

9 August 2021

By E-mail

National Indigenous Advisory Agency
CATSIActReview@niaa.gov.au

Your Ref

File No. 011749052

Contact
Bridgid Cowling
Direct 61 3 9229 9746
bcowling@abl.com.au

Partner
Peter Seidel
Direct 61 3 9229 9769
pseidel@abl.com.au

Dear CATSI Act Review Team

CATSI Amendment Bill Exposure Draft

- 1 We refer to our submission of 13 October 2020 in relation to the CATSI Act Review 2020. In this submission we have again not sought to comprehensively address all aspects of the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 (CATSI Amendment Bill)* but have focussed on key issues.
- 2 Arnold Bloch Leibler's native title practice covers all aspects of native title and land rights law and advisory work, including transactional, litigious, organisational, governance and administrative law related matters.
- 3 This 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. We continue to act for the Yorta Yorta peoples, nearly 30 years after we were first retained.

Comments on proposed amendments

- 4 Our observations here are set out under headings which correspond with the Part/Fact Sheet numbers produced by NIAA and, where greater specificity is required, the item numbers contained within them.
- 5 To the extent that the detail of some of the proposed amendments will be contained in the proposed amendments to the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017*, our observations are subject to whatever follows from our review of those amendments once they are published.

Part 1 – Review of operation of the Act.

- 6 We welcome the mandated review of the operation of the Act, in particular the requirement that the review must consider the effectiveness of the Act as a special



MELBOURNE
SYDNEY

Partners
Mark M Leibler AC
Henry D Lanzer AM
Joseph Borenszajn AM
Leon Zwier
Philip Chester
Ross A Paterson
Stephen L Sharp
Kenneth A Gray
Kevin F Frawley
Zaven Mardrossian
Jonathan M Wenig
Paul Sokolowski
Paul Rubenstein
Peter M Seidel
John Mitchell
Ben Mahoney
Jonathan Milner
Jonathan Milner
John Mengolian
Caroline Goulden
Matthew Lees
Genevieve Sexton
Jeremy Leibler
Nathan Briner
Jonathan Caplan
Justin Vaalstra
Clint Harding
Susanna Ford
Tyronne McCarthy
Teresa Ward
Christine Fleer
Jeremy Lanzer
Bridget Little
Gia Cari
Jason van Grieken
Elyse Hilton
Jonathan Orner
Stephen Lloyd
Scott Phillips
Gavin Hammerschlag
Shaun Cartmon
Damien Cuddihy
Dorian Henneron
Rebecca Zwier

Consultant
Jane C Sheridan

Special Counsel
Sam Dollard
Laila De Melo
Emily Simmons
Bridgid Cowling
Rosalee Cattermole

Senior Associates
Liam Thomson
Brianna Youngson
Kaitlin Lowdon
Stephanie Campbell
Claire Stubbe
Briely Trollope
Laura Cochrane
Rachel Soh
Greg Judd
Ben Friis-O'Toole
Elly Bishop
Liam Cavell
Raphael Leibler
Gabriel Sakkal
Peter Scott
Mark Macrae
David Monteith
Rebekah French
Gisella D'Costa
Lisa Garson
Vidushee Deora
Luke Jedynak
Emily Korda
Jenny Leongue
Chris Murphy
Gabrielle Piesiewicz
Michael Repse
Anna Sapountsis
Jessica Thrower
John Birrell
Rob Deev
Caitlin Edwards
Jessica Elliott
Simone Gould
Alexandra Harrison-Ichlov
Andrew Low
Genevieve Pope
Claire Southwell
Luise Squire

measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders.

- 7 It is obviously of utmost importance that special measures do not further entrench disadvantage. 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 in the governance of their own organisations, and also stifle economic development.
- 8 While many of the amendments proposed by the CATSI Amendment Bill will provide for greater flexibility, enhanced privacy and reduced compliance burdens, some will achieve the opposite (for example mandatory tabling or reports and adoption of the whistleblower regime).
- 9 We re-iterate the comments from our 13 October 2020 submission that when compared with the flexibility provided to companies limited by guarantee that are registered as charities, the CATSI Act is relatively prescriptive, at times opaque and somewhat inflexible.
- 10 Each CATSI Act Review is an opportunity to consider other mechanisms for ensuring greater ease of use, flexibility and most importantly self-determination, This includes 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.
- 11 We welcome all amendments that move away from prescriptive regulation teamed with granting of permission towards overall flexibility. We also encourage the publication of governance recommendations and guidance by the Registrar.

Part 2 – Powers and functions of Registrar

- 12 We support the inclusion of enforceable undertakings (items 2 and 3).
- 13 We are extremely disappointed to see the introduction of new mechanisms to entrench the issuing of infringement notices. We do not believe there is compelling evidence that this 'stick approach' is needed or likely to be effective (items 21-23). We suspect it will have the opposite effect.

Part 3 - Membership applications, member contact details and electronic communication

- 14 We agree with amendments that facilitate greater ease of communication, such as communication by email rather than requiring post.
- 15 We also welcome the increased privacy that is afforded by requiring inspections of the register by non-members to require a proper purpose and enabling redaction of information.

