Australian Government

Office of the Registrar of Indigenous Corporations

Analysing key characteristics in
Indigenous corporate failure

research paper

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Glossary of terms

Administrator

A person appointed in a voluntary administration under the *Corporations Act 2001* or the CATSI Act to determine whether a body corporate should enter into a deed of company or corporation arrangement, be wound up or revert back to the control of the directors.

Annual general meeting or AGM

A meeting of corporation members required to be held once a year.

Annual reports

The reports required to be lodged by Indigenous corporations with the Registrar each year. Reports required will depend on the registered size and income of the corporation but may include the general report, audited financial report and/or directors' report.

Bankrupt

A person:

- against whose estate a sequestration order has been made making the person bankrupt or
- who has become a bankrupt by virtue of the presentation of a debtor's petition

under the *Bankruptcy Act 1966*.

Bankruptcy

Any jurisdiction or proceedings under the *Bankruptcy Act 1966*.

Board

The collective term for directors of a corporation.

CATSI Act

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Conflict of interest

A situation where a person has a personal interest in a matter that is also the subject of a decision or duty of the person.

Constitution or rule book

The instrument that governs the activities of a corporation and its members.

Corporate failure

An Indigenous corporation that has been subject to external administration.

Corporate governance

The term that broadly refers to the 'framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations' (Owen 2003). Specifically for Indigenous corporations, corporate governance refers to structures that govern them, including the CATSI Act, a corporation's constitution, policies, procedures, funding/grant agreements and staffing controls.

Deregistration

The process through which an Indigenous corporation is deregistered. A corporation ceases to exist on deregistration. Deregistration usually follows winding up.

Director

A person

- appointed as a director
- appointed as an alternate director and acting in that capacity
- not validly appointed as a director but either acts in the position of a director or the corporation's directors are accustomed to acting on their instructions or wishes.

Examination

When the Registrar appoints an authorised officer under section 453-1 of the CATSI Act to examine the books of an Indigenous corporation or related body corporate. An examination usually identifies if the corporation has failed to comply with provisions of the CATSI Act, its constitution or any other Commonwealth, state or territory laws. Findings of examinations can form the basis of grounds for appointing a special administrator.

External administration

When the management of some or all of the affairs of a corporation is assumed by someone other than the directors. External administration includes:

- the appointment of a special administrator
- the appointment of a receiver or other controller
- the appointment of an administrator or
- the winding up of a corporation.

Fraud

Obtaining money or a financial advantage, for oneself or another person, through dishonesty or deception.

Indigenous person

An Aboriginal and/or Torres Strait Islander person.

Indigenous corporation

A corporation registered under the CATSI Act.

Insolvency

When an individual or corporation cannot pay all their debts when they fall due and payable.

Manager/chief executive officer

The person with overall responsibility for the day-to-day management of a corporation.

Material personal interest

A personal interest of a director that has the capacity to influence the vote of the director on a corporation decision to be made, and the conflict of interest is of a real or substantial kind. *Murray J in McGellin v Mount King Mining NL* (1998) 144 FLR 288.

Objectives

The aims that a corporation is established to pursue.

Office of the Registrar of Indigenous Corporations (ORIC)

The office that supports the Registrar's work.

Officer

A person who:

- is a director or secretary of an Indigenous corporation
- is a special administrator of an Indigenous corporation
- is a receiver, or other controller, of the property of an Indigenous corporation
- is an administrator of an Indigenous corporation appointed under the *Corporations Act 2001*
- is a liquidator of an Indigenous corporation
- is a trustee or other person administering a compromise or arrangement made between an Indigenous corporation or someone else
- makes or participates in making decisions that affect the business of an Indigenous corporation
- makes or participates in making decisions that have the capacity to affect significantly an Indigenous corporation's financial standing
- an Indigenous corporation's directors are accustomed to acting on their instructions or wishes.

Pecuniary interest

An interest that involves something of pecuniary (financial) value.

Public funding

Money, assets or property given by a Commonwealth, state or territory government to an individual or organisation either with or without conditions attached.

Receiver

A person appointed by a creditor or court under the *Corporations Act 2001*, CATSI Act or a contractual right to investigate the affairs of a corporation or to secure its assets.

Registrar of Indigenous Corporations

The person appointed under section 653-1 of the CATSI Act. The Registrar's functions include:

- to administer the CATSI Act
- to maintain registers
- to make information about registration of Indigenous corporations public
- to provide advice about registration, internal governance rules and operation of Indigenous corporations
- to conduct public education programs
- to assist with the resolution of some disputes
- to assist with some complaints under the CATSI Act
- to conduct research and develop policy proposals about Indigenous corporations.

Show cause notice

A notice issued to a corporation to show cause as to why a special administrator should not be appointed. The Registrar can waive the requirement for a show cause notice in some circumstances.

Special administrator

A person appointed under section 490-1 of the CATSI Act. The special administrator's role is to assume control of and fix problems within a corporation. The aim of a special administration is to return control of the corporation to its members and directors after governance structures have been strengthened and the corporation is compliant under the CATSI Act and its constitution.

Winding up

The process by which a liquidator assumes control of a corporation's affairs in order to discharge its liabilities and prepare for deregistration. The liquidator ascertains the liabilities of the corporation, converts its assets into money, terminates its contracts, disposes of its business, distributes the net assets to creditors and any surplus in accordance with its constitution and extinguishes the company as a legal entity by formal deregistration.

Overview

This research paper aims to:

- identify and examine characteristics in cases of Indigenous corporate failure
- comparatively examine the literature on corporate failure within an Indigenous context
- provide an analysis of the evidence for consideration in regulatory and policy approaches to Indigenous corporate failure.

This research paper examines 93 cases of corporate failure within Indigenous corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) between April 1996 and July 2008.[1] For this paper, corporate failure is defined as a corporation that has been subject to external administration[2] initiated by the Registrar of Indigenous Corporations (the Registrar).

This paper identifies 23 symptoms of corporate failure. From the symptoms prominent themes were identified and synthesised into seven classes. Each corporation that failed was categorised into a class.

1 The CATSI Act replaced the *Aboriginal Councils and Associations Act 1976* on 1 July 2007.

2 See glossary for definition.

Summary of findings

The literature study findings:

Finding 1: In the accounting and management disciplines corporate failure is primarily because of management and how they managed the affairs of the corporation.

Finding 2: In the accounting and management disciplines the general and immediate environment of the corporation can accelerate or decelerate its failure, but are rarely the source of failure.

Finding 3: The accounting and management disciplines describe a general process of business failure as a corporation spiralling downwards from the original source of failure and displaying symptoms of organisational failure (when intervention is more likely to reverse the corporation's decline). This leads to signs of financial failure and ultimately to insolvency and winding up of the corporation.

Finding 4: Over the past two decades the responsibility that directors have for the performance of the corporation has come to the foreground of corporate governance. Areas of concern include strategy, risk, performance monitoring, the distinction between governance and management and the performance of directors.

Finding 5: Corporate governance literature now recognises that one form of governance does not meet all circumstances. Further, that good corporate governance must be appropriate to the context of a corporation and demonstrably effective in advancing the corporation's objectives.

Finding 6: Two areas of the Indigenous economic development literature have recently emerged which focus on positive aspects of corporate success—Indigenous community governance and Indigenous entrepreneurship. Both areas recognise the importance of Indigeneity to corporate identity, objectives and ownership.

The empirical study findings:

Finding 7: There are three common symptoms of corporate failure—poor financial accounts, not holding annual general meetings and poor record keeping of members' records—that were prevalent in most cases (between 75 and 81 per cent).

Finding 8: Problems involving pecuniary interests and conflicts of interest were identified in 50 per cent of Indigenous corporations that failed.

Finding 9: Insolvency was identified in 30 per cent of Indigenous corporations that failed. Most of these corporations were wound up.

Finding 10: Fraud is not associated with public funding in the cases of Indigenous corporate failure. Four of the five cases in the fraud class were publicly funded. Given this was not reported in the source material it could suggest that the fraudulent activity did not involve the misuse of public funding.

Finding 11: A clear majority of Indigenous corporations failed (67 per cent) because of poor management or poor corporate governance.

Finding 12: Over 40 per cent of Indigenous corporations were returned to members' control after external administration. This increased to 70 per cent when liquidation only cases were excluded.

Key findings

- Most Indigenous corporations failed because of poor management or poor corporate governance.
- Over 40 per cent of Indigenous corporations that had experienced corporate failure were returned to members after external administration. This increased to 70 per cent when liquidation only cases were excluded.
- There are three common symptoms of failure found in cases of corporate failure—failure to produce financial accounts, not holding annual general meetings and poor record keeping of members' records.
- Each of these common symptoms of failure can be improved by providing corporate governance support services.
- Corporate insolvency, in both the literature and this paper, is most often linked with poor management of the corporation by directors and staff.
- The largest cases of corporate failure involving people's intentions and behaviours relate to disputes within and between corporations.
- There are only five cases (5 per cent) involving fraud and just one case (1 per cent) involving a bankrupt director.

The research findings suggest that early external intervention in Indigenous corporations exhibiting poor corporate governance and management issues or potential insolvency is important and effective.

The findings also suggest that Indigenous corporations need support and capacity development in managing the corporation's affairs and not only in the governing of corporations. It is important that both directors and staff acquire skills and competencies in business management to perform their duties and fulfil their responsibilities in this area.

The research findings are consistent with mainstream research on corporate governance and business failure. Future research could look at identifying organisational practice and environments that lead to Indigenous corporate success and economic development with a focus on the long-term viability of corporations and the sector.

Introduction

Purpose of the research paper

This research paper aims to better understand factors that contribute to corporate failure in Indigenous corporations.

In reporting on Indigenous organisations, mainstream media often make significant reference to the divide between traditional Aboriginal and Torres Strait Islander values and western values, particularly regarding the effective governance of corporations and communities. Aboriginal and Torres Strait Islander values may include obligations based on kinship relationships, a different orientation towards time, an importance of consensus decision making and putting family needs before business goals. These aspects of Aboriginal and Torres Strait Islander sociality are perceived as inhibiting factors to effectively govern Indigenous corporations, and explain why dysfunctional communities exist. This in part sets the scene for undertaking this research.

An empirical analysis was done based on regulatory data held by the Registrar of Indigenous Corporations (the Registrar) who administers the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and regulates Indigenous corporations. The Registrar regulates approximately 2300 Indigenous corporations, just under half of the estimated 5000–6000 incorporated Indigenous organisations nationwide. The Office of the Registrar of Indigenous Corporations (ORIC) supports the Registrar in administering the CATSI Act and providing corporate governance support services to Indigenous corporations.

This paper details the origins of corporate failure in a literature study to provide a context to the empirical research on Indigenous corporate failure. The empirical study identified 23 symptoms of corporate failure. From the symptoms prominent themes were identified and synthesised into seven classes. Each corporation that failed was categorised into a class. This type of research based on empirical regulatory data has not previously been done.

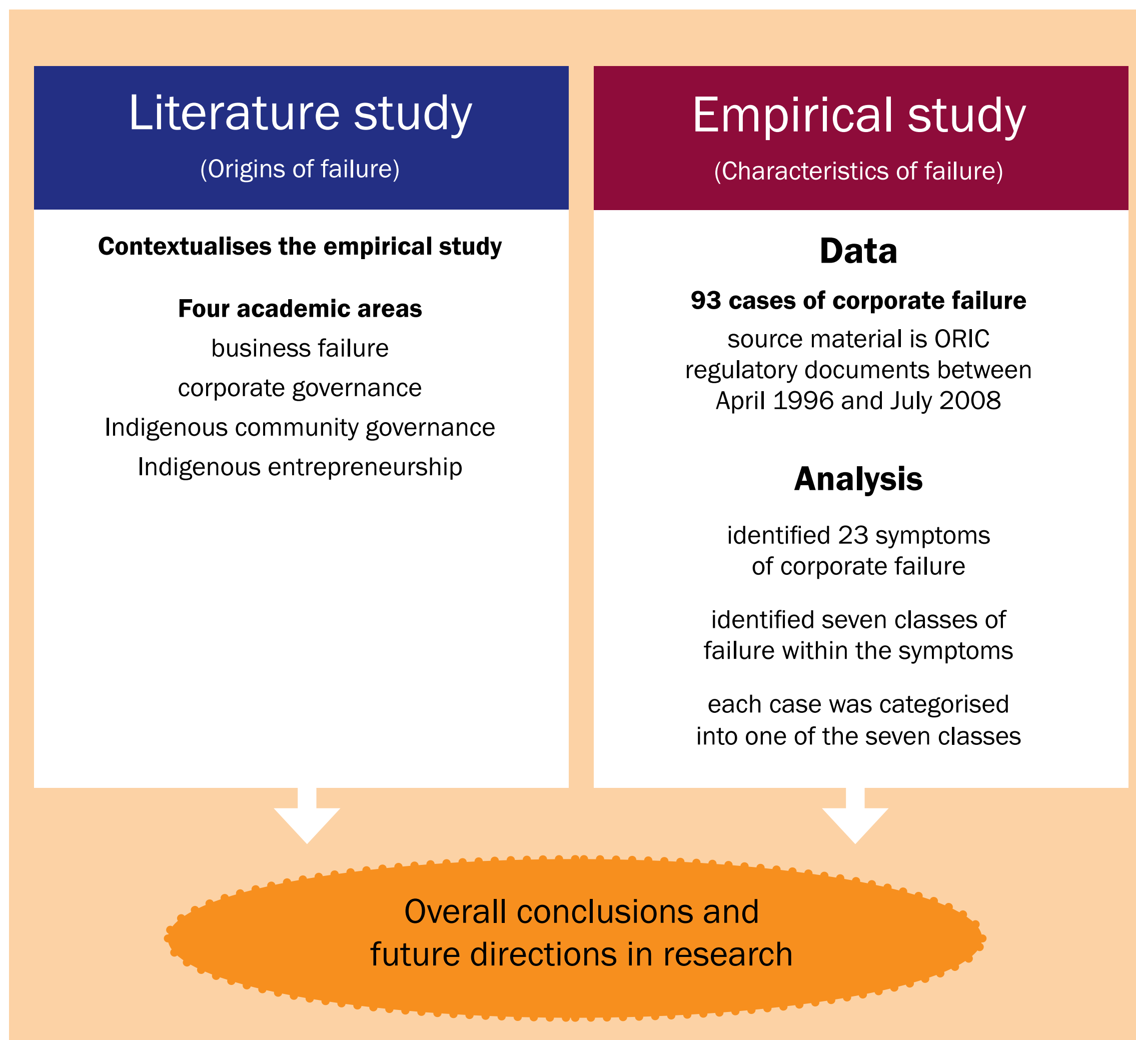
The research was conducted by the Australia and New Zealand School of Government's (ANZSOG) Institute for Governance on behalf of the Registrar. The audience for this paper may include policymakers, Indigenous corporations, funding agencies, regulators and others interested in pathways to stability and development of the Indigenous corporate sector and Indigenous economies.

This paper is written so that the reader can focus on topics to the level of detail that satisfies their interest in this research study. In places, the paper presents findings and information as both graphs and tables to allow the reader's preference for either graphs or tables to guide them in interpreting the information.

Outline of the research paper

This research paper is organised in two parts (see figure 1): a literature study and an empirical study.

Figure 1: The structure of the research paper



Text extracts, called 'case studies', are used throughout the paper to illustrate the symptoms of failure and the different academic areas related to Indigenous corporate failure. These extracts are rendered as they appear in the source documents. The names of the Indigenous corporations have been substituted with a case number to maintain anonymity. Other identifying information, such as group names or locations, has also been substituted.

Part one: The literature study

The first part provides a detailed analysis of the academic literature and provides a context for the empirical study of Indigenous corporate failure, as well as future directions in researching Indigenous corporate governance. These research areas include examining Indigenous governance and linking it to economic development. The four areas are: business failure prevention, corporate governance, Indigenous community governance and Indigenous entrepreneurship (see figure 2).

Figure 2: Indigenous corporate failure and the four academic areas

The paper also identifies possible future directions in researching Indigenous corporate governance with a focus on governance relationships and systems that promote and hinder economic development and opportunity. For this paper, corporate governance refers to 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations' (Owen 2003).

Two recent sub-disciplines have emerged from the study of Indigenous economic activity—Indigenous community governance and Indigenous entrepreneurship. Both sub-disciplines cite the importance of Indigenous economic development to curtail Indigenous disadvantage in complex environments of power, institutions and governance. The empirical findings in this paper suggest that the four academic areas can contribute to policy development around Indigenous governance and economic development.

Part two: The empirical findings

The second part is the empirical study of Indigenous corporate failure. This part analyses in detail the symptoms and seven classes of corporate failure with references to the academic literature.

The empirical study is based on 93 cases of Indigenous corporate failure between April 1996 and July 2008. These cases represent all cases of corporate failure for this period. For this paper, corporate failure is defined as an Indigenous corporation that has been subject to external administration. It excludes the winding up of corporations by creditors or other parties as the data held by the Registrar is not as comprehensive or consistent where the external administration process was not initiated and managed by the Registrar.

The source material of the data examined in this paper is regulatory documents lodged with the Registrar—examination reports, affidavits, liquidation reports—written for regulatory and possible legal purposes, and with reference to the provisions of the legislation. Therefore these documents have been examined to identify the significant themes and symptoms of corporate failure without interpreting the content.

Part one

Literature study

Analysing key characteristics in

Indigenous corporate failure

part one

Comparative analysis

This part of the paper provides a context to comparatively analyse the academic literature related to Indigenous corporate failure and the empirical study on Indigenous corporations. This part also identifies possible future directions in support for and research into Indigenous corporate governance.

Governments and policymakers recognise that Aboriginal and Torres Strait Islander groups experience significant social and economic disadvantage. Aboriginal and Torres Strait Islander people also possess a range of socioeconomic and cultural characteristics that differ from those of other Australians. The review of the *Aboriginal Councils and Associations Act 1976*, which was replaced by the CATSI Act, found that because of Aboriginal and Torres Strait Islander people's particular socioeconomic circumstances, cultural practices, and special needs, they may be disadvantaged if they incorporate under state or territory legislation or the Commonwealth *Corporations Act 2001*. To relieve these disadvantages the review found the need to maintain a special incorporation and corporate regulation regime for Aboriginal and Torres Strait Islander groups (Corrs Chambers Westgarth et al. 2002). In reviewing the CATSI bills that were being considered by the Senate, the Senate Standing Committee on Legal and Constitutional Affairs supported the need for a separate incorporation regime for Indigenous groups because of their particular needs, circumstances and issues (SSCLCA 2006).

The four academic areas analysed are:

- business failure
- corporate governance
- Indigenous community governance
- Indigenous entrepreneurship.

This is the first study to synthesise these academic areas. Some areas will be already understood by interested policymakers and researchers, others are known of, and some are connected for the first time here. It is therefore useful to describe these four academic areas rather than refer the reader to references. In some cases there are summary monographs that explain the research areas, and these are relied on in the descriptions that follow.

The four academic areas combine elements of several disciplines—including management, accounting, sociology, psychology and law. Largely due to this multidisciplinary nature, each of these areas are new and developing, and fragmented.

Generally within the broad disciplines of business and commerce there are two areas regarding the success and failure of corporations:

- business failure (accounting, management and law)
- corporate governance (management, accounting, law, sociology and psychology).

Generally, research in these areas investigates why development policies fail. In the last decade, two areas have emerged that reverse the research question and seek to identify what is required for Indigenous economic development to succeed:

- Indigenous community governance
- Indigenous entrepreneurship.

