INDIGENOUS CORPORATIONS AND THE BEST INTERESTS OF THE CORPORATION: MEMBERS OR BEYOND?

Marina Nehme*

Directors of Indigenous corporations registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) and directors of companies registered under the Corporations Act 2001 (Cth) have similar duties. However, the context in which these legal entities operate is different, with Indigenous corporations mainly operating in the not-for-profit sector supplying essential services to their communities. Additionally, these corporations are established under legislation designed to be "a special statute of incorporation for Aboriginal and Torres Strait Islander peoples that takes account of the special risks and requirements of the Indigenous corporate sector".

Accordingly, this article considers the extent to which the best interests obligation imposed on directors under s 265-5 of the CATSI legislation goes beyond the interest of members to take into account the interest of the stakeholders. In doing this, the article first reviews the interpretation of the sister provision of s 265-5 in the Corporations Act to understand how the provision operates and the implications of such an interpretation on the management of Indigenous corporations. Further, the article analyses the role that members and stakeholders play in the Indigenous corporation and then assesses possible avenues that may be available to ensure that this directors' duty is in line with the core purpose of the CATSI Act.

I INTRODUCTION

In Australia, Indigenous people may establish their businesses and not-for-profit organisations as bodies corporate under a range of Federal and State legislation, including incorporated associations

* Associate Professor, School of Private and Commercial Law, Faculty of Law and Justice, University of New South Wales, Sydney. I would like to thank Dr Shelley Bielefeld and Dr Elfriede Sangkuhl for their feedback regarding this article. I would also like to thank the student editors of this journal for their work as well as Santina Grech for compiling some of the data used in this article.

Acts,[1] the Corporations Act 2001 (Cth) (Corporations Act) and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act). The CATSI Act aims to maintain "a special statute of incorporation for Aboriginal and Torres Strait Islander peoples that takes account of the special risks and requirements of the Indigenous corporate sector".[2] However, this was not the first legislation that has been introduced in Australia to promote self-determination through the use of the corporate form.[3] The now-repealed Aboriginal Councils and Associations Act 1976 (Cth) (ACA Act) was first adopted in 1976 to allow for the establishment of Indigenous entities (Aboriginal Associations) to enable Indigenous Australians to run their businesses and other organisations in a culturally appropriate way, ensuring their focus could remain on meeting community needs rather than corporate legal requirements.[4]

As originally designed, the ACA Act provided the Aboriginal Associations with a set of broad rules that they needed to operate under. Corporate governance was not a key factor, and it was left to the organisation to decide on the best way to implement this notion.[5] Further, the accountability imposed on these Indigenous corporations mainly related to accounting and reporting.[6] As such, a

---

1 Associations Incorporation Act 1991 (ACT); Associations Incorporation Act 2009 (NSW); Associations Act 2003 (NT); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Reform Act 2012 (Vic); and Associations Incorporation Act 2015 (WA).

2 Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) (revised explanatory memorandum) at ii.

3 This is in line with art 3 of the United Nations Declaration on the Rights of Indigenous Peoples. That article notes that Indigenous people have the right to self-determination. One way to achieve this is through allowing them to freely pursue economic development. The corporate form may be one way to achieve this. For a critique of the Declaration, see Irene Watson *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, London, 2014) at 148.

4 In his Second Reading speech on the Aboriginal Councils and Associations Bill 1976 (Cth), then-Minister for Aboriginal Affairs, the Hon Ian Viner, referred to the:

> … bewilderment of Aboriginal elders in remote tradition-oriented communities, who simply want to get on with their own projects, when faced by the immense amount of documentation necessary to enable them to act as a legally recognised corporate body.

(3 June 1976) 23 Cth PD 2946 (Ian Viner). See also Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory *The Situation of Aborigines on Pastoral Properties in the Northern Territory* (December 1971) at 75; Aboriginal Land Rights Commission *First Report* (July 1973) at iii; and (3 June 1976) 23 Cth PD 2947 (Ian Viner).

5 See Christos Mantziaris "Beyond the Aboriginal Councils and Associations Act? Part I" (1997) 4(5) Indigenous Law Bulletin 10.

6 See for example Aboriginal Councils and Associations Act 1976 (Cth), ss 38 and 39.

directors' duties regime was not set up by the original legislation.[7] The directors' conduct instead was regulated by the general law.[8] While this status quo was in place for around 20 years, reviews into the ACA Act criticised the accountability regime imposed on directors and there was a push for a change in this area.[9] Accordingly, in 1992, directors' duties were introduced in the legislation.[10] However, these changes to the law did not necessarily result in an improvement of the system. For instance, a range of reviews of the legislation in the 1990s[11] and 2000s[12] highlighted dissatisfaction with the legislation and criticised it as a "piece of over-regulation" that imposed a high burden on the Indigenous corporations registered under it.[13]

Accordingly, in 2006, the CATSI Act was enacted to replace the ACA Act. Like its predecessor, the new statute allows Indigenous Australians to register for a bespoke business structure – in the case of this legislation, the Aboriginal and Torres Strait Islander corporations, referred to in this article as Indigenous corporations.[14] The legislation focused on improving "governance and capacity" in the Indigenous corporate sector.[15] It further aimed to modernise the way Indigenous Australians ran their businesses and organisations by providing a legislative framework that "maximises alignment" where practical with the Corporations Act, the mainstream legislation governing the regulation of companies in Australia.[16] Accordingly, mirror provisions of directors' duties have been introduced in the CATSI Act as highlighted in Table 1.

---

7 Graeme Neate *Report to the Registrar of Aboriginal Corporations on the Review of the Aboriginal Councils and Associations Act 1976* (September 1989) at 14–16.

8 Christos Mantziaris and David Martin *Native Title Corporations: A Legal and Anthropological Analysis* (The Federation Press, 2000) at 189.

9 See for example Neate, above n 7.

10 See for example Aboriginal Councils and Associations Act, ss 49C and 49D.

11 See for example Australian Institute of Aboriginal and Torres Strait Islander Studies *Review of the Aboriginal Councils and Associations Act 1976: Final Report* (1996) at 12. Aspects of these reviews will be considered in this article.

12 Corrs Chambers Westgarth *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act* (December 2002) at 157. Aspects of this review will be considered in this article.

13 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 11, at 15.

14 An "Aboriginal and Torres Strait Islander corporation" is defined by s 16-5 of the CATSI Act as "a corporation registered under this Act".

