

EMBEDDING INDIGENOUS EXPERIENCES IN THE TEACHING OF CORPORATIONS LAW

BEDE HARRIS*

Introduction

This article addresses the challenges involved in the embedding of Indigenous perspectives in the teaching of corporations law. Part I discusses the Priestley 11 requirements relating to corporations law and scholarship on the teaching of corporations law. Part II discusses how corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) can be integrated into a corporations law course, thereby introducing students to the social background to Indigenous corporations and the role they play in Indigenous communities. Part III examines how value-laden tests contained in corporations legislation provide an opportunity for the consideration of issues relevant to Indigenous corporations. Part IV gives examples of ways in which assessment tasks can be tailored so as to require consideration of Indigenous issues.

Part I: Teaching Corporations Law

The Priestly 11 requires that law degrees include a course in “company law” (cf “corporations law” which is now the term in general use).¹ To fulfil the Priestley requirements, a course on corporations law must cover the following prescribed areas:

- 1 Corporate personality;
- 2 The incorporation process;
- 3 The corporate constitution;
- 4 Company contracts;
- 5 Administration of companies and management of the business of companies;
- 6 Duties and liabilities of directors and officers;
- 7 Share capital and membership;
- 8 Members’ remedies;
- 9 Company credit and security arrangements; and

* Senior Lecturer, School of Accounting, Charles Sturt University.

¹ The use of the term “corporations law” has now become standard, in recognition of s 51(xx) of the *Commonwealth Constitution* (the corporations power), upon which the *Corporations Act 2001* (Cth) is based, although it was commonly used even prior to the enactment of that Act. The term “corporations law” will be used in this article.

10 Winding up of companies.

The need to cover these topics in both LLB and non-LLB courses,² means that classroom time in a corporations law course is well and truly committed. This is all the more so given that the syllabus must typically be covered in the space of 13 teaching weeks. However, notwithstanding this, there are ways in which an Indigenous perspective can be incorporated into a corporations law course without a net increase in the topics covered. In discussing how this might be done, the author would like to acknowledge his experiences while teaching Corporate Entities at the School of Law, University of Waikato, where an institutional commitment to bicultural education gave scope for the incorporation of Māori perspectives in the teaching of corporate law. In the context of Australia similar acknowledgement of Indigenous experiences can be achieved by having regard to corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Scholarship on the teaching of corporations law emphasises the difficulties associated with teaching the topic. Key among these are the volume of material, and the challenge involved in inspiring student interest in what has the reputation of being a subject which is both intimidating and dry.³ Another important theme is the difficulty in striking an appropriate balance in the syllabus between theory and practice.⁴ Researchers have also paid significant attention to teaching and assessment methods, such as allocating small groups of students to hypothetical companies which they need to build through the semester, addressing problems arising from new factual circumstances, which develops attributes such as problem-solving and critical analysis.⁵ More significantly, the literature reveals that there has been a move towards a more contextual approach to teaching corporations law, one which emphasises the role of the corporation in society and the impact of the application of value-laden rules.⁶ Using the specific context of

² In recognition of the fact that many students are taught corporations law in the context of commerce degrees and of the fact that the accounting profession requires that a course in corporations law be included in accredited programmes leading to registration as an accountant.

³ Andrew Hicks, 'Teaching Company Law: The Pint Pot' (1994) 26 *The Law Teacher* 4.

⁴ Bruce Dyer, 'Making Company Law More Practical and More Theoretical: Curriculum Design' (1995) 5 *Australian Journal of Corporate Law* 281. See also Caroline Bradley, Vanessa Finch and Judith Freedman, 'The Future of Company Law: Themes and Structures' in Peter Birks (ed) *Examining the Syllabus: Beyond the Core* (1993), 41.

⁵ Andrew Hicks, 'Introducing Modern Company Law: The Life of a Company' (1994) 28 *The Law Teacher* 138.