Several aspects of this research is known to policymakers and have been integrated into policy, for example, recognising the importance of cultural legitimacy and match in developing Indigenous governance to achieve best practice business standards equivalent to mainstream corporate governance. The 2008 Ministerial Council for Aboriginal and Torres Strait Islander Affairs' project paper no. 2, *Governance and service delivery* stated:

> There are approximately 5,000 incorporated Indigenous organisations in Australia with standards of governance covering the full spectrum. In one way or another, they are all faced with the key governance issues of cultural legitimacy/fit and operational best practice. Improving the level of governance expertise in even a small proportion of these organisations would make a substantial positive contribution to Indigenous service delivery and community wellbeing.

Business failure

Understanding business failure has been one of the central topics of business studies for decades, driven by the concern of numerous stakeholders in corporations and the dramatic consequences of corporate failures. The initial work of Fitzpatrick (1932) following the stock market crash of 1929 has developed into a considerable canon—known by various names—on the *prediction* of business failure. Increasing corporation and systematic market failure has alarmed governments and the public, and has focused research activity on statistical models aiming to accurately determine a corporation's risk of insolvency and failure.

This objective is narrow and fails to suggest potential causes of failure. A smaller body of business failure prevention literature seeks to explain why and how corporations fail. However, this literature is highly fragmented by constant innovation and specific disciplinary approaches to this area of research. In particular the organisational approaches have tended to focus on the (potentially reversible) deterioration of the organisation of a failing corporation at the early stage, whereas the financial approaches focus on the clear failure symptoms observable in the later stages of descent toward insolvency.

Understanding the process of business failure is central to the aim of this research paper. The following is a hybrid of key concepts drawn from two recent works that synthesise theories of business failure from this fragmented area. Ooghe and De Prijcker combine a general theory of initial causes with a general failure process to describe the failure pathway for four types of failing business (Ooghe and De Prijcker 2007). Crutzen and Van Caillie propose a generalised time sequence of the failure process (Crutzen and Van Caillie 2007) (see figure 3). This area of research is based on the fundamental idea of corporate failure—the misalignment of a corporation's resources with its environment for sustaining a viable strategic position (see table A2). This misalignment is explored in detail in 'Process of business failure'(p. 15). This area of research suggests the need to merge financial and non-financial observations and analyses.

Activity of the corporation

The literature on business failure understands corporations to exist in relationship to their environment—such as its social, economic and legal environment—and to establish a position in which that relationship exchange adds more to the value and resources of the corporation than it subtracts. Management's role is to deploy the resources of the corporation to achieve its objectives and maintain its strategic position. This understanding is incorporated into the synthesised theories of the process of business failure (see p. 15).

Most authors suggest that management (including directors responsible for the overall management of the corporation) is the source of most problems initiating corporate failure. The environment and the corporation's interaction with it, through investors, creditors, suppliers, customers and competitors, primarily influence the pace of corporate failure by either restricting or indulging resources at management's disposal. Managers' motivation, skills and attitudes determine the deployment of resources to strategically position the corporation in its environment. Inexperience, inability to accept advice, failure to anticipate, threats, risk seeking or risk aversion, overestimation of growth, apathy and lack of commitment can all undermine the effective performance of management. Moreover, as management develops and implements corporate policy, errors may propagate through strategic, commercial, financial and operational policies that may undermine the corporation.

CASE**STUDY**

The affairs of [case 10] are in a chaotic state with a stand off in place between the manager and the outgoing external accountant. The current financial position is not being monitored, taxation has not been paid for three or four months, superannuation remains unpaid for at least eighteen months, bank reconciliations have not been completed since [5 months] and the filing of financial records is in disarray. The manager has no interest in, or understanding of, the financial affairs of [case 10] and, in our opinion, is not capable of appropriately managing the affairs of [case 10]. There is no effective reporting of the financial position to the Governing Committee which in any case is not involved in approving accounts for payment or signing cheques.

CASE**STUDY**

[Case 58] faces issues that are common to many remote communities in the region—that is, issues relating to finances, staffing, isolation from supports, and lack of local governance and management skills. It is dependent on government funding for survival. It is currently facing difficult financial circumstances, exacerbated by structural/staffing instability. Monitoring and support from the main funding agency should be ongoing.

CASE**STUDY**

COMMERCIAL

The [case 37] has failed to recover, or enter into commercial arrangements for the satisfactory recovery of, over payments of salary to two members of the [case 37] to a value of approximately $46,000. Both members were at the time of payment Committee members and one person remains an existing member of the Committee.

OPERATIONAL

No evidence … of applications for membership nor minutes of meetings of the Committee in [case 37] recording acceptance of persons as members … no evidence of any notice corresponding to the three annual general meetings … no matching of purchasing orders to invoices … no staff contracts were in place …

FINANCIAL

… the business of the [case 34] has been suspended for a continuous period of more than 1 year. [Case 34] is still in control of a number of property assets, some income producing, plant and equipment and two bank accounts. Inadequate controls exist over the assets and the income of the [case 34]. No accounting is performed for the [case 34].

Finding 1: In the accounting and management disciplines corporate failure is primarily because of management and how they managed the affairs of the corporation.

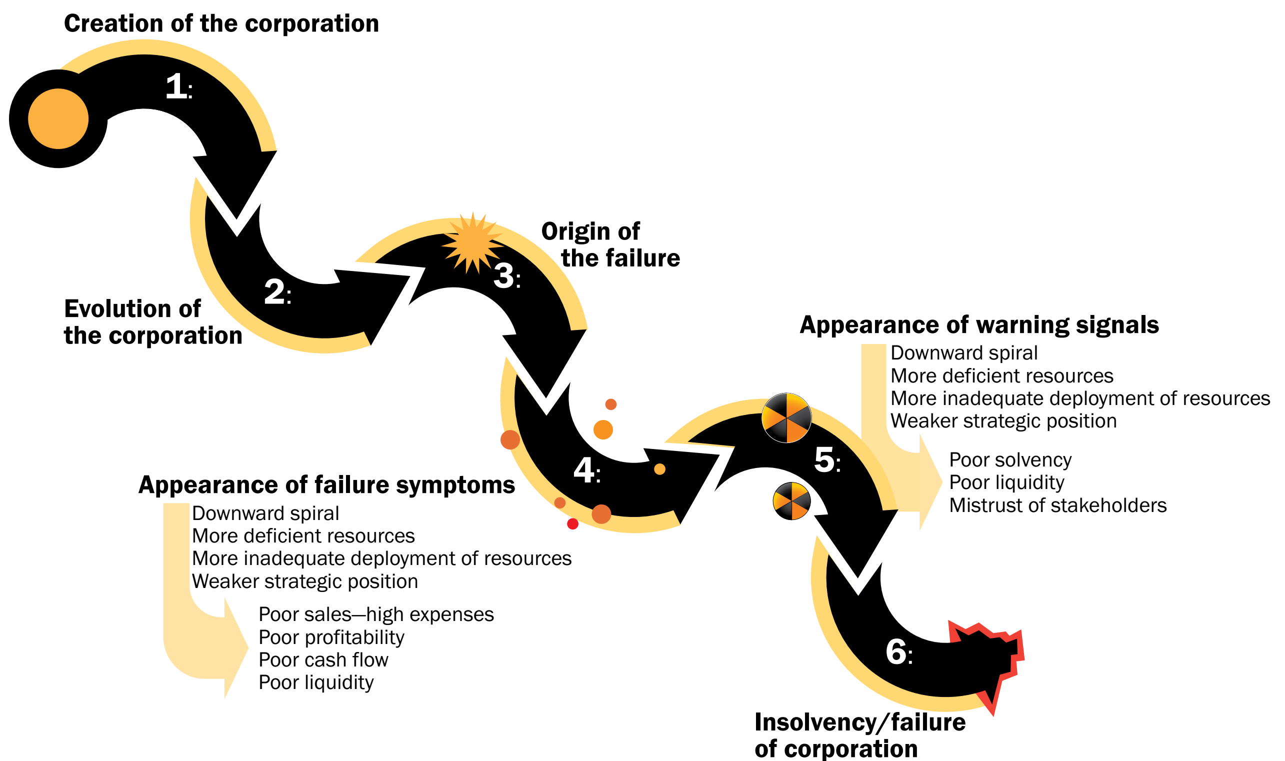
Finding 2: In the accounting and management disciplines the general and immediate environment of the corporation can accelerate or decelerate its failure, but are rarely the source of failure.

Process of business failure

The research on corporate failure suggests there is a sequence to the process of corporate failure (see figure 3). The initial stages of failure are followed first by organisational and internal problems and later by financial signals that are common to the varying origins of failure of Ooghe and De Prijcker’s process types.

The corporation is created and evolves, although the root of failure may exist from the outset. The origin of the failure lies in a misalignment of the corporation with its environment, leading to a strategic position that depletes the resources of the business. Organisational failure begins to manifest as financial failure in a downward spiral, first in weak performance, then in signals warning of imminent failure and, finally, in insolvency or failure itself.

Figure 3: Process of business failure



This area of research suggests that the failure process begins when the corporation's resources and their deployment are inadequate to create or sustain a valuable strategic position. During a corporation's cycle it responds to internal pressures (exploiting internal strengths and avoiding internal weaknesses) and external pressures (responding to opportunities and neutralising threats).

The definition of managerial competencies as an intangible resource means that even failure to manage resources appropriately is still interpreted ultimately as a deficiency of resources, albeit common and essential ones.

A corporation may experience a lack of resources, inappropriate management of resources or both. Moreover business failure is generally the result of a series of inadequacies, not a single deficiency. A list of examples is shown in tables A2, A3 and A4 in the appendix. This complexity gives rise to the process types examined in the next section, which differ in how the failure process begins.

The outcome of the corporation's resource position and deployment determines its business strategic position within the environment. If this is misaligned this position's lack of value will deplete the corporation's resources and/or deployment.

> Thus, if the resources of the firm and their deployment are inadequate to respond to internal and external pressures, the firm cannot create or sustain a valuable strategic position … If no corrective actions are taken to (re)align the resources of the firm and their deployment with the environment requirements, the failing firm enters into an organisational downward spiral. (Crutzen and Van Caillie 2007)

Increasing deficiencies lead to increasingly inadequate responses to pressures, generating more difficulties in maintaining a valuable strategic position. As the corporation progresses in this downward spiral the opportunities to recover occur less frequently. As discussed in the previous section, the immediate and general environments and internal factors can affect the rate of this process.

CASE**STUDY**

What is needed are good governance and management practices which are achievable within the limitations imposed by size, location and level of skilled resources available. Appropriate capacity building and support for ongoing management improvement would help. [Case 24]

CASE**STUDY**

The position of Chief Executive Officer (CEO) appears to be a 'revolving door' with three members holding the position during the last three months [with one suing for unfair dismissal]. At the time of our examination the [committee] decided to appoint a [committee member] as the interim CEO. This decision was made with an acceptable quorum and before finalisation of the termination of the previous CEO ... [Case 22]

CASE**STUDY**

The main cause of insolvency was poor management, which resulted in: poor selection of staff; staff, especially administrative staff, not being appropriately qualified or trained for their positions; a lack of accountability, and members of the Governing Committee failing to appreciate their responsibilities. [Case 79]

The decreasing efficiency of the business starts to show by the appearance of failure symptoms, mostly financial. It is significant that the organisational downward spiral continues until the end of the process, and is its principal driver. However, a chronology of financial failure symptoms becomes clearer and clearer:

- The poor position of the business leads to poor sales relative to high expenses.
- This leads to a decrease in profitability and competitiveness (seen in financial ratios).
- Low profitability slows cash flow.
- Lack of cash flow and excessive investments (often in poorly planned rescues) leads to a lack of liquidity.
- Faced with the need for cash, management are obliged to seek external financing—but deteriorating relationships with stakeholders make raising equity difficult and increasing debt likely.

- Higher debt means higher financial charges demanding higher business profitability at a time when it is least likely to occur, resulting in lower profitability and cycling back to stage two.

After a period of decline the corporation's solvency and liquidity become critically low leading to the corporation's stakeholders (such as customers, suppliers and creditors) distrusting the corporation and making transactions extremely difficult. The corporation is in actual, if not official, insolvency, and the final insolvency stage rapidly follows.

CASE STUDY

It is evident that the [case 30] has exhausted its cash reserves and in the absence of future funding in the near future, the [case 30] will be unable to meet its operational commitments ... It is considered that the Committee would have been unable to effectively monitor and operate the financial performance of the [case 30] ... The [case 30] is not exercising sufficient custodianship over the assets within its control.

CASE STUDY

[Case 65]'s income is primarily government funds and rent of approximately $800,000–$1,000,000 per annum ... However the [case 65]'s current liabilities exceed its current assets. This is a poor operating position and if funding was to be reduced or stopped by government agencies, it would have a direct affect on the [case 65]'s ability to provide its current services and meet its liabilities.

CASE STUDY

The [case 43]'s ongoing viability is completely dependant on receiving grant funding from external sources ... If continued funding is received, the [case 43] may be able to work itself back towards a position of safety by implementing administrative cost savings, provided either the [case 43]'s creditors allow the debts to remain unpaid in the short term, or a specific grant is received to extinguish these liabilities. Should this not be achievable, it must be concluded that the [case 43] is insolvent.

Process types

Between the creation of a corporation and its initial failure, the evolution of a corporation may vary and different preconditions for failure may be established. Ooghe and De Prijcker (2007) define four types of business failure processes, refining the three first distinguished by Argenti (1976).[3]

Type 1: Start-up company

It is widely accepted that a large number of corporations fail within a few years of establishment.[4] The general cause of their failure is the basic lack of resources for the task from the outset. A shortage of tangible resources is a product of the prior lack of managerial or industry-related experience leading to the underestimation of requirements. Poor corporate policy, often including the lack of a strategic plan, leads to a failure of a start-up company to achieve its target strategic position. Heavy capital expenditure and expenses and low sales begin the financial decline. When all stakeholders are aware of the corporation's circumstances, the failure to establish stable relationships with shareholders and lenders means that any possible restructure is reactive and is then restricted by this cause of failure.

CASE **STUDY**

In summary, [case 24] has had no source of income in or about 1996; vacated its premises in or about October 1996; had its bank account stopped since or about July 1997; and has never commenced the business for which it was original incorporated ... at no time in the minutes is there any discussion about establishing a [service], obtaining premises for a service, applying for a license or any other activity that might indicate an intention to run a [service].

Type 2: Ambitious growth corporation

These businesses are led by risk lovers with ambitious objectives who launch business expansions despite the lack of demand and management's lack of ability and experience. Large overcapacity, with its high expenses and low sales, leads to a lack of profit and poor cash flow. Although management normally recognise these issues—unless internal capital or external credit is available, which it usually is not—they are unable to efficiently reorganise, and the corporation is vulnerable to environment changes.[5]

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3 Ooghe and De Prijcker's study includes analyses of the four clusters of failure factors versus these business types (see tables A3 and A4 in the appendix).

4 However, the definition of 'the liability of adolescence' varies by author—for example, Argenti (four to 14 years), Ooghe and De Prijcker (five years), while Thornhill and Amit (2003) merely distinguish young and old phases in a company's life.

5 This scenario may be applicable to Indigenous corporations as a group because of their lack of internal capital and external credit as a class, particularly in view of the restrictions on secured credit in the CATSI Act.

Type 3: Dazzled growth corporation

These corporations are more mature than type 2 corporations, having already successfully negotiated a growth phase, and management characteristics correspondingly differ from ambitious growth cases. The first shortcoming does not occur in the first phase of growth, but as a consequence of management's reaction to success. Over-optimism pursues growth and capital expenditure, ignoring problems emerging within a static structure. Inevitably control and efficiency are diminished. Negative signs continue to be ignored while restructuring becomes more urgent. The deterioration of this downward spiral depends on attempts by management to recover and the cooperation of stakeholders, but is finally irreversible. A major distinction from type 2 corporations is that dazzled growth corporations have more existing reserves from their successful growth phase to outlive bad planning.

CASE**STUDY**

The [case 51] has a number of serious issues that need rectifying as soon as possible. The [case 51] appears to be predominantly controlled by the one person, the CEO and chairperson [party 1] who is seemingly at odds with funding bodies that are not happy with the service delivery being provided by the [case 51]. Part of the problem is due to the [case 51] entering into seemingly overambitious projects … instead of it concentrating on getting real outcomes from the funding monies it has been provided with.

Type 4: Apathetic established corporation

Due to a lack of motivation and commitment, management fail to notice the drift of the environment away from the context that granted their established strategy an advantage, losing ground to competitors. The gradual loss of customers and profitability is attributed to temporary factors rather than systematic causes, and reorganisation is deferred until internal resources are significantly depleted. Unable to estimate opportunities and threats accurately, the recovery plan results in inappropriate capital expenditures, low sales and increased expenses. Customers and creditors lose confidence in the failing corporation and, though now fully aware, management lack the reason to overcome ultimate failure.

CASE**STUDY**

An overview of the [case 78] is that it is living beyond its means. Although still solvent it is already unviable, if one of the criteria for viability is that normal operating costs are to be met from normal operating income.

Finding 3: The accounting and management disciplines describe a general process of business failure as a corporation spiralling downwards from the original source of failure and displaying symptoms of organisational failure (when intervention is more likely to reverse the corporation's decline). This leads to signs of financial failure and ultimately to insolvency and winding up of the corporation.

Corporate governance

There is no singular definition of corporate governance. The term ‘corporate governance’ came into use six or seven decades after the practice it describes—which resulted from the separation of executive management from private owners at the beginning of the 20th century.

The disciplines of management, accounting, sociology and psychology have supplemented its meaning as defined in law. Consequently it has long been understood that there is no one-size-fits-all definition or model of corporate governance that suits all corporations in all fields. The following definitions of corporate governance are provided to illustrate the particular ways in which the term is understood, applied and defined.

Definitions of corporate governance

- ‘Corporate governance encompasses the arrangements by which the power of those in control of the strategy and direction of an entity is both delegated and limited to enhance prospects for the entity’s long-term success, taking into account risk and the environment in which it is operating.’ *Review of the corporate governance of statutory authorities and office holders*, J. Uhrig, 2003.
- ‘Corporate governance refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organisation.’ *Public sector governance, volumes 1 & 2: Better practice guide*, Australian National Audit Office, 2003.
- ‘Corporate governance is the system by which corporations are directed and managed. It influences how the objectives of the corporation are set and achieved, how risk is monitored and assessed, and how performance is optimised. Good corporate governance structures encourage corporations to create value (through entrepreneurism, innovation, development and exploration) and provide accountability and control systems commensurate with the risks involved.’ *Principles of good corporate governance and best practice*, Corporate Governance Council, Australian Stock Exchange, 2003.
- ‘The OECD takes a broad view of corporate governance and defines it as the full set of relationships among a corporation’s management, its board, its shareholders and other stakeholders. It provides the structure through which the objectives of the corporation are set, and the means of attaining those objectives and monitoring performance determined.’ *Ad-hoc taskforce on corporate governance*, OECD principles of corporate governance, 1999.

The series of large corporate and market failures (see table 1) that alarmed governments and the public have been increasingly met with the question: Where were the directors or board collectively while management led this corporation into decline? The role of directors or the board in controlling or contributing to the corporation’s decline has focused successive waves of legal, managerial and accounting inquiries into corporate governance, such that parts of the business failure (prediction and prevention) literature is to be found in governance publications.

