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15 September 2006

Attention: Ms Julie Dennett
A/g Committee Secretary
The Senate Legal and Constitutional Legislation Committee
LegCon.Sen@aph.gov.au

Dear Ms Dennett,

RE: SUBMISSION – CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2005

I refer to our discussion today concerning a submission to the committee in relation to the new Bill.

I am pleased to attach an online copy of my article recently published in the Australian Indigenous Law Reporter in August 2006. The article provides a detailed legal analysis of the new Bill.

I have scanned the 2 new bills (The Transitional Bill and the Amendment Bill) and as a result, do not wish to add any further comments to this submission.

Kindly place this submission and my article before the Committee for its consideration.

Should you wish to contact me about any matter discussed in the article please do not hesitate to contact me.

Yours sincerely

Kathleen Clothier
Legal Practitioner

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) BILL 2005: 'POSITIVE OR NEGATIVE DISCRIMINATION?'

Kathleen Clothier*

I 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 term.[1]
>
> *Jackie Huggins*
>
> It is not appropriate for [Aboriginal corporations] to have lower corporate governance standards.[2]
>
> *The Hon Warren Entesch*

Indigenous governance is in the news. Seemingly everyone, including governments, academics, Indigenous leaders, regulators and all who strive to create better outcomes for Indigenous communities, sees good governance as pivotal.

Of course, 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 them.[3]

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 corporate form has 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) Bill 2005* ('CATSI Bill') 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 Office of Aboriginal Corporations ('ORAC') – the regulator of Indigenous corporations.

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

This article analyses the CATSI Bill, primarily from a legal perspective, to see if the government's aims in introducing the Bill are likely to be met.

II Purposes of the CATSI Bill

The CATSI Bill was introduced into the Australian Parliament on 23 June 2005. If parliament agrees to the Bill it will become law on 1 July 2007. Some parts of the new law may come into force at a later date. Further transitional legislation is due to be introduced into Federal Parliament in the Spring sittings.

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 Bill[5] the purpose of the Federal Government in creating the CATSI

Bill is the need to overcome the 'rigidity of corporate design', achieve 'simplicity' and improve 'accountability'.[6]

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 foremost.[7]

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.'[8] Aboriginal corporations[9] are permitted to include provisions in their constitutions that take into account cultural factors.[10] This is intended to provide more structural flexibility. However, presumably any such provisions must still be consistent with the CATSI Bill, 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 Bill will be permitted. Indeed, the CATSI Bill already provides for mandatory 'internal governance rules' in all constitutions.[11]

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 Bill, unlike the *Corporations Act*, imposes significant control by the Registrar over the corporate design of Aboriginal corporations. The Registrar will exercise far more control than does ASIC over companies limited by guarantee. For example, 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 Bill) 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 Bill, 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 Bill. This flexibility is primarily focused on exempting bodies from the full rigour of record keeping and financial reporting.[12] Such exemptions, however, do not involve cultural factors but rather size and complexity of operations.

Improve simplicity

Simplicity – Fact or Fiction?

The CATSI Bill 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 Bill.

The process of incorporation is relatively straightforward (although more complex than under the *Corporations Act*) but is subject to significant discretion of the Registrar who may refuse incorporation on several grounds. It cannot be said that there is a 'right to incorporate', as applies to companies under the *Corporations Act* (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 the regulations) even allowing for reduced records 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 within the CATSI Bill's jurisdiction.

III Nature and Extent of Penalties

Civil Penalties

Both civil and criminal penalties apply to contraventions and offences under the CATSI Bill. ASIC gained the power to seek civil penalties under the *Corporations Act* only in 1993 with the introduction of the civil penalty regime.[13]

Importantly, the civil penalty regime permits ORAC to prove a contravention of a provision of the CATSI Bill 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 scrutiny by the Australian Law Reform Commission[14] which described the imposition of civil penalties as a pyramid approach as postulated by Ayres and Braithwaite:

> 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 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.[15]

This approach may not suit funding bodies which may wish to move to the 'top of the pyramid' as a first, not a last, step. Agencies' priorities and those of the Registrar 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 for enforcement remedies.

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 Bill or to remain under the Bill.