⁶ See, for example, Bryan Horrigan, 'Teaching and Integrating Recent Developments in Corporate Law, Theory and Practice' (2001) 13 *Australian Journal of Corporate Law* 1; Dimity Kingsford Smith, 'Studying Modern Corporations Law in Context' (1999) 33 *The Law Teacher* 196; Paula Darvas, 'How to See the Forest for the Trees: What's the Point of So Much Corporate Law?' (2002) 9 *eLaw Journal* available at:

Indigenous corporations as a vehicle for teaching corporations law enhances teaching and learning by encouraging students to think beyond their own immediate experience (which, for the many of them will be one that is likely to have included very little exposure to Indigenous Australians) and also to think about how the Indigenous experience affects other areas of the law.

In this article I use this contextual approach to demonstrate that despite the prescriptive nature of the Priestley requirements, and the volume of material that has to be covered, there is significant scope for the incorporation of material relevant to the Indigenous experience into the existing framework of a corporations law course.

Part II: Introduction to Corporate Law — Broadening Students’ Perspectives of Corporate Structures

Standard approaches to teaching corporations law involve an initial overview of the types of structures that can be used by people wishing to engage in business, community or charitable activity, including incorporated associations, joint ventures, partnerships, trusts and the various types of corporation contemplated under State, Territory and Commonwealth legislation, reflecting the Priestley requirement to address corporate personality and the incorporation process. This initial stage of content-delivery provides an opportunity for the lecturer to include reference to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (*‘CATSI Act’*), which, like its predecessor, the *Aboriginal Councils and Associations Act 1976* (Cth) (*‘ACA Act’*), was enacted under the s 51(xxvi) races power, and provides the statutory framework for corporations meeting the specific needs of Indigenous people.⁷ These corporations have assumed increasing importance in recent years, in particular as the trustees of native title awarded to successful claimants under s 56 of the *Native Title Act 1993* (Cth). In addition, corporations are frequently used in a service-delivery role in Indigenous communities. The *CATSI Act* is administered by the Office of the Registrar of Indigenous Corporations (ORIC).⁸

The key factor distinguishing corporations under the *CATSI Act* from others is the Indigeneity requirement — at least 51 per cent of the members and directors of a

<http://www.murdoch.edu.au/elaw/issues/v9n3/darvas93.html>.

⁷ For an overview of the CATSI Act see Laura Beacroft and Sayuri Piper, ‘ORATSIC and the CATSI Act’ (2007) 6 *Indigenous Law Bulletin* 19.

⁸ The website of the Office of the Registrar of Indigenous Corporations is available at: <http://www.orac.gov.au/>.

CATSI Act corporation must be Indigenous people.⁹ The *CATSI Act* requires corporations to have a constitution.¹⁰ The constitution creates a contract between the corporation and the members, between the corporation and its directors and secretary and between the members *inter se*.¹¹ Like the *Corporations Act 2001* (Cth), the *CATSI Act* contains replaceable rules, which may be modified by a corporate constitution.¹² The Act provides that the replaceable rules contained in the Act, and any rules contained in a corporation's constitution, are collectively known as the corporation's internal governance rules,¹³ and are published as a rule book by the corporation.¹⁴ The Registrar is empowered to change the constitution of a corporation on various grounds,¹⁵ and has exercised this power by replacing the internal governance rules of those corporations previously governed by the *ACA Act* which did not adopt a rule book consistent with the *CATSI Act* with a standard rule book.

Corporations under the *CATSI Act* must have a board of directors¹⁶ and, unless the corporation's constitution provides to the contrary, a director must be a member of the corporation and be of Aboriginal or Torres Strait Islander descent.¹⁷ A majority of the directors must be Aboriginal or Torres Strait Islander people.¹⁸ The duties of *CATSI Act* corporation directors are considered below in the discussion on teaching director's duties.