15 Revised explanatory memorandum, above n 2, at ii.

16 At ii.

Key directors' duties	Under the Corporations Act	Under the CATSI Act
Duties to act in good faith and for a proper purpose	Section 181: (1) A director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.	Section 265-5: (1) A director or other officer of an Aboriginal and Torres Strait Islander corporation must exercise his or her powers and discharge his or her duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.
Duty of care	Section 180: (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they: (a) were a director or officer of a corporation in the corporation's circumstances; and (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.	Section 265-1: (1) A director or other officer of an Aboriginal and Torres Strait Islander corporation must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if that reasonable person: (a) were a director or officer of an Aboriginal and Torres Strait Islander corporation in the corporation's circumstances; and (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
Duty to avoid conflict of interest	Section 182: (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or	Section 265-10: (1) A director, secretary, other officer or employee of an Aboriginal and Torres Strait Islander corporation must not improperly use his or her position to: (a) gain an advantage for himself or herself or someone else; or

	(b) cause detriment to the corporation. Section 183: (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.	(b) cause detriment to the corporation. Section 265-15: (1) A person who obtains information because he or she is, or has been, a director or other officer or employee of an Aboriginal and Torres Strait Islander corporation must not improperly use the information to: (a) gain an advantage for himself or herself or someone else; or (b) cause detriment to the corporation.

Table 1: Key directors' duties[17]

As can be seen from Table 1, the duties appear to be identical to the ones present under the mainstream legislation. However, one key caveat does exist in the instance where the Indigenous corporation is also a registered native title body corporate.[18] In that situation, s 265-20 states:

> A person who is a director or other officer, or an employee, of an Aboriginal and Torres Strait Islander corporation that is a registered native title body corporate does not contravene subsection 265-1(1), 265-5(1), 265-10(1) or 265-15(1), and does not breach the person's equivalent duties at common law and in equity, merely because of doing (or refraining from doing) a particular act if the person does (or refrains from doing) the act:
>
> (a) in good faith; and

17 The duty to prevent insolvent trading has not been included in the table because s 531-1 of the CATSI Act notes that "The Corporations Act insolvent trading and creditor-defeating disposition provisions apply to an Aboriginal and Torres Strait Islander corporation". Section 588G of the Corporations Act 2001 (Cth), which imposes a duty on directors to prevent their company from trading when insolvent, would as a result apply to Indigenous corporations (see for example s 531-5 of the CATSI Act).

18 A registered native title body corporate is a corporation that is specifically incorporated as a registered native title body corporate to oversee and manage native title rights and interests on behalf of Traditional owners. Native title is the terminology used to recognise that Indigenous people have rights and interests in their lands and waters.

(b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a Native Title legislation obligation.

This caveat only applies in the case of 7.9 per cent of Indigenous corporations registered under the CATSI Act.[19] The rest of the entities are bound by the duties highlighted in Table 1.

While there are a range of duties imposed on directors under the CATSI Act, this article focuses on one particular aspect of s 265-5 of the CATSI Act: the duty to act "in the best interests of the corporation". Due to the similarity between the relevant provisions in the Corporations Act and the CATSI Act in that regard, reference to the mainstream legislation and the general law's interpretation of the duty will be considered. Consequently, Part II of this article first evaluates the position of the Australian law regarding the analysis of this duty, with a particular focus on the implication it may have on the extent to which stakeholders' interests may be embedded in the decisions directors make when running their entities. Part III then considers the appropriateness of this approach, with the aim of highlighting the flaws of the existing system and providing alternatives to remedy the issues raised in the article.

II THE BEST INTERESTS OF THE CORPORATION

As noted in the revised explanatory memorandum of the CATSI Act, the alignment between directors' duties as highlighted in Table 1 is the result of a push toward:[20]

> … enhancing the standard of management of Indigenous corporations by applying directors' duties to senior management, and ensuring appropriate duties apply to both directors and senior management. This is implemented by aligning with the director, officer and employee duties in Part 2D.1 and the disqualification provisions of Part 2D.6 of the Corporations Act.

In view of this reality, consideration of the mirror provision of s 265-5 is needed before evaluating the way the duty under this provision may operate.[21]

A The Duty under s 181

Analyses of 181 of the Corporations Act abound within the corporate law literature.[22] As a consequence, this part first provides a brief review of the terminologies used in the provision, followed

---

19 This data is correct as of 27 May 2024. The data has been collected by the author from a review of the Office of the Registrar of Indigenous Corporations "Public Register of Aboriginal and Torres Strait Islander Corporations" <www.mycorp.oric.gov.au>; and a review of the Register of Prescribed Bodies Corporate, PBC "Find a PBC" <www.nativetitle.org.au>.

20 Revised explanatory memorandum, above n 2, at 10.

21 At 70.

22 See for example Jean J du Plessis "Directors' duty to act in the best interests of the corporation: 'Hard cases make bad law'" (2019) 34 Aust Jnl of Corp Law 3; Joseph Negrine "A shell for directors? Issues facing

by an examination of the extent to which s 181 makes space for directors to take into account the interests of stakeholder groups.

1 Section 181: Terminologies

When considering s 181, a range of questions may be raised, including the following: is there a difference between directors acting in "the interests of the company", used under the general law, and acting in "the best interests of the company" referred to in s 181? The dominant view is that these two terms are interchangeable, as judgments have in the past referred to both expressions.[23] For example, in *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*, Owen J noted:[24]

> So far as I can see there is no material difference, for present purposes, between the phrases "benefit of the company", "best interests of the company" and "interests of the company". In the authorities they are often used interchangeably and, in my view, are all to the same broad effect.

The next question that may be asked relates to the meaning of "the interests of the company". Historically, this term equates to the best interests of members collectively.[25] For instance, in *Greenhalgh v Arderne Cinemas Ltd*, Evershed MR stated:[26]

> … the phrase, "the company as a whole", does not … mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit.

Accordingly, directors have to act for the best interests of the group and must have regard to the interests of "corporators as a general body".[27] Based on this interpretation, the accountability in place does not directly allow directors to consider the different stakeholders that may impact, or may be

---

climate-oriented derivative action claims" (2024) 39 Aust Jnl of Corp Law 286; William Heath "The Corporations Law, Section 181: a two-edged sword" (2000) 18 C&SLJ 377; and Jessica Baker "Australia is burning: Aligning corporate social responsibility and community expectations following the Black Summer" (2021) 36 Aust Jnl of Corp Law 113.

23 Ian M Ramsay *Company Directors: Principles of Law and Corporate Governance* (2nd ed, LexisNexis, Australia, 2023) at 494.

