



**AIATSIS**

AUSTRALIAN INSTITUTE OF ABORIGINAL  
AND TORRES STRAIT ISLANDER STUDIES

**AIATSIS response to Office of the Registrar of  
Indigenous Corporations (ORIC) Technical  
Review of the Corporations (Aboriginal and  
Torres Strait Islander Act) 2006**

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AIATSIS makes the following submissions in response to the technical review of the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (Cth) (CATSI Act), which commenced on 1 July 2007.<sup>1</sup> We understand the purpose of the review is to seek advice on technical amendments that may address the following matters:

1. Whether any part of parts of the CATSI Act could be amended to create a more efficient and effective regime of registration, regulation, enforcement, support and administration.
2. The appropriateness of the current size classification of corporations (small, medium and large) and the meeting and reporting requirements for Aboriginal and Torres Strait Islander corporations, and whether these can be simplified and streamlined.
3. The desirability and appropriateness of increased alignment of any provisions of the CATSI Act with provisions of the Corporations Act, including whether the current applied provisions are still effective.
4. Any new or altered powers or functions for the Registrar to strengthen the administration of the CATSI Act and the provision of increased support and assistance to Aboriginal and Torres Strait Islander corporations, including, but not limited to, a greater role in the resolution and mediation of disputes.
5. Amendments that would provide greater flexibility in the design of corporate structures for Aboriginal and Torres Strait Islander corporations, particularly to promote increased economic activity.
6. Amendments to improve consistency and interaction with native title legislation.
7. The appropriateness of existing penalties in the CATSI Act.

This submission addresses the detailed questions set out in the Discussion Paper, paying particular attention to the role of the CATSI Act as a dedicated legislative instrument for the incorporation of native title bodies corporate. With the exception of the first section – which addresses the overall legislative framework, this submission follows the numbering of the Discussion Paper.

## **1. THE LEGISLATIVE FRAMEWORK**

The Preamble and Objects of the CATSI Act in section 1-25 have been understood to 'recognise that Aboriginal and Torres Strait Islander peoples, in some circumstances, have special needs for incorporation, assistance, monitoring and regulation which the

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<sup>1</sup> For a summary of the regulatory regime see *Registrar v Monaghan* (No2) [2016] FCA 1143 at [5]-[18] per Griffiths J. Griffiths J cites with approval the helpful summary of the CATSI Act by Jacobson J in *Registrar of Aboriginal and Torres Strait Islander Corporation v Matcham* (No2) [2014] FCA 27 at [8]-[29].

*Corporations Act 2001* (Cth) is unable to meet.<sup>2</sup> To this end, the Act is intended as a special measure under Article 1 of the International Convention on the Elimination of all forms of Racial Discrimination and the Commonwealth *Racial Discrimination Act 1975*. This imports the principles of equity which require that the while relevant differences are taken into account in framing the CATSI Act, irrelevant differences are disregarded so as to ensure that special measures do not become instruments of discrimination and overburden. As noted in *Registrar v Monaghan (No.2)* [2016]:

The Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) explained that the Bill aligned with modern corporate governance standards and corporations law but maintained a special stature of incorporation that took account of the special risks and requirements of the Aboriginal and Torres Strait Islander corporate sector.<sup>3</sup>

The CATSI Act came into force on the 1 July 2007. The Commonwealth Parliament endorsed the United Nations Declaration on the Rights of Aboriginal and Torres Strait Islander Peoples<sup>4</sup> on 3 April 2009.<sup>5</sup> The CATSI Act must now also be read and any changes contemplated in the context of the rights of Aboriginal and Torres Strait Islander peoples under the United Nations Declaration on the Rights of Indigenous Peoples.

With its genesis in the emergence of the community controlled sector in the 1970s, a major reason behind the introduction of Aboriginal and Torres Strait Islander corporate legislation in Australia<sup>6</sup> was the desire to recognise the rights of Aboriginal and Torres Strait Islander Australians to a measure of self-determination. While the purposes for which corporations are formed under the CATSI Act are varied and diverse, the nature of the CATSI Act as a vehicle for Aboriginal and Torres Strait Islander peoples' goals in particular must guide any reform of the CATSI Act; technical or otherwise. Each reform, and the package as a whole, must facilitate and provide a vehicle for contemporary Aboriginal and Torres Strait Islander aspirations for self-determination and self-management; they must recognise and value Indigenous peoples' knowledge and ways of governing, free from discrimination and regulatory overburden.

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<sup>2</sup> *Registrar v Monaghan* (No2) [2016] FCA 1143 at [6] per Griffiths J

<sup>3</sup> *Ibid.* at [5] per Griffiths J.

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples* Adopted by the United Nations General Assembly on 13 September 2007, GA Res 61.295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup>, plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007)

<sup>5</sup> Australian Government-*International Indigenous Issues-Declaration on the rights of Indigenous Peoples* (3 April 2009)

<sup>6</sup> Marina Nehme and John Juriansz 'The Evolution of Indigenous Corporations: Where to Now?' (2012) 33 *Adelaide Law Review* 101, 128 Also for a history of the motivation behind the adoption of Indigenous Corporations see Nehme and Juriansz at pp104-122.

This is particularly important in the special role that the CATSI Act plays as the vehicle for incorporation of native title bodies corporate. The *Native Title Act 1993* (Cth) (NTA), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) work together with the CATSI Act to require Indigenous peoples who secure a determination of native title to establish an incorporated body under the CATSI Act to hold and/or manage their native title rights and interests on their behalf.<sup>7</sup>

### **Establishing a Native Title Chapter of the CATSI Act**

For some observers ‘the fact that incorporation is a mandatory requirement for an Aboriginal and Torres Strait Islander [people] to be recognised by the State as a legal entity constitutes a form of cultural coercion’<sup>8</sup> whilst others still have described it as the means by which Aboriginal and Torres Strait Islander Peoples can negotiate with government.<sup>9</sup> In any event, Jackie Huggins has noted the importance of institutions of governance for Indigenous peoples:

If we are truly committed to the notion of self-determination, we cannot begin to pursue it without instruments of governance. If we do not have these structures, we cannot engage with government other than on an ad hoc, individual basis that leaves us vulnerable. We cannot engage in partnerships with business, we cannot benefit from the essential nature of our communal identity as Aboriginal and Torres Strait Islander People.<sup>10</sup>

To address the risk presented by mandatory incorporation by Indigenous peoples for native title purposes, AIATSIS is supportive of recommendations from the National Native Title Council (NNTC) (in its submission to this review) to establish a separate chapter of the CATSI Act to cater to the specific needs and circumstances of native title corporations.

The Overview of the Explanatory Memorandum emphasises the need for the CATSI Bill to accommodate ‘specific cultural practices and tailoring to reflect the particular needs and

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<sup>7</sup> The NTA ss56-57 require the Court to determine a Prescribed Body Corporate’ to for the native title determination; Reg 4 of PBC Regulations require the PBC to be an Aboriginal or Torres Strait Islander Corporation, which is defined reg 3) in accordance with the CATSI Act; the CATSI Act s16-5 defines such corporations as those incorporated under the CATSI Act.

<sup>8</sup> Basil Sansom *Aborigines, Anthropologist and Leviathan* in Noel Dyck (ed) *Indigenous Peoples and the Nation State: Fourth World Politics in Canada, Australia and Norway* (Institute of Social and Economic Research Memorial, University of Newfoundland, 1985) p67 ; Marina Nehme and John Juriansz ‘*The Evolution of Indigenous Corporations: Where to Now?*’ (2012) 33 *Adelaide Law Review* 101, p128

<sup>9</sup> Charles Rowley *Outcasts in White Australia: Volume 2 of Aboriginal Policy and Practice* (Australian National University Press, 1971); Marina Nehme and John Juriansz ‘*The Evolution of Indigenous Corporations: Where to Now?*’ (2012) 33 *Adelaide Law Review* 101, 128

<sup>10</sup> J Huggins online opinion (2006) <http://www.onlineopinion.com.au/view.asp?article=784>> as cited in Kathleen Clothier ‘*Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or negative discrimination?*’ 10(2) [2006] *Australian Indigenous Law Reporter* 1

circumstances of individual groups.<sup>11</sup> The CATSI Act already has provisions specifically directed to native title corporations, but there remain some areas where the legislation has not appropriately adapted or anticipated the unique status of native title corporations.

The *Aboriginal Councils and Associations Act 1976* (Cth) (ACA Act) sought to provide Aboriginal and Torres Strait Islander Australians with a quick and flexible mode of incorporation. The CATSI Act has sought to modernise Aboriginal and Torres Strait Islander Australians corporations whilst continuing to take into account the specific needs of Australia's Aboriginal and Torres Strait Islander Peoples. After 25 years of seeking to fit native title corporation into a ill-suited incorporation model, it is timely to consider a more targeted accommodation of the needs of native title corporations that take into account that:

- Native title corporations are not necessarily a voluntary incorporation but are mandated by statute
- Native title corporations hold or manage rights and interests on behalf of a group or society, in accordance with the laws and customs of that group or society
- Those rights and interests are inalienable and inherent rights derived from the unique status of Indigenous peoples
- Native title corporations have legal and equitable responsibilities to that group or society that may conflict with normal corporation and directors duties
- Native title Corporations are required or expected to fulfil governmental roles including relationships with governments

Native title corporations that will exist in perpetuity are entrusted with the task of maintaining and preserving Indigenous law and culture and the inherent rights of native title holders to their lands and water.

Native title clearly is not a mere regulatory or compliance mechanism for seeking land use approvals. The 2006 federal government report on RNTBC roles and responsibilities (The PBC Report) for example, acknowledged that RNTBCs are likely to be engaged on issues that reflect their roles as traditional owners more broadly. It identified such additional activities as 'town planning, social harmony projects, cultural protocols, welcomes to country and interpretive cultural signage' as well as economic development, but described these as secondary to the primary roles of RNTBCs as prescribed in the legislation. Yet it is clear from

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<sup>11</sup> Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1

these case studies that the report underestimated the demands placed on RNTBCs, both from their own membership and from other parties.<sup>12</sup>

Recognising and acknowledging the special fiduciary obligation that native title corporations have for their membership requires the CATSI Act being capable of incorporating Indigenous law and customary political, economic and juridical structures.

Indigenous Peoples in Australia see native title as a set of relationships, viewed holistically with implications for cultural, social, economic ties. For them native title, as Weiner has described, is a ‘total social fact’ which cannot be compartmentalised into distinct ‘realms’ of law and society.<sup>13</sup>

Native title corporations are unique. In the stewardship and management of native title, officers of native title corporations must manage extraordinary expectations from internal and external actors. At the same time, they must reconcile Indigenous conceptions and relevant laws and customs with the Australian legal understanding of the corresponding native title right and interest within the context of private corporations law. Differences between meanings make this task particularly challenging.<sup>14</sup> In addition, native title has complex interactions with Equity, Property law, Administrative law, Planning law, Environmental law, Resources law, Land law, Taxation, Trusts, Occupational Health and Safety, Employment law, and the many other legal obligations that emerge across native title operations, often with limited resources and funding.<sup>15</sup> Previous observations about the need for native title jurisprudence to adapt and empower Indigenous governance are applicable to native title incorporation law:

The jurisprudence or philosophy of native title requires further development to ensure that native title does not become a constraining force that works against the interests of Aboriginal and Torres Strait Islander Peoples and against the development of a just and inclusive law.<sup>16</sup>

A specific chapter for native title corporations should be designed to increase the ability of Aboriginal and Torres Strait Islander communities to self-determine and self-manage. For

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<sup>12</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p7

<sup>13</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p6-citing J F Weiner ‘The law of the land: a review article’ *Australian Journal of Anthropology*, volume 14, no.1, 2003, p100

<sup>14</sup> C Martin and D Mantziaris *Native title corporations: a legal and anthropological analysis*(Federation Press, Sydney 2000) pp29-30

<sup>15</sup> For example-see P Memmott and P Blackwood ‘Managing mixed indigenous land titles –Cape York case studies’ in *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) pp217-254 ‘Native title is one of several categories of Aboriginal-owned land on Cape York, each of which is associated with a particular corporate land holding entity.’p218

<sup>16</sup>L M Strelein *Conceptualising Native Title*, *The Sydney Law review* vol. 23, no1, 2001 95, p97

Aboriginal and Torres Strait Islander peoples, this requires the ability to choose the most appropriate governance structures that meet their needs and that will enable them to develop in accordance with their own aspirations.

