last 18 months my office has been leading a post-determination dispute resolution pilot. It's a collaborative – cross organisational learning and knowledge sharing model. It brings together all intergovernmental agencies with responsibilities.

The pilot's steering committee has representatives from ORIC, NNTT, FaHCSIA and AGD.

The pilot is exploring new ways and we hope to learn a lot more as we go through. We're probably about half way through the process.

Some lessons we have learnt so far include the following:

- There may be more of a role for ORIC in helping to design pre-determination rule books and in providing follow up support for post determination. A lot of dispute issues can be pre-empted with clearly defined rules around membership eligibility, composition of the board, and dispute resolution processes tailored for an appropriate cultural fit.
- The important role of out-posted ORIC staff. This supports a team-based approach to dispute resolution with a key member able to use local contacts and on-the-ground knowledge.
- A need to build relationships with the relevant NTRBs also supports a collaborative and team-based approach which leverages local knowledge and relationships.
- The value of taking a case-by-case approach. We're designing dispute resolution models for individual RNTBCs. By engaging groups in how to manage disputes we can also lead them to develop rules or procedures. These in turn help to place corporations in better positions to handle disputes in the future.
- The importance of capacity building. We see there is a need not only to leave corporations in a better position to manage future disputes but also to improve corporate governance and management practices. When the pilot work is evaluated, we will be looking to see how this work can link into other partnerships ORIC is building, such as with Rio Tinto on a sector specific governance training package for the Pilbara.

We also know one of the pitfalls for corporations, once a determination has been made, is that the support from external parties, such as the NTRBs, Federal Court or NNTT, can fall away dramatically.

Yet this is a key juncture for a corporation and the community it represents. We are keen at ORIC to see how we can support the viability of RNTBCs through

strengthening governance. But we need to take a coordinated approach and build on the existing networks of knowledge and support.

## **Conclusion**

In the next financial year, ORIC will also look at undertaking a governance audit of the native title sector and benchmarking it against Aboriginal and Torres Strait Islander corporations generally. What we're doing at ORIC fits well with the Australian Government's Indigenous Economic Development Strategy which is exploring opportunities to improve and strengthen Indigenous corporate governance.

The CATSI Act and ORIC will continue to recognise the special role that PBCs have in native title, by providing specific support like this to the sector.

I believe that by taking advantage of the opportunities available in their corporations, by encouraging them to participate in our training programs, and by raising their compliance levels, PBCs have a very good chance of developing into sustainable and more independent organisations.

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Thank you.

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