

Friday 2 October 2020

National Indigenous Australians Agency

via email: [CATSIActReview@niaa.gov.au](mailto:CATSIActReview@niaa.gov.au)

Dear Sir/Madam,

### **Review of the CATSI Act – Phase 2 Consultation**

I am writing in relation to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**) draft report (**Draft Report**) prepared by the National Indigenous Australians Agency (**NIAA**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses, CATSI Act corporations (**corporations** or **CATSI corporations**) and the government sector.

In September 2017, the AICD put in place its first Reconciliation Action Plan (**RAP**) that focused on ways we could better support Aboriginal and Torres Strait Islander leadership and governance. This first RAP was an important step for the AICD, outlining commitments on which the AICD will build over coming years. Drawing lessons from this first experience, the AICD plans to launch its second RAP later in 2020.

The AICD team has presented more than 145 Indigenous Governance Programs to over 1900 participants since 2010, and delivered the Company Directors Course to more than 210 Indigenous business leaders since 2009. All these programs are facilitated by faculty who are experienced directors on Indigenous boards. We are also looking to appoint an Indigenous sector leader to bolster our expertise and engagement with First Australians.

Our recommendations and observations outlined in this submission should be read in light of the AICD's limited internal expertise in relation to the CATSI Act. However, we have undertaken external consultation with directors and senior executives of Indigenous corporations, AICD Faculty and Indigenous organisations to inform this submission.

### **1. Executive summary**

The AICD strongly supports the purpose of the CATSI Act. We understand from our consultation that it facilitates Aboriginal and Torres Strait Islander persons to create and manage Indigenous entities which play a vital role in Indigenous communities. These organisations deliver essential services, including health, education, employment and native title services and play a fundamental role in Indigenous communities.

The AICD endorses certain elements of the Draft Report which seek to promote the purpose of the CATSI Act, in particular those that promote a flexible legislative framework that accommodates specific cultural practices and allow for self-determination. In particular, we support the following:

- Proposals to allow CATSI corporations to apply for an extension to both hold an AGM and lodge financial reports in the case of 'Sorry business';
- Proposals to allow CATSI corporations to incorporate wholly owned subsidiaries and form joint ventures;
- Proposals to modernise the CATSI Act to ensure that corporations can determine how they hold AGMs and contact members; and
- A consultation on related party provisions.

However, our stakeholder engagement has highlighted that certain proposals set out in the Draft Report, if adopted, will add a further level of complexity, compliance and regulation to CATSI corporations that is unnecessary and out of step with the purpose of the legislation. We have also received feedback that the existing CATSI Act does not, in some cases, provide the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander peoples.

The AICD encourages the NIAA to reconsider some of the additional proposed regulation, especially where it may run counter to the objective of the legislation. Further, our engagement with stakeholders has highlighted the need for the CATSI Act to empower corporations to focus on the important public function and custodial role these organisations have in Indigenous communities.

When it comes to governance, the AICD supports principles-based governance. We are concerned that some of the current recommendations risk conflating legal requirements and better practice, rather than encouraging CATSI corporations to adopt sound governance principles. In our view, the CATSI Act should be focused on promoting governance and responsibility rather than being punitive in nature. This is particularly important for smaller CATSI corporations.

We have included comments under the following key topics and included paragraph references to the Draft Report where applicable.

## **2. Governance requirements**

This chapter covers significant ground. We have sought to make some general statements around governance practices and commented on some of the proposals/questions based on our stakeholder engagement.

The AICD supports a principles-based approach to many of the governance questions the Draft Report covers. Such an approach recognises that governance frameworks must respond to a corporation's context, community and member expectations, as well as its strategic and operational imperatives. Prescriptive legislation can create unnecessary rigidity and complexity, and lead to unintended consequences. The AICD is concerned that some of the questions posed in the Draft Report propose prescription where guidance would be preferable.

