



Australian Government

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Resources Sector Regulation Study
Productivity Commission
LB2, Collins Street East
MELBOURNE VIC 8003
Email: resources@pc.gov.au

Dear Commissioner Gropp,

Submission to the Inquiry on Resources Sector Regulation

Thank you for the opportunity to make a submission to this inquiry. As the Registrar of Aboriginal and Torres Strait Islander Corporations, my role is primarily concerned with the regulation and support (including capacity building) of all corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

I am supported by the Office of the Registrar of Indigenous Corporations (ORIC). ORIC assists and regulates corporations that are incorporated under the CATSI Act. It does this in a variety of ways, for example by:

- advising them on how to incorporate;
- training directors, members and key staff in good corporate governance;
- making sure they comply with the law, and
- intervening when needed.

Minister Wyatt announced a comprehensive review of the CATSI Act in December 2019 which is being led by the NIAA. A Draft Report on the CATSI Act Review has been published on the NIAA website, and consultations are currently being conducted. For your information, details of the review can be found at <https://www.niaa.gov.au/indigenous-affairs/economic-development/review-catsi-act>.

Dispute Resolution

The *Native Title Act 1993* (Native Title Act) requires Registered Native Title Bodies Corporate (RNTBCs) to be incorporated under the CATSI Act. It should be noted however that they represent only about six per cent of the 3,354 CATSI Act corporations registered as at 25 June 2020.

The responsibilities conferred on the Registrar because the CATSI Act is a special measure mean that my office engages in regulatory activity that other regulators would generally avoid, for example, disputes between members and directors. The Registrar has statutory functions that are associated with disputes in relation to corporate governance either within the corporation, or between the corporation and other parties.

Membership is the issue that provokes most disputes, and for which ORIC's help is frequently sought, particularly in regard to native title bodies. Membership confers rights on members, including an ability to vote on directors and resolutions, so when a membership application is rejected or membership is cancelled, the applicant or member involved may dispute the outcome. The other major area of dispute is around transparency of the treatment and distribution of native title money. Proposals to improve the transparency of decision making, recording and reporting of receipt and expenditure of native title money are discussed later.

Additionally, the consent determination process of native title decisions by common law holders is currently not regulated. Under proposed amendments to the Native Title legislation currently before the Parliament, RNTBCs will be required to lodge with the Registrar certificates confirming native title decisions have been made in accordance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999*. The proposed amendments will also require rule books of RNTBCs to contain dispute resolution processes in relation to native title disputes. This will, I expect, bring more native title disputes into the Registrar's purview.

As currently proposed, the Registrar would also have a role in assisting the National Native Title Tribunal (NNTT) to mediate disputes arising under this process although neither the NNTT Registrar, or the Registrar of Aboriginal and Torres Strait Islander Corporations have a binding arbitral power. This is something the National Indigenous Australians Agency (NIAA) is exploring as part of the current review of the CATSI Act, in relation to administrative issues such as membership disputes and compliance with the process for making native title decisions.

Information Request 10.1

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native title agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

The purpose of the CATSI Act, as set out in the Revised Explanatory Memorandum is to improve governance and capacity in the Indigenous corporate sector. Section 658-1 of the CATSI Act outlines the functions of the Registrar which includes conducting public education programs on the operation of the Act and on the governance of Aboriginal and Torres Strait Islander corporations. The Revised Explanatory Memorandum notes that this

provision aims to address some of the underlying problems, including lack of awareness and lack of skills, that lead to disputes and invalid actions and to encourage good corporate governance. Significantly, it identifies this as a key capacity building measure.

ORIC is not a funding body and provides no direct funding to Indigenous corporations.

ORIC currently provides a range of training courses that are open to directors, future directors, members and key staff of CATSI corporations. Topics include Introduction to Corporate Governance workshops (three day), governance workshops (two day), Building Strong Stores, Certificate IV in Business (Governance), Diploma of Business (Governance), corporation specific training, and Understanding Finances for Corporations.

ORIC funds the costs of delivering the workshop and materials, training venue and catering during the day (morning tea, lunch and afternoon tea). In previous years, ORIC paid participants' costs, including accommodation, meals and reasonable travel costs for all participants attending the three day Introduction to Corporate Governance (ICG) workshops which are held in capital cities. In January 2019, due to budgetary considerations, the policy was changed so that ORIC only covers the costs for participants if they are from a small corporation.

As well as providing training, ORIC produces a broad range of published materials to provide information and support for the staff, members and directors of corporations. This includes a range of fact sheets, and policy statements published on the ORIC website, and the ORIC ORACLE newsletter.

Additionally, the Registrar and other staff are available to provide presentations and speak to public gatherings, and attend general meetings and director's meetings. ORIC also provides a call centre facility providing information and advice to corporations, and local support staff are available in 8 locations around Australia to talk one on one with corporations and offer their support.

Finally, ORIC also provides access to free services including:

- LawHelp - a referral service provided in partnership with some of Australia's top lawyers and law firms who volunteer their time and expertise to help corporations interpret and comply with laws and manage the legal side of registration and other legal issues;
- ORA – ORIC Recruitment Assistance that offers recruitment assistance to corporations registered under the CATSI Act; and
- Independent Directory - a free service that connects skilled and interested people looking to become an independent director with Aboriginal and Torres Strait Islander corporations looking to appoint independent directors to their boards.

ORIC is well positioned to work with the NIAA and other stakeholders to continue to build the capacity of PBCs were the resources available.

Information Request 10.4

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

As outlined in the submission from the NIAA, the review of the CATSI Act is currently exploring a range of proposals around benefit management structures including providing for the establishment of trusts under the CATSI Act and providing regulatory oversight for PBC functions.

ORIC regularly receives feedback about the need for greater transparency in decision-making and recording of, and reporting about, receipt and expenditure of native title monies, including in external trusts. While RNTBCs represent 6.5 per cent of CATSI corporations, they generate 22 per cent of complaints to ORIC. Many of these complaints concern governance shortcomings, including the use of native title benefits. This highlights the need for improved regulatory infrastructure that supports the transparent and accountable management of monies derived from native title.

Currently common law holders, particularly those receiving large native title related payments such as mining royalties, often rely on complex benefits management structures. These may, in addition to a RNTBC, include trusts, subsidiaries and corporations established under the Corporations Act. This is a common way to manage risk and reduce tax. Regulatory oversight of these benefits management structures is fragmented. They may be regulated by ASIC, the ACNC, state and territory jurisdictions (for charitable trusts) or have no external regulator, such as for private discretionary trusts. These arrangements can be costly to establish and maintain. They also limit the transparency and accountability to RNTBC members and common law holders about the receipt and use of native title monies.

The Review is canvassing providing for the creation of trusts under the CATSI Act. In turn, the Registrar could hold a Register of Trust Deeds ensuring accessibility and transparency for members and common law holders and could require regular reporting on trust activity.

I strongly support these proposals and look forward with interest to the outcomes of the consultations and the recommendations of the review.

Once again, I thank you for the opportunity to provide input to the draft report.

Yours sincerely

Selwyn Button
Registrar