



Australian Government

Office of the Registrar of Indigenous Corporations



## The Indigeneity requirement

<b>Policy</b>	PS-11: The Indigeneity requirement
<b>Relevant legislative provisions</b>	CATSI Act section 29-5 CATSI Regulations section 6
<b>Last updated</b>	21 February 2020
<b>Other relevant policies</b>	PS-01: Providing information and advice PS-15: Privacy

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## **PS-11: The Indigeneity requirement**

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### **1 Purpose**

- 1.1 In this policy statement, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) provides guidance on the Indigeneity requirements for members and directors of Aboriginal and Torres Strait Islander corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).
- 1.2 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 Indigeneity requirement**

- 2.1 In order for a corporation to be registered under the CATSI Act, the corporation must satisfy an Indigeneity requirement in section 29-5. This means that a corporation must have the required number or percentage of members who are Aboriginal and Torres Strait Islander people. The requirements for different size corporations are listed below.
- In a corporation with five or more members 51 per cent of the members have to be Aboriginal or Torres Strait Islander people—section 29-5(a) of the Act and prescribed in section 6 of the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017
  - In a corporation with fewer than five members but more than one member, all of the members, or all but one of the members have to be Aboriginal or Torres Strait Islander people—section 29-5(b)
  - In a corporation with only one member, that member has to be an Aboriginal or Torres Strait Islander person—section 29-5(c).
- 2.2 An application for registration must show which members are non-Indigenous. The person applying for registration of a proposed corporation has to sign the application form confirming all information in it is true and correct.
- 2.3 It is also an ongoing requirement that a corporation continues to meet the Indigeneity requirement at all times—section 141-10. A corporation which allows for members who are not Aboriginal and Torres Strait Islander people must record whether a member is non-Indigenous on its register of members—section 180-5(2).
- 2.4 A corporation's rule book may also provide that the corporation must have a higher percentage of members who are Aboriginal and Torres Strait Islander persons than that provided for in the Indigeneity requirement in

section 29-5—section 141-10(2). However, a corporation that does not meet this higher number or percentage of people will not be in breach of the Indigeneity requirement in section 29-5 if it fails to have this increased number of people—section 141-10(3).

- 2.5 Also, unless a corporation’s rule book provides otherwise, all directors of corporations must be Aboriginal and Torres Strait Islander persons—section 246-1(3). If a corporation’s rule book does allow for non-Indigenous directors, a majority of the directors (including non-member directors if allowed by a corporation’s rule book) must be Aboriginal and Torres Strait Islander persons—section 246-5(1).
- 2.6 A director of a proposed corporation must sign a declaration in the application for registration that they are eligible to become a director of a corporation.

### **3 Indigeneity requirement—at registration**

- 3.1 In determining whether the Indigeneity requirement for members has been satisfied, the Registrar will accept the confirmation provided by the applicant that all information in the application, including information on the Indigeneity of proposed members, is true and correct. Similarly, the Registrar will accept the declaration by directors that they are eligible to become a director of a corporation and, accordingly, meet the Indigeneity requirements for directors.
- 3.2 In most cases, self-identification by a member of a corporation or proposed corporation as an Aboriginal and Torres Strait Islander person will be sufficient to satisfy the Indigeneity requirement in section 29-5. However, circumstances may arise where the Registrar will require further information on whether a corporation meets the Indigeneity requirement. Whether this information is required will be determined on a case by case basis.
- 3.3 The Registrar will not seek to verify the Indigeneity of a member or director unless there is a risk that the Indigeneity requirement is not satisfied.

### **4 Indigeneity requirement—ongoing requirements and challenges from third parties**

- 4.1 The Registrar believes it is a corporation’s responsibility to ensure it continues to comply with the ongoing Indigeneity requirements for its members and directors. This is not an area that the Registrar will be actively regulating.
- 4.2 In the event of any challenge to the Indigeneity of a member or director of a corporation, the Registrar will not personally make any determination on the Indigeneity of the person.

- 4.3 Each community will have its own processes or protocols to follow for determining whether a person is from their community. The Registrar believes that any determination regarding Indigeneity is best made by the member or director's own community in accordance with the community's own processes or protocols.

## **5 Indigeneity test—how a determination is made by the courts**

- 5.1 The Australian courts have also developed a three point legal test to determine whether a person is an Aboriginal or Torres Strait Islander person. The requirements of the three point test (first outlined by Deane J in *Commonwealth v. Tasmania*<sup>1</sup>) are:

- the person is of Aboriginal or Torres Strait Islander descent
- the person identifies himself or herself as an Aboriginal or Torres Strait Islander person
- the community recognises the person as an Aboriginal or Torres Strait Islander person.

- 5.2 More recent cases have also established the following principles in applying the three-point test<sup>2</sup>:

- some degree of descent is necessary, but not of itself a sufficient condition of eligibility to be an Aboriginal person
- a small degree of Aboriginal descent coupled with genuine self-identification or with communal recognition may, in a given case, be sufficient for eligibility
- a substantial degree of descent, given the general communal recognition of Aboriginality that usually accompanies it, may by itself be enough to require that the person be regarded as an 'Aboriginal person'
- communal recognition as an Aboriginal person may, given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records, often be the best evidence available of proof of Aboriginal descent.

## **END OF POLICY STATEMENT**

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<sup>1</sup> (1983) 158 CLR 1.

<sup>2</sup> These principles are taken from the judgment of Merkel J in *Shaw v. Wolf* (1998) 83 FCR 113 at 118 and are a summary of conclusions made by Drummond J in *Gibbs v. Capewell* (1995) 54 FCR 503.