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**Indigenous Corporate Governance in
Australia and Beyond**

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Indigenous Corporate Governance in Australia and Beyond

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Abstract

Indigenous Australians, like their counterparts around the world, have not consistently had their rights acknowledged and upheld since the earliest days of Western colonisation. From the concept of Terra Nullius to the forcible removal of indigenous children from their families, indigenous Australians have had to fight hard to have their rights recognised. International recognition of the rights of indigenous peoples is now widespread, with 150 countries endorsing the United Nations Declaration on the Rights of Indigenous Peoples since 2007. One of the rights acknowledged by the United Nations Declaration relates to the economic freedom that should be given to indigenous peoples.

Such freedom will remain symbolic if governments around the world do not take steps to ensure that indigenous peoples can establish their businesses based on their own cultures and traditions. In Australia, for instance, the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) ('CATSI Act') attempted to take such a step even prior to Australia's endorsement of the United Nations Declaration. This statute was introduced with the aim of empowering indigenous Australians to run their businesses based on their culture and traditions. However, although this legislation may have high aspirations, it does not always achieve its objectives.

This chapter considers the rights of indigenous Australians under the CATSI Act. The Australian position will also be compared with steps taken by other countries to provide economic freedom to indigenous peoples by allowing them to run their businesses based on their own cultures and traditions.

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Introduction

When the British arrived in Australia in 1788, Aborigines had been residing in the country for over 45,000 years (Allen & O'Connell, 2003). Conflict between indigenous and Western cultures began with the arrival of the First Fleet (Ranzijn, McConnochie & Nolan, 2009, 71) and was exacerbated when the colonisers declared Australia to be *terra nullius* (Latin for no man's land) and seized the land of Aborigines. Social Darwinism was relied upon to justify the belief that indigenous peoples were inferior to Westerners (Francis, 1996) and, consequently, the dispossession of Aborigines was deemed legitimate (Locke, [36]). This dispossession further resulted in Aborigines losing control of their economy, which was based on the land (Keen, 2004).

In the nineteenth century and first half of the twentieth century, the situation of Aborigines did not improve, as segregation was implemented and Aborigines were marginalised. This period was followed by a policy of assimilation which resulted in the removal of indigenous children from their homes. Further, laws were passed to control all aspects of indigenous life (Van Krieken, 1999). During the second half of the twentieth century, however, the emergence of an indigenous protest movement resulted in support for the Aborigines' cause. In the 1970s, for example, the Whitlam government was elected on a platform which included self-determination for Aboriginal people (Rhodes, 1974-1975). This government instituted a number of reforms, including passage of the *Aboriginal Councils and Associations Act 1976* (Cth) ('ACA Act') which empowered Aborigines to run their businesses based on their own culture and traditions.

The ACA Act evolved over the next 30 years and was replaced in 2006 by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('CATSI Act'). A year after the new legislation was enacted, the United Nations General Assembly adopted by overwhelming majority its *Declaration on the Rights of Indigenous Peoples* ('UN Declaration'; General Assembly Res No 61/295, 2007). Although the UN Declaration is non-binding and aspirational, it presents, for the first time, a comprehensive list of the rights of indigenous peoples (Prasad, 297), including their economic rights (see, for example, UN Declaration, article 20). The latter are especially important as cultural freedom may be said to depend on economic freedom which may be sustained through engagement in real economic activities (O'Sullivan, 2007, 203). To assess whether incorporation is a suitable means of empowering indigenous peoples from an economic perspective, this chapter first examines Australia's attempt at the economic empowerment of its Aboriginal people by providing them with the option to create indigenous corporations. It then considers initiatives other countries have implemented to enable their indigenous peoples to take control of their economy through the establishment of indigenous corporations.

The Australian Position

The need to permit Aborigines to run their businesses based on their own traditions and culture had been recognised in Australia well before the adoption of the UN Declaration by the United Nations General Assembly. For example, in the first report of the Aboriginal Land Rights Commission published in July 1973, Justice Woodward stated:

[S]ince unincorporated associations, co-operatives and trustee arrangements all have clear defects in the Aboriginal situation, there is an obvious need for provisions for incorporation. Further, laws relating to incorporation under the Companies Acts are inappropriate for most Aboriginal purposes (Aboriginal Land Rights Commission, 1973, [166]).

