

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006

“Positive or Negative Discrimination” by

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INTRODUCTION

“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 Indigenous people

....

Communities that make a conscious decision to go back to the beginning and explore where their institutions are out of sync with their cultures - not only traditional culture but the day-to-day culture of how the community actually operates - are the ones that prosper over the long term¹.” Jackie Huggins

“It not appropriate for Aboriginal corporations to have lower corporate governance standards².” The Hon Warren Entesch

Indigenous governance is a major focus of governments, indigenous communities and the wider community. All who strive to create better outcomes for indigenous communities see good governance as pivotal.

The critical need for good governance is not confined to Australian indigenous communities and their institutions. Internationally, countries and institutions in perceived ‘weak governance zones’ are seen as a major risk to international global trade and to multinational companies and governments dealing with them³.

It seems apparent that the Federal government considers that the current *Aboriginal Councils and Associations Act 1976* (‘ACA Act’) has failed to create a strong governance framework for indigenous organisations. In its view, ‘*the ACA Act has*

¹ “*Indigenous good governance begins with communities and institutions*”, by Jackie Huggins extracted from a speech given to the 10th Annual Cultural Heritage and Native Title Conference, held in Brisbane on 30 September 2003, <<http://www.onlineopinion.com.au/view.asp?article=784>> accessed 27 June 2006.

² The Hon Warren Entesch, Second Reading speech, CATSI Bill at page 1

³ “*OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*” OECD 2006 <http://www.oecd.org/dataoecd/26/21/36885821.pdf> accessed 26 June 2006

inadequate protection for members, rigidity of corporate design and insufficient third party protection which makes securing credit more difficult.⁴

The *Corporations (Aboriginal and Torres Strait Islander) Act 2005* ('CATSI Act') is a substantive piece of 'black letter' law, based on a modernised *Corporations Act 2001* ('Corporations Act'). By significantly 'beefing up' the accountability of Aboriginal corporations and those who direct and manage them, the Federal government hopes to provide improved governance options to stakeholders including members (and consequently, Indigenous communities), creditors, and the regulator of indigenous corporations, the Office of Aboriginal Corporations ('ORAC').

The CATSI Act is aimed at addressing the 'weak governance zone' that the Federal government sees as indigenous governance.

This paper provides a legal analysis of the CATSI Act to see if the government's aims in introducing the Act, are likely to be met. Recommendations for changes to the CATSI Act and other matters are set out at the conclusion of the paper.

PURPOSES OF THE CATSI ACT

The CATSI Act was introduced into the Australian Parliament on 23 June 2005. A new package of laws, which replaces the *Aboriginal Councils and Associations Act 1976*, was assented to on 4 November 2006⁵. The total package includes:

- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006*
- *Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Act 2006* – this Act operates to remove any contradictions or gaps between the Corporations Act and the new CATSI Act.

The new legislation is due to commence on 1 July 2007 (subject to a 2 year transition period for some provisions).

In both the Second Reading Speech by The Honourable Mr Warren Entesch and in earlier reviews referred to in the Overview of the Explanatory Memorandum to the Act⁶ the purpose of the Federal government in creating the CATSI Act was the need to overcome the 'rigidity of corporate design', achieve 'simplicity' and improve 'accountability'⁷.

⁴ '*Corporations (Aboriginal and Torres Strait Islander) Act 2005: Overview of the Explanatory Memorandum*' at page 4

⁵ No. 124, 2006

⁶ See para 3.3 of Overview of the Explanatory Memorandum

⁷ See page 1 of 2nd Reading Speech

To overcome ‘rigidity of corporate design’

“Institutions for the delivery of services, development programs and policing of basic standards of respectful behaviour should adhere to universal standards of good management first and foremost⁸.”

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 circumstances of individual groups’⁹. Aboriginal corporations are permitted to include provisions in their constitutions that take into account cultural factors¹⁰. This is intended to provide more structural flexibility. However, presumably any such provisions must still be consistent with the CATSI Act, other legislation, the common law and rules of equity especially given the current government’s ‘hard line’ approach of non recognition of cultural factors in the area of sentencing of violent offenders. It is unlikely that cultural factors that are contrary to governance standards embodied in the CATSI Act will be permitted. Indeed, the CATSI Act already provides for mandatory ‘internal governance rules’ in all constitutions¹¹.

It is hard to see what special provisions would not already be permitted in the constitution of a company limited by guarantee, given that the Corporations Act already permits a great deal of flexibility in how governance arrangements may be structured.

The CATSI Act, unlike the Corporations Act, imposes significant control by the Registrar over the corporate design of Aboriginal corporations, far more so than does ASIC over companies limited by guarantee. For instance, the Registrar has the power to pre-approve all constitutions before they become effective. Given the importance placed on the ‘special assistance’ role of the Registrar, it is hoped (though not spelt out in the CATSI Act) that the Registrar will be prepared to pre-vet constitutions and provide ‘in principle’ approvals.

However, it would appear that it is not the CATSI Act, itself, which is intended to provide for flexibility of ‘corporate design’ but rather the power of the Registrar to exempt bodies from the usual operation of the CATSI Act. This flexibility is primarily focused on exempting bodies from the full rigour of record keeping and financial reporting¹². Such exemptions, however, do not involve cultural factors but rather size and complexity of operations.

Improve simplicity

Simplicity - fact or fiction?

The CATSI Act is a highly complex piece of legislation. It is an amalgam of provisions from the Corporations Act, State Associations Incorporation legislation and untested new provisions unique to the CATSI Act.

⁸ Patrick Sullivan, 2006 *“Indigenous Governance – The Harvard Project on Native American Economic Development and Appropriate Principles of Governance e for Aboriginal Australia”* AIATSIS Discussion Paper 17, at page 7.

⁹ See para 1.7 of Overview of the Explanatory Memorandum

¹⁰ See para 1.7 of Overview of the Explanatory Memorandum

¹¹ Division 66 of CATSI Act

¹² Part 7-4 and 7-7 of CATSI Act

The steps to actually incorporate are relatively straight forward (although more complex than under the Corporations Act) but are subject to significant discretion of the Registrar to refuse incorporation on several grounds. It cannot be said that there is a ‘right to incorporate’, as applies to companies (subject to following a simple set of administrative and legal requirements). In the case of for profit Aboriginal corporations, the policy grounds for these powers are not clearly articulated.

