



Australian Government

Office of the Registrar of Indigenous Corporations



Examinations

Policy	PS-25: Examinations
Relevant legislative provisions	CATSI Act Parts 10-2, 10-3 and 10-4 CATSI Act Division 439 CATSI Act Division 421 CATSI Act Division 487 CATSI Act Division 604
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Other relevant policies	PS-20: Special administrations PS-26: Compliance notices

PS-25: Examinations

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PS-25: Examinations

1 Purpose

- 1.1 The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) governs the regulation of Aboriginal and Torres Strait Islander corporations.
- 1.2 In this policy statement, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) provides guidance on the power to examine the books of a corporation and how and when that power may be used.
- 1.3 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, a reference in this policy statement to the Registrar is also a reference to a delegate who is lawfully exercising the powers of the Registrar.

2 Introduction

- 2.1 The Registrar may cause authorised officers, known as examiners, to examine the books of an Aboriginal and Torres Strait Islander corporation or a related body corporate, and to report to the Registrar on the results of the examination—section 453-1.
- 2.2 An examination of books under the CATSI Act is used to obtain information to enable the Registrar to carry out his or her statutory functions, including supervision of the governance and financial affairs of Aboriginal and Torres Strait Islander corporations.
- 2.3 Section 453-1 is based on the examination power contained in section 60 of the former *Aboriginal Councils and Associations Act 1976*. The power was explained by the Federal Court in *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corp v Registrar of Aboriginal Corporations* [1998] FCA 743 (29 June 1998); (1998) 54 ALD 55. The court stated:

The purpose of s 60 is clearly to obtain information to enable the Registrar to carry out his statutory function, including prudential supervision of the operations and financial affairs of incorporated Aboriginal associations.
- 2.4 An examination of books contributes towards the intent of the CATSI Act as a special measure to advance and protect Aboriginal and Torres Strait Islander people and their respective cultures. It is an important measure particularly where a corporation is publicly funded, providing essential services or community infrastructure, or holding interests in native title.

- 2.5 Examinations may identify when corporations are running well but if a corporation is shown to be experiencing financial or governance difficulties the Registrar may use an examination as a basis to identify and provide assistance or to exercise regulatory powers.
- 2.6 The Registrar does not need to apply to a court or to satisfy any statutory grounds to commence an examination of a corporation's books. The Registrar merely appoints one or more persons as authorised officers to examine the books of a corporation.
- 2.7 In *National Aboriginal & Islanders Legal Services Secretariat Aboriginal Corp v Registrar of Aboriginal Corporations* the Federal Court stated:
There is nothing in s 60 which preconditions the exercise of the power by the Registrar under the section. Nor is there anything limiting or fettering the exercise of the discretion. Accordingly, there are no circumstances which the Registrar is bound to take into account, nor precluded from taking into account, before exercising the power. The exercise of discretion is only confined by any limitation implied by the subject matter, scope and purpose of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40.
... There is nothing which requires that the Registrar have any particular concern before exercising the power under s 60 to inspect documents and obtain a report. Nor is there anything which requires that, where there is a matter of concern, the exercise of the power under s 60 be limited to that concern rather than the concern being the catalyst for a wider investigation into the operations and financial affairs of the Association as disclosed by its documents (as defined).
- 2.8 The Registrar's decision to appoint authorised officers and commence an examination of a corporation's books is not subject to an internal merits review under the CATSI Act—section 617-1.
- 2.9 During an examination an examiner will attend the registered office or document access address of a corporation to examine its books. They may ask questions about the books and take copies. The examiner will work through a terms of reference provided by the Registrar's office which will guide the examiner through the governance and financial matters that they need to review.
- 2.10 When the examination is completed the examiner will provide a written report to the Registrar. The report will then be assessed by the Registrar's office to determine an appropriate outcome or response.

3 The objectives of an examination

- 3.1 An examination is a review of the standard of corporate governance and financial management of a corporation.