Evolution: From ACA Act to CATSI Act

The *ACA Act* was enacted as a result of the recommendations of Justice Woodward's report. The legislation aimed to take indigenous values and practices into account and to make it simpler for indigenous groups to 'adopt structures relevant to their needs and to incorporate in an appropriate manner' (Commonwealth, 1976, 2947). Consequently, one of the main features of the *ACA Act* in its original form was its flexibility and non-prescriptive nature. This allowed Aborigines to create their businesses in a culturally appropriate manner. Further, s 43(4) of the *ACA Act* stated that the rules regulating the management of indigenous corporations could be based on 'Aboriginal custom'.

Since the *ACA Act* recognised that indigenous customs had a role to play in the running of indigenous corporations, the legislation appeared to achieve one of the aspirational goals of the UN Declaration. However, the *ACA Act* was subject to a number of criticisms, one of which was that the legislation did not comply with Western standards of accountability (Neate, 1989). As a result, amendments to the *ACA Act* in 1992 introduced more restrictions on the running of indigenous corporations. The *ACA Act* became a very complex piece of legislation. The amendments, and the manner in which they were applied by the regulator, meant that the legislation became prescriptive and very rigid. In effect, the freedom that Aborigines had had to create culturally appropriate corporations was removed. Some went as far as describing the Act as obsolete (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996).

To deal with these criticisms, a review of the *ACA Act* was conducted in 2002. The review found that the *ACA Act* failed to address the needs of the indigenous community and recommended that it be replaced by new legislation that would provide Aborigines with the 'key facilities of a modern incorporation statute...while remaining tailored to meet the specific

incorporation needs of indigenous Australians’ (Corrs Chambers Westgarth Lawyers, 2002, 2, 110).

As a result of the 2002 review, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (‘CATSI Act’) was passed by the Australian Parliament in October 2006 to replace the *ACA Act*. Like its predecessor, the *CATSI Act* allows indigenous Australians to create indigenous corporations. While the legislation commenced on 1 July 2007, existing indigenous corporations registered under the *ACA Act* were given a transition period of two years in which to comply with the new statute. As the legislation empowers Aborigines to take control of their economy through the establishment of indigenous corporations, it appears to fit with the economic objectives of the UN Declaration.

Does the Legislation Empower Indigenous Australians?

Indigenous corporations may help to close the socioeconomic gap between indigenous and non-indigenous Australians (Macklin, 2009, 29) as they may be deemed as a culturally appropriate business structure that provides work to Aboriginal people, especially in remote areas of Australia. Over the years, the number of indigenous corporations has steadily increased. As of May 2012, 2,392 entities were incorporated under the *CATSI Act* (Office of Registrar of Indigenous Corporations, 2012). This number is important, as the incorporation process under the legislation is voluntary and Aborigines may opt to run their businesses under mainstream legislation such as the *Corporations Act 2001* (Cth) or the Partnership Acts in each state. While it appears that the *CATSI Act* is a step forward towards empowering indigenous Australians, the legislation is problematic for a number of reasons:

- Firstly, the *CATSI Act*, like its predecessor, allows for the creation of indigenous corporations based on the Western concepts of incorporation and the legal recognition of bodies corporate. These concepts are foreign to indigenous Australians. For example, Sansom (1985, 70) argued that the fact that incorporation is a mandatory requirement for an indigenous organisation to be recognised as a legal entity by the State constitutes a form of cultural coercion. In a similar vein, Rowse (1992, 98) labelled it a paradox that the concept of the indigenous corporation aims to empower indigenous Australians by imposing Western notions upon them. Politicians, too, have recognised this incongruity. In 1990, the final report of the House of Representatives Standing Committee on Aboriginal Affairs, *Our Future Our Selves*, observed that ‘it is ironic that Aboriginal communities are being asked to accept non-Aboriginal structures in order to have greater control over their own affairs’ (25). Consequently, the very concept of incorporating an organisation may be confusing to indigenous Australians.
- Secondly, under the *CATSI Act*, as under mainstream corporations legislation in Australia, a board of directors is in charge of the management of an indigenous corporation. As the decisions of the indigenous corporation

are not made collectively and are not group-oriented, the management structure does not reflect the decision-making structure within the indigenous community (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996, 53). In *Nyul Nyul Aboriginal Corporation v Dann* (1996) 133 FLR 359, the Federal Court of Australia confirmed that even though an indigenous corporation is created to serve the interests of its indigenous members, the board of directors is in charge of the running of the business and is not bound by the decisions of the members it is serving ([27]). Accordingly, members of indigenous corporations may not have a say in their management (Mantziaris & Martin, 2000, 202), and this in itself may reduce the role indigenous culture and values are able to play in indigenous corporations.

