



Australian Government

Office of the Registrar of Indigenous Corporations



POLICY STATEMENT 27

Suspension of members and directors

Policy	PS-27: Suspension of members and directors
Relevant legislative provisions	CATSI Act sections 26-1(2)(v), 29-20, 66-1(5), 69-30(2) and (4) CATSI Act Parts 4-2, 6-2, 6-4
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Other relevant policies	PS-04: Registration under the CATSI Act

PS-27: Suspension of members and directors

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PS-27: Suspension of members and directors

1 Purpose

- 1.1 In this policy statement, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) provides guidance on the suspension of members and directors by a corporations and sets out the Registrar's policy for approving rule book provisions providing for the suspension of members and directors.
- 1.2 This policy statement does not deal with the cancellation of membership (Subdivision 150-C of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act)) or the removal of directors (Division 249 of the CATSI Act). Both of those processes are clearly set out in the CATSI Act and do not require further guidance. This policy statement only deals with the suspension of a member or a director (including suspension of their rights or duties).
- 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, references in this policy statement to the Registrar are also references to a delegate who is lawfully exercising the powers of the Registrar.

2 Who is a member or director of a corporation?

- 2.1 Membership of a corporation is determined under Part 4-2 of the CATSI Act, including sections 138-1 and 144-1. Directors of a corporation are determined under Part 6-2 of the CATSI Act and relevant provisions of a corporation's rule book.

3 No legislative or common law power to suspend

- 3.1 There is no power under the CATSI Act or common law to suspend a member or director of a corporation (or their rights or duties). Whether it is possible to suspend a member or director of a corporation (or their rights or duties) will therefore depend on whether such a power can be validly included in a corporation's rule book.

4 Approval of proposed rule books and rule book changes

A. Proposed rule books

- 4.1 When an applications for registration of a new Aboriginal and Torres Strait Islander corporation is lodged, the Registrar is required to consider the proposed rule book that is lodged under sections 22-5(1)(c), 29-17(1)(b) or 29-19(1)(b) with the application. The Registrar is not permitted to make a

decision to register a new corporation unless satisfied that the ‘internal governance rules requirements’ are met—sections 26-1(2)(v) and 29-20.¹ The internal governance rules requirements are set out in section 66-1.

B. Proposed changes to a rule book

- 4.2 The Registrar also considers proposed rule book changes lodged under sections 69-20 or 69-25. The Registrar is not permitted to make a decision to register a rule book change unless the corporation’s governance rules comply with the ‘internal governance rules requirements’—section 69-30(2). If the Registrar is not satisfied of this, the proposed changes must be refused—section 69-30(4).

5 Suspension of members

A. Considerations

- 5.1 The rule book of a corporation may provide for eligibility requirements for membership of the corporation. Section 141-25 allows a corporation to tailor membership to its particular needs and circumstances.²
- 5.2 For policy reasons membership provisions in the CATSI Act are subject to certain procedural safeguards.³ This extends to the provisions of a rule book of a corporation. A provision in a proposed rule book or rule book change that provides a power to suspend a member (or their rights or duties) will also be subject to procedural safeguards, including review by the Registrar before registration. This ensures that the internal governance rules of a corporation are internally consistent, and adequate and workable (section 66-1(5)(a) and (b)).
- 5.3 The Registrar will consider each proposed rule book or rule book change on a case-by-case basis. However, the Registrar will not register a proposed rule book or rule book change that includes a power to suspend a member (or their rights or duties) unless the applicant or the corporation, as the case may be, can clearly demonstrate that the power would be allowed under the CATSI Act.
- 5.4 If the power to suspend a member (or their rights or duties) is allowed in a rule book; it would be as binding on the corporation, each director and each member as a contract—section 60-10.
- 5.5 However, any rule book of a corporation must be consistent with the CATSI Act—section 66-1(5)(c). A power to suspend a member (or their rights or duties) that is inconsistent with a provision of the CATSI Act (other than those in replaceable rules)⁴ would not be allowed. In such circumstances the Registrar would not register the proposed rule book or rule book change.