In the broadest (international law) sense, self-determination refers to the right of Aboriginal and Torres Strait Islander peoples to freely determine their political status and freely pursue their economic, social and cultural development. In the Australian context, Aboriginal and Torres Strait Islander peoples' self-determination includes regional autonomy and Aboriginal and Torres Strait Islander peoples, groups and communities exercising substantive control over decisions affecting both themselves and their lands and waters, whilst further accepting that this takes place within the Australian nation state and Australian law.

Self-determination is based on the democratic principle that people should be involved in making the decisions that affect their lives.<sup>17</sup> As governments at both the federal and state and territory level look toward models of local engagement, decision-making and funding; including treaty style negotiated settlements, the need for the CATSI Act to adapt the forms of Indigenous incorporation to better reflect native title holders as polities rather than member associations, will increase.

The ongoing determination of what constitutes good governance within Aboriginal and Torres Strait Islander cultures will require ongoing negotiations about cultural norms and the desired social, economic and cultural outcomes.<sup>18</sup> The development of a new chapter of the CATSI Act will require further engagement, negotiation and co-design with Aboriginal and Torres Strait Islander peoples themselves. In the first instance, however, there may be little change required to establish a new chapter of the CATSI Act to address some of the points of divergence already well known, whilst providing a future framework for the development of native title corporations in ways that best reflect their unique purpose and constitutions.

## **2. ESTABLISHMENT OF CATSI CORPORATIONS**

### **Classification of CATSI corporations**

**2.1.1** AIATSIS supports the classification of small medium and large corporations as appropriate. Further consultation and engagement with CATSI Corporations themselves, Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) and the National Native Title Council (NNTC) will provide guidance about the categorisation of CATSI Corporations and in particular for the impact upon native title corporations also

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<sup>17</sup> L Strelein, S Brennan, G Williams, L Behrendt *Treaty* (Federation Press, Sydney, 2005) p8, pp63-64

<sup>18</sup> Jon Altman (2000) 'The economic status of Indigenous Australians' *CAEPR Discussion paper, NO. 193*, CAEPR, ANU, Canberra. Gillian Cowlishaw (1998) 'Erasing culture and race: Practising 'self-determination' *Oceania* 68(3): pp145-170

known formally as Registered Native Title Bodies Corporate (RNTBCs) (or Prescribed Bodies Corporate, PBCs).

CATSI Corporations may have multiple functions and different obligations and reporting requirements. It is important to retain relevant statutory obligation reporting exemptions where appropriate.<sup>19</sup> Large and well-funded CATSI Corporations will have the ability to recruit appropriate staff and advisers to ensure financial and other reporting and compliance. Small CATSI Corporations may struggle to even exercise basic functions. A small and inactive land holding body, possibly a native title corporation, may receive little or no income, may have geographically diverse membership and undertake few if any activities. The requirements to hold AGMs and or provide detailed audit reports would clearly be onerous and possibly unnecessary for such corporations. Consequently adjustments to the reporting and compliance regimes are essential based on CATSI Corporation size. Statutory rights of exemption for very small CATSI Corporations (proposed as 'exempt corporations' below) may reduce the administrative burden upon both the relevant corporations and the Registrar and their officers.

**2.1.2** AIATSIS supports less onerous reporting requirements for small corporations under the CATSI Act particularly for registered native title corporations (RNTBCs) in their establishment phase. 'Administrative requirements which do not match local realities can also disable the operation of [RNTBCs]'.<sup>20</sup> Providing a less onerous compliance regime for small CATSI Corporations is of benefit for both the relevant CATSI Corporations themselves and for the efficient use of the resources of the ORIC.

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<sup>19</sup> 'Under the CATSI Act, corporations are classified as large, medium or small. The size of a corporation is worked out by looking at a corporation's income, assets and its number of employees in a single financial year (ORIC, May 2015: 1).

A small corporation will have at least TWO of the following in a financial year:

- consolidated gross operating income of less than \$100,000
- consolidated gross assets valued at less than \$100,000
- fewer than five employees.

A medium corporation will have at least TWO of the following in a financial year:

- consolidated gross operating income between \$100,000 and \$5 million
- consolidated gross assets between \$100,000 and \$2.5 million
- between five and 24 employees.

A large corporation will have at least TWO of the following in a financial year:

- consolidated gross operating income of \$5 million or more

consolidated gross assets valued at \$2.5 million or more than 24 employees'

A Blechynden and B Burbidge *Prescribed Body Corporate Rulebook Analysis: A comparative report on the registered constitutions of Prescribed Bodies Corporate* (AIATSIS Research Publications, Canberra 2017 forthcoming).page 8

<sup>20</sup> Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 7



AIATSIS submits that many RNTBCs are not presently adequately resourced to meet the reporting and compliance requirements under the CATSI Act<sup>21</sup>. The Registrar must have the discretion as part of legislative amendments, to waive compliance and reporting requirements for small CATSI Corporations that may be exempted from certain functions. Streamlining the reporting requirements for small and medium CATSI Corporations will also be of benefit.

**2.1.3** Increasing the powers of the Registrar to grant exemptions to small corporations from compliance with the CATSI Act and a new category of very small CATSI Corporations (exempt corporations) would assist the relevant bodies corporate and alleviate the administrative burden upon the resources of the ORIC.

**2.1.4** Establishing a less onerous compliance regime will mean that very small CATSI Corporations could be exempted from compliance obligations if they have (1) limited activity or functions and (2) have issues and difficulties with respect to resourcing and or capacity and (3) for other reasons that may become clearer as part of this review.

Many CATSI Corporations who may be eligible for exemptions might not have the resources to make an application for the exemption in the first place due to lack of capacity or funding or both. The requirement that each application is assessed individually means that the ORIC is placed under a corresponding administrative burden. AIATSIS submits that the provision of expanded classes of statutory exemptions to the reporting requirements rather than requiring exemptions to be granted on an individual basis is preferable.

In February 2001, the Registrar of Aboriginal Corporations appointed a team led by Corrs Chambers, Westgarth lawyers to review the *Aboriginal Councils and Associations Act 1976* (Cth) (**ACAA**). The Review team found that some frequently reported problems for ACAA Corporations included: the failure or inability to conduct annual general meetings, low attendance at meetings and non-satisfaction of *quorum* requirements, a lack of participation by members, poor understanding of minutes and procedures, procedural irregularities in the conduct of meetings and elections of the board, and confusion between the memberships of corporations operating in the same area.<sup>22</sup>

Following the introduction of the CATSI Act, ORIC has actively worked to retire inactive corporations, together with the introduction of reduced reporting requirements for small corporations. However, for some CATSI Corporations, AGMs are little more than a

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<sup>21</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelain Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p46

<sup>22</sup> *A Modern Statute for indigenous Corporations: Reforming the Aboriginal Councils and Associations Act Cth 1976* Final Report of the Review of the Aboriginal Councils and Associations Act 1976 Cth (2002) -Appendix C.

compliance exercise, and at times a costly one. This is particularly the case where the membership may still struggle with education about or familiarity with financial and corporate governance, such as to render the annual general meeting's approval of the financial statements of the corporation meaningful.<sup>23</sup> Compliance in and of itself should not lead policy and practice. For small inactive corporations, the transparency imperative behind the annual approval of financial statements may be insufficient to justify the expense of an AGM or the risks of non-compliance. In saying this we recognise that many Corporations do not effectively utilise their AGMs. There is a misunderstanding (perhaps derived from the model Rule book) that the business of an AGM is fixed and limited to those items set out in legislation. This may be an area for further development of good practice.

AIATSIS submits that a review of the categorisation and or amendments so as to establish tiers of reporting is necessary. There may be **exempt corporations** who are very small and could be automatically exempted from reporting requirements without the need to make an application for exemption. **Small corporations** would have to provide minimal financial information in annual reports and may also adjust the requirement for annual general meetings. They would still be required to maintain balance sheets for any income and expenditure and be required to make these available by members and the Registrar on request. Current requirements for the Registrar to approve individual applications for exemption are occasioning an unnecessary administrative burden. **Medium and large corporations** would likewise have their reporting and other requirements adjusted accordingly. **Large corporations** should be required to provide general purpose financial reports that comply with relevant accounting standards and full disclosure by directors.

The basis for determining the categories should be flexible using objective criteria such as: turnover, assets, and the number of employees for example. The main stakeholders of a small proprietary limited company (apart from creditors) are usually the members and the directors. If a small corporation is in receipt of government funding, then it will be required to prepare financial accounts, which can be presented to the members as well as stakeholders.<sup>24</sup>

**2.1.5** AIATSIS supports tailored constitutions often called Rule books and the development of policies and guidelines for corporations to assist with the facilitation of effective decision making and dispute resolution processes. In accordance with the objects of the CATSI Act,

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<sup>23</sup>For the unique governance challenges for Registered Native Title Bodies Corporate (RNTBCs) –see *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013), 'Navigating complexity' pp1-25.

<sup>24</sup> Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1, p6

tailoring the design of the constitution to the specific circumstances of Aboriginal political communities is appropriate.

AIATSIS submits that one issue worthy of further examination is that problems may arise when a CATSI Corporation decides to adopt the condensed rule book published by the ORIC without suitably adapting it to the circumstances of that particular community. This may produce internal contradictions and inconsistencies.<sup>25</sup> As amendments to the constitution must be endorsed by the membership at a general meeting, providing additional special regulatory assistance for CATSI Corporations in their establishment phase would be of benefit. It would also be of benefit if the condensed rule book could clearly state which rules are replaceable rules and/or to provide guidance to CATSI Corporations about the development of their constitutions prior to registration and a certificate of incorporation being granted by the Registrar.

**2.1.6** AIATSIS supports the replaceable rules as relevant and applicable for CATSI corporations. The replaceable rules may be further developed and or amended via consultation with the sector. In particular, consideration should be given to circumstances in which different fixed and replaceable rules may be appropriate. Here we refer specifically to RNTBCs and we support the development of a native title specific condensed rule book and replaceable rules system that could be included in the native title chapter of CATSI proposed above.

The replaceable rule system provides appropriate flexibility that allows the design of Aboriginal and Torres Strait Islander corporate constitutions to be tailored to meet specific needs and achieving the right design for each localism and or community.<sup>26</sup> AIATSIS supports increasing the number of replaceable rules where matters may be better dealt with in policies and procedures, which can then be readily modified or amended by the directors and officers of the corporation.

## **Prohibited names under the CATSI Act**

**2.2** AIATSIS submits that it is likely inappropriate to restrict use of the terms Aboriginal and or Torres Strait Islander in the names of non-CATSIS Corporations, although this issue requires further consideration. Many Aboriginal and Torres Strait Islander businesses freely incorporate under the *Corporations Act 2001* (Cth) and should be able to use terms such as Indigenous and Aboriginal in their names. Some further investigation for ORIC and ASIC

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<sup>25</sup> Marina Nehme and John Juriansz 'The Evolution of Indigenous Corporations: Where to Now?' (2012) 33 *Adelaide Law Review* 101, 133

<sup>26</sup> See Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1

might include: (1) whether restrictions on the use of these names is tied to an indigeneity requirement regardless of the incorporating legislation; ie. majority Indigenous membership or a majority of Indigenous directors of the board; and (2) whether terms such as Indigenous or Aboriginal may be used by related or joint venture corporations.