Strict Liability Offences

The CATSI Bill contains a large number of strict liability offences based on Corporations Act offences.[16] 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 ongoing basis.

Presumably the government departments 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'?

IV Regulation of Different Types of Aboriginal Corporations

The CATSI Bill 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 as opposed to public companies. The CATSI Bill does not make this further distinction, thus imposing public company obligations on small and medium commercial and not-for-profit Aboriginal corporations.

- *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 Bill, 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 both.[17] 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 Bill provisions, for example, s 526–25 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 is no provision 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 Bill.

Small, Medium and Large Aboriginal Corporations

The categorisation of Aboriginal corporations into small, medium and large under the CATSI Bill 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 the directors. Usually, they do not receive government funding and if banks or larger creditors do require financial information, then 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 they should be required to prepare some 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*[18] found shortcomings in the 'small and large' categorisation. The Committee was charged with undertaking 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 Bill? This may require a rethink of the underlying rationale for the small, medium and large categories.

Special Features under the CATSI Bill

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

- *majority of directors cannot be employees:*[19] not in *Corporations Act* but applies as a non-mandatory guideline in ASX Corporate Governance Guidelines;[20]
- *a majority of directors must be members*[21]: 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:[22] not in *Corporations Act* nor in State Associations Incorporation legislation;

- *maximum 2 year term for directors:*[23]: 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*.

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 counterproductive if Indigenous corporations decide to opt out to less rigorous and prescriptive regulatory regimes, for instance, under the *Corporations Act*, co-operatives legislation or State Associations legislation.

V Disincentives to Becoming or Remaining an Aboriginal Corporation

There would appear to be many disincentives for small and medium Aboriginal corporations, in particular, to register or remain under the CATSI Bill if they are given a choice. For example, under most State AIA legislation there is:

- *limited statutory duty of care*: There is no equivalent to s 180 *Corporations Act* (s 265–1 of CATSI Bill): 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 Bill;

- *no insolvent trading liability* – this is generally the case, 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, s 561–5 CATSI Bill (equivalent to s 1309 *Corporations Act*) imposes significant compliance obligations on Aboriginal corporations to ensure that accurate information reaches the board and members and others. There is no equivalent under State Associations legislation;

- *no civil penalty regime:* [24] discussed below, not applicable to State Associations Incorporation legislation;

- *no related party provisions*[25] – applicable to public companies only under Chapter 2E *Corporations Act* and does not apply under State Associations Incorporation legislation.

When promoters are deciding upon a structure for their new organisation, 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 Bill, 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 s 439–20 of CATSI Bill.

Unless they are not given a choice (as is the case for Native Title corporations), many Aboriginal not for-profits may seek to avoid the CATSI Bill 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 Bill.

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 interstate.[26]

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 Bill without the share capital and charges mechanisms to function, effectively.

VI Accountability vs Capacity Building

The change of emphasis from 'simplicity' to accountability is arguably the main focus of the CATSI Bill.

Corporate Governance Standards of Directors and Officers

Will the Imposition of Higher Standards Lead to Improved Management Practices?

The Overview of the Explanatory Memorandum assumes[27] 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 Explanatory Memorandum.

It is equally arguable that the performance of managers would 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, improved quality of operational processes and systems and better alignment of the interests of managers with those of Aboriginal corporations.

In the Queensland Crime and Misconduct Commission Report *Making a Difference – Governance and Accountability of Indigenous Councils,*[28] the author explored 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.

Related Party Transactions

The related party ('RPT') provisions[29] 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 approvals by members in general meeting.

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 s 293–1 of CATSI Bill 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'. This may not be appropriate in the context of more traditional communities.

Insolvent Trading Liability

The CATSI Bill, unlike the *ACA Act*, imposes insolvent trading liability on directors of an Aboriginal corporation.[30] Of all of the changes introduced in the CATSI Bill, 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 Bill). Detailed board training will also be vital, especially in the area of financial literacy, to raise awareness of 'passive' directors who over rely on management and others.

Departmental and other funding bodies will also 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 by the directors of the insolvent trading provisions. Wording in most funding agreements will need to be revisited.

