



Australian Government

Office of the Registrar of Indigenous Corporations



POLICY STATEMENT 05

The Registrar's powers to intervene

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| Policy | PS-05: The Registrar's powers to intervene |
| Relevant legislative provisions | CATSI Act sections 69-20(4), 72-1(1), 88-5(1), 115-10, 115-15, 166-5, 166-10, 169-1, 386-10(1), 439-5, 439-10, 439-15, 439-20, 453-1, 453-3, 453-5, 456-1, 487-1(1), 526-5, 526-15(1)(h), (2) and (3), 546-5(1), 576-25, 581-1, 658-5 |
| Last updated | 8 February 2017 |
| Other relevant policies | PS-02: Complaints involving corporations PS-17: Deregistrations and reinstatements PS-20: Special administrations PS-21: No-action letters PS-22: Disputes involving corporations PS-25: Examinations PS-26: Compliance notices |

Legal Services Directions 2005 (Cth)
Prosecution Policy of the Commonwealth

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PS-05: The Registrar's powers to intervene

1 About this policy statement

- 1.1 The Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) regulates corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).
- 1.2 The Registrar has a number of regulatory and enforcement powers under the CATSI Act and the Corporations (Aboriginal and Torres Strait Islander) Regulations 2007 to intervene to resolve problems within corporations. The type of power or powers the Registrar uses, if any, depends on the facts and circumstances of each case.
- 1.3 This policy statement:
- provides an overview of the Registrar's regulatory and enforcement powers
 - outlines the Registrar's considerations in deciding whether to use his or her powers to intervene
 - indicates the kind of circumstances that might cause the Registrar to intervene
 - refers to other policy statements that focus on particular powers.
- 1.4 References to sections in this policy statement are references to sections of the CATSI Act unless otherwise specified. References to corporations in this policy statement are references to Aboriginal and Torres Strait Islander corporations unless otherwise specified. In addition, references in this policy statement to the Registrar are also references to a delegate who is lawfully exercising the powers of the Registrar.

2 Use of powers must accord with the Registrar's aims

- 2.1 Any exercise of power by the Registrar must be in accordance with the Registrar's aims (set out in section 658-5) to:
- facilitate and improve the effectiveness, efficiency, sustainability and accountability of corporations, while taking into account Aboriginal and Torres Strait Islander tradition and circumstances
 - provide certainty for:
 - members, officers and employees of a corporations in their dealings with the corporation and with each other
 - people outside corporations in their dealings with those corporations
 - administer the CATSI Act and related legislation effectively and in a way that eases the burden on corporations
 - ensure information is available as soon as is practicable for access by the public.

3 Purpose of interventions

- 3.1 Broadly, the Registrar uses his or her statutory powers of intervention to deal with issues early, flexibly and simply, in order to:
- maintain public confidence in corporations
 - improve the governance of corporations
 - prevent or minimise the risk of fraud, dishonesty and misconduct
 - take action when there are serious breaches of the CATSI Act
 - protect innocent parties
 - deter or punish those who cause or might cause harm to others
 - educate those involved with corporations about unacceptable behaviour.

4 How the Registrar decides which powers to use

- 4.1 The Registrar does not use his or her statutory powers of intervention in every complaint, dispute or adverse matter that comes to his or her attention. The Registrar's resources are finite. The Registrar considers a range of factors to ensure that resources are directed toward interventions that are appropriate and most effective.
- 4.2 The Registrar aims to exercise powers and discretions consistently—to provide fairness and certainty, while at the same time considering the particular facts of each case and different points of view.
- 4.3 If an important issue needs to be tested or resolved, the Registrar may initiate court proceedings or intervene in proceedings already underway.

- 4.4 In determining whether or not to intervene, and how, the Registrar considers factors including:
- when and how the matter is brought to the Registrar's attention
 - whether there is sufficient evidence to establish the facts of the matter
 - the seriousness of the matter, including:
 - the impact on a corporation's governance
 - any detriment caused and its value
 - if evidence suggests misconduct that is intentional, reckless or negligent
 - whether the matter is ongoing
 - how old is the matter
 - what action is available to or has already been taken by the corporation or other parties to address the matter
 - the likely cost of intervening
 - the effectiveness of intervening—for example, will the person's or corporation's understanding of their obligations increase? Will public confidence be maintained? Will innocent people be protected? Will others be deterred from similar behaviour?