Importantly, we support elements of modernising the CATSI Act. The AICD believes organisations should have the capacity to adopt the best meeting format for their circumstances, members and stakeholders — physical, virtual or hybrid. Regulations should focus on the outcomes and purpose of meetings, not their delivery channel, enabling flexibility and technological neutrality.

## A. Membership management

### *Contacting members (para 4.8)*

Recommendations that empower CATSI corporations to determine how members should be contacted, including via social media and community noticeboards, may be appropriate. However, such decisions should require resolution at a general meeting and ensure that members can still opt in to receive a written notice, for example.

### *Member privacy (paras 4.9-4.10)*

As part of consultation with Treasury on the introduction of a new *Commonwealth Modern Business Registry Regime (MBR Regime)* and the requirement for officers to obtain a director identification number (**Director ID**) under the *Corporations Act 2001 (Cth) (Corporations Act)* and CATSI Act, the AICD expressed concerns with the confidentiality and security of information held on existing registrar systems.

In today's digital world, personal identity information is a key exploitation target of cyber and identity criminals. Further, an external expert we have engaged in this area has indicated that public holdings of identity information are known to have attracted serious and organised crime committed to exploiting this information for criminal misuse.

We welcome the introduction of functions and powers under the new MBR Regime for the new centralised registrar to make a determination that certain personal information may not be disclosed unless it is satisfied that the benefits of disclosure would outweigh the risks.

In the interests of consistency, we encourage the NIAA to consider amendments to enable the Registrar of the CATSI corporations register to apply a similar principled and risk-based approach to assessing whether members' addresses may be disclosed on request. This may for example include consideration of:

- why the information is being used;
- who is using the information;
- whether the information will be stored in a safe and secure environment; and
- whether there are appropriate and proportionate protections in place for its use and storage.

### *Membership applications (paras 4.11-4.17)*

Decisions regarding membership applications should be subject to due process and therefore the AICD supports the inclusion of a statutory timeframe within which corporations need to consider membership applications. Similarly, an appropriate process should be put in place if a member wishes to challenge the acceptance of another person's membership.

## **B. Corporate structures (paras 4.19-4.21)**

### *Subsidiaries and joint ventures*

The AICD agrees that the CATSI Act should be amended to allow CATSI corporations to establish wholly owned subsidiaries and a group of CATSI corporations to establish a CATSI corporation akin to a joint venture. We agree that the existing requirements would be unnecessary where the parent company satisfies the personal Indigenous requirement. Taking such steps will ensure that CATSI corporations can design corporate structures that are fit-for-purpose and maximise opportunities for Indigenous communities.

## **C. Size classification (paras 4.28 – 4.34)**

Based on our consultation, we support the thresholds for size classification being aligned to that of Australian Charities and Not-for-profits Commission, and being based solely on revenue, as is the case for other corporate entities. It is worth noting, however, that the change will increase the regulatory burden for the 250 CATSI corporations currently classified as medium sized. We understand that reporting thresholds for not-for-profits, which might include CATSI corporations, are currently being reviewed by the Australian Accounting Standards Board (**AASB**) and it might be appropriate to deal with those thresholds in that process.

## **D. Meetings**

### *AGMs (4.36-4.43)*

AGMs are important events for organisations, providing a chance for members and other stakeholders to gather, hear about the organisation's activities and financial position for the previous year, ask questions, discuss plans for the coming year and celebrate achievements. For CATSI corporations, AGMs also provide a forum for accountability to members and the community.

For the above reasons, the AICD cautions against amending the CATSI Act to enable small corporations to pass a resolution to not have an AGM for up to three years. Although this may be appropriate for smaller organisations that only hold land, for example, it may not be appropriate for small corporations with many members that place importance on the AGM.

Based on our consultation, the AICD supports corporations being able to access a 30-day time extension to hold an AGM for reasons including if there has been a death in the community. However, a process which requires an application and an explanation for the extension is required to ensure there is sufficient rigour around the granting of extensions.

