CATSI Act Review Consultation

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Aboriginal Health Council of South Australia Ltd
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9 August 2021

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BACKGROUND AND PRELIMINARY COMMENTS

1. In December 2019, the Minister for Indigenous Australians (**Minister**) announced a comprehensive review into the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**) (**2019-2020 Review**) which has been led by the National Indigenous Australians Agency (**NIAA**).

2. This submission is prepared on behalf of the peak body for Aboriginal and Torres Strait Islander Health Services (**ACCHS**) in South Australia, the Aboriginal Health Council of South Australia (**AHCSA**) and those of its members who are incorporated under the CATSI Act, namely the Aboriginal Health Council of South Australia, Yadu Health Aboriginal Corporation, Pangula Manamurna Aboriginal Corporation, Umoona Tjutakgu Health Service Aboriginal Corporation and Aboriginal Sobriety Group Aboriginal Corporation.

3. AHCSA is membership based and represents a wide range of Aboriginal Community Controlled Health and Substance Misuse Services across Australia. It offers a wide range of support services to its Members, including but not limited to, advocacy, governance and state, territory and national policy.

4. ACCHSs contribute to improving Aboriginal and Torres Strait Islander health and wellbeing through the delivery of comprehensive holistic Aboriginal primary health care. This is achieved by integrating and coordinating care and services, and by advising and supporting other providers to deliver better quality healthcare for Aboriginal people. In addition, ACCHSs play a significant role in improving Aboriginal health through addressing the social determinants of health by employing, educating and training Aboriginal people and by being practical expressions of Aboriginal self-determination.

5. Where amendments are supported by the South Australian sector, or are irrelevant to their operation, they have not been addressed, below.

6. As a vital part of the community controlled sector in South Australia, AHCSA and its members extend an invitation to the NIAA to discuss this consultation response and ways in which the CATSI Act can better support community controlled organisations, particularly in the health sector.

RULE BOOKS

Replaceable Rules

7. The South Australian sector agrees that the requirement for Rule Books to refer to all replaceable rules (if any) that continue to apply to the Corporation will ensure that Rule Books remain current if there are any amendments to the CATSI Act. However, such a change will impose costs on Corporations if it will require amendment of Constitutions to ensure compliance. As we understand it, with the implementation of this new rule, Corporations will therefore be required to review and update their existing Rule Books. In our experience, the review of a Corporations Rule Book can often cost individual Corporation's thousands of dollars (staffing resources, community consultation sessions, travel and venue costs, legal and/or consultancy costs etc.). The current practice we have observed is that ORIC generally encourage organisations to use their model Rule Book (and discourage customised documents). This unfortunately takes a one-size-fits-all approach to organisations, and the model rules by their nature general in application, and not necessarily appropriate for more specialised industry sectors (such as health), or different organisational contexts.

8. We understand that ORIC would not be in the position to provide funding to all corporations incorporated under the Act. Therefore, we suggest that Rule Book Templates be developed on a sector by sector basis.

9. Using a more customised approach, the Registrar would be confident that Rule Books are 'fit for purpose' for the particular kinds of organisations that exist under the Act.

10. The South Australian sector would be happy to collaborate further with ORIC to develop an Aboriginal Community Controlled Health Service specific template in collaboration with ORIC.

11. The current regime of replaceable rules is appropriate and acceptable, however we have concerns that additional provisions in the Act, such as those relating to the ability to remove or suspend Directors and Members should be made replaceable, or at least more flexible than is currently the case. The current provisions are quite rigid and one-size-fits-all, and do not necessarily fit the unique circumstances of some of our members, leading to situations where directors or members should have been removed but were not able to be before significant damage was done to the Corporation. We would support an expansion of the replaceable rules throughout the Act to enable flexibility - see examples below:

Proxies

a) The CATSI Act provides mechanisms for the appointment and voting by proxy which are replaceable rules. However section 201-100 of the CATSI Act which specifies who may appoint a proxy is not a replaceable rule. For consistency the South Australian sector suggests that all provisions relating to proxies should be replaceable rules.

Attendance and participation of non-members at general meetings

b) The South Australian sector believes that a replaceable rule should be provided that only members are entitled to attend and participate in a general meeting unless a non-member is invited by the Board or allowed to attend and/or participate by a resolution of that meeting.

