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Arnold Bloch Leibler Submission for the CATSI Act Review 2020

Introduction

1 Arnold Bloch Leibler's native title practice forms an integral part of the firm's overall public interest law practice and is a very important part of the firm's culture. Our involvement in native title and land rights law began in 1993 when we first acted for the Yorta Yorta peoples in their seminal native title claim. Since then our practice has evolved to cover all aspects of native title and land rights law and advisory work, including transactional, litigious, organisational, governance and administrative law related matters.

2 The firm also actively contributes to public policy in this area and we are pleased to provide feedback on the Draft Report published on 31 July 2020 in response to Phase 2 of the CATSI Act Review.

3 Our submission does not seek to comprehensively address all areas covered in the Draft Report but instead focusses on particular areas that are relevant to our experience and practice**.** Our observations are set out under headings which correspond with the chapters of the Draft Report.

Chapter 1: Introduction

4 We strongly support the focus in this review on whether the CATSI Act is achieving its objects, particularly as a special measure under the *Racal Discrimination Act 1975.*

5 As stated at paragraph 1.7 of the Draft Report "special measures aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community".[1] It is of utmost importance that special measures do not further entrench disadvantage.

6 In our view, the high degree of complexity and prescriptive governance in the CATSI Act create a sometimes-impenetrable and almost impossible to navigate system that in our experience can inhibit participation by Aboriginal and Torres Strait Islander people

[1] Australian Human Rights Commission, *Special Measures* [Internet], 2020, available from <https://humanrights.gov.au/quick-guide/12099> [accessed 15 September 2020].

in the governance of their own organisations, and also stifle economic development. This must be monitored carefully if the CATSI Act is to achieve its object as a special measure.

7 For this reason, it is equally important that a focus of the CATSI Act Review is on simplifying and streamlining governance requirements as much as possible. As a high level observation it appears that many of the recommendations are aimed at positive streamlining, however there are also a number of recommendations that in our opinion are very likely to simply add additional administratively burdensome governance and reporting requirements, without any real analysis of whether that reporting will address the governance challenges that are highlighted in the Draft Report.

Chapter 2: Objects of the CATSI Act

8 Paragraph 2.11 of the Draft Report lists a number of ways in which the CATSI Act provisions are specific to Aboriginal and Torres Strait Islander people.

9 Paragraph 1.15 of the Draft Report also quotes from the Revised Explanatory Memorandum to the CATSI Bill which emphasises Parliament's intention to create a strong but flexible incorporation statute that can accommodate specific cultural practices and be tailored to reflect the needs of individual Aboriginal and Torres Strait Islander groups.

10 When compared with the flexibility provided to companies limited by guarantee that are registered as charities, the CATSI Act is relatively prescriptive and inflexible.

11 Companies limited by guarantee that are registered as charities no longer have to comply a number of procedural requirements in the *Corporations Act 2001* (Cth) (**Corporations Act**) that relate to the holding and running of meetings. Instead they must simply demonstrate that they are accountable to their members in accordance with the Australian Charities and Not-for-profits Committee (**ACNC**) Governance Standard 2.

12 The requirement that the Registrar performs his or her functions and exercises his or her power with the aim of having regard to Aboriginal and Torres Strait Islander tradition and circumstances[2] is crucial to recognising culturally appropriate governance and is a true strength of the Act as written.

13 However, the CATSI Act's main mechanism for achieving tailored and culturally sensitive governance arrangements is a range of exemptible provisions that require the Registrar's permission for an exemption. For example, at paragraph 2.32 the example of extensions for the holding of AGMs where there has been a death in a community is given to show that the CATSI Act provides for culturally sensitive governance requirements. This is an example of giving corporations permission to extend a deadline rather than flexibility to ensure a corporation achieves substantive accountability to members in a way that is culturally appropriate.

14 The CATSI Act Review is an opportunity to consider other mechanisms for ensuring greater flexibility and self-determination, including the adoption of standards or principles-based regulation, like ACNC Governance Standard 2, that do not require the regulator's approval or permission for governance adaptations.

15 The Review is also encouraged to consider the publication of governance recommendations and guidance by the Registrar, rather than amending the CATSI Act to include even more prescriptive governance rules.