After each successive crisis the question becomes more pointed so that, in the current global financial crisis—in Australia and internationally—governments are being asked to explain why senior executives and directors are being remunerated so highly for presiding over failure. This paper is also based on the data provided by a corporate regulator, prompting the question: What role does the regulator have in business failure (as part of the activity of the corporation more generally)?

Table 1: High profile corporate failures attributed in varying degrees to poor corporate governance

Maxwell publishing group	late 1980s	UK
Savings and loans collapses	1986–1995	USA
Poly Peck, BCCI, Marconi	1990s	UK
Crédit Lyonnais	1990s	France
Holtzman, Berliner Bank, Babcok	1990s	Germany
Banking industry (in the Asian crisis)	1997	South Korea
HIH, Ansett Airlines, One.Tel	2001	Australia
Vivendi	2000s	France
Swissair	2000s	Switzerland
Enron, World.Com, Tyco	2001	USA

Each wave of regulatory reform and academic attention after public corporate failures has focused on and segregated more facts of this complex practice. In about 2001 a global wave of spectacular corporate failures exposed market disclosure and the functions of external auditors as fault lines. The responses included new corporate governance legislation (most notably the 2002 Sarbanes-Oxley legislation in America and in Australia; CLERP 9 or *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004)* and voluntary regulation (e.g. *Principles of good corporate governance and best practice recommendations* (CGC 2003) and *Beyond compliance: building a governance culture* (JCCG 2001)).

It has been increasingly recognised by policymakers and the corporate sector that 'outward compliance with good corporate governance principles is not a sufficient guarantee of their effective operation' (JCPA 2000). In the Royal Commission into the HIH collapse Justice Owen remarked:

> Systems and structures can provide an environment conducive to good corporate governance practices, but at the end of the day it is the acts or omissions of the people charged with relevant responsibilities that will determine whether governance objectives are in fact achieved. For example, the identification of the background, skills and expertise of the people who walk into the board room is a good start, but it is what they do when they get there that is critical. (Owen 2003, Part 3: 105)

The modern incorporation system establishes a corporation that consists of three functional groups (after Monks and Minnow 2002):

1. owners/members, who provide the corporation's objectives and the initial capital
2. workers, who provide labour
3. managers (including directors), who provide the skills to deploy resources efficiently to effectively achieve the corporation's objectives.

CASESTUDY

Many of the parties with whom we spoke commented that members are part of the same family group 'and run the [case 59] to the detriment of others, which includes selecting who they allow to become members of the [case 59]'.

CASE STUDY

> Our own inquiries have revealed [case 67] as an organisation with an extremely limited membership ... Any such meetings are invalidly conducted with only half a dozen or so members in attendance, resulting in the same small group being re-elected to the governing committee. It is therefore highly likely that any increase in membership is being actively opposed by the current Committee which is quite obviously benefiting from its position of power.

'This structure creates a balance of power struggle between the two main factors of the corporation: managers and owners' (Grant 2003). The purpose of corporate regulation is to set the context for this relationship, compared with industrial law that establishes the environment for relations between workers and management. Therefore corporate law and regulation relates primarily to the responsibilities of those responsible for management—the corporation's directors—what they do and how they do it. It follows that the regulator's documentation will be dominated by corporate governance issues.

Corporate governance can be best considered through a number of dichotomies and/or spectra that capture a significant element of the area. These are both distinct enough that none can comprehensively or exclusively characterise the corporate governance literature, and interlink and overlap one another in such a way that no author ever really deals solely with just one. Extensive, though not mutually exclusive, literature exists for each distinction of corporate governance as:

- hard ←→ soft
- narrow ←→ wide
- advisory ←→ responsible for key areas
- strategy/risk ←→ compliance/risk
- proactive ←→ reactive
- governance ←→ management.

Some of these are described further in what follows, recognising this is not a comprehensive review of the corporate governance literature: the dichotomy of soft and hard governance, the spectrum of strategy and compliance and the distinction between governance and management roles.

Hard and soft governance

By the turn of the 21st century an intense debate on corporate governance was motivated by an ongoing series of high-profile international corporate failures and debacles (see table 1). These crises put pressure on governments globally to reconsider governance arrangements which 'not long ago were regarded as either excellent or at least as not presenting serious policy problems' (Kirkpatrick 2004).

The first phases of inquiry and regulatory responses focused on board composition and duties (including controlling conflicts of interest) in the judgment that this is where problems have arisen. Questions of composition include the size of a governing body, the presence of independent (non-executive) directors and the skills and knowledge directors bring to a board. A transatlantic

debate continues regarding the virtues of traditions of separate (United Kingdom/Australia) or conjoint (United States of America) chief executive officer and chair of the board roles. Questions of the duties of the directors focus on conflicts of interest. Management and accounting literature increasingly investigate how, or if, such corporate governance factors correlate with business performance.

CASE**STUDY**

Neither the Committee nor General Manager is mindful of the procedures required by the [case 14]'s Constitution.

CASE**STUDY**

The fact is that [case 35]'s purported Committee has evinced an intention not to carry on the [case 35]'s affairs in accordance with the requirements of the Act, Rules and funding guidelines, and has remained virtually inactive over the year, resulting in the cessation of services provided to the [region] community.

The failure to definitively link business performance with quantifiable elements of corporate governance led to a shift in research emphasis to more subtle practices, such as behavioural dynamics, that engender a culture that performs well or badly within structures and processes (Cook and Deakin 1999; Leblanc 2001; Lawler et al. 2002; Roberts 2002; Kiel and Nicholson 2003; Nadler 2004; Kiel and Nicholson 2005; Leblanc and Gillies 2005). These two approaches are commonly called 'hard governance' and 'soft governance'. However, soft governance is an ambiguous, problematic term, suggestive of weak governance. Alternative dichotomies that perhaps better describe these distinctive features of governance are tangible and intangible, or quantifiable and unquantifiable.

> It is the proper combination of the varying behaviours of directors that determine whether or not the board will operate effectively. So in addition to competence and independence, the chemistry among the members of the board must be correct if the board is … to make sound decisions. (Leblanc and Gillies 2005)

In *Corporate governance and performance*, Edwards and Clough (2005) summarise some of the important intangible governance factors:

- a clarity in roles, responsibilities, and relationships between: CEO and chair; directors and management; directors and shareholders/stakeholders
- a healthy chair/CEO interface
- directors working as a team
- culture, trust and open dissent
- right skills, competencies and characteristics, including 'industry/business knowledge'

- a good induction process and ongoing access to training
- leadership skills of chair
- information flows
- regular evaluation of board performance.

CASE**STUDY**

Our attendance for part of one [case 17] Committee meeting revealed in-fighting between directors, a lack of understanding of their role, a desire to override decisions of the management team, little, if any, business acumen, a lack of understanding of the role and purpose of a CDEP [Community Development Employment Projects] corporation and a lack of leadership generally. In our opinion ... the [Committee] is dysfunctional and should be replaced.

According to Sonnenfeld (2002) the intangible factors that compose a 'virtuous cycle of respect, trust and candour' are difficult to identify or quantify, and are referred to as 'chemistry' that works. The ability to challenge one another is perhaps, he suggests, the most important link in the virtuous cycle: 'Respect and trust do not imply endless affability or absence of disagreement.' Understanding the distinction between dissent and disloyalty is essential. 'The highest performing companies have extremely contentious boards that regard dissent as an obligation and that treat no subject as undiscussable.'

CASE**STUDY**

Apart from several [case 13] Committee meetings in the early stages Corporate Governance appears to have been non-existent. The Secretary, [party 2] and the Treasurer, [party 3] state that [party 1] ran and controlled all aspects of the Corporation without consulting them. They claim he assured them 'all was in order' each time they requested meetings and or questioned what was happening.

The difficulty with intangible or unquantifiable corporate governance factors, as many authors have noted, is that behaviour cannot be legislated.

> The most involved, diligent, value-adding boards may or may not follow every recommendation in the good-governance handbook. What distinguishes exemplary boards is that they are robust, effective social systems. (Sonnenfeld 2002)

Building effective governance is a task a governing board achieves over time and maintains with vigilance. Sonnenfeld recommends:

- Creating a climate of trust and candour—including rotating members through small groups to develop familiarity but avoid factions.
- Fostering a culture of open dissent—distinguishing constructive professional conflict from disloyalty.
- Using fluid portfolios—to avoid typecasting individuals and to continue to challenge roles and assumptions.

- Ensuring individual accountability—including explicit task completion by directors.
- Evaluating the board's performance—including full governing body evaluation, individuals' self-assessment and peer reviews.

CASE**STUDY**

The Committee of the [case 44] has not worked as a team. The Chairman does most of the Managerial, Secretarial and Treasurer's duties. There is internal Committee disputation and frequent changes in Committee personnel.

The significance of this evolution is that there are no definitive good corporate governance models or one-size-fits-all structures. Instead good corporate governance is about *what people do* and the systems used to make sound decisions to achieve corporate objectives.

Strategy and compliance

The activity of directors is sited on a continuum between considering the future of the business and ensuring the corporation's compliance with regulation and law. Historically the emphasis has been the latter whereby directors may have merely endorsed a management-developed corporate strategy in considering the corporation's future direction:

> This focus on regulation rather than performance has arisen despite the fact that more value is lost through strategic mismanagement than through fraud and malpractice. (Young 2006)

The repeated questioning of the value added by directors to business performance has driven a shift in emphasis from the role of governance to one that balances issues of compliance with strategy. Directors can improve corporate performance by being more conscious of time spent on important and strategic issues within a strategic framework. Such a framework could include:

- the board explicitly identifying and regularly reconsidering the five to six most important factors for the success of the corporation, on an annual basis
- prioritising and emphasising strategic issues in the directors' meeting agenda
- clear processes for introducing strategic issues to the directors from management and stakeholders
- clear processes for delegating the development of strategic responses on the directors' behalf for both management and committees of the board.

CASE**STUDY**

The actions of the [case 33]'s committee have put at risk the financial viability of the Indigenous corporation. Firstly, the actions directly resulted in the loss of funding from government departments. Save for the purchase of deteriorating assets ... the Indigenous corporation has failed to invest funds obtained from [funder] in an enterprise which provides ongoing financial returns.

Commonly, risk is almost exclusively interpreted by directors and managers in a financial or legal context associated with board and corporation compliance. More generally, risk can be understood as the flip side of strategy—a governance risk framework may be understood to include any actual or potential threats or obstacles to achieving the corporation's objectives and strategy, and directors should be aware of the corporation's strategy to face, reduce, avoid or circle those risks.

Governance and management roles

A contemporary definition of organisational governance used by the ANZSOG Institute for Governance is 'the processes whereby decisions important to the future of an organisation are: taken; communicated; monitored; and assessed'.

The key to the usefulness of this definition is that governance is about:

- making decisions
- the future
- an organisation/enterprise
- what a body of people do about those decisions on the future of their enterprise.

Fundamental governance role: making decisions

Adding value through good decision making requires knowledge creation based on sound understanding. It is therefore a right and responsibility of directors to be properly informed in making decisions by considering and comprehensively understanding an issue before a decision is made.

Fundamental governance role: communicating decisions

Directors decide the corporation's mission and values and have primary responsibility for interpreting their meaning and putting them into practice. If directors, who are the peak authority, cannot articulate and commit to the corporation's mission and values, what leadership are they providing that encourages the wider corporation to do likewise?

The Australian Stock Exchange *Principles of good corporate governance and best practice* includes:

> Principle 10. Recognise the legitimate interests of stakeholders—Recognise legal and other obligations to all legitimate stakeholders. (CGC 2003)

Principle 10 requires directors to recognise the relative priority of the corporation's legal owners and other stakeholders. This is part of implementing a directors' and stakeholders' communication strategy.

Fundamental governance role: monitoring decisions

Having determined that certain strategies and policies support a corporation to accomplish its mission, the directors must ensure that they are effectively implemented. This includes reporting on the key result areas, and implementing the identified key performance indicators (KPIs) suitable for governance monitoring that are aligned with management KPIs. These reports should be robustly tested and verified by directors. To do this, senior managers have to be present at meetings to answer questions about their areas of responsibility.

CASE**STUDY**

> Controls over income, expenses and wages are poor and it is apparent that they have not been paying the correct amount of Workers' Compensations premiums for many years ... We do not believe the current committee or staff have the ability to run the [case 29] properly without substantial training.

The principles of internal control (Stock 1999) can be transferred from their financial origins to non-financial performance areas. This leadership is reinforced by clearly identifying responsibilities for internal control throughout the corporation—to management for communication and enforcement and staff for understanding and adherence.

Fundamental governance role: assessment

Good corporate governance is about quality assurance and improving how decisions are made and how best to achieve corporate objectives. Monitoring the implementation of governance decisions and the performance of the corporation to achieve its mission provides evidence to the directors regarding the quality of its decisions and decision-making. How well designed are the current mission measures to meet governance needs? How successful is a strategic approach to improve organisational performance against its mission?

CASE**STUDY**

> The examination has revealed that there have been many serious breaches of the Act and the Rules of the [case 63] since incorporation, however [party 1] informed me they had never seen ORAC Guide books or a copy of [Act] and appreciated the 1 hour training session delivered by the examiner to his family ... Governing Committee members now better understand the obligations and requirements of the Act and Rules which had never been read nor understood over the past four years.

Good corporate governance is linked to effective corporations, so are we evaluating board effectiveness? The development of board performance evaluation techniques includes assessment of soft as well as hard governance (Kiel and Nicholson 2003; Kiel and Nicholson 2005).

Separation of management and governance roles

A commonly cited problem with the 'governance' role is the vague distinction from management contained in the statement that directors are responsible (to owners) for overall management of a corporation, but they are not responsible for managing the business. This is the grey area of corporate governance that must always be negotiated by each individual corporation.

This is further complicated in small corporations where no or few permanent management staff are employed, in which case individual directors may also possess executive responsibilities such as being president or chief executive officer. The potential for conflicts of interest can be alleviated by clear distinctions in the executive and director roles, even when carried out by the same person.

CASE STUDY

The co-ordinator complains of constant interference by [case 18] Committee members in her job responsibility, countermanding and overriding her instructions or plans for action. With up to 20 Committee members unnecessarily involving themselves in the functions and roles of management, and the seemingly constant blurring of respective roles, the situation is next to hopeless.

CASE STUDY

However, anecdotal evidence was provided to us by other parties that, in practice, the Chairperson deals directly with staff on a daily basis without going through the relevant supervisor. [Case 67]

Finding 4: Over the past two decades the responsibility that directors have for the performance of the corporation has come to the foreground of corporate governance. Areas of concern include strategy, risk, performance monitoring, the distinction between governance and management and the performance of directors.

Finding 5: Corporate governance literature now recognises that one form of governance does not meet all circumstances. Further, that good corporate governance must be appropriate to the context of a corporation and demonstrably effective in advancing the corporation's objectives.

Indigenous community governance

Research into Indigenous community governance is an emerging area, having been imported around 2002–03 from North America by academics and practitioners at the Harvard Project on American Indian Economic Development and Native Nations Institute. In 2003 the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University and Reconciliation Australia started an Australian Research Council Linkage four-year grant called the Indigenous Community Governance Project (ICGP). In Australia the ICGP has already been recognised by policymakers as it has become part of the discourses and reports in Indigenous affairs. For example, the term 'the governance of governments' is used by policymakers and is analysed as part of the Productivity Commission's *Overcoming Indigenous disadvantage report*.

The ICGP is aimed (Hunt and Smith 2006):

> … to investigate Indigenous community governance arrangements—its processes, structures, institutions, leadership, powers and capacities, and cultural foundations—across rural, remote and urban settings. It aims to elucidate:
>
> 1. the diverse conditions and models of contemporary Indigenous governance in different community settings, with a focus on key governing bodies in each community, and the underlying cultural systems within which governance is embedded
> 2. the nature of the broader governance environment (at regional, state and national levels) and its impacts on community governance
> 3. the effectiveness of Indigenous governance arrangements in terms of meeting community and external objectives and expectations, and implications of the different rationales underlying such assessments
> 4. whether the heterogeneous forms of governance in Indigenous communities have any ramifications for community self-determination and sustainable economic development, and
> 5. in doing so, to identify broadly relevant insights, practices and enduring design principles for improving community governance performance; including options for building sustainable arrangements that address inter-cultural matters of power, autonomy, scale, representation, and accountability.

The ICGP methodology is based around case studies at the community level across a variety of Indigenous communities. The general principles of Indigenous community governance were explored in an Australian context by Dodson and Smith (2003).

Typically Indigenous economic development research has investigated possible causes for the failure of economic development in Indigenous communities, recognising factors such as unworkable, externally imposed conditions, lack of skills (such as poor overall literacy), non-existent labour markets in remote localities and problems of scale and duplication. Lately the question has become: What are the key ingredients for successful economic development? Adapting the Harvard Project's 'degree of control' matrix to Australia, Dodson and Smith (2003) identify high degrees of local control over three key dimensions of economic development—governing structures, processes and institutions; local economic policy; and local development activity. This approach suggests an Indigenous community's economic development focuses first on developing governance skills and context, providing the solid foundations and capacity for making sound decisions and future planning. The research focus then becomes: What are those skills and context?

Two paradigms of governance practice must be reconciled:

- the western paradigm—sound corporate governance, limitation and separation of powers, dispute resolution, effective financial and administrative management, and realistic strategy
- the Indigenous paradigm—stable and broadly representative organisational structures, capable institutions, cultural relevance and good two-way communications.

Motivated by the desire for effective governance, the ICGP considered what the existing and prospective conditions for good community governance are.

Legitimacy or cultural fit

The Harvard Project has identified the 'cultural match' between organisational governance standards and community traditions for the exercise of power as a fundamental issue underpinning practical success in reconciling these paradigms. On the one hand, governance structures and processes that closely match traditional values and practices will more easily be identified as legitimate and secure the mandate of community members; on the other hand, these structures and processes are expected—by money suppliers (e.g. public funders), members and service clients—to deliver the strategy as well as the financial and administrative management to achieve organisational objectives. However, achieving legitimacy is complex as it involves a process of invention and accommodation, especially in the Australian context where so many geographical communities are culturally mixed.

> Most importantly, while Indigenous governance arrangements need to be informed by local cultural standards if they are to be regarded as legitimate by community members, the governing arrangements also have to work—governing bodies have to be practically capable of responding and taking action in the contemporary environment. (Dodson and Smith 2003)
>
> Sustaining this legitimacy also requires organisations to achieve a workable two-way balance—between Indigenous ideas of effectiveness and accountability (e.g. 'looking after' and 'working for' their people) and those of external stakeholders (e.g. grant reporting and financial compliance). (Hunt and Smith 2007)

CASE**STUDY**

That the affairs of [case 2] have caused concern not only to members, one of whom complained to me by letter [dated], but also to Aboriginals of standing in the wider Aboriginal community.

CASE**STUDY**

If the [case 76] ... continues to wallow in a state of inactivity it is considered an administrator should be appointed ... the [case 76] has too much at stake on behalf of the [nation] people to be allowed to fail ... ultimately any new organisation would comprise the same claimants and Steering Committee so it would seem to be desirable to address the current problems through [case 76] rather than have a repeat performance in another Corporation.

There is also the need to maintain a realistic political analysis of types of community governance, such as the 'community government' form provided in the Northern Territory *Local Government Act 2008* (Sanders 2004). This includes accommodating political differences and needs for autonomy within an Indigenous community, not just autonomy from the non-Indigenous community. One regional governing body will concentrate power, prestige and access to resources that might otherwise be distributed among various corporations for housing, pastoral, store, social/sports activities and so on.