5 Summary of the Registrar's powers

- 5.1 Section 658-10 gives the Registrar the power to do all things necessary or convenient to perform his or her functions. (The Registrar's functions are set out under section 658-1.)
- 5.2 Chapter 10 contains specific regulation and enforcement powers of the Registrar.
- 5.3 Other provisions throughout the CATSI Act and the Corporations (Aboriginal and Torres Strait Islander) Regulations 2007 give the Registrar powers to make decisions, issue a direction and to intervene.
- 5.4 Some powers of the Registrar involve minor consequences for corporations and individuals while others are more serious, such as imprisonment, fines, special administration and disqualification orders.
- 5.5 The Registrar is not limited to exercising only one power and in some cases multiple forms of intervention may be appropriate.
- 5.6 Sections A to Q, below, describe various powers available to the Registrar.

A. Responding to complaints

- 5.7 The Registrar's powers to respond to complaints include powers to ask questions, examine books, convene meetings, apply for injunctions, appoint special administrators and petition courts for a corporation to be wound up. For details see 'PS-02: Complaints involving corporations'.
- 5.8 The Registrar's assessment and response to a complaint is not a formal investigation. A formal investigation is not undertaken into every complaint made to the Registrar and is just one possible outcome of a complaint.

B. Assisting with the resolution of disputes

- 5.9 The Registrar is unable to intervene in disputes other than to provide advice, convene meetings and provide mediation services. For details see 'PS-22: Disputes involving corporations'.

C. Issuing a no-action letter

- 5.10 In some cases, the Registrar may decide to issue a no-action letter, which assures a corporation or its directors that no action will be taken for a particular breach or breaches of the CATSI Act or other legislation administered by the Registrar. No-action letters are an expression of regulatory intent at a particular time and do not preclude the Registrar from taking action at a later time, for example, if further information emerges regarding the breach. For details see 'PS-21: No-action letters'.

D. Convening and calling meetings

- 5.11 Under Part 10-2 of the CATSI Act, the Registrar may:
- convene a meeting to discuss a matter affecting a corporation (section 439-5)
 - call a general meeting of a corporation (section 439-10)
 - call an annual general meeting (AGM) (section 439-15).
- 5.12 Where the Registrar has called a meeting, the Registrar may:
- chair the meeting or authorise another person to do so
 - determine which of the rules concerning meetings under the CATSI Act do and do not apply
 - authorise a person to attend the meeting as an observer.

Meetings with interested persons

- 5.13 The Registrar may convene a meeting of interested persons to discuss a matter affecting a corporation. Those persons may include a corporation's members, funding bodies and community stakeholders.
- 5.14 The Registrar may report to the Minister and the public about the meeting.

General meetings (other than annual general meetings)

- 5.15 The Registrar may call and arrange to hold a general meeting other than an annual general meeting of a corporation for any purpose relevant to the corporation if:
- the corporation has called a meeting for a particular day but it has not been held for 14 days after that day
 - the minimum number of corporation members (whichever is the greater of five members or 10 per cent of members) have asked the Registrar in writing—for example, if the directors are unwilling to address governance issues raised by members
 - the corporation has not held a general meeting within three months of its registration
 - the Registrar is satisfied that in the circumstances there is a need to do so.

Annual general meeting

- 5.16 The Registrar may call and arrange an AGM of a corporation if the corporation has not held the meeting as required by section 201-150 or section 201-155.
- 5.17 The Registrar may write to a corporation about the calling of a general meeting or AGM and arrangements for the meeting and invite representations.

Other attendance at general meetings, AGMs and directors' meetings

- 5.18 The Registrar has no statutory power to attend a general meeting or AGM that has not been called by the Registrar under Part 10- 2 of the CATSI Act. Similarly, the Registrar is unable to attend a directors' meeting.
- 5.19 As with any other non-member the Registrar, including his or her staff, can only attend a corporation meeting if the corporation's rule book does not prohibit non-members attending and the Registrar has been invited to attend. An invitation for the Registrar to attend must be in writing and be made by:
- the corporation's chairperson (if it has one)
 - a resolution of the directors, or
 - a resolution of the members in general meeting.
- 5.20 The Registrar's resources are finite and he or she will not be able to accept all invitations to attend corporation meetings. Attendance will depend on the availability of the Registrar, his or her staff, and the circumstances of each corporation making a request.

