***Submission to the National Indigenous Australian Agency on the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (“CATSI Act”) Review 2019 – 2020***

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1. **Introduction** 
   1. The Central Australian Aboriginal Congress Aboriginal Corporation ICN 7823 (**Congress**) is grateful for the opportunity to provide a submission on the CATSI Act Review Draft Report of 31 July 2020 (**Draft Report**).
   2. In these submissions Congress limits it comments to the extent that the proposed amendments are relevant to Congress’s interaction with the CATSI Act, and accordingly has not sought to comment on all of the proposed amendments set out in Draft Report.
   3. These submissions:
      1. support the continuation of the CATSI Act as a special measure for the advancement and protection of Indigenous people under the *Racial Discrimination Act* 1975 (at 2 below);
      2. sets out which of the proposed amendments from the Draft Report Congress specifically supports (at 3 below);
      3. comments on the proposed introduction of a broader suite of regulatory powers (at 4 below);
      4. proposes further amendments to the CATSI Act not captured in the Draft Report (at 5 below).
   4. Where proposed amendments require an amendment to a corporation rule book Congress supports the use of transitional provisions or other arrangements to avoid the administrative burden of requiring Aboriginal corporations to hold special general meetings to incorporate any changes to their rule books.
   5. Congress has been operating for almost 50 years. It was formed in 1973 to provide advocacy and support to Central Australian Aboriginal people in the struggle for justice and equity. In 1975 Congress evolved to provide a medical service in Alice Springs. Since then Congress has become one of the largest Aboriginal community controlled health services (ACCHS) in Australia providing a comprehensive, holistic and culturally appropriate primary health care service to Aboriginal people living in and nearby Alice Springs, including five remote communities: Amoonguna, Ntaria (and neighbouring Wallace Rockhole), Santa Teresa, Utju and Mutitjulu. It currently employs 420 staff of which 42% are Aboriginal. The recipients of Congress’s services are 16,000 of 18,000 Aboriginal people living in Central Australia.
   6. Previously a Northern Territory Association incorporated under the Associations Act NT, in 2012 Congress incorporated as an Aboriginal corporation pursuant to the CATSI Act and is a ‘large’ corporation with income over 50 million dollars per annum.
   7. Congress also provides governance assistance to the five ‘small’ Aboriginal corporations which perform an advisory function in relation to the programs and clinics run by Congress in remote Aboriginal communities:
      1. Utju Health Service Aboriginal Corporation ICN 4034;
      2. Amoonguna Health Service Aboriginal Corporation ICN 7083;
      3. Mutitjulu Community Health Service Aboriginal Corporation ICN 761;
      4. Mpwelarre Health Aboriginal Corporation ICN 7072; and
      5. Western Aranda Health Aboriginal Corporation ICN 1867,

(together, the ‘**Remote Health Boards**’). The Remote Health Boards do not have any assets or liabilities as their primary function is advisory. For this reason they have all recently applied for, and been exempted from reporting and meeting requirements.

* 1. Congress and the Remote Health Boards enjoy a constructive relationship with the Office of the Registrar of Indigenous Corporations (**ORIC**).

