Modifications for Native Title legislation obligations

The CATSI Bill makes sure that directors and employees of corporations that are formed to hold or manage native title, known as prescribed bodies corporate (PBCs) or registered native title bodies corporate (RNTBCs), will not be put in a position where their duties under Native Title legislation conflict with their duties under the CATSI Bill. For more information see the Native Title fact sheet.

Better governance

The CATSI Bill sets up requirements that ensure a corporation can operate with better and clearer governance. These include:

- *constitution*:
  - the corporation must have a constitution written in English, which is publicly available on the Register of Indigenous Corporations maintained by ORAC
  - the constitution must cover the matters that the Act sets out, including a dispute resolution process
  - the rules for internal governance must be workable and consistent.
- *registered native title bodies corporate*: If the corporation aims to become an RNTBC, or is already an RNTBC, the rules must also be consistent with Native Title legislation.
- *providing anti-nepotism measures*: These prevent corporations from giving financial benefits to directors or related parties (such as a spouse of a director) unless approved by members.
- *strengthening members' capacity to participate in managing the corporation*: This is done by allowing members to request information about directors' payments and requiring members to approve related party transactions. These include transactions involving another business or personal interest of a director or even a relative of a director.
- *bringing members' rights into line with the Corporations Act*: For example, members can apply to a court to inspect a corporation's books or to stop a corporation from acting in a way that is unfair to the members.

The Registrar can act for members in some circumstances, for example, when a corporation is acting unfairly towards members.

Consequences of breach

When the duties of directors and officers are breached, there may be consequences, depending on the type of duty and the nature of the breach. For example:

- *Disqualification*—under the CATSI Bill the Registrar retains a power to automatically disqualify people from managing a corporation if they have been convicted of fraud or if they are bankrupt. The Bill introduces a new power for disqualifying individuals by a court if they have contravened a civil penalty provision of the Bill, have repeatedly contravened provisions of the Bill, or if they have been involved with two or more corporations that have experienced corporate failure. This is consistent with the Corporations Act.

  The Registrar will maintain a register of people who are disqualified from managing corporations. This register will be publicly available.

  A person disqualified from managing corporations cannot participate in making decisions that affect a substantial part of the corporation's business. They therefore cannot be a director. A disqualified person also cannot significantly affect the corporation's financial standing; or instruct the directors, knowing or intending that they will follow the person's instructions.
- *Civil penalties*—If a person breaches a civil penalty provision, for example, a director who fails to exercise reasonable care and diligence in carrying out their duties, the Registrar may apply to a court for a declaration of contravention, which provides conclusive evidence of the breach. A court may then order the person to pay a penalty and/or compensate the corporation for damage suffered as a result of the contravention.
- *Criminal penalties*—Breach of certain duties may attract criminal penalties. If a person is found guilty by a court of breaching a duty where a criminal penalty applies, the person may be fined or sentenced to imprisonment.

Further information

website: www.orac.gov.au

hotline: 1800 622 431
(free except for mobiles)

email: info@orac.gov.au

Published September 2006.

Fact sheet

Australian Government
Registrar of Aboriginal Corporations

Duties of directors and other officers

On 23 June 2005 the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) was introduced into the Australian Parliament. It is the result of a review of the *Aboriginal Councils and Associations Act 1976* (ACA Act) in 2001, and largely reflects the review's recommendations.

If agreed to by the Australian Parliament, the CATSI legislation will start on 1 July 2007 replacing the ACA Act. Transitional provisions, in a separate piece of legislation, allow corporations registered under the old ACA Act to transfer to the new CATSI legislation. More information about this is available in a separate fact sheet.

The ACA Act has limited provisions that set out the duties of directors—and these provisions are outdated. Clearly defining these duties is important as they help a corporation to function properly, making sure directors and officers such as senior staff are accountable and carry out their duties in the interests of the corporation and its members. The CATSI Bill modernises these provisions, bringing them into line with the *Corporations Act 2001* with appropriate modifications to meet the circumstances of Aboriginal and Torres Strait Islander corporations.

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What are the duties of directors and other officers?

For directors and other senior officers of a corporation, special duties towards the corporation—especially a duty of loyalty and a duty of care—are imposed by the general law (the non-statutory law developed by judges). The duties are owed to the corporation as a whole which includes all its members and creditors.

As well as these general law duties, the CATSI Bill imposes specific statutory duties on directors and other senior officers. Some of these overlap with the general law duties and are based on similar ones in the Corporations Act:

Duty of care and diligence

This duty requires directors to exercise their powers and discharge their duties with reasonable care and diligence. It means directors must take their responsibilities seriously.

Directors who are acting carefully and diligently will be well prepared, making sure they are properly informed about their corporation's affairs. For example, this might include reading board papers before a meeting, attending meetings, asking questions and seeking more information if they do not understand the information being presented to them.

