

9 October 2020

CATSI Act Review
National Indigenous Australians Agency
PO Box 2191
CANBERRA ACT 2600

By email: CATSIActReview@niaa.gov.au

Dear Sir/Madam

RE: ETNTAC response to the Corporations (Aboriginal and Torres Strait Islander) Act 2006 - Draft Review Report

The Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC (ETNTAC) welcomes the opportunity to provide this response to the Corporations (Aboriginal and Torres Strait Islander) Act 2006 -Draft Review Report (CATSI Act Report).

ETNTAC holds native title for and on behalf of Esperance Nyungar native title holders and in addition to its functions as a Prescribed Body Corporate (PBC), is also the head company in the Esperance Nyungar Corporate Group. We have included an organisation structure chart with this submission as it demonstrates the corporate complexity of ETNTAC's operations and also provides a useful example to consider in relation to how native title groups are often regulated under different statutory regimes.

ETNTAC notes that it has been challenging to respond to the CATSI Act Report in the time provided and that it does not have the time or resources to undertake a detailed review of the CATSI Act or provide detailed submissions. ETNTAC suggests that other PBCs will be in a similar situation and therefore the National Indigenous Australians Agency (NIAA) should consider designing a consultation process that targets PBCs specifically and that these consultations should be focused on the particular nature of PBCs' corporate operations and the complex governance requirements that underpin native title.

ETNTAC have been provided with a copy of the National Native Title Council's draft submission and concurs with much of the analysis and the comments made. That being said, the NNTC's primary role is as the peak body for native title representative bodies corporate rather than registered native title bodies corporate and the Commonwealth should consider how PBC's are represented in policy matters that affect them, either through the NNTC or through a new peak body that has the interests of PBCs as its primary focus.





In particular ETNTAC agrees with the NNTC's position that PBCs are at present not appropriately resourced to fulfil their statutory and legal function and that any review of the CATSI Act and its application to PBCs should, as a first step, take account of capacity constraints and the lack of resources available to comply with compliance and regulatory requirements, before considering how those requirements should be improved to enhance the effectiveness of regulation.

ETNTAC would also support the NNTC's position that the various provisions which apply to PBCs should be harmonised and brought together in one place to ensure compliance and regulation requirements are clear and are appropriate for the specific nature of PBC's operations.

ETNTAC notes that every Aboriginal and Torres Strait Islander Corporation is unique and will have its own set of governance challenges to manage and will operate in very different cultural, climatic and economic environments. It is therefore very difficult to make specific comments about specific proposals in relation to the reform of the CATSI Act and the implications of amending specific provisions or rules is often difficult to predict.

ETNTAC does support enhanced flexibility in the CATSI Act and online mechanisms in the CATSI Act which improve efficiencies and allow corporations to better tailor their decision making and governance processes to their particular regional and operational circumstances. ETNTAC suggests that this should be a particular area of focus for ORIC in relation to building capacity as enhanced IT and virtual meeting capability, particularly in remote areas, could dramatically increase efficiencies and cost effectiveness.

ETNTAC makes the following further comments:

1. Capacity Building

It is important that there is investment in building the capacity of Indigenous directors and their understanding of their obligations as directors, particularly in a native title context. ETNTAC notes that often lack of capacity is a function of a lack of resources and notes the need for the