

**Supporting Sustainable Corporations in the Native Title Sector**  
**2007 Native Title Conference: Tides of Native Title, Cairns Convention Centre**  
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*The Registrar of Aboriginal and Torres Strait Islander Corporations is an independent statutory office holder appointed by the Minister for Indigenous Affairs under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (the CATSI Act). The Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC) has been set up to help the Registrar administer the CATSI Act and to support and regulate corporations for Indigenous people throughout Australia. ORATSIC also provides an avenue for new incorporations, delivering a tailored service that responds to the special needs of Indigenous groups and corporations, and striving for national and international best practice in corporate governance.*

Under the *Native Title Act 1993*, Prescribed Bodies Corporate (PBCs) are required to incorporate with ORATSIC. ORATSIC regulates corporations pursuant to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) and PBCs therefore have a close relationship with ORATSIC. On 1 July 2007 the CATSI Act repealed and replaced the *Aboriginal Councils and Associations Act 1976* (ACA Act).

The CATSI Act is a special measure and is enacted under the race power of the Australian Constitution. This power allows Parliament to ‘make laws for the peace, order, and good government of the Commonwealth with respect to ... the people of any race for whom it is deemed necessary to make special laws’<sup>1</sup>. Therefore the CATSI Act has a human right built into it by requiring it to be implemented and administered for the overall benefit of Indigenous people. The CATSI Act builds upon the *Corporations Act 2001*, which in turn responded to international trends in corporations law.

ORATSIC is not a government department, it is a regulator. ORATSIC has similar powers to the Australian Securities and Investments Commission (ASIC), and operates cooperatively within a framework of regulators in Australia. Every corporation in Australia is regulated; however Aboriginal and Torres Strait Islander corporations are set up and regulated in a slightly different way because the CATSI Act creates space to incorporate customary values in the business of the corporation.

ORATSIC exists to implement the law, but not blindly. The Registrar of Aboriginal and Torres Strait Islander Corporations has to strike a balance between monitoring transactions and compliance, and encouraging good management practices. The CATSI Act tries to maintain this balance by emphasising an upstream model, based on training, streamed reporting and design of corporations.

One of the findings of the report of the Royal Commission into the HIH Collapse found that the Australian Prudential Regulatory Authority (APRA) – the relevant

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<sup>1</sup> See section 51(xxvi) of the Commonwealth of Australia Constitution Act, available online at <http://www.comlaw.gov.au>

regulating body – did not contribute to the collapse. However there was scrutiny of the way that APRA had exercised their regulatory powers. In particular, the Commission commented that the community was entitled to expect regulators to continually analyse and actively monitor the practices of the groups that they regulate. This was as well as anticipating market trends rather than simply assessing corporations following a collapse<sup>2</sup>. This is a systems based approach consistent with modern regulatory practice, compared with a mere supervisory role.

The latest Productivity Commission Report on *Overcoming Indigenous Disadvantage: Key Indicators 2007*<sup>3</sup> identified a number of factors that contributed to good Aboriginal and Torres Strait Islander corporate governance whilst recognising that no one factor, in isolation, would tend to promote good governance. The report highlighted that a system of practices consisting of a combination of several factors would be more beneficial. These factors included:

- Governing institutions
- Leadership
- Self-determination
- Capacity building
- Cultural match
- Resources

The CATSI Act will strengthen the capacity for ORATSIC to preserve these good governance indicators and provide the Registrar with the power to maintain and develop proactive regulatory practices<sup>4</sup>. The CATSI Act emerged from wide consultation with Indigenous corporations, communities and governments involved in Indigenous Affairs. The main theme of the Act is the promotion of transparency in Aboriginal and Torres Strait Islander corporations. This is achieved through a number of mechanisms, including:

- Director's and Officer's duties – directors and officers of Aboriginal and Torres Strait Islander corporations now have the same duties as any other Australian corporations
- Strengthened member's rights – there are increased avenues for members seeking information about their corporation's affairs
- Related party transactions – how to manage and provide for transparent and accountable practices in relation to nepotism
- Streamed reporting – corporations will report according to their size (small, medium or large), based on their income, assets and number of employees. Small corporations only need to provide a minimum general report, whilst still retaining access to support services offered by ORATSIC, large

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<sup>2</sup> See particularly responses to the Royal Commission Report by the Copyright Law Review Committee, available online at [http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(4D01E434619C87569CB49DC74104B39B\)~HIH+Royal+Commission+Speech.pdf/\\$file/HIH+Royal+Commission+Speech.pdf](http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(4D01E434619C87569CB49DC74104B39B)~HIH+Royal+Commission+Speech.pdf/$file/HIH+Royal+Commission+Speech.pdf) (18 June 2007); The Treasurer's (Peter Costello) media release, available online at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/020.asp> (18 June 2007); and APRA's media release, available online at [http://www.apra.gov.au/media-releases/03\\_39.cfm](http://www.apra.gov.au/media-releases/03_39.cfm) (18 June 2007). See also the Royal Commission's website, <http://hihroyalcom.gov.au/> (18 June 2007).