24 *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, (2008) 70 ACSR 1 at [4384].

25 At [4384]; and *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438–40.

26 *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA) at 291. Although this case discussed the concept of the "benefit of the company as a whole", it was done in the context of voting rights of shareholders. However, the case was relied on by Plowman J as the authority in *Parke v Daily News Ltd* [1962] Ch 927 (Ch) at 963 to find that in the context of directors' duties, "the benefit of the company meant the benefit of the shareholders as a general body". See discussion on this in du Plessis, above n 22, at 3.

27 *Ngurli Ltd*, above n 25, at 438.

impacted by, the decisions adopted by the board.[28] However, this does not mean that the interests of such parties should be ignored. In that regard, the Final Report of the Banking Royal Commission stated that, in considering this duty, directors may make decisions that benefit stakeholders as long as this benefits the corporate entity, even if there are no direct benefits to shareholders.[29] This is aligned with findings from previous reviews that have been conducted in this area, as will be discussed under the next heading.

2 Section 181 and stakeholders

In 2006, two different reports reviewed, among other things, the extent to which directors may consider corporate social responsibility issues in their decision-making. First, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) noted that:[30]

> Directors' duties as they currently stand have a focus on increasing shareholder value. This is important, because the provision is first and foremost intended to protect those investors who trust company directors with their savings and other investment funds. Directors' duties enable such investors to have some confidence that their funds will be used to in order to increase the income and value of the company they part-own.

The PJC further stated that directors may still consider the interest of stakeholders more broadly but the interests of shareholders must be a priority.[31] It espoused an "enlightened self-interest" to the duty, as investments in corporate social responsibility and philanthropy may benefit the company in the long term.[32] In many regards, the focus in this report is on the "long term viability of a company" and the best interests of the company from a "commercial perspective".[33]

The second report on this topic was issued by the Corporations and Markets Advisory Committee (CAMAC) in December 2006.[34] In its consideration of the directors' duty to act "in the interests of the company as a whole", it first notes that the general law views this phrase as usually focusing on

---

28 Directors may take these interests indirectly. However, financial considerations attached to the entity have to remain paramount. For a discussion of the schism that may exist between directors' decisions and stakeholders, see for example Shelley Bielefeld and others "Directors' duties to the company and minority shareholder environmental activism" (2004) 23 C&SLJ 28.

29 Kenneth Hayne *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019) vol 1 at 401–403.

30 Parliamentary Joint Committee on Corporations and Financial Services *Corporate responsibility: Managing risk and creating value* (June 2006) at [4.58].

31 At [4.59].

32 At [4.32]–[4.39].

33 At [4.32].

34 Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* (December 2006).

the "financial well-being of the shareholders as a general body".[35] The report further cites the following statement to highlight its point:[36]

> It is clearly open to companies to engage in activities which, viewed in isolation, may suggest pure altruism—provided that there is some connection (which is rational and, while it may be speculative, is nevertheless cogent) between those activities and the furtherance of the company's commercial interests represented by the financial well-being of its proprietors.

Further, in analysing s 181, the report states that the duty will not exclude the directors from considering the interests of other stakeholders if this will benefit the shareholders of the company:[37]

> An extreme view, namely that a company should make only those expenditures that are directly related to the pursuit of profit for the benefit of members, would restrict management. The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company but may not be generous with company resources when there is no prospect of commercial advantage to the company.

Accordingly, while relying on different perspectives,[38] both inquiries rejected the need to expand directors' duties to other stakeholders, as they viewed that the current regime provides directors with flexibility to consider the interest of stakeholders when this may benefit the company. This understanding was to a certain extent reflected in the findings of Marshall and Ramsay when they conducted a survey to assess whether directors understood their legal obligations in that regard. They found that the majority of respondents believed that the law allows directors to consider the interests of stakeholders when managing their entities.[39]

3 Call for change?

Despite these findings, there are still ongoing queries regarding whether the duty should be amended to allow for a more explicit consideration of stakeholder position. For instance, the Australian Institute of Company Directors issued a report in 2021 that supports "stakeholder governance".[40] This notion "requires organisations to identify, engage with and understand stakeholder perspectives on key issues, and then reflect on how these perspectives should be

---

35 At 84.

36 At 88.

37 At 92.

38 For a brief discussion on differences in approach, see Ramsay, above n 23, at 83–85.

39 Shelley Marshall and Ian Ramsay "Stakeholders and Directors' Duties: Law, Theory and Evidence" (2012) 35 UNSWLJ 291 at 304.

40 Australian Institute of Company Directors *Elevating stakeholder voices to the board: A guide to effective governance* (2021) at 5.

considered in decision making".[41] To that end, companies are encouraged to implement a range of steps to promote such an approach, including:[42]

> Step 1: Identifying and prioritising stakeholders that are of interest to the company, and assessing their interests and any conflict that may arise between the priority of these groups.
>
> Step 2: Adopting a formal framework to engage stakeholders to ensure that the board considers these different groups' perspectives.
>
> Step 3: Receiving timely and accurate information regarding stakeholders at management level.
>
> Step 4: Using the information received from stakeholders in a bid to enable the board to make informed decisions regarding the management of the company.
>
> Step 5: Regularly evaluating the stakeholder governance in place to ensure its effectiveness.
>
> Figure 1 summarises the benefits of such a structure that is highlighted by the report.

41 At 5.

42 At 7–9.

Figure 1: Benefits of a stakeholder governance system[43]

Similarly, the Governance Institute of Australia also issued a report in 2021 which collected 550 directors' and executives' responses to the Institute's survey on pressures and challenges that boards of directors may face in the future.[44] 89 per cent of those surveyed agreed that a company's purpose has to be aligned with community values.[45] Further, stakeholders' engagement is a key issue that influences directors' agendas. This again reflects a call for a "shift in perspective towards a more stakeholder-centric operating model".[46] The findings may not be surprising, as there is growing

43 This diagram is an adaptation of the information provided in Australian Institute of Company Directors, above n 40, at 12.

44 Governance Institute of Australia *Future of the board* (2021) at 3.

45 At 5.

46 At 9.

community expectation that businesses should consider the interests of the communities and wider society where they operate.[47]

Lastly, consideration of stakeholder interest is currently reflected in the ASX Corporate Governance Council consultation draft regarding its corporate governance principles and recommendations.[48] For instance, a new proposed recommendation notes that:[49]

> A listed entity should have regard to the interests of the entity's key stakeholders, including having processes for the entity to engage with them and to report material issues to the board.

In view of all of the above, the next question to tackle is how this all translates in the context of Indigenous corporations.