- 3.2 The main objectives of an examination are to:
- assess whether the corporation is being governed in accordance with the CATSI Act (including the regulations and the applied *Corporations Act 2001* provisions) and its rule book (constitution)
 - check that a corporation is managing its financial affairs properly, including maintaining financial records that correctly record and explain its transactions and financial position and performance, and would enable true and fair financial reports to be prepared and audited. It checks that proper financial records are kept and that proper procedures and policies are in place
 - determine the financial position of the corporation as at the date of the examination
 - check that the directors, officers and employees of the corporation are carrying out their common law and statutory duties and exercising their powers appropriately
 - check whether the directors have properly disclosed and managed any material personal interests that may exist or occur while they hold office
 - check whether any benefits given to related parties have been properly managed by the corporation
 - report any fraud or misuse of corporation resources for personal benefit
 - assess the viability and solvency of the corporation as at the date of the examination
 - identify and report any lack of control, direction and management of the affairs of the corporation by the directors or senior management
 - inquire and report on any specific governance or operational concerns identified by the Registrar.

4 How corporations are selected for an examination

- 4.1 The Registrar conducts an annual rolling program of examinations. The program examines large, essential or publicly funded corporations. The number of corporations examined each year under the rolling program will depend on the resources available to the Registrar in each year.
- 4.2 Examinations are also conducted when matters come to the Registrar's attention and the Registrar is satisfied that an examination of the books should be undertaken. These matters may include:
- circumstances that are impacting on a corporation's governance
 - the existence of disputes between members or between members and directors
 - information that the directors, officers or employees of a corporation are not carrying out their duties and exercising their powers appropriately
 - irregularities relating to a corporation's financial or operational management

- complaints or allegations about a corporation
- the existence of problems or other indications that there are emerging problems that could impact on the corporation's viability.

4.3 These matters may come to the Registrar's attention through complaints, lodged documents (for example, financial statements and the auditor's reports) or a history of non-lodgment or late lodgment. Representations may also be made about a corporation by members, directors, creditors or funders, other stakeholders and members of the public.

4.4 The directors or members of a corporation can request the Registrar to conduct an examination.

4.5 The Registrar does not, however, undertake an examination of every complaint, dispute or adverse matter that comes to the Registrar's attention. Examination resources are finite. The Registrar considers a range of factors to ensure that examinations are focused on the most appropriate matters and that the finite resources are directed appropriately.

5 When can the Registrar cause an examination to commence

5.1 The Registrar may cause an examination to occur at any time—subsection 453-1(1).

6 Statutory purpose test

6.1 The exercise of the regulation and enforcement powers in Part 10-3 of the CATSI Act, including examinations, are subject to a statutory purpose test—section 450-1.

6.2 The purpose test is very broad and the Registrar may use these powers:

- for the purposes of the performance or exercise of any of the Registrar's functions and powers under the CATSI Act—subsection 450-1(a)
- for the purpose of ensuring compliance with the CATSI Act—subsection 450-1(b), or
- in relation to certain alleged or suspected contraventions of the CATSI Act or other Commonwealth, state or territory legislation—subsections 450-1(c)(i)-(iii).

7 Appointment of authorised officers to carry out an examination

7.1 Examinations are conducted by an authorised officer, also referred to as an examiner. The Registrar may appoint an officer or employee of the Department of the Prime Minister and Cabinet or any other suitably qualified person to be an authorised officer—subsection 447-1(1).

- 7.2 The Registrar may appoint more than one authorised officer for an examination. Authorised officers may be staff from the Registrar's office or suitably qualified personnel from a panel of external firms that is maintained by the Registrar, or both.