However, many Aboriginal corporations may find significant difficulty in complying with the ongoing compliance obligations. The complexity is exacerbated for small and medium Aboriginal corporations (which are yet to be defined by regulations) even allowing for reduced record keeping and financial reporting obligations.

The complexity of compliance coupled with the significant increase in exposure of Aboriginal corporations and directors and officers under the civil and criminal penalty regimes may ultimately militate against Aboriginal corporations remaining under the CATSI Act.

Civil penalties

Both civil and criminal penalties apply to contraventions and offences under the CATSI Act. ASIC gained the power to seek civil penalties under the Corporations Act only in 1993 with the introduction of the civil penalty regime¹³.

Importantly, the civil penalty regime permits ORAC to prove a contravention of a provision of the CATSI Act on a lower onus of proof, namely, the balance of probabilities. This allows the Registrar a significantly easier means of enforcing many contraventions including non-criminal breaches of directors’ duties and insolvent trading. Civil penalties allow the Registrar to avoid taking criminal action, at least in the first instance and has proved to be an often used and effective tool for ASIC. ORAC is still able to seek significant remedies such as fines, disqualification from management and damages.

Civil penalties have been the subject of scrutiny¹⁴ by the Australian Law Reform Commission which contended that compliance with laws subject to civil penalties was most effective when a pyramid approach as postulated by Ayres and Braithwaite¹⁵ is followed:

“My contention is that compliance is most likely when the regulatory agency displays an explicit enforcement pyramid. ... Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution

¹³ The civil penalty provisions in Part 9.4B of the *Corporations Law* (now the *Corporations Act*) came into operation on 1 February 1993. The *Corporate Law Economic Reform Program Act 1999* (Cth) consolidated and streamlined Part 9.4B with s 1317E setting out the civil penalty provisions under the *Corporations Act*.

¹⁴ “ALRC 95 *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*”, 31 October 2002

¹⁵ Ayres, I and Braithwaite, J (1992) “*Responsive Regulation: Transcending the Deregulation Debate*” Oxford University Press, New York.

ensues; if this fails the plant is shut down or a licence to operate is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid’.

This approach may not suit the government which may wish ORAC to move to the ‘top of the pyramid’ as a first, not a last, step. Government priorities and those of ORAC could conflict from time to time and the bigger issue of political influence over regulatory priorities will be keenly watched in the future.

It will be important for ORAC to explain its intended approach to Aboriginal corporations and their officers given the significant powers open to the Registrar.

Civil penalty provisions do not apply to breaches of State Associations Incorporation legislation thus providing yet another disincentive for not for profit Aboriginal corporations to incorporate under CATSI Act or to remain under the Act.

Strict liability offences

The CATSI Act contains a large number of strict liability offences based on Corporations Act offences¹⁶. Unless the Registrar is prepared to follow the ‘pyramid’ approach described above for civil penalty provisions then there is a risk that many Aboriginal corporations will find themselves in multiple breach situations on an on going basis.

Presumably the government will not be prepared to fund fines incurred. Some Aboriginal corporations may fail through lack of funding to pay fines especially when that organisation is almost totally dependent upon government funding. Does the government have a ‘back up’ strategy, especially for bodies that deliver ‘essential services,’ should an Aboriginal corporation fail in these circumstances?

And just how aggressive a regulator will ORAC be? Why include such draconian penalties both criminal and civil if, in reality, ORAC’s main focus will be to provide special assistance?

Regulation of different types of Aboriginal corporations

The CATSI Act regulates:

- *Different types of bodies:* For profit and not for profit Aboriginal corporations, unique ‘trustee’ type bodies, namely, Native Title corporations, Aboriginal corporations that provide essential services and small Aboriginal corporations that may not trade and may be in receipt of no or minimal government funding. The small, medium and large distinctions are made primarily for financial reporting purposes whereas the Corporations Act makes a further distinction in reducing red tape for proprietary companies vs public companies. The CATSI Act does not make this further distinction, thus imposing many public company obligations on small and medium commercial and not for profit Aboriginal corporations.

¹⁶ See Table in para 3.40 of Overview of Explanatory Memorandum

- *Small, medium and large Aboriginal corporations:* Small and even medium sized not for profits would ordinarily incorporate under a State AIA unless they carry on activities interstate or have other strong reasons for choosing the far more rigorous and costly structure of a company limited by guarantee under the Corporations Act. Until State Associations Incorporation legislation was introduced in each State jurisdiction in the early 1980s, virtually the only way to incorporate a not for profit body (unless specific legislation was available, for example, for many Church bodies) was as a public company limited by guarantee. When the cheaper and less complex alternative of incorporated associations' legislation was introduced, most unincorporated small not for profits chose this more appropriate structure and continue to do so. However, small and medium Aboriginal corporations are to be regulated by public company regulation under the CATSI Act, which is comparable to regulation of public companies limited by guarantee under the Corporations Act. For further comment, see below '**Small, medium and large Aboriginal corporations**'.

For profit Aboriginal corporations

The Act does not distinguish between for profit and not for profit corporations and allows registration of both¹⁷. There is no prohibition on Aboriginal corporations trading and distributing their profits to members. Both for profit and not for profit Aboriginal corporations are regulated by the same CATSI Act provisions, for example, s526-25 allows distribution of assets to members on a voluntary winding up.

However, there is no easy method for commercial Aboriginal corporations to distribute profits as there are no provisions for the issue of shares or share classes. The name of a 'for profit' Aboriginal corporation cannot be distinguished from a 'not for profit' (other than a Native Title corporation).

How a for profit Aboriginal corporation is supposed to distribute profits will be a matter solely for the constitution which may not constitute sufficient power. There appears to be few incentives or, indeed, mechanisms for a for profit body to utilise the CATSI Act.

Small, medium and large Aboriginal corporations

The categorisation of Aboriginal corporations into small, medium and large under the CATSI Act is for the primary purpose of differentiating their financial reporting obligations (plus appointment of a contact officer rather than a secretary). Under the Corporations Act, the categories of small and large are used to differentiate financial reporting obligations of proprietary limited companies, only.

The main stakeholders of small proprietary limited companies (apart from creditors) are usually the members who also are usually, the only directors. Normally, , they do not receive government funding and if banks or larger creditors do require financial

¹⁷ Section 26-1 of CATSI Act– refers to the need for a very large trading corporation with complex subsidiary arrangements to register under another Act (this comment confirms that small commercial trading corporations may register under the CATSI Act). See also s96-1of CATSI Act which permits the constitution to contain a provision distributing assets to members on a winding up.

information, a small proprietary limited company would prepare such information notwithstanding its categorisation.