¹ There is also a public interest test for registration under section 26-1(2)(f).

² Revised Explanatory Memorandum for the Corporations (Aboriginal and Torres Strait Islander) Bill [5.159].

³ See Revised Explanatory Memorandum [5.162] [5.170] [5.172] [5.173] [5.174].

⁴ Note also that some provisions of the CATSI Act are exemptible.

- 5.6 A clause in a proposed rule book or rule book change that includes a power to suspend a member from any of the following statutory rights under the CATSI Act would also not be allowed under the CATSI Act:
- rights to request internal governance material of the corporation (see section 72-5)
 - rights to seek a court order regarding oppressive conduct (section 163-1 and Division 166)
 - rights to bring or intervene in proceedings on behalf of the corporation (section 163-1 and Division 169)
 - rights relating to the changing of class rights (section 163-1 and Division 172)
 - rights to apply to the court for an order to inspect the corporation's books (section 163-1 and Division 175)
 - rights to inspect the register of members and former members without charge (section 180-30(4))
 - rights to call (together with other members sufficient to constitute the required minimum number) a general meeting and to put forward resolutions to be considered at the meeting (sections 201-5, 201-10 and 201-40)
 - rights to (together with other members sufficient to constitute the required minimum number) request members' statements (section 201-50)
 - rights to receive notice of general meetings (if entitled to vote at the meeting) (section 201-25) and to receive notice of resolutions (section 201-45)
 - rights to access minutes of general meetings (section 220-10)
 - rights to (together with other members sufficient to constitute the required minimum number) obtain information about the remuneration of directors (section 252-5)
 - rights to receive reports (Part 7-3).
- 5.7 In *Daphne Lowe v. Australian Chinese Community Association of NSW (No 2)* Justice Slattery held that a suspension may in some circumstances amount to the 'practical equivalent' of a cancellation.⁵ Whether a 'suspension right' amounts to a cancellation of membership will require a case-by-case assessment.
- 5.8 Some of the matters the Registrar will take into account in determining whether a clause in a proposed rule book or rule book change that includes a power to suspend a member (or their rights or duties) can be registered include, but is not limited to, the following:
- does the proposed rule book provision identify the extent and nature of any suspension
 - do the members in a general meeting exercise the power to suspend (rather than the directors)

⁵ [2010] NSWSC 1375 at [48].

- does the clause in the proposed rule book or rule book change clearly set out the grounds for suspension
- is there a limitation on the length of any suspension
- is there a prohibition or restriction on the use of the power to suspend after notice of a general meeting has been issued by the corporation
- does the rule book provide a procedure for notifying a member of an intention to suspend them (or their membership rights or duties) and to allow them an opportunity to be heard and/or provide review or appeal rights.

5.9 Where a corporation is, or is applying to be, a registered native title body corporate (RNTBC) the Registrar may also consider whether a suspension power in a proposed rule book or rule book change is consistent with the *Native Title Act 1993* (section 66-1(5)(d)), including whether suspension of membership (or of rights or duties) may have the consequence of affecting a member's native title rights and benefits.

5.10 A clause in a proposed rule book or rule book change that includes a power to relieve a member of their statutory obligations under the CATSI Act (other than those in replaceable rules), such as any obligation to contribute to the debts of the corporation if it is wound up (sections 147-1 and 147-10), is likely to be inconsistent with the CATSI Act, and cannot be registered under the CATSI Act.

6 Suspension of directors

A. Considerations

6.1 The power to suspend (or their rights or duties) largely falls into the same category as the suspension of a member (or their rights or duties).

6.2 The Registrar will consider each proposed rule book or rule book change on a case-by-case basis. However, the Registrar will not register a proposed rule book or rule book change that includes a power to suspend a director (or their rights or duties) unless the applicant or the corporation, as the case may be, can clearly demonstrate that the power would be allowable under the CATSI Act.