Composition of immediate family members on a Board

c) The South Australian sector supports a replaceable rule to restrict the maximum number of immediate family members that can be on the Board of a corporation at any one time. It is considered that this should be a replaceable rule on the basis that some remote communities will have insufficient nominations to create an appropriate number of directors. Immediate family members should be defined to be: spouse (whether married, same-sex or de facto), parents or legal guardians (including step-parents), children (including step children and adopted children) siblings (including step-siblings), grandparents and grandchildren.

Refusal to register a rule book

12. The South Australian sector see no major issue with the Registrar's right to refuse to register a Corporations Rule Book in some circumstances, and the additional ability to require Corporations to retain elements imposed by Special Administration may be appropriate in certain circumstances, however the proposed changes to the Act don't address the current practical issues caused by the existing process for Rule Book reviews.

13. Presently the process of completing change of Rule Book involves the following steps:

a) a corporation follows current processes of reviewing/developing their Rule Book (i.e. consulting with their membership and moving a motion at a General Meeting to approve the Rule book to be submitted to ORIC);

b) the Registrar reviews the draft Rule Book and if determined as inappropriate for registration, the Registrar will write to the Corporation detailing the potential issues and to request that the Corporation's membership re-consider those aspects;

c) the corporation reviews the potential issues as detailed by the Registrar (and amends if required and appropriate);

d) the corporation holds another General Meeting to consult with the membership and gain approval for the second time;

e) the corporation re-submits Rule Book to the Registrar; and

f) the Rule Book only comes into effect when the Registrar approves the Rule Book.

14. The above process imposes significant additional costs for Corporations to hold several General Meetings as well as additional resourcing costs. Our suggestion is that Section 69-40 of the Act the Act be amended to allow for proposed changes to Rule Books to be 'pre-approved' by the Registrar, prior to the Corporation taking it to a General Meeting for a vote.

15. Implementing such a process would not only reduce the cost for Corporations holding various meetings with their members, but would also allow changes to come into effect immediately upon being passed by an appropriate resolution of the Members. Whilst there is an informal system of 'pre-approval', the Act does not allow for a formal pre-approval process which can be detrimental to a Corporation if there was, for example, a change to process or Board composition. Any changes are not able to be implemented until registration has occurred. This increases the cost to Corporations in that they must hold a Special General Meeting sufficiently in advance to the conduct of their Annual General Meeting to allow time for registration with the Registrar.

BUSINESS STRUCTURES

16. We support the proposed change allowing CATSI Act Corporations to create subsidiary and joint venture organisations. However, we encourage the Minister to review the indigeneity requirements for subsidiary Corporations. As it stands, we believe this creates a concerning loop hole for non-Indigenous entities to continue to access Indigenous funding via being a 'subsidiary.'

MEETINGS AND REPORTING

Notice of meetings

17. The South Australian sector suggests that section 201-25(3) be further defined to include community notice boards. This would be particularly helpful for remote communities where there is no postal service available.

Members' access to reports

18. The South Australian sector supports the requirement for directors to lay before an Annual General Meeting any reports they have been required to prepare and submit to the Registrar, but notes that it is frequently challenging for organisations to provide these reports prior to meetings being held and suggests that these only be required to be provided at an Annual General Meeting rather than with the notice of the meeting.

Extensions of time

19. The South Australian sector supports a Corporation having the option to automatically reschedule General Meetings without prior approval from the Registrar the reasons of a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit. However, we suggest that the automatic extension not be limited to one per year, or at least be able to be more than once per year at the discretion of the Registrar.

20. The South Australian sector also supports Director's being able to cancel a general meeting by resolution and not an individual decision from an employee or a single Director.

21. It is important to note that in the case of Directors not being able to physically meet to make such a decision, then a circulating resolution process is recommended. As per usual processes, Corporations would reflect this decision within their minute books. We would also support this resolution being provided to ORIC via email as soon as practically possible.

False and / or misleading information

22. The South Australian sector supports the provision of setting out what reasonable steps means in the context of providing false and / or misleading information in relation to a corporation's affairs. However, the South Australian sector would also support the inclusion of a defence for individual officers to have taken reasonable efforts to either correct or clarify the misleading information and acted in good faith. This is to protect Directors who may be in a minority and were not in favour of the distribution of the impugned material.

