Submission to National Indigenous Australian Agency

Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 Exposure Draft

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INTRODUCTION

This submission is in response to the issues raised by the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 Exposure Draft. The aim of this submission is to provide an informed debate on some key issues considered by the proposed Bill. Most of the changes in this exposure draft are welcomed but some provisions should be reconsidered.

If any of the responses require further explanations, please contact Associate Professor Marina Nehme at m.nehme@unsw.edu.au.

SUMMARY OF OBSERVATIONS MADE IN THIS SUBMISSION

This submission makes the following recommendations:

- Introduction of enforceable undertaking is a step in the right direction. However, it is important to remember the purpose of this sanction and the ability of ORIC to include monitoring terms in the undertaking itself. The sanction is based on a relationship of trust and consequently compliance monitoring should maintain a dialogue based on this trust.
- The use of infringement notices has limited benefits.
- Allowing access to the full register when a redacted version is available should be in the hand of the directors.
- Joint venture reference should be removed from Part 4 as the part does not deal with joint venture. Allowing for the establishment of subsidiaries between corporations is not the same as joint venture.
- The provisions of related parties transactions have been simplified but further simplifications are needed.
- Proposed provisions regarding independent directors may be amended to include the appointment of these directors by members to ensure transparency and accountability of the governance regime.
- The presumption of insolvency may include similar a provision to s 459C of the *Corporations Act 2001* (Cth).

Comments Regarding Part 2- Powers and Functions of Registrar

Enforceable Undertaking

As mentioned in my previous submission regarding the CATSI Review, the introduction of enforceable undertaking is welcomed. This sanction will allow the Registrar to deal with certain alleged conduct in a restorative healing way that is not currently possible.

However, I question the need to add at the end of s 453-1(1), the following provision:

> (f) a suspected breach of any of the terms of an undertaking given under section 439-25.

While this provision is being implemented to ensure that there is no doubt that ORIC may monitor enforceable undertaking, the provision goes against the spirit of the sanction. The sanction, for it to be relied on, requires a degree of trust between the regulator and the promisor. This trust means that there is an expectation that the parties to the undertaking will comply with its terms and in case of non-compliance communicate freely regarding this issue to be able to reach an appropriate compromise. Further, the terms of the undertakings can and really should include monitoring provisions where the promisor reports to the regulator regarding it compliance status. As part of this compliance, the regulator can include terms that allow it to review the books of the corporation to assess levels of compliance. Such a promise in the undertaking goes beyond the proposed legislative provision and may be more effective. Lastly, even without such terms in the undertaking, a suspicion of non-compliance with the terms of undertaking may trigger s 453-1(a) and (b).

Notice to Produce Books

The proposed introduction of s 453-2 is welcomed.

Infringement Notices

The infringement notice provisions have been strengthened and made robust under the proposed changes in the Exposure Draft. However, it is currently unclear which areas will be targeted by an infringement notice as this is left to be determined by regulation. Infringement notices should not have more than a marginal use in ORIC's enforcement regime. The majority of Aboriginal and Torres Strait Islander Corporations (ATSI corporations) are not-for-profit entities and are reliant on grants to function. Further, they are providing, in many instances, essential services to their community. Accordingly, their funds should not be funnelled to pay infringement notices. It is important to remember that the large majority of organisations are trying to do the right thing. An imposition of an infringement notice may be counterproductive. ORIC should focus on its educative role when dealing with ATSI corporations. Further deterrence attached to infringement notices is really limited. Lastly, an infringement notice does not rectify the alleged breach as it does not have educative purpose. It may be viewed as a draconian cost for business and may limit cooperation between the regulator and the entities.

Comments Regarding Part 3- Membership Applications, Member Contact Details and Electronic Communication

The provisions in this part are welcomed.

Access to Full Register While Redacted Copy Exists

It is a welcomed move that redacted registers are currently being introduced by the exposure draft. However, decisions to provide access to full register while a redacted copy exists should be left in the hand of the directors of the ATSI corporation and not the Registrar for the following reasons:

- The directors of the corporations would have a better understanding than ORIC of the reasons behind the redaction of information from the register and, accordingly, are in a better position to make a decision regarding this matter;
- Taking this power away from the directors and giving it to the Registrar may be viewed as a paternalistic approach and a move that disempowers indigenous people from running their businesses effectively.