[2] CATSI Act section 658-5(c)

16 While these approaches may provide less certainty to third parties such as funding bodies and creditors, in our view the convenience of third parties should never be prioritised over the interests of Aboriginal and Torres Strait Islander organisations.[3]

Chapter 3: Powers and Functions of the Registrar

17 Overall, in our view compliance of CATSI Corporations will be much better achieved by resourcing ORIC to engage in education and assistance upon request, rather than by introducing additional punitive measures.

Broader suite of regulatory powers

18 The Draft Report states at paragraph 3.4 that the only action open to a Registrar where a corporation has failed to lodge reports is to commence a criminal prosecution. This is followed by a suggestion that a system of fines should be introduced as an intermediary measure.

19 Respectfully, it is not accurate to state that the only option for the Registrar is criminal prosecution. The Registrar has many other ways of educating and encouraging compliance and building capacity to achieve compliance.

20 A system of fines should only be considered as an additional punitive measure if there is compelling evidence that it is needed and likely to be effective. The potential financial burden on organisations that may not have funds to pay a fine must be considered as priority.

Enforceable undertakings

21 We recommend the final report should include consideration of enforceable undertakings, particularly as this could be used in place of special administration in the appropriate context.

Chapter 4: Governance

Contact details

22 Any amendments to section 180 of the CATSI Act to explicitly allow the collection of additional personal information about Members should have regard to the privacy of Members and limit what information must be made available to the public, online Register maintained by ORIC under Division 418 of the CATSI Act.

23 The Register maintained by ORIC is already extensive and includes more publicly available information than is available for a public company or ACNC registered charity. While there may be merit in allowing corporations to record a members' alternative contact details in the corporation's records, we see absolutely no reason why this should be a prescriptive requirement as opposed to an option.

Redaction of member details

24 In our strong view there is an important distinction between the register of members maintained by each CATSI Corporations, and the public online Register maintained by ORIC under Division 418 of the CATSI Act.

[3] We note that paragraph 3.17 of the Explanatory Memorandum to the CATSI Bill states that the CATSI Act implements recommendations to enhance the capacity of funding bodies and creditors to take a more proactive role in protecting their interests and paragraph 3.22 states that the CATSI Act implements recommendations to promote the certainty of internal corporate processes and transactions with third parties (thereby enhancing the functionality of Indigenous corporations and removing commercial disincentives for dealing with them).

25 While section 180-20 requires the register of a CATSI Corporations to be open for inspection, we support ORIC's announcement that this does not mean that all information included in a corporation's register of members should be routinely included in the central online Register.

26 We do not object to a system that would allow members to request their information to be redacted from a corporation's register of members. However, we do not support the imposition of a threshold for requesting the redaction.

27 In response to the question of how members would be able to organise a meeting without access to personal information, it may be possible members to give prior consent to the use of their information for this limited purpose or to provide a proxy or alternative mode of contact for this purpose.

28 In our view, the obligation under section 180-20 to make a corporation's register open for inspection should include a proper purpose test before access is granted, to better ensure alignment with Privacy Principles under Commonwealth privacy law. The Corporations Act includes a proper purpose requirement for applications to access to share registers[4] and so should the CATSI Act.

Membership approval

29 Public companies limited by guarantee, including registered charities, do not require Boards to give reasons for a decision to reject a membership application. Outside of the context of a native title representative body or where a company is established to represent or provide services to all relevant native title holders, there is no general right to membership of a CATSI Corporations.

30 Therefore, we do not support a blanket proposal to require Directors of CATSI Corporations to provide reasons or allow members to override the Board's decision to refuse a membership application. The existing rules regarding requisitioning of a members' meeting should not apply as the power to approve and reject members belongs to the Board, not to members. If a Board is not accountable to members, there are alternative procedures for removing and replacing Directors.

Corporate structures

31 The inability to establish a CATSI Corporations as a wholly owned subsidiary is a clear limitation of the CATSI Act. We agree that the CATSI Act needs to be amended to enable CATSI Corporations to be wholly owned subsidiaries.

32 We also agree there is merit in removing the requirement that a majority of directors be Aboriginal and Torres Strait Islander persons in circumstances where a CATSI Corporations is established with two members and instead ensuring Aboriginal and Torres Strait Islander control through provision of a casting vote to the Aboriginal and Torres Strait Islander director.