MEMBERSHIP

Using alternative contact details for communications

23. The South Australian sector supports the mandated use of using alternative contact details for Members. However, to ensure it's time and cost effective, we suggest that only two alternate contacts should be received for example; a primary address and an email address.

24. To reduce the administrative burden on Corporations, it is suggested that all membership details should be managed on the one master register, with alternate contact details redacted from public view on the ORIC website to maintain Members' privacy.

Cancellation of membership

25. The South Australian sector welcomes the proposed change to reduce the make the non-contactability period a replaceable rule.

26. In addition, further clarity is required between members who are classified under the non-contactable rule and those members who have moved out of the required catchment area as described within the respective Rule Book. We suggest that the Minister considers other avenues of objective evidence, such as the electoral roll to determine if Members still meet eligibility requirements.

Membership Applications

27. In line with appropriate oversight and governance principles, the South Australian sector believes that the rejection or acceptance of a membership application should be able to be reviewed by the membership. The South Australian sector welcomes the provision that allows CATSI corporations (that are not RNTBCs) to include a process for considering membership applications in their rule books that may alter the discretion of directors and/or provide a review mechanism for membership decisions.

Membership and Directorship Suspensions

28. Although not included within the proposed amendments to the CATSI Act, the South Australian sector recommends further consideration of the concept of suspension of Directors or Members in appropriate circumstances (provided safeguards are embedded in a Rule Book).

29. If legitimate proof is provided regarding the actions or omissions of a Director or Member that are inconsistent with the law or guiding principles and objectives of the corporation, the Board should be able to suspend the Director or Member with immediate effect. The current provisions only provide for the removal of a Director or Member in the event that misconduct has occurred, and then only by resolution of the Membership.

30. Unfortunately, where situations like these arise, the time between discovery of the misconduct and the removal of the Director or Member provides considerable time for the relationship and ongoing management of the organisation to deteriorate.

31. Accordingly, the South Australian sector supports a resolution of the Board to suspend a Member or a Director, with immediate effect together with safeguards to ensure that it is possible to reverse or affirm that decision by the membership within a specified period of time.

32. As an added protection against the pursuance of ulterior motives, the South Australian sector believes a positive obligation on the Board to act reasonably and in accordance to the principles of natural justice in all circumstances surrounding the suspension is required and that the decision to suspend the member or director should be made by 75% of the Board, present and voting, excluding the director in question (if applicable).

Privacy of members

33. The South Australian sector supports the inclusion of the provision of individual members, including former members, having the right to directly request that their personal information be redacted.

34. However, we consider it important that this process is made as easy as possible for members. We suggest a two-way process should be implemented. For example, Members should be provided with a range of avenues to have their personal details redacted, such as:

    a) a tick box section on the Membership application form;

    b) a public form, available on both ORIC's website and the Corporation's Website (if available);

    c) by way of email to the Registrar requesting the redaction.

35. Whilst the above option does place more responsibility on ORIC to ensure they advise the relevant Corporation of any changes to information, we firmly believe that providing Members the right to do this offers necessary safeguards for both Members and the Corporation as a whole.

36. The Corporation should also have a mechanism to redact individual Members personal details on the Member's behalf. The South Australian sector suggests that this be done through a form, developed by ORIC, and signed by the individual member requesting the details be redacted.

37. The South Australian sector supports the provision that the Corporation is responsible for managing, requests for redaction including retaining records of requests and withdrawals for a period of 7 years. We note that the regulations may prescribe requirements in relation to requests for information to be redacted and suggested that the Members Register should be kept confidentially with the Corporation's Secretary. The South Australian sector would support the introduction of an offence for the Secretary and/or Corporation if it is proved that confidentiality is breached.

38. The South Australian sector also suggests that Corporations continue to update their Members Registers at their Annual General Meeting but as those members sign in, they are taken away from the public to confirm their details still remain the same.

Proper purpose test to inspect or copy membership registers

39. The South Australian sector accepts the implementation of a proper purpose test in the event that a non-member seeks to either inspect a corporation's register of members or register of former members or request a copy of the register of members or register of former members, but holds concerns that this could be used by Boards to deny access to members who refuse to explain their reasons for access (which may occur due to cultural power imbalances between members and Boards). Accordingly, it is suggested that access for a commercial purpose, or to menace or harass members be the only forms of access prohibited.