- Thirdly, the accountability regime of indigenous corporations is based on Western concepts. For instance, the directors of indigenous corporations have Western-based duties, such as the principle of fiduciary obligation, imposed on them (see, for example, *CATSI Act*, ss 265-10, 265-15). It has been argued that indigenous corporations are better suited to business structures that do not rely on fiduciary principles for accountability (Mantziaris, 1997, 16; Martin & Finlayson, 1996, 23).
- Fourthly, under the *CATSI Act*, every indigenous corporation must hold an annual general meeting (*CATSI Act*, s 201-150), at which procedure heavily reliant on democratic processes is imposed even though decision-making by democratic process may be inappropriate in indigenous cultures (Mantziaris & Martin, 2000, 188, 311-315; Taylor, 1996, 432-3). When in the early 1970s Justice Woodward highlighted the need for the introduction of a special system of incorporation for indigenous groups, he warned that any such legislation ‘should, so far as possible, make provision for Aboriginal methods of decision-making by achieving consensus rather than by majority vote’ (Aboriginal Land Rights Commission, 1973, [332]). Justice Woodward further observed that meetings may not be the best way to elect directors, since elections were a recent innovation that may not conform to indigenous culture (Aboriginal Land Rights Commission, 1973, [180]).

Therefore, as seen above, the very concept of incorporation of the indigenous entity, the management of the organisation, its accountability regime, and its members’ involvement—or lack thereof—are all based on Western notions. One may then question whether entities registered under the *CATSI Act* can be run based on indigenous concepts. Although, unlike its predecessor, the *CATSI Act* does not officially acknowledge that these entities may be run based on indigenous customs and traditions, the legislation does allow indigenous corporations to adopt a set of internal governance rules that the members of the corporation believe to be culturally appropriate to run their business.

This is a very important move, as the internal governance rules are those rules which regulate the activities of the organisation and the relationships within it. Under the *CATSI Act*, the internal governance rules of

an indigenous corporation are constituted by the replaceable rules set out in the *CATSI Act* and the corporation's constitution (*CATSI Act*, ss 57-5, 63-1). The 29 replaceable rules dealing with a range of matters from members' general meetings to the appointment of directors will apply to an indigenous corporation unless they have been modified or replaced by the corporation's constitution. The fact that these rules are replaceable allows indigenous corporations a certain amount of flexibility in respect of these matters, and enables the introduction of rules more suitable to a particular indigenous organisation. Consequently, each indigenous corporation is able to determine the content of the replaceable rules that will apply to its members' general meetings. For example, a corporation may provide in its constitution that members' resolutions must be passed by consensus rather than by majority. This is a small step towards empowering indigenous Australians. However, it may be said that the current regime under the *CATSI Act* only allows Aborigines to play a minor role in the shaping of their institutions, and does not provide them with autonomy (O'Sullivan, 2007, 8). More needs to be done to ensure the economic independence of Aborigines through the establishment of indigenous corporations.

Accordingly, examining the manner in which other countries have established indigenous corporations is essential to determine whether this form of business, despite being foreign to indigenous peoples, may allow for their economic empowerment and fulfil some of the aspirational goals of the UN Declaration.

The Position in Other Countries

While Australia has allowed for the creation of Westernised indigenous corporations, other countries have also relied on incorporation in seeking to empower their indigenous peoples. Like Australia, Papua New Guinea ('PNG') has created a special regime for the establishment of indigenous corporations. Other countries, such as New Zealand ('NZ'), have adopted a more fragmented approach to incorporation. It may be seen that the colonial history of each country has shaped its current indigenous corporations.

Papua New Guinea

Indigenous people have been living in PNG for over 50,000 years (Griffin, Nelson and Firth, 1979, 1). Colonisation of PNG in the nineteenth century resulted in the resettlement of its indigenous peoples and the destruction of traditional ways of life, causing great harm to the indigenous population (Connolly & Anderson, 1987). After gaining independence from Australia in 1975, PNG attempted to reaffirm indigenous sovereignty by recognising, for example, that the customs governing the affairs of people are part of the laws that may apply to the population (*Constitution of the*

Independent State of Papua New Guinea, s 9). This is despite the reality that customary practices vary from one tribe/clan to the next.

Consequently, the indigenous population in PNG still has strong ties to their customs and traditions (Narokobi, 1980, vii) and, even though the country ‘inherited much of the social and economic undertakings from Australia immediately after Independence’ (Matui, 2010, 138), the PNG government has taken a different approach to Australia regarding the economic empowerment of its indigenous population.