33 As a useful illustrative guide, a company that is 50% Aboriginal and/or Torres Strait Islander owned is eligible for Supply Nation registration but not certification.

34 It is obviously important that members of a corporation understand the structure of their corporation and its subsidiaries. The directors of a CATSI Corporations should provide this information to members as part of their general accountability.

35 Paragraph 4.26 of the Draft Report suggests additional support for for-profit CATSI Corporations. We recommend this include the provision of a template for-profit

[4] See for example section 173(3A) of the Corporations Act regarding requirements to submit purpose for which the applicant seeks a copy of the register and the proscription of improper purposes.

constitution and a greater emphasis on the option for CATSI Corporations to be for-profit on the ORIC website.

Meetings

36 We support amendments to create more flexibility regarding the holding of AGMs.

37 We support the suggestion that ORIC be able to cancel meetings after they have been called and for the CATSI Act to make clear that general meetings can be cancelled for a proper purpose and within a certain timeframe of the meeting being held.

38 We also support the Technical Review's proposal to allow small corporations not to hold AGMs in certain circumstances. In our view, this proposal should be applied more broadly than to only those CATSI Corporations for whom all Directors are Members. This is where the ACNC's principle-based approach of requiring accountability to members, rather than annual AGMs, needs to be applied to CATSI Corporations, as it allows organisations to tailor accountability and decision-making processes.

39 We also support the ability for CATSI Corporations to choose to adopt rules that allow greater use of technology platforms where it is suitable to that organisation and its members.

40 In our view the suggestion that large corporations establish audit committees should be a governance recommendation, not a mandatory requirement.

Further ideas – streamline requirements for registered charities

41 Registered charities incorporated under the CATSI Act do not benefit from the governance streamlining that has been achieved for companies limited by guarantee. With respect to companies limited by guarantee a number of provisions of the Corporations Act have been effectively "switched off" for registered charities by operation of section 111L of the Corporations Act. This facilitates the flexible regulation of charities that are companies limited by guarantee through conduct standards rather than inflexible procedural requirements.

42 In our view, consideration should be given to "switching off" certain provisions of the CATSI Act for CATSI Corporations that are also registered charities, especially in relation to ensuring accountability to members.

43 Currently CATSI Corporations that are ACNC registered charities are subject to a more prescriptive set of requirements than those imposed on companies limited by guarantee. In our experience, the effect of this is that a corporation wanting a corporate structure that will provide the most flexibility in designing a constitution and governance practices to reflect their organisation's Indigenous cultural practices and traditions, will likely choose a company limited by guarantee structure unless they are required to incorporate under CATSI.

44 The Technical Review rejected the idea of "switching off" certain provisions of the CATSI Act for registered charities. However, in our view the reasons provided by the Technical Review are inadequate and confuse the proposition to "switch off" certain CATSI Act provisions for a limited class of CATSI Corporations (for whom the ACNC Governance Standards would then apply) with a much broader proposal for ORIC to create an entirely new set of governance principles under the CATSI Act.

45 Contrary to paragraph 7.91 of the Technical Review, there is absolutely no need to amend the CATSI Act to "create a principles-based governance regime" if the goal is simply to streamline the requirements for CATSI Corporations that are charities. In our view also, the Technical Review greatly overstates the risk that "switching off" certain

CATSI Act provisions for registered charities would risk the ongoing charitable status of these organisations.

46 As stated in relation to Chapter 2 above, we also strongly believe there is merit in considering the advantages of the ACNC's regulatory approach for *all* CATSI Corporations. A major goal of the CATSI Act is to provide flexibility and create a corporate structure that is responsive to the specific incorporation needs of Indigenous people. In our view, the ACNC system of regulation has much to offer here as an alternative to prescriptive rules with a system for permitted exemptions.

Chapter 5: Officers of corporations

Disclosure

47 We are generally supportive of the proposal for greater transparency and accountability of senior executives and directors of CATSI Corporations. However, we do not support the disclosure of remuneration of key management personnel in accordance with the requirements imposed on publicly listed companies under the Corporations Act.

48 To impose conditions beyond those required of private companies more generally would clearly be discriminatory and risks imposing an unnecessary and onerous burden on many CATSI Corporations.