As mentioned, the AICD is a strong advocate for ensuring organisations have the capacity to adopt the best format for meetings for their circumstances, members and stakeholders — physical, virtual or hybrid. This has been highlighted during the COVID-19 pandemic, where it has been critical for organisations to be able to host meetings online in order to mitigate the public health risks from physical gatherings.

To this end, the AICD has been a strong advocate for the modernisation of the Corporations Act and agrees that the CATSI Act should be flexible to allow corporations to be able to hold AGMs in a virtual environment. However, members should be responsible for determining whether this is acceptable for their corporation. As such, this should require a member resolution.

#### *Audit committees (para 4.44)*

Mandating audit committees for large organisations is unnecessary for many large organisations (especially if the reporting thresholds change). Notably, the Corporations Act does not require corporations to have an audit committee. The ASX Listing Rules do however mandate the establishment of an audit committee for the top 300 companies in the S&P ASX 300 Index. Imposing this requirement on CATSI corporations would be disproportionate and is likely to impose undue logistical and financial burdens on these organisations. Instead, the emphasis should be on educating directors of corporations on good governance practices, including the value of having an audit and risk committee in certain circumstances.

### **3. Reporting requirements**

#### *Reporting (paras 4.45 – 4.47)*

As with our comments above relating to an AGM extension, corporations should be allowed to apply for a 30-day extension to lodge reports with the Registrar in the case of death, natural disaster and certain cultural activities in the community.

Corporations should not have to give members copies of reports (such as financial, audit and directors' reports) at AGMs to provide greater transparency to members. Although publication of the report is crucial, corporations should be encouraged to present information about the corporations (including financial results) in an appropriate way for members. For example, we understand some corporations produce slides (in multiple languages in some cases) that are far more digestible for many members of CATSI corporations.

A dormant corporation, that is one that has not undertaken any operations throughout the year, should have reporting and auditing requirements waived. Where that dormant corporation has continued to earn income, for example through a passive investment, then the reporting and auditing requirements should remain.

Finally, the AICD agrees that the CATSI Regulations should be updated to clarify that financial reports need to be in accordance with the AASB standards.

#### *Rule books (4.49 – 4.55)*

We understand from our consultation that rule books can become very complicated and unwieldy. Although we support incorporating replaceable rules into corporations' rule books and clarifying those which apply to the corporation, we would caution against implementing this recommendation if it would increase the complexity of rulebooks.

Our consultation has also highlighted the need for rule books to be simpler for smaller corporations.

### **4. Officers of corporations**

#### **A. Remuneration**

##### *Disclosure of executive remuneration (paras 5.4 - 13)*

We agree that heightened transparency around remuneration of CEOs and senior executives should be encouraged. However, it is important that any new requirements around reporting are not unduly complicated. Detailed or lengthy remuneration disclosures can be extremely

burdensome for organisations to comply with, and are often difficult for members and users of this information to understand, ultimately undermining the objective of transparency and accountability to members. Disclosures at a level similar to that required under the Corporations Act for publicly listed companies would be inappropriate and disproportionate.

With this in mind and consistent with the *2018 Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review (ACNC Review)*, we suggest that any requirements on remuneration reporting are limited to the senior executives and responsible persons of large CATSI corporations, disclosed on an aggregated basis, in bands. As noted in the Government's response to the ACNC Review, this disclosure should only be required from large entities with two or more key management personnel to accommodate privacy concerns. This disclosure could also include a high-level description of the nature of the remuneration paid, for example whether it is a fixed salary, sitting fee or variable pay that is tied to performance or service.

#### *Member approval of remuneration (paras 5.14 – 5.15)*

We note that Division 252 of the CATSI Act provides that a CATSI corporation is not to pay remuneration to a director unless specifically provided for in the rule book, and to the extent the rule book allows this, the remuneration must be approved by the members of the corporation.