1. **CATSI Act as a special measure under the Racial Discrimination Act 1975 and importance of supporting community controlled sectors**
   1. Congress supports the Draft Report’s conclusion at [2.39] that the CATSI Act continues to ‘fulfil an important role as a special measure, supporting and building the capacity of Aboriginal and Torres Strait Islander corporations’ and therefore supports the continuation of the CATSI Act as a special measure pursuant to the *Racial Discrimination Act* 1975.
   2. We note the Draft Report’s reference to the recent Closing the Gap Report [2.27] – [2.29]. Congress’s view is that the recent 12th Closing the Gap Report 2020 highlights the continuing disadvantage faced by Aboriginal people and is a measurable indicator that the reasons for the enactment of the CATSI Act as a special measure still exist. Congress, as a provider of primary health services to Aboriginal people is disappointed to see that many targets are not on track, for example, the target to halve the child mortality rate by 2018, and closing the gap in life expectancy by 2031.[[1]](#footnote-1)
   3. As beneficial legislation, Congress supports the continuation of the CATSI Act to support Aboriginal corporations to meet their regulatory requirements and fostering them to achieve their objectives.
   4. Congress supports that the CATSI Act remain, and agree with the proposal in the Draft Report that the focus should not be to disband the CATSI Act, but focus on improving its operation including adding further special measures (at [2.39 Draft Report] to ensure that it is meeting its objective as a special measure to support and empower Aboriginal Corporations.
   5. Congress also wishes to stress the importance of Aboriginal community controlled organisations and notes the Priority Reform Area two of the National Agreement on Closing the Gap which came into effect on 27 July 2020 (**National Agreement**).[[2]](#footnote-2) Priority Reform Area two of the National Agreement is ‘**Building the Community Control Sector’**. Parties to the National Agreement, including the Commonwealth Government, State and Territory Governments, and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations, acknowledge that ‘Aboriginal and Torres Strait Islander community controlled service usually achieve better results, employ more Aboriginal and Torres Strait Islander people and are often preferred over mainstream services’ and that Governments:
      1. ‘will commit to building strong Aboriginal and Torres Strait Islander community-controlled sectors and organisations’; and
      2. will ‘implement measures to increase the proportion of services delivered by Aboriginal and Torres Strait Islander organisations.[[3]](#footnote-3)
   6. Any amendments to the CATSI Act should therefore, insofar as the proposed amendments affect Aboriginal community controlled entities, incorporate the commitments and priorities of the National Agreement and should, at its core, be about supporting and promoting Aboriginal community controlled sectors. If Aboriginal community controlled organisations and other CATSI Act corporations are not functioning effectively, the focus should not be on closing them down, but giving the community the right tools and assisting them to effectively govern themselves. The regulatory body and framework should not focus on penalising corporations in a way that reduces them and should instead focus on promoting, enhancing and expanding community controlled entities. Any proposed amendments to the CATSI Act must have the principles of supporting community controlled entities as well as the intent and spirit of the CATSI Act as a special measure to address disadvantage, at their core.
2. **Congress support for amendments proposed in CATSI Draft Report** 
   1. Congress supports the following proposed amendments set out in the Draft Report:

*Redaction of member details*

* 1. Congress supports the removal of member’s addresses from viewing at AGMs.

*Reduction of time required to contact a member to cancel membership*

* 1. Congress supports the reduction of the required amount of time before a membership may be cancelled after attempted contact from two (2) years to eleven (11) months as the current two (2) year requirement is unnecessarily lengthy and onerous. Congress has a large membership base of 1020 members and the proposal to reduce the timeframe to contact members would assist Congress in keeping its member details up to date.

*Inclusion of replaceable rules in rule books*

* 1. Congress supports the proposal that all replaceable rules be included in a corporation’s rule book, and submit that this will help clarify all rules that apply to a corporation, noting that in the event an Aboriginal Corporation elects not to adopt the rule or amends it then this should also be reflected in the rule book. This would create one source where all applicable rules would be available to members and directors which would assist those who are not legally trained or familiar with reading legislation. It would remove the burden of needing to interpret and navigate the CATSI Act and regulations alongside the corporation rule book.

*Related Party provisions*

* 1. Congress supports the proposal that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions, where it would be beneficial to the affected director and in no way detrimental to the members of the Corporation. It also supports the proposal that a threshold of $5000 or such amount be used as a trigger for the related party transaction provisions in the CATSI Act for small corporations but that all related party benefits be included in an annual report that is provided to members and the Registrar.

*Whistleblower protection*

* 1. Congress supports the proposed amendment to expand the protection provisions for whistleblowers under the CATSI Act to be in line with the 2019 amendments to the Corporations Act. This would promote greater consistency in the regulatory frameworks for both CATSI and non‑CATSI corporations.

*Accounting standards*

* 1. Congress supports the proposal to amend CATSI Regulation 23 so that it is clear that reporting entities need to prepare general purpose financial statements in accordance with accounting standards, as opposed to special purpose financial statements.