E. Directing a corporation to act

- 5.21 In certain circumstances, the CATSI Act gives the Registrar a power to direct a corporation to do something—for example to:
- lodge a consolidated copy of its rule book—section 69-20(4)
 - lodge a copy of its rule book—section 72-1(1)
 - change its name—section 88-5(1)
 - change a corporation's document access address—sections 115-10 and 115-15
 - require a corporation for a particular period of time to prepare additional reports for members or meet additional reporting requirements—sections 336-1 and 336-5
 - produce additional documents or information about a submitted document—section 407-5.
- 5.22 The Registrar may issue a direction when a mistake has been made that needs to be corrected. For example, if a corporation was registered with a name that was not available, the Registrar could issue a direction to correct the mistake.
- 5.23 The Registrar will also use these powers of direction to ensure that members and others dealing with a corporation have access to important information. For example, if a consolidated copy of the corporation's rule book is not readily available, the Registrar may use his or her powers of direction under section 69-20(4), since all members are entitled to have reasonable access to their corporation's rule book.
- 5.24 Similarly, members need to have a place where they can access the corporation's books. The CATSI Act states that this should be at the 'document access address' or 'registered office', as the case requires. If the Registrar finds that the address given by the corporation cannot effectively be used by members, he or she may direct that the address be changed—sections 115-10 and 115-15.
- 5.25 The above situations are provided by way of examples and do not limit the situations where the Registrar might use the powers to direct.

F. Issuing a compliance notice

- 5.26 Under section 439-20, the Registrar may issue a compliance notice to a corporation suspected of:
- failing to comply with the CATSI Act or its rule book
 - having other irregularities in its governance or management
 - being subject to other circumstances, potential or actual, that would give grounds to appoint a special administrator.

5.27 The notice will inform the corporation of actions it is required to take, a timeframe for doing so, and what will happen if it does not. The corporation will be provided with a draft of the compliance notice and given an opportunity to be heard before the Registrar makes a final decision regarding whether a compliance notice should be issued.

5.28 For details see 'PS-26: Compliance notices'.

G. Examining a corporation's books and asking questions

5.29 The Registrar has powers under section 453-1 to examine the books of a corporation. The examination checks a corporation's compliance with the CATSI Act and other laws, and any irregularities in operations. For details see 'PS-25: Examinations'.

H. Placing a corporation under special administration

5.30 The grounds for placing a corporation under special administration are identified in section 487-5. If the Registrar has determined that at least one ground is met, and either undertaken the 'show cause' procedure or determined that the situation requires urgent attention, he or she may place a corporation under special administration. For details see 'PS-20: Special administrations'.

I. Conducting an investigation

5.31 Potential breaches of the law, including the CATSI Act, are brought to the Registrar's attention in a number of ways, including from:

- complaints or inquiries from members of the public
- referrals from funding agencies, other regulators or the police
- statutory reports from examiners, auditors and external administrators (liquidators, special administrators, voluntary administrators and receivers)
- the Registrar's staff.

5.32 The Registrar carefully considers how to respond to all potential breaches of the law, but does not undertake a formal investigation of every complaint or matter that is brought to the attention of the Registrar.

5.33 If the available information suggests a breach that is serious, ongoing, and provable, the Registrar may investigate. In those circumstances a formal investigation is the first step toward initiating (or ruling out) a prosecution.

5.34 Neither an examination nor an audit or a Registrar's assessment and response to a complaint constitute a formal investigation.

5.35 The specific factors that the Registrar will consider before deciding whether to conduct a formal investigation vary according to the individual circumstances of each matter but may include:

- Would an investigation be an appropriate use of the Registrar's finite resources?
- Is there credible evidence of a breach of a law that is admissible in a court?
- How long ago did the conduct occur and is it ongoing? Any action in relation to old conduct is likely to have less regulatory impact or general deterrence.
- How serious is the matter and its impact on members and clients of the corporation? For example, how much money is involved and how many people are affected?
- Does the matter involve conduct that the Registrar should strive to deter, because it's either common or in serious conflict with the public interest?
- Is there a way, other than formal investigation, to address the matter? For example, a member may be able to use the corporation's internal dispute resolution process or request a meeting of members, or a corporation may have legal remedies available to it.

5.36 The evidence or information gathered in an investigation may be used by the Registrar to exercise another power of intervention, such as criminal prosecution or civil penalty proceedings.