## **Corporate Structures**

**2.3.1** AIATSIS supports amendments to the CATSI Act that facilitate the incorporation of wholly owned CATSI Corporations as subsidiaries so that several CATSI Corporations and Corporations regulated by ASIC (ASIC Corporations) can incorporate a company to be jointly owned by them such as a joint venture.<sup>27</sup> However the challenging interaction between the CATSI Act and the *Native Title Act 1993* (Cth) (NTA) and their highly prescribed nature has led Mantziaris and Martin to argue that it may be more appropriate for native title claimants to set up independent but related corporations through which to achieve their wider goals.<sup>28</sup> The creation of more corporations will surely stretch local resources even further and this will require assistance in terms of how these different corporations intersect and interrelate with each other.<sup>29</sup>

AIATSIS submits that it is preferable to provide additional resources and special regulatory assistance to CATSI Corporations rather than employ punitive measures for breaches or failures that have resulted from a lack of capacity.

**2.3.2** AIATSIS supports further research as to the adaptation of section 265-35 CATSI (which reflects section 187 *Corporations Act 2001* (Cth) and director's obligations with respect to their extension to parent companies). Any further modification so as to appropriately tailor the provisions to the specific socio-cultural requirements and corporate structures of CATSI Corporations will require further analysis and negotiation with CATSI Corporations themselves and more broadly-the native title sector.

**2.4** In general, the CATSI Act provides an appropriate vehicle for CATSI corporations to engage in economic activity. However there are reportedly misgivings among private industry about the regulatory and oversight powers of the Registrar when negating joint ventures or funds management:

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<sup>27</sup> For a further discussion of the need for a structural separation of the functions of the corporation in the conduct of land claim negotiations and litigation from the functions of a corporation in the holding and management of the legal interest obtained from the land claim in the Queensland land rights context-see C Mantziaris and D Martin *Native title corporations: a legal and anthropological analysis* (Federation Press 2000) pp243-244

<sup>28</sup> See C Mantziaris and D Martin *Native title corporations: a legal and anthropological analysis* (Federation Press 2000) p239

<sup>29</sup> Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 10

One of the key issues confronting native title holders is how they can convert their native title rights into a resource base for development. Associated with this is a high degree of mistrust in the broader business community regarding the reliability and dependability of native title corporations. This mistrust prevails despite the overarching CATSI Act which strictly regulates RNTBCs, and despite the fact that some of the Central Arrernte whom I spoke during field work identified the CATSI Act as paternalistic and as providing opportunities for the Australian Government, through ORIC to impose particularly onerous reporting constraints and compliance costs.<sup>30</sup>

### 3. DIRECTORS OF CATSI CORPORATIONS

#### Independent Directors

Chapter 6 of the CATSI Act deals with the officers and directors of an Aboriginal and Torres Strait Islander Corporation. Directors and officers of corporations assume positions of significant trust.<sup>31</sup> In many cases, CATSI Corporations are established to highlight the values, culture and identity of a particular grouping within Aboriginal and Torres Strait Islander society. Intra-Aboriginal and Torres Strait Islander struggles over legitimacy and authority which are often transmitted to the formal legal setting of the corporation associated with the group. Members of a corporate board may assert authority by virtue of their position *within the corporation* rather than their position *within the group* and it is this and other particular features of native title corporations that may have transforming effects on Aboriginal and Torres Strait Islander law and Aboriginal and Torres Strait Islander polities.

While in some instances a lack of the formal management skills is a factor in some of the issues facing CATSI Corporations the influence of ethical principles based on obligations and responsibilities to immediate kin and clan based affiliations rather than to the broader 'membership' is important to note.<sup>32</sup>

**3.1** Division 246 of the CATSI Act (ss 246-1 and 246-5), sets out a number of director requirements for Aboriginal and Torres Strait Islander corporations. Independent directors (also referred to as non-member or specialist directors) are non-member directors that can offer a RNTBC specialist advice on areas such as business, law or financial management. The CATSI Act does not have a section that deals with Independent directors. If a RNTBC

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<sup>30</sup> M Barcham 'Working with Indigenous and western corporate structures-the Central Arrernte case' in (eds L M Strelein Jessica K Weir and T Bauman, *AIATSIS Research Publications*, Canberra 2013) p261

<sup>31</sup> *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [168] per Gordon J

<sup>32</sup> L M Strelein, B Burbidge and C Hassing Forthcoming AIATSIS Issues Paper (2017) *Decision Making and Dispute Resolution* (AIATSIS Research Publications, Canberra, 2017)

wishes to have independent directors they must remove the section of the rulebook that states all directors must be members and include an extra section on independent directors.<sup>33</sup> Both the ORIC Condensed Rulebook and the ORIC Guide discuss the issue of independent directors and include example rules that RNTBCs can choose to include within their rulebooks.

CATSI Corporations are able to include an extra section on independent directors within their discretion subject to the endorsement of the membership at a general meeting. At present the inclusion of independent directors is not included in the CATSI Act or the Info-kit and the default rule is for RNTBCs not to have independent directors.

Independent directors can add a skill set for the benefit of CATSI Corporations and they may bring particular expertise for the benefit of CATSI Corporations.<sup>34</sup> Further consultation and engagement with the sector and CATSI Corporations themselves is required. Allowing CATSI corporations by default to appoint independent directors may be of benefit. Whilst non-Aboriginal and Torres Strait Islander directors may be appointed to provide an expert skill set there should never be the opportunity for non-Aboriginal and Torres Strait Islander directors to be in the control of an Aboriginal and Torres Strait Islander corporation.

Ultimately decisions concerning the appointment and or election of directors are decisions for the general membership. Flexibility for corporations to create their own specific rules particularly around meetings, membership and directors remains important.<sup>35</sup> The essence of achieving and developing appropriate Aboriginal and Torres Strait Islander corporations is to be undertaken through establishing institutional structures and principles which are robust enough to encompass and engage diversity.<sup>36</sup>

If independent directors are provided for in amended constitutions and or via legislative changes that make this a default but replaceable rule, CATSI Corporations should provide further information about the election processes or the terms of office for independent directors. Constitutions should set out what if any voting rights exist for independent directors and rules and or accompanying policies about the eligibility requirements of independent directors should also be provided.

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<sup>33</sup> Op.Cit Blechynden and Burbidge: page 65

<sup>34</sup> Redmond, P. 'Nominee Directors,' (1987) 10 *University of New South Wales Law Journal* 164

<sup>35</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p45

<sup>36</sup> D F Martin *Rethinking the design of Indigenous organisations: the need for strategic engagement* (Centre for Aboriginal Economic Policy Research, ANU, 2003 Discussion Paper 248/2003) P9

Determining the number of independent directors used in RNTBCs and how they are impacting the RNTBC sector, particularly in governance and capacity building would be of value to understanding the sectoral practice.

As a replaceable rule within the CATSI Act, RNTBCs can choose to include, change or remove the alternate director rule in their rulebook. The alternate director rule is included within the info-kit but is not mentioned in the Condensed Rulebook or the Guide. The default rule for alternate directors is as stated in the CATSI Act s.246-30, 'with the other directors' approval, a director may appoint an alternate to exercise some or all of the director's powers for a specified period.'<sup>37</sup>

Consultation with RNTBCs is required to determine whether RNTBCs who have rules permitting alternate directors in fact use alternate directors, the regularity in which they are called upon by directors and the impact they have upon the corporation and the board.<sup>38</sup>

Members and boards of Aboriginal and Torres Strait Islander corporations as managers bring distinctive understandings and practices regarding such matters as the undertaking of responsibilities, the exercise of authority, the conduct of disputes, and the making of decisions. Formal legal ideas and theories such as 'the interests of the corporation as a whole', central to the fiduciary duty of directors, may need to be reconciled with cultural or social norms in some Aboriginal and Torres Strait Islander political communities. Directors' duties and performance is assessed objectively based upon what a reasonable person would do and the Australian law may need to demonstrate cultural competency in applying standards of reasonableness in Indigenous contexts.<sup>39</sup>

More data from RNTBCs is required to understand the frequency of directors' meetings, director payments and the use of independent and alternate directors. Such future research questions might explore:

- How many RNTBCs with rules permitting independent directors in fact use independent directors? Is this different across regions? What is the procedure for recruiting independent directors? What impact do independent directors have on the board?

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<sup>37</sup> Op.Cit Blechynden and Burbidge: page 67

<sup>38</sup> Ibid page 69

<sup>39</sup> *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [3] per Gordon J. Also Op Cit. see Mantaziaris and Martinpp182-238. Also note in *Shaw Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397, the best interests of the corporation as a whole is determined objectively (since ASIC v Adler [2002] NSWSC 171) and according to the context of each particular factual circumstance and situation and the rules of incorporation themselves. In other words, determining what is in the best interests of a corporation is affected by the specific context of the corporation and its purpose and objects.

- How many RNTBCs with rules permitting alternate directors regularly use alternate directors? Is this different across regions? Do alternate directors have valuable impact on the board?
- Do RNTBCs hold directors' meetings as often as stated in the rulebooks or do the meetings in fact occur more or less often? If so, why is this case?
- Why do so few RNTBC rulebooks have rotational director systems despite this being a key recommendation in the ORIC guides? What impacts do rotating director systems have on RNTBC board capacity and dispute management? Are they an effective means for building RNTBC capacity?<sup>40</sup>

## Related Parties

**3.2.1** Related party transactions (RPT) are regulated by ss 208-230 *Corporations Act 2001* Cth and ss 284-1-296-1 CATSI Act. The RPT provisions prohibit the provision of any financial benefits to a related party subject to certain exceptions and approvals by members in a general meeting. The RPT provisions in the CATSI Act reflect the *Corporations Act 2001* and are very much based on Western concepts of the 'nuclear family'. This may not be appropriate in the context of some Aboriginal political communities.<sup>41</sup> At the same time, to extend related party transaction provision to the broad kinship network of Indigenous communities may hobble Aboriginal and Torres Strait islander corporations. In these circumstances, it is important to return to principled approach – what is the mischief to which the laws of related parties are directed. Issues of fairness, absence of bias, protection against personal self-interest and transparency can help guide the decisions about what if any reform is required. Further investigation, analysis and consultation about this issue must be undertaken so as to properly review and revisit Part 6-6 of the CATSI Act.

**3.2.2** Establishing the disclosure of interests and other fiduciary obligations and requirements for native title corporations (RNTBCs) as distinct from non-native title CATSI Corporations is the focus of current and ongoing AIATSIS research.

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<sup>40</sup>Op.Cit Blechynden and Burbidge: p71

<sup>41</sup> Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1, p9



## 4. MANAGEMENT OF CATSI CORPORATIONS

How organisational management in a corporate form will relate and reflect Aboriginal and Torres Strait Islander governance structures is critical to the success and support of the general membership in CATSI Corporations.<sup>42</sup>

**4.1.1** Whether or not the registration of CEOs and other senior executives with the Registrar would be of benefit is not yet clear. The increased reporting and compliance obligations upon under resourced CATSI Corporations are a significant concern. Establishing clearly and for what purpose these proposed amendments are proposed is necessary.

