



Australian Government

Office of the Registrar of Indigenous Corporations



## POLICY STATEMENT 11

# The Indigeneity requirement

<b>Policy</b>	PS-11: The Indigeneity requirement
<b>Relevant legislative provisions</b>	CATSI Act sections 29-5, 141-10, 180, 243, 246-1, 246-5, 407-5, 407-10, 689-25 and 700-1 CATSI Regulations section 6
<b>Last updated</b>	24 January 2022
<b>Other relevant policies</b>	PS-01: Providing information and advice PS-02: Complaints involving corporations PS-05: The registrar's powers to intervene PS-15: Privacy PS-25: Examinations

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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) and *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (CATSI Regulations).

#### 1.B References

- 1.2 Unless otherwise specified, references in this policy statement to:
- sections are references to sections of the CATSI Act
  - paragraphs are references to paragraphs of this policy statement
  - corporations are references to Aboriginal and Torres Strait Islander corporations
  - Aboriginal and Torres Strait Islander person are references to persons as described in the CATSI Act—see section 3.B of this policy statement.
- 1.3 In addition, references to the registrar in this policy statement are also references to a delegate who is lawfully exercising the powers of the registrar.

### 2 The Indigeneity requirement

2.1 For a corporation to be registered under the CATSI Act, the corporation must satisfy the Indigeneity requirement for members and the majority of directors requirement. Directors must ensure that their corporation meets the Indigeneity requirement at all times—section 141-10.

#### 2.B Members

- 2.2 The Indigeneity requirement is based on the number of members of the corporation and to meet the Indigeneity requirement, a certain number or percentage of members of the corporation must be Aboriginal and Torres Strait Islander persons.
- 2.3 In a corporation with:
- 5 or more members, 51 per cent of the members must be Aboriginal and Torres Strait Islander persons—section 29-5(a) of the Act and prescribed in section 6 of the 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).

- 2.4 A corporation may have corporate members. These are members that are corporations or other types of incorporated entities. The Indigeneity requirement also applies to corporations that have corporate members (see section 6.C of this policy statement).
- 2.5 If the corporation’s rules allow 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).
- 2.6 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 CATSI Act—section 141-10(2).
- 2.7 If the number or percentage of members who are Aboriginal and Torres Strait Islander persons does not meet what is set out in the rule book, the corporation will be in breach of its rule book but not necessarily in breach of the CATSI Act—section 141-10(3).

## **2.C Directors**

- 2.8 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).
- 2.9 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).
- 2.10 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.
- 2.11 If a corporation has 2 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 if, at all times:
- the Aboriginal and Torres Strait Islander member is a director and there is an independent director who is an Aboriginal and/or Torres Strait Islander person appointed, or
  - the corporation has more than 2 directors and the majority are Aboriginal and/or Torres Strait Islander persons.
- 2.12 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.

## **3 Definitions under the CATSI Act**

- 3.1 To comply with the Indigeneity requirement, corporations need to know which members meet the definition of an Aboriginal and Torres Strait Islander person under the CATSI Act.

### **3.B Aboriginal and Torres Strait Islander person**

- 3.2 Section 700-1 of the CATSI Act defines ‘Aboriginal and Torres Strait Islander person’ only for the purpose of determining how the CATSI Act applies.
- 3.3 Under the CATSI Act, an Aboriginal and Torres Strait Islander person may be:
- an [Aboriginal person](#)
  - a [Torres Strait Islander](#) person
  - an [Aboriginal and Torres Strait Islander person](#)
  - a [Torres Strait Islander](#) and [Aboriginal person](#)
  - an Aboriginal and Torres Strait Islander corporation, or
  - a body corporate in which a controlling interest is held by any or all of the following persons:
    - an [Aboriginal person](#)
    - a [Torres Strait Islander](#) person
    - an [Aboriginal and Torres Strait Islander person](#)
    - a [Torres Strait Islander](#) and [Aboriginal person](#)
- 3.4 There is currently no body corporate prescribed by name, or class of bodies specified in the regulations.

### **3.C Controlling interest**

- 3.5 Under the CATSI Act, an entity has a controlling interest in a body corporate if the entity has the ability to control 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 trustee of a trust—section 694-40.
- 3.6 To determine whether or not a body corporate is controlled by an Aboriginal and/or 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.
- 3.7 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** have a controlling interest—section 689-25(3).
- 3.8 For the registrar to accept that a body corporate 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.

## 4 The Indigeneity test for individuals

4.1 The Australian courts have developed a 3-point legal test<sup>1</sup> to determine whether an individual person is an Aboriginal and/or Torres Strait Islander person, which is:

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

4.1 More recent cases have also established the following principles in relation to the 3-point test:<sup>2</sup>

- Some degree of descent is necessary but is 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 communal recognition may be sufficient for eligibility.
- A substantial degree of descent alone may be enough to regard someone as an Aboriginal person, given the general communal recognition of Aboriginality that usually accompanies that descent.
- Communal recognition as an Aboriginal person may be the best evidence available given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records.