However, even small Aboriginal corporations will usually be in receipt of government funding. If they are, then should they not be required to prepare some basic audited accounts (even if the auditor is the local accountant)? Again, the comparison should not be with small proprietary limited companies but with comparably sized incorporated associations and other not for profits that receive government funding. It is possible that too little scrutiny is envisioned of the small and medium Aboriginal corporations.

The report of the then Parliamentary Joint Statutory Committee on Corporations and Securities '*Report on Aspects on the Regulation of Proprietary Companies*', delivered March 2001 has found shortcomings in the 'small and large' categorisation. The Committee was charged to undertake a mandatory review of the small and large proprietary limited categories. There is no mention of a consideration of the Committee's findings in the Overview of the Explanatory Memorandum.

If, in the future, this categorisation should change under the Corporations Act (for example, to return to reporting based on ownership or control of a proprietary company by a public company) then how should this affect the basis for categorisation under the CATSI Act? This may require a rethink of the underlying rationale for the small, medium and large categories.

Special features under the CATSI Act

The CATSI Act includes an *ad hoc* mix of provisions unique to Aboriginal corporations, for example:

- *majority of directors cannot be employees*¹⁸: a similar provision is not in Corporations Act but does apply as a non-mandatory guideline in ASX Corporate Governance Guidelines;¹⁹
- *a majority of directors must be members*²⁰: a similar provision is not in Corporations Act nor under State Associations Incorporation legislation (though may be present in Model Rules of State Associations Incorporation legislation and rules of companies limited by guarantee);
- *Chief Executive Officer who is a director may not chair directors' meetings*²¹: a similar provision is not in Corporations Act nor in State Associations Incorporation legislation;
- *maximum 2 year term for directors*²²: ASX Listing Rule 14.4 sets a 3 year limit for directors of a listed company – there are maximum terms under some State Associations Incorporation legislation but not under the Corporations Act;

¹⁸ See s246-5 of CATSI Act

¹⁹ ASX '*Principles of Good Corporate Governance and Best Practice Recommendations*' - <http://www.shareholder.com/visitors/dynamicdoc/document.cfm?documentid=364&companyid=ASX>
> accessed 31 March 2006

²⁰ See s246-5 of CATSI Act

²¹ See s246-5 of CATSI Act

The policy of ‘best practice’ governance which underlies these provisions is laudable especially if the Federal government is correct in viewing indigenous governance as a “weak governance zone”. However, it may be counter productive if indigenous corporations decide to opt out to alternative less rigorous and prescriptive regulatory regimes including under the Corporations Act and State Associations legislation.

Disincentives to becoming or remaining an Aboriginal corporation

There would appear to be several disincentives for small and medium Aboriginal corporations, in particular, to register or remain under the CATSI Act if they have a choice. For example, under most State Associations Incorporation Act legislation there is:

- *no or limited statutory duty of care* – no equivalent to s180 Corporations Act (s265-1 of CATSI Act): Under South Australian Associations provisions, a penalty of \$1,250 plus damages for breach of the obligation to act with ‘reasonable care and diligence’, apply; compare fines of \$200,000 per contravention and 20 years disqualification from management and damages under the CATSI Act);
- *no insolvent trading liability* - with some exceptions such as under New South Wales Associations provisions;
- *no liability of officers and employees should they provide misleading and deceptive information to a director, member by commission or omission etc* - whilst laudable, s561-5 CATSI Act imposes significant compliance obligations on Aboriginal corporations to ensure that accurate information reaches the board and members and others; no equivalent under State Associations legislation, equivalent to s1309 under Corporations Act.
- *no civil penalty regime* ²³: discussed below, not applicable to State Associations Incorporation legislation;
- *no related party provisions* ²⁴ : such provisions apply to public companies only and entities controlled by them and their controllers under Chapter 2E Corporations Act & do not appear in State Associations Incorporation legislation;

When Aboriginal persons are deciding upon a structure for their body, they will weigh up the pros and cons of different structures and their flexibility, complexity and personal risk to officers and employees. The Explanatory Memorandum and the Act do show some ‘carrots’ to form and stay under the CATSI Act, for example, a preparedness by the Registrar to be flexible in financial reporting obligations, to offer advice and training and the ‘early warnings’ system under s439-20 of CATSI Act.

²² See s246-25 of CATSI Act

²³ See Div 386 of CATSI Act

²⁴ See Part 6-6 of CATSI Act

Unless they are not given a choice (such as Native Title corporations), many Aboriginal not for profits may seek to avoid the CATSI Act and opt for regulation under a State AIA or the Corporations Act. The outcome could be a significant opting out from transitioning to the CATSI Act.

Most State Associations Incorporation Acts have been, or are in the process of being, modernised but remain far less rigorous both as to personal liability and complexity, for incorporated associations. Also, although they are State based, an incorporated association in any State may seek to become an Australian Registered Body under the Corporations Act and thereby, carry on business interstate²⁵.

Similarly, a for profit Aboriginal corporation could prefer to transition to, or form as, a proprietary limited company or a co-operative rather than incur the added rigour of what amounts to public company accountability under the CATSI Act without the share capital and charges mechanisms to function effectively.

ACCOUNTABILITY VS CAPACITY BUILDING

The change of emphasis from ‘simplicity’ to accountability is arguably the main focus of the CATSI Act.

Corporate governance standards of directors and officers

Will the imposition of higher standards lead to improved management practice?

The Overview of the Explanatory Memorandum assumes²⁶ that the standard of management will be enhanced by introducing statutory duties and increasing penalties for breach of duties by senior management. This assumption is not supported by any research detailed in the Memorandum.

It is equally arguable that the performance of managers could improve, not as a result of increased penalties, but rather as a result of improved clarity of roles and responsibilities, better oversight by independent boards, improved board and management training, increased resourcing to implement better quality systems and better alignment of the interests of managers with those of the Aboriginal corporation.

In the Queensland Crime and Misconduct Commission Report ‘*Making a Difference - Governance and Accountability of Indigenous Councils*’ dated October 2002, the authors explore the Queensland government’s efforts to support Aboriginal Councils. The report found that Councils repeatedly failed to adequately manage their financial reporting obligations, notwithstanding substantial assistance provided by Queensland government departmental officers. The report details the unique logistical and infrastructure problems faced by these Councils in trying to comply with an extraordinary range and complexity of responsibilities.