**4.1.2** It may be beneficial for the Registrar to have the power to deregister and disqualify CEOs and senior executives who fail expectations and or legal requirements, subject to procedural fairness requirements and the opportunity of a fair hearing and investigation. This would include clearly established avenues of appeal and review that must be set out in plain English. The Registrar has existing powers to investigate and undertake inquiries in circumstances of misconduct.<sup>43</sup>

CEOs have existing legal and equitable obligations under the general law that they must subscribe to and<sup>44</sup> the Registrar already has extensive powers to conduct examinations and investigations into the affairs of CATSI Corporations where there may have been misconduct and or breaches of legal and or equitable obligations.

**4.1.3** AIATSIS does not support the disclosure of remuneration of CATSI Corporation CEOs and senior executives to the Registrar. Establishing a power for the Registrar to set maximum limits on remuneration for CATSI Corporations would be discriminatory given that no such power is available to Government with respect to non-Aboriginal and Torres Strait Islander corporations established pursuant to the *Corporations Act 2001*.

The forthcoming debates on the [Banking Executive Accountability Regime Bill](#) will be informative for the purposes of this review.

**4.1.4** AIATSIS supports the Registrar having the legislative power to impose civil penalties for corporations and their directors who fail to properly monitor senior executives and CEOs in relation to cases of dishonest or bad faith actions so as to protect CATSI Corporations from rogue directors and or officers.<sup>45</sup> Small CATSI Corporations however should not be

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<sup>42</sup> Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 8

<sup>43</sup> Also see Chapter 13 CATSI Act -Offences

<sup>44</sup> Also see Chapter 13 CATSI Act –Offences and Chapter 14 CATSI Act-Courts and proceedings

<sup>45</sup> See also Australian Law Reform Commission *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* Report No 95 (2002)

further penalised for lack of resources. Special regulatory assistance and earlier intervention by the Registrar would be more helpful for smaller CATSI Corporations.

AIATSIS submits that providing information and education about corporate governance and responsibilities including increasing capacity for CATSI Corporations to undertake their functions (particularly RNTBCs) is preferable given that some CATSI Corporations may fail for failure to pay a fine or a number of fines.

**4.1.5** AIATSIS supports statutory duties of care and diligence being imposed upon CATSI Corporation CEOs and senior executives in accordance with directors' duties under the *Corporations Act 2001*. AIATSIS supports special regulatory assistance being provided by the Registrar and resources that allow small and medium CATSI Corporations to provide effective strategic planning, management and governance training to senior executives.

**4.1.6** AIATSIS submits that disclosure requirements should be restricted to medium and large CATSI Corporations.

**4.1.7** AIATSIS supports in principle, members of large CATSI Corporations having the same powers relating to approval of remuneration and reporting as contained within the *Corporations Act 2001*, subject to consultation with relevant stakeholders.

## **5. MEETINGS OF CATSI CORPORATIONS**

Chapter 5 of the CATSI Act deals with directors' meetings and general meetings of CATSI Corporations. The coordination and compliance requirements for meetings under the *Corporations Act 2001* and the CATSI Act may be burdensome particularly for CATSI corporations that are small or lacking resources and capacity (as is the case with many native title corporations) to meet their obligations to members, often across vast geographical areas. The CATSI Act s 201-70 details a quorum requirement for general meetings which is determined by the number of members of the corporation. This is a replaceable rule that RNTBCs can alter to better suit their needs and circumstances. Aboriginal and Torres Strait Islander corporations must hold an Annual General Meeting unless they are an exempt corporation (a proposed new categorisation to alleviate administrative and reporting requirements for small passive corporations).

Preliminary AIATSIS research has found that the decision making processes utilised in general meetings are not uniform but are instead characterised by a degree of variation between RNTBCs and across regions. Constitutions detail various processes of majority

based voting, consensus voting and decision making procedures that are shaped by family, language and descent group structures.<sup>46</sup>

The majority of rules regarding members' meetings are replaceable rules.<sup>47</sup> This means that the constitution of a CATSI Corporation can articulate the way in which a resolution is put to the vote at a members' meeting.<sup>48</sup> So for example a resolution may be decided by way of a simple majority and or via consensus and a CATSI Corporation may determine whether or not the appointment of proxies is culturally appropriate.<sup>49</sup>

AIATSIS submits that one issue for further examination is that previous reviews have found that for Aboriginal and Torres Strait Islander Peoples general members' meetings are not usually a good forum for making informed decisions and setting policies however the members' meeting was adopted by the CATSI Act.

**5.1.1** When there has been little or no activity, AIATSIS supports small CATSI Corporations being exempted from the requirement to hold an AGM on the basis that it takes only 10% of the membership to call for a general meeting. The membership can poll for a general meeting to discuss urgent business at hand. Small RNTBCs with limited resources and limited activity can also regularly communicate via social media and other means to communicate with their membership. For small regional and remote CATSI Corporations the meeting and notification requirements can be extremely burdensome.

**5.1.2** AIATSIS does not necessarily support members of medium and large corporations having the power to pass a resolution not to have an AGM for up to three years. Applications for an extension of time to hold an AGM already fall within the Registrar's jurisdiction. AIATSIS appreciates however that requests for additional time do have an impact upon the administrative burden of the ORIC.

**5.2** AIATSIS submits that if a CATSI Corporation cannot meet the requirement for general meetings or directors meetings for specific reasons and or events, that they should be able to re-schedule the time for holding the meeting, noting that 10% of the membership can request a general meeting if required.

**5.3.1** AIATSIS submits that it would be appropriate for the Registrar to be authorised to direct a corporation to hold a general meeting in specific circumstances and or a directors'

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<sup>46</sup> Op.Cit Blechynden and Burbidge: page 85

<sup>47</sup> CATSI Act ss57-5

<sup>48</sup> CATSI Act 201-75

<sup>49</sup> Marina Nehme and John Juriansz '*The Evolution of Indigenous Corporations: Where to Now?*' (2012) 33 *Adelaide Law Review* 101,pp131-132

*AIATSIS response to Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006*

meeting if certain adverse issues are identified by the Registrar. AIATSIS further submits that for native title corporations:

The funding and support need of RNTBCs will vary depending on a number of factors including the nature and extent of native title rights and interests, the remoteness of the determination area, the geographic dispersal of the native title holders, and the level and type of future act or activity. The cost of undertaking such tasks as convening AGM can be enormous particularly in remote and regional areas where membership is widely dispersed.<sup>50</sup>

## **6. REPORTING BY CATSI CORPORATIONS**

**6.1.1** It is beneficial in the interests of transparency (as is the case for corporations established pursuant to the *Corporations Act 2001* (Cth)) for certain CATSI Corporations at their AGM to receive the company's annual financial report, director's report and auditor's report (if any).

**6.2.1** The Registrar would benefit from increased powers to extend the date for lodgement of financial reports given that medium and large CATSI Corporations face delays in lodgement of financial reports by 31 December for reasons often beyond their control: such as death of members of the community, natural disasters and for cultural activities or delays with auditors. The circumstances to obtain such dispensation must include factors relevant to Aboriginal and Torres Strait Islander Law and cultural responsibilities, exigencies and other events.

**6.3** And **6.3.1** AIATSIS supports qualified privilege being extended to auditors under the CATSI Act in accordance with the *Corporations Act 200* (Cth).

To promote compliance ORIC should continue:

- Providing assistance with drafting of CATSI Corporation constitutions;
- Providing training and advice to CATSI Corporations on effective corporate governance;
- Providing training and advice about the operation of the CATSI Act and regulations;
- Providing assistance with the compliance and the regulatory and reporting requirements CATSI Act and regulations;
- Publishing and distributing educational materials to promote better understanding of CATSI Act and regulations and effective corporate governance;

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<sup>50</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p47

- Developing or supporting the development of appropriate skills, training and accreditation schemes for directors and officers of CATSI Corporations;
- Coordinating special regulatory assistance and activities;
- Providing education and training to other government agencies (both Federal and State) involved in the funding of Aboriginal and Torres Strait Islander corporations on the operation of the CATSI Act, about the roles of the Registrar's Office and public funding bodies in relation to the oversight of and intervention in the affairs of CATSI Corporations;
- Negotiating with Aboriginal and Torres Strait Islander communities about emerging issues in corporate governance and company law.

## 7. OBLIGATIONS TO MEMBERS

Chapter 4 of the CATSI Act provides for amongst other things, the membership of Aboriginal and Torres Strait Islander Corporations. As a general principle members are not subject to fiduciary duties and are permitted to act in their own best interests (except in cases of fraud on the minority and or for oppressive conduct upon a minority).<sup>51</sup> How membership of the native title group and membership of the corporation will interrelate is the subject of ongoing research at AIATSIS.

**7.1 & 7.1.1** AIATSIS does not believe that additional information should be provided for the register. AIATSIS is concerned about the public register particularly in circumstances where individuals may for example be experiencing or at risk of family violence where Aboriginal and Torres Strait Islander women may have ongoing fears about confidentiality and safety.<sup>52</sup>

Whilst AIATSIS appreciates that an additional method of contacting a member may assist in circumstances where a member has become uncontactable, updating contact details is a responsibility that should be borne by members and their families. The discretion to maintain and or cancel a membership remains within the directors' powers and discretion. Further it may be that if the Registrar had the power to require production of membership lists this

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<sup>51</sup> A number of statutory remedies are available to members as are representative actions that may be undertaken by the Registrar in these circumstances. See *Registrar v Monaghan (No2)* [2016] FCA 1143 Griffiths J. See also Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1, p11

<sup>52</sup> See [4.1.6] Rural Regional and remote [Women, Domestic and Family Violence and Homelessness: A Synthesis Report \(2008\)](#) Flinders University Prepared for the Office for Women Department of Families, Housing, Community Services and Indigenous Affairs. See also [Responding to Family Violence in Aboriginal Communities NSW Health Aboriginal Family Health Strategy 2011-2016](#)

would be largely meaningless if there is no power to verify the same lists or do anything meaningful with them.<sup>53</sup>

**7.2.1** Providing there is a record made of the two attempts to contact a member AIATSIS believes that two (2) years is the appropriate time frame for cancelling membership by way of special resolution. It should be within the director's discretion to decide what methods and how many attempts should be made to contact a member within that two year time frame. This is especially pertinent for RNTBCs who maintain responsibilities over remote areas. Membership rights could at least lapse if fees remain unpaid and or a member remains uncontactable after a number of years.<sup>54</sup>

**7.2.3** CATSI Corporations already bear the responsibility to maintain and update membership records however again this requires additional resources for RNTBCs in particular to meet these heavy administrative burdens. AIATSIS notes that in some instances small corporations may be under resourced and the public officer and board may have limited training or experience with respect to corporate management, whilst in other larger CATSI Corporations these skill sets will be readily available.

The Registrar may exercise certain remedies on behalf of an aggrieved or a number of aggrieved members, so as to address the special incorporation requirements of CATSI Corporations. These remedies include: a statutory oppression remedy, statutory injunctive relief and a statutory derivative action for members.

RNTBCs may also seek assistance from Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) pursuant to NTRB/NTSP facilitation and assistance functions under the *Native Title Act 1993* (Cth).

AIATSIS strongly believes that further engagement with RNTBCs and longitudinal research would add a layer of understanding to how RNTBCs coordinate membership applications and membership.<sup>55</sup>

AIATSIS further notes that neither the CATSI Act, the info-kit, the Guide or the Condensed Rulebook include a process for dealing with disputes over membership applications.