Areas where Accountability is Lacking

There are several important areas where, arguably, Aboriginal corporations lack sufficient accountability, especially if they are not for-profits and receive taxpayer funding and sponsorships.

Distribution of Profits and Assets to Members

There is no prohibition on distribution of profits or assets to members of not-for-profit Aboriginal corporations. This is contrary to most State Associations Incorporation legislation[31] whilst the *Corporations Act* is silent on the matter. It is thus 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 compared to seeking damages or defunding means that the Aboriginal corporation, rather than the perpetrators, 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 many other areas.

What is the policy basis for allowing a not-for-profit Aboriginal corporation that is receiving monies from 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.

However, 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 the most appropriate way to regulate non distribution of assets given the abolition of the *ultra vires* rule which means that obligations entered into by directors in breach of an objects clause or other provision in the constitution, will still bind the corporation.[32]).

If the only other barrier to distribution of profits or assets to members is contractual prohibitions in individual funding/sponsorship agreements then a review of these agreements should be undertaken by each government department and contact officers should be trained to negotiate the inclusion of not-for-profit clauses, if they do not already contain them and how to monitor their compliance.

Also, the CATSI Bill could contain a provision similar to s 33C of AIA (Vic) which permits a 'clawback' of unspent funding provided by government departments and agencies, both state and federal, on a winding up.

Other Accountability Gaps

The CATSI Bill does not mandate public liability insurance for Aboriginal corporations. Such insurance is required for all incorporated associations under State Associations Incorporation legislation, for example, s 70 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 consent.[33] 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?

The CATSI Bill does not contain a provision in the same or similar terms to s 140(2)(b) *Corporations Act* which restricts the ability of a company to require payment of moneys from a member.

To whom is an Aboriginal Corporation Accountable?

Government and Sponsors

The Aboriginal corporation and its controllers are accountable to the government and the Australian taxpayer and 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, and member's rights to hold directors and officers accountable coupled with 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 for 'locked in minorities' 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 ongoing proper functioning of an Aboriginal corporation (and more so if the Aboriginal corporation is a not-for-profit delivering essential or key 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 on the board over other less influential groups usually because they constitute a majority of influence on the board.[34] ORAC should be prepared to exercise its powers to enforce oppression actions against a majority membership group (and not only against directors) in the interests of an oppressed minority.[35]).

Members' Rights and Obligations

Members' Rights

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 eg s 166–1 of CATSI Bill).

The CATSI Bill focuses on accountability by Aboriginal corporations to its members. The CATSI Bill emphasises members exercising their 'rights'. But what rights can a member in a non-share based corporation, actually exercise?

Members as 'Consumers'

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 services. Members cannot exercise rights, under the constitution nor under corporate law principles, as 'consumers' of goods and services provided by Aboriginal corporations.[36] The Australian Consumer and Competition Commission ('ACCC') is the appropriate regulator of consumer rights in relation to goods and services provided by 'corporations'.[37]

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?

If 'financial products' including securities, are issued by an Aboriginal 'corporation' then would such issues be regulated under the *Corporations Act* and the ASIC Act given there are no regulatory provisions in the CATSI Bill?

Members' Obligations

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

- *Uncontactable members* – a board of directors is bound to act on a resolution passed by a majority of the members in general meeting[38] and not remove a member from the register of members 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 members.[39] Membership rights should at least lapse if fees are 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 board meetings for more than 3 meetings he or she cannot be removed without general meeting approval.[40] 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' (if the constitution so permits)?

- *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 (for example, child sex offences or domestic violence). If the general meeting does not remove the director, then the Aboriginal corporation is bound to keep that person on the board. The automatic disqualification provisions should be broadened from only financial impropriety offences under s 279–5 of CATSI Bill and the members should not be empowered to override a board decision in these circumstances. The Registrar could act should a majority of directors act in breach of their duties and attempt to 'dismiss' a director, inappropriately.

Fifteen-Year-Old and Corporate Members

The CATSI Bill 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 would not face this potential liability.

Fifteen-year-olds would be liable for any amount stated in the constitution to be the liability of members on a winding up,[41] 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',[42] but this seems unlikely for a 15-year-old.