Like Australia, PNG allows for the incorporation of mainstream corporations under the *Companies Act 1997*. So too, although incorporation is a concept foreign to indigenous peoples as noted previously, it has given legal recognition to indigenous groups with the passage of the *Land Groups Incorporation Act 1974* (*LGI Act*) and the *Business Groups Incorporation Act 1974* (*BGI Act*). Like the *CATSI Act*, these statutes aim to encourage indigenous people to be involved in business activities run based on their customs and traditions (Ghai, 1982). The *LGI Act*, for example, allows ‘greater participation by local people in the national economy by the use of the land’ (*LGI Act*, s 1). These incorporated land groups are very popular among ‘resource renters’ in forestry and oil and gas projects, ‘where customary land holders on whose land these resources are found are now statutorily required to have themselves organised into [incorporated land groups] before they can negotiate’ as ‘resource renters’ with ‘resource project developers’ (Kalinoe, 2003, 73). The *BGI Act* also enables indigenous people to participate in general business activities, not necessarily linked to the land, run based on their customary laws (*BGI Act*, s 1).

However, unlike Australia’s *CATSI Act*, the *LGI Act* and the *BGI Act* allow entities to really be run based on indigenous customs and traditions, as they do not prescribe any clear corporate governance framework. As customary law is relied on to appoint the executive and to manage the corporation, entities registered under these statutes can be referred to as ‘customary corporations’. Such corporations ‘are not creatures of statutory enactments but are merely legitimised through statutory enactments, in the sense that legislation merely formalises and gives “recognition” to existing social organizations of the respective societies of PNG, and also gives them certain statutory powers’ (Kalinoe, 2001, 73). Therefore, even though these entities rely on the Western concept of incorporation, this notion is just one way to justify the legal existence of the entities. The rest of the affairs of these corporations are run in accordance with customary law. This approach is different from that in Australia, where there is heavy legislative intervention in the process of running an indigenous corporation.

While the lack of prescriptive rules in the governance of PNG customary corporations allows its indigenous peoples to shape their businesses as they see fit, this same lack of guidance is problematic, as it has left a number of these entities riddled with mismanagement and misuse (Kalinoe, 2003). Although to have customary corporations is a noble goal, these entities have not always run successfully (Mugambwa, 1990).

New Zealand

The Māori people have lived in NZ for over 1000 years (McGlone & Wilmshurst, 1999, 5). When the British colonised NZ in the early nineteenth century, the Māori did not fare much better than Australia's Aborigines. Although the colonial history of NZ originally differed from Australia in that the British formally recognised Māori independence in 1835, this position soon changed (O'Malley, Stirling and Pentito, 2010, 30, 32). The Treaty of Waitangi signed in 1840 was supposed to lead to the sharing of power between the British and the Māori (Durie, 1998, 3, 177). However, there were two versions of the Treaty of Waitangi: one in Māori and one in English, and the two versions were not exact translations of each other. While the English version supported British sovereignty, the Māori version maintained the chieftainship of the Māori people and only gave the British governance (Orange, 1987, 90). Having signed it, the British ignored the Treaty of Waitangi, and this attitude led to the expropriation of land and the cultural marginalisation of the Māori (Rumbles, 1999, 2).

More recently, grievances arising from the consistent breach of the Treaty of Waitangi have been brought forward and attempts have been made to resolve them. For example, settlement processes have been put in place. These settlement processes deal with breaches of the Treaty by allowing the aggrieved party to enter into negotiations with the government directly or after a hearing in front of the Waitangi Tribunal (Coxhead, 2002). Positive steps have been taken to compensate the Māori for their loss, but the Māori do not have one general business structure specifically designed to allow them to create indigenous corporations to run their businesses based on their customs and traditions. Over the years, the NZ legislature has relied on incorporation to empower indigenous people to achieve certain particular objectives through the following organisational structures:

- Māori Trust Boards: Available since 1922, each Māori Trust Board is a body corporate with perpetual succession. The *Māori Trust Boards Act* provides some level of accountability and transparency, but these boards are ultimately responsible to the Minister of Māori Affairs rather than to the beneficiaries of the trust (*Māori Trust Boards Act 1955*, s 32).
- Incorporations and Trusts under the *Te Ture Whenua Māori Act 1993*: This type of business structure is specifically designed for the management of Māori land.
- Mandated Iwi organisations: This type of organisation provides for the governance of entities that specifically deal with the management of fisheries assets received under the *Fisheries Act 2004*. The business structure cannot be used for any other venture and consequently is limited in scope.
- Statutorily-created entities: This type of entity is created by private statute and may provide the most tailor-made vehicle for managing Māori affairs. However, as drafting and enacting legislation is complex and time consuming, creating these statutory entities is difficult.