The CATSI Act does, however, outline a model to deal with the cancellation of membership (s150-20). The Info-kit and the Condensed Rulebook both include this same process for cancelling membership.<sup>56</sup>

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<sup>53</sup> See also *A Modern Statute for indigenous Corporations: Reforming the Aboriginal Councils and Associations Act Cth 1976* Final Report of the Review of the Aboriginal Councils and Associations Act 1976 Cth (2002) p235

<sup>54</sup> Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1, p12

<sup>55</sup> Op.Cit Blechynden and Burbidge: p51

## 8. DIRECTORS

Indigenous peoples have been managing their traditional lands and waters in accordance with Indigenous law for tens of thousands of years. Indigenous law is not sufficiently accommodated or recognised within the corporations' law model. For RNTBCs in particular, the principle of voluntariness is disregarded. Incorporation is a compulsory requirement of the *Native Title Act 1993* (Cth). Whilst for some Aboriginal and Torres Strait Islander communities there exists a high level of capacity and familiarisation with western principles of business administration and law; in others there is a lack of capacity:

Prescribing such a corporate sector without concomitant funding and support is a policy failure that exasperates Indigenous peoples' governance bodies and leadership and frustrates all parties who have business with native titleholders.<sup>57</sup>

As a consequence for some CATSI corporations, increasing the capacity of directors is central to achieving good corporate governance for CATSI Corporations. This technical review must have regard to the special incorporation needs of Aboriginal and Torres Strait Islander directors where required. These are relevant in several respects:

- Aboriginal and Torres Strait Islander directors may have limited understanding of their obligations under the CATSI Act. Acknowledging their special incorporation needs is an alternative to providing punitive measures for the breach of directors' duties of care and diligence.
- The ability of many existing CATSI Act corporations to meet requirements of the legislation within prescribed timeframes may be limited, particularly for Aboriginal and Torres Strait Islander corporations in remote locations. A review of the penalties is inappropriate.
- The capacity to pay penalties may be limited. The imposition of high penalties might prove particularly onerous and dissuade and discourage some members of the community from becoming directors of CATSI Corporations. The penalties for breaches of director's duties are high in terms of maximum penalties and the required objective duty of care is set out in the increasing number of decisions being brought before the Federal Court of Australia and State and Territory Supreme Courts.<sup>58</sup>

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<sup>56</sup>Op.Cit. Blechynden and Burbidge: p97

<sup>57</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013)

<sup>58</sup> *Registrar v Monaghan* (No2) [2016] FCA 1143 Griffiths J at [358]-[353]

- Formation of Aboriginal and Torres Strait Islander corporations and nominations to their boards may not be voluntary in the true sense of the word, particularly when it comes to small CATSI Corporations. There is no voluntariness for RNTBCs who are compelled to incorporate pursuant to the *Native Title Act 1993* (Cth).

**8.2.1** Special regulatory assistance requires early intervention so as to avoid possible breaches of the law. AIATSIS submits and supports the ORIC ensuring that corporate governance training is provided to CATSI directors. ORIC could potentially outsource this training to institutes and or agencies including AIATSIS and/or the Australian Aboriginal and Torres Strait Islander Governance Institute (AIGI).

RNTBC governance training needs to be purpose built and not modelled on existing governance training that does not presently include training around the issues that are specific to native title corporations. Indeed, standard governance training that does not accommodate the particular fiduciary responsibilities that RNTBCs have to their native title holders is legally misleading and potentially exposes the directors to legal risks.

**8.2.2** Corporate governance training should be provided widely. Providing that consideration is given for prior learning and existing knowledge in terms of Aboriginal and Torres Strait Islander knowledges and epistemologies, AIATSIS supports the provision of corporate governance training to Aboriginal and Torres Strait Islander board directors. As to whether this is mandatory or not is dependent upon the ability to secure additional funding to achieve this for the more than 2,600 CATSI Corporations already in existence as well as new bodies corporate.

**8.2.3** AIATSIS submits that the grounds for automatic disqualification in section 279-5 CATSI Act must be reviewed. Aboriginal and Torres Strait Islander directors must be afforded some discretion at the point at which the Aboriginal and Torres Strait Islander law and non-Aboriginal and Torres Strait Islander law intersect. Where there may be a conflict or incommensurability<sup>59</sup> between Aboriginal and Torres Strait Islander law and the requirements of the CATSI Act, it is important to consider all of the circumstances and accommodate Aboriginal and Torres Strait Islander law as part of the developing common law of Aboriginal and Torres Strait Islander corporations and the developing common law of native title.

For example a director may have very specific exchange; ritual; kin and other obligations towards for example their mother's brother. By upholding those obligations they will be

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<sup>59</sup> D Martin and C Mantziaris *Native title corporations: a legal and anthropological analysis* (Federation Press, 2000).



maintaining a system of authority and law that supports effective corporate governance and their particular responsibilities to their kin group. The particular director may submit that in upholding Indigenous law they are acting in accordance with their fiduciary obligations. However this may appear to be in direct conflict with the related party provisions of corporations law models and the requirement to act in the 'best interests' of the corporation which is an objective test at law.

For RNTBCs their assessment might be a subjective or objective one within and according to the purview of Indigenous law. As a native title decision it will also not be within the jurisdiction of the CATSI Act. A dedicated chapter within the CATSI Act itself that provides for RNTBCs may be beneficial (see earlier). Or it may be preferable to allow these issues to develop within the jurisdiction of the developing common law of native title and Indigenous corporations.<sup>60</sup>

## 9. SPECIAL ADMINISTRATION

The Registrar may determine in writing that a CATSI Corporation is to be under special administration for the term specified pursuant to s 487-1 of the Act.<sup>61</sup> The Court's role is to ensure that the power to make such a determination is exercised within the legal framework erected by the CATSI Act supplemented by the principles of procedural fairness which operate within this framework.<sup>62</sup> Special administration intervention can be an important regulatory intervention that prevents the seriousness of corporate failure and the resulting losses to the native title group as beneficiaries. In the circumstances of some CATSI Act Corporations, actions such as administration and winding-up are experienced as external interventions into Aboriginal political communities and are, in the main part resented.

AIATSIS submits that on some occasions the appointment of administrators by the Registrar is inappropriate and ineffective. The particular difficulties faced by Aboriginal and Torres Strait Islander people in the management of CATSI Corporations strongly indicates that ORIC should provide extra assistance to CATSI corporations facing financial hardship or difficulty before the circumstances warrant an extreme intervention. The Registrar could assist the board and managers of CATSI Corporations to analyse the source of the problems and then to advise or facilitate an appropriate course of action to resolve the issues. Additional functions and powers such as mediation of disputes, and mechanisms for the

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<sup>60</sup> *Ibid.* pp271-284.

<sup>61</sup> *Dunghutti Elders Council Aboriginal Corporation RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88, Keane CJ, Lander and Foster JJ at [12]

<sup>62</sup> *Dunghutti Elders Council Aboriginal Corporation RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88, Keane CJ, Lander and Foster JJ at [35] citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at pp74-577.

arbitration of disputes may also be of assistance. Special regulatory assistance is preferable to the drastic step of appointing an administrator, except in urgent circumstances.

The Registrar has the ability to place RNTBCs under Special Administration, a process by which an independent person (or persons) are appointed to try to solve problems within an RNTBC. This might include, for instance, if the RNTBC is facing financial problems, unresolvable disputes or internal governance concerns. Special administration is a special measure within the CATSI Act and only Aboriginal and Torres Strait Islander corporations can be placed under special administration. Special administration differs from other forms of administration under the *Corporations Act 2001* (Corporations Act).<sup>63</sup>

Preliminary AIATSIS research of only of a small sample of RNTBCs, who have been under special administration revealed that RNTBCs who have been or are currently in special administration often have made changes to their constitutions.

During special administration the administrators review and make changes to the structures and processes of RNTBCs including making changes to constitutions. As at January 2017 nine RNTBCs have been placed in special administration. The most notable differences nationally between RNTBCs under special administration deal with rules around directors and directors' meetings.

AIATSIS research of this small sample group has revealed that 100% of the RNTBCs in special administration now include the default rule of holding directors meetings every three months as compared to 62% nationally. 67% of RNTBCs who have been under special administration have rules that permit independent directors as opposed to 47% nationally. 78% of RNTBCs who are under special administration do not allow alternate directors as opposed to 59% nationally and 25% more RNTBCs under special administration with the default process of voting in directors' meeting when compared to the national average. 13% more RNTBCs who have been under special administration have additional director requirements. 89% of constitutions for RNTBCs under special administration include the default process of majority voting in general meetings compared to 62% nationally and 10% more RNTBCs under special administration do not allow proxies as compared to the national average.<sup>64</sup>

Applying to the Court for the appointment of a receiver should be used to address serious corporate governance issues, where appointment of a facilitator and/or other mechanisms has failed to provide results. The Court would have regard to the facts of the situation in

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<sup>63</sup> Op.Cit. Blechynden and Burbidge: 101

<sup>64</sup> Op Cit. Blechynden and Burbidge :pp 101-103

determining whether appointment of a receiver is justified and if so, in setting the scope of the receiver's role and powers. The receiver will then report to and be supervised by the Court.

The fear that an administrator could deal with native title without the consent of the native title group is likely to be misplaced. There are three sources of constraint on the administrator:

- (1) The administrator only has such powers to conduct the corporation's affairs as may have been exercised by the public officer and the board prior to the administration. These powers are governed by the corporate constitution the CATSI Act and the delegation by the Registrar. The corporate constitution may limit the powers of the corporation in relation to the native title.
- (2) The administrator must act in accordance with the terms of the statutory trust or agency relationship and the legal consent and consultation procedures that are mandated by the PBC Regulations made under the *Native Title Act 1993* (Cth)
- (3) Unless the native title group consents to dealing in relation to the native title that dealing will have no effect.

## **10. VOLUNTARY ADMINISTRATION**

**10.1.** Under the Corporations Act, the regime of voluntary administration in encourages managers of the corporation to take steps to deal with an existing or impending state of insolvency. As this is a process which is generated by the corporation itself, the corporation does not experience an external intervention by the state. Moreover, much of the impetus for placing a corporation under voluntary administration comes from the directors themselves.

Directors have an incentive and an obligation to transfer the management of the corporation to the administrator so as to avoid liability for managing a corporation that is trading while insolvent. In this way, the incentive to improve corporate governance aligned with the incentive of avoiding personal liability. The voluntary administration mechanism must be readily available to the directors of CATSI Corporations to enable them to take action when necessary, without the need for external intervention by the Registrar.

## **11. WINDING UP AND DEREGISTERING COMPANIES**

Winding up refers to a form of external administration under which a person called a 'liquidator' assumes control of a company's affairs in order to discharge its liabilities in preparation for its eventual dissolution. The 'just and equitable' ground for winding up is a

wide discretionary remedy that the Courts may use which is adapted to the circumstances of each case.

‘Special regulatory assistance’ is preferable and could be provided to CATSI Corporations by the Registrar so as to: (1) assist members and directors of corporations in developing the skills to participate effectively in corporate processes and to satisfy the requirements of regulatory compliance via education and training; (2) assist corporations facing corporate governance difficulties and insolvency. The Registrar is also already able to protect members of the corporation from abuses. Specific tailored training for RNTBCs about their management responsibilities and the positive legal and financial obligations directors as managers owe the corporation is needed.

Winding-up proceedings may be brought by the corporation itself, a creditor, a member of the corporation, ‘the judicial manager of a corporation’ or the Registrar. Compulsory winding-up occurs where a corporation is insolvent and the Court makes an order winding up the corporation on the application of a creditor, member or director or the corporation. The liquidator realises the corporation’s assets and pays its debts to the extent that payment is possible. After a winding up is finalised, the corporation may be deregistered.

**11.1.1** AIATSIS submits that the alignment of the CATSI Act with the insolvency provisions of the Corporations Act where a CATSI Corporation is or was the trustee of a trust requires further analysis and investigation as will the power of an external administrator (whether they be a voluntary administrator and or liquidator) with respect to the power to dispose of assets or make distributions to a creditor without making an application to the Court (**11.1.2** and **11.1.3.1**).