A teacher of corporations law must inevitably be selective in determining which of the range of corporate entities to survey before moving on to consideration of corporations formed under the *Corporations Act 2001* (Cth), which forms the bulk of a corporations law course. However, coverage of the *CATSI Act* at the overview stage enables a lecturer to emphasise to students issues relevant to legal practice, including the fact that practitioners need to take into account the specific requirements that clients have when giving advice on the most appropriate business structure to adopt. They cannot take for granted a one-model-fits-all

⁹ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 29-5 ('*CATSI Act*') as read with Reg 29-5.01 of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2006* (Cth).

¹⁰ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 66.1 ('*CATSI Act*').

¹¹ *Ibid* s 60.10 ('*CATSI Act*').

¹² *Ibid* s 60.1.

¹³ *Ibid* s 57.1 and s 63.1.

¹⁴ The requirements for a rule book are contained in the following publication available on the ORIC site:

<http://www.orac.gov.au/html/publications/factsheets/Factsheet_Rule-book_Sept08_A4lowres.pdf>.

¹⁵ *CATSI Act* s 69.35.

¹⁶ *Ibid* s 243.1.

¹⁷ *Ibid* s 246.1(3).

¹⁸ *Ibid* s 246.5(1).

approach, or assume that knowledge of corporations law only requires knowledge of entities formed under the *Corporations Act 2001* (Cth).

Teaching about Indigenous corporations in the overview stage also serves to disabuse students of the assumption that corporations law is solely the domain of the “big end of town”, and to alert them to the variety of contexts in which the corporate form is relevant. This can engage students who do not necessarily want to pursue a corporate law career path. Teachers should point to how the *CATSI Act* addresses unique social and business needs of Indigenous people, and can also invite students to discuss areas requiring reform.¹⁹

The early stages of a corporations law course typically includes an overview of the regulatory scheme contained in the *Corporations Act 2001* (Cth), and the functions and powers of the corporate regulator, ASIC. As has been noted by Kingsford-Smith,²⁰ a useful teaching aid for teachers of corporations law is to invite a representative from the office of the corporate regulator to visit the class as guest lecturer, in order both to explain the role of their office and also to invite students to consider careers outside private practice. In the context of the teaching of the *CATSI Act*, a teacher of corporate law could invite a representative of the Indigenous corporations regulator (ORIC) to speak to the class about the types of issues Indigenous incorporators and their legal advisors need to bear in mind.

Part III: Addressing Value–Laden Criteria in Corporations Law

Apart from the requirements relating to the Indigeneity of members and directors, the *CATSI Act* essentially brought the law relating to Indigenous corporations into line with that governing corporations formed under the *Corporations Act 2001* (Cth), and so the substantive law is in most cases identical (indeed, the *CATSI Act* usually adopts verbatim what the *Corporations Act* provides). That being the case, it is not so much that there is a comparison to be made between the two Acts as that the two Acts are run in parallel, and so a teacher can switch between *CATSI Act* provisions and *Corporations Act* provisions in explaining the same key concepts of corporations law, without significantly adding to the material that is covered. The utility of using the *CATSI Act* therefore lies in the fact that it exposes the students to the operation of the principles of corporations law in a different social context to a conventional corporations law course.

A significant focus of corporations law teaching involves exposing students to statutory tests the application of which turn on value-laden concepts. Key provisions contained in the *Corporations Act 2001* (Cth) serve to illustrate this:

¹⁹ See Beacroft and Piper, above n 7, for a discussion of Indigenous organisational structures.

²⁰ Kingsford Smith, above n 6, 209-210.

