



# Indigeneity provisions

For a corporation to be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the corporation must satisfy the Indigeneity provisions for members and directors. While the CATSI Act sets out minimum requirements for the proportion of members who are Aboriginal and Torres Strait Islander persons, a corporation may set requirements for a higher proportion of such members in its rule book.

Unless otherwise specified, references in this fact sheet to:

- sections are references to sections of the CATSI Act
- paragraphs are references to paragraphs of this fact sheet
- corporations are references to Aboriginal and Torres Strait Islander corporations registered under the CATSI Act
- Aboriginal and Torres Strait Islander person is a reference to persons as described in the CATSI Act – see section 700-1.

References to the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) in this fact sheet are also references to a delegate who is lawfully exercising the powers of the Registrar.

## Key points

1. The Indigeneity provisions under the CATSI Act are fundamental to ensuring that Aboriginal and Torres Strait Islander corporations are, at all times, Indigenous owned and controlled.
2. A corporation must meet the Indigeneity provisions at registration and at all times while they are registered under the CATSI Act.
3. The majority of a corporation's members must be Aboriginal and Torres Strait Islander persons. This rule also applies to corporations with body corporates who are members. To meet the Indigeneity requirement a body corporate must be Indigenous-controlled.
4. If a corporation permits members who are not Indigenous, then this must be specified in its rule book.
5. In addition to the Indigeneity requirement, all directors of a corporation must be Aboriginal and Torres Strait Islander persons, unless specified in a corporation's rule book. Even where a rule book allows for non-Indigenous directors, the majority of directors must be Aboriginal and Torres Strait Islander persons.
6. Directors must ensure that their corporations meet the Indigeneity provisions at all times.



## Membership

The Indigeneity requirement is set out in section 29-5 of the CATSI Act and is based on the number of members of the corporation at any point in time. To meet the Indigeneity requirement, a certain number or proportion of members of the corporation must be Aboriginal and Torres Strait Islander persons.

In a corporation with:

- 5 or more members, 51% of the members must be Aboriginal and Torres Strait Islander persons – section 29-5(a) of the CATSI Act and prescribed in section 6 of the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations)
- 2 – 4 members, all the members, or all but one of the members, must be Aboriginal and Torres Strait Islander persons – section 29-5(b)
- only one member, that member must be an Aboriginal and Torres Strait Islander person – section 29-5(c).

If the corporation's rule book allows members who are not Aboriginal and Torres Strait Islander persons, the corporation must record whether a member is non-Indigenous on the register of members – section 180-5(2).

A corporation's rule book may also require that Aboriginal and Torres Strait Islander persons make up a higher proportion of members than required by the Act – section 141-10(2). It cannot be lower. If the number or proportion of members who are Aboriginal and Torres Strait Islander persons does not meet the higher proportion that is set out in the rule book, but still complies with the CATSI Act Indigeneity requirement, the corporation will be in breach of its rule book but not in breach of section 141-10(3) of the Act.

A corporation's rule book cannot have a proportion of members who are Aboriginal and Torres Strait Islander persons that is lower than required by the Act – section 141-10(2).

## Body Corporates

A corporation may have corporate members. These are members that are not individual people but are corporations or other types of incorporated entities. The Indigeneity requirement also applies to

corporations that have corporate members. As such, it may be necessary for the Registrar to consider if a corporate member is Indigenous-controlled when determining if a corporation meets the Indigeneity requirement. Control is the key consideration to whether a body corporate is Indigenous.<sup>1</sup>

Having an Indigenous person represent the corporate member does not automatically mean the corporate member is Indigenous-controlled. To determine whether a body corporate is controlled by an Aboriginal and Torres Strait Islander person or persons, the Registrar must consider the practical influence that the person or persons can exert over the body corporate, and any practice or pattern of behaviour that affects the financial or operating policies of the body corporate.

For the Registrar to accept that a body corporate member meets the definition of an Aboriginal and Torres Strait Islander person under the CATSI Act, the Registrar must be satisfied that Aboriginal and/or Torres Strait Islander persons exert more influence over the financial and operating policies of the body corporate than non-Indigenous persons do.

A relevant factor will be whether Aboriginal and Torres Strait Islander persons comprise a majority of members, shareholders and directors (depending on the type of body corporate).

If an Aboriginal and/or Torres Strait Islander person and a non-Indigenous person jointly have the capacity to control decisions about a body corporate's financial and operating policies, the Aboriginal and/or Torres Strait Islander person does not necessarily have a controlling interest – section 689-25(3). In this instance the corporate member will not be considered Aboriginal or Torres Strait Islander controlled and is therefore a non-Indigenous member of the corporation.

Government entities, including local councils, are generally not considered to be Indigenous controlled.

<sup>1</sup> Under the CATSI Act, an entity has a controlling interest in a body corporate if the entity has the capacity to determine the outcome of decisions about the body corporate's financial and operating policies – section 689-25. In this context, an entity means an individual person, a body corporate, a partnership or a trust (including the trustee of a trust) – section 694-40.

## Directors

Unless a corporation's rule book provides otherwise, all directors of corporations must be individuals who are Aboriginal and/or Torres Strait Islander persons – section 246-1(3).

If a corporation's rule book allows for non-Indigenous directors, a majority of the directors (including any non-member directors) must be Aboriginal and/or Torres Strait Islander persons – section 246-5(1). This includes any non-member or independent directors.

A director of a proposed corporation must sign a declaration that they are eligible to become a director of a corporation as part of the application for registration of the corporation – section 21-1(1) (h) together with 21-1(3)(f). In doing so a consenting director must confirm their Indigeneity (unless a non-Indigenous director is provided for as noted above).