**11.1.4** The question of employee entitlements and any alignment between the Corporations Act 2001 and the CATSI Act including what if any appropriate links between the insolvency provisions of the Corporations Act (**11.5.1**) is beyond the scope of the timeframe to provide this submission.

## **12. REGISTERED NATIVE TITLE BODIES CORPORATE (RNTBCs)**

RNTBCs play an important role in managing and protecting the native title rights and interests of Aboriginal and Torres Strait Islander people. ‘Effective governance is appreciated by Aboriginal and Torres Strait Islander People, academics and government as one of the keys to overcoming colonial legacies of socioeconomic disadvantage and social dysfunction, and for building a sound base for local community and economic

development.<sup>65</sup> The number of RNTBCs has increased rapidly within recent years. As at October 2017 there were 170 RNTBCs registered with the ORIC.<sup>66</sup>

RNTBC governance is much more than compliance, tax, internal structures and accountabilities in the regulatory framework of the NTA, the PBC Regulations and the CATSI Act. It is also much more than the myriad state, territory and Commonwealth regulatory regimes that impact on the enjoyment of native title rights-from planning legislation to fishing regulations. ...it is critical for RNTBCs to have the governance capacity to respond to changing social, economic, political and cultural contexts, not least of which are changes to laws and customs and the expectations and requirements of native title holders'.<sup>67</sup>

AIATSIS research and native title corporation case studies have identified four broad priorities for RNTBCs:

1. Independence: RNTBCs seek more corporate independence in the management of their native title rights and interests.
2. Respect and recognition: RNTBCs seek greater levels of political recognition and respect for their traditional rights from other groups.
3. Caring for country, culture and people: RNTBCs aspire to use their native title rights to improve the social and cultural wellbeing of their members as well as the broader community.
4. Community development, service provision and economic development: RNTBCs want to use their native title rights to provide greater socio economic security for their communities.<sup>68</sup>

To achieve these societal goals, the groundwork for good governance requires investment. RNTBCs require additional resources so as to secure legal and financial advice<sup>69</sup> and other assistance to meet their basic administrative requirements and then attend to their corporate governance and business administration requirements.<sup>70</sup> The provision of direct funding to RNTBCs as well as additional funding for salaried positions and assistance from dedicated

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<sup>65</sup> Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 3

<sup>66</sup> A Blechynden and B Burbidge *Prescribed Body Corporate Rulebook Analysis: A comparative report on the registered constitutions of Prescribed Bodies Corporate* (AIATSIS Research Publications, Canberra 2017 forthcoming). p11

<sup>67</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p9

<sup>68</sup> *Ibid.* p29

<sup>69</sup> See L M Strelein *Taxation of native title agreements*, Native Title Research Monograph, no.1, Native Title Research Unit, Canberra, 2008 <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/native-title-research/TaxationAgreements.pdf> accessed 21 September 2017

<sup>70</sup> *Living with native title: The experiences of registered native title corporations* (eds L M Strelein Jessica K Weir and T Bauman, AIATSIS Research Publications, Canberra 2013) p17 and see chapter 2 - 'Overview of the RNTBC regime'. pp27-64

staff members from the ORIC is required.<sup>71</sup> Direct funding will allow RNTBCs to address cultural competency issues for staff as well as to increase their native title expertise more broadly. A national network for RNTBCs currently being facilitated by AIATSIS and now the National Native Title Council (NNTC) will also require resourcing and funding.<sup>72</sup>

**12.1.1** AIATSIS submits that the Registrar should not have oversight of the *Native Title Prescribed Body Corporate Regulations 1999 (Cth)*. Under the current existing arrangements the ORIC is not equipped with the requisite expert knowledge of native title to ensure appropriate stewardship of native title laws. This is a role properly within the purview and jurisdiction of the Federal Court of Australia.

## **Membership**<sup>73</sup>

**12.2.1** AIATSIS submits that RNTBCs should not be required to keep a register of all common law holders in addition to members. Importantly, however, we note that many RNTBCs have expressed the desire to be able to hold and maintain or have access to records of all of the common law holders. The reality is that this has not proved practicable, in some instances for legal reasons, or because of the capacity of many RNTBCs. The AIATSIS Managing Information in Native Title Project has been examining the challenges in repatriating materials collected in the native title process to RNTBCs, including connection and genealogical material, which underpins the definition of the native title group and its membership.<sup>74</sup>

Worse, an incomplete list may be apt to mislead directors in terms of the legal requirements for consultation and consent that are required under the NTA and PBC Regulations (reg 8). RNTBCs must consult with the native title group, as defined under native title law when making 'native title decisions'. 'Native title decisions' are decisions to surrender or otherwise do an act that affects native title. The scope of native title decisions was clarified by the High Court's decision in *Western Australia v Ward*<sup>75</sup>, which held that native title only protects rights in relation to land and waters. Native title decisions are therefore only decisions which relate to rights of access to or use of land and waters, and which will 'affect' native title. Where the access or use will not affect native title (and therefore will not extinguish, suppress, or suspend native title rights), it is not a native title decision. Likewise decisions

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<sup>71</sup> *Ibid.* pp47-48

<sup>72</sup> *Ibid.* pp50-52

<sup>73</sup> *Corporations (Aboriginal and Torres Strait Islander) Bill 2006*: Explanatory Memorandum at [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'

<sup>74</sup> <http://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/managing-information-native-title>.

<sup>75</sup> (2002) 191 ALR 1

that relate only to the use or protection of cultural knowledge are not native title decisions. Neither are decisions of an administrative nature (for example the purchase of equipment by a RNTBC). It is interesting to note that many RNTBC constitutions refer to 'other land based decisions', in which a broader sphere of decisions about traditional lands and waters is contemplated.

Native title decisions must be made in accordance with the underlying statutory trust or agency relationship between the RNTBC and the members of the native title group. They must be made in accordance with consultation and consent provisions of the PBC Regulations, or they are deemed to be of no effect. These consultation and consent requirements are not likely to be met by relying on a register that is established without access to the research and knowledge currently held by the NTRBs.

**12.2.2** AIATSIS does not agree that the Registrar should have the power to amend the register of members of an RNTBC to reflect the description of native title holders in the relevant native title determination. Attempting to include all of the common law native titleholders as members of the RNTBC would be impracticable and potentially even impossible. As noted above, attempts to do so may lead the RNTBC to confuse the membership and processes of the RNTBC with the membership of the group of native titleholders and the consultation and consent requirements. This could in turn expose purported native title decisions to being deemed as having no effect. For example a decision made by a general meeting of an RNTBC may not satisfy the consent and consultation requirements of the RNTBC Regulations which must be addressed to all of the common law holders. The common law holders will be a broader group than the members of the RNTBC.<sup>76</sup>

AIATSIS recommends that the policies and procedures of an RNTBC set out the legal obligations of RNTBCs to the native title holding group and the requirements for native title decisions. There is a need for effective education and training for directors and officers to further clarify and reinforce the obligation for an RNTBC to comply with the consultation and consent provisions.<sup>77</sup> How the sphere of authority will be exercised will be a matter for each particular native title group.<sup>78</sup>

**12.2.3** AIATSIS does not support the Registrar having the power to refuse to register or amend a rule book if its terms may be inconsistent with a native title determination. As stated

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<sup>76</sup> *Ibid.* pp 279-280

<sup>77</sup> See *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 and *Walmbaar Aboriginal Corporation v Queensland* [2010] FCA 993 at [10]-[30] per Greenwood J. See also N Duff *Authorisation and decision making in native title* (AIATSIS Research Publication, 2017, chapter 7 Authorisation and agreement making.

<sup>78</sup> L M Strelein *Conceptualising Native Title*, *The Sydney Law review* vol. 23, no1, 2001, p124

this is a broad discretion. A native title determination includes not only the definition of the native title holders, but the land to which a determination refers, the relationship with other rights and interests and reference to agreements reached. ORIC does not have the capability to engage with the complexity of native title law at this time. The Federal Court has the authority to determine if a native title corporation adheres to the prescribed requirements set out in the NTA and the PBC regulation including regulations as to membership. RNTBCs are able, under the PBC regulations, to admit other persons or classes of persons to be members. If there is any inconsistency this should be resolved via the internal dispute resolution mechanisms of the relevant RNTBC and their relevant rule books, which should include seeking the provision of professional advice. Failing resolution of the issue internally the matter should be dealt with in accordance with the RNTBCs guidelines for dispute resolution-whether this includes: a referral to a council of Elders and or another arbitral body. The Federal Court of Australia may review the constitution and the determination to ensure consistency with the PBC regulations in any contested proceedings.<sup>79</sup>

**12.2.4** RNTBCs hold or manage native title on behalf of the determined native title holding group. Membership of the native title holding group is determined in accordance with traditional laws and customs. In submitting an application to the Federal Court for a determination of native title, the applicant is required to define the group with sufficient clarity that the Court can determine whether a particular individual is a member of the group or not. Native title is generally held communally by a particular society, which is bound by law and custom. A determination of native title will rarely list a group of individuals that are the holders of native title, rather native title is held or managed by the RNTBC on behalf of a society – which is class of beneficiaries that is not determined at any single point in time but includes future generations. The RNTBC must therefore make decisions that are binding on those who hold ‘or may hold’ native title. This creates a fiduciary responsibility upon the RNTBC (either expressly as trustee RNTBC or implied as agent RNTBC). The relationship between a native title corporations’ membership and the native title holding group is therefore not straightforward.

The NTA and reg 4 of PBC Regulations requires that the members of the native title corporation at the time of registration and at all times after registration must all be members of the determined native title holding group or persons (or class of persons) agreed by the native title holding group. A presumption of eligibility of native title holders to become members is therefore legislatively mandated. All RNTBCs have some additional

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<sup>79</sup> *Dunghutti Elders Council Aboriginal Corporation RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88, Keane CJ, Lander and Foster JJ. See also L M Strelein, B Burbidge and C Hassing Forthcoming Issues Paper *Decision Making and Dispute Resolution* (AIATSIS Research Publications, 2017) *Decision Making and Dispute Resolution*



qualifications on memberships such as minimum age. Any additional classes of members or restrictive eligibility requirements (eg defined number of members per descent group) are rare.

However, despite the presumption of eligibility, native title holders do not automatically become members of their RNTBC. If they wish to join their RNTBC they must submit an application either before the RNTBC is registered (membership by registration) or after the RNTBC is registered (membership by application). It is not compulsory for native title holders to be members of their RNTBC.<sup>80</sup> Membership structures are a matter for individual RNTBCs to determine.<sup>81</sup> The common law native title group is a constantly changing intergenerational group. The diaspora of native title holders may also mean that the group may be difficult to precisely determine and or identify.

Proposals for automatic membership (as opposed to automatic eligibility) may require a level of precision in groups' definition that is not legally practicable. Membership of the common law native title holding group is a matter of the operation of law; whereas membership of the corporation is a matter within the powers of the directors of a corporation that is dealt with by way of application.

In practice however, the alignment of the native title holding groups and the membership of the corporation can reduce the complexity of dealings for directors and reduce the conflict between the distinct legal duties owed to the members and the native title holders. This may be appropriately dealt with by providing guidance, including through the replaceable rules system for RNTBC that reverses or qualifies the standard presumption of an absolute discretion on the part of directors to accept or reject membership. For example, model rules for RNTBCs could include a rule that directors cannot unreasonably deny membership to a native title holder. It is important to note that this will not resolve disputes about who is a member of the native title group. Further guidance through policy and procedure and informed practice could support directors' decision making in relation to membership. For example, policy guides should set out the kind of information to which a Board may have reference in determining membership, such as connection material, genealogies, expert advice, advice from the NTRB, historical documents, etc. Such guides also assist in improving understanding among RNTBCs about the seriousness of the decisions concerning membership.

