

Friday 6 August 2021

National Indigenous Australians Agency (NIAA)

via email: CATSIActReview@niaa.gov.au

Dear NIAA,

Consultation on the Exposure Draft of the CATSI Act Amendment Bill 2021

I am writing in relation to the Exposure Draft of the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (**the Exposure Draft**) that seeks to amend the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the **CATSI Act**) following the release of the final report on the CATSI Act review.

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 46,000 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.

As with our submission on the review of the CATSI Act (available [here](#)), 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 and Indigenous organisations to inform this submission.

The AICD team has presented more than 145 Indigenous Governance Programs to over 1920 participants since 2010, and delivered the Company Directors Course to more than 230 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. We have also engaged IPS Management Consultations to guide the development of our second Reconciliation Action Plan.

1. Executive summary

The AICD strongly supports the purpose of the CATSI Act. We understand from our consultation on the Exposure Draft and CATSI Act review, 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 Exposure Draft that seek to promote the purpose of the CATSI Act, particularly those that promote a flexible legislative framework that accommodates specific cultural practices and allow for self-determination. In particular, we support the following:

- amendments to allow CATSI corporations to apply for an extension to both hold an AGM and lodge financial reports in the case of 'Sorry business';
- amendments to allow CATSI corporations to incorporate wholly owned subsidiaries and form joint ventures;
- amendments to simplify related party transactions and remove the requirement for member approval of small, related party transactions;
- amendments to modernise the CATSI Act to ensure that corporations can determine how they hold AGMs and contact members, noting that these should be subject to member resolutions; and
- amendments to allow CATSI corporations to appoint independent directors.

However, as previously advised, our stakeholder engagement has highlighted that certain amendments risk adding a 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 such as proposals to lay reports before an AGM.

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.

The AICD supports principles-based governance regulation. We are concerned that some of the amendments in the Exposure Draft (such as the incorporation of *Corporations Act 2001 (Cth)* (**Corporations Act**) Whistleblowing protections and disclosure of executive remuneration) 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.

Section 2 below includes comments on governance-related aspects of the Exposure Draft under the Fact sheet headings and includes Bill item references where applicable. Section 3 also considers recommendations of the review to be dealt with in the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations)* and issues not addressed by the Exposure Draft.

Our comments remain subject to a review of the proposed amendments to the CATSI Regulations.

2. Detailed comments on the Exposure Draft

A. Fact sheet 3: Membership applications, contact details and electronic communications

Alternative contact details

The AICD supports amendments in the Exposure Draft that empower CATSI corporations to obtain alternative contact details for members and determine how members should be contacted, including via social media and community noticeboards. However, we suggest that contacting members using alternative contact details should require resolution at a general meeting to ensure that members can still opt-in to receive a written notice, for example.

Membership applications

Decisions regarding membership applications should be subject to due process, and, therefore the AICD supports the inclusion in Item 56 of the Exposure Draft of a six-month timeframe within which corporations need to consider membership applications, as well as the process for allowing the extension or exemption from the period for deciding an application (Item 58 of the Exposure Draft).

Redaction of member contact details

We also support Items that will allow members to request that their contact details be redacted from a member register. The AICD has long been concerned with the confidentiality and security of information held on existing business registries. In today's digital world, personal identity information is a key exploitation target of cyber and identity criminals.

Expert advice commissioned by the AICD confirms that the public availability of personal information (such as residential address and date of birth) exposes directors and officers to undue privacy, cyber-security and personal safety risks, including identity fraud.

B. Fact sheet Subsidiaries and joint ventures

The AICD supports Items 86-92 and 96 of the Exposure Draft that allow CATSI corporations to establish wholly owned subsidiaries and joint ventures. These steps enable CATSI corporations to take advantage of different business structures and design corporate structures that are fit-for-purpose and maximise opportunities for Indigenous communities.

We also support Items 93-95 of the Exposure Draft that allow for establishing two-member corporations where only one member is an Aboriginal or Torres Strait Islander person provided that the person has the deciding vote.