49 In our view providing CATSI Corporations with additional information and education about corporate governance and responsibilities, including additional guidance for boards about how to apply appropriate care and diligence in setting salaries will better ensure remuneration packages are consistent with industry expectations and are reasonable.

50 The Draft Report notes the lack of information available to assess what a reasonable level of remuneration might be given the corporation's circumstances and the skills, experience and performance of the executive in question.

51 We support the proposal that CATSI Corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar, so that the Registrar can publish de-identified information by salary bands.

52 In our view this should be a voluntary model. A voluntary model offers flexibility and recognises that remuneration reporting can be a complex area for preparers and auditors and may not be appropriate for many CATSI Corporations.[5]

53 Further, if corporations determine that an annual sectoral analysis will help them to benchmark their remuneration packages against current practice in the sector then it is reasonable to assume that they will participate. There should be no need to make this mandatory but rather it should be offered as a service by ORIC.

Executive Performance

54 We agree that the propensity of CEOs to move from one corporation to another without any seeming accountability, identified in paragraph 5.17 of the Draft Report, is an issue of concern.

55 As a starting point, this issue can be addressed by expanding the capacity of ORICs to train and advise CATSI Corporations and directors and members of their various roles and responsibilities.

[5] See for example the discussion of disclosure of remuneration in the '*Strengthening for Purpose: Australian Charities and Not-for-profits Commission: Legislation Review 2018*' < https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf> pages 61-63.

56 We are generally supportive of a proposed minimum requirement that all corporations include the names of key management personnel and their qualifications in their Annual Reports. We see this as an effective means of increasing accountability, which is not overly onerous.

57 However, in our view to require that medium and large corporations include the 10-year employment history of their CEO and senior executive in their annual report places an undue administrative burden on CATSI Corporations. Given that no such requirement is imposed by the Corporations Act, this appears to be a paternalistic and patronising approach, which approach must be avoided. Rather, ORIC should prioritise building CATSI Corporations' capacity to undertake reference checks and provide guidance on appointing senior staff and managers.

Chapter 6: Modernising the CATSI Act

58 We generally support changes that will modernise the CATSI Act. While we agree that email and web-based notification systems should be provided for in various contexts, it is important that accessibility issues for remote communities are considered. There is simply not reliable internet coverage in remote parts of Australia. Accordingly, we support moving to internet-based notice provided a corporation can still request that ORIC provides notice using the methods currently in place.

59 We fully support the recommendations in paragraph 6.16 and 6.17 of the Draft Report that corporations are notified once an examination is formally concluded or compliance issues have been adequately addressed.

Chapter 7: Registered Native Title Bodies Corporate

Benefits management structures

60 Chapter 7 of the Draft Report refers to the often-complex benefits management structures created to receive payments under native title agreements. This complexity is largely related to the difficulties in ensuring that native title payments are tax effective.

61 Amendments to the *Income Tax Assessment Act 1997* (Cth) (**Tax Act**) and developments in charities law, including the enactment of the *Charities Act 2013* (Cth) and the creation of the ACNC and its supporting legislation, have gone a long way to removing this complication.

62 Native title benefits, as defined in the Tax Act, are now expressly non-assessable non-exempt income. The *Word Investments*[6] decision has helped clarify that charities can use business as a means to pursue their charitable purpose. However, much unnecessary complexity remains.

63 Determining whether a payment is or is not a native title benefit under the Tax Act is not a simple process. In addition, to provide intergenerational benefit from native title payments in a tax effective manner, there must be investment and growth of the payments within a charity structure. And while charities certainly can undertake and support Indigenous business, charities must always be for public benefit. This creates an obvious tension because native title payments are not public money. They are not charity. They should be able to be applied for private benefit. Furthermore, the need to rely on the structures of charity law are simply not palatable to many native title holders, and nor should they be.

64 In short, the current legislative framework still does not facilitate simple benefits management structures, which typically include both charitable and non-charitable

[6](2008) 236 CLR 204.

structures to enable provision for public benefit, some private benefit, and ensure a future fund for intergenerational benefits.