²⁵ See Part 5B.2 Div 1 of the Corporations Act.

²⁶ See para 3.21 of Overview of Explanatory Memorandum.

Related party transactions

The related party provisions²⁷ ('RPT') are mostly a reflection of the Corporations Act provisions under Chapter 2E. The RPT provisions prohibit the provision of any financial benefits to a related party subject to certain exceptions and member approvals. However, it may be appropriate to start 'from scratch' and examine the actual 'evil' that the RPT provisions are intended to constrain in an Aboriginal context.

For instance, the definition of 'related party' under s293-1 of CATSI Act prohibits the provision of financial benefits to 'family related parties', namely parents and children of a director of an Aboriginal corporation. It may be more appropriate to also cover, for example, members of a director's extended familial group (where that interest is not shared by all the members as a whole). The RPT provisions are very much based on Western concepts of the 'nuclear family' whereas this may not be appropriate in the context of more traditional communities.

Insolvent trading liability

The CATSI Act, unlike the ACA Act, imposes insolvent trading liability on directors of an Aboriginal corporation²⁸. Of all changes introduced in the CATSI Act, it is these provisions that are most likely to be of concern to directors. This is because the provisions, although providing defences, can be breached without an intention to do so or even awareness of having breached the Act.

Again, the civil penalty provisions are applicable and provide for substantial fines, disqualification from management and damages actions against individual directors.

Substantial internal reporting systems will be vital for all Aboriginal corporations (which militates against relief from stringent financial reporting obligations for small and medium bodies contemplated by the CATSI Act) Detailed board training will also be vital, especially in the area of financial literacy, to raise awareness of those 'passive' directors who currently over rely on management and others. 'Shadow directors', namely, persons in accordance with whose instructions or wishes a director is accustomed to act will need to consider their position should they decide to assist a struggling board in a 'hands on' manner²⁹.

Departmental and other funding bodies may not be able to force a defunded Aboriginal corporation to continue trading whilst transitioning to a replacement body, if to do so would incur a breach of the insolvent trading provisions. Wording in many funding agreements may need to be revisited.

Areas where accountability is lacking

There are several important areas where Aboriginal corporations perhaps should be made more accountable, especially if they are not for profits and receiving taxpayer funding and private sponsorships.

²⁷ See s287-1 of CATSI Act

²⁸ See s531-1 CATSI Act where the provisions are incorporated by reference to the Corporations Act provisions.

²⁹ See s683-1 CATSI Act.

Distribution of profits and assets to members

There is no prohibition in the CATSI Act on distribution of profits or assets to members of not for profit Aboriginal corporations. This is contrary to most State Associations Incorporation legislation³⁰ whilst the Corporations Act is silent on the matter. It is left to the Australian Tax Office (if an Aboriginal corporation qualifies as a charity or Public Benevolent Institution ('PBI')) and government departments and agencies in their funding agreements, to impose these prohibitions and even then these are only contractual or constitutional and not statutory, prohibitions. The inability to impose statutory sanctions, for examples, fines compared to remedies in damages or defunding means that the Aboriginal corporation rather than a perpetrator, is penalised.

This lack of restriction on the distribution of profits to members is at odds with the emphasis on accountability and over regulation of Aboriginal corporations in so many other areas.

What is the policy basis for allowing a not for profit Aboriginal corporation that is receiving monies from private sponsors and the government to be free to distribute these monies and assets purchased with these assets, to members on a winding up? Indeed, the rationale for not prohibiting companies limited by guarantee to also be free to do so, is to be questioned but many companies limited by guarantee are industry bodies and not in receipt of government funding or are larger PBIs and contain constitutional restrictions imposed by the ATO (which again, is not necessarily the most appropriate way to regulate non distribution of assets).

If the only barrier to distribution is individual funding/sponsorship agreements that prohibit distribution then a review of these agreements should be undertaken by each government department and sponsor and relevant officers should be trained to negotiate the inclusion of adequate not for profit clauses, if they do not already contain them and how to monitor their compliance.

Also, the CATSI Act could also contain a provision similar to s33C of AIA (Vic) which permits a 'clawback' of unspent funding by government departments and agencies, both state and federal.

Other accountability gaps

The CATSI Act does not require mandatory public liability insurance for Aboriginal corporations - this is required for many incorporated associations under State Associations Incorporation legislation, for example, s70 of the AIA (Qld) 1981.

An Aboriginal corporation must form with at least 5 members (for non-Native Title corporations) but may move to a 'one member/one director' corporation with consent³¹. But is this compatible with community accountability or is it more appropriate for small commercial Aboriginal corporations and wholly owned entities controlled by another not for profit Aboriginal body?

³⁰ For example, see s33A of the AIA (Vic) 1981

³¹ See s77-10(3) of CATSI Act

To whom is an Aboriginal corporation accountable

Government and taxpayers and sponsors

The Aboriginal corporation and its controllers are accountable to the government, the taxpayer and private sponsors for expending funding in accordance with funding agreements and sponsorship agreements. The emphasis has now moved from external accountability underpinned by the threat of defunding for contractual non-compliance to internal accountability, member's rights to hold directors and officers accountable and the threat of heavy penalties.

But just how effective are minority members in holding boards accountable? Without the assistance of ORAC, this power may well be illusory, just as it is in non-Aboriginal companies, where a majority of members control the composition of the board.

The “Community”

The local community is a main stakeholder in the proper functioning of an Aboriginal corporation (and more so if the Aboriginal corporation is a not for profit delivering essential services to that community). The community is vitally concerned in the good governance of the Aboriginal corporation as a body that represents it and thus, will often be a reflection of its own well being and self determination aspirations.

The community will often determine some or all of the composition of the board. Accountability issues may centre on confidentiality obligations of board members who ‘report’ back to the community rather than communicating via the chair or by an official method of communication such as by newsletter or radio broadcast.

Conflicts may arise when one group within the ‘community’ is singled out to receive benefits or the ‘ear’ of a majority of the board over less influential groups usually because they constitute a majority of influence on the board³². Will ORAC be prepared to exercise its powers to enforce oppression actions against, not only directors that act oppressively, but also a membership majority in the interests of an oppressed minority?³³).

