

First Nation's Business: The growth of the Indigenous sector

Written by Terri Janke and Laura Curtis, Terri Janke and Company, 17 May 2019

Introduction

The Indigenous business sector is one of the fastest growing sectors in the Australian business community. The number of Indigenous people who are in business or self-employed has increased from around 4,000 in 1991 to nearly 20,000 today.¹ Between 2011 and 2016, there was a 30% increase in the number of Indigenous people in business or self-employed.²

Indigenous business may be sole traders, companies or Indigenous corporations. They work across all industries, including the construction, telecommunications, hospitality and beauty industries (to name a few). The defining feature of an Indigenous business is that it is majority Indigenous owned and controlled.

This article will take a closer look at some of the challenges and opportunities facing the Indigenous business sector. The article underlines the importance of Indigenous ownership and control over Indigenous businesses, starting with their business structure and continuing with their on-going governance. It also highlights the dynamism and growth potential of the Indigenous business sector.

What is an Indigenous business?

Economic and policy factors feed into how an Indigenous business is defined.³ A minimum requirement is that a business must be at least 50% Indigenous owned, controlled and managed.⁴ Depending on the chosen business structure, there are different practical implications of this requirement. For example, where the business is a sole trader, it must be 100% Indigenous owned; where it is a partnership, at least 50% of the partnership interest must be Indigenous owned; in the case of an incorporated entity, an Indigenous person(s) must own at least 50% of each class of shares; and in the case of a trust, at least 50% of the trust assets must be Indigenous owned.

Indigenous businesses are growing in number. In 2018, the Department of Prime Minister and Cabinet released the *Indigenous Business Sector Strategy*, which found that the Indigenous business sector is growing rapidly and faster than the rest of the Australian Economy.⁵ This rapid growth is due in part to the Indigenous Procurement Policy (IPP). It also found that businesses registered with

¹ Michelle Evans, "Closing the Gap in the Indigenous Business Sector", *Inside Business* (online) 29 March 2019, <<https://pursuit.unimelb.edu.au/articles/closing-the-gap-in-the-indigenous-business-sector>>.

² See above.

³ Dennis Foley and Boyd Hunter have written an excellent analysis of the main issues that must be addressed when defining 'Indigenous Business'. Dennis Foley and Boyd Hunter "What is an Indigenous Australian Business?" (2013) 16(3) *Journal of Australian Indigenous Issues*.

⁴ This is an industry recognized standard. See, for example, the Supply Nation requirements for registration as an Indigenous business: Supply Nation, "Why Indigenous businesses should register with Supply Nation" (2018) <<https://supplynation.org.au/benefits/supplier/#eligibility>>.

⁵ Department of Prime Minister and Cabinet "Indigenous Business Sector Summary" *Indigenous Business Sector Strategy* (12 February 2018) <<https://www.pmc.gov.au/resource-centre/indigenous-affairs/indigenous-business-sector-strategy>>.



Australia's leading database of Indigenous businesses, Supply Nation, earn more than \$1 billion per year with revenue growing at an annual average rate of 12.5%.⁶

The service offering of Indigenous businesses is broad, and generally mirrors the service offerings of non-Indigenous entrepreneurs: the majority are in services and construction (69%) with wholesale and retail being the next largest (9%). A few examples of Indigenous businesses include Muru Office Supplies, Bush Medijina (handmade bush recipes and beauty products), MJB Solutions (an information, communications and technology company), and Young Guns (who manage inbound/outbound shipping containers).⁷

Types of Indigenous corporations

Economic practicalities and development opportunities have meant that Indigenous entrepreneurs have taken advantage of a range of business models. As a result, Indigenous businesses may be, for example, a sole trader; an Aboriginal Corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) and regulated by the Office of the Registrar of Indigenous Corporations (**ORIC**); a proprietary limited company; or a company limited by guarantee. Another possible model is that of a Land Council constituted under the *Aboriginal Land Rights Act 1983* (NSW) or the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), although this form of Indigenous corporation is not the focus of this article.