The duty is subject to the business judgment rule. This means that a court will not normally intervene if a business decision is within the director's power and made honestly. Breach of this duty may result in a civil penalty. More information about penalties is below.

Duty of good faith

This duty requires a director to act honestly in the best interests of the corporation. It means that directors will be honest and loyal in their dealings with other directors and with the corporation.

For example, directors who are acting in good faith will not make a decision for their own personal self-interest but in the best interests of the corporation as a whole. A breach of this duty may lead to civil liability or criminal liability if the breach is reckless or intentionally dishonest.

Duty of disclosure of conflicts of interest

This duty requires a director to disclose to the board any conflict of interest that they may have in a matter which relates to the corporation's affairs.

For example, a director must not allow conflicting interests or personal advantage to take priority over the interests of the corporation. The corporation must always come first.

It means that a director must avoid making a decision about the corporation's affairs which *might* be affected, even if not *actually* affected, in some important way by another business or personal interest of the director or even a relative of the director. So a director needs to avoid not only actual conflicts of interests but the perception of a conflict, or potential conflict, of interest.

To avoid conflicts of interest, a director is required to disclose any interest. The disclosure can take the form of a standing notice or notice to a meeting where the interest may be raised. Disclosing an interest does not mean that a director cannot participate in the meeting, but may mean that they cannot be involved in a decision about that particular matter. Failing to disclose a conflict of interest is a criminal offence.

There is nothing wrong with having a conflict of interest, so long as directors disclose these interests.

Duty not to improperly use position or information

This duty requires directors to act properly in their position. This means that directors must not improperly use their position, or use information obtained as a director, for any purpose other than the business of the corporation.

For example, directors cannot use their position or information obtained in their role as a director for their own personal advantage or to the detriment of the corporation. To do so may incur civil liability or criminal liability if the breach is reckless or dishonest.

Duty to not trade while insolvent

This duty means that directors must not allow their corporation to trade when the corporation is insolvent or if there are reasonable grounds to suspect insolvency.

Insolvency means not being able to pay debts when they become due and payable. If a director makes a transaction which makes a corporation insolvent, and is aware or should have been aware that this would happen, then the duty is breached. The duty applies to each director individually and together as a board.

If you would like more information about the CATSI Bill or if you would like to subscribe to ORAC's newsletter, *The Oracle*, please call 1800 622 431 or visit our website on **www.orac.gov.au**.

The functions of the board of directors

Like the Corporations Act, the CATSI Bill does not state the functions of the board but it does contain a replaceable rule which says that the business of an Aboriginal and Torres Strait Islander corporation is to be managed by or under the direction of the directors. Usually the board of directors does not manage the day-to-day operations of a corporation—that is the role of the CEO.

This replaceable rule also states that the directors may exercise all the powers of the corporation, except any powers that the CATSI Bill or the corporation's constitution requires a general meeting of members to exercise.

The constitution of a corporation may replace this rule and set out what functions the board will have. Normally the functions of the board include:

- appointing the corporation's chief executive officer (CEO)
- setting goals, formulating strategy and approving business plans for the corporation
- approving annual budgets and key management decisions (such as decisions on major capital expenditure, business acquisitions, restructuring and refinancing)
- monitoring the management of the corporation and its business results
- setting and reviewing policies for communication with members and approving reports to members
- setting and reviewing budgets

Number of directors on a board

The CATSI Bill sets the maximum number of directors for a board as 12, although this number may be changed by regulations made under the Bill. Having a maximum number of 12 directors aims to avoid large and unworkable boards as the board is a decision-making body. A corporation may also apply to the Registrar to be exempted from this requirement if it wants its board to have a higher number.

For corporations which are concerned that a maximum board of 12 will not allow for broad participation and representation in management, using management committees and other structures provides a way to do this without increasing the number of directors. This leaves a more streamlined board to consider the recommendations of the committees when making decisions.

Who do the duties apply to?

The duties of directors and officers apply not only to the directors but also to the officers of a corporation.

The directors are the people who make up the governing body of a corporation and are referred to as the 'board of directors'. Under the ACA Act directors are referred to as governing committee members. Directors and members of the governing committee are appointed by members of a corporation to govern the corporation. They therefore have authority over the corporation and are ultimately accountable for it. This is why the duties exist, to ensure that directors are accountable to the corporation and to the members of the corporation.

Directors' duties apply individually to each director, so each individual must ensure the board complies with the law, as well as applying to the board as a group.

The scope of directors' duties has been extended so that the CATSI law includes officers. This brings Aboriginal and Torres Strait Islander corporations in line with the Corporations Act and meets a recommendation of the review.

Chief executive officers (CEOs) and other officers of the corporation must therefore also comply with the duties of directors. The CEO is usually the most senior officer in the corporation and is appointed by the board to take overall day-to-day control. The title is not always 'Chief Executive Officer' but may also be General Manager or Executive Director.