Members

As a general principle, members are not subject to fiduciary duties and are permitted to act in their own best interests (subject to concepts of fraud on the minority and oppression of minority interests, for example, see s166-1 of CATSI Act).

The CATSI Act focuses on the accountability of an Aboriginal corporation to its members. The CATSI Act emphasises members exercising their ‘rights’. But what rights can a member in a non-share based corporation, actually exercise?

Members as ‘consumers’

Members cannot exercise rights, under the constitution nor under corporate law principles, as ‘consumers’ of goods and services provided by Aboriginal corporations.

³² See comments under ‘**Related Party Provisions**’ and the suggestion to broaden the definition of who is a ‘related party’.

³³ See s166(1)(c) of CATSI Act

The Australian Consumer and Competition Commission ('ACCC') is the appropriate regulator of consumer rights in relation to goods and services provided by 'corporations'³⁴. If 'financial products' including securities, are issued by an Aboriginal 'corporation' then these presumably would need to be regulated by the Corporations Act and the ASIC Act and ASIC given there are no applicable regulatory provisions in the CATSI Act.

Members seeking to take action for poor service delivery or quality of goods and services would not be able to do so in their capacity as members but rather would need to do so as a consumer of those goods and services³⁵.

In limited circumstances, a member may be able to establish a personal right to take action but they would need to establish this right. Should ORAC's role extend to protecting personal rights as compared to protecting rights exercised by a person in their capacity as a member?

Members' obligations

There are several examples where the CATSI Act supports members but where this may not amount to good governance. For example:

- *Uncontactable members* –the board is bound to act on a resolution passed by a majority of the members in general meeting³⁶ and not remove a member from the register even if that member has been uncontactable for years. This could impose a large expense on large Aboriginal corporations, especially, as they must send out all financial and other information to members³⁷. Membership rights should at least lapse or be suspended if any monies remain unpaid or a person is uncontactable notwithstanding that the person remains on the register – thus, a for profit Aboriginal corporation would not be obliged to send out dividend cheques to an address it knows is not an accurate address.
- *Removal of a director* – if a director does not attend meetings for more than 3 meetings he or she cannot be removed without general meeting approval³⁸. How does this promote good governance when members can allow a non-active board member to continue in office and receive remuneration as 'sitting fees' should the constitution the payment of such fees?
- *Improper behaviour by directors* – there is no power to include automatic disqualification provisions in the constitution in relation to offences that could bring the Aboriginal corporation into disrepute eg child sex offences, domestic violence etc. If the general meeting does not remove the director, then the Aboriginal corporation is bound to keep that person on the board. As a safeguard, the Registrar may have a role should a majority of directors act in breach of their duties and attempt to 'dismiss' a director, inappropriately. The

³⁴ For example, s52 and Part V of Trade Practices Act 1974 (misleading and deceptive conduct and implied conditions and warranties in consumer contracts)

³⁵ *Hickman v Kent or Romney Marsh Sheep-Breeders Assn* [1915] 1 Ch 881 and *Bailey v New South Wales Medical Defence Union Ltd* (1995) 132 ALR 1.

³⁶ See s150-25 of CATSI Act

³⁷ See s342-5 of CATSI Act

³⁸ See s249-20 of CATSI Act

automatic disqualification provisions should be broadened from financial impropriety offences under s279-5 of CATSI Act and consequently, the members would not be able to override a board decision in these circumstances.

15 year old and corporate members

The CATSI Act permits persons as young as 15 years old to be members, of an Aboriginal corporation. Personal liability for insolvent trading is only applicable to directors and so 15 year old members do not face this potential liability.

They would be liable for any amount stated in the constitution to be the liability of members on a winding up³⁹, similar to the ‘guarantee’ payable by all members in a company limited by guarantee but which invariably is a small nominal sum such as \$10.00. A member could face wider liability if they are found to be a ‘deemed director’ or ‘deemed officer’⁴⁰ but this would seem unlikely.

The more significant issue of permitting 15 year olds to be members is the influence to which a 15 year old may be subject, for example, by community elders or others. For example, young members may be pressured or influenced to vote in accordance with the directions of elders to elect or remove a director and to appoint non-member influencers as their proxies to speak and vote for them at general meetings. It is argued that the policy reasons for giving a vote to 15 year old members is not persuasive⁴¹.

Members, especially corporate members, should be required to confirm to Aboriginal corporations their indigeneity⁴² when requested and for this obligation to be the subject of penalties if such information is not provided in a timely manner or is misleading and deceptive. Section 561-5 could set this out as an ‘example’ of ‘misleading and deceptive conduct’.

Non members as consumers of goods and services

Users and consumers of goods and services may seek remedies from ACCC where a provider of goods and services is a ‘corporation’⁴³. ‘Accountability’ in this context is to provide improved delivery of consumer services. Again, is this an appropriate role for the Registrar given the resources available to the ACCC compared to the Registrar? See comments under ‘**Members’ Rights**’ above.

Creditors

A major part of the Registrar’s focus will be on capacity building and providing ‘special assistance’ when applicable. However, a ‘capacity building’ supportive approach will be for nought when the liquidator steps in and takes action against directors and officers to recoup funds for the benefit of unsecured creditors eg for breach of insolvent trading provisions or breach of directors’ duties. But damages

³⁹ See s147-1 of CATSI Act

⁴⁰ See s683-1 of CATSI Act

⁴¹ See para 5.42 of Overview of Explanatory Memorandum. The argument put is that at 15 years of age, young people are eligible to participate in CDEP programs and should be given the opportunity for leadership positions and to participate in corporations.

⁴² See s141-10 of CATSI Act

⁴³ For example, s52 and Part V of *Trade Practices Act 1974* (Cth)

collected by a liquidator from errant directors for insolvent trading liability are unlikely to result in substantial amounts for unsecured creditors.

Creditors will need to continue to act proactively, when dealing with Aboriginal corporations⁴⁴. Thus, risk assessment and searches by creditors⁴⁵ will be vital. ORAC Office has confirmed that it is liaising with ASIC to see what facilities under the Corporations Act can be made available to those dealing with Aboriginal corporations.

The Explanatory Memorandum states that “*CATSI corporations will not have debenture holders*”⁴⁶ However, both not for profit and for profit Aboriginal corporations may well wish to borrow from financial institutions and if they do so then the usual method of security would be the issue of a debenture which can be registered with the regulator and thereby, gain priority. An Aboriginal corporation will have all the powers of an individual and a body corporate⁴⁷. However, the CATSI Act makes no express provision for the issue of any securities, at all.