Comments Regarding Part 4 – Subsidiaries and Joint Ventures

This submission welcomes the changes put forward in Part 4 (subsidiaries and joint ventures) However the provisions, in that part, relate to subsidiaries (permanent arrangement to set up ties between corporations) rather than joint venture (contractual agreement solely focused on sharing of products for a period of time). I would recommend the removal of joint venture from the title.

As mentioned in my previous submission regarding this matter, The *CATSI Act* should not legislate provisions regarding joint venture. This form of business is not a separate legal entity but is a contractual arrangement between entities focused on sharing of products. Consequently, the Registrar and the legislation should not take part in this matter as it relates to freedom of contract.

Comments Regarding Part 9 – Related Parties Transaction

The proposed provisions regarding related parties transactions are an improvement to the existing regime. They introduce a new exemption (small amounts given to related parties) and simplify the procedure attached to related parties transaction.

However, the proposed changes still apply the same requirement to all ATSI corporations. The approach needs to be nuanced especially in small entities. For small entities, this provision, even with its simplification, is not appropriate. Consequently, I recommend that for smaller entities, a parallel regime may apply to them which only requires the following:

> Directors have to disclose related party benefit to members prior to the benefit being provided. If members are concerned about this, they will have a period of time to request for more clarification and for the matter to be put forward for members' approval.

This will remove red tape attached to related benefit provisions while providing the necessary protection to members in small entities.

Further, exceptions should be introduced linked to urgent repairs (which may exceed $5,000 – the small amounts exemption. For instance, a plumbing emergency may go beyond the $5,000 limit).

Additionally, it is important to remember that related parties transaction provisions are not an island of their own. They complement directors' duties. Consequently, if directors are entering into inappropriate transaction, they will be held accountable for breaches of conflict of interest and/or the duty to act in the best interest of the corporations. As a result, related parties transaction is not needed for small entities.

Comments Regarding Part 11 – Independent directors

Independent directors may play an important role in the management of a corporation. Generally, they are defined as directors who are unaffiliated to the entity and do not have a material or pecuniary relationship with the company or related persons (such as directors).

The deletion of subsection 246-1(3) opens the door wide for the appointment of such independent directors and this is a positive move.

However, the addition to s 246-15 is problematic. From an accountability and transparency perspective of corporate governance, members should be able to vote on the appointment of all directors, be it independent or otherwise. The current proposal is restricting that right when there is no reason for such a restriction. If the directors believe that an independent director is needed, then they should be able to put forward that name to the members to vote on such an appointment. This will enhance the transparency of the corporation and allow the members to understand the added value in having a particular person as a director.

Allowing for such a matter, does not preclude the introduction of s 246-17. Directors may still be able to also appoint independent directors on ad hoc basis when they need a particular skill to manage their corporation. However, that right should not be taken from the members of the corporations for purpose of transparency and accountability.

Lastly there is no need to have a different rule regarding duration of appointment for independent and non-independent directors. Both should be the same. The corporation when appointing the independent director may decide on a shorter period however that decision should be left to the corporation as it is best placed to determine its own needs.

Comments Regarding Part 17 – External Administration and Deregistration

The proposed provision in this Part simplifies the current regime which is to be applauded.

I would recommend revisiting the proposed change under s 526-12: presumption of insolvency.

A presumption of insolvency is important to facilitate liquidation of an insolvent corporation. However, the current proposal mirrors a presumption of insolvency under s 588E of the *Corporations Act 2001* (Cth). This is an issue as that presumption operate for insolvent trading by directors, voidable transactions and may also help liquidators establishing the insolvency of the company at a particular time.

There are other presumptions under s 459C of the *Corporations Act 2001* (Cth) that may have more merit in being used in the context of ATSI corporations. These presumptions are specifically targeted to the winding up of an insolvent company.

CONCLUSION

The changes proposed by this exposure draft make key changes to the *CATSI Act*. However, some of the suggestions need further consideration and amendments.

Associate Professor Marina Nehme

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