6.3 A power to suspend a director (or their rights or duties) that is inconsistent with a provision of the CATSI Act (other than those in replaceable rules)⁶ would not be allowed. In such circumstances the Registrar would not register a proposed rule book or rule book change containing such a power. A clause in a proposed rule book or rule book change that includes a power to suspend all of a director's rights under a corporation's rule book or the CATSI Act would not be allowed under the CATSI Act. The Registrar would not register a proposed rule book or rule book change that included such a clause.

⁶ Note also that some provisions of the CATSI Act are exemptible.

- 6.4 A clause in a proposed rule book or rule book change that includes a power to suspend a director from any of the following statutory rights under the CATSI Act would also not be allowed under the CATSI Act:
- the right to receive notices of meeting (section 201-25)
 - rights of reimbursement for travelling and other expenses (section 252-1(3))
 - the right to inspect the books of the corporation for the purposes of legal proceedings and make copies in certain circumstances (section 274-15)
 - the right to access records (section 322).
- 6.5 The Registrar will consider the interaction of any clause in a proposed rule book or rule book change that includes a power to suspend a director (or their rights or duties) with the removal of director provisions in sections 249-10 and 249-15 of the CATSI Act. This is to ensure that the internal governance rules are internally consistent, and adequate and workable (section 66-1(5)(a) and (b)).
- 6.6 A suspension of a director may in some circumstances amount to the practical equivalent of removal or constructive removal of that director. For instance, a suspension of a director (or their rights or duties) may mean that a director cannot meet the duties of the position, such as the duty to exercise due care and diligence. Whether a clause in a proposed rule book or rule book change to suspend a director (or their rights or duties) would in effect amount to a removal of a director, and therefore not allowable under the CATSI Act, will require a case-by-case assessment.
- 6.7 Some of the matters the Registrar will take into account when determining whether a clause in a proposed rule book or rule book change that includes a power to suspend a director (or their rights or duties) can be registered include, but is not limited to, the following:
- does the proposed rule book provision identify the extent and nature of any suspension
 - do members in a general meeting exercise the power to suspend (rather than the directors)
 - does the proposed rule book provision clearly set out the grounds for suspension
 - is there a limitation on the length of any suspension
 - is there a prohibition or restriction on the use of the power to suspend close to or at a meeting of directors
 - does the rule book provide a procedure for notifying a director of an intention to suspend them (or their membership rights or duties) and to allow them an opportunity to be heard and/or provide review or appeal rights.

7 Duties of directors

- 7.1 A director of a corporation must comply with certain duties, including those identified in Part 6-4 of the CATSI Act.

- 7.2 Where a director is suspended (rather than removed) they will continue to hold office, and accordingly will continue to owe the duties of their position. A director that is suspended (or their rights or duties are suspended) would need to ensure they are still in a position to fulfil their duties as a director, or consider whether they need to resign. This is a separate issue from the Registrar's decision in relation to whether a clause in a proposed rule book or rule book change that includes a power to suspend a director (or their rights or duties) should be registered.

8 Registrar may seek further information

- 8.1 The Registrar may seek further information from an applicant or a corporation before deciding whether or not to register a proposed rule book or rule book change. For instance, the Registrar can seek further information from an applicant for the registration of a new corporation—section 21-10.

9 Registrar-initiated rule book changes

- 9.1 The Registrar has the power under section 69-35 to change a corporation's rule book on the Registrar's own initiative if the rule book is not meeting the internal governance rules requirement or the affairs of the corporation are being conducted in an oppressive way (as determined in subsection 69-35(3)).
- 9.2 If a clause in a registered rule book includes a power to suspend a member or director (or their rights or duties) and it was inadvertently registered by the Registrar; or if the wording or operation of the clause is subsequently found to be oppressive or not allowed under the CATSI Act, the Registrar may remove the clause from the corporation's rule book under section 69-35.

END OF POLICY STATEMENT