We do not agree that CATSI corporations should be required under legislation to seek member approval of director remuneration. While their rule book may specify member approval as a requirement of allowing payments to directors, this should be left to boards and organisations to determine, and not regulation. We caution against a level of prescription in the regulation of CATSI corporations that goes beyond that imposed on similar sized organisations and intrudes on the role of the board. Such an approach risks introducing a paternalistic approach to regulation upon CATSI corporations.

#### *Director fees (para 5.16)*

The AICD encourages organisations to disclose directors' remuneration and other benefits. However, as stated in the Executive summary, it is important to emphasise that good practice is not conflated with minimum legal settings, particularly when similar requirements are not imposed on organisations of similar size and resources.

### **B. Executive performance (paras 5.17 – 5.23)**

Again, the AICD supports disclosure of the names of the CEO and other senior staff in a CATSI corporation's annual report.

However, we do not think it is appropriate or necessary for medium and large corporations to include the 10 year employment history of their CEOs and senior executives in their annual reports. The board of an organisation has been elected to do many things including to make decisions regarding the appointment of a CEO. Implementing such disclosure is overly burdensome and ultimately unnecessary as these individuals are already in these positions. Again, such prescription risks being seen as paternalistic and perpetuating a view that many individuals in the senior ranks of CATSI Act organisations lack appropriate skills and experience.

### **C. Related party provisions (paras 5.24 – 5.38)**

The AICD agrees that the related party provisions in the CATSI Act are overly burdensome and the provisions can work against the best interests of some corporations, especially in small communities

or where it is not easy for corporations with a dispersed membership to call a general meeting. The AICD further agrees that the provisions are more restrictive than the Corporations Act and that is not appropriate.

For the above reasons, the AICD agrees that related party provisions should be reviewed to make them more workable for CATSI corporations. In particular, the AICD agrees that the restrictions should be retained, but that certain exemptions available in the Corporations Act be considered and included as appropriate, including for example, a monetary threshold trigger for the related party transaction provisions of the CATSI Act to apply.

More broadly, we understand from our consultation that conflicts of interest can be much more complex in Indigenous corporations where the idea of kinship is much broader. Provision of services amongst different community groups can cause enormous conflicts and it has been suggested that this should be considered in any further consultation.

#### **D. Appointment of directors and other director requirements (paras 5.43 – 5.44)**

The AICD has long supported a majority of independent non-executive directors (independent directors) on boards. However, we recognise that independent directors may not always be appropriate or necessary for CATSI corporations given the nature of the organisations and the stakeholders which they seek to serve. The AICD suggests that independent directors should be encouraged but not mandated for large CATSI corporations, noting that we have received some feedback that CATSI corporations tend to focus on Indigenous representation at the expense of technical expertise and governance experience.

It may be useful for the Office of the Registrar of Indigenous Corporations (**ORIC**) to produce guidance regarding board composition and the benefits of having a diverse board that includes some independent directors. The AICD highlights the benefits of board diversity in its [NFP Principles](#), including that diversity on the board can contribute to improved performance.

We also agree that in certain circumstances the Registrar should be able to exempt corporations from the requirement that directors must not be employees of the corporation. Again, an appropriate application process is necessary, which requires corporations to justify why it is necessary for the director to be an employee.

Finally, the AICD has consulted on whether a defence should be available for directors or officers who are complying with traditional Aboriginal customs or practices of their tribal group. While the AICD acknowledges the merit in such a defence, we understand that this would be incredibly challenging for ORIC to regulate in practice and would therefore not be appropriate. The AICD considers that such a defence would require further consultation and consideration before being implemented.

#### *Terms of appointment*

An additional issue that is not raised in the Draft Report but that has been raised by stakeholders as being particularly problematic for CATSI corporations is the requirement in section 246.25 of the CATSI Act which states that a director of a CATSI corporation must not be appointed for a period exceeding two years (unless the Registrar grants an exemption).