8 Authorised officers attend the corporation

- 8.1 A corporation will be notified when the Registrar approves an examination of the corporation. The names of the authorised officers that will conduct the examination will be provided in the notice.
- 8.2 Authorised officers are entitled to access a corporation's books at all reasonable times—subsection 453-1(2). In carrying out an examination, an authorised officer must comply with any directions from the Registrar—subsection 447-1(2).
- 8.3 Authorised officers must carry an identity card at all times when exercising powers under the CATSI Act or performing functions as an authorised officer—subsection 447-5(4).
- 8.4 After a corporation is notified by the Registrar's office about an examination the authorised officers will make contact with the corporation and set dates to attend the corporation premises to examine its books. This is the field work of the examination. This field work will usually last between two to five days.
- 8.5 The authorised officers will usually arrange for an entry meeting with the directors and the chief executive officer (or general manager) on arrival at a corporation. The purpose of this meeting is to outline the examination process and answer any questions. It also allows the corporation to raise with the examiner any issues or concerns. If necessary the Registrar's staff will assist with the arrangements for the entry meeting with the authorised officers and attend by telephone.
- 8.6 The authorised officers may also conduct an exit meeting with the directors and the chief executive officer (or general manager) to provide a preliminary overview of the authorised officers' findings.

9 Books examined

- 9.1 The authorised officers may examine the books of a corporation and any related body corporate—section 453-1.
- 9.2 The meaning of related body corporate can be found in sections 700-1 and 689-20 and includes holding and subsidiary bodies corporate. Related bodies corporate can include entities that are not registered under the CATSI Act.

- 9.3 However compiled, recorded or stored—section 700-1, books include:
- registers
 - any other record of information
 - financial reports or financial records
 - documents.
- 9.4 In practical terms the books that will be examined include, but are not limited to:
- the register of members and register of former members, and any application forms for membership submitted to the corporation in the preceding two years
 - the minutes of the annual general meetings and all other general meetings held in the preceding two years
 - the minutes of all directors' meetings held in the preceding two years
 - financial records and reports including, but not limited to:
 - the general ledger and current trial balance
 - bank statements and bank account reconciliation documentation
 - paid invoices and supporting documents
 - payroll records
 - the latest audited financial statements
 - the latest management letter issued by the auditor
 - the financial policy and procedure manuals
 - funding agreements and relevant acquittance documents
 - the asset register and relevant insurance documents (policies and certificates of currency)
 - personnel records including a list of staff, employment contracts (in particular for the chief executive officer and other senior managers)
 - documents pertaining to the corporation's taxation status with the Australian Taxation Office
 - documents relating to any subsidiaries, trusts and partnerships
 - if applicable, documents that relate to CDEP and housing operations
 - any other documents relevant to the functions or operations of the corporation.

10 Examination powers of authorised officers

- 10.1 Authorised officers are entitled, at all reasonable times, to full and free access to the books of the corporation and any related body corporate—subsection 453-1(2).

- 10.2 Authorised officers may also:
- make copies or take extracts from any books of the corporation— subsections 453-1(3) and 456-10(3)
 - require any person (which includes a body corporate) to produce the books of the corporation or a related body corporate in that person’s possession or to which that person has access—subsection 453-1(4)
 - require a person who produced any books to explain (to the best of his or her knowledge or belief) any matter about the compilation of the books or matters to which the books relate—subsection 456-10(9)(a)
 - require a person who was a party to the compilation of the books produced to explain (to the best of his or her knowledge or belief) any matter about the compilation of the books or matters to which the books relate—subsection 456-10(9)(b)
 - take possession of any books produced—subsection 456-10(2)
 - retain possession of any books produced—subsection 456-10(5)
 - deliver any books produced into the possession of the Registrar or a person approved by the Registrar to receive them— subsection 456-10(8)
 - use or permit the use of any books produced for the purpose of a court, tribunal or other examination, hearing or proceeding— subsection 456-10(4).
- 10.3 While books are in the authorised officer’s possession, the officer:
- must permit another person to inspect, at all reasonable times, the books that the person would be otherwise entitled to inspect, such as a person’s right to inspect the register of members under section 180-25— subsection 456-10(7)(a)
 - may permit another person to inspect the books— subsection 456-10(7)(b).