40. Additionally, a limit on the frequency of access may also be appropriate to avoid vexatious requests. For example, the same person may not request access more than twice in 12 months.

TRANSPARENCY OF SENIOR EXECUTIVES

Information regarding CEO and CFO function

41. The South Australian sector welcome the changes to various provisions to include the concept of CFO and CEO and other officer roles. However, we would suggest that this should also take into account circumstances where a CATSI Act Corporation has outsourced the function of a role, such as CFO, and be clear about whether or not a person who is responsible for overseeing outsourced financial management (as opposed to performing that role) is considered to be a CFO or not.

42. In addition, we ask that clarity be provided in circumstances where no separate CFO is employed (such as where a CEO undertakes finance duties).

43. The South Australian sector consider that the proposed Amendment Bill needs to specify exactly what personal details of a person performing a CEO or CFO function will be required by the Registrar. We also query what happens with the personal details once they have been submitted. Further, whether this requirement is across all sizes of organisation should also be specified to avoid confusion.

Remuneration

44. The South Australian sector does not support the inclusion of a rule which may allow the regulations to require the remuneration report of medium and large Corporations to publicly report on the remuneration details of the “key management personnel” which includes the Chief Executive Officer and Senior Executive staff via its Annual Report.

45. Like the proposed rule regarding the reporting of Senior Executive work history, this area of discussion is not only contentious, but in our opinion, is completely inappropriate. Whilst the South Australian sector recognises that publicly listed companies provide this information as a matter of course, to equate a Medium or Large CATSI Act Corporation to a publicly listed company is an unfair comparison.

46. The CATSI Act was introduced to take the needs and circumstances of Aboriginal and Torres Strait Islander people into consideration. It is noted that under the Corporations Act, for Proprietary Limited companies there is no requirement for remuneration of senior executives to be publicly shared with Members. In light of this, it is unclear why this rule should be proposed for CATSI Act corporations, which would further the (unjustified) argument of implied misappropriation of money only within Aboriginal and/or Torres Strait Islander organisations.

47. The introduction of such reporting rules may also cause unintended consequences such as driving talented individuals away from the South Australian sector.

48. The South Australian sector suggests instead, the remuneration of Chief Executives (or similar) should be disclosed to the Registrar on a confidential basis. This would allow a provision for the Registrar to collate Executive position remuneration, aggregate this data to create benchmarks and therefore provide guidance to the boards of Corporations on State, Territory and/or national pay rates. In addition, members of CATSI Act Corporations could be advised whether their key management personnel are receiving remuneration which is below, within or above the average band of remuneration for an organisation of their size and type.

THRESHOLDS FOR RELATED PARTY FINANCIAL BENEFITS

Approval for related party financial benefits

49. Whilst the South Australian sector appreciate the provision that member approval is not needed to give financial benefit to a related party if the amount or value is less than or equal to an amount prescribed under the regulation, we strongly recommend that such decisions should be decided by the Members.

50. This is because an amount that is prescribed under the regulations is a one-size-fits all approach which may lead to difficulty in certain circumstances. Whilst a maximum threshold could be prescribed by regulations, Corporations should have the option to lower the threshold above which approval is required.

51. We suggest that matters concerning related party financial benefits should be decided at the Annual General Meeting whereby the membership pass a resolution agreeing to the dollar figure they believe appropriate for their organisation.

52. Furthermore, additional clarity is required with respect to whether or not non-pecuniary benefits (such as access to services or ability to undertake training and work placements) would constitute a related party benefit.

53. The current exception in the Act for reimbursement of ‘expenses’ is undefined. This means that, for example, a volunteer director who attends a meeting in their official capacity and has to take annual leave from their employment would not be entitled to compensation for their foregone leave, as it does not constitute an ‘expense’ under a strict interpretation of the word.

54. Additionally, due to the close familial connections between individuals within communities, it should be expressed as to what level of abstraction the regime will capture (including de facto relationships).

SPECIAL ADMINISTRATIONS

Extending the grounds

55. Given the extension of the grounds in which a Special Administrator can be appointed, the distinction between Special Administration and Voluntary Administration is now unclear. We suggest that the Minister, through this review process, replace the existing ability for organisations to access Voluntary Administration; or provide clarity on the difference between the two and why it remains necessary to include the ability to access Voluntary Administration within the Act.