The CATSI Act runs in parallel to the *Corporations Act 2001* (Cth) (the **Corporations Act**). It includes governance standards that are intended to meet the specific needs of some Indigenous groups or businesses, including increased support and oversight in relation to governance duties. In some circumstances, ORIC has the power to appoint a special administrator, for instance where the corporation has failed to lodge its annual report, or at the request of a majority of directors. And on its website, ORIC offers a number of support resources such as the Healthy Corporation checklist, and links to free services including LawHelp (pro bono legal services) and Independent Directory (a website matching skilled directors with Indigenous corporations).

In addition, the Indigenous Governance Toolkit by the Australian Indigenous Governance Institute, is a useful resource for any Indigenous nation, community, individual or organisation.⁸ The Toolkit includes resources on understanding governance, building capacity of organisations, and future planning.

While registration under the CATSI Act is mostly voluntary, organisations set up under the *Native Title Act 1993* must be incorporated under the CATSI Act. For example, the Kimberley Aboriginal Law and Cultural Centre.⁹

Many Indigenous businesses choose to register under the Corporations Act as a company limited by shares or guarantee, in which case their regulator is the Australian Securities and Investments Commission. For example, Kakadu Tiny Tots is a proprietary company limited by shares, which

⁶ Supply Nation provides Australia's leading database of verified Indigenous businesses: Supply Nation *Search Indigenous Business Direct* (2018) <<https://supplnation.org.au/>>; Department of Prime Minister and Cabinet "Indigenous Business Fact Sheet" *Indigenous Business Sector Strategy* (12 February 2018) <<https://www.pmc.gov.au/resource-centre/indigenous-affairs/indigenous-business-sector-strategy>>.

⁷ Muru Office Supplies (2018) <<http://www.muruoffice.com.au/>>; Bush Medijina (2018) <<https://bushmedijina.com.au/>>; MJB Solutions Pty Ltd (2015) <<http://www.mjb.com.au/>>; Young Guns Container (2016) Crew <<http://www.ygcc.com.au/index.html>>.

⁸ The Australian Indigenous Governance Institute *Indigenous Governance Toolkit* (2019) <<http://toolkit.aigi.com.au/>>.

⁹ Kimberley Aboriginal Law and Cultural Centre *Governance* (2016) <<http://kalacc.org/about/governance/>>.



produces children's clothing and gifts decorated using Indigenous designs.¹⁰ Murrumburr woman, Kylie-Lee Bradford, started the business as a sole trader and registered as a company in 2015.

Another possible business model is a company limited by guarantee such as the Healing Foundation. In operation since 1997, the Healing Foundation registered as a company limited by guarantee in 2016.¹¹ It partners with communities to address ongoing trauma, including the trauma caused by the forced removal of children from their families. Since 2010, it has funded more than 175 community organisations for healing projects and assisted more than 45,000 Aboriginal and Torres Strait Islander community members in their healing journeys.¹²

Beyond commercial enterprises, Indigenous entrepreneurs may wish to establish a business that is not-for-profit, or has a charitable purpose, such as a Native Title organisation. In those circumstances, the business owner may look at a trust structure or registration under the CATSI Act, as in some circumstances the increased oversight and regulation provides practical support for businesses whose primary focus is not profit-driven.

There are many factors which determine the most practical and desirable business structure for an Indigenous business, and over its lifetime a business may move through several different structures.