Body politic and community

A significant assumption of the ICGP, in the context of this empirical study, is the focus on political governance—governance of the 'body politic' of the community (Sanders 2004, Hunt and Smith 2006).

CASE**STUDY**

Meetings are regularly held however the matters discussed appear to be more in respect of Community matters and little in the way of managing the [case 55]'s operations. In addition it appears obvious that the preparation varied greatly between each CEO revealing a general lack of knowledge of the [case 55]'s rules and general corporate governance.

Governance is taken to mean the evolving processes, relationships, institutions and structures by which a group of people, community or society organise themselves collectively to negotiate their rights and interests, get things done and make decisions about:

- how they are constituted as a group (who are members and who are not)
- who has authority within the group, and about what
- their agreed rules to ensure authority is exercised properly and their decision-makers are held accountable
- how they enforce the decisions they make
- what arrangements will best enable them to achieve their goals (Hunt and Smith 2006).

This is combined with a wide definition of 'community' (Hunt and Smith 2006) that can refer to several types:

- a discrete geographic location—a neighbourhood, town, outstation or remote settlement
- a 'community of identity'—such as a clan, language group or urban group
- a 'community of interest'—people who share a set of common goals
- a political, policy or administrative community—a state authority or a federation; a service population or electoral ward; a policy or bureaucratic network of individuals.

This conceptual approach 'encompasses issues of jurisdictional power, policy frameworks, scope of local control, issues of resource allocation and funding, and the conditions of economic development' (Hunt and Smith 2006). The ICGP sought as best as possible to select a range of case studies representative of this breadth. The research into the ICGP reports reveal complex, highly politicised community environments within which their case studies operate, competing for constituencies and scarce resources within shifting social webs (Hunt and Smith 2006).

CASE**STUDY**

Because of its isolated location the [case 55] is responsible for many civic type responsibilities … and is generally considered to be the "Shire Office" of [location] … The acceptability of managing community and town infrastructure business by an [IC] has no doubt been previously discussed by many of the supporting agencies. [IC] responsibilities include housing, power and water, sewerage, communication, sanitation, airport, roads and infrastructure, sporting facilities, Centrelink services, CDEP [Community Development Employment Projects]/ATSIS [Aboriginal and Torres Strait Islander Services] functions and many other coordination roles. As such this huge responsibility in an isolated region requires planning and significant resources. In our opinion the resources available are insufficient. Support by agencies has been varied but there appears to be little coordination of services as a joint effort. As such when expertise does deteriorate it generally affects all aspects of [location] operations.

Regional skills markets

Sanders (2004) raises the legitimate question of whether small corporations can sustain administration and staff on a long-term basis. Small corporations in regional and remote areas are likely to place an enormous amount of responsibility on their one or two managerial staff. Consequently these people:

- can be the target of considerable community pressure over the allocation of resources within the community
- can work in isolation without peer support and unsupervised by more senior managerial staff
- can become somewhat jaded and dissatisfied during the course of a task (rather than being unethical or incompetent at the outset)
- may be unable to find relief from such pressures, even on leave
- may have no identifiable real career path.

CASE**STUDY**

Should an administrator be appointed in the short term to begin this process, and hire staff with sufficient skills, [case 42] has the potential to become financially viable and a good source of training and development for people in the community. Whether such staff would be available in the [location] area or would transfer from other areas for reasonable remuneration is unknown.

Further, there is often no plan for succession within corporations when the time comes for the incumbent to move on, as Sanders argues:

> This is a recipe for managerial disaster. It is highly likely that over time tensions will develop within the community over the allocation of resources and that these will be seen, in personal terms, as reflecting on the manager and his or her relations with particular people on the council or in the wider community. It is also highly likely that, in the face of these sorts of tensions, the manager will, at some point leave the organisation and the community without succession having being fully put in place and hence with virtually no passing on of corporate knowledge. (Sanders 2004)

The scenario described by Sanders is consistently raised by people working in Indigenous communities, both members of Indigenous communities and observers, and in policy. Employing staff with the appropriate skills and abilities to be able to work in the long term in Indigenous communities and organisations is important in terms of improving corporate governance. Intimately connected to this is an organisation's strategic focus on employment, retention and management (Limerick 2009).

One prominent finding of the ICGP case studies is that a significant number of senior and key staff are non-Indigenous, and that their positions are subject to a high turnover because of the stress and pressure of high workloads in isolated working environments subject to competing Indigenous community demands. The competence and professionalism of both directors and management is essential to overall performance.

> Indigenous boards have complained about non-Indigenous staff taking over policy roles and decision making. Conversely, non-Indigenous staff have complained about debilitating political interference from Indigenous governing boards and councils in the everyday work of organisations. (Hunt and Smith 2006)

CASE STUDY

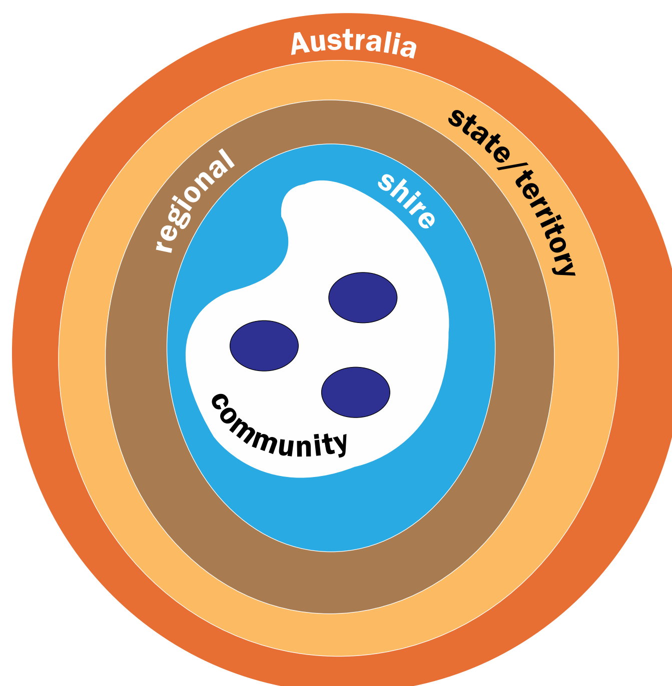
At a meeting of community leaders ... it was the unanimous decision of that group, wholeheartedly supported by the [regional board], that the current situation whereby the CEO and non-Indigenous management staff have been forced from their workplace with threats and illegal actions by the employing Board of the [case 19] is total unacceptable to the community of [locality].

The governance environment

ICGP reports that the 'governance environment' considerably affects the effectiveness of Indigenous community and regional governance. This concept as used within the ICGP is illustrated in figure 4, taken from Hunt and Smith (2006). Each layer represents levels of interactions that surround the Indigenous community, family and clan groups at the centre. The layers centre on the Indigenous community, family, clans and other social and culturally based structures. Each surrounding layer represents the complex system of entities and interactions of business, government and not-for-profit organisations. The distribution of resources and powers between entities is uneven, and their histories influence contemporary decisions. In the real world, these layers are permeable and have complex connections with each other, just as Indigenous organisations, families and leaders have complex connections into this surrounding environment.

> Indigenous capacity to manage or adapt to a rapidly changing external environment, coupled with internal governance resilience, are key attributes for the ongoing viability of community organisations. (Hunt and Smith 2006)

Figure 4: The governance environment, extracted from Hunt and Smith (2006)



Developing community governance capacity

The findings from the ICGP research are (Hunt and Smith 2007):

- existing latent Indigenous capabilities are demonstrated where circumstances demand Indigenous decision making
- the individual and collective capacity to govern well can be actively facilitated by a 'tone from the top' that values people's skills and contributions
- individual capabilities and organisational capacity are strongly linked—building an individual's skills enables the organisation to meet strategy and compliance requirements; conversely, corporations fail to meet such requirements if they are too complex for Indigenous staff and leaders to manage.

However, there is one finding of the ICGP research that is difficult to reconcile with the larger literature about corporate failure and corporate governance: the value judgment of the governance environment.

> A key lesson from the research to date is that efforts to improve the effectiveness of Indigenous governance at the local level will also need to focus considerably more attention on the wider governance environment and the extent to which *it is either enabling or disabling* Indigenous governance efforts. (Hunt and Smith 2006) (emphasis added)
>
> As the wider governance environment changes, Indigenous community and organisational capacity to deal with new transitions may be lacking. In a number of the case study sites, organisations have found themselves ill-prepared to deal with the rapid changes taking place at national and state levels. Some are now unable or unwilling to continue certain programs, unclear how to position themselves for the future or were structurally unprepared for the new demands placed on them. (Hunt and Smith 2007)

This challenges the value-neutral characterisation of the general environment in the corporate failure prevention paradigm that has been previously discussed, and in business literature more generally:

> In the private sector world, the fundamental aim of any private sector business is financial sustainability in its changing market place. (Allan 2006)

But the environment is not neutral to influence, or more precisely, some parts of the external environment is more pliable than others. To this end it is instructive to divide the corporation's external environment (as is similarly done when discussing factors of business failure from the general and immediate environment) and distinguish the regulatory and competitive environments as two areas that may be influenced. In both of these areas corporations can attempt to influence stakeholders, including regulators and supply creditors (e.g. funding agencies) to achieve particular environmental outcomes (e.g. change government policy, funding new programs).

Australian examples in the regulatory environment include:

- the four pillars policy in banking
- climate change and carbon tax/trading
- Telstra.[6]

Conversely, at least in the regulatory environment, governments recognise that they impose both intended and unintended red-tape burdens and constraints on corporations. In the last decade there has been increasing attention by governments on identifying principles of good regulation (Better Regulation Task Force 2003), reducing regulatory burden on business (Commonwealth Regulation Taskforce 2006, Department of Treasury and Finance 2006) and regulating the not-for-profit sector (State Services Authority, Victoria, 2007 and Productivity Commission 2010).

Indigenous entrepreneurship

Indigenous entrepreneurship is the latest and perhaps least developed area of research in Australia and internationally that is clearly relevant to the success or otherwise of Indigenous economic activity through an incorporated body.

Not all Indigenous corporations' activity is necessarily or exclusively in pursuit of community interests. Some Indigenous corporations are for-profit and with a restricted membership. Despite this difference, there usually is some aspect of cultural legitimacy and Indigenous identity and the desire to positively reflect Indigenous values in the surrounding mainstream community.

This 'second wave' strategy of Indigenous economic development follows the apparent failure of direct economic assistance to significantly improve the chronically poor health, educational and financial outcomes of Indigenous populations around the world. This definition of activity means that organisations can be private, public or non-profit, and the outcomes and entitlements derived from these Indigenous activities may extend to non-Indigenous stakeholders.

6 A prominent recent Australian example in the competition environment is the Visy and Amcor cartel in the cardboard packaging industry.

Indigenous entrepreneurship is an emerging area that is still defining itself as a distinct discipline (Peredo et al. 2004, Hindle and Lansdowne 2005, Dana and Anderson 2007, Hindle and Moroz 2008). It is a sub-discipline of entrepreneurship—the identification of unmet or under-satisfied needs and related opportunities, and the creation of enterprises, products and services in response to these opportunities. Given this is a new area of research, there has been minimal research activity; instead, research questions form the debates about what is Indigenous entrepreneurship, for example (from Peredo et al. 2004):

- Can Indigenous people participate in the expanding global economy and its rapidly advancing technological changes with a degree of self-determination and, if so, how?
- Does entrepreneurship among Indigenous people display combinations of entrepreneurial features that are distinct from mainstream entrepreneurship theory? Is Indigenous entrepreneurship different, and do Indigenous histories, traditions and cultures promote or inhibit any of these distinctive features?
- Are the goals of Indigenous entrepreneurship significantly different from non-Indigenous entrepreneurship in neighbouring locations? How significant are ending dependency and improving the socioeconomic circumstances of communities and strengthening traditional culture, values and languages of Indigenous peoples to Indigenous entrepreneurial activities?
- Are Indigenous people fundamentally or naturally more 'collective' or community-based in their entrepreneurial activities as is often suggested in academic and public policy discourses? Or do other legal, economic or structural characteristics mask Indigenous communities entrepreneurial traits commonly perceived as 'western', such as individual incentives, personal property ownership, rights of inheritance and exploitation of natural resources?

Hindle and Lansdowne (2005) sought to distil the core paradigm concepts of Indigenous entrepreneurship as a research area and identified three essential elements to distinguish Indigenous entrepreneurship from mainstream entrepreneurship:

1. **The heritage positioning index**. A given venture may not be included as Indigenous entrepreneurship if heritage and the importance of Indigenous culture do not constitute an issue, even though the particular enterprise may have a degree of Indigenous ownership or involvement. Some explicit treatment of the degree to which heritage matters influences the management and growth of the enterprise is required.
2. **The autonomy–accountability network**. This network unifies a range of concerns about the degree of Indigenous autonomy, including what distinguishes one venture from another, accounting for venture performance and providing entitlements to multiple stakeholders.
3. **The twin skills inventory**. Significant participants in an Indigenous entrepreneurial process must possess a relevant mixture of technical and cultural skills. In Indigenous entrepreneurship, cultural variables are vitally important attributes of any venture.

Strong parallels between these characteristics of the Indigenous entrepreneurship literature and key themes emerging from this paper can be seen.

Table 2: Parallels between Indigenous entrepreneurship and key themes of research paper

Indigenous entrepreneurship	Key themes of research paper
Cultural heritage position	Indigeneity requirement
Autonomy and accountability	Annual general meetings, registration of members, financial accounts and meetings and minutes
Twin skills set	Financial accounts, employment contracts and inadequate staffing

CASESTUDY

There exists a complete communication breakdown within the Aboriginal community itself that has resulted in a sense of alienation between certain members of [case 22] and factions within the community at large.

The examiner has noted allegations of threatening and intimidating behaviour and the fact that the chairperson [of case 22] [party 1] currently has an apprehended violence order against a community member.

CASESTUDY

The [case 22]'s chairperson, [party 1] and administrator, [party 2] reveal that in their view the Committee has in the past and continues to act in the broader interests of the Aboriginal community … These statements are at odds with the views held by a 'vocal' minority who believe that the [Committee] is rife with 'nepotism, cronyism and poor governance.'

CASESTUDY

A number of complainants state that it seems that committee members run the [case 59] with little regard for the well being of the Indigenous community and without considering the purpose for which the [case 59] was established.

The focus on the relationship between Indigenous economic development and commercial enterprise can be seen in the establishment of a range of Indigenous business bodies to promote and facilitate Indigenous enterprise such as the Indigenous Business Council of Australia, the Business Council of Australia Indigenous Engagement Taskforce, Indigenous chambers of commerce, the Australian Indigenous Minority Supplier Council, the Victorian Aboriginal Economic Development Group, and the Australian Government's Indigenous Business Australia. In the review of the *Aboriginal Councils and Associations Act 1976* it was recommended that for-profit

Indigenous business enterprises be allowed to incorporate under the Indigenous specific statute of incorporation. Consequently provisions were made in the CATSI Act to allow for single member and director corporations that operate for profit.

Finding 6: Two areas of the Indigenous economic development literature have recently emerged which focus on positive aspects of corporate success—Indigenous community governance and Indigenous entrepreneurship. Both areas recognise the importance of Indigeneity to corporate identity, objectives and ownership.

In summary

This literature study examined four distinct areas of academic research that bear on the success or otherwise of Indigenous corporations: business failure; corporate governance; Indigenous community governance; and Indigenous entrepreneurship. These four academic areas combine elements of several disciplines, including management, accounting, sociology, psychology and law. Largely due to this multidisciplinary nature, each area is new or fragmented.

Understanding business failure is central to understanding the failure of any corporation, including Indigenous corporations. Recently corporate failure prevention researchers have proposed a generalised time sequence of the failure process: the origins of failure lead to disorganisation visible within the corporation, then financial trouble visible outside the corporation and, finally, insolvency.

The research identifies the central place of management, including directors, as the origin of business failure, failing to adequately match the corporation's human, financial, technical and management resources to its environment and goals. Managers' personalities, the inability to accept advice, failure to anticipate threats, risk seeking or risk aversion, overestimation of growth, apathy and lack of commitment can all undermine effective performance.

Environmental factors—such as the economy, trust and availability of credit, relationships with investors, creditors, suppliers, customers and competitors—all affect the rate at which a corporation will spiral through organisational and financial failure to insolvency but are rarely the initial cause of failure.

The major finding of this paper is that the failure of the vast majority of Indigenous corporations is due to poor performance of their directors and staff. This is consistent with mainstream corporate failure.

The inclusion of directors—those responsible for management—within 'management' as an origin of failure, leads to focusing on best practices in corporate governance. This area itself has transformed in the last two decades as public expectations and government responses have turned attention from compliance to strategy. The question of how directors add value to the corporation has promoted the professionalisation of director roles and performance evaluation, of both the corporation and its directors, to the prime question for stakeholders.

This literature study highlights the importance of individual and collective values and behaviours to make governance structures and processes work. That is one-size-does-not-fit-all, and directors

must consider a range of elements in their governance framework that make it effective and productive for their corporation in its own context.

The Indigenous context of these corporations leads the focus to questions of difference. Are there any characteristics of Indigenous governance or Indigenous enterprises that are fundamentally different from mainstream corporate economic activity? Two emergent areas seek to identify factors that support effective and productive Indigenous economic activity. Both Indigenous community governance and Indigenous entrepreneurship acknowledge a fundamental Indigenous characteristic that distinguishes Indigenous economic activity from mainstream economic activity—a degree of cultural match or heritage that sufficiently shifts the corporation's environment to question what influence Indigeneity has on particular elements of performance.

Both areas, at this early stage of their development in Australia, indicate some potential lessons of interest to practitioners and researchers. For example, both areas have identified the human resource problems for Indigenous organisations within a restricted skills market in regional and remote areas (with different responses). At the same time this must be assessed carefully to match the paradigms for these areas to the circumstances of individual examples. For example, the ICGP emphasises the political meaning encompassed in the word 'governance', relevant perhaps when an Indigenous corporation is a de facto civic body, but perhaps less so in a bookshop. However, the suggestion that the governance environment is enabling or disabling is difficult to reconcile with the value-neutral concept of 'environment' in the business failure prevention literature. This reflects the value given to environmental factors such as government policy or funding may have on influencing Indigenous governance outcomes.

The emerging area of Indigenous entrepreneurship is providing significant insights into the relationships between business enterprise, commercial success, the mainstream economy and Indigeneity. The focus is on creating and supporting Indigenous corporate and commercial success. This has been incorporated into Australian Government policy through its Indigenous economic development strategy, as part of closing the gap on Indigenous disadvantage. The success-oriented outlook of both areas indicates their significance in terms of contributing to better outcomes for Indigenous governance and economic development.

Part two
Empirical study

Analysing key characteristics in
Indigenous corporate failure

part two

Methodology

This section of the research paper empirically examines cases of Indigenous corporate failure. First, this section outlines the methodology used in the empirical study and then examines in detail the empirical results.

Source material

The source material used comprises case documents relating to Indigenous corporations that have been subject to external administration initiated by the Registrar between April 1996 and July 2008. The records include 167 documents for 93 separate cases of Indigenous corporate failure (see table 3). In some cases different documents relate to the same event in the corporation's case history leading to the same outcome. In one case, one Indigenous corporation had two events separated by three years with two outcomes.

Within the source materials there are seven document types relating to these cases. The description and number of each type is given with the shortened terms used when referring to these documents.