Part 4 – Subsidiaries and joint ventures

- 16 We welcome the proposed amendments at items 86 to 92 and 96. They will facilitate flexible corporate structuring for Aboriginal corporations and support economic development. To further facilitate flexibility and effective corporate structuring we re-iterate our request for ORIC to provide a template for profit Rule Book for Aboriginal Corporations.

Part 6 – Meeting and Reports

- 17 The proposed amendments to reduce the frequency of general meetings for small non-charity Aboriginal Corporations, enshrine mechanisms for virtual meetings, defer, and cancel meetings are all sensible amendments to remove unnecessary red tape for

CATSI Corporations. However we re-iterate the statements made in our 13 October 2020 submission that we strongly believe there is merit in considering the advantages of the ACNC's regulatory approach for all CATSI Corporations.

- 18 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.

Part 8 – Officers of corporations

- 19 We re-iterate our 13 October 2020 submission that imposing transparency conditions beyond those required of non-CATSI corporations more generally would clearly be discriminatory and risks imposing an unnecessary and onerous burden on many CATSI Corporations.
- 20 We support transparency of CEO and CFO salaries to Members of CATSI corporations. However, to the extent that disclosures are beyond what is required for non-CATSI corporations it should be voluntary only, and any data published more widely should be de-identified.

Part 11 – Independent Directors

- 21 We welcome more flexibility in relation to the ability to appoint independent directors. We do not agree with the default that they have a one-year term (item 177), even as a replaceable rule. A one-year term is, in most cases, inadequate for a Director to be effective. While it can be extended at subsequent AGMs this is an unnecessary administrative burden. A default minimum of three years would be far more appropriate.

Part 14 – Improving Consistency with Corporations Act

- 22 We are concerned by the proposal to import by cross-reference the requirements of part 9.4AAA of the Corporations Act (item 216). Whistleblower protections are important however the particular Corporations Act scheme is complex and burdensome of smaller and/or under-resourced entities.
- 23 If this amendment is made we recommend a reasonable transition period, especially given the penalties for non-compliance.
- 24 It is critically important that ORIC provides comprehensive and user-friendly advice, including a template whistleblower policy. It will also be crucial that the exemption from the requirement to have a whistleblower policy for eligible public companies under the *ASIC Corporations (Whistleblower Policies) Instrument 2019/1146* is extended to apply to CATSI Corporations.
- 25 We also recommend that consideration be given to whether there are circumstances where this exemption should be extended to CATSI Corporations with consolidated revenue over \$1 million, such as where an entity does not employ staff and does not deliver services.

Part 15 – Finalising a process

- 26 The proposed new requirement to provide letters at the closure of a review where the Registrar is satisfied no further action is required is a very positive addition.

Part 17 – External administration and deregistration

- 27 In our 13 October 2020 submission we did not support the proposal 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'. The now proposed ground of requiring a 'serious irregularity in the financial affairs of the corporation' is a significant improvement on the earlier proposal.

- 28 However, as a general comment, we reiterate that there should not be any change that increases the ability for the Registrar to place a CATSI Corporation into special administration. The existing ability is already controversial and sometimes viewed as a paternalistic and antiquated measure. It should be used as infrequently as possible and certainly should not be more widely available.
- 29 We do not support amendments to introduce a rebuttable presumption of insolvency where a CATSI Corporation has failed to keep adequate written financial records or has failed to keep adequate financial records for a period of seven years. A rebuttable presumption places the burden back on stretched and often under resourced CATSI Corporations to prove that are not insolvent.
- 30 We see absolutely no justification for this shift of burden and expense back onto the CATSI Corporations.

Non-legislative changes

- 31 The *Guide to the Exposure Draft CATSI Amendment Bill* outlines non-legislative approaches to certain recommendations in the final report from the 2019-2020 review of the CATSI Act. We have responded to some of these approaches here, identified by recommendation number.
- 32 Recommendation 21 is that a targeted review be undertaken to consider establishing a special class of CATSI corporation in relation to for-profit entities. We certainly support such a review.
- 33 Recommendation 32 is that a subsequent targeted review be undertaken to consider further streamlining arrangements for CATSI corporations that are also registered charities. We again support such a review and recommend it be undertaken with priority.
- 34 Recommendation 55 is that current benefit management structures be reviewed to identify and address the impediments to supporting economic development for common law holders, including the extent to which charities can engage in economic development activities and act as future funds, given the conflicting obligations of paying out benefits and accumulating them for future generations.
- 35 Recommendation 56, which is to consult in relation to allowing for the creation of registered trusts, is related to this overall review of benefits management structures.
- 36 One of our key areas of practice is the tax effectiveness of benefit management structures and our expertise encompasses charitable and non-charitable structures. We emphasise that charities can both engage in economic development activities and build future funds. However, we understand that the charities framework is not preferred for many groups. In addition, there are nuances in the law that can make it difficult for understandably risk-averse groups to feel comfortable adopting a charitable structure.
- 37 These issues should be addressed by comprehensive reform undertaken in conjunction with Treasury and building on the work that has been done in this area over the past decade.
- 38 We would be delighted to become involved in any such review.

39 Recommendation 58 is for the NIAA and ORIC to work with stakeholders to develop and deliver education and information resources on changes to reporting and compliance obligations. We strongly support a focus on education and information.

We would be happy to discuss any of these comments further.

Yours sincerely
Arnold Bloch Leibler



Peter Seidel
Partner



Bridgid Cowling
Special Counsel