<sup>3</sup> See chapter 11: *Economic Participation and Development*, available online at <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2007/index.html> (18 June 2007)

<sup>4</sup> See the Registrar's functions and powers under section 658-1 of the CATSI Act, which supports a broader role than was legislated under the ACA Act, both available online at <http://www.comlaw.gov.au>

corporations need to report similarly to ASIC corporations which most in this category are doing already

The CATSI Act also provides flexibility for corporations that operate in a cross-cultural setting and makes no assumptions about literacy (unlike the *Corporations Act 2001*). It increases exemption powers for the Registrar, enabling the Registrar to act on all the surrounding circumstances in order to reduce burdens on corporations unable to comply with the legislation at a given time.

The various inquiries into alleged corruption within the International Olympic Committee (IOC) ran into difficulties when assessing what constitutes a conflict of interest and possible nepotism. This primarily arose from the fact that the culture of gift-giving within the IOC could not be consistently assessed across the world<sup>5</sup>, indicating that culture did have an impact on perspectives of corruption. Within ORATSIC, the fear of nepotism usually generates complaints where there is no conflict actually existing.

These mechanisms targeting transparency are therefore not specific to the Indigenous sector, but follow Australian and international trends in corporate governance that have been emerging generally. The latest OECD Principles of Corporate Governance (2004)<sup>6</sup> reflect the trend towards disclosure, transparency, members' rights, directors' duties and effective corporate governance.

More governments are relying on the community sector to deliver services, for example charitable organisations and not-for-profit organisations. There are common themes between the not-for-profit sector and Indigenous corporations, such as funding arrangements often being primarily through government<sup>7</sup>, however not-for-profit organisations are able to choose their preferred regulator and therefore may be less accountable than corporations registered under the CATSI Act. Research shows that the not-for-profit sector makes up almost 10% of the Australian economy but remains virtually unaccountable and lacks transparency<sup>8</sup>.

ORATSIC recommends that groups wanting to incorporate consider which agency is the most appropriate to incorporate with. ORATSIC and other regulators are generally similar in that they aim to achieve transparency in the business of their corporations. The CATSI Act particularly provides flexibility for Aboriginal and Torres Strait Islander corporations in the form of their Rule Book. ORATSIC says that corporations should be clear about why they exist, and that this should be reflected by member agreement in the corporation's Rule Book<sup>9</sup>. Corporations should also be aware of obligations of imposed by their regulator, such as:

- Being aware of duties owed by directors and officers
- Getting reporting done correctly and therefore remaining compliant
- Paying their tax

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<sup>5</sup> Booth, Douglas 'Gifts of Corruption' *Olympika: The International Journal of Olympic Studies*, Vol. VIII, 1999, pp. 43-68

<sup>6</sup> Available online at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> (20 June 2007)

<sup>7</sup> Government grants made up approximately 69% of community sector organisation's income in 2006 – see the *Australian Community Sector Survey 2006*, Australian Council of Social Service, available online at [http://www.acoss.org.au/upload/publications/papers/561\\_Paper%20143.pdf](http://www.acoss.org.au/upload/publications/papers/561_Paper%20143.pdf) (18 June 2007)

<sup>8</sup> Ferguson, A. (2005) 'Charity Cases' *Business Review Weekly*, 24 March 2005

<sup>9</sup> See section 29-15 of the CATSI Act – the pre-incorporation requirement requires 75% of the corporation's proposed members, among other things, to agree on the corporation's Rule Book

- Conducting their AGMs in the prescribed manner
- Maintaining a good relationship and understanding contracts with their funding body
- Managing conflicts of interest by declaration and exclusion from decision-making
- Being as transparent as necessary in the surrounding business environment

*For more information, visit the ORATSIC website at [www.oratsic.gov.au](http://www.oratsic.gov.au) or contact the office on toll free number 1800 622 431.*