Table 3: ORIC source material

Type	Referred to as	No.
Notices that the Registrar will conduct an examination of an Indigenous corporation under s. 60 of the ACA Act and s. 453-1 of the CATSI Act	notices	4
Reports of an examination	examinations	59
Internal ORIC memos making recommendation for action based on examination reports	recommendations	7
Notices from the Registrar calling on an Indigenous corporation to 'show cause' as to why the Registrar should not appoint a special administrator under s. 71 of the ACA Act and s. 487-10 of the CATSI Act	notices	50
Affidavits supporting court applications.	affidavits	26
Reports to the Registrar from special administrators	administrator reports	3
Reports to the Registrar from liquidators	liquidator reports	18

In addition to the number and types of documents varying by case, the quantity and quality of information varies considerably by the type of document. Because of this variation there needs to be some qualifications made about the findings from the data.

The regulatory documents use legalistic language and are structured according to the applicable requirements of the legislation, particularly the CATSI Act and the superseded *Aboriginal Councils and Associations Act 1976*. Notices to Indigenous corporations and the terms of reference of examiners, administrators, liquidators and the responding reports, tend to be organised by directors' duties and the statutory grounds for placing an Indigenous corporation under special administration. Furthermore, to maximise the effectiveness of each regulatory tool—that is, notices, examinations and court applications—the Registrar usually employs a range of possible legal grounds under the legislation (see table 4). The frequency with which these grounds were invoked for the 93 Indigenous corporations to consider placing them under special administration is set out in table 4. Multiple grounds can be invoked to place a corporation under special administration.

Table 4: The 10 grounds under which the Registrar can consider placing a corporation under special administration

Clause	Grounds	No. times invoked
a)	Trade at a loss for at least six months	31
b)	Failed to comply with the Act, the constitution or a notice from the Registrar	73
c)	Failed to comply with reporting requirements	42
d)	Officers of the corporation acting in their own interest	27
e)	The corporation is being conducted in a way that is oppressive, prejudicial or contrary to members' interests	11
f)	Disputes between members, and between members and officers	7
g)	Disputes between the corporation's officers	9
h)	Request has been made by directors	7
i)	Request has been made by members	6
j)	Otherwise required (in the interests of the members of the corporation, corporation's creditors or in the public interest)	53

It is recognised that the grounds for the Registrar to consider placing a corporation under special administration are generic and may not adequately capture the individual circumstances of corporate failure. That is, a statement that an Indigenous corporation has met a ground, such as failing to comply with reporting requirements or trading at a loss for at least six months, does not necessarily explain the full set of circumstances leading to the failure. More often the details explaining the situation appear in background histories, reports of conduct, items of special concern or supporting documentation to the regulatory instruments.

For this research, examination reports—or extracts from them included in later documents—are the most valuable in identifying symptoms of corporate failure. As indicated in table 3, the source material contains 59 complete examination reports, as well as any material from these reports included in later recommendations, notices and affidavits.

Data extracted from source material

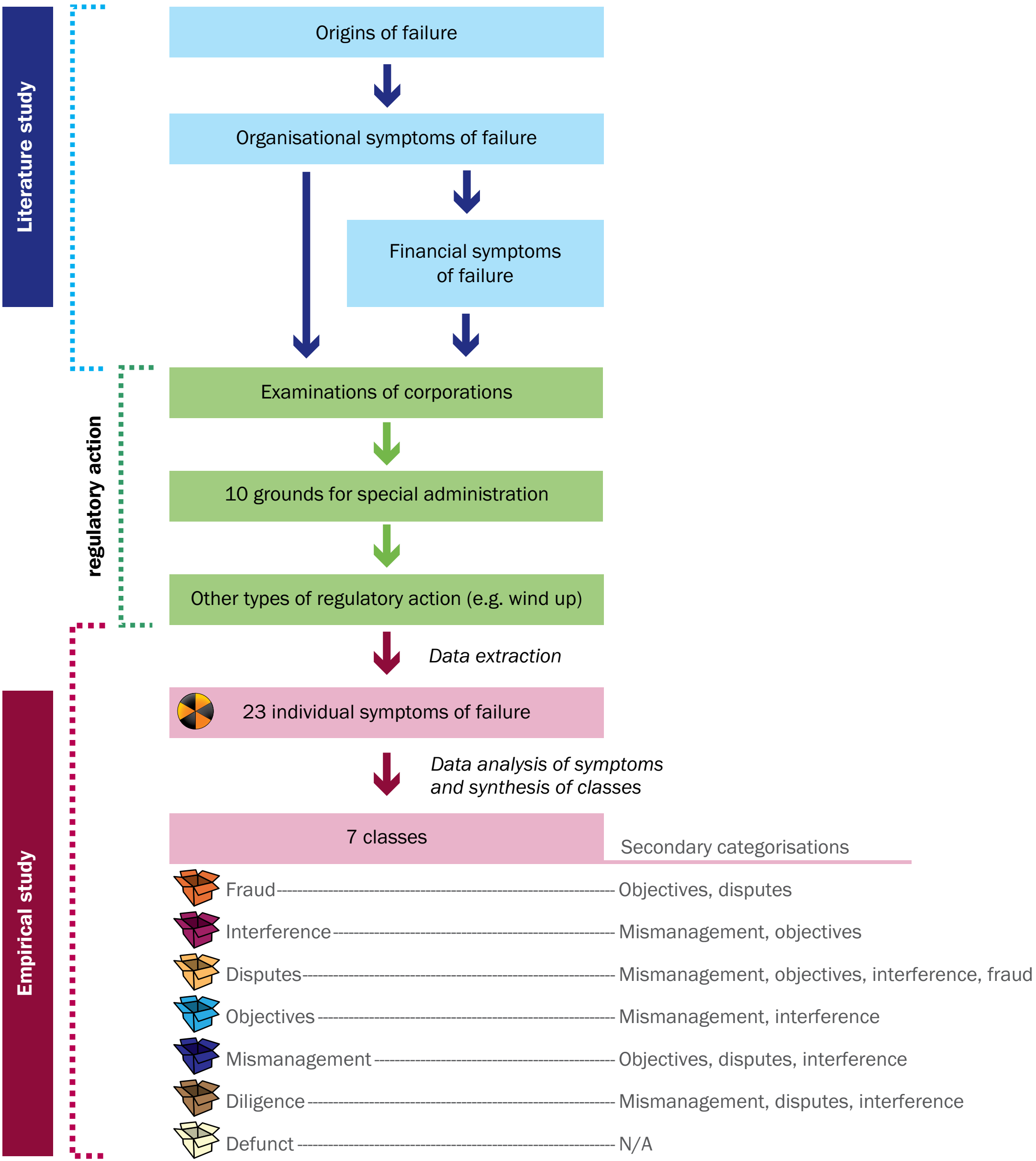
Two kinds of data have been extracted from the source materials.

First, the source materials have been examined to identify symptoms of failure. The regulatory language in the source material does not reference the symptoms commonly used in the business failure literature reviewed in this paper. Instead a method of reiterative examination has been used to identify significant themes from these documents without using the business failure literature for interpretation. In each case themes were identified that for this paper are considered symptoms of corporate failure. This method produces a large matrix of raw data for 93 cases, with 23 symptoms of failure and other characteristics from the source materials. This data is tractable for numerical and logical analysis (see table A5 in the appendix). As figure 5 illustrates, these symptoms of failure are separate from the origins of corporate failure and are not in themselves causes.

Second, once the symptoms of failure were identified, the case documents were re-examined to find text extracts illustrating the symptoms of failure or the particular characteristics of a case. These text extracts, called 'case studies', are used throughout the paper to illustrate the symptoms of failure and the different academic areas related to Indigenous corporate failure.

Figure 5 illustrates the relationship between regulatory action and the focus of this research paper, both in terms of the methodology for conceptualising different types of corporate failure as understood in the academic literature and by the Registrar, and the relationship between the literature study and empirical analysis. As repeated in this paper, the classes of failure are not individual causes of corporate failure; rather they are categories of symptoms to illustrate general patterns of failure. Further, because the classes of failure are derived from analysing regulatory documents, they do not mirror the academic literature definitions. This reflects the paper's emphasis on a regulatory understanding of corporate failure. This paper highlights the lack of such a perspective in the academic literature.

Figure 5: The relationships between regulatory action and the objectives of this research



Data analysis and synthesis of classes

The symptoms of failure are too specific to be sole causes of failure in individual cases. But they cannot simply be aligned with the causes of failure identified in the literature either. Therefore the data must be analysed to identify patterns that can be synthesised into general causes of failure of Indigenous corporations, what this paper calls classes of failure. Broadly, this consisted of three steps.

1. The symptoms of failure listed in table 5 vary in their direct relationship and effect on corporate failure. For example, insolvency and a corporation ceasing trading are seen as critical, whereas a failure to notify the Registrar of all details of a director or member does not necessarily affect a corporation's viability. Some symptoms can be grouped together as more general observations. Each case has been scored on the sum of numerical values attributed to each symptom, based on its general severity, and the whole list of cases ranked from the worst cases involving fraud and insolvency to the most benign cases of not doing anything.
2. The cases have been roughly ranked into sets with common themes that may be aligned with general causes of corporate failure:
    - Text extracts reveal that many of the high-scoring cases exhibit evidence of clearly malevolent intentions on the part of individuals or groups involved with the Indigenous corporation.
    - Another group of high-scoring cases did not exhibit evidence of intentional causes of failure but still displayed many symptoms of failure in a range of areas.
    - A third group consisted of low-scoring cases with no outstanding fault as a reason for their demise.

    From this ranked list, themes were identified and synthesised into seven classes of failure associated with the separate origins of business failure. Each case has been categorised into a class of failure and in some cases a secondary categorisation is relevant as some cases exhibited features of more than one class.

    The first four classes relate to the intentions of persons or parties regarding the activities of the corporation (in order of severity):

    (i) fraud class
    (ii) interference class
    (iii) disputes class
    (iv) objectives class.

    Two classes relate to the performance of persons or parties in the conduct of the corporation:

    (v) mismanagement class
    (vi) diligence class.

    There are a small number of cases where an Indigenous corporation is neither currently operating nor likely to recommence operating:

    (vii) the defunct class.
3. Finally, for each case, the source material was re-examined to confirm or change these primary and secondary categorisations. In some cases a secondary categorisation was identified or dismissed on closer examination.

The result is a more compact table of seven classes containing the frequency of the symptoms of failure (see table A5 in the appendix). With the text extracts from individual cases, table 9 forms the basis for inferences about both individual symptoms of failure and individual classes of failure reported in the findings.

Empirical results

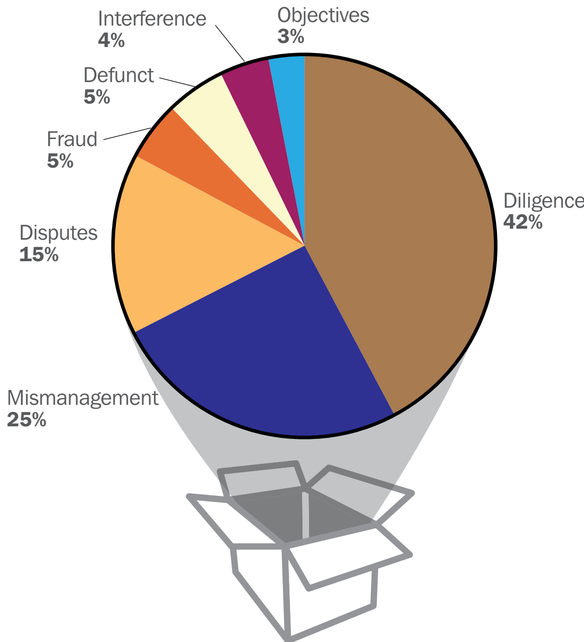
This section of the paper analyses in detail the empirical results of the study. First, the individual symptoms of failure are examined followed by the seven classes of corporate failure. The symptoms of failure provide insight into poor governance and management issues and practices that are occurring in corporations. The symptoms do not explain why they are occurring. To provide a broader analysis of causes of corporate failure key themes within the symptoms have been identified and synthesised into classes.

Before analysing the 23 symptoms of failure, short definitions of each class are given to assist readers in understanding what the classes mean and how they are being used. This is necessary as the classes are referred to when discussing the symptoms of failure. Extracts from the empirical data is used to provide examples of the classes.

Classes of Indigenous corporate failure

This section defines the major classes of Indigenous corporate failure, in order of prevalence (see figure 6 and table 5).

Figure 6: Seven classes of Indigenous corporate failure[7]



7 The percentages have been rounded and all together total 99 percent.

Table 5: Seven classes of Indigenous corporate failure[8]

Seven classes of failure	Cases	Percentage (%)
Diligence	39	42
Mismanagement	23	25
Disputes	14	15
Fraud	5	5
Defunct	5	5
Interference	4	4
Objectives	3	3

Diligence class

The diligence class refers to failure in the governance of the corporation—including directors not meeting their obligations and duties, poor practices around directors' and general meetings and registration of members. This type of failure does not generally lead to the critical debilitation of a corporation, but it is a leading indicator of failure.

CASE**STUDY**

During the course of our fieldwork we became aware of a number of corporate governance and internal control deficiencies with [case 68]. The last Committee meeting was held over 12 months ago on [date] following the [year] AGM. It would appear that since that time the Committee has acted in an informal and non structured manner and allowed Management to make decisions that are unauthorised and/or not documented.

CASE**STUDY**

It would appear all committee members have acted honestly and diligently. This point cannot be further expanded/explored as the availability of minutes is not frequent enough … none of the committee members have had a pecuniary interest in any matters being carried on by the organisation … the [case 79] has not had any allegations or suspicions of fraud or criminal activity … the [case 79] is in accordance with its objectives as set out in the [case 79]'s rules …

CASE**STUDY**

The [case 74] is facing a number of significant issues that could have a detrimental impact upon the sustainability of operations. These matters … include: no governance procedures in place; poor financial controls and reporting; significant increase in [loans]; and poor/inadequate staffing structure.

8 The percentages have been rounded and all together total 99 percent.

Mismanagement class

The mismanagement class refers to failure in the management of the corporation—for example, the corporation is poorly run and has poor financial accounting practices and a general lack of record keeping relating to the management of the corporation. This type of failure greatly affects service provision, and the viability and solvency of the corporation.

CASE **STUDY**

It has been concluded that several years of failure to manage in accordance with the Rules, in accordance with the Act, and in accordance with the funding agreements, have led to the current situation: [case 28] is inoperative; and [case 28] is unable to pay all of its debts as and when they fall due and payable. We found [case 28]'s office to be kept unlocked … The common seal was left out on the desk … We also found folders just sitting in book shelves, regardless of what they contained. The filing cabinet was unlocked during our visit. We found files containing both cancelled cheques and current cheque books. Fortunately, there were no 'pre-signed' cheques. We were advised that [case 28] had MYOB but it was a pre GST version and no one had been trained in MYOB anyway. A cash book was located but this was incomplete and lacked details as to what it related to.

CASE **STUDY**

The management of the [case 39] is currently in our opinion dysfunctional, and is having significant impact on the delivery of [service] and staff morale. We were informed by three key senior staff members during our examination that if action was not taken by an external body that they would resign in the next few weeks. It appears that there have been ongoing issues between successive [CEO]'s and the [party 1] and other staff of the [case 39] which has led to a succession of Administrators lasting only a few months in the previous six months.

Disputes class

The disputes class refers to a conflict or division within or between corporations, directors, officers and members, which restricts the corporation to carry out its objectives.

CASE **STUDY**

A review has revealed a totally dysfunctional Indigenous corporation with a Governing Committee comprised of persons who can no longer meet in the same room and a Manager who has usurped the power of, and dominates, the Committee but who is not capable of satisfactorily managing the Indigenous corporation's affairs. Despite still having a majority, the group of four has been ostracised by the [case 10] manager who refuses to deal with them and has effectively banned them from the [case 10] office. Conversely, [party 1] and [party 2] are supported by the manager and these two Committee members have attempted to create a Committee by invalidly "appointing" further members to their group and then passing resolutions noting that members of the group of four are no longer members.

CASE**STUDY**

Currently there are two groups claiming to be the legitimate Governing Committee of the [case 20], the dispute has become protracted involving Solicitors and the police and there is little likelihood of the dispute being resolved at a local level. It is concluded that neither current Governing Committee has a legitimate claim to manage the [case 20] affairs subject to legal advice … it is considered that acknowledgement of one committee over the other will only open the gates to legal challenges by the disenfranchised Committee, the outcome of which may only be resolved in a court of law.

CASE**STUDY**

Certain members of [case 16] have been in serious dispute with members of [case 16A] which is linked to the [faction], effectively freezing any activity by the [case 16]. Both groups belong to the same tribal group, the split between the older members of the community [faction] and the younger members of [case 16]. Whilst both groups apparently work well together on tribal matters, there is considerable conflict in relation to [case 16]. In addition the [faction] is pursuing court action in support of their claim that their group represents the Governing Committee of the [case 16]. Any voluntary winding up of the [case 16] will require a three quarters majority of those members present and voting. In view of our findings that various members of the [faction] could be considered members of [case 16], it may not be possible to achieve this result even if the [case 16] wished to pursue it.

Fraud class

The fraud class refers to behaviour or circumstances involving fraud. For this paper fraud is defined as obtaining money or a financial advantage, for oneself or another person, through dishonesty or deception. In some instances cases were referred to a regulatory body or the police for investigation or to a director of public prosecutions for prosecution. This is not the same as actual cases of people being convicted of fraud.

CASE**STUDY**

The Administrator highlights that [case 1A] was the vehicle for stripping [case 1] of cash reserves under the cover of a poorly drafted MOU. [Case 1] is insolvent at the date hereof, and I suspect has been so since [date] (which coincides with the decision to incorporate [case 1A] as part of a ‘phoenix’ scheme, designed to defeat existing [case 1] creditors.

Defunct class

The defunct class refers to cases where the corporation is not operating, but has not been wound up.

CASE STUDY

The examination has reported that the [case 89] has not operated for two years and that the Governing Committee has been disbanded and, as such, the [case 89] is unable to comply with the Act and rules.

Interference class

The interference class refers to non-members, non-directors and non-officers unduly influencing or interfering in decisions of directors and activities of the corporation.

CASE STUDY

The [case 7]'s former Chairperson, and current Public Officer, has undue influence over the affairs of the [case 7], and may have personally benefited from his dealings with the [case 7]. The Committee is dominated by individuals with close personal relationships. [Case 7] is not actively pursuing its objectives, and the Governing Committee has acted in their own interests rather than in the interests of the members of the [case 7].

Objectives class

The objectives class refers to instances where corporation resources have been used to pursue activities outside the corporation's objectives. This does not involve intentional action that would support the cases categorised in the fraud, interference or disputes classes.

CASE STUDY

In summary, [case 24] has had no source of income since in or about 1996; vacated its premises in or about October 1996; had its bank account stopped since in or about July 1997; and has never commenced the business for which it was originally incorporated. At no time in the minutes is there any discussion about establishing a [service], obtaining premises for a service, applying for a licence or any other activity that might indicate an intention to run a [service].

Findings on individual symptoms of failure

An examination of the source material identified the language commonly used to exemplify symptoms of failure. As previously stated these symptoms are separate from the origins of failure and do not represent causes of failure. Nonetheless, specific lessons can be found in considering particular symptoms or groups of symptoms.