B Indigenous Corporations and Expectations Generated from the Duty

When considering s 265-5 of the CATSI Act, this article first considers the context in which the Indigenous corporation operates in. This context is important to understand challenges directors may face when running their entity and to appreciate the way the duty may be interpreted. Consequently, while guided by the findings of Part II(A), this section highlights the meaning of "best interests of the corporation" under this provision. Part III will then continue this discussion to assess the implications of the legal norm set up by the CATSI Act.

1 Context

While the CATSI Act was introduced to provide a way for Indigenous corporations to run their businesses, the format of the corporation under that legislation has meant that the large majority of these entities are run as not-for-profit entities. As of 28 May 2024, 3,477 such corporations are registered with the Office of the Registrar of Indigenous Corporations, of which 257 are registered native title bodies corporate. These registered corporations' dominant purpose in most instance is to

47 At 10. See also Michelle Worthington "The corporation as a constructed ethical agent: Monism, pluralism and options for reform" (2017) 32 Aust Jnl of Corp Law 91; and Baker, above n 22, at 113.

48 ASX Corporate Governance Council *Corporate Governance Principles and Recommendations: Consultation Draft, 5th ed* (2024).

49 At 27 (recommendation 3.3).

provide essential services to the community, including in remote areas.[50] For instance, the Central Land Council noted:[51]

> Yet the Aboriginal people living on these remote communities are compelled to incorporate simply so that they can receive the basic necessities of life that others take for granted. For example, they are required to incorporate before they can receive funding for housing, power, water, or a motor vehicle. In other words, Aboriginal people living on remote communities are required to subject themselves to an additional level of bureaucratic regulation before they can be accorded their fundamental human rights to security, and a standard of living adequate for their health and well-being.

The reason behind the lack of use of this form of entity as a for-profit corporation relates to a range of factors, including the rigidity attached to the registration of the company and the classification of these entities, which is limited to small, medium and large corporations without the option to establish a company with shares.[52] Accordingly, the CATSI Act does not provide for shareholding by members. This means that when the corporation is liquidated, the distribution of profit is done at the discretion of directors, the liquidator or the members.[53] Consequently, the inability of members to hold shares in for-profit Indigenous corporations once again may hinder investments in these corporations, as returns are not guaranteed or protected by the legislative framework.

2 Interpretation

In view of the above, one may question whether the same interpretation of "the best interests of the corporation" that is used in s 181 of the Corporations Act would apply under s 265-5 of the CATSI Act. As noted previously, this push to assimilate the Indigenous corporation legislation with the dominant legal perspective of the Corporations Act is not new but has been growing since the early 1990s.[54] Accordingly, nowadays, it is not surprising to see that "the best interests of the corporation" under this provision is viewed as distinct from the interests of individual members, kin and

---

50 See Jon Altman "Arguing the Intervention" (2013) 14 Journal of Indigenous Policy 1 at 18 and 107; Heron Loban "Aboriginal and Torres Strait Islander People and Consumer Law" (PhD thesis, James Cook University, 2018) 10; and National Indigenous Australians Agency *CATSI Act Review: Draft Report* (31 July 2020) at [2.38] and [2.43].

51 Central Land Council submission 49 to Australian Institute of Aboriginal and Torres Strait Islander Studies, as cited in Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 11, at 70.

52 For a discussion on this, see Marina Nehme "Aboriginal and Torres Strait Islander corporations: Time for a rethink?" (2023) 48 Alt LJ 127.

53 See for example *The Rule Book of Gadi Naraganawali Aboriginal Corporation* (19 August 2020) at 19.

54 Christos Mantziaris "The Dual View Theory of the Corporation and the Aboriginal Corporation" (1999) 27 Federal Law Review 283 at 308.

community, and mirrors the interpretation under s 181 of the Corporations Act. For example, in *Registrar of Aboriginal and Torres Strait Islander Corporations v Ponto*, Reeves J noted:[55]

> … s 265-5 is substantially identical to s 181 of the Corporations Act. I therefore consider that the authorities on ss 9 and 180–181 of the Corporations Act can be used in construing the provisions of ss 683-1, 265-10 and 265-5 of the Aboriginal Corporations Act.

The above quote from Reeves J does not take into account the context of what is actually occurring with Indigenous corporations, the challenges directors may face when managing these entities and the rising community voice that is calling for a social licence for corporations across all entities.[56] It also does not recognise the fact that the large majority of Indigenous corporations are not-for-profit entities.

Accordingly, one may wonder whether the pendulum has swung too far in the endeavour of the legislator to ensure high corporate governance standards within the CATSI Act, as the current legislation does little to acknowledge the ties that may exist between the directors, kinship, elders and the community.[57] Instead, the approach that is adopted by the legislation focuses on perspectives of the capital market and shareholders. It largely promotes neoliberal logic[58] and policies.[59] This is ironic, as the CATSI Act's flexibility and adaptability is very limited.[60] Further, for neo-liberal legislation, it does not support the proposition of establishing membership with shares within the entity.

However, due to the context in which the Indigenous corporation operates, and the different expectations that communities have in regard to companies in general, a reflection is needed on the

---

55 *Registrar of Aboriginal and Torres Strait Islander Corporations v Ponto* [2012] FCA 1500, (2012) 208 FCR 346 at [56].

56 For discussions on the social licence of corporations, see for example Sara Bice "What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry" (2014) 3 Resources 62; Kieren Moffat and others "The social licence to operate: a critical review" (2016) 89 Forestry 477; and Robyn Mayes "A social licence to operate: corporate social responsibility, local communities and constitution of global production networks" (2015) 15 Global Networks S109.

57 Marina Nehme "Indigenous corporations and accountability – The evolution of the directors' duties" (2021) 36 Aust Jnl of Corp Law 240 at 251.

58 Jamie Peck *Constructions of Neoliberal Reason* (Oxford University Press, Oxford, 2013). According to Peck, the normalisation of neoliberal logic includes rapid policy development through inter-local transfer, "appropriation of networking forms of governance and policy development" and posturing of the adaptability of the policy: at 25.

59 Judy Brown and Jesse Dillard "Opening Accounting to Critical Scrutiny: Towards Dialogic Accounting for Policy Analysis and Democracy" (2015) 17 JCPA 247 at 248.