5.37 The Registrar will not usually advise a corporation or individual if they are the subject of an investigation. However, prior to commencing any criminal proceedings the Registrar will generally provide the corporation or individual with an opportunity to respond to any allegations in a voluntary record of interview. Answers provided in the record of interview may be used as evidence by the Registrar.

J. Intervening in a civil proceeding

5.38 The Registrar may intervene in any court proceeding relating to a matter arising under the CATSI Act—section 581-1. If the Registrar intervenes in such a proceeding, the Registrar is taken to be a party to the proceedings and has all the rights, duties and liabilities of a party. The Registrar may appear and be represented by a delegate of the Registrar or by solicitor or counsel—sections 581(2) and (3).

5.39 The Registrar will consider intervention in the following four cases.

Interpretation of the CATSI Act

- 5.40 The Registrar believes it is important that judicial interpretation of the CATSI Act is consistent, and this can be assisted by pertinent submissions from the Registrar. Submissions are particularly important where the judiciary is considering an ambiguity.

Knowledge acquired through investigations

- 5.41 In certain cases, through his or her investigative powers, the Registrar will acquire information that could assist the court. For example, information may be acquired through examination of witnesses under section 453-5. Such information may be confidential and the Registrar may elect to only disclose this information to the court through formal intervention.

Protection of members' interests

- 5.42 The Registrar may apply to the court under section 166-10 for an order under section 166-5 to protect members' rights in the case of conduct or acts or omissions which are either contrary to the interests of members as a whole or are oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members.

Acting in court on behalf of a corporation

- 5.43 Section 169-1 enables the Registrar to bring proceedings on behalf of a corporation, or intervene in proceedings to which a corporation is a party, for the purpose of taking responsibility for the corporation and acting in the corporation's name.
- 5.44 While the Registrar has a broad power to intervene in civil proceedings under section 169-1, the Registrar will not agree to bear the cost of any party to civil proceedings. Rather, the Registrar will exercise his or her right of intervention on the following basis:
- The Registrar will not agree to be represented as an intervening party by another party to the proceedings.
 - Any information which the Registrar provides to another party to the proceedings will be on a confidential basis. It will be provided subject to the agreement of the other party that the Registrar will exercise an overriding discretion as to whether that information will be put before the court by the Registrar as an intervening party.

K. Applying for an injunction

- 5.45 Section 576-25 of the CATSI Act allows the Registrar to apply for an injunction in a broad range of situations where a person is engaged in a contravention of the CATSI Act. This section enables the Registrar to protect member and creditor interests where they are threatened by persons who are contravening the Act.

5.46 An injunction is a court order requiring a person to do, or refrain from doing, a particular action. Only a court can make an order for an injunction and it is up to the Court to decide whether or not to grant it. For the purposes of the CATSI Act, an injunction orders a person to comply with a section of the Act, or refrain from breaching a section of the Act.

5.47 A person who does not obey an injunction may be punished for contempt of court, which could result in a fine or imprisonment, or both.

L. Civil penalty orders

5.48 As an alternative to criminal prosecution, the CATSI Act (Division 386) allows the Registrar to seek civil penalty orders from the court against a person that is found to have breached one of a number of civil penalty sections. Civil penalty orders can:

- require a person to pay a pecuniary penalty (fines) —section 386-10
- require a person to compensate a corporation—section 386-15
- disqualify a person from managing corporations—section 279-15

5.49 Pecuniary penalties (fines) of up to \$200 000 apply for each breach of the civil penalty provisions of the CATSI Act. Under section 386-10(1), the Registrar can seek pecuniary penalty from a court if the court finds that a civil penalty provision was contravened and the contravention:

- materially prejudices the interests of the corporation or its members
- materially prejudices the ability of the corporation to pay its creditors, or
- is serious.

5.50 If a corporation has suffered damage as a result of the contravention by a person of a civil penalty provision in the CATSI Act the court can order the person to pay compensation and any profits made from the contravention to the corporation—section 386-15.

5.51 Pursuant to section 279-15 of the CATSI Act a court can, if it is satisfied that is it justified, disqualify a person from managing a corporation for any period that the court considers appropriate. The person must have breached a civil penalty provision of the CATSI Act.

5.52 Before the Registrar commences proceedings for civil penalty orders he or she must first consult with the Commonwealth Director of Public Prosecutions (the CDPP). The CDPP provide advice on whether civil penalty proceedings and not criminal prosecution are appropriate in the circumstances.

5.53 All civil litigation undertaken by the Registrar, including proceedings for civil penalty orders, is subject to the Commonwealth *Legal Services Directions 2005*.