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<sup>80</sup>Op.Cit. Blechynden and Burbidge: p41

<sup>81</sup> See N Duff *Authorisation and decision making in native title* (AIATSIS Research Publication, 2017) Decision making and RNTBCs pp213-220

**12.2.5** There are circumstances in which a corporation may wish to suspend or expel a member for disciplinary reasons (including consistency with cultural disciplinary action).<sup>82</sup> The circumstances in which a common law holder ceases to be a member is a matter for the relevant RNTBC, their dispute resolution procedures and then failing internal resolution—either arbitral or judicial relief. However, it should be clear that removal as a member of the corporation may not affect the individual person’s status as a member of the native title holding group and whatever rights or interest the person may hold under traditional law and custom, including being involved in native title decisions. These interactions between legal regimes can be managed through policies and procedures and development of RNTBC governance practice, including training and education specifically directed to RNTBC governance.

## **Flexibility**

**12.3.1** AIATSIS supports the Registrar having the authority and discretion to dispense with some of the obligations arising under the CATSI Act for smaller CATSI Corporations upon request from the relevant corporation. A new category of exempt CATSI Corporations is proposed earlier in these submissions.

## **Decision making and transparency**

Any proposed reforms of the CATSI Act with respect to RNTBC obligations will require further engagement and co-design with the native title sector, especially given the limited time in which the sector had an opportunity to consider and comment on the proposed reforms or to suggest more comprehensive or targeted reforms. Improving consistency between the CATSI Act and native title legislation will require careful consideration and negotiation with RNTBCs and their representative and regional support organisations. Promoting best practice amongst RNTBCs is not achieved by the imposition of unrealistic compliance expectations. There is great deal more that could be done in developing a community of practice and supporting resources for RNTBCs to strengthen governance and build an independent and authoritative native title sector that is free from the over-regulation and burdens of past regimes.

**12.5.1** The NTA and PBC regulations already require RNTBC to make their native title decisions available on request to interested individuals (reg 10). The Registrar may recommend via the use of relevant policies and or guidelines that RNTBCs maintain a register of native title decisions however this would be largely a compliance exercise and is perhaps better left as a decision for the relevant RNTBC, based on their administrative

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<sup>82</sup> L M Strelein, B Burbidge and C Hassing Forthcoming AIATSIS Issues Paper (2017) *Decision Making and Dispute Resolution AIATSIS response to Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006*

capacity. RNTBCs are already struggling in some instances to address even their basic administrative requirements.<sup>83</sup> RNTBCs are able to charge fees for access to these decisions by persons other than perhaps native title holders, other PBCs and NTRBs (s60AB of the NTA and Part 4 of the PBC regulations likely apply).

**12.5.2** Requests to review and inspect the registers of a CATSI Corporation's registers and or records is a matter properly determined by the directors as managers of the corporation, including appropriate fees and charges.

**12.5.3** AIATSIS submits that registers should not be made available to members of the public unless such application is made to the directors and approved by them upon request. There is a real administrative cost to RNTBCs to provide access to registers and this must guide rules and practice in this regard, including ensuring that apart from members and native title holders, other parties pay a fee for access.

## **Fees**

Further to the discussion above, despite the introduction of provisions to enable RNTBCs to charge fees for services in 2011, AIATSIS is concerned about the continued reticence of proponents of future acts to pay fees to RNTBCs for performing certain functions. Modelling of administrative costs of processing even the most simple future act notices is required to provide a better and even shared understanding across government, private industry and native title organisations. We note the work undertaken recently by the Queensland NTRB working group on this matter. We know anecdotally, and from recent case studies, that an extraordinary amount of voluntary labour is engaged in by RNTBCs, and directors in particular.<sup>84</sup>

**12.6.1** AIATSIS is supportive of RNTBCs publishing, and being encouraged to publish a schedule of fees. Again, however, unless the administrative burdens and access to resourcing is addressed, this should not be a legal or compliance requirement.

**12.6.2** AIATSIS supports the Registrar maintaining a register of opinions given in relation to fees. There is a concern, for example, that the appeal mechanisms in the NTA and PBC regulations that allow the Registrar to review a decision about fees could result in very long

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<sup>83</sup> N Duff, *Authorisation and decision making in native title* (AIATSIS Research Publication, 2017)

<sup>84</sup> See for example, <https://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/understanding-native-title-economies>.

delays in RNTBC receiving payments that are entirely justified.<sup>85</sup>

**12.6.3** After appropriate research and analysis the Registrar could be given the power to set such fees, only upon request. This could assist for example, in the context of continued disputes over fees between proponents and RNTBCs. In effect this could take the form of arbitration. The Registrar would need to be required to publish reasons and modelling for such fees to ensure that RNTBCs were appropriately compensated for the work carried out. This would require further discussion and support from RNTBCs and their representative organisations as there are risks in this approach, as we have seen with the arbitral powers of the National Native Title Tribunal which have demonstrably been exercised against the interests of native title groups.

### **Native title benefits and trusts**

Native title benefits, as defined under s59-50 of the *Income Tax Assessment Act 1997* (Cth) generally result from payments from future acts and Indigenous Land Use agreement or compensation determinations. The Australian law recognises that payments for the loss or impairment of native title rights and interests are not within the tax system and are not subject to income tax. These amounts are held on trust (express or constructive) and the accounting standards and common law rules in relation to the management of similar funds apply, including any requirements to account.

A list of trustees' duties at general law and that might be implied by a statutory corporate native title trustee includes:

- (a) The duty to exercise the standard of care of the ordinary prudent business person<sup>86</sup>. This standard is higher than the director of a corporation. Where the duties of the directors of a native title trustee corporation are under consideration, the trustee standard will force the director's standard of care and diligence to be higher
- (b) The duty to account and to provide information<sup>87</sup>
- (c) The duty to administer the trust personally which includes a duty not to delegate<sup>88</sup>
- (d) The trustee has a fiduciary duty not to misuse its position or knowledge or opportunity resulting from that knowledge to a third party and not to have a personal interest or inconsistent engagement with a third party<sup>89</sup>

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<sup>85</sup> L Strelein 2011. 'Prescribed Bodies Corporate: Charging fees for services', *Native Title Newsletter*, January/February, No.1/2011 (AIATSIS, Canberra), p5.

<sup>86</sup> *Re Speight; Speight v Gaunt* (1883) 22 Ch D 727 pp 739-740

<sup>87</sup> *Wroe v Seed*(1863) SC 9 LT 254. 66 ER773 p774

<sup>88</sup> PD Finn *Fiduciary Obligations* (Sydney LBC, 1977) Chapters 5-7

For some RNTBCs, these funds immediately distributed to the affected native title holders in accordance with traditional law and custom. For others, the terms of any agreement may prescribe an independent trustee. It is likely that requirements to account and provide information are held to the beneficiaries (that is, native title holding group) rather than to the members.

As noted above, native title decisions are decisions to surrender or otherwise do an act that affects native title. Native title decisions must be made in accordance with the underlying statutory trust or agency relationship between the RNTBC and the members of the native title group. They must also be made in accordance with the consent and consultation requirements and provisions of the PBC Regulations or they are deemed to have no effect.<sup>90</sup> These consultation and consent provisions of the PBC Regulations requires consultation with and obtaining the consent of all of the native title holders; which is likely to be a broader group than either the directors or the membership of the RNTBC.

**12.7.1-12.7.2** and **12.8-12.9** Given the complex tax and trust environment into which many native title benefits are paid AIATSIS submits that further consultation and engagement with NTRBS, NTSPs, the NNTC and trust fund managers such as the [Victorian Traditional Owners Trust](#) and the [Ambooriny Burru Charitable Foundation](#) is required to address the issue of financial reports and concerning native title benefits; including any additional powers for the Registrar to enforce compliance with relevant laws concerning obligations in relation to charitable and discretionary trusts that receive native title benefits. There is presently insufficient information on which the ORIC could determine if these reforms are appropriate or practical.

**12.9** Other proposals to achieve consistency between the *Native title Act 1993* (Cth) and the CATSI Act include the development of resources, models and precedents as well as specific training for RNTBCs. Together with a separate chapter within the CATSI Act and tailored condensed rule book and replaceable rules regimes would greatly assist RNTBCs to manage the rights and responsibilities of RNTBCs under different legal systems and disciplines.

AIATSIS is presently undertaking work on effective policy making, decision making and dispute resolution for RNTBCs.<sup>91</sup> It is critical that bureaucratic and technical matters do not divert attention away from the necessary strategic and operational planning that RNTBCs

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<sup>89</sup> *Ibid.* Also see D Martin and C Mantziaris *Native title corporations: a legal and anthropological analysis* (Federation press, Leichardt, 2000) pp152-154

<sup>90</sup> *Dunghutti Elders Council Aboriginal Corporation RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCAFC 88, Keane CJ, Lander and Foster JJ at [11]

<sup>91</sup> Forthcoming publication, Strelein, Burbidge, Hassing *RNTBC Dispute resolution and decision making* (AIATSIS Research Publications, Canberra, 2017)

are keen to proceed with. RNTBCs exist in perpetuity, building on centuries of law and governance traditions with their own values, ethics and principles that we are yet to fully appreciate, let alone accommodate in the Australian legal framework for native title governance. This longevity and resilience is an important form of self-identified Aboriginal and Torres Strait Islander governance. This is an opportunity for both governments and Aboriginal and Torres Strait Islander people to invest in Aboriginal and Torres Strait Islander governance via meaningful engagement.<sup>92</sup> The benefits from building strong native title governance in both legal traditions can also assist with intergenerational change that promotes a cultural resurgence, local decision-making, choice in development and intergenerational succession for thriving Aboriginal and Torres Strait Islander peoples.<sup>93</sup>

### **13. THE REGISTRAR AND THEIR POWERS**

In *Registrar v Monaghan*<sup>94</sup> the Registrar explained his regulatory role and referred to his 48 full time equivalent staff (as at 2015) in premises in Canberra, Perth, Broome, Darwin, Alice Springs and Coffs Harbour.<sup>95</sup> The Registrar described the role as being: to build the capacity of CATSI Act corporations and their directors through a 'number of unique statutory support functions, such as education programs, dispute resolution, research and policy.

The Registrar also deposed that his office has limited resources and he cannot oversee the daily governance and internal management of all CATSI Corporations noting that as at March 2015 there were 2600 CATSI Corporations with 60 per cent based in remote or very remote areas. Nearly all CATSI Corporations are not for profit organisations with some 20 per cent (as at 2015) registered as charities.<sup>96</sup>

AIATSIS submits that the Registrar has existing powers to intervene for enforcement purposes but that greater resources should be provided so that the ORIC is able to provide more special regulatory assistance to RNTBCs in particular so as to develop capacity and capability within the ORIC and in turn, in the native title sector.

**13.1.1** AIATSIS agrees that the CATSI Act could be amended so that references to the Registrar and their office are more flexible.

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<sup>92</sup> Jessica Weir (ed T Tran) *Native title and governance: the emerging corporate sector prescribed for native title holders* ((3)(9) *Land Rights Laws Issues of Native Title* AIATSIS Research Publications, Canberra 2007, Canberra) 11

<sup>93</sup> Geoff Buchanan 'Gender and generation in native title: Director demographics and the future of prescribed bodies corporate (6)(3) *Land Rights Laws Issues of Native Title*, AIATSIS Research Publications, Canberra, 2015) 18

<sup>94</sup> *Registrar v Monaghan* (No2) [2016] FCA 1143 Griffiths J

<sup>95</sup> See affidavit of Anthony Bevan, Registrar of Indigenous Corporations, dated 20 March 2015, filed in *Registrar v Monaghan* (No2) [2016] FCA 1143 Griffiths J at [27]-[30]

<sup>96</sup> *Registrar v Monaghan* (No2) [2016] FCA 1143 Griffiths J referring to the affidavit of Registrar Anthony Bevan dated 20 March 2015 at [27]-[30]

## **Power to amend the register of members**

**13.2.1** AIATSIS submits that the Registrar should not have the power to amend the register of members to include or add members as this is a power properly maintained by the directors of the corporation (and the common law native title holders in relation to classes of members of RNTBCs).