Section 232 provides members of a corporation with a remedy for conduct which is ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against’ them (an important dimension of the Priestley requirement to include members’ remedies in a corporations law course); s 180(1) requires directors and other officers to discharge their duties with a standard of care that is ‘reasonable...in the corporation’s circumstance’ and the s 180(2) business judgment rule defence to actions for breach of this duty require, *inter alia*, that directors show that they acted ‘in the best interests of the corporation’. The ‘best interests’ test is also relevant to the s 181 duty to act in the best interests of a corporation. The circumstances in which a director may find him or her self liable for a breach of the s 182 duty not to misuse position and the s 183 duty not to misuse information, will depend on whether the use of position or of information was ‘unlawful’, and this in turn will depend upon the context in which the use occurred. Sections 180-183 are the core provisions of the Act which must be covered in fulfilment of the Priestley requirement to address the duties and liabilities of directors and other officers.

The standard approach to corporations law teaching is to address these concepts solely by reference to sections of the *Corporations Act 2001* (Cth). However, the *CATSI Act* contains provisions which exactly correspond to those provisions: Section 166 of the *CATSI Act* provides a remedy for oppression in the same circumstances as does s 232 of the *Corporations Act 2001* (Cth). Similarly, s 265.1(1) imposes a duty of care, subject to the business judgement defence contained in s 265.1(2). Section 265.5 imposes the duty to act in good faith and to exercise powers for a proper purpose, while ss 265.10 and 265.15 impose the duties not to misuse position and information respectively. The only unique feature of the *CATSI Act* in relation to directors’ duties is s 265.20, which exempts directors from breaches of duty where their conduct was engaged in good faith and for the purpose of complying with Native Title legislation.

Teaching these provisions in what, for many students, will be the unimagined context of an Indigenous corporation, will give students the opportunity to expand their skills at integrating contextual analysis into their consideration of how statutory tests apply to factual scenarios. The next paragraphs of this section examine how the three value-laden tests discussed above can be taught in a way that incorporates Indigenous legal issues.

Oppressive Conduct

In teaching the remedy for oppression contained in s 232 of the *Corporations Act* (Cth), lecturers usually begin by discussing the standard test for whether conduct in the running of a corporation is ‘oppressive’, illustrated by referring to cases

such as *Scottish Co-Operative Wholesale Society Ltd v Meyer*,²¹ where the court referred to conduct which is ‘burdensome, harsh and wrongful’. In *Morgan v 45 Flers Avenue Pty Ltd*,²² the court emphasised that a broad approach should be adopted, and that the terms used in s 232 ‘should be considered merely as different aspects of the essential criterion, namely commercial unfairness’. The court in *Wayde v NSW Rugby League Ltd*²³ stated that unfairness should be determined objectively, in accordance with what a reasonable director would regard as unfair. In *Thomas v HW Thomas Ltd*²⁴ the court held that what is oppressive will be affected by the company’s background and the reasonable expectations of the shareholders, balancing the interests of majority and minority groups.

Discussion of these tests in Corporations Law courses usually focuses on their application in a conventional commercial context. However, teaching the analogous provisions of s 166 of the *CATSI Act* provides lecturers with an opportunity to include material within an Indigenous context. For example, oppressive conduct is often found to occur when a majority on the board excludes other members from management in circumstances where, because of the history and size of the company, the latter had a reasonable expectation of such participation.²⁵ Most examples concern small, family-based companies. However, by introducing examples of oppressive conduct in the context of a *CATSI Act* corporation, lecturers can point to incidents where board members who were elected by specific sub-groups within the community excluded other community members, thereby giving students an insight into the background against which Indigenous corporations operate. This would include consideration of the variety of reasons for which *CATSI Act* corporations are formed, such as the lodgement of native title claims and the governance of Indigenous communities. It would also involve consideration of the divisions that sometimes occur in the communities from which the corporations draw their membership, which would in turn provide teachers of corporations law with a useful peg on which to hang a discussion of the rights of minority shareholders. Lecturers could supplement conventional case-law readings and articles with material relating to the social background of *CATSI Act* corporations so as to make students aware of the experiences of Indigenous people.²⁶ This would also be an opportune circumstance in which to discuss the use of alternative forms of dispute resolution, as the *CATSI Act* requires all corporations to include internal dispute resolution mechanisms in their rule

²¹ [1959] AC 324.