The 23 symptoms of failure (see table 6) vary in severity, frequency and causal priority. Most of the 23 symptoms occur in approximately one-quarter of cases. At each extreme a small number of these symptoms are very common and very rare (four are found in fewer than five per cent of cases). There are three significant findings:

- Three common symptoms are found in over three-quarters of all cases.
- Some symptoms of failure correspond to criminal or civil penalties in law.
- Trends of failure have been identified within publicly funded Indigenous corporations.

Table 6: Symptoms of corporate failure in descending order of frequency

Rank	Characteristic	Cases	Percentage (%)
1	Inadequate, or non-existent process/records for **financial accounts**	75	81
2	**Annual general meeting** not held or inappropriately conducted	72	77
3	Inadequate, non-existent or poor record keeping of **members' records**	70	75
4	Committee **meetings/minutes** not held or inappropriately conducted/recorded	50	54
5	Indigenous corporation is noted to have received **public funding**	39	42
6	Inadequate or non-existent process/records for **director elections**	39	42
7	**Mismanagement** of Indigenous corporation	33	35
8	Existence/declaration of **pecuniary interest**	30	32
9	A general **lack of records**	29	31
10	Indigenous corporation is **insolvent**	28	30
11	Inadequate appointment/notification of **public officer**	26	28
12	Inadequate or non-existent **employment contracts**	26	28
13	Indigenous corporation is **not trading**	21	23
14	Indigenous corporation subject to **interference/fraud**	20	22
15	Existence/declaration of **conflict of interest**	17	18
16	Indigenous corporation is pursuing activities **outside objectives**	15	16
17	Indigenous corporation has poor or **inadequate staffing**	12	13
18	Dispute/conflict with **CEO**	8	9
19	Registration of **ineligible members**	7	8
20	A **poor history**, including previous external administration	4	4
21	Indigenous corporation has a **bankrupt director**	3	3
22	Lack of governance **transparency**	1	1
23	**Turnover of land** owned by Indigenous corporation	1	1

Most common symptoms of failure

Table 6 shows that the top three symptoms of failure stand above and apart from the remaining symptoms by a margin of at least 20 per cent or 20 cases, with each occurring in approximately 75 per cent of all cases. In general, it is probable that an Indigenous corporation under duress, beginning to fail or in a downward spiral of failure will exhibit at least one of these three symptoms:

- inadequate or non-existent processes/records for financial accounts
- an annual general meeting (AGM) not held or inappropriately conducted
- inadequate, non-existent or poor record keeping of members' records.[9]

Finding 7: There are three common symptoms of corporate failure—poor financial accounts, not holding annual general meetings and poor record keeping of members' records—that were prevalent in most cases (between 75 and 81 per cent).

Criminal and civil penalties

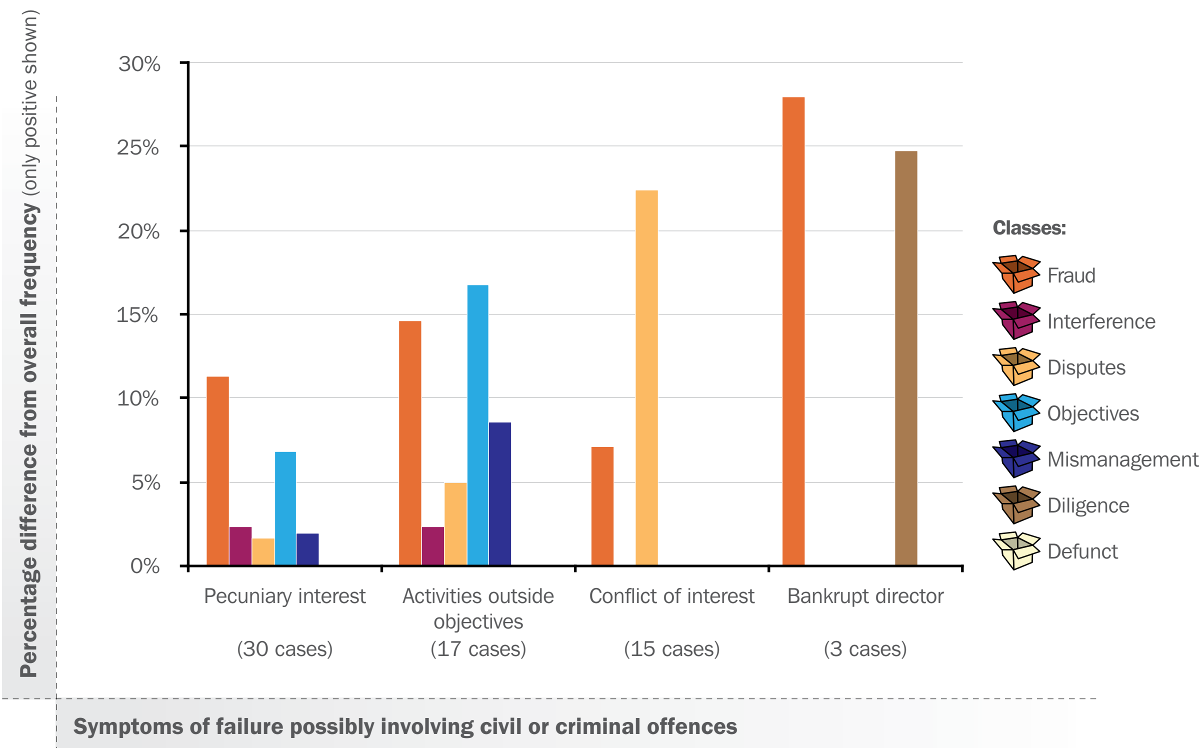
Four of the symptoms of failure identified correspond to possible offences sanctioned by serious criminal or civil penalties—pecuniary interest, insolvency, conflict of interest and director bankruptcy (in order of rank from table 6).[10] Generally the frequency of these symptoms is low, varying from 30 cases of the appearance of pecuniary interest to just three cases involving a director who is or has been bankrupt.

A simple analytic tool to detect associations between these symptoms and classes is to consider the difference between the distribution of all 93 cases (the left-hand column in table 7) and the distribution of the cases in each symptom (the left-hand column under each class in table 7) over the seven classes. If there is no association, then the two distributions would be almost identical and the difference would be near zero. Significant positive differences (figure 7 and table 7) indicate an over-representation of these symptoms in specific classes as compared with the whole sample—showing some association, although not the relationship.

9 See table A1 and figure A1 in the appendix for a more detailed analysis of the most common symptons of failure.

10 The data generally only refers to the possibility of an offence or circumstances open to infringement, rather than an offence having been committed.

Figure 7: Analysis of symptoms of failure corresponding to classes[11]



Given the sample size of 93 cases in figure 7, an 8 per cent threshold represents a deviation of more than one case in a class for an equal distribution across classes (i.e. 13 cases per class). This means that an over-representation in a specific class of greater than 8 per cent may be significant. Moreover, given the unequal distribution across classes, such comparisons are only valid within a class, and no inferences can be made between classes.

Table 7 provides additional information to figure 7—the overall frequency of the classes of failure, the frequency of a symptom in a given class and the difference between the overall frequency and the frequency of the individual symptom.

11 Only the positive scale is shown as this is specifically focused on cases of over-representation.

Table 7: Analysis of symptoms of failure corresponding to classes

		Symptoms possibly involving civil or criminal offences							
		pecuniary interest		activities outside objectives		conflict of interest		bankrupt director	
	Overall frequency	Total	Difference	Total	Difference	Total	Difference	Total	Difference
Classes	%	%	%	%	%	%	%	%	%
Fraud	**5.4**	16.7	**11.3**	20.0	**14.6**	5.9	**0.5**	33.3	**28.0**
Interference	**4.3**	6.7	**2.4**	6.7	**2.4**	5.9	**1.6**	0.0	**–4.3**
Disputes	**15.1**	16.7	**1.6**	20.0	**4.9**	23.5	**8.5**	0.0	**–15.1**
Objectives	**3.2**	10.0	**6.8**	20.0	**16.8**	5.9	**2.7**	0.0	**–3.2**
Mismanagement	**24.7**	26.7	**1.9**	33.3	**8.6**	11.8	**–13.0**	0.0	**–24.7**
Diligence	**41.9**	23.3	**–18.6**	0.0	**–41.9**	41.2	**–0.8**	66.7	**24.7**
Defunct	**5.4**	0.0	**–5.4**	0.0	**–5.4**	5.9	**0.5**	0.0	**–5.4**
Total	**100**	**100**	**0**	**100**	**0**	**100**	**0**	**100**	**0**

Pecuniary interest and conflict of interest

It is not uncommon for corporation directors to have a conflict between personal interests and activities or proposals of the corporation. A conflict of interest is ‘a situation where a person has a personal interest in a matter the subject of a decision or duty of the person’ (Butterworths 2008). A pecuniary interest relates to a person’s interest in a matter being based on the probability that the person stands to gain or lose financially from it. These types of interest include remuneration, gifts or loans to directors, corporations with competing businesses or subcontractors, but are not exclusively pecuniary in nature. Over time the law has evolved regarding the management of these conflicts, primarily through declaration of interests and the abstinence of interested parties from corporate decision making involving these conflicts.

In total, 50 per cent of cases suggest the possibility of either pecuniary interest (30 cases) or conflicts of interest (17 cases).

Figure 7 and table 7 show that pecuniary interest is over-represented in the fraud class and, to a lesser extent, in the objectives class, while conflict of interest is over-represented in the disputes class (see table 9). This may be due to the level of detail provided in the source material. Significantly only three cases include a definite recommendation for referral to police or the relevant director of public prosecutions or regulatory body for further action. There is no evidence available as to whether any criminal proceedings commenced or any conviction was recorded by a court.

Finding 8: Problems involving pecuniary interests and conflicts of interest were identified in 50 per cent of Indigenous corporations that failed.

Insolvency

The insolvent status of an Indigenous corporation is significant as it signals corporate failure and is a civil penalty provision and may be a criminal offence. The cases assessed as insolvent refer to possible rather than actual insolvency. Only seven of the 28 cases were returned to members' control, indicating that financial failure is very difficult to reverse. However, an analysis of the data showed insolvency to be an issue noted in 23 of the 61 cases (38 per cent) where the corporation had been wound up, so financial failure is not the exclusive terminal cause of corporate failure.[12]

In table 9 it is clear that insolvency is an issue in the mismanagement class, as a majority of cases in this class were insolvent (52 per cent). This suggests that insolvency is a financial warning of possible corporate failure as most cases in the mismanagement class were wound up. Windings-up were most likely to occur in the mismanagement class out of all classes (see figure 9). This is consistent with the general understanding of business failure in the academic literature.

Bankrupt directors

A person is a 'bankrupt' if they have been declared bankrupt under the provisions of the *Bankruptcy Act 1966* and have not been discharged from bankruptcy. Both the CATSI Act (s. 279-5(3)) and the *Corporations Act 2001* (s. 206B) state that an undischarged bankrupt is automatically disqualified from managing a corporation and from being a director.

Under the CATSI Act it is an offence for a disqualified person to manage a corporation (s. 279-1 of the CATSI Act) and may incur an imprisonment term of 12 months, 50 penalty units ($5500) or both. This reflects the seriousness of the offence and the reasons for this are to:

- protect the interests of corporation members, the public and creditors from people who are unable to appropriately manage their financial affairs and possibly the affairs of a corporation, which might lead to the corporation becoming insolvent
- deter others from engaging in such conduct, particularly if the breaches are serious
- deter others from abusing the corporate structure to the disadvantage of investors, shareholders, members and others dealing with a corporation.[13]

Only three cases identified that a director of an Indigenous corporation was a current or discharged bankrupt, and the two discharged bankrupts were not prohibited from being directors. The one case is in the fraud class, involving an intent to pervert the law by disguising the business activity of the bankrupt person.

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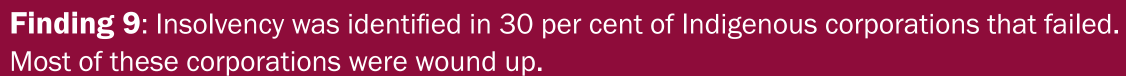
12 There is no corresponding table to this statement. The information is derived from analysing the raw data, particularly statements made in the examination reports. Noting an issue is not the same as identifying a symptom.

13 These three points are derived from the principles used by courts to consider an application by a disqualified person from managing a corporation for leave to manage a corporation (see *Adams v Australian Securities & Investments Commission* [2003] FCA 557).

CASE STUDY

[Party 1] owned [corporation] with a shop … It would appear that [case 5] was incorporated around the time when [corporation] was being closed down and this was his next venture. The membership list appears to be his friends from the local area together with a few outsiders. [party 1] acts as the CEO of the Indigenous corporation, he is not a Director. He admitted to me that he is a bankrupt, as his business, [corporation] closed down … One could take a cynical view that the Indigenous corporation is nothing more than a legal front for [party 1] to run this [activity] in the hope that he might gain financially from the sub-contractor. Apart from sub-contracting the … [case 5] has not operated. Until it gets funding, [party 1] does not intend to comply with all the statutory matters. The other members appear to be friends and local contacts with no real interest in the organisation and it is vulnerable to being used by [party 1] as a business front. As he is a bankrupt, he will rely on other members being the Directors and cheque signatories if [case 5] ever starts activities in its own name.



Finding 9: Insolvency was identified in 30 per cent of Indigenous corporations that failed. Most of these corporations were wound up.

Publicly funded

In this paper the characteristic of public funding of Indigenous corporations refers only to money, assets or property given by government as identified in the source material. More generally it is recognised that most Indigenous corporations receive public funding. Consequently there is a special concern in the failure of these corporations regarding the waste or misappropriation of public funds.

In the source material a total of 39 cases were identified as being publicly funded. This indicates that examinations of Indigenous corporations usually do not report the types of funding corporations receive. Of these reported cases:

- 21 were categorised in either the diligence or defunct class
- 21 were returned to members after external administration
- 14 cited potential loss of future public funding as a threat to viability, of which half were returned to members after external administration.

On the issue of misappropriation of public funds, the research findings suggest that fraud is not prevalent in the cases of Indigenous corporate failure. Although four of the five cases in the fraud class were publicly funded, this was not reported in the source material. This suggests that the fraudulent activity did not involve the misuse of public funding.

CASE**STUDY**

There are concerns that due to the way the [case 51] currently operates, funding may be lost thereby risking its viability.

The members of the Governing Committee maintain that [case 27] failed due to ATSIC [Aboriginal and Torres Strait Islander Commission] failing to provide grants. Officers of ATSIC maintain that ATSIC refused to provide grants as [case 27] had accumulated debts to the Australian Taxation Office, failed to comply with the Act and also used previous grants for purposes other than the purpose that the grant was provided for.

Finding 10: Fraud is not associated with public funding in the cases of Indigenous corporate failure. Four of the five cases in the fraud class were publicly funded. Given this was not reported in the source material it could suggest that the fraudulent activity did not involve the misuse of public funding.

Findings on classes of corporation failure

Primary categorisation of cases of failure

The primary distribution of 93 cases across these seven classes is shown in figure 6 and table 5. Every case is categorised into one of seven classes. This is the primary categorisation. Some cases exhibit features of more than one class. This is the secondary categorisation.

The two performance-related classes—diligence (39 cases) and mismanagement (23 cases)—account for 67 per cent of cases. The largest number of corporate failure involving people's intentions and behaviour is the disputes class (14 cases), with fraud accounting for five cases.

It cannot be identified from the source material whether this is due to lack of ability or negligence by directors and staff.

Finding 11: A clear majority of Indigenous corporations failed (67 per cent) because of poor management or poor corporate governance.

Secondary categorisation of cases of failure

The secondary categorisation of cases of failure is shown in figure 8 and table 8. In figure 8 each bar represents a class of failure and contains secondary categorisations of failure that are differentiated by colour. Further, each bar shows the number of corporations in each of the classes of failure including their secondary categorisation (where there is one). No case had a secondary categorisation that contained either diligence or defunct. Table 8 lists the number of corporations categorised as having secondary categorisations in each class.

In the mismanagement and diligence classes the primary categorisation is the significant symptom of failure, representing 41 cases or 66 per cent of these cases. Secondary categorisations of failure are much more prevalent in classes involving malevolent intention—fraud, interference, disputes or objectives. This suggests that although poor corporate governance and mismanagement may foster conditions for fraud or disputes, the intentions of directors, staff, members or others to pursue such conduct is a significant contributing factor.

Figure 8: Secondary categorisation of cases of failure

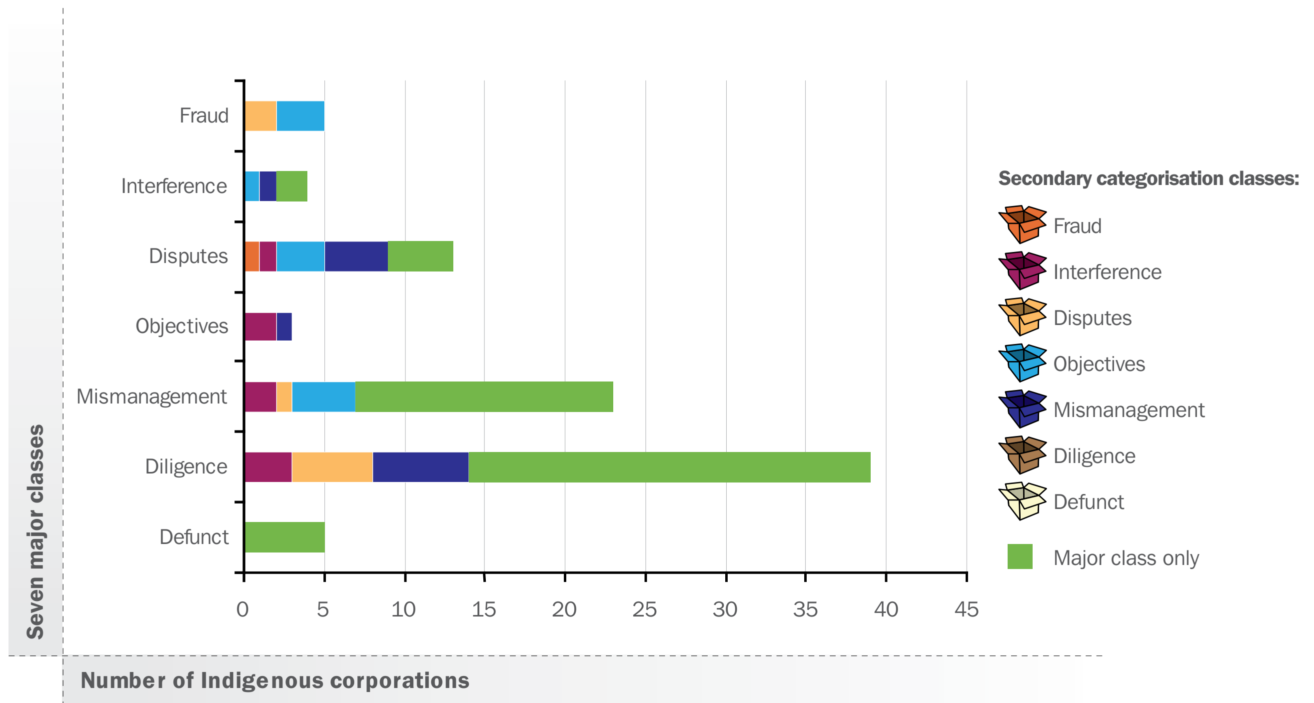


Table 8: Secondary categorisation of cases of failure

	Secondary categorisation							
Seven major classes	Fraud	Interference	Disputes	Objectives	Mismanagement	Diligence	Defunct	Major class only
Fraud	0	0	2	3	0	0	0	0
Interference	0	0	0	1	1	0	0	2
Disputes	1	1	0	3	4	0	1	4
Objectives	0	2	0	0	1	0	0	0
Mismanagement	0	2	1	4	0	0	0	16
Diligence	0	3	5	0	6	0	0	25
Defunct	0	0	0	0	0	0	0	5

Figures show number of Indigenous corporations.