60 See for example Marina Nehme and John Juriansz "The Evolution of Indigenous Corporations: Where to Now?" (2012) 33 Adel L Rev 101.

interpretation of the duty to act "in the best interests of the corporation". Focusing on the not-for-profit nature of Indigenous corporations and the important services they provide within their communities, directors may face three different interpretations of this duty:[61]

- Viewing the best interests of the corporation as referring to achieving the specific purpose of the entity. Such an interpretation would allow for a broader view of the interests of the corporation. In fact, it is that purpose that will define the stakeholders' interests the directors should pursue. This is a standard flagged by the Australian Charities and Not-for-profits Commission Regulations 2022, which specifically notes that directors of charities must "further the purposes of the registered entity".[62] Accordingly, there is a priority for the entity to comply with "its purposes and its character as a not-for-profit entity".[63] Further, in the context of s 265-5, this approach may be preferable to the other two models discussed below, as it has the potential to be more aligned with the values of Indigenous communities.
- Owing the duty to the public generally, with a specific focus on the community serviced by the corporation. This approach goes beyond the purpose of the organisation to focus on the general public interest, and as such, will require directors to consider a broad range of stakeholders when making their decisions.[64] The challenge with this approach may be the creation of a complex, unwieldy matrix of stakeholders whose interests directors of Indigenous corporations have to consider. Directors may be viewed as owing duties to all stakeholders.[65]
- Focusing on the financial health of the entity. This is a more restrictive interpretation to the duty when compared with the other two options. However, this approach may be supported by the Australian Charities and Not-for-profits Commission Regulations, as Governance Standard 5 does not conflate the duty to act "in the best interests of the corporation" with the duty to further the purpose of the entity.[66] This distinction means that these two expectations may be independent from each other and considered as separate obligations imposed on

61 These interpretations have been adapted from an article considering the best interests duty from the perspective of charities: Caleb Simmons "Good faith and faith's goods: Exploring the application of the best interests duty for religious charities" (2022) 37 Aust Jnl of Corp Law 230 at 240–243.

62 Australian Charities and Not-for profits Commission Regulations 2022, reg 45.25(2)(b).

63 Regulation 45.5(2)(c).

64 For a critique of this approach, see Simmons, above n 61, at 242.

65 Jeffrey Bone "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?" (2011) 24 CJLJ 277 at 293.

66 Australian Charities and Not-for profits Commission Regulations, reg 45.25(2)(b).

> directors. However, in the context of Indigenous corporations, such a distinction is counter-intuitive, as it narrows the meaning of "best interests".

The judiciary may apply the last option since it is, in many regards, a measurable standard fitting within the construction of s 181 of the Corporations Act, while still allowing for consideration of stakeholders' interests. Further, it is in line with one of the key reasons behind the introduction of directors' duties under the CATSI Act. As first noted by the Final Report of the Review of the ACA Act in 2002:[67]

> If the directors duties in the ACA Act were generally harmonised with the text of the Corporations Act, interested parties could take advantage of the more settled jurisprudence on the meaning of these [directors' duties] sections.

This led the Review Team to conclude that the duties should "be modernised and brought into line with the Corporations Act".[68]

Further, the Review Team viewed that the duties should not take into account the special circumstances of Indigenous directors, as this would "introduce uncertainty and would ultimately prejudice the members of the corporations".[69] Consequently, as noted previously, the interpretation of s 265-5 will reflect the interpretation adopted under the duty in s 181 of the Corporations Act.[70]

III IS A CHANGE IN APPROACH NEEDED?

While interpreting the duty to act "in the best interests of the corporation" as focusing on the financial health of a corporation is a legitimate form of accountability, it should not come at the expense of the beneficiaries of Indigenous corporations whose voices are currently not heard.[71] In view of the above discussion, this part will consider whether, in this context, this approach is appropriate, and why further consideration of the notion of the "best interests of the corporation" is needed.

A Appropriateness of the Approach

The interpretation of the duty discussed above has created a tension between the two purposes of the introduction of the CATSI Act which focus on the establishment of a special incorporation statute,

---

67 Corrs Chambers Westgarth, above n 12, at [980] (footnote omitted).

68 At [1336].

69 At [1340].

70 Revised explanatory memorandum, above n 2, at 70.

71 Kylie Kingston and others "From monologic to dialogic: Accountability of nonprofit organisations on beneficiaries' terms" (2019) 33 AAAJ 447 at 452.

while at the same time modernising it in terms of accountability to match the Western standard of that term. This dichotomy has been highlighted by Logan J:[72]

> In imposing that particular obligation, necessary as it is, particularly where public funds are deployed, the CATSI Act is pregnant with the potential of a clash between conventional expectations of appropriate corporate governance and directors' behaviours and the very real, heartfelt obligations of clan and tribe to a fellow member of a clan or tribe in the Australian Aboriginal and Torres Strait Islander community.

His Honour further observed that this reality may create a challenge for Indigenous directors to reconcile the expectation set up under the statute regarding ensuring good corporate governance and the "equally worthy expectations as to the ability of Australian Aboriginals and Torres Strait Islanders, not to be the subject of paternal supervision, but instead to have a determinative say in matters touching upon their aspirations and lifestyle".[73] Accordingly, the CATSI Act creates a schism between Indigenous people's expectations, and Western regulatory expectations, regarding accountability.[74] This schism is not new and was highlighted in 1996 by the Fingleton report, which advocated for the introduction of a revised notion of accountability.[75] Accountability should not only take into account upward accountability. It should also consider inward (staff and employees) and downward accountability (beneficiaries).[76]

B What Does This All Mean?

Following on the above discussion, one may then wonder: what would a change in perspective regarding this matter really mean? To answer that question, one needs to reflect on the fact that Indigenous corporations are mainly operating in the not-for-profit sphere, and that a multi-stakeholder matrix may affect the way the corporation is run, as shown in Figure 2.

---

72 *Registrar of Aboriginal and Torres Strait Islander Corporations v Kerkhoffs* [2013] FCA 1445 at [10].

73 At [11].

74 See for example Kimberley Land Council "Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Bill 2005" (19 September 2005).

75 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 11, at ch 6.