4.2 The registrar will employ these principles to consider whether a person is an Aboriginal and Torres Strait Islander person under the CATSI Act (see section 6 of this policy statement).

4.3 Each community and organisation will have its own processes or protocols for recognising a person as an Aboriginal and Torres Strait Islander person. The registrar relies on the communities and organisations using their own knowledge, processes and protocols to provide evidence that a person is an Aboriginal and/or Torres Strait Islander person to satisfy the Indigeneity test.

## 5 When evidence of Indigeneity is required

5.1 The registrar may seek evidence that a member or director of a corporation is an Aboriginal and Torres Strait Islander person:

- when a corporation applies for registration—section 21-10
- when a corporation lodges a document with the registrar—section 407-5, or

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<sup>1</sup> First outlined by Deane J in *Commonwealth v. Tasmania* (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.

- at any time when a corporate member is included on a register kept by the registrar—section 407-10.

5.2 In addition, the registrar is likely to request evidence of the Indigeneity of corporation members at registration if a corporation:

- has fewer than 20 members
- is not established as a not-for-profit corporation, or
- has corporate members.

## **6 Evidence of Indigeneity**

6.1 To consider whether a corporation meets the Indigeneity requirement, the registrar may accept:

- an applicant's confirmation that all information in the application for registration is true and correct, including information on the Indigeneity of proposed members and directors
- a declaration by a person lodging reports and forms with the registrar that the information being lodged is true and correct.

6.2 In most cases, confirmation by the corporation or self-identification by the member or director will be sufficient to satisfy the registrar that a person is an Aboriginal and Torres Strait Islander person. However, if the registrar has concerns that a corporation may not meet the Indigeneity requirement, the registrar may require evidence that a corporation's members or directors are Aboriginal and Torres Strait Islander persons.

6.3 When the registrar requires further evidence that a corporation's members or directors are Aboriginal and Torres Strait Islander persons, the registrar may exercise his or her powers to acquire it. To do so, 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.

### **6.B Individuals**

6.4 The registrar may require evidence that an individual person is an Aboriginal and Torres Strait Islander person in the form of a document that confirms the person is:

- a common law holder described in a determination of native title
- an applicant or a member of a native title claim group in relation to a registered application for a determination of native title
- a member of an entity listed in attachment A

- recognised as an Aboriginal and/or Torres Strait Islander person by a declaration made and bearing the signature of an officer or seal of:
  - an Aboriginal and Torres Strait Islander corporation that is not the corporation in relation to which the registrar is seeking evidence
  - a particular Aboriginal and Torres Strait Islander body listed in attachment A
  - 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 entity that is a member of the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.

## **6.C Corporate members**

- 6.5 If a corporate member is not an Aboriginal and Torres Strait Islander corporation, the registrar may require evidence that an Aboriginal and/or Torres Strait Islander person or persons have the capacity to determine the outcome of decisions about the financial and operating policies of that corporate member.
- 6.6 The registrar may require evidence that the majority of both directors and members are Aboriginal and/or Torres Strait Islander persons to accept that any of the following is an Aboriginal and Torres Strait Islander person:
- an incorporated association
  - a cooperative
  - a company limited by guarantee, or
  - another body corporate incorporated under a Commonwealth, state or territory law.
- 6.7 The registrar may require evidence that the majority of both directors and shareholders are Aboriginal and Torres Strait Islander persons to accept that either of the following is an Aboriginal and Torres Strait Islander person:
- a public company or
  - a proprietary limited company.
- 6.8 For the purpose of the CATSI Act, a body corporate that is a local government is not an Aboriginal and Torres Strait Islander person.

## **7 Failure to comply with the Indigeneity requirement**

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



- 7.2 If the registrar finds that an existing corporation no longer complies with the Indigeneity requirement, 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).
- 7.3 In addition, any person may bring a challenge to the Indigeneity of a member or director of a corporation in the Federal Court.

**END OF POLICY STATEMENT**

## **Attachment A—Aboriginal and Torres Strait Islander bodies**

- a Northern Territory land council established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- a New South Wales local Aboriginal land council established under the *Aboriginal Land Rights Act 1983* (NSW)
- a native title representative body recognised under section 203AD of the *Native Title Act 1993* (Cth)
- Anangu Pitjantjatjara Yankuntjatjara, established under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA)
- Wreck Bay Aboriginal Community Council, established under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)
- a community working party of the Murdi Paaki Regional Assembly