Registration under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)

A corporation must meet the Indigeneity requirement in order to be registered as an Indigenous corporation. This requires a minimum number of members to be Aboriginal or Torres Strait Islander. The CATSI Act and its Regulations requires the following Indigenous membership:

- **5+ members:** at least 51% of members;
- **2-4 members:** all of the members (or at least all but one);
- **1 member:** that member.¹³

It is not a condition of the CATSI Act that the Indigenous corporation be responsible for the management of native title rights; however, the *Native Title Act 1993* requires corporations determined by the Federal Court to hold and manage native title rights and interests to register with ORIC, as established by the CATSI Act.¹⁴

Though the CATSI Act is based on the Corporations Act, it has been adapted to meet the specific needs of Indigenous corporations. Some of the key differences include:

- Indigenous businesses may choose to register under the CATSI Act, which is administered by ORIC not ASIC¹⁵;
- there is a minimum of 5 members (unless otherwise approved by ORIC), but no upper limit on member numbers¹⁶;
- members must be at least 15 years of age and of Aboriginal or Torres Strait Islander descent¹⁷;

¹⁰ Kakadu Tiny Tots (2018) <<http://www.kakadutinytots.com.au/>>.

¹¹ Healing Foundation (2019) <<https://healingfoundation.org.au/about-us/>>.

¹² Healing Foundation, *About Us* (2019) <<https://healingfoundation.org.au/about-us/>>.

¹³ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s29-5; *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* reg 6.

¹⁴ *Native Title Act 1993* (Cth) s 56(2)(a)(i); *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* reg 4(d).

¹⁵ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s658-1

¹⁶ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s77-5(1)

¹⁷ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s29-10



- depending on the corporation's rule book, members will not be liable for the debts of the corporation if it is wound up¹⁸;
- Indigenous corporations have greater flexibility in relation to some governance requirements e.g. small and medium corporations may register a document access address rather than an office, as they may not have the resources to finance an office space¹⁹;
- the Registrar may appoint an examiner to conduct "healthy corporation checks" to identify any financial or governance problems. The Registrar can also appoint a special administrator to a corporation to avoid the possibility of corporate failure.²⁰

The CATSI Act offers regulatory and support advantages for some Indigenous businesses, although whether this translates into a practical and positive impact depends on the circumstances of the business. For example, a commercial enterprise, run by experienced entrepreneurs, may find the flexibility on governance unnecessary and the increased regulation restrictive.

There are also some limitations under the CATSI Act that may hinder an Indigenous business' sustainability. For example, while a business registered under the Corporations Act can issue shares, debentures or other securities in order to raise funds, CATSI corporations cannot own or trade shares in their corporation, nor can they issue debentures or securities.²¹ This may impact their long-term profit making and growth potential.

Governance Implications

The two regimes – registration through the Corporations Act or registration under the CATSI Act – have governance implications that can influence the decision of an Indigenous entrepreneur when selecting a business structure.

The structure of the CATSI Act mirrors the structure of the Corporations Act in the way it sets out governance rules. Parts of the Corporations Act are reproduced in the CATSI Act, for example the directors' duties, and the calling and conduct of members' meetings. However, the content of some CATSI Act provisions have been changed to reflect the Act's underlying policy of providing additional support to Indigenous communities. Two examples are the inclusion of a defence for breach of directors' duties and variations in the conduct of directors' meetings.

For a directors' meeting of a CATSI corporation, quorum is a majority of directors. This is not a replaceable rule – it is compulsory. In comparison, the Corporations Act has a replaceable rule that quorum is 2 directors.²²

In the case of directors' duties, the CATSI Act has an additional defence available to directors of Native Title bodies. A director or officer of a Native Title body corporate, who would otherwise be in breach of their duties (such as care and diligence, good faith, use of position, use of information) does not contravene those sections if they acted:

¹⁸ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s147-10(1)

¹⁹ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s115-1 & 115-5(1)

²⁰ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s487-1(1) & 490-1(1); See also Office of the Registrar of Indigenous Corporations, *The CATSI Act and the Corporations Act – some differences* (June 2010) <http://www.oric.gov.au/sites/default/files/documents/06_2013/Factsheet_CorporationsAct_Jun2010.pdf>.

²¹ ²¹ Office of the Registrar of Indigenous Corporations, *The CATSI Act and the Corporations Act – some differences* (June 2010)

<http://www.oric.gov.au/sites/default/files/documents/06_2013/Factsheet_CorporationsAct_Jun2010.pdf>.