If a corporation has two members and only one member is an Aboriginal and/or Torres Strait Islander person, the Registrar will consider that the corporation meets the majority of directors requirement under section 246-5, if at all times:

- the one Aboriginal and Torres Strait Islander member is a director and there is also an independent director who is an Aboriginal and/or Torres Strait Islander person who has no restrictions on their voting rights, or
- the corporation has more than two directors and the majority are Aboriginal and/or Torres Strait Islander persons (this being necessary if the one non-Indigenous member is also a director).

If a corporation has corporate members and directors are appointed to represent those corporate members, a majority of the directors must be Aboriginal and/or Torres Strait Islander persons. A non-Indigenous corporate member can be represented by an Indigenous director but this does not mean the corporate member will be considered as Indigenous.

## Indigeneity test

It is not the statutory role of the Registrar to accept or determine an individual's Indigeneity, but to be

satisfied that the evidence (when sought) provides acceptable proof of complying with the Indigeneity requirement of the CATSI Act.

A corporation will need to establish the Indigeneity of members or directors, including individual members or directors of corporate members.

The Australian courts have developed a 3-point legal test to determine whether an individual person is an Aboriginal and/or Torres Strait Islander person, which is the:

- person is of Aboriginal and/or Torres Strait Islander descent
- person identifies themselves as an Aboriginal and/or Torres Strait Islander person, and
- community recognises the person as an Aboriginal and/or Torres Strait Islander person.

In determining the third point, each community may also have its own criteria, processes and protocols for recognising an individual's Indigeneity. This might include matters of descent or cultural practices and lore.

ORIC will consider the 3-point test when considering evidence provided to demonstrate a corporation satisfies the Indigeneity requirements of the CATSI Act.

## Requiring evidence of Indigeneity

The Registrar's focus is not on the Indigeneity of individuals but on being satisfied that corporations meet the Indigeneity requirement and are Aboriginal and Torres Strait Islander owned and controlled.

The Registrar may ask a corporation to provide evidence of the Indigeneity of one or more of its members (including directors) where there is a potential risk the corporation is not meeting the Indigeneity provisions of the CATSI Act. The Registrar may also ask for evidence of the Indigeneity of a director or member if the corporation's rule book does not expressly permit directors or members who are not Aboriginal and Torres Strait Islander persons.

The Registrar will determine whether there is need to seek evidence of Indigeneity:

- when a corporation applies for registration – section 21-10
- when a corporation lodges a document with the Registrar – section 407-5



- at any time when a corporate member is included on a register kept by the Registrar – section 407, or
- where there is reasonable belief that a corporation may not meet the Indigeneity requirement.

The Registrar will seek evidence from corporations with the following characteristics:

- corporation's corporate member is not an Aboriginal and Torres Strait Islander corporation
- corporation has 20 or fewer members.

Where the Registrar receives a report of concern regarding the Indigeneity of an individual member or director, ORIC will consider whether it raises a reasonable concern that:

- a corporation is not meeting the Indigeneity provisions of the CATSI Act, or
- the corporation has a non Indigenous director which is not expressly provided for in its rule book.

A certificate of Indigeneity is the most common form of evidence recognising an individual's Indigeneity. The Registrar will accept this form of declaration where it is made by a corporation under its common seal, and where the corporation is:

- an Aboriginal and Torres Strait Islander corporation that is not the corporation, nor a related entity, of the corporation the Registrar is seeking evidence
- a body corporate that is recognised under relevant state or territory legislation as a body to be consulted in relation to Aboriginal and/or Torres Strait Islander heritage matters
- an Indigenous controlled entity that is a member of the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.

The Registrar may also accept documentation that confirms the person is a:

- common law holder described in a determination of native title
- member of a native title claim party to an active registered application and where there is supporting evidence to the claim
- member of a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976*
- member of a Local Aboriginal Land Council under the *NSW Aboriginal Land Rights Act 1983*
- recipient of an Indigenous measure or benefit
- member of a group which is for Indigenous people only (stolen generation, resident of an institution etc).

Recognising the challenges that some Indigenous people face in obtaining formal documentation, the Registrar may at their discretion, accept a corporation's reliance on a:

- statutory declaration made by someone of standing within the community such as a health care worker regarding the Indigeneity of a member or director of a corporation. Preferably the person making the declaration is independent of the corporation i.e. not a member of the corporation.
- letter from a council of an Indigenous community on letter head and signed by an Indigenous person with authority such as a councillor or signed by a member of staff if the letter states that it is council authorised.

The Registrar will exercise this consideration at their sole discretion considering the risks and other information provided by the individual.

When gathering evidence to satisfy Indigeneity, the Registrar may:

- ask questions of those people with knowledge of the affairs of a corporation – section 453-5
- require the corporation to produce additional documents or information about a submitted document – section 407-5
- examine the books of a corporation – section 453-1
- convene meetings of interested persons – section 439-5.

Under the CATSI Act it is an offence to provide false or misleading information to the Registrar.

## Failure to comply with the Indigeneity requirement

An application for registration of an Aboriginal and Torres Strait Islander corporation may be unsuccessful if the proposed corporation does not meet the Indigeneity provisions.

If the Registrar finds that an existing corporation no longer complies with the Indigeneity provisions, the Registrar may:

- issue a notice to the corporation requiring the corporation to comply with the CATSI Act – section 439-20
- request the Court wind up the corporation if the corporation fails to comply with the notice – section 526-15(1)(h).

## Important notice

Please note that this fact sheet is a summary giving you basic information about the CATSI Act. It does not cover the entirety of the relevant law regarding these powers, and it is not a substitute for professional advice. Omission of any matter in this fact sheet will not relieve a corporation or its officers from any penalty incurred by failing to comply with any statutory obligations within the laws ORIC administers.

You should also note that because this fact sheet is providing a plain language legal summary, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your circumstances must be taken into account when determining how the law applies to you.