11 Hindering an examination

- 11.1 It is important that the directors and staff of a corporation assist an examiner and provide all relevant information and books to ensure that the report to the Registrar is as accurate as possible.
- 11.2 There are serious penalties in the CATSI Act for a person that interferes with or hinders an examination.

12 Failure to produce books for examination

- 12.1 Failure to comply with a requirement by an authorised officer to produce the books of the corporation or a related body corporate in that person’s possession, or to which that person has access, is an offence under the CATSI Act—subsection 453-1(5). This provision applies to corporations and natural persons.

- 12.2 If a person fails to produce books to an authorised officer, the Registrar, or an authorised officer, may apply to the court for a warrant to enter and search premises and seize books not produced—section 456-1.
- 12.3 Additionally, if a person fails to produce the corporation’s books to an authorised officer for examination, the Registrar can issue a formal notice under section 453-5 to any person (including the directors, contact person or secretary) who the Registrar believes has custody or control of the books. Failure to comply with this formal notice is an offence under the CATSI Act—subsection 453-5(5).

13 Failure to explain matters about the compilation of books

- 13.1 Under subsection 456-10(9) an authorised officer, the Registrar, or an approved person, who was provided books by the authorised officer may require a person who produced any books or was a party to the compilation of a book to explain (to the best of their knowledge or belief) any matter about the compilation of the books.
- 13.2 Intentional or reckless failure to comply with a requirement under subsection 456-10(9) is an offence under the CATSI Act—subsection 456-10(11).

14 Obstructing or hindering an authorised officer

- 14.1 Engaging in conduct that results in the obstruction or hindering of an authorised officer’s examination of a corporation’s books is an offence under the CATSI Act—subsection 461-1(1).
- 14.2 Engaging in conduct that results in the concealment, destruction, mutilation or alteration of a book that a corporation has been required to produce, or taking a required book out of a state or territory or Australia, is also an offence under the CATSI Act—subsection 461-10(1).

15 Providing false or misleading information

- 15.1 Providing false or misleading information and material to an authorised officer during an examination of a corporation’s books is an offence under the CATSI Act—section 461-5.

16 Report to the Registrar

- 16.1 After examining the books of a corporation, the authorised officer will provide a report to the Registrar—subsection 453-1(1).

17 Content of an examination report

- 17.1 Aboriginal and Torres Strait Islander corporations operate in widely differing circumstances and therefore no two examination reports will be the same.
- 17.2 An authorised officer may draw attention to any or all of the following matters in the report to the Registrar:
- if the corporation has failed to comply with a provision of the CATSI Act or the corporation’s rule book—subsection 453-1(1)(a)
 - any alleged or suspected breaches of Commonwealth, state or territory laws that concern the management or examinable affairs of an Aboriginal and Torres Strait Islander corporation or a related body corporate, or involve fraud or dishonesty—subsection 453-1(1)(b)
 - any irregularities in the operations or examinable affairs of the corporation—subsection 453-1(1)(c)
 - any existing or potential circumstances that constitute, or may constitute, grounds for appointing a special administrator for the corporation—subsection 453-1(1)(d) and (e).
- 17.3 Other matters that may be contained in the report to the Registrar include information on the following matters:
- an executive summary which includes:
 - the dates of the field work
 - comments about the current activities and/or services provided by the corporation
 - comments about the entry and exit discussions with the directors
 - a summary of the findings, for instance, in relation to the maintenance of the register of members and former members, management of membership, the conduct of annual general meetings and general meetings, directors and officers, directors’ meetings, financial and other records, staff and reporting lines, subsidiary corporations, related trusts and partnerships, related party benefits and the tax status of the corporation
 - a paragraph summarising the corporation’s financial position, trading results and solvency as at the date of the examination
 - details of any instances of non-compliance or breaches of legislation
 - the current financial position of the corporation
 - copies of any supporting documents.

18 Potential outcomes of an examination

- 18.1 The examination report and any supporting documents are carefully reviewed by the Registrar’s office to assess the standard of the corporate governance and financial management of a corporation.