²² (1986) 5 ACLC 222.

²³ (1985) 180 CLR 459.

²⁴ (1984) 2 ACLC 610.

²⁵ See, for example, *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97 and *Ebrahimi v Westbourne Galleries* [1970] AC 360.

²⁶ See, for example, Kathleen Clothier, ‘Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?’ (2006) 10 *Australian Indigenous Law Reporter* 1.

books²⁷ in order to maximise the chances of resolving disputes without resort to litigation.²⁸ This would enable the lecturer to remind students that not all disputes end in litigation, a fact that is easy to forget, given the centrality of case-law to the subject.

The Best Interests of the Corporation

Section 181 of the *Corporations Act 2001* (Cth) imposes a duty on directors to act in the best interests of the corporation. Whether directors are acting ‘in the best interests of’ a corporation was previously tested purely subjectively²⁹ but is now determined according to the objective test in *ASIC v Adler*,³⁰ in which it was held that whether a director has acted in the best interests of a corporation will be tested in accordance with what the similarly placed reasonable director would have done. ‘Acting in the best interests of the corporation’ means acting in the best interests of the corporation as a whole,³¹ even though there may be groups of shareholders with competing views as to what the best interests may be.³² In such circumstances, directors must act in a manner which balances fairness to all groups of shareholders.³³ Students sometimes find it difficult to apply abstract tests such as this one in concrete situations, and it is here that the *CATSI Act* can provide an opportunity to enhance student skills. This is because in the context of the *CATSI Act*, determining what is in the best interests of the corporation will require students to take into consideration a wider range of factors that they might consider when dealing with a conventional corporation involved in general commercial operations. In other words, a determination of what is in the best interests of a corporation is affected by the specific context of the corporation, and so students applying the test in a case involving an Indigenous corporation will be called upon to consider the purpose that such corporations serve, which might be quite different from the purposes for which *Corporations Act* corporations are established. This point is well illustrated by the recent decision in *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (‘*Shaw*’).

In *Shaw* the Federal Court was called upon to consider the effects of the *Northern Territory National Emergency Response Act 2007* (Cth) (‘*NTER Act*’) on *CATSI*

²⁷ *CATSI Act* s 66.1(3A).

²⁸ See paragraph 1.99 the Explanatory Memorandum on the *CATSI Bill* at: <http://www.austlii.edu.au/au/legis/cth/bill_em/catsib2006520/memo_0.html>.

²⁹ See for example *Re Smith and Fawcett* [1942] Ch 304.

³⁰ [2002] NSWSC 171. The objective nature of the test was also discussed by the court in *The Bell Group Ltd v Westpac Banking Corporation (No 9)* [2008] WASC 239.

³¹ *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286.

³² *Darvall v North Sydney Brick & Tile Co Ltd (No 2)* (1987) 6 ACLC 154.

³³ *Mills v Mills* (1938) 60 CLR 150.

Act corporations. The case was brought by members of several Housing Associations, some of which were *CATSI Act* corporations. The members wished to prevent the executive committees of the corporations (which, legally speaking, were their boards under the *CATSI Act*) from signing contracts in terms of which land leased by the corporations would be sub-let to the Commonwealth for 40 years. Adoption of the contracts was a condition set by the Commonwealth for the provision of \$100 million in funding for the communities concerned. The alternative to the corporations agreeing to the contracts was compulsory acquisition of the leases by the Commonwealth under s 47 of the *NTNER Act*. The issue before the court was whether, by entering into contracts, the executive committees of the corporations would be in breach of the corporations' rule books (equivalent to corporate constitutions) and in breach of their duty to act in the best interests of the corporations.³⁴