CASE STUDY

Based on interviews with the Ex-Chairperson and Members of the current [case 13] Committee it appears that the Ex-Chairperson, [party 1] has not acted honestly with respect to the operations of his [service] business. It was operated initially through the bank accounts of the Corporation, then through separate bank accounts but still through the Corporation's premises, staff and overheads. It was not possible to ascertain the extent of [party 1]'s gain, if any, and whether he is guilty of fraud or misappropriation. It is considered that an extensive investigation may not reveal conclusive evidence due to the way [party 1] successfully "intertwined" the activities of all of the businesses and staff.

Individual classes of corporate failure

The seven classes of failure are discussed in greater detail in their order of frequency.

Table 9 shows the symptoms of failure within each class.

Table 9: Frequency of corporate failure symptoms within each class of failure

		Classes						
	Frequency within all classes	Diligence	Mismanagement	Disputes	Fraud	Defunct	Interference	Objectives
Symptoms of corporate failure	%	%	%	%	%	%	%	%
Financial accounts	81	90	91	86	60	0	75	33
AGM	77	92	70	57	80	60	75	67
Register of members	75	87	74	64	60	60	75	33
Meetings/minutes	54	51	74	21	40	60	50	100
Publicly funded	42	49	39	50	0	40	25	33
Director elections	42	41	43	57	40	20	50	0
Mismanagement	35	5	96	43	20	0	0	67
Pecuniary interest	32	18	35	36	100	0	50	100
Lack of records	31	15	52	29	20	60	25	67
Insolvent	30	21	52	29	20	20	25	33
Public officer	28	33	39	14	20	0	0	33
Employment contracts	28	21	43	29	40	0	25	33
Not trading	23	10	26	29	0	80	0	100
Interference/fraud	22	10	9	21	100	0	100	67
Conflict of interest	18	18	9	29	20	20	25	33
Activities outside objectives	16	0	22	21	60	0	25	100
Inadequate staffing	13	18	13	7	0	0	0	33
CEO	9	8	4	21	20	0	0	0
Registration of ineligible members	8	3	13	14	0	0	25	0
Poor history	4	0	4	14	0	0	0	33
Bankrupt director	3	5	0	0	20	0	0	0
Transparency	1	3	0	0	0	0	0	0
Turnover of land	1	3	0	0	0	0	0	0

Diligence class

The most populous class is the diligence class, which is the first of two classes based on performance. The diligence class contains cases in which directors and staff either conducted poor oversight of the Indigenous corporation or where the scarcity of records means there is no evidence to categorise the case in another class. While there are poor practices around corporate governance processes—such as the register of members and properly conducting and recording general and committee meetings (see table 9)—the underlying business is generally not critically debilitated. This is demonstrated by the fact that 28 of the 39 corporations in this class were returned to members after external administration (see figure 9).

CASE**STUDY**

The breaches of the [Act] and the [case 54]'s constitution reported upon by the examiner are of a serious nature, with no financial records having been maintained for the past year or so. In addition the actions of the Chairperson are indicative of a complete breakdown in acceptable standards of corporate governance for an incorporated entity ...

CASE**STUDY**

During the course of our fieldwork we became aware of a number of corporate governance and internal control deficiencies with [case 68]. The last Committee meeting was held over 12 months ago on [date] following the [year] AGM. It would appear that since that time the Committee has acted in an informal and non structured manner and allowed Management to make decisions that are unauthorised and/or not documented.

CASE**STUDY**

Due to the professional nature of the [case 57]'s activities, medical professionals also dictate the management of the [case 57], primarily however the lines of management are from the Governing Committee through the Manager to the other staff inclusive of professional staff. The Governing Committee however tends to rely heavily on the advice of management and external service provides. This has resulted due to a lack of knowledge of the Governing Committee and/or awareness of their responsibilities under the Act and Rules of the [case 57].

This class also contains the single case where an examiner commented on the lack of 'governance transparency' due to the turnover of land. Governance transparency refers to the disclosure of accurate information about performance and decisions made by directors to members (Hermalin and Weisbach 2007). Here the directors allegedly caused the Indigenous corporation to enter into a development management deed of agreement (DMDA) to contribute all its 'unencumbered present and future freehold or leasehold land' into a joint venture and develop the land through the joint venture while the corporation would incur all expenses. Some 10 months later at a special general meeting it was resolved that the corporation should obtain independent legal advice regarding the execution of the DMDA, which did not appear to be validly signed within the corporation's rules. The meeting neither approved entry into the DMDA nor ratified the signing of the DMDA by the chairperson and treasurer. The examination of the corporation strongly recommended a 'course of transparency' urgently seeking member approval of the DMDA. However, the examination noted 'a reluctance on the part of the chairperson'. The case appears to have been resolved without ORIC appointing a special administrator.

Mismanagement class

The mismanagement class is the second of two classes based on performance. The mismanagement class contains cases where the corporation is poorly run by directors and staff—including poor financial accounting (21 of the 23 cases) and a general lack of record keeping, such as recording decisions in minutes of meetings and documenting management structures or employment contracts (see table 9). The emphasis here is on how these poor practices affect the corporation rather than on individual intentions. This type of failure greatly affects service provision and the viability and solvency of the corporation—for example, when resources are inappropriately allocated and debts and debtors are neglected. Half of the cases in this class were insolvent, although only one-quarter had ceased trading. The viability of these Indigenous corporations is critically harmed and 20 of these cases were wound up (see figure 9).

CASE**STUDY**

During the period covered by this examination [case 41] has been virtually inactive due to a lack of major funding ... The existing accounts and records of [case 41] are in a state of disarray ... Records were not filed systematically, cheque books could not be located, mail was unopened, and documentation was strewn across the floor. The [case 41] has an outstanding taxation liability for unremitted group deductions. There was also a large amount of unopened mail including bank statements, creditors' demands for payment (including the ATO). The [case 41] no longer has any paid employees. Whilst there is still a functioning Governing Committee, the voluntary part time manager [party 1] appears to operate fairly independently from the Committee. It would therefore be reasonable to state that there are no lines of management operating within the [case 41]. Although not inactive, the [case 41] has no immediate prospects of attracting funding. We believe that, without such funding, and in the absence of alternative arrangements to satisfy the ATO, the [case 41] has no future.

CASE**STUDY**

The management of the [case 39] is currently in our opinion dysfunctional, and is having a significant impact on the delivery of [service] and staff morale. We were informed by three key senior staff members during our examination that if action was not taken by an external body that they would resign in the next few weeks. It appears that there have been ongoing issues between successive [CEO]s and the [party 1] and other staff of the [case 39] which has led to a succession of Administrators lasting only a few months in the previous six months.

CASE**STUDY**

The Committee entered into an arrangement with a then Committee member to take over management of a hairdressing salon without first obtaining independent financial advice as to the financial viability of such a venture. Over a period of less than twelve months the arrangement operated at a loss for the [case 37], so that at termination of the arrangement the losses totalled $110,000.

In the literature study section four types of business failure processes were outlined, and the unavailability of internal capital or external credit was recognised as an issue in some instances of corporate failures. This is considered a mismanagement class issue as it relates to the financial management, liquidity and growth of a corporation. This issue is particularly relevant to Indigenous corporations because they have limited access to internal capital as members usually have limited financial resources. Further, charges (securities) cannot be registered against Indigenous corporations, unlike companies incorporated under the *Corporations Act 2001.* This restricts Indigenous corporations from qualifying for significant credit. However, Indigenous corporations can obtain unsecured credit—such as an overdraft—but this is not significant secured credit.

Disputes class

The disputes class contains cases in which factionalism between directors and within the corporation and community was a major factor inhibiting an Indigenous corporation from achieving its objectives. In some cases the directors were not prepared to meet or it was not possible to determine which directors were the properly constituted directors.

Staff feature prominently in this class. As illustrated in the case studies managers and staff can exploit divisions in the boards, take sides or be bullied by directors. Under such leadership the administrative and financial affairs of the corporation degenerate, though not necessarily irreversibly, as demonstrated by the four cases that were returned to members. However, the preoccupation with the dispute jeopardises the business, as poor financial accounts is identified as the most prevalent symptom in this class (86 per cent) and the other classes relating to people's intentions.[14] These range from poor attention to finances by the directors, the removal or departure of key staff responsible for accounts to the seizure of assets and records by one faction effectively stopping the operations of the Indigenous corporation.

The disputes class has the highest proportion of questionable elections of directors, eight of 14 cases or 57 per cent (table 9). As seen in the case studies that follow, factions between directors or within the community often attempt to take control of the Indigenous corporation by gaining voting majorities. In two cases such action is associated with ineligible members of the corporation. The validity of memberships, general meetings or election processes can be, and often is, legally challenged, though as noted in some of the case studies, legal rulings are not necessarily conflict resolutions.

The history of the Indigenous corporation is significant in this class, which includes two of the four cases noting 'poor history' where ORIC has previously intervened and poor corporate governance has existed for various reasons. These include lengthy debates, 'open warfare between competing families' and prior periods of being placed under special administration.

14 The other three classes relating to people's intentions are fraud, interference and objectives.

CASE **STUDY**

MANAGERS

A review has revealed a totally dysfunctional Indigenous corporation with a Governing Committee comprised of persons who can no longer meet in the same room and a Manager who has usurped the power of, and dominates, the Committee but who is not capable of satisfactorily managing the Indigenous corporation's affairs. Despite still having a majority, the group of four has been ostracised by the [case 10] manager who refuses to deal with them and has effectively banned them from the [case 10] office. Conversely, [party 1] and [party 2] are supported by the manager and these two Committee members have attempted to create a Committee by invalidly "appointing" further members to their group and then passing resolutions noting that members of the group of four are no longer members.

CASE **STUDY**

DIRECTORS

The examiner found that there are significant issues relating to the composition of the Governing Committee, specifically in relation to which group is the correctly appointed managing committee. The examiner's discussion with both groups have revealed multiple allegations including fraud, theft, abuse, misappropriation of the Indigenous corporation's funds, threats, destruction of books and records, breaking and entering and other alleged criminal activity by both groups. Both groups have reported these allegations to the Police and have also sought independent legal advice. It is clear that the recent dispute between the two "Committees" has resulted in inadequate records being maintained by the [case 15]. Whilst the new CEO is showing signs of rectifying this breach the present situation is far from acceptable.

CASE **STUDY**

COMMUNITY

The report described the [case 18] as being an organisation enduring significant turmoil due to divisive elements within the community. There are two factions each claiming to represent the Governing Committee of the [case 18] and that there is little possibility of these two groups reconciling their differences and working together for the good of the [case 18]. The office of the [case 18] has been closed by the [party 1] faction and the affairs of the [case 18] are effectively in limbo.

Fraud class

The fraud class contains cases in which the intention of staff and directors was to perpetuate possible fraudulent behaviour or establish circumstances permitting fraud. This is not to assert that criminal fraud actually occurred; only one of these cases refers to the start of a police investigation, and one case recommended referral to police for investigation. The source material does not contain information about the outcome of such investigations.

Three symptoms are over-represented in the fraud class (see table 9): pecuniary interest, activities outside objectives and bankruptcy (which has been previously discussed).

In every case one or more directors or staff held a pecuniary interest in the activities of the corporation and the decisions of its directors. These cases are about money and in this class they illustrate that the intentions of persons go beyond financial personal interest and benefit—such as pecuniary interests—where the behaviour of directors and staff are clearly dishonest and possibly criminal. There were seven cases where fraud was used to explain corporate governance issues. Of these, two referred to no evidence of fraud, two referred to the inability to determine fraud, two referred to the involvement or recommendation of police and one related to accusations of parties in a dispute. Of the five cases categorised in the fraud class, only two specifically mention fraud or police involvement.

A recent research thesis investigating the incidence of corruption and fraud in Indigenous corporations receiving public funding found that grant corruption and fraud is not a significant problem. Further, it also found that, when it does occur, it usually has a small financial value. However, incidents of corruption and fraud are more likely to occur when an Indigenous corporation receives a combination of grant funding and other income (Goddard 2009).[15]

This is consistent with this paper's findings that incidences of fraud were minimal in Indigenous corporations (five out of 93 cases), and that the fraudulent activity was not associated with public funding.

CASE**STUDY**

I have been unable to locate employment contracts between [case 1] and [CEO] which may have detailed any benefits receivable and review of [case 1]'s Minutes of Meetings are silent in all respects to [CEO]'s remuneration and other benefits receivable... With the assistance of Qld Police Fraud Unit, and equipped with a Search Warrant, I staged a raid on [CEO]'s property last Tuesday... A fully kitted builders trailer, plant equipment and tools to the value of $10,000 and a lap-top computer were seized...

CASE**STUDY**

The Committee has allowed some of its cheques to be fraudulently negotiated. There is no fully operative accounting rental and collection system [case 2].

15 The research methodology used by Goddard differs to the methodology employed in this paper. Goddard's research uses interviews and questionnaires to determine perceptions of the extent and nature of corruption and fraud. Goddard's research also includes the act of corruption, which broadens the research scope beyond that of this paper.

CASE**STUDY**

The Administrator highlights that [case 1A] was the vehicle for stripping [case 1] of cash reserves under the cover of a poorly drafted MOU. [Case 1] is insolvent at the date hereof, and I suspect has been so since [date] (which coincides with the decision to incorporate [case 1A] as part of a 'phoenix' scheme, designed to defeat existing [case 1] creditors).

CASE**STUDY**

The deed agreement arose as a result of an intention to compensate a Native Title claimant for a lease ... in relation to land. A cheque for $16,800 ... was banked... subsequently cheques for equal amounts of $2,500 were drawn and made payable (to 5 beneficiaries) ... There is no evidence that any of the monies were used for the benefit generally of native title claimants nor in particular for the other person whose name was included on the original cheque. The significant issue is that two parties to the agreement ... did not: (a) confirm their approval as to the method of payment; (b) received any benefit from the funds received by the [case 3]. Both [parties] are not "friendly parties" with the current committee. A few members controlling the [case 3] are the only ones benefiting from the [case 3] to the detriment of other members.

Defunct class

None of the Indigenous corporations in the defunct class (five cases) were operating.

CASE**STUDY**

The examination has reported that the [case 89] has not operated for two years and that the Governing Committee has been disbanded and, as such, [case 89] is unable to comply with the Act and rules.

CASE**STUDY**

[Case 93]'s business has been suspended since or at [date] and probably during [year]; the bank account held by [case 93] has been inactive since it ceased business ... the principals of [case 93] have departed from the community and abandoned the [land] ...

Interference class

The interference class contains cases in which one or more people—not necessarily directors, staff or members of the Indigenous corporation—unduly influenced (two cases) or interfered with (two cases) the decisions of directors and the activities of the corporation. In the cases of interference the parties were outside the corporation.

In the cases of undue influence by directors, pecuniary interests and poor meeting and minute processes were noted issues. The election of directors was an issue in one case involving interference and influence. In one case, ineligible members were registered to bolster the position of the former chairperson. But such influence is not necessarily directed at defrauding the corporation, and two cases were returned to members after the corporation was placed under special administration.

CASE**STUDY**

UNDUE INFLUENCE

The [family] does appear to exert a lot of influence over the [case 6]'s affairs and management. [family member 1] and her family have a monopoly over the [case 6]'s operations and have the power to clear cheques through the bank without consultation with members of the Committee outside the family. There is a separation of duties conflict as [family member 1] is on the Committee and also the bookkeeper in the [case 6]. There appears to be non-[case 6] employees having positions of control within the [case 6]. There is a tenant [family member 2] having control over receipting of the rental monies collected on behalf of the [case 6]. The tenant is not an employee of the [case 6] but is under the control of the CDEP program [Community Development Employment Projects] which is administered by [family member 3], [family member 2's father] … No activities have arisen which would be considered a contravention of the law or constitute fraudulent activities during the period of the investigation.

CASE**STUDY**

SHADOW DIRECTOR

In particular the examiner perceives the Indigenous corporation to be controlled by [party 1] (and to a lesser extent by [party 2]), with the members of the Indigenous corporation being denied a say in the proper functioning of the Indigenous corporation … The examiner noted petitions signed by 26 [nation] people exhorting the Registrar to appoint an administrator as a matter of urgency. The Committee have not acted with the requisite degree of care and diligence by reason of, inter alia, permitting the control and affairs of the [case 8] to be effectively assumed by a non-member [party 1].

Objectives class

The objectives class contains three cases in which the material and human resources available to the corporation were dissipated in the pursuit of activities outside of the objectives of the corporation. These cases did not involve instances of intentional action that would support categorising it as fraud, interference or disputes. In all three cases pecuniary interests are suggested and the corporations had stopped trading.

CASE STUDY

In summary, [case 24] has had no source of income since in or about 1996; vacated its premises in or about October 1996; had its back account stopped since in or about July 1997; and has never commenced the business for which it was original incorporated.
At no time in the minutes is there any discussion about establishing a [service], obtaining premises for a service, applying for a licence or any other activity that might indicate an intention to run a [service].

CASE STUDY

It is apparent from the report that [case 25] does not presently operate and is in effect a mere shell of a corporation. [Case 25] gained control over the tenancy of two properties and obtained funds from ATSIC for the purpose of developing those properties for a skilled trades training centre and trainees' accommodation. However the houses are used as residential properties for [party 1], the alleged previous chairman and current governing committee member and [party 2] the alleged chairman and current governing committee member.

CASE STUDY

Confusion needs to be removed regarding [case 26], [case 26B] and [case 26C].
We understand that the motel and hostel is owned by [case 26B] and yet [case 26] appears to be paying for a number of items that do not relate to the museum such as motel and hostel wages, rates and insurance. It is absolutely imperative that a restructure take place as soon as possible. All three entities should in our opinion be converted into one if possible to save administration costs and resources which at present all three cannot afford.

Outcome of external administration

The outcome of each external administration—returning the corporation to the control of members or winding it up—is shown in figure 9 and table 10. This is broken down by each class of failure. Of the 93 cases examined for this paper only two-thirds constitute failure ending in Indigenous corporations being wound up and deregistered. This represents an annual rate of 0.2 per cent. In comparison to corporations registered under the *Corporations Act 2001*[16] entering administration or insolvency, the average annual rates are 0.5 per cent and 0.8 per cent respectively.[17]

Most cases in the mismanagement class were wound up, whereas a majority of cases in the diligence class were returned to the control of members after external administration. Thirty-eight Indigenous corporations were restored to corporate health and returned to members after external administration. The majority (28 cases) are from the diligence class, which suggests that this type of failure in poor corporate governance can be changed. Only three of the 28 cases

16 The *Corporations Act 2001* is administered and regulated by the Australian Securities and Investments Commission.

17 Based on registration, administration and insolvency statistics from 1999 to 2008 published by the Australian Securities and Investments Commission on its website: www.asic.gov.au. Neither ORIC nor ASIC data includes voluntary administration data.

in the mismanagement class were restored to corporate health and returned to members, suggesting that mismanagement of financial affairs in a corporation is difficult to turn around.

In some cases in the disputes and interference classes, and one in the fraud class, the intentions and actions of a few people have influenced the operation and activities of the Indigenous corporation, particularly in terms of operating outside of its objectives. However, following external administration, these issues have been dealt with and the control of the corporation has been returned to the directors.