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, especially being 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. The policy reasons for giving a vote to 15-year-olds as members is not persuasive.[43]

Members, especially corporate members, should be required to confirm to Aboriginal corporations, their indigeneity[44] 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 who are non-members may seek remedies from the Australian Consumer and Competition Commission ('ACCC') where a provider of goods and services is a 'corporation'.[45] '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?[46]

Creditors

A major part of the Registrar's focus will be on capacity building and providing 'special assistance' to Aboriginal corporations. 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, for example, for breaches of the insolvent trading provisions or breaches of directors' duties. But damages 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 corporations.[47] Thus, risk assessment and searches by creditors[48] will be vital. ORAC 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*'.[49] However, both not for-profit and for-profit Aboriginal corporations may well wish to borrow from financial institutions or other bodies. If they were to do so then the usual method of security would be the issue of a debenture which is registered with the regulator and thereby, able to gain priority. An Aboriginal corporation will have all the powers of an individual and a body corporate.[50] However, the CATSI Bill makes no express provision for the issue of any securities at all and no provision for the registration of charges.

Creditors will not be able to register their interests in priority to other creditors given the absence of a charges regime under the CATSI Bill. Other quasi debt/equity instruments, such as convertible preference shares, are also not dealt with under the CATSI Bill. 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 Bill compared to being employed by an Aboriginal company, under the *Corporations Act*.

Training programs offered by ORAC are currently available to persons unconnected with Aboriginal corporations, for instance, Aboriginal incorporated association's staff can attend seminars held by ORAC.

VII The Conflicting Roles of the Registrar

The CATSI Bill as a 'Special Assistance' Measure

The Overview of the Explanatory Memorandum states that the CATSI Bill would be:

> 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.[51]

'Positive' or 'Negative' Discrimination?

The CATSI Bill is predicated on providing 'positive discrimination' to Aboriginal corporations formed under or regulated by the CATSI Bill.[52]

But why should Aboriginal bodies formed under State Associations Incorporation legislation be treated less favourably than those formed under the CATSI Bill? 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 Bill. 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, be established to regulate and provide assistance to all in the not for-profit sector.[53]

It is not evident what additional or unique benefits 'Indigenous people' will enjoy from incorporation under the CATSI Bill. 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 Bill.

The Registrar of Aboriginal Corporations

Role and Powers

The Registrar is 'between a rock and a hard place'. He or she must take into account the legislators' priorities in introducing the CATSI Bill, 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 or which do not require dishonesty as an element for breach?

Issues Facing the Registrar

When the Registrar takes representative action for members in the name of the Aboriginal corporation under s 169–1 CATSI Bill or in an oppression action under s166–1 CATSI Bill then:

- *The Registrar may be accused of acting with bias*: This could be asserted if the Registrar later acts in a regulatory role against the same Aboriginal corporation. There is no equivalent provision under the *Corporations Act* which enables ASIC to bring statutory derivative action proceedings on behalf of others[54] nor to commence an oppression action;[55]

- *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?

- *Grounds:* Should the Registrar be required to provide 'public policy' grounds before deciding to proceed on behalf of a member or commence an oppression action?

- *Consistency and Transparency:* 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 '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 Bill, what is the policy behind the ORAC 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'.[56] 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 Bill to other regulators, in particular, to ASIC even though secondments of APS staff would appear to be possible from ASIC and ACCC.

ASIC has 'deep' knowledge in its insolvent trading section, directors' duties and disqualification from management sections, record keeping surveillance, external administration section 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 2800 Aboriginal corporations?. This number can be expected to reduce should some current Aboriginal corporations transition out of the CATSI Bill regime, if they are able to do so, and if Aboriginal Councils and corporations are reduced in number following the current Federal government's review of the viability of remote communities.

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 pursing 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 to 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 its 'special assistance' function and trust building needed to create 'positive' discrimination for Aboriginal corporations?

VIII Impact of the CATSI Bill

Financial Impact

The Explanatory Memorandum states that the financial impact of the CATSI Bill is nil.[57] 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 in the following circumstances:

- *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 costs of legal advice to the Registrar as new provisions, and constitutional issues, are tested.