The corporations' rule books, which created a contract between each corporation and its members,³⁵ were in similar terms to each other, required the corporations to make land available to members of the corporations and, broadly speaking, required them to control and manage the town camps in accordance with the social needs of the members. After applying the general corporations law test that a corporation's constitution must be interpreted 'by a fair reading of the whole instrument',³⁶ the court found that, despite the loss of control inherent in signing the subleases, the terms of the rule books were sufficiently broad as to empower the executive committees to enter into those contracts.³⁷ Key to this conclusion was the court's finding that the corporations' objectives, as stated in their rule books, conferred on them functions that were far wider than just the leasing of land for the benefit of Indigenous people — the rule books referred to broader social objectives to which the executive committees could have regard in deciding what contracts to enter into. Although on the face of it this aspect of *Shaw* boiled down to one of textual interpretation of the rule book, it highlighted the need to pay attention to the specific text of a corporation's governing document and the social context in which the corporation operates. *Shaw* demonstrates to students that not all corporate constitutions are alike (an important fact to remember when in legal practice) and also illustrates the varied objects that Indigenous corporations serve.

³⁴ The applicants also alleged that the Commonwealth's requirement that the corporations enter into the subleases amounted to the tort of procuring a breach of the fiduciary duty.

³⁵ Section 60.10(2) of the *CATSI Act*.

³⁶ *HA Stephenson & Son Ltd (In Liquidation) v Gillanders Arbuthnot & Co*, (1931) 45 CLR 476, 487 (Dixon J).

³⁷ *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397, [332-49] ('*Shaw*').

So far as the issue of a breach of the duty to act in the best interests of the corporations was concerned, the court applied the standard corporations law test, from cases such as *Allen v Gold Reefs of West Africa Ltd*³⁸ and *New South Wales Rugby League v Wayde*,³⁹ that a board must act ‘in the interests of the members as a whole’, and that that test means that the board must act ‘to the benefit of the company as a whole’, because the only legitimate interests of the members is their interest as members of the corporation.⁴⁰ The court further held that what is in the best interests of a corporation will depend on the terms of its constitution, including the purpose for which it is formed. The court adopted dicta from *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co N.L.*⁴¹ to the effect that directors may take note of a wide range of considerations in determining where the best interests of a corporation lie, and that provided that their decisions are taken in good faith and not for irrelevant purposes, they will not be open to challenge. Having already concluded that the interests of the members would not be prejudiced by the 40-year subleases,⁴² and that, faced with a stark choice between allowing compulsory statutory take-over by the Commonwealth and signing the subleases, the executive committees chose the lesser of two unpalatable courses of action,⁴³ the court held that, having regard to the varied objectives contained in the corporations’ rule books, and the competing considerations weighing upon them, it could not be said that the executive committees had breached their fiduciary duty.⁴⁴

The importance of *Shaw* for teaching purposes is that it brings home to students the key point that one needs to adopt a contextual approach to the interpretation of the duty to act in the best interests of a corporation — a lesson that needs to be imparted in any corporations law course — while simultaneously placing that lesson in an Indigenous setting. There are as yet few reported decisions interpreting the *CATSI Act*, but as they arise they will provide teachers of corporate law with an armoury of resources which they can use to illustrate common doctrines of corporations law by reference to the experiences of Indigenous peoples.⁴⁵

³⁸ [1900] 1 ChD 656.

³⁹ (1985) 1 NSWLR 86.

⁴⁰ *Shaw*, [364].

⁴¹ (1968) 121 CLR 483, 493 (Barwick CJ, McTiernan and Kitto JJ).

⁴² *Shaw*, [264] and [361].

⁴³ *Shaw*, [310-15].

⁴⁴ *Shaw*, [375-7].

⁴⁵ See, for example *T R & M R Wardle & Sons Pty Ltd v Tjaliri Aboriginal Corporation* [2009] SASC 146 (29 May 2009) on what is required for effective service of documents on a CATSI Act corporation and *Billabong Aboriginal Corporation v Registrar of Aboriginal Corporations* [2007] FCA 1496 (27 September 2007) on the power of the Registrar to place a corporation under administration.