NZ's indigenous people may run their businesses under mainstream legislation. For example, indigenous people may run their business in the form of incorporated societies. Though this business structure may look attractive as it is cheap to create, its major limitation is that incorporated societies must be not-for-profit organisations, and they are not accountable to their members but to a government body. Further, the *Incorporated Societies Act 1908* is out of date and has many gaps (*Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472, [80]). Similarly, Māori may incorporate companies. While companies may be for-profit organisations, their foundation is based on Western concepts and not indigenous values. They are not suitable for cultural activities, for example (McKay, 2011, 38). Further, Māori have found it difficult to align their values with this Western corporate structure (Harmsworth, 2005, 108).

In 2006, the NZ Law Commission proposed the introduction of Māori corporations, or *Waka Umanga* (Law Commission, 2006). The introduction of this type of corporation was aimed toward rebuilding Māori institutions. The new form of business proposed allowed for the establishment of a legal entity tailored to meet the organisational needs of Māori tribes and other groups that manage communal Māori assets (Law Commission, 2006, 12). Māori concepts were to be incorporated in the legislation, ensuring that Māori ideas become an operational part of the Western regime (Turvey, 2009, 535).

The Law Commission's proposals resulted in the introduction of the *Waka Umanga (Māori Corporations) Bill* in 2007. In allowing the creation of tailored business structures, the Bill provided flexibility to the Māori people to shape their governance to suit their particular needs (Explanatory Memorandum of the *Waka Umanga (Māori Corporations) Bill*). In 2008 the Māori Affairs Select Committee supported passage of the Bill with some changes, but a change of government during the year meant that the Bill was not passed, as it was opposed by the National-led government which came to power (McKay, 2011, 89). The National party's position was reflected during the First Reading of the Bill when Honourable Georgina Te Heuheu stated that 'Māori did not seek this legislation. There is no demand for it from Māori. The initiative ... seeks to be imposed on Māori tribes' (*Waka Umanga (Māori Corporations) Bill – First Reading*, 11 December 2007).

In NZ therefore, unlike in Australia and PNG, the current approach to the formation of a business by indigenous people does not allow for one general business structure. While NZ's indigenous people may choose which of a number of business structures they wish to adopt, structures specifically targeted toward Māori such as entities registered under the *Te Ture Whenua Māori Act 1993* or the *Fisheries Act 2004* can only be used in limited instances, and the reality remains that there is a lack of cohesion between the structure and function of existing legal frameworks and the unique characteristics that form the Māori collectives.

Conclusion

One way to empower indigenous peoples is by allowing them to create businesses based on their values and traditions through the process of incorporation. However, as the concept of incorporation is foreign to indigenous peoples, the adoption of such a regime needs to be considered carefully in order to successfully achieve a balance between allowing indigenous people to run corporations based on their culture and values while still holding those corporations accountable to prevent mismanagement.

The Australian system of incorporation under the *CATSI Act* is not an ideal system as it is too heavily reliant on Western values. The PNG system is the opposite, being too heavily reliant on indigenous values. The problem with the latter approach is that PNG's regime does not have an efficient system of accountability, which has resulted in infighting and problems in the management of its organisations. Such an approach is not desired as mismanagement does not lead to the empowerment of indigenous peoples. NZ has historically taken a different approach to Australia and PNG, in opting to allow the incorporation of indigenous organisations in limited instances, so that indigenous corporations can only be run for certain purposes such as the management of land or fisheries. This is problematic as it forces indigenous people to register under mainstream legislation when they wish to establish a general business. Consequently, a middle ground for the successful implementation of indigenous corporations has yet to be found.

Additionally, all the laws referred to in this chapter have been adopted before the endorsement of the UN Declaration by an overwhelming majority of countries. Consequently, it is now the time for Australia, NZ and PNG to review their existing laws and initiate reforms to ensure that they empower indigenous people.

In the end, incorporation may still be an option for the economic empowerment of indigenous peoples. However, any such legislation must balance Western and indigenous concepts. The legislation should not set one particular model for best practice, but any proposed model should be able to integrate indigenous governance values into the legal system. The system needs to allow indigenous and mainstream governance to co-exist.

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