- *'Chinese Walls'* – ORAC will need 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.

- *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 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 Bill.

- *Directors' and Officers' insurance premiums to rise* – consequences of increases in penalties could be

increases in directors' and 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, for example, where an Aboriginal corporation delivers essential services.

- *Loss of directors from Aboriginal corporations or demand for substantial 'sitting fees' for accepting a position on a board of an Aboriginal corporation* – 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

IX Specific Areas in the CATSI Bill

Meetings

Section 201–5(4) of CATSI Bill 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 rights[58] 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 in this area.[59]

The Registrar can convene a meeting for 'any purpose'.[60] There should be a 'proper purpose' requirement that also applies to such meetings and what can be decided at these meetings. If they are held 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.

Searches

Members of the public who seek information about documents lodged with ASIC by a corporation can utilise the 'ASIC Alert' free facility. This informed about key documentation lodged by a corporation assists not only creditors but others who need to track lodgements, for example, 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 s 330–1 of CATSI Bill. 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 Bill 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 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 failed to 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 Bill.

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.

X Areas for Further Consideration

Set out here are some suggested areas for further enquiry and review of the CATSI Bill.

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 should be utilised in lieu of delivery by an Aboriginal corporation. This would be especially the case where there is a demonstrable lack of skilled independent persons to run an essential service. 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 Bill 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 from the other roles of this office and the 'special assistance role' be undertaken by a national body with assistance provided to all not-for-profit Aboriginal bodies, notwithstanding 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 Bill) to an incorporated association (or other desired structure) and *vica versa*.

6. That further consideration be given to adding a provision similar to s 33C of the *Associations Incorporated Act 1981* (Vic) 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, s 70 *Associations Incorporation Act 1981* (Qld).

8. That commercial Aboriginal corporations be excluded from the CATSI Bill (unless provisions for share capital and related provisions be included in the CATSI Bill) 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 Bill 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 Bill 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 s 694–85 of CATSI Bill. 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 Bill). Forms detailing the appointment of directors will be needed to capture the above information from Aboriginal corporations.

14. That an annual statement to be completed by each Aboriginal corporation to reveal the above information.

15. That the CATSI Bill contain a provision in the same or similar terms as s 140(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 express consent).

16. That members, especially corporate members, be required to confirm to Aboriginal corporations their indigeneity[61] 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 s 249D and s 249F of *Corporations 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 Bill.[62]

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 Bill 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 Bill, be empowered to issue other suitable securities such as shares and be expressly empowered to pay dividends.

XI Conclusion

The CATSI Bill attempts to address the major shortcomings and strengths 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 Bill and whether the Bill is likely to achieve those aims. Given the current attention being paid by the Federal government to Indigenous governance in remote communities where many Aboriginal corporations are located, there may yet be substantial areas of change yet to be affected to the final form of the CATSI Bill and the transitional provisions.

However, it will the politics of Indigenous governance that ultimately determines the fate of the CATSI Bill, not legal analysis.

Endnotes

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1 Jackie Huggins, 'Indigenous Good Governance begins with Communities and Institutions', (2003) *On Line Opinion* , <http://www.onlineopinion.com.au/view.asp?article=784> at 27 June 2006.

2 Second Reading Speech, Corporations (Aboriginal and Torres

Islander) Bill 2005, (Cth), House of Representatives 23 June 2005 (The Hon Warren Entesch).

3 *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006) Oganisation on Economic Co-operation and Development <http://www.oecd.org/dataoecd/26/21/36885821.pdf> at 26 June 2006.

4 Explanatory Memorandum, Corporations (Aboriginal and Torres Islander) Bill 2005 (Cth) 6.

5 Ibid.

6 Second Reading Speech, above n 2.

7 Patrick Sullivan, *Indigenous Governance – The Harvard Project on Native American Economic Development and Appropriate Principles of Governance e for Aboriginal Australia*, Research Discussion Paper No 17, Australian Institute of Aboriginal and Torres Strait Islander Studies (2006) 7 <http://www.aiatsis.gov.au/__data/assets/pdf_file/5621/DP-17.pdf> at 5 July 2006.