While we understand directors can be re-appointed at the AGM, such a short period is particularly onerous in the sector given CATSI corporations often struggle to find the right people to take



director positions. Notably, such restrictions do not apply to Corporations Act entities although, directors of listed companies are required to stand for re-election every three years. Stakeholders we have spoken to have suggested that the term restriction should be removed entirely and left to each corporation to decide in their rules what the term of appointment should be. Alternatively, the term should be increased to at least three years.

## 5. Whistleblower protections

The AICD strongly supports robust whistleblower protections and believes that they support high standards of governance. Boards have a strong interest in corporate misconduct being brought to light early, so that it can be addressed and prevented from recurring.

Certainly, as a matter of good governance, organisations should have robust internal whistleblowing frameworks in place which aim to detect, address and ultimately prevent corporate wrongdoing.

We welcomed the reforms that were introduced to strengthen Australia's whistleblowing laws in the corporate sector and were actively engaged in the relevant consultations leading up to the passage of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Whistleblower Act)*.

However, we would have concerns about simply transposing the same legal framework into the CATSI Act, given the nature of the protections and the penalties that apply. There were concerns expressed during the consultation on the Whistleblower Act that the prescriptive nature of certain aspects of the new legislative regime (including the requirement to have a whistleblower policy in place) may be too onerous for certain types of corporations in light of their size and resources, and restrict boards' abilities to set fit-for-purpose governance arrangements. We understand that stakeholders have similar concerns about the appropriateness of the protections in the context of CATSI corporations.

We also note that certain protections are already available under the CATSI Act, and that ORIC's *Policy Statement 2: Complaints involving corporations* outlines the Registrar's approach to whistleblowers. One option may be to consider targeted amendments to the current framework to more closely align with the new corporate sector regime (including, for example, to expand the list of people in section 466.1(1)(a) of the CATSI Act who may be considered whistleblowers to cover former employees, officers, and contractors), without unduly increasing the compliance burden for CATSI corporations. Such an approach could be considered in conjunction with a practice-focused campaign (e.g. led by ORIC) to raise awareness of the issue and encourage an organisational culture of transparency.

Finally, we note that the whistleblower protection regime in the corporate sector context is due to be reviewed as soon as practicable after the end of five years from coming into effect. It may be prudent to hold off extending the regime to the CATSI Act until after this review has concluded, even if it were considered appropriate for CATSI corporations.

## 6. Special administration, insolvency and winding up

*Special administration (paras 9.4 – 9.6)*

The AICD received limited feedback on these proposals and so have restricted our comments to certain questions raised in the Draft Report. The AICD supports the aim of the special administration



process to provide early assistance when a CATSI corporation faces financial or governance difficulties. In particular, we have received feedback that it is crucial that the corporation be returned to the control of its members at the conclusion of special administration.

While we do not have suggestions for changing the name "special administration", we appreciate the stigma attached with appointing a special administrator and agree that a name change may assist with changing the negative affiliations with the term. Notably, this is not an issue unique to CATSI corporations. Many corporates, particularly SMEs, avoid engaging insolvency practitioners and entering into voluntary administration as a consequence of the perceived failure associated with the process.

#### *Potential 'safe harbour' for directors*

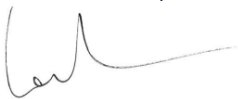
In 2017, after much consultation, a safe harbour was introduced into the Corporations Act to empower directors to take actions which will promote the company's interests by protecting them from personal liability.

Under the safe harbour, directors are not held liable for an insolvent company's debts, if they can show they were in the process of taking a course of action which was "reasonably likely" to lead to a better outcome than the immediate appointment of an administrator or liquidator. Although this will require further consultation and consideration, the AICD suggests that it may be appropriate to incorporate this amendment into the CATSI Act to ensure directors of CATSI corporations benefit from the same relief afforded to directors of Corporations Act entities.

## **7. Next steps**

We hope our comments will be of assistance as you undertake this important consultation. If you would like to discuss any aspects further, please contact Christie McGrath, Senior Policy Adviser at [cmcgrath@aicd.com.au](mailto:cmcgrath@aicd.com.au) or Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,



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