18.2 There are a number of responses that the Registrar may make to an examination report. These include:

- issuing a management letter to the corporation if its standard of corporate governance and financial management is considered good.

A management letter is a report from the Registrar to the directors of a corporation that makes recommendations for correcting weaknesses or minor issues identified during an examination. The weaknesses and issues are important enough to be brought to the attention of the directors but not so serious as to require a compliance notice to be issued by the Registrar under section 439-20

- arranging governance and other training for the corporation and its directors
- arranging for the Registrar's office to facilitate mediation or dispute resolution
- calling a meeting of interested persons under subsection 439-5(1) to report about the findings of the examination of the corporation
- calling a general meeting of the members of a corporation under subsection 439-10(1)(d) to report about the findings of the examination
- issuing a compliance notice to the corporation or its directors under section 439-20 requiring the directors to take action to ensure the corporation is complying with the CATSI Act or its rule book, or to remedy irregularities in the affairs of the corporation (refer to the Registrar's policy statement 'PS-26: Compliance notices').

A compliance notice becomes a document on the Register of Aboriginal and Torres Strait Islander Corporations and is publicly available. Corporations will therefore be provided, in most instances, with an opportunity to make submissions to the Registrar regarding its content before it is finalised.

Where a compliance notice is issued the Registrar will monitor the corporation's progress in implementing the requirements of the notice over the following six to 12 months to ensure that appropriate action is taken

- issuing a show cause notice to the corporation asking it to explain why it should not be placed under special administration—subsection 487-10(1).
The show cause notice invites the corporation to respond and say why it should not be placed under special administration. The length of time a corporation has in which to show cause to the Registrar will depend on the circumstances of a particular corporation, but it is the usual practice of the Registrar to allow at least 14 days. For more information on special administrations refer to the Registrar's policy statement 'PS-20: Special administrations'
- in certain urgent situations, immediately placing a corporation under special administration—subsection 487-10(1)
- applying to wind up the corporation—subsection 526-15(1)(h)
- undertaking further investigation.

19 An examination report is an exempt document

- 19.1 Unless the corporation has agreed to the release or inspection of an examination report, the report is an ‘exempt document’ for the purposes of the Register of Aboriginal and Torres Strait Islander Corporations and division 421 of the CATSI Act. A person cannot under section 421-1 inspect or copy an examination report.

20 Information in an examination report is protected information

- 20.1 Unless information in an examination report has already been lawfully made available to the public from other sources, information in an examination report is protected information—subsection 604-5(2).
- 20.2 Information given to an authorised officer, in confidence, during an examination is also protected information—subsection 604-5(1).
- 20.3 The Registrar is required to take all reasonable measures to ensure that protected information is not the subject of unauthorised use or disclosure—section 604-10.
- 20.4 The use or disclosure of protected information is authorised if the use or disclosure is:
- made for the purposes of the CATSI Act—subsection 604-25(1)(a)
 - required or authorised by a law of the Commonwealth, a state or a territory—subsection 604-25(1)(b)
 - made in the circumstances set out in subsections 604-25(2)-(4).

21 Healthy corporation checklist

- 21.1 The Registrar has developed a governance self-assessment tool for corporations. The ‘Healthy corporation checklist’ is available on the Registrar’s website and allows a corporation to check its compliance with the CATSI Act and its own rule book. It is also a useful guide on matters an authorised officer may assess as part of an examination.
- 21.2 The checklist includes a list of questions to ask about a corporation. Each question has a tick box to record the corporation’s compliance or to highlight areas that need attention. The checklist also has links to important template documents and forms which may be useful for corporations wanting to make further improvements to their standards of corporate governance.

- 21.3 The checklist can be accessed at www.oric.gov.au under the 'Resources' tab. The 'Healthy corporation checklist' is located in the menu on the left hand side. Alternatively, it can be accessed at: <http://oric.gov.au/free-templates/healthy-corporation-checklist>

END OF POLICY STATEMENT