8 Explanatory Memorandum, above n 4, 1.

9 Means an Aboriginal and Torres Strait Islander corporation, or where specifically referred to, a Native Title corporation.

10 Explanatory Memorandum, above n 4, 1.

11 Division 66 of CATSI Bill.

12 Part 7–4 and 7–7 of CATSI Bill.

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 Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Report No 95 (2002).

15 Ian Ayres and John Braithwaite (1992) quoted in ALRC, above n 15, 77.

16 Explanatory Memorandum, above n 4, 12–15.

17 Section 26–1 of CATSI Bill – 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 Bill). See also s 96–1of CATSI Bill which permits the constitution to contain a provision distributing assets to members on a winding up.

18 Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of the Commonwealth of Australia, *Report on Aspects of the Regulation of Proprietary Companies* (2001)

19 See s 246–5 of CATSI Bill.

20 ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003) Australian Stock Exchange <http://www.asx.com.au/about/pdf/ASXRecommendations.pdf > at 5 July 2006.

21 See s246–5 of CATSI Bill.

22 See s246–5 of CATSI Bill.

23 See s246–25 of CATSI Bill.

24 See Div 386 of CATSI Bill.

25 See Part 6–6 of CATSI Bill.

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

27 See para 3.21 of Overview of Explanatory Memorandum.

28 Zoe Ellerman, *Making a Difference: Governance and Accountability of Indigenous Councils*, Queensland Crime and Misconduct Commission (2002).

29 See s 287–1 of CATSI Bill.

30 See s 531–1 CATSI Bill where the provisions are incorporated by reference to the Corporations Act provisions.

31 For example, see s 33A of the AIA (Vic) 1981.

32 See s 72–10 of CATSI Bill which provides that an exercise of a power by an Aboriginal corporation is not invalid merely because it is contrary to an express restriction or prohibition in the constitution or beyond the objects.

33 See s 77–10(3) of CATSI Bill.

34 See comments under 'Related Party Provisions' and the suggestion to broaden the definition of who is a 'related party'.

35 See s 166(1)(c) of CATSI Bill.

36 *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.

37 For example, s 52 and Part V of *Trade Practices Act 1974* (Cth) (misleading and deceptive conduct and implied conditions and warranties in consumer contracts).

38 See s 150–25 of CATSI Bill.

39 See s 342–5 of CATSI Bill.

40 See s 249–20 of CATSI Bill.

41 See s 147–1 of CATSI Bill.

42 See s 683–1 of CATSI Bill.

43 Explanatory Memorandum, above n 4, 35. 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.

44 See s 141–10 of CATSI Bill.

45 For example, s 52 and Part V of *Trade Practices Act 1974* (Cth).

46 See comments under 'Members' Rights' above.

47 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*, above n 3.

48 For searches available see Part 3–6 of CATSI Bill.

49 See para 5. 259 of Explanatory Memorandum.

50 See s 96–1(1) and (2) of CATSI Bill.

51 Explanatory Memorandum, above n 4, 8.

52 Ibid.

53 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*' accessible from the home page of Senator Andrew Murray <http://www.andrewmurray.org.au/Home/> at 5 July 2006 and S Woodward and S Marshall_ *A Better Framework: reforming not-for-profit regulation* (2004) Working paper, University of Melbourne. .

54 See s 236 *Corporations Act*.

55 See s 234 of the *Corporations Act*.

56 For example, First Australians < http://www.firstaustralians.org.au> at 5 July 2006.

57 Explanatory Memorandum, above n 4, 1.

58 See s 201–40 and s 201–115 of CATSI Bill which provides for one member one vote, as a non-mandatory replaceable rule.

59 For example, *Expressing the Voice oif Shareholders: A Move to Direct Voting*, Discussion Paper, Chartered Secretaries Australia (2006) <http://www.csaust.com/AM/Template.cfm?Section=CSA_Titles&Template=/CM/ContentDisplay.cfm&ContentID=5945> at 5 July 2006.

60 See s 439–10 of CATSI Bill

61 See s 141–10 of CATSI Bill.

62 Chartered Secretaries Australia '*Expressing the Voice of Shareholders*, above n 59.