²² *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s212-20; *Corporations Act 2001* (Cth) s248F.



- in good faith, and
- with the belief that their action was necessary to comply with Native Title legislation.²³

These examples suggest that the CATSI Act is making certain assumptions about the objectives and expertise of the business owners it regulates. The Act prioritises collaborative decision making by requiring a majority of directors present to form a quorum, and it also assumes directors may not always be well versed in their legal duties as directors. In the context of a Native Title body, where there may be a large number of directors or members, who may or may not have a background in business, this may be appropriate. But it is not always relevant or desirable for an Indigenous entrepreneur building a commercially competitive business. At any rate, an Indigenous entrepreneur should at least have the option of building their governance structures according to their own preferences.

Indigenous Procurement Policy, joint ventures and 'black cladding'

The IPP is a Commonwealth procurement policy that requires a target number of contracts to be awarded to Indigenous businesses. Since it was introduced in July 2015, nearly 12,000 contracts have been awarded to 1,473 Indigenous businesses to the value of \$1.832 billion.²⁴ Following a recent review, and to further build on the success of the policy, a target based on the value of contracts awarded will be introduced from 1 July 2019. It will start at 1% and increase in 0.25% increments until it reaches 3% in 2027.

To take advantage of these opportunities, many Indigenous and non-Indigenous businesses are establishing joint ventures. Joint ventures have the potential to benefit both businesses; by combining forces they widen their skills and resources base and, in doing so, open opportunities that might not otherwise have been available.

However, a negative consequence has been the rise of 'black cladding'. This is an inequitable partnership where a non-Indigenous business partners with an Indigenous business, without sharing any ownership or control. This creates the façade of an Indigenous business in order to benefit from the IPP when, in fact the Indigenous partner has no ownership or control over the joint venture.

In order to prevent 'black cladding', the 2019 IPP update will now require an IPP supplier to be a business registered with Supply Nation.²⁵ This increases the monitoring and oversight arrangements of the joint venture to ensure Indigenous ownership and control.

Conclusion

The establishment of a sustainable Indigenous business eco-system supports the economic, social and cultural empowerment of Indigenous people. The definition of Indigenous business has enabled companies that are 50% Indigenous owned to be classed as Indigenous. However, the Indigenous business values should be reflected in the business foundations. Ensuring Indigenous ownership and

²³ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s265-20.

²⁴ Department of Prime Minister and Cabinet, *Indigenous Procurement Policy* (2019) <<https://www.pmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>>.

²⁵ A Registered Supply Nation business must be 50% or more Indigenous owned, while a Certified business must be at least 51% Indigenous owned, managed and controlled: Supply Nation *Why Indigenous businesses should register with Supply Nation* (2018) <<https://supplynation.org.au/benefits/supplier/#eligibility>>.



control is a consideration in selecting the appropriate business structure, and is also a concern when it comes to joint ventures and the Commonwealth's IPP.

What is clear is the enormous growth potential of Indigenous led commercial enterprises; Indigenous business is booming across all sectors and continues to grow. For this reason, it is important to promote Indigenous governance. This means building on Indigenous ownership structures with equally strong Indigenous governance structures, and giving Indigenous owners and executives the lead in developing and managing their business. Ultimately, promoting the integrity of the sector, and the long-term sustainability of Indigenous businesses, is for the benefit of the Indigenous business community and the Australian economy as a whole.

Terri Janke is a Wuthathi/Meriam woman from Cairns. She is the Solicitor Director of Terri Janke and Company, an Australian law firm specialising in intellectual property and business law.

Laura Curtis is a recent law graduate of the University of Sydney. She also has an Arts Degree (University of Sydney) and a Master of Cultural Materials Conservation (University of Melbourne).

www.terrijanke.com.au

Phone: 61 (0)2 9693 2577 Fax: 61 (0)2 9693 2566



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