76 Kingston and others, above n 71, at 450.

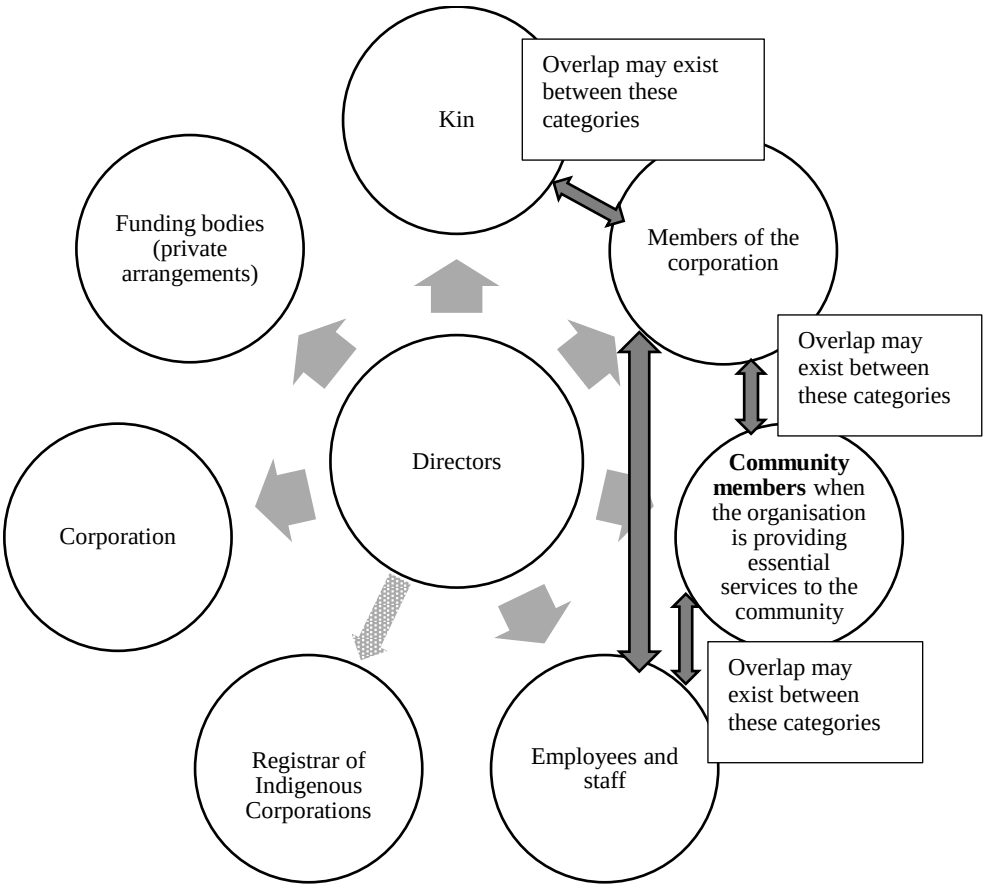

Figure 2: Different forums where accountability may be relevant[77]

The current law, as it stands, focuses on a three-dimensional relationship of the duty to act "in the best interests of the corporation":

- the corporation;
- the Registrar of Indigenous Corporations, in its capacity to enforce the duties; and
- members (in the sense of a hypothetical member).

The rest of the stakeholders' interests may be considered as per the discussion above in the context of s 181. However, the implication of such an approach is that the CATSI Act may not really meet its

77 This diagram has been adapted from Nehme, above n 57, at 251.

objectives as a special incorporation measure[78] but may focus instead on implementing assimilation as a tool to ensure inclusion of Indigenous people in the economy.[79] This approach is problematic as it may lead to the disempowerment of Indigenous people.[80]

Consequently, in view of the nature of the legislation and the complex web of relations that exist within the corporation as represented in Figure 2, a shift in approach is needed, not only to clarify but also to recontextualise the meaning of the best interests provision.[81] The reality is that the dynamic created by s 265-5 of the CATSI Act risks undermining the accountability of the directors to the community being served, as it ignores the complex web of relations that may be in place as a result of Indigenous laws, cultures and traditions.[82]

C Where to From Here?

Accordingly, in the context of directors' duties, a rethink of the duty to act "in the best interests of the corporation" is needed to make sure the legislation truly achieves its aim of being a special incorporation statute. This article puts forward two possible approaches below. They consider two perspectives:[83]

- "lawmaking", focusing on the creation of the law; and
- "lawfinding", centring on applying the law once it has been established by the judiciary.

1 Indicative behaviours

One approach to enhancing the duty is to recontextualise the legislative provision and shift it away from financial accountability to the members as a whole and to the Registrar of Indigenous

78 For a discussion on legislative norms, see for example Andrew Godwin and Micheil Paton "Social licence, meaningful compliance, and legislation norms" (2022) 39 C&SLJ 276.

79 For a broader discussion on the issue of recognition through the process of assimilation, see for example Irene Watson "Aboriginal laws and colonial foundation" (2017) 26 GLR 469.

80 At 474.

81 For a discussion of arguments regarding the appropriateness of such an approach in the context of the Corporations Act, see RP Austin "When (if ever) Should Corporations Legislation Lay Down Succinct Normative Standards without Prescriptive Rules?" in Rosemary Teele Langford (ed) *Corporate Law and Governance in the 21st Century: Essays in Honour of Professor Ian Ramsay* (The Federation Press, Alexandria (NSW), 2023) 73.

82 An example of this can be found in *Registrar of Aboriginal and Torres Strait Islander Corporations v Kerkhoffs*, above n 72. See also Irene Watson "Indigenous Peoples' Law-Ways: Survival Against the Colonial State" (1997) 8 Aust Feminist LJ 39. This piece is one of many that highlights that Indigenous laws continue to impose obligations on Indigenous peoples irrespective of whether Western legal systems acknowledge this or not.

83 See A Javier Treviño *The Sociology of Law: Classical and Contemporary Perspectives* (St Martin's Press, New York, 1996) at 175.

Corporations. This may be achieved at the lawmaking stage by introducing in s 265-5 of the CATSI Act a form of signposting of behaviours that would indicate compliance with the norm. This would provide a list of indicative behaviours that would likely constitute compliance with the norm set up in s 265-5 of the CATSI Act. This approach has recently been adopted in New Zealand to clarify the standard of the best interests of the corporation, where s 131(5) of the Companies Act 1993 (NZ) now notes:

> To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters).

Considering these factors may help the courts at the "lawfinding" stage when assessing the duty and evaluating whether there has been a breach of the provision. This approach means that the judiciary would be guided by clear rules that "provide a reference point for the construction of the surrounding statutory language".[84]

The benefit of this approach is to finally provide an opportunity for the legislation to acknowledge the ties that may exist between the directors, kinship, elders and the community. It may also be a step toward recognising current calls from the community and entities such as the Australian Institute of Company Directors and the Governance Institute of Australia to create a regime that adopts a stakeholder-centric approach.