1. **Comments on proposed amendments in Draft Report**

*Broader suite of regulatory powers*

* 1. Congress understand the intent behind the proposal for a broader suite of lower level regulatory powers more akin to ASIC’s powers in relation to companies. At present, as recognised in the Draft Report at [3.4] – [3.8] the Regulator only has available to it a limited range of responses which at times may result in a heavy handed approach to minor regulatory breaches.
  2. Congress submits that any introduction of a suite of lower enforcement options, including fines to Aboriginal corporations, must be carefully approached as there is serious scope for this to be detrimental to Aboriginal corporations.
  3. Part of the appeal of incorporation as an Aboriginal corporation, compared to another legal vehicle, is the lack of fees, for example for the registration of the corporation or lodgement of reports.
  4. NIAA should always be mindful of the intent and purpose of the CATSI Act as beneficial legislation. If fines are to be imposed, we submit that this be done sparingly on a case by case basis as considered by senior officers within ORIC and never by an automated function. Where fines are imposed there should be a lenient system of appeal which factor in cultural reasons and remoteness of corporations. Part of the purpose of the CATSI Act is to support Aboriginal Corporations; the introduction of fines for minor regulatory breaches, for example, could serve to frustrate and disempower Aboriginal corporations, particularly small corporations or those, like the Remote Health Boards, that do not have any assets or funds to pay fines.

1. **Additional proposed amendments**
   1. Congress proposes the following amendments which are not covered by the Draft Report:

*Ability to remove directors who are in breach of their director’s duties*

* 1. Currently directors are only able to remove another director if they have missed more than three meetings without a reasonable excuse (s249.15 CATSI Act), the CATSI Act however does not provide for the removal of directors by other directors on the basis of that directors serious breach of statutory and fiduciary duties. Congress submits that provision should be made in the CATSI Act and subsequently included in a corporation’s rule book so that directors who are in breach of their director’s duties can be removed by other directors. This is a fundamental aspect of good governance. Currently if directors are in breach of their duties it is difficult to remove them from their appointment which poses a risk for a corporations due to the actions of individual directors and holds corporations hostage to the actions of those individual directors.
  2. We submit ORIC should have more power to intervene, regulate and investigate when directors are in breach of their director’s duties including by supporting directors to remove a director who is in breach of their directors’ duties. The regulator should take a more active involvement in these matters particularly when director’s duties are being breached rather than leaving the onus on Aboriginal corporations to resolve these issues.
  3. Congress submits that the board of directors upon a prior notification to and approval by ORIC, should be empowered to remove directors who are in breach of their duties. This will ensure maintenance of the effective operation of business and good governance.
  4. The current requirements whereby a director who is removed by other directors can object and cause a general meeting to occur is impracticable. For a large corporation the effect of this rule is to expose members to disputes at the board level which then jeopardises the reputation and effective running of an otherwise successful corporation, as a result of one director who is in breach of their duties. Congress submits that this does not align with the priority of the National Agreement to support community controlled sectors. In order to better support community controlled organisations ORIC should support directors to remove other directors who are in breach of their duties, without the potential for a members meeting being called.

*Members and directors should not be employees of corporation unless valid reason*

* 1. Congress proposes that a new replaceable rule be introduced where members and directors of the corporation cannot be employees of the corporation unless an exemption is given. This assists in the good governance of the corporation as it ensures the separation of the operation of the corporation and its members and governance, and reduces conflicts of interest.
  2. At present, unless a corporation’s rule book specifically precludes staff being members of the corporation, the status quo is that staff can apply to be members which puts the onus on Aboriginal corporations to resolve this issue. We submit it should be the other way around whereby, to promote principles of good governance, staff should not be members or directors of a corporation unless there is a valid reason to justify this. Exemptions to this rule could, for example, apply in small remote communities’ of less than 500 hundred people where it is difficult to attract employees.

1. National Indigenous Australians Agency (NIAA), *Closing the Gap Report 2020*, NIAA, 2020, available from <<https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>> [accessed 20 September 2020]. [↑](#footnote-ref-1)
2. Joint Council on Closing the Gap, National Agreement on Closing the Gap, Priority Reforms https://www.closingthegap.gov.au/priority-reforms. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)