Creditors will not be able to register their interests in priority to other creditors given the absence of a charges regime under the CATSI Act. Other quasi debt/equity instruments, such as convertible preference shares, are also not dealt with under the CATSI Act. Such instruments may be very beneficial to for profit Aboriginal corporations that wish to encourage private investment.

Staff

Staff are always vulnerable when they do not have ‘inside information’ about the true state of financial affairs of their company. It is hard to see, apart from the ‘whistleblowing’ protections, any particular benefits staff may gain from being employed by an Aboriginal corporation formed under the CATSI Act compared to being employed by an Aboriginal company, under the Corporations Act.

Training programs offered by the Registrar’s Office are currently available to persons unconnected with Aboriginal corporations, for instance, Aboriginal incorporated association’s staff may attend seminars held by ORAC.

THE CONFLICTING ROLES OF THE REGISTRAR

The CATSI Act as a ‘Special assistance’ measure

The Overview of the Explanatory Memorandum⁴⁸ states that the CATSI Act would be:

⁴⁴ For suggestions as to how international companies can assess and take precautions when considering dealing with companies and institutions in ‘weak governance zones’ see “*OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*” OECD 2006 <http://www.oecd.org/dataoecd/26/21/36885821.pdf> accessed 26 June 2006

⁴⁵ For searches available see Part 3-6 of CATSI Act

⁴⁶ See para 5.259 of Explanatory Memorandum

⁴⁷ See s96-1(1) and (2) of CATSI Act

⁴⁸ At para 3.14 of Explanatory Memorandum

'a temporary form of 'positive discrimination' based on race aimed at enabling Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities (and attendant socio economic benefits) that incorporation can confer'.

'Positive' or 'Negative' Discrimination?

The CATSI Act is predicated on providing 'positive discrimination' to Aboriginal corporations formed under or regulated by the CATSI Act⁴⁹.

But why should Aboriginal bodies formed under State Associations Incorporation legislation be treated less favourably than those formed under the CATSI Act? Subject to constitutional restrictions on the Commonwealth, 'special assistance' should be provided to all Aboriginal bodies regardless of their structure and not on the basis of forming under the CATSI Act. Indeed, many in the not for profit sector consider that a new regulatory regime with a specialist regulator, such as the Charities Commission in the UK, should be established to regulate and provide assistance to all not for profits operating within the sector⁵⁰.

It is not evident what additional or unique benefits 'indigenous people' will enjoy from incorporation under the CATSI Act. Any such benefits come at a very high compliance price. Rather the 'special assistance' arises more in the unique powers given to the Registrar under the CATSI Act.

The Registrar of Aboriginal Corporations

Role and powers

The Registrar is 'between a rock and a hard place'. He must take into account the legislators' priorities in introducing the CATSI Act, namely, increasing accountability by being an active regulator of Aboriginal corporations and their officers, whilst at the same time, build trust with these same organisations and providing 'special assistance' to assist capacity building.

Will the Registrar be an active regulator or a 'toothless tiger'? What will be the perception of Aboriginal communities and Aboriginal corporations, if the Registrar takes aggressive civil action against uninformed but well intentioned Aboriginal directors who are 'easy targets'? If it is not the intention of the Registrar to be aggressive, then why have a 'hammer to smash an acorn' approach by including so many criminal and civil penalty provisions many of which are strict liability offences?

Issues facing the Registrar

When the Registrar takes representative action for members in the name of the Aboriginal corporation under s169-1 CATSI Act or in an oppression action under s166-1 CATSI Act then:

⁴⁹ See para 3.14 of Overview of Explanatory Memorandum

⁵⁰ Senator Andrew Murray and Mary O'Donovan, March 2006 "'One Regulator One System One law': The Case for Introducing a New Regulatory System for the Not for Profit Sector" and Woodward, S Marshall, S (2004) "A Better Framework: reforming not-for-profit regulation" (released 19 February 2004)" <http://cclsr.law.unimelb.edu.au/index.cfm?objectId=017B1CA1-B0D0-AB80-E29B8B41F029F841> accessed 31 March 2006

- *The Registrar may be accused of acting with bias*: this could be asserted if the Registrar later acts in a regulatory role against the Aboriginal corporation. There is no equivalent provision under the Corporations Act for ASIC to bring a statutory derivative action proceedings on behalf of others⁵¹ nor to commence an oppression action⁵²
- *Seeking costs/damages against members*: will the Registrar be prepared to take action (and can the Registrar) by recovering costs in failed actions if members have not been honest with the Registrar or negligent in providing information?
- *Should not the Registrar have to provide 'public policy' grounds* before deciding to proceed on behalf of a member or commence an oppression action?
- *Will the Registrar provide guidelines outlining in what circumstances action will be taken?* : will the Registrar issue Policy Statements and liaise with ASIC in developing same?
- *Will there be publication of past decisions* by ORAC to promote consistency and transparency of decision making?
- *Will there be limits to the 'special assistance'*? How much assistance and help should the Registrar provide to an Aboriginal corporation if its members insist on electing poorly skilled directors and keeping in office, non-diligent directors? Should there be an obligation on Aboriginal corporations and their members to 'help themselves' before they can access special assistance?

Will the Registrar provide 'special assistance' to for profit Aboriginal corporations? As both for profit and not for profit enterprises may register under the CATSI Act, then what is the policy behind the Registrar's Office providing 'special assistance' to for profit Aboriginal corporations?

There are many bodies in the not for profit, private sector and government agencies that assist 'indigenous entrepreneurship'⁵³. Is it appropriate that a regulator also provide this assistance? And if a good policy reason can be sustained, then why should this assistance only be provided on the basis of structure? Why should not a for profit Aboriginal proprietary company formed under the Corporations Act or an Aboriginal co-operative, not also receive this assistance?

Power to delegate

The Registrar appears to have no power to delegate its powers under Div 668 of CATSI Act to other regulators, in particular, to ASIC even though secondments of Australian Public Service staff is contemplated from ASIC and ACCC.