65 Accordingly, while much can be achieved with the limits of a benefits management structure that includes charitable entities, we have long been on the record for supporting a unique and new model to enable a break from the notions of charity and still enable tax free growth of wealth in recognition of the uniquely binding nature of native title agreements. Ultimately, this should be a new category of tax concessions within the Tax Act and should build on the work done by the Taxation of Native Title and Traditional Owners Benefits and Governance Working Group in 2013 to develop the Indigenous Community Development Corporation model.

66 In the short term we support consideration of new corporate models that might begin this transition.

Recording, reporting and decision making

67 We do not support the proposal for amendment to the CATSI Act to require RNTBCs to report on monies derived from native title, as well as non-monetary native title benefits held on trust, in addition to any existing reporting requirements.

68 Agreements in relation to native title contain commercially sensitive and highly confidential information. It is simply not appropriate that RNTBCs be required to share this information publicly through reporting, beyond what is already required. A RNTBC must be accountable to common law holders of native title and we support efforts to increase such accountability. However, an RNTBC does not have to account for the use of native title moneys more broadly as a matter of public policy. Native title moneys are not public moneys.

69 At paragraph 7.22 the Draft Report suggests amendment to the *Native Title (Prescribed Bodies Corporate) Regulations 1999* to amend the definition of native title decisions and ensure that common law holders must be consulted in relation to decisions about investing or applying native title benefits. Such a requirement would be extremely unwieldy and is likely to stifle agility and economic development within PBCs and instead create impossibly bureaucratic systems requiring consultation that will not necessarily reflect either traditional decision-making structures, or the desires of common law native title holders to see native title benefits effectively and efficiently utilised.

70 Any such amendments must be carefully considered, and the cost and challenge of convening meetings of native title holders must be a key factor in determining whether such amendments would lead to a workable system. In our view, providing a suite of best practice suggestions and options alongside accountability standards is significantly more preferable to mandated meetings.

71 We support accountability and transparency, and agree with the aims articulated at paragraph 7.24, of achieving increased clarity and transparency about native title benefits including non-monetary benefits for common law holders. However, making confidential commercial information publicly available is certainly not an appropriate way to achieve it.

72 Paragraph 7.25 highlights an additional limitation of this approach if the aim is to increase transparency for common law holders. Native title moneys are commonly held in entities and trusts that are not regulated through the CATSI Act. Accordingly, any increased burden on CATSI Corporations will likely not achieve the transparency sought.

73 Rather than increasing regulatory burden on CATSI Corporations and unnecessarily requiring public disclosure in relation to private moneys, we recommend that ORIC and

the NNTT can and should work together to improve the capacity of native title holders to require accountability from their RNTBCs and from trustee companies. This could include empowering common law holders to become members and directors of their RNTB and resourcing native title representative bodies to follow up and monitor implementation of native title agreements and to assist common law holders of native title.

74 It should be a fundamental consideration that any amendments to the CATSI Act to increase oversight in relation to private moneys are truly special measures that are specifically designed to promote self-determination.

RNTBC model rule book

75 Developing a proposed model RNTBC Rule Book, which we support, is another way in which accountability to common law holders can be encouraged. Good governance and accountability practices can be written into a Rule Book without the need for additional public reporting.

Chapter 9 - Special Administration, insolvency and winding up

76 We agree with the observation at paragraph 9.6 of the Draft Report that the name 'special administration' is confusing and an alternative term may assist.

77 We do not support the proposal in paragraph 9.14 to increase the grounds for appointment of a special administrator on the basis that the Registrar "identifies an irregularity or irregularities in the management of a corporation's financial affairs". This is simply too broad. The existing ability for the Registrar to place CATSI Corporations into special administration is already controversial and sometimes viewed as a paternalistic measure. It should be used as infrequently as possible and certainly should not be more widely available.

78 We also do not support amendments suggested at paragraph 9.33 to introduce a rebuttable presumption of insolvency where a CATSI Corporations has failed to keep adequate written financial records or has failed to keep adequate financial records for a period of seven years. As noted at paragraph 9.31 these rebuttable presumptions do not apply at the time of winding up a Corporations Act company. A rebuttable presumption places the burden back on the CATSI Corporations to prove it is not insolvent. We see no justification for this shift of burden and expense back onto the CATSI Corporations.

Yours sincerely

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