## **Exempting compliance with provisions in the rule book**

**13.3.1** AIATSIS believes that the Registrar should have the power in certain circumstances to exempt a corporation from complying with the provisions in the constitution either in a specific instance or upon request. It would also be of assistance if the condensed rule book could clearly identify what rules are replaceable rules and for there to be some form of special regulatory assistance that provides advice to CATSI Corporations in their establishment phase so as to avoid internal inconsistencies or contradictions within rulebooks/constitutions of CATSI Corporations.

**13.3.2** AIATSIS supports the Registrar having the power to impose conditions on such an exemption such as requiring the relevant provisions to be considered by members at the next AGM.

**13.3.3** AIATSIS supports specific case by case reporting and or a policy statement or class order being prepared by the Registrar concerning relevant exemptions.

## **Late fees**

**13.4.1** Given the limited resources available to CATSI Corporations and other burdens imposed upon them AIATSIS submits that the Registrar should not be given the power to impose automatic late fees for non-lodgement of reports in a similar fashion to ASIC.

## **The Registrar's investigatory powers**

**13.5.1** The CATSI Act timeframe of 14 days is sufficient.

## **Compliance notices**

**13.6.1** AIATSIS proposes an additional remedy for compliance notices, whereby ORIC makes further contact with the CATSI Corporation to ensure (1) such notice of non-compliance has been received and understood and (2) there is capacity for the relevant CATSI Corporation to respond to the notice. If after a period of three months there has been no response from the corporation then ORIC could proceed with the Special Administration measures.

## Enforceable undertakings

**13.7.1** The Registrar should be given the power to accept enforceable undertakings and to take action to enforce such undertakings rather than undertake a prosecution in the first instance for breaches of the CATSI Act.

AIATSIS Further submits that education and capacity building of CATSI Corporations is essential. However, the current capability of ORIC in this regard, particular to corporations that operate in complex legal or financial contexts is limited. The available pool of expert advice and support must go beyond ORIC.

Further education and assistance to CATSI Corporation boards to achieve effective corporate governance might include providing information, education and capacity building assistance in relation to such issues as:

- **directors' or board members' duties** (in particular the concept and practice of fiduciary duties owed to the corporation, as opposed to duties to particular groups or families);
- the differences between being a member of the corporation and being a client of the corporation, including the means by which a corporation and its board are accountable to members, clients and constituents;
- **meeting procedures** – for example, preparing meeting agenda and taking and distributing minutes;
- **the nature of the board's role and its relationship to the corporation's management**, and the functions and responsibilities of a corporation's public officer;
- **strategic planning**, including developing a corporation's goals, vision and objectives and drafting strategies to achieve these;
- **establishing management tools**, skills and processes, such as book keeping, resolution of disputes within organisations, and when and how to seek professional advice (legal, accounting or other).<sup>97</sup>

## 14. ALTERNATIVES: THE ACNC REGIME

**14.1 & 14.3** AIATSIS submits that the Registrar should be given the power to create a regime similar to the ACNC governance regime for CATSI Corporations that are charities and small corporations. It is important that the reform of Aboriginal and Torres Strait Islander Corporations be integrated and made consistent with the reform and regulation of the not for

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<sup>97</sup> Forthcoming publication, Strelein, Burbidge Hassing *RNTBC Dispute resolution and decision making* (AIATSIS Research Publications, Canberra, 2017). See also *A Modern Statute for indigenous Corporations: Reforming the Aboriginal Councils and Associations Act Cth 1976* Final Report of the Review of the Aboriginal Councils and Associations Act 1976 Cth (2002) p72



profit sector generally and not separate from it so as to examine relevant and irrelevant differences.<sup>98</sup>

## 15. GENERAL ISSUES

There remains a level of consistency between the contemporary requirements of the CATSI Act and the earlier review of Aboriginal and Torres Strait Islander corporations' legislation In 2002, that review proposed the following the appropriate and ongoing functions for the Registrar:

- Providing assistance with drafting of rules and applications for incorporation;
- Providing training and advice on good corporate governance;
- Providing training and advice about the operation of the CATSI Act and Regulations;
- Providing assistance with compliance with the regulatory and reporting requirements of the CATSI Act and Regulations;
- Preparation and provision of educational materials to promote better understanding of the CATSI Act and Regulations and corporate governance;
- Developing or supporting the development of appropriate skills, training and accreditation schemes for directors and officers of Aboriginal and Torres Strait Islander corporations;
- Coordinating with and, where appropriate, entering agreements with relevant government public funding bodies to ensure the efficient operation of the CATSI Act and Regulations and Aboriginal and Torres Strait Islander Corporations (including through the sharing of information,
- Coordinating external intervention in the management of Aboriginal and Torres Strait Islander corporations, and coordinating special regulatory assistance activities);
- Where appropriate, providing education and training to other government agencies (both Federal and State) involved in the funding of Aboriginal and Torres Strait Islander corporations on the operation of CATSI Act and Regulations, about the respective roles of the Registrar's Office and public funding bodies in relation to the oversight of and intervention in the affairs of Aboriginal and Torres Strait Islander Corporations;
- Consulting with Aboriginal and Torres Strait Islander communities about emerging issues in corporate governance and company law.<sup>99</sup>

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<sup>98</sup> Kathleen Clothier 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' (2006) 10 *Australian Indigenous Law Reporter* 1, p19. See also [IBN Submission on behalf of Yinhawangka, Banjima and Nyiyiparli Peoples in response to the Native Title, Indigenous Economic Development and Tax Consultation Paper, May 2010](#)

It is important that the Registrar promote and act on their 'special assistance role' to ensure the good health and good governance of CATSI Corporations before they are in difficulty or extreme interventions are made. It is also of assistance for ORIC to publish material that educates the essential roles and responsibilities for senior managers in CATSI Corporations.<sup>100</sup>

While acknowledging the regulatory gap between the Federal Court's oversight of the native title regime and the CATSI Act, the ORIC does not currently have capability whether in capacity of expertise, to provide regulatory oversight of the PBC regulations. The preponderance of practice to date has demonstrated a reluctance to adapt the corporate framework to the particular needs of native title corporations, but rather to seek to shift the complexity outside the corporation. ORIC would need to make a significant mind shift and build both capability and trust before native title holders would be expected to support such a role. More thought and discussion is required to interrogate how and if this investment in building the confidence in ORIC to administer the native title regulation should be made.

### **Alignment with the Corporations Act**

**15.2** There are other areas where increased alignment with the *Corporations Act 2001* is desirable and appropriate. With respect to corporate governance the *Corporations Act 2001* and the CATSI Act are already closely aligned.<sup>101</sup> However:

if the CATSI Act is to meet the needs of Australia's Aboriginal and Torres Strait Islander people, it is crucial that it differs from the Corporations Act 2001 (Cth) so as to allow Aboriginal and Torres Strait Islander Australians to run their organisations based on their own cultural values and practices, rather than on Western European legal values and practices.<sup>102</sup>

AIATSIS submits that further harmonisation of the CATSI Act provisions with the provisions of the Corporations Law would mean that interested parties may benefit from the settled jurisprudence relating to the Corporations Law provisions. This may potentially lead to greater clarity and certainty. AIATSIS submits that it will always be the particular context of Aboriginal and Torres Strait Islander Corporations that forces close examination of the

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<sup>99</sup> *A Modern Statute for indigenous Corporations: Reforming the Aboriginal Councils and Associations Act Cth 1976* Final Report of the Review of the Aboriginal Councils and Associations Act 1976 Cth (2002) pp 248-249

<sup>100</sup> See also Research Discussion Paper No.17: Patrick Sullivan '*Indigenous Governance: The Harvard Project on Native American Economic Development and appropriate principles of governance for Aboriginal Australia*' (AIATSIS Research Publications, Canberra, 2006) pp18-24 *Governance management, cultural appropriateness, civil and human rights.*'

<sup>101</sup> Marina Nehme and John Juriansz '*The Evolution of Indigenous Corporations: Where to Now?*' (2012) 33 *Adelaide Law Review* 101, p131

<sup>102</sup> *Ibid.* pp 130-131

corporation and its particular circumstances to establish its obligations even where CATSI provisions mirror the Corporations Law.

## **Dispute resolution**

### **15.4.1 What other powers could the Registrar be given to help resolve disputes involving members or directors of CATSI Corporations?**

The Registrar could provide support for requests of an independent facilitator, mediator or arbitrator and develop a network of experts to provide independent advice to CATSI Corporation boards about their roles, responsibilities, rights and obligations under the CATSI Act and their own rules. A greater emphasis on facilitation of good governance could assist in building the confidence of corporations in their own governance and their ability to manage conflict. Facilitators may be better able to successfully achieve a voluntary resolution of issues in ways that build long terms organisational resilience, without any further need for interventions such as mediation or arbitration or other more serious action by the Registrar or the Courts.

Where matters remains unresolved, the Registrar could play a role in appoint an arbitrator and managing the arbitration process. Under a CATSI Corporation's rules the Registrar may be required to arbitrate when a dispute arises. There does not appear to be any specific legal impediment to the Registrar having a role in mediation as well as arbitration, with the possible exception of conflict of interest.

There are a number of limitations in only examining the dispute management rules to gauge an understanding of how RNTBCs manage and resolve disputes, for example many disputes may be avoided or mitigated through strong decision-making processes or there may be additional processes that RNTBCs utilise that they do not outline or describe within the confines of their rulebook. Disputes can be complex and multifaceted and not captured by the parameters of the constitution. Further engagement with RNTBCs is required in this area.<sup>103</sup> Many answers lie in the provision of strong examples of good decision making that avoid the occurrence of and subsequent management of disputes.

It is of particular concern when anecdotal or small samples are used to derive 'rules' for what constitutes good governance and decision-making. For example, an intervention or circuit breaker in one dispute (eg radically changing the rules for appointment of directors away from representational election to general election) may work to build stronger decision making in one circumstance, but those same governance structures may be a source of strength in decision-making in another. Building strong decision making and dispute

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<sup>103</sup> Op.Cit. Blechynden and Burbidge: 95

management within corporations requires bespoke processes and outcomes that are designed and owned by the members (and native title holders in the case of RNTBCs), but they need to be supported by accessible and culturally capable expertise and advice.

An understanding of decision making and dispute resolution for RNTBCs necessitates further engagement with RNTBCs and qualitative study into how decision making and dispute resolution works 'on the ground'. Further research could explore, for instance, the frequency at which RNTBCs have to make decisions and deal with disputes, the effectiveness of their decision making methods and dispute resolution procedures and whether they utilise any additional policies or procedures to deal with decision making and dispute resolution in addition to that within their rulebooks.<sup>104</sup> This is an area of ongoing research and practice development for AIATSIS.

In summary, any amendments to the CATSIS Act must be able to demonstrate that they are empowering rather than disempowering; that they celebrate and value Indigenous difference and ways of governing and do not regulate or burden indigenous corporations in ways that do not meet the expectations of Aboriginal and Torres Strait Islander peoples to be free from discrimination. For native title corporations, any amendments must accommodate the unique nature of native title and the role and responsibilities of RNTBCs.

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<sup>104</sup> Op.Cit. Blechynden and Burbidge: 100