⁵¹ See s236 Corporations Act

⁵² See s234 of the Corporations Act

⁵³ For example, First Australians < <http://www.firstaustralians.org.au/>> accessed 3 April 2006

ASIC has ‘deep’ knowledge in the areas of insolvent trading, directors’ duties and disqualification from management, record keeping surveillance, external administration and civil penalty ‘prosecutions’. Will the Registrar be able to take advantage of ASIC’s knowledge and not attempt to duplicate all functions, at great expense especially given there are currently only approximately 2,800 Aboriginal corporations. This number can be expected to reduce should some current Aboriginal corporations transition out of the CATSI Act regime, if they are able to do so, and if Aboriginal Councils and corporations are reduced in number following the current Federal government review of the viability of remote communities and the transition program for Aboriginal Councils.

The ‘Big Stick’ vs The ‘Carrot’

No matter how threatening is ‘black letter’ law, directors and senior managers will only respond to threats of higher penalties if there is an active regulator who makes such threats ‘real’.

It is not clear how aggressive ORAC has been, or what success to date it has had, in pursuing directors who have breached their duties under the ACA Act. Its website provides a cross reference to ASIC’s database for disqualified directors but its approach of supporting Aboriginal corporations to induce good behaviour would seem to be at odds with ASIC’s more aggressive approach especially in seeking jail terms and hefty fines for major or ‘high profile’ infringements.

If ORAC will be increasing its regulatory stance then how will this position sit with the ‘special assistance’ function and trust building needed to create ‘positive’ discrimination for Aboriginal corporations?

IMPACT OF THE CATSI ACT

Financial impact statement

The Explanatory Memorandum states that the financial impact of the CATSI Act is nil⁵⁴. In practice, it is arguable that the financial impact may well be substantial for the following reasons:

Consider the increase in funding that will be needed from Commonwealth and State governments and others:

- *Costs of new legislation* – costs to up skill and increase ORAC staff to duplicate many ASIC functions. Up skilling of ORAC staff will be required in all aspects of their new responsibilities with the inevitable legal costs of external advice to the Registrar as new provisions, and constitutional issues, are tested.
- *The need for ORAC to establish a ‘Chinese Wall’* to ensure that staff that provide ‘special assistance’ to Aboriginal corporations are not the same persons as, and/or do not provide this information to, persons who act in regulatory roles.

⁵⁴ See para 1.8 of Explanatory Memorandum

- *Costs for Aboriginal corporations to understand and put in place extensive new legal compliance and risk management processes including whistleblower protection provisions* – otherwise, the government will be rightly accused of setting up Aboriginal corporations up to fail. ‘Capacity building’ and improved record keeping and legal compliance systems will be mandatory for both Aboriginal corporations and their directors, so as to avoid liability under the many strict liability offences under the CATSI Act.
- *Directors & Officers insurance premiums to rise* – consequences of increases in penalties could be increases in Directors & Officers insurance premiums - increased coverage will be required, if obtainable at all. What will be the approach of insurers to a lack of skills and/or poor track record of directors or managers? There may well be higher premiums consequent upon a higher risk profile eg where an Aboriginal corporation delivers essential services.
- *Loss of directors from Aboriginal corporations or demand for substantial ‘sitting fees’ by non/experts for accepting a position on a Aboriginal corporation board (compared to being on a management committee member of an incorporated association).*
- *Choice of State Associations Incorporation legislation for incorporation purposes (where this option is available to Aboriginal promoters), thus, defeating the purpose of higher accountability under the CATSI Act.*

SPECIFIC AREAS IN THE CATSI ACT

Meetings

Section 201-5(4) of CATSI Act provides for the requisitioning of a general meeting by 5 members or 10% of members, whichever is the greater. However, there appears to be no restriction in including in the constitution or by special resolution, membership classes which confer weighted voting rights⁵⁵ so that members in one class could be allocated greater voting rights than other classes. Requisitioning a meeting should be tied to voting rights not numbers of members as is the case under the s249D and s249F of Corporations Act.

Meeting provisions should also be aligned with current developments under the Corporations Act in this area.⁵⁶

The Registrar can convene a meeting for ‘any purpose’⁵⁷. There should be a ‘proper purpose’ requirement that also applies to such meetings and what can be decided at these meetings. If they are for ‘discussion’ purposes only, then no resolutions should be able to be put. Adverse findings can be included in reports prepared in an Agency Report as a result of these meetings.

⁵⁵ See s201-40 and s201-115 of CATSI Act which provides for one member one vote, as a non-mandatory replaceable rule

⁵⁶ For example, Chartered Secretaries Australia ‘*Expressing the Voice of Shareholders: A Move to Direct Voting*’

<http://www.csaust.com/AM/Template.cfm?Section=CSA_Titles&Template=/CM/ContentDisplay.cfm&ContentID=5945> accessed 31 March 2006

⁵⁷ See s439-10 of CATSI Act

Searches

Members of the public who seek information about documents lodged with ASIC by a corporation can obtain information about such lodgements by using the 'ASIC Alert' free facility. This ability to be informed about key documentation lodged by a corporation assists not only creditors but others who need to track lodgements eg victims of torts, contracting parties and funding bodies. The Registrar should also offer this as an easily accessible, free service.

Will online intermediaries be available to undertake online searches? Will a MOU with ASIC be possible to leverage ASIC's excellent IT infrastructure and integrate Aboriginal corporations into ASIC searching results?

Books and records

All Aboriginal corporations must prepare a general report for each financial year under s330-1 of CATSI Act. The report must set out the names and addresses of all members. This is not required of companies limited by guarantee where no names or addresses of any members of such a company, appear in the annual statement. Why is it considered necessary for such disclosure for Aboriginal corporations and not for companies limited by guarantees? ORAC currently also displays all names and addresses of members on its website but is reconsidering this practice.

Section 407-20 of CATSI Act permits the destruction of books which are greater than 15 years old. Should not the Registrar maintain these essential records by electronic means especially given the emphasis on the poor record keeping history of many Aboriginal corporations? Members and creditors need to be able to access key documents from the public record should the Aboriginal corporation not have adequately maintained these. Record keeping obligations, both as to the length of retention and the manner of retention under the Corporations Act, should align more appropriately with record keeping obligations under the CATSI Act.

Currently, the ORAC website states that any documents lodged with the Registrar may be the subject of a Freedom Of Information application. If this is permitted by law, then this fact should be made clear in publications issued by the Registrar.

AREAS FOR FURTHER CONSIDERATION

Set out below are some areas for further enquiry and review of the CATSI Act.