M. Issuing a penalty notice

- 5.54 Various provisions in the CATSI Act identify offences and provide that a person who contravenes them is liable for a fine, usually expressed in penalty units (the value of a penalty unit is set in the *Crimes Act 1914* (Cth) and reviewed every three years. As at the date of releasing this policy statement the value is \$180).
- 5.55 The legislation recognises that some contraventions might be inadvertent or minor and that a prosecution may not be warranted. As an alternative, the legislation allows for the Registrar to issue a 'penalty notice' under section 566-5. A penalty notice operates in the same way as an on-the-spot fine for a parking infringement. A person who receives a penalty notice has at least 21 days to pay the penalty and to take any outstanding action. However, if the person thinks that he or she did not contravene the relevant provision, he or she can require the matter be taken to a court for determination.
- 5.56 A person who pays a penalty notice needs to make sure that he or she also corrects whatever action caused the issue of the penalty notice in the first instance. If the person does not, he or she might be liable under section 566-10 to subsequent action and a fine for a 'continuing offence' for each day the offence continues.
- 5.57 At the time of the release of this policy statement there are no penalties prescribed in the Corporations (Aboriginal and Torres Strait Islander) Regulations 2007.

N. Criminal prosecution

- 5.58 Criminal prosecutions are pursued by the Registrar in cases of:
- serious, reckless or intentional misconduct
 - offences of strict liability, such as failure to lodge annual reports.
- 5.59 A wide range of outcomes to a criminal prosecution are possible, including:
- no conviction recorded
 - a fine
 - a community service order
 - a prison sentences (up to five years).

- 5.60 The evidence required for a criminal prosecution is higher than it is for a civil penalty order because the consequences are more serious.
- 5.61 Generally, prosecutions are conducted by the CDPP. The Registrar may refer matters to the CDPP but it is the CDPP that ultimately decides whether or not to prosecute based on the requirements of the *Prosecution Policy of the Commonwealth*. Under the prosecution policy, a criminal matter must meet two conditions:
- There must be sufficient evidence to secure a conviction.
 - It must be clear, from the facts and surrounding circumstances, that prosecution would be in the public interest.
- 5.62 To determine whether a prosecution is in the public interest, the CDPP considers:
- whether the offence is serious or trivial
 - any mitigating or aggravating circumstances
 - the age, intelligence, health or special vulnerability of the alleged offender, witness or victim
 - the alleged offender's history and background
 - how long ago the alleged offence occurred
 - if any alternatives to prosecution would be quicker and similarly effective
 - if the type of alleged offence is widespread or increasing in frequency,
 - the need to deter the alleged offender or others
 - the attitude of the victim
 - the likely outcome in the event of a finding of guilt.

O. Banning people from managing corporations

- 5.63 In addition to court ordered disqualifications, under section 279-30, where a person has a history of financial mismanagement the Registrar can disqualify them from managing corporations.

P. Intervening when a corporation winds up

- 5.64 The Registrar's powers in relation to corporations that wind up voluntarily or as the result of a court order are covered by section 526-35, which in turn refers to various sections of the *Corporations Act 2001*. The main one is the power to deregister the company—see 'PS-17: Deregistrations and reinstatements'—but there are various others, for example those relating to:
- the process of liquidation
 - consent to destroy the corporation's books
 - unclaimed property.

Q. Deregistering or reinstating a corporation

- 5.65 Section 546-5(1) empowers or requires the Registrar to deregister or reinstate a corporation under certain circumstances—see 'PS-17: Deregistrations and reinstatements'. For example the Registrar may deregister a corporation if it is dormant or non-responsive, or the Registrar determines it to have been wound up but remains registered; and the Registrar must deregister a corporation if a court orders it.

6 Reviewable decisions

- 6.1 Certain decisions of the Registrar made under the CATSI Act are reviewable. There is a list of reviewable decisions in section 617-1. See also 'PS-14: Review of reviewable decisions'. People affected by a reviewable decision may seek reconsideration through merits review processes, including internal review and review by the Administrative Appeals Tribunal (AAT)—sections 620-5 and 623-1. The Registrar also has the power to reconsider a reviewable decision on his or her own initiative—section 620-1.
- 6.2 Whenever a decision is made, a decision-maker must take reasonable steps to notify each person whose interests are affected by the decision and the person's right to seek a review of the decision.

END OF POLICY STATEMENT