However, it must be noted that attempts to clarify the norms set up by legislative provisions through the insertion of words and lists that are designed to make the drafting more specific and precise can be, in certain instances, counterproductive.[85] This may, for example, be illustrated through a very brief review of the literature attached to s 172 of the Companies Act 2006 (UK) which states:

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.

---

84 This is what Weber refers to as rationality: Max Weber *Economy and Society* (University of California Press, Berkeley, 1978) vols I–II at 655.

85 Austin, above n 81, at 74.

This provision used indicative behaviours to highlight the interests that directors may consider when running their corporation. The approach promotes an "enlightened shareholder value" akin to the PJC interpretation discussed earlier in s 181 of the Corporations Act. However, the United Kingdom provision has been critiqued on several grounds. For instance, from a "lawfinding" perspective, the indicative behaviours have given rise to some problems in interpreting the provision.[86] Additionally, from a practical perspective, questions have been raised regarding whether such indicative behaviours do in fact lead to real change in the practices of directors when managing their corporations.[87]

In summary, when considering this option in the context of Indigenous corporations, certain benefits are in place in terms of clarifying that directors can take into account a broad matrix of stakeholders when running their legal entities. However, the reality is that this approach may only be a small and even negligible step forward in the context of empowering Indigenous Australians to run their entities in a culturally appropriate manner.

2 Co-production in the making of the law

Another approach can go further than this by rethinking the duty and adopting a co-production model[88] between lawmakers and Indigenous knowledge when designing the duty to act "in the best interests of the corporation".[89] Co-production may be viewed as a process of opening up "policy making in a normatively desirable way with equitable, even egalitarian potential".[90] In the lawmaking sphere, it may lead to the "[c]o-creation of reciprocity norms".[91] The co-participation of Indigenous people in the process of lawmaking would put them at the centre of legislative design[92] and would

86 See for example Austin, above n 81, at 91; Nicholas Grier "Directors Deliver—Just Not Very Much: Further Reflections on Section 172 of the Companies Act 2006" [2022] Jur Rev 212; *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2024] AC 211; and Peter Walton "Triggers, Content, and Enforcement: Directors' duties to creditors – where are we after *Sequana*?" (2024) 9 Wolverhampton LJ 5.

87 See for example Richard Williams "Enlighted Shareholder Value in UK Company Law" (2012) 35 UNSWLJ 360; and Grier, above n 86, at 212.

88 This article uses the terms "co-design" and "co-production" interchangeably. For a distinction between the two, see Carmen Vargas and others "Co-creation, co-design and co-production for public health: a perspective on definitions and distinctions" (2022) 32(2) Public Health Research & Practice e3222211.

89 Tim Rowse "Culturally Appropriate Indigenous Accountability" (2000) 43 American Behavioral Scientist 1514 at 1522.

90 Matthew Flinders, Matthew Wood and Malaika Cunningham "The politics of co-production: risks, limits and pollution" (2016) 12 Evidence & Policy 261 at 266.

91 Louise Young and Per Vagn Freytag "Beyond research method to research collaboration: Research co-production relationships with practitioners" (2021) 92 Industrial Marketing Management 244 at 249.

92 Amanda Crompton "Inside co-production: Stakeholder meaning and situated practice" (2019) 53 Soc Policy Admin 219 at 219.

provide them with an important platform to embed Indigenous values and customs within the duty itself and start remedying dominant inequalities.[93] This may create a different form of adaptation that opens a pathway for Indigenous people to incorporate associations that take into account the full matrix of accountability forums highlighted in Figure 2, or to even go beyond that.[94]

However, this approach requires rethinking the legislative settings and truly putting the duty within the context of the CATSI Act being "a special statute of incorporation" for Indigenous corporations. Co-designing new normative standards that focus on closing the existing schism identified by Logan J may lead to clarity in this area of the law.[95] Additionally, at a "lawfinding" stage, this approach may allow judges to reach sensitive, culturally appropriate conclusions while at the same time providing guidance on the way the norm is to be interpreted.[96]

Co-production may further help establish input legitimacy of CATSI's legal framework. This form of legitimacy focuses on ensuring that citizens have a say in the lawmaking process.[97] As co-production focuses on building a partnership that is based on genuine and not just symbolic participation and consensus between policymakers and Indigenous Australians, such an approach may be the first step towards including affected parties' preferences in the decision-making of the corporation.[98] It will further move away from the current approach, where institutions may not meet the underlying values and customs of Indigenous people.[99]

Further, relying on a co-production model may mitigate some of the rhetoric that hounds input legitimacy where there is a distance between affected parties and policymakers.[100] Instead, it is one

93 For a discussion on this, see David M Bell and Kate Pahl "Co-production: towards a utopian approach" (2018) 21 International Journal of Social Research Methodology 105.

94 An example of this in a different context can be viewed in Rosemary Hill and others "Knowledge co-production for Indigenous adaptation pathways: Transform post-colonial articulation complexes to empower local decision-making" (2020) 65 Global Environmental Change 102161.

95 See *Registrar of Aboriginal and Torres Strait Islander Corporations v Kerkhoffs*, above n 72, at [10].

96 Austin, above n 81, at 74.

97 Thomas Risse and Mareike Kleine "Assessing the Legitimacy of the EU's Treaty Revision Methods" (2007) 45 JCMS 69 at 72.

98 Jurian Edelenbos and Ingmar van Meerkerk "Normative Theory" in Christopher Ansell and Jacob Torfing (eds) *Handbook on Theories of Governance* (Edward Elgar Publishing, Cheltenham, 2016) 410.

99 Robert Joseph "Contemporary Māori Governance: New Era or New Error?" (2007) 22 NZULR 682 at 682.

100 Fritz Scharpf *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford, 1999) at 7.

method to bridge the schism that is currently in place between the law and community expectations. It may even facilitate "government by the people".[101]

In that regard, it may also be beneficial from the perspective of self-determination of Indigenous Australians. It will provide them with a means to "control their own cultural and economic destinies within existing state structure".[102] It will further allow the CATSI legislation to really be a special measure statute that empowers Indigenous Australians' economic future and results in the beginning of the decolonisation of the corporate form. For decolonisation to occur, legislators need to do more than just tweak "the existing colonial system to make it more Indigenous-friendly or a little less oppressive".[103] Instead, it is about "the reclaiming of the right of Indigenous peoples to once again govern themselves in their own lands".[104] Accordingly, co-production may be viewed as a small step toward tackling issues such as lack of consent, unjust dispossession and unjust treatment that Indigenous people have been subjected to over the centuries.[105]

However, the use of co-production is not without its challenges. One of the key challenges of this approach is generating resources to implement a true co-production model.[106] This includes providing compensation for Indigenous people to take part in co-production. It is important to avoid a situation where a cultural load is imposed on them. For instance, in the workforce, it often falls on one or a very small number of Indigenous people to conduct extra Indigenous-related work on behalf of everyone.[107] As one Indigenous person noted:[108]

> It really is a draining thing cultural load. So unless it's in your specific job role or you simply love doing it, I'd encourage my fellow First Nations colleagues to not feel obligated to say yes every time when asked to organise Reconciliation Week or NAIDOC events or to deliver cultural training components for your

---

101 Magdalena Bexell and Ulrika Mörth "Introduction: Partnerships, Democracy, and Governance" in Magdalena Bexell and Ulrika Mörth (eds) *Democracy and Public-Private Partnerships in Global Governance* (Springer, 2010) 3 at 12.