Use of Corporate Position and Information

A key aspect of the general law fiduciary duties of directors is the duty not to allow a conflict of interest to exist between directors and the company. This is reflected in ss182 and 183 duties not to make unlawful use of position and of information acquired as a result of being a director. Common circumstances in which such conflicts may arise are where a director or other person connected to them has a financial interest in a transaction of the corporation (a ‘related party transaction’) or where the director competes with a corporation, most commonly where he or she has exploited a business opportunity that rightfully belongs to the corporation.

Related party transactions are regulated by ss 208–230 of the *Corporations Act (2001)* (Cth) and ss 284.1–296.1 of the *CATSI Act*. The provisions of the Acts are essentially identical. In the context of the *CATSI Act* one could imagine circumstances in which interpretation of terms which are uncontroversial in the context of the *Corporations Act 2001* (Cth) present challenges. For example, where s 293-1 of the *CATSI Act* defines ‘related party’ to include a ‘spouse’, should the latter term be interpreted to take account of spousal relationships that might exist under Aboriginal customary law but which are not marriages under the *Marriage Act 1961* (Cth)?⁴⁶ Such an interpretation, while arguably not consistent with the ordinary dictionary meaning of the word, would be consistent with the purpose of the provision which, among others, is to ensure that shareholder approval is required for financial transactions affected by familial relationships. The introduction of such issues into the teaching of corporations law gives lecturers the opportunity to invite students to consider the important question of legal pluralism and the impact of Indigenous law on statutory interpretation; issues not referred to in conventional corporations law courses.

So far as the duty not to compete with a company is concerned, a director may not exploit a corporate opportunity unless he or she makes disclosure to the board and obtains the approval of a majority of shareholders⁴⁷ who are disinterested.⁴⁸ The key question in such cases is whether the opportunity is indeed a ‘corporate’ one, rightfully belonging to the company? Case law provides that an opportunity will be ‘corporate’ not only if it is one that was known to, and being pursued by, the company.⁴⁹ but also if it was one that the company is not yet aware of and which

⁴⁶ For a discussion of functional recognition of Indigenous institutions (such as marriage) as the equivalent of institutions under common or statute law see Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report*, Project No 94 (2006), 272-5. The report is available at <<http://www.lrc.justice.wa.gov.au/094g.html>>.

⁴⁷ *Furs v Tomkies* (1936) 54 CLR 583.

⁴⁸ *Cook v Deeks* [1916] 1 AC 554.

⁴⁹ *Canadian Aero Services v O’Malley* (1973) 40 DLR (3d) 371.

falls into the company's current line of business or areas of operation into which it might reasonably be expected to expand.⁵⁰ The multitude of fact-contingent circumstances in which a breach of the duty can arise allows a teacher of corporations law to use *CATSI Act* corporations as the context in which to expose students to examples of the types of enterprise that such corporations might engage in — for example, the development of Indigenous artists — and to use this social background as the basis for an exploration of whether the opportunity to purchase works from an artist learned of by a director would be one which belonged to the company. Here again a test which is usually illustrated by reference to the operations of large corporations can provide a vehicle for exposing students to issues arising in Indigenous communities and the need to consider types of corporate opportunity which they might not think about in a conventional corporations law course.

Part IV: Suggested Assessment Tasks

As with most courses in the law degree, problem-solving is the most important type of assessment recommended for students of corporations law.⁵¹ Common types of corporations law questions include those that require students to advise shareholders on derivative remedies on behalf of the company and actions for relief of shareholder oppression,⁵² or to advise on a corporate transaction — for example, the validity of a contract entered into by a corporate agent or statutory compliance issues arising out of a fundraising proposal.⁵³ Corporations law also provides an avenue for essay-writing, particularly on topics relating to the social and economic role of corporations.⁵⁴ More imaginative types of assessment, which serve to integrate theory into practice, include setting students the task of registering a company, using templates of actual documents used by regulators,⁵⁵ having students role-play a meeting of company members or of a board of

⁵⁰ *SEA Food International Pty Ltd v Lam* (1998) 16 ACLC 552.