C. Fact sheet 5: Classification of corporations and Fact Sheet 19: Review of financial reports

Aligning financial reporting thresholds with ACNC standards

Based on our consultation, we support the amendments in the Exposure Draft that will ensure financial reporting thresholds be aligned to that of the Australian Charities and Not-for-profits Commission (**ACNC**), and be based solely on revenue, as is the case for other corporate entities. We note that the Government has announced that reporting thresholds for ACNC-registered charities will be increased from 1 July 2022.¹ We assume that the CATSI Act regulations (which we understand

¹ Financial reporting thresholds for small charities will increase to under \$500,000 annual revenue (from \$250,000) and medium-sized charities will increase to under \$3 million (from \$1 million). The threshold for large charities will

will contain the new thresholds) will reflect the new ACNC reporting thresholds. We also understand that the Australian Accounting Standards Board (**AASB**) are also considering thresholds and do caution that it might be appropriate to deal with those thresholds in that process.

Review of financial reports

We also agree with amendments included in Part 19 of the Exposure Draft that allow medium-sized corporations to have their financial reports reviewed rather than audited. This will bring CATSI corporations' requirements into line with registered entities under the Australian Charities and Not-for-profits Commission Act 2012 and companies limited by guarantee under the Corporations Act.

D. Fact sheet 6: Meetings

Meeting formats

The AICD strongly supports amendments included in Items 104 and 105 of the Exposure Draft to enable CATSI corporations to hold a general meeting, such as an annual general meeting (**AGM**), without a physical venue, using any technology that gives members as a whole a reasonable opportunity to participate.

The disruption caused by COVID-19 has highlighted the need to modernise these provisions to enable organisations to continue to meet their governance requirements where organisations may not be able to facilitate physical meetings or send meeting materials to shareholders in hard-copy (for example, due to snap lockdowns, social distancing requirements and travel restrictions). It is critically important that the legislation is not overly prescriptive. We agree with the Exposure Draft's amendments which provide CATSI corporations flexibility to adopt the best meeting format for their circumstances, whether that be physical, hybrid or wholly virtual meetings, on a permanent basis.

However, it is important to protect shareholder democracy and organisations that wish to have the option of conducting virtual meetings on a permanent basis should ensure that shareholders or members have consented via a member resolution. We encourage consistency with the permanent reforms currently contemplated under the Corporations Act for organisations to seek one-off shareholder or member approval to amend the constitution to permit the conduct wholly virtual meetings on a permanent basis.

Automatic extension for holding an AGM and lodging reports

The AICD also supports Items 106-109 and 114-120 that will allow all corporations to activate an automatic, one-off extension of 30 days to hold an AGM and lodge their reports with the Registrar in the case of death, natural disaster and certain cultural activities in the community. The grounds for an extension are appropriate (including that the request can be made orally and must be specific when the corporation intends to hold its AGM and lodge its reports).

We note that we have received some feedback from stakeholders that 30 days is a relatively short period to enable a community to respond to a natural disaster or mourn the loss of a family member

increase to \$3 million or more. These changes have the potential to reduce compliance costs for smaller charities (for example on requirements for review or audit).

following traditional ceremonies and practices, and that 45 days may be more appropriate extension period.

Requirement to lay reports before AGM

The AICD agrees that members of a corporation should be able to request copies of reports. However, we have received feedback that it would be unnecessarily onerous and inappropriate for all corporations (required to hold an AGM) to lay before the AGM any report in respect of the relevant financial year (Item 121 of the Exposure Draft), particularly those in remote communities with limited access to resources. The AICD does not support this Item of the Exposure Draft and asks that its inclusion be reconsidered.

E. Fact sheet 7: Constitutions

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 that apply to the corporation, in our submission on the review we cautioned against implementing this recommendation if it would increase the complexity of rulebooks.

As such, we support Item 125 of the Exposure Draft, which requires rule books to refer to replaceable rules rather than incorporate them in full. This will not only ensure that rule books do not become unwieldy, but also ensure that they remain current if there are amendments to the CATSI Act.