102 Paul Keal "Indigenous Self-Determination and the Legitimacy of Sovereign States" (2007) 44 International Politics 287 at 288.

103 Waziyatawin Angela Wilson and Michael Yellow Bird *For Indigenous Eyes Only: A Decolonization Handbook* (SAR Press, Santa Fe, 2005) at 4.

104 Moana Jackson "Where to next? Decolonisation and the stories in the land" in Bianca Elkington and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 135.

105 Keal, above n 102, at 297.

106 Kathryn Oliver, Anita Kothari and Nicholas Mays "The dark side of coproduction: do the costs outweigh the benefits for health research?" (2019) 17:33 Health Research Policy and Systems 10.1186/s12961-019-0432-3.

107 Australian Public Service Commission "Cultural load, it's a real thing!" (8 August 2023) <www.apsc.gov.au>.

108 Australian Public Service Commission, above n 107.

> organisation. I'd also encourage management to stop assuming your team members who happen to be First Nations want to do the organising or training.

Additionally, co-production requires the building of trust between the parties involved[109] and a move away from the embedded hierarchy that exists within the system,[110] and instead adopting a true egalitarian approach which becomes imperative to avoid or to mitigate bargaining inequalities that exist between the stakeholders.[111]

IV CONCLUSION

Section 265-5 of the CATSI Act is currently interpreted based on Western accountability standards. As noted in this article, this has been flagged from the inception of the legislation with its revised explanatory memorandum noting that the provision mirrors the duty under s 181 of the Corporations Act.[112] However, this approach may be at odds with the fact that the CATSI Act is a special measure statute that is designed to empower Indigenous people. Yet, in this regard, its corporate governance regime does not acknowledge that purpose.

Accordingly, this article puts forward that a review of s 265-5 of the CATSI Act should take place to incorporate the role of stakeholders within the management of the Indigenous corporation.

---

109 Jenevieve Mannell and others "Challenges and opportunities in coproduction: reflections on working with young people to develop an intervention to prevent violence in informal settlements in South Africa" (2023) 8(3) BMJ Global Health e011463.

110 For an interesting discussion on government policy, see Larissa Behrendt "Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development" (2001) 24 UNSWLJ 850.

111 Oli Williams and others "Lost in the shadows: reflections on the dark side of co-production" (2020) 18:43 Health Research Policy and Systems 10.1186/s12961-020-00558-0. For further challenges on the co-production approach, see for example Crompton, above n 92. For a discussion on differences between philosophical approaches of government and Indigenous communities, see for example Bronwyn Rossingh *Culture Legitimate Accountability: Finding the Balance for Indigenous Communities* (PhD thesis, Charles Darwin University, 2014).

112 Revised explanatory memorandum, above n 2, at 70.

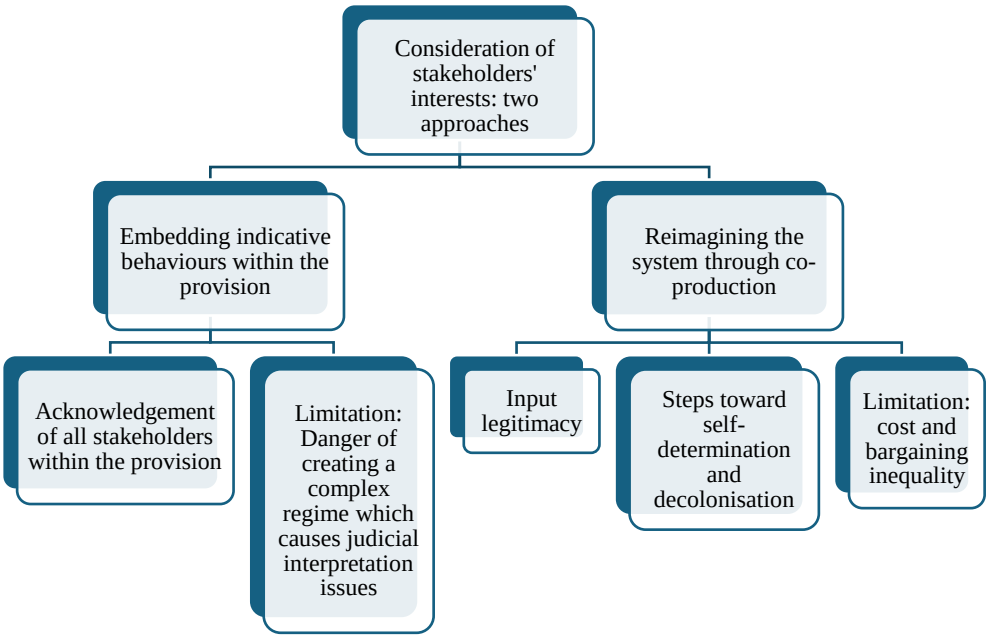

Figure 3: Two different approaches

As highlighted in Figure 3, the article puts forward two approaches that may be taken in this area: the inclusion of indicative behaviours within the provision, or the reliance on a co-production model to reimagine the provision.

In view of the limitations that may be created by the first approach, which is focused on the implementation of indicative behaviours within s 265-5 of the CATSI Act, this article supports the adoption of a more ambitious approach which is based on co-production, as it may be the first step toward the decolonisation of the Indigenous corporation as a legal entity. It will ensure that Indigenous Australians are not passive actors, but that they are making a choice in the way they are designing, as well as running, their legal entities.[113] It will also make it clear for directors that the duty is to be interpreted in terms of a broader range of stakeholders which may vary from considerations taken under s 181 of the Corporations Act.

113 David Boyle and Michael Harris *The Challenge of Co-Production: How equal partnerships between professionals and the public are crucial to improving public services* (NESTA, December 2009).