⁵¹ For useful discussions on the role of problem-solving in the teaching of corporate law see Dyer, above n 4 at 285-8; Karl Okamoto, 'Learning and Learning-To-Learn by Doing' (1995) 45 *Journal of Legal Education* 498; William Carney, 'Teaching Problems in Corporate Law: Making it Real' (2000) 34 *Georgia Law Review* 823.

⁵² See Jill Fisch, 'Teaching Corporate Governance through Shareholder Litigation' (2000) 34 *Georgia Law Review* 745.

⁵³ Victor Fleischer, 'Deals: Bringing Corporate Transactions into the Law School Classroom' (2002) *Columbia Business Law Review* 475.

⁵⁴ Larry Ribsteinn, 'Writing about and Teaching Corporate Law: Reflections on Corporate Law and Economic Analysis' (1991) 40 *Emory Law Journal* 509.

⁵⁵ Andrew Hicks, 'Getting Started in Company Law: The Role of Post-Examination Lectures' (1993) 27 *The Law Teacher* 270.

directors,⁵⁶ or assigning students to fictitious companies which they manage as the course progresses.⁵⁷

Bearing these techniques in mind, here are a number of assessment tasks which could be used to integrate Indigenous issues into assessment:

- Ask students to write an essay contrasting the role played by different types of corporate body, including the specific role of Indigenous corporations;
- Ask students to advise hypothetical clients on what business structure is best for them, taking into account the clients' specific objectives. Include in the range of fact-situations an Indigenous community seeking to establish a corporation to hold land and deliver services;
- Ask students to access the ORIC website and to download and complete registration forms for a *CATSI Act* corporation according to requirements you have set regarding membership and objects;
- Present students with an agenda for a meeting of shareholders and/or directors of a *CATSI Act* corporation, and ask them to discuss the legal implications of the issues you have put on the agenda;
- Set an on-going assignment which requires students to follow the life of a corporation from registration to liquidation, with new events being added every few weeks for students to respond to. Among the scenarios, create some that involve *CATSI Act* corporations, and introduce events that might arise relating to members' remedies, directors' duties, responses to government policy etc; and
- When setting problem questions, include problems that require students to explore the application of value-laden criteria in an Indigenous context — for example, problems which require students to refer to considerations of what is 'in the best interests' of a corporation whose members belong to a remote Indigenous community or which require students to evaluate whether a corporate opportunity taking the form of intellectual property in Indigenous artwork has been misused 'unlawfully'.

⁵⁶ Maria Tzannes and Philip King, 'Meeting Procedure: A Vehicle to Better Teach Corporations Law and a Professional Legal Skill' (1998) 15 *Journal of Professional Legal Education* 123.

⁵⁷ See Kingsford Smith above n 6, 207-8; Lynne Dallas, 'Limited Time Simulations in Business Law Classes' (1995) 45 *Journal of Legal Education* 487.

Conclusion

Although corporations law is not usually thought of as a setting in which Indigenous issues can be ventilated, it is evident that teachers in this area have significant scope to expose their students to Indigenous concerns, which will simultaneously make students aware that an understanding of corporations law requires an awareness that its scope extends beyond entities formed under the *Corporations Act 2001* (Cth). This can be done by relatively minor modification to conventional syllabi, using *CATSI Act* corporations as a vehicle, and by the inclusion in the course of creative assessment tasks which require students to research the social context in which Indigenous corporations operate. In doing so, students will enhance their critical thinking and will also come to understand the importance of incorporating social justice considerations into their practise of law. The author's experience teaching in a bicultural context at the University of Waikato is that students respond with enthusiasm to the broadening of company law courses beyond what is perceived as their technical — and somewhat dry — core. I have no doubt that an expansion of students' horizons so as to take into account the Indigenous context in Australia would meet with a similar response.