F. Factsheet 8: Officers of corporations

Senior executive remuneration

While we agree that heightened transparency around remuneration of CEOs and senior executives should be encouraged, it is important that any new requirements around reporting are not unduly complicated. Although items 148-158 of the Exposure Draft incorporate the concept of a remuneration report for a financial year, we understand that the detail of what these remuneration reports will include will be dealt with in the CATSI Regulations.

We caution that 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.

We support using the accounting standards definition of “key management personnel” on the basis that our above points are addressed.

G. Factsheet 9: Related party transactions

Related party transactions

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 provisions are more restrictive than the Corporations Act, which is inappropriate.

The AICD supports, in principle, Items 165-171 of the Exposure Draft. However, it is difficult to comment on the operability of these provisions without knowing what the monetary threshold trigger for a related party transaction will be, which we understand will be prescribed in the CATSI Regulations.

We also support requirements in the Exposure Draft that require corporations to report related party transactions in their annual reporting to members to ensure transparency and removing the Registrar from participating in the process to make it less administratively burdensome.

Conflicts

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

H. Fact sheet 10: Power to exempt corporation from employee director requirement

We support Items 172 and 173 of the Exposure Draft that allow the Registrar to exempt corporations from the requirement that the majority of directors must not be employees of the corporation in certain circumstances. We support this proposal on the basis that section 310 of the CATSI Act sets out an appropriate application process and criteria for the Registrar to consider for an organisation to follow to benefit from the exemption.

I. Fact sheet 11: Independent directors

The AICD generally supports 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 whom they seek to serve.

We support the inclusion of Items 174 to 177 of the Exposure Draft that incorporates a new replaceable rule that allows directors to appoint independent directors for a period not exceeding one year (with the ability to seek reappointment at the next AGM). In our view this is balanced by proposed new section 246-17 which enables corporations to amend the replaceable rule to prevent the appointment of independent directors if it is not appropriate in the context of their organisation. We recommend that the term of appointment of independent directors be extended to three years to reduce red tape around the appointment and enable the independent director to develop an ongoing relationship with the corporation.

The AICD also suggests that independent directors should be encouraged, but not mandated, for large CATSI corporations.

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.

J. Fact sheet 12: Modernising publication requirements

We support modernising the CATSI Act. 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.

K. Fact sheet 14: Improving consistency with Corporations Act

Whistleblowing

The AICD strongly supports robust whistleblower protections and believes that they support high standards of governance. As a matter of good governance, organisations should have strong 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 have concerns about transposing the same legal framework into the CATSI Act as per Part 10-5 of the Exposure Draft, given the nature of the protections and the penalties that apply (100 penalty units or imprisonment for two years, or both, as per Item 217 of the Exposure Draft). There were concerns expressed during our initial 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.

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.

Auditors – qualified privilege

We support amendments in Items 219-221 of the Exposure Draft that provide auditors with qualified privilege consistent with the Corporations Act.

3. Issues not addressed in the Exposure Draft

The AICD remains concerned about a number of issues that have not been addressed in the Exposure Draft or are to be included in CATSI Regulations that are not yet available for consultation.

Director pay

The CATSI Act review recommended that the Act be amended to require corporations to report how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar. We understand that this recommendation will be given effect through changes to the CATSI Regulations.

The AICD encourages organisations to disclose directors' remuneration and other benefits. However, as stated in the Executive Summary, it is important that good practice is not conflated with minimum legal settings, particularly when similar requirements are not imposed on organisations of similar size and resources. We note that large private companies incorporated under the Corporations Act are not required to disclose director fees. The AICD does not support CATSI Act corporations having a higher disclosure obligation on director fees than other corporations.

Safe harbour

In 2017 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. As previously recommended, the AICD considers that the NIAA should 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.

4. Next steps

We hope our comments on the Exposure Draft and other matters will be of assistance. If you would like to discuss any aspects further, please contact Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au or Christian Gergis, Head of Policy, at cgergis@aicd.com.au.

Yours sincerely,



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