1. The government should analyse which organisations deliver essential services that would ordinarily be delivered by statutory boards or Departments and consider if a statutory board or Department be utilised in lieu of delivery by an Aboriginal corporation. Statutory boards generally are more attractive to volunteers – Crown indemnity for board members, no insolvent trading liability, strong support from the relevant department with policy and infrastructure, and in most instances, the department pays creditors if the body fails.
2. That ORAC more clearly articulate the incentives for Aboriginal corporations to form or remain under the CATSI Act and in its publications, provide a balanced approach when setting out the detriments as well as the incentives in doing so.

3. That the reform of regulation of Aboriginal corporations be integrated and be made consistent with the reform of regulation of the not for profit sector, generally and not occur separately from it, taking into account special features of Aboriginal corporations.
4. That the 'special assistance role' of the Registrar be separated off and be undertaken by a national body with assistance provided to all not for profit Aboriginal bodies, irregardless of their structure.
5. That all State Associations Incorporation legislation (and other relevant legislation, for example, co-operative legislation) and the Corporations Act be reviewed to facilitate the transfer of status of an existing or future Aboriginal corporation (other than a Native Title corporation and any other categories of Aboriginal corporation that must be formed or remain under the CATSI Act) to an incorporated association (or other desired structure) and vica versa.
6. That further consideration be given to adding a provision similar to s33C AIA (Vic) 1981 which provides that unspent grant funding and property supplied by a government department or public authority not be considered assets available to the liquidator on a winding up and which must be returned to the government department or agency (and thus, not be regarded as an unfair preference). Section 33C purports to override ordinary preference provisions on a winding up under the Corporations Act and thus, gives an advantage to government funding bodies over other unsecured creditors.
7. That all not for profit Aboriginal corporations have in place mandatory public liability insurance to a minimum amount as is required for incorporated associations under State Associations Incorporation legislation for example, s70 AIA (Qld) 1981
8. That commercial Aboriginal corporations be excluded from the CATSI Act (unless provisions for share capital and related provisions be included in the CATSI Act) and that it clearly focus on not for profits Aboriginal corporations (whether or not they are eligible to obtain charitable or PBI status).
9. That the CATSI Act set out prohibitions on distributing profits and assets to members both during and after the winding up of a not for profit Aboriginal corporation (with limited exceptions).
10. That the CATSI Act expressly provide for the Registrar as part of its 'special assistance' role, to pre-vet all constitutions and provide 'in principle' approvals or reasons for rejection of draft constitutions prior to their submission to members for approval.
11. That ORAC provide guidelines on what is considered to be the essential roles and responsibilities of a senior manager of an Aboriginal corporation

in addition to the brief description in s694-85 of CATSI Act. This would assist Aboriginal corporations and senior managers, when drafting a contract of employment, to include key performance indicators and the scope of a senior manager's delegated authority.

12. That ORAC issue extensive Policy Statements and, in particular, make clear its approach to its regulatory and special assistance roles and how these will be balanced.
13. That ORAC provide the following information which would be searchable by the public:
 - whether the Aboriginal corporation is registered as a 'for profit' or 'not for profit' Aboriginal corporation;
 - whether the Aboriginal corporation, for a particular year, is a small, medium or large Aboriginal corporation;
 - information about directors – who is also an employee and the position held. This will be critical for creditors and the statutory assumptions;
 - information about directors - who is also a member and until what date (when the 2 year tenure expires). Again, this will be critical for creditors and the statutory assumptions;
 - who is also the chair of the board and when appointed by the board, by resolution.

(The last 3 bullet points to be included because they are mandated by the CATSI Act). Forms detailing the appointment of directors will need to capture the above information from Aboriginal corporations.

14. That the general report contain the above information.
15. That the CATSI Act contain a provision in the same or similar terms to s140(2)(b) Corporations Act (restriction on ability of a company to add to a constitution a requirement for payment of moneys by a member without their consent).
16. That members, especially corporate members, be required to confirm to Aboriginal corporations their indigeneity⁵⁸ when requested and for this obligation to be the subject of penalties if such information is not provided in a timely manner to an Aboriginal corporation or is misleading and deceptive. Section 561-5 could set this out as an 'example'.
17. That requisitioning a meeting be tied to voting rights not numbers of members as is the case under the s249D and s249F of Corporations Act.

⁵⁸ See s141-10 of CATSI Act

18. That future corporate law developments, for example, the extension of officer liability to non employee 'managers', be tracked and adapted to the CATSI Act.⁵⁹
19. That a 'proper purpose' requirement for all meetings also apply to meetings convened by the Registrar with clarification of what can be decided at these meetings.
20. That all Aboriginal corporations be given the express power under the CATSI Act to issue debentures and for ORAC to register them as charges to protect creditors' priorities.
21. That for profit Aboriginal corporations, should they remain within the ambit of the CATSI Act, be empowered to issue other suitable securities such as shares and be expressly empowered to pay dividends.

CONCLUSION

The CATSI Act attempts to address the major shortcomings of the current ACA Act by providing for increased accountability, flexibility and simplicity. In many ways, it achieves these aims but the price may appear too high for many Aboriginal corporations.

This paper has not sought to 'take sides' but to present a balanced approach to the aims of the CATSI Act and whether the Act is likely to achieve those aims. However, ultimately it may well be the politics of indigenous governance that will determine the effectiveness of the CATSI Act and not its content.

NB An adapted version of this paper was published prior to the passing of the CATSI Act, in Volume 10(1) AILR (Australian Indigenous Law Reporter) in August 2006.

Glossary of Terms

'Aboriginal corporation' means an Aboriginal and Torres Strait Islander corporation or where specifically referred to a Native Title corporation

'ACA Act' means the *Aboriginal Councils and Associations Act 1976* (Cth)

'CATSI Act' means *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)

'Corporations Act' means the *Corporations Act 2001* (Cth)

'Overview of the Explanatory Memorandum' means the Overview of the Explanatory Memorandum to the CATSI Act

'ORAC' means the Office of the Registrar of Aboriginal Corporations

'State Associations Incorporation legislation' and **'AIA'** mean the State Associations Incorporation legislation and a relevant State Act, as the context permits.

⁵⁹ Chartered Secretaries Australia 'Expressing the Voice of Shareholders: A Move to Direct Voting' <http://www.csaust.com/AM/Template.cfm?Section=CSA_Titles&Template=/CM/ContentDisplay.cfm&ContentID=5945> accessed 31 March 2006