Figure 9: Outcomes of cases for each major class of failure

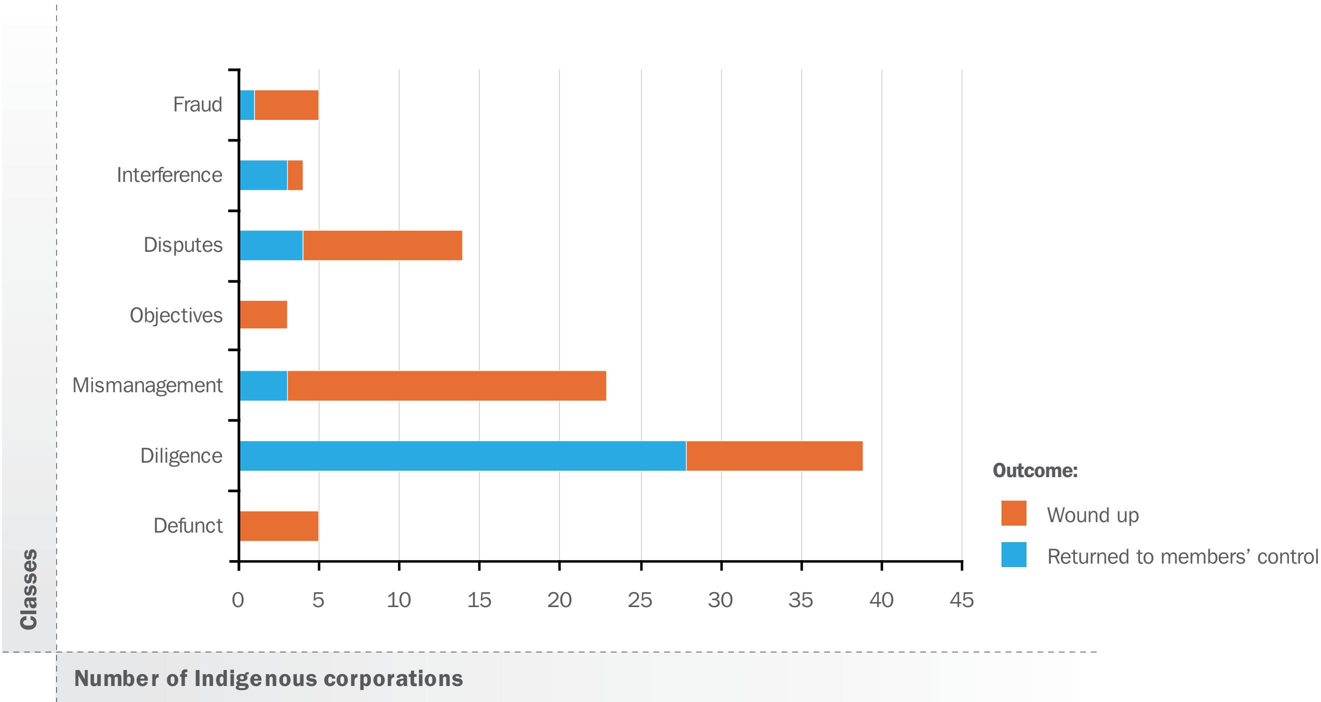


Table 10: Outcomes of cases for each major class of failure

Class	Returned to members' control	Wound up
Fraud	1	4
Interference	3	1
Disputes	4	10
Objectives	0	3
Mismanagement	3	20
Diligence	28	11
Defunct	0	5

Finding 12: Over 40 per cent of Indigenous corporations were returned to members' control after external administration. This increased to 70 per cent when liquidation only cases were excluded.

In summary

This empirical study examined regulatory documents held by the Registrar that capture data about Indigenous corporations under external administration because of corporate failure. The data extracted from these source materials is indicative of symptoms of failure but separate from the origins of failure. The paper identified 23 symptoms of failure. Seven classes of failure were synthesised from the symptoms that are indicative of general causes of failure in these Indigenous corporations. Each case was categorised in one or more classes.

The major finding of this empirical study is that Indigenous corporations have failed primarily because their directors and staff have failed in the performance of their duties. Two-thirds of the 93 cases examined had failed either by directors performing poorly in their duties and obligations (diligence class) or by management exercising poor control of the corporations' operations (mismanagement class).

The study found that the cases in the mismanagement class are likely to be insolvent and, for most, the failure of the corporation is permanent. In contrast, the governance of Indigenous corporations in the diligence class was largely restored, and the corporations were returned to members following external administration.

These findings support the focus on providing corporate governance support services to Indigenous corporations to improve outcomes both before and after corporate failure.

The lower overall rate of Indigenous corporate failure compared with ASIC-registered companies is probably partly due to the support services ORIC delivers (drawing inferences from both the primacy of the diligence class and the rectification of such cases).

A significant implication of the prevalence of the mismanagement class is the need for corporations to be aware of the performance management role of directors and staff in managing the affairs of a corporation. Corporations could receive support in this area—similar to ORIC's support services relating to corporate governance. The high prevalence of poor management performance illustrates the need for corporations to be able to hire staff, especially senior staff, to adequately and properly manage the daily affairs of the corporation, such as the finances. However, having highly skilled managers does not alleviate directors of their duties and responsibilities to govern the corporation and to be aware of how the corporation is performing, including its solvency.

Finally, the third most populous class—disputes—suggests that ORIC may stimulate better outcomes for these Indigenous corporations by early identification of such cases and facilitating mediation and dispute resolution.

Conclusion and future directions in research

The overall pattern and major finding of this paper is that the failure of Indigenous corporations is primarily related to the poor performance of directors and staff in performing their duties. This finding is consistent with the academic literature on mainstream business failure and is illustrated by the three most common symptoms of corporate failure (poor financial accounts, not holding annual general meetings and poor record keeping of members' records—see table 6).

In the academic literature the contemporary focus in corporate governance is on performance rather than legislative compliance. However, there is an ongoing tension for corporations between responding to increasing regulation—as evident in government responses to recent corporate collapses[18]—and the need to strategically plan to maximise business and long-term commercial success:

> This focus on regulation rather than performance has arisen despite the fact that more value is lost through strategic mismanagement than through fraud and malpractice. (Young 2006)

The empirical findings suggest that it is probable that a corporation under duress and beginning to fail will exhibit at least one of the three most common symptoms. Therefore this type of regulation, which is required under the CATSI Act as part of annual reporting, does provide significant benefits to the Registrar in regulating corporations and conducting regulatory action at the organisational failure level, possibly before financial failure has taken hold and the corporation has progressed down the spiral of failure (see figure 3). The three most common symptoms of failure are features of both the diligence class, i.e. directors not performing their duties to hold an AGM, and the mismanagement class, i.e. poor financial record keeping and accounts and member registers. The difference though is the extent to which such practices affect the viability and solvency of the corporation.

This research paper found that the mismanagement class highly correlates with insolvency and the potential for permanent failure, while in the diligence class the governance affairs of corporations were largely restored and returned to members following external administration. These findings suggest that business failure is primarily linked to failures in the management of the corporation, and that monitoring performance against the objectives and business strategy of the corporation is imperative for good corporate governance.

The findings of this research paper reinforce the importance of ORIC's focus on providing corporate governance support services to Indigenous corporations to improve outcomes both before and after corporate failure. ORIC support services may be inferred (from both the primacy of the diligence class and the rectification of such cases) to contribute to the lower overall rate of corporate failure than companies registered with the Australian Securities and Investments Commission under the *Corporations Act 2001*.

The significance of the mismanagement class indicates that ORIC may further support Indigenous corporations by stressing the performance management role of directors and staff in developing management capabilities. This includes the need for skilled and capable staff, which was identified as an issue in the Indigenous community governance research.[19]

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18 See table 2 and the section on corporate governance in part one.

19 See regional skills markets on page 33.

Finally the third most populous class, disputes, suggests that, by early identification of such cases and facilitating mediation and dispute resolution, ORIC may stimulate better outcomes for these Indigenous corporations.

This research paper is a first step in understanding the key factors that contribute to Indigenous corporate failure. Further research could aim to test the validity of specific elements of a combined theory of failure of Indigenous corporations using rigorous qualitative and quantitative methods. This research would be grounded in the contexts and environments of corporations to determine whether there are institutional or system-wide issues inherent in corporate failure. This type of research would examine in more detail the symptoms of corporate failure and stress the underlying reasons, which in turn have both regulatory and policy implications in preventing corporate failure.

The focus on corporate failure can also be turned on its head—that is, identifying and understanding what leads to Indigenous corporate success. This positive research stance relates to two contemporary sub-disciplines of Indigenous economic development discussed in this paper: Indigenous governance and Indigenous entrepreneurship. The source material illustrates clear links with these disciplines, in particular reconciling legalistic and Indigenous concepts of governance and capacity development in regional and remote areas.

Stemming from these themes, research areas of interest could include organisational practice and environments that lead to Indigenous corporate success, including the authority, legitimacy and practice of Indigenous corporate governance models that promote long-term viability of corporations and the sector (Indigenous community governance and Indigenous entrepreneurship). Further research areas could examine the twin skills inventory of technical and cultural skills (Indigenous entrepreneurship) (see table 2) and Indigenous and mainstream skills and business partnerships to promote Indigenous economic development (Indigenous entrepreneurship).

Appendix

Most common symptoms of failure

Figure A1 and table A1 analyse the distribution of the three common symptoms of failure—poor financial accounts, not holding annual general meetings (AGMs) and poor record keeping of members' records as the differences between the topical distribution and the overall distribution across the seven classes of failure. The same data is represented in a table format in table A1. Differences of less than 8 per cent are generally insignificant in proportion to the total sample size of 93 cases, while differences of more than 8 per cent are indicative of an over- or under-representation of a symptom of failure in a given class. Given the sample size of 93 cases, the 8 per cent limit represents a deviation of more than one case in a class for an equal distribution across classes (i.e. 13 cases per class).

Figure A1: Analysis of the three most common symptoms of failure as a percentage

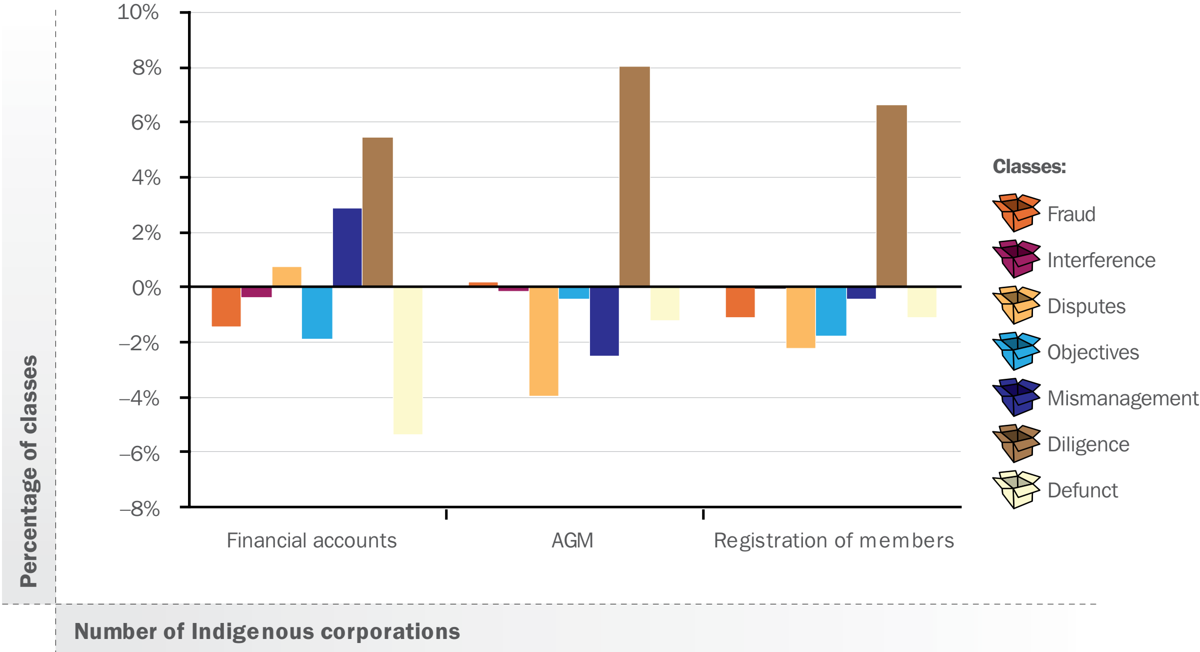

Table A1: Analysis of the three most common symptoms of failure as a percentage

		Three most common symptoms					
		Financial accounts		AGM		Registration of members	
	Overall frequency	Total	Difference	Total	Difference	Total	Difference
Classes	%	%	%	%	%	%	%
fraud	**5.4**	3.9	**–1.5**	5.6	**0.2**	4.3	**–1.1**
interference	**4.3**	3.9	**-0.4**	4.2	**–0.1**	4.3	**0.0**
disputes	**15.1**	15.8	**0.7**	11.1	**–3.9**	12.9	**–2.2**
objectives	**3.2**	1.3	**–1.9**	2.8	**–0.4**	1.4	**–1.8**
mismanagement	**24.7**	27.6	**2.9**	22.2	**–2.5**	24.3	**0.0**
diligence	**41.9**	47.4	**5.4**	50.0	**8.1**	48.6	**6.6**
defunct	**5.4**	0.0	**–5.4**	4.2	**–1.2**	4.3	**–1.1**

Figure A1 shows that the three most common symptoms of failure are prevalent in all classes as the percentage difference is less than eight per cent. This indicates that the distribution of the three individual symptoms over the seven classes closely matches the overall distribution of cases. With the high frequency of these symptoms, this uniform distribution across classes confirms these as common symptoms of failure.

Figure A1 and table A1 indicate that, while there is a typically high incidence of the three common symptoms across most classes, these are particularly prevalent in the performance classes of mismanagement and diligence, and less so in the intentional classes of fraud, interference, disputes and objectives.

Although statistically minimal, the poor financial accounts symptom is distinctively over-represented in the mismanagement and diligence classes. This is consistent with the theory of business failure whereby the organisational deterioration of the corporation leads to its financial deterioration. Further, the symptoms of inadequate members' registration and AGMs are similarly over-represented in the diligence class. This is consistent with the role of director accountability to members in corporate governance.

Table A2: Examples of resource and deployment deficiencies from the literature cited by Crutzen and Van Caillie (2007)

Resources	Insufficiently specialised machinery
	Insufficient financial capital
	Managerial competencies restricted to a limited area (marketing, finance)
	Lack of technical competencies
	Lack of ability to anticipate events
	Lack of flexibility
	Insufficient external relationships
Deployment—strategy	Absence of strategic planning
	Insufficient or excessive diversification
	Inadequate investment policy
	Corporate governance
Deployment—commercial	Dependence on limited number of clients
	Difficulty determining adequate sales price
	Inadequacy of the 'product–market' couple
	Absence/insufficiency of promotion
	Poor recovery of account receivables
Deployment—operational	Problematic localisation
	Inadequacy of organisational routines
	Deficient organisation of the internal/external value chain
Deployment—financial	Deficient accounting systems
	Poor administrative system
	Absence of provisions or budgets

Factors influencing corporate failure

Table A3: Ooghe and De Prijcker (2007) immediate factors of business failure

	Type 1	**Type 2**	**Type 3**	**Type 4**
	Failure process of an unsuccessful start-up	Failure process of an ambitious growth company	Failure process of a dazzled growth company	Failure process of an apathetic established company
Management				
Competencies and skills	Insufficient competencies and skills in many areas	Wrong estimation turnover Lack of financial background		
Motivation		Enduring motivation	Very motivated	Insufficient motivation and commitment
Personal characteristics	Rashness Authoritarian leadership	Persuasiveness Risk lovers Over-optimism	Over-optimism Dazzled	Inertia
Corporate policy				
Strategy	No strategic advantage			No adjustments to environment
Capital expenditures	Inappropriate	Exaggerated	Exaggerated	Unadjusted
Commercial policy	Lack of customers Customer dissatisfaction	Overestimated sales		Loss of customers Customer dissatisfaction
Finance and administration	Insufficient financial planning	Lack of expertise	Extreme gearing	
Operational policy	Severe operational errors		Unadjusted management and operational structure	Operational inefficiencies
Human resources management	Insufficient training Minor influence			
Corporate governance	Moderate influence			

Table A4: Ooghe and De Prijcker (2007) distant factors of business failure

	Type 1	Type 2	Type 3	Type 4
	Failure process of an unsuccessful start-up	Failure process of an ambitious growth company	Failure process of a dazzled growth company	Failure process of an apathetic established company
Immediate environment				
Customers	Shortage of customers Customer dissatisfaction Mistrust	Shortage of customers Mistrust	Mistrust	Shortage of customers Customer dissatisfaction Mistrust
Competition	Lack of strategic advantage	Competition of foreign companies Consequence of inflexibility		Strategic advantage competitors
Suppliers		Increasing mistrust		
Banks		Mistrust		
Stockholders		Only applicable for listed companies		
Misadventure		Exceptional, but very damaging (if already in distress)		
Personnel and trade unions		Possible consequence of financial problems		
General environment				
Economic factors	Recession in the industry	Weak stock markets Price increase of raw materials	Weak stock markets Recession of the industry	
Technology				
Foreign countries				Economic changes in foreign countries
Political influences				Stricter legislation

Reduced data

Table A5: The reduced data indicating the frequency of the symptoms of failure in each of the seven classes of failure

	Classes							
Characteristic	Fraud	Interference	Disputes	Objectives	Mismanagement	Diligence	Defunct	Total
Inadequate or non-existent process/records for financial accounts	3	3	12	1	21	35	0	75
AGM not held or inappropriately conducted	4	3	8	2	16	36	3	72
Inadequate, non-existent or poor record keeping of members' records	3	3	9	1	17	34	3	70
Committee meetings/minutes not held or inappropriately conducted/recorded	2	2	3	3	17	20	3	50
Indigenous corporation is publicly funded	0	1	7	1	9	19	2	39
Inadequate or non-existent process/records for director elections	2	2	8	0	10	16	1	39
Mismanagement	1	0	6	2	22	2	0	33
Existence/declaration of pecuniary interest	5	2	5	3	8	7	0	30
A general lack of records	1	1	4	2	12	6	3	29
Indigenous corporation is insolvent	1	1	4	1	12	8	1	28
Appointment/notification of public officer	1	0	2	1	9	13	0	26
Inadequate or non-existent employment contracts	2	1	4	1	10	8	0	26
Indigenous corporation is not trading	0	0	4	3	6	4	4	21
Indigenous corporation subject to interference/fraud	5	4	3	2	2	4	0	20
Existence/declaration of conflict of interest	1	1	4	1	2	7	1	17
Indigenous corporation is pursuing activities outside objectives	3	1	3	3	5	0	0	15
Indigenous corporation has inadequate staffing	0	0	1	1	3	7	0	12
Dispute/conflict with CEO	1	0	3	0	1	3	0	8
Registration of ineligible members	0	1	2	0	3	1	0	7
Indigenous corporation has a poor history	0	0	2	1	1	0	0	4
Indigenous corporation has a bankrupt director	1	0	0	0	0	2	0	3
Lack of governance transparency	0	0	0	0	0	1	0	1
Turnover of land owned by Indigenous corporation	0	0	0	0	0	1	0	1
Number of cases in class	5	4	14	3	23	39	5	

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