56. We would also support additional powers to be afforded to the Registrar short of Special Administration which would allow for precise, targeted relief for Corporations, to be exercised only in circumstances in which either the Board or Membership has requested them to be exercised, or where ORIC holds a reasonable belief that doing so is in the best interest of the Membership.

57. In addition to this, though possibly outside the scope of this review, we believe that ORIC should empower (and ideally fund) sector based organisations (such as State and Territory peak bodies) to provide mentoring, facilitation, mediation and support in circumstances of conflict or concern as an alternative to Special Administration, at least as an initial option to be considered before more severe action is taken.

58. In appropriate circumstances, we would support the Registrar's power to require enforceable undertakings and the implementation of remediation plans, provided that such undertakings or plans were developed in consultation with the Corporation.

59. The proposed Amendment Bill refers to a 'serious irregularity' in a Corporation's financial affairs, limiting the scope of the grounds for appointing a special administrator. While the South Australian sector supports the inclusion, it believes that the definition of 'serious irregularity' needs to be fleshed out so there is at least a baseline standard that Corporations can refer to of what constitutes irregular and what is serious. There also needs to be a link to the whistleblowing provisions.

60. The South Australian sector expresses concern in relation to timeframes for taking action in relation to serious financial irregularity. The South Australian sector supports the inclusion of timeframes on the Registrar to intervene if evidence sufficient to found a reasonable suspicion of serious irregularities is provided before action is taken (with appropriate natural justice mechanisms afforded to the relevant Corporation).

VOLUNTARY DEREGISTRATION

61. The South Australian sector agrees with the new proposed process for voluntary deregistration's.

COMPLIANCE POWERS

62. There is general agreement that the implementation compliance powers modelling on ASIC's powers should be introduced, however, it is imperative that sufficient time and educational resources are provided by ORIC in relation to the additional requirements. Furthermore, we encourage the Registrar to consider implementing a two-strike rule. In practical terms, Corporations should be provided with one written warning for each different offence prior to any fines being imposed. For example, 'Organisation A' submits their General report past its due date without seeking approval from the Registrar. In this case, the Registrar would write to 'Organisation A' advising them about the offence, clearly document the requirement as per legislation, and provide a warning. Should 'Organisation A' submit their General Report late for the second time the following year, this is when the Registrar may consider imposing a fine. With this in mind, it is the role of ORIC to be working with organisations to ensure appropriate governance practices are in place to prevent breaches and deviations from compliance.

63. Additionally, the South Australian sector suggests amendments to limit and cap the damages available as a result of the breach of CATSI Act. Other legislative schemes such as the *Fair Work Act* and the *Civil Liability Act* impose limitations on the amount of damages that can be awarded for a breach of that legislation as a mechanism to support legitimate commercial interests and encourage the resolution of disputes outside the Court system.

MISCELLANEOUS

Disqualified persons not to manage corporations

64. The South Australian sector do not support the amendment to subparagraph 279-25(1)(a)(iii) to clarify that the court may only disqualify a person from managing a CATSI corporation if the conditions in both paragraphs 279-25(1)(a) ***and*** (b) are met. The South Australian sector consider that combining these two provisions makes it easier for a person who should be disqualified from managing an Aboriginal or Torres Strait Islander corporation to circumvent committing an offence as they need to satisfy both requirements, not one or the other.

Prohibited names

65. The South Australian sector notes that the proposed Amendment Bill does not include a provision that prohibits entities that are not registered under the CATSI Act from using 'Aboriginal Corporation', 'Torres Strait Islander Corporation', 'Indigenous Corporation' or 'Aboriginal and Torres Strait Islander Corporation' in their name. However, we ask that the Registrar consider allowing the option to abbreviate such words, for example to AC or ATC, should be provided.

Independent Directors

66. The South Australian sector agrees that Corporations should be able to appoint Independent Directors whether it be written in their Rule Books or not. The sector, however, believes that further consideration and clarification needs to be given to the roles, responsibilities and accountability of the Independent Directors. For example, voting rights and ways of safeguarding those individuals should decisions be made by the Board of Directors that may not be in the best interests of an organisation.

Auditors

67. The South Australian sector agrees that Auditors must be provided with qualified privilege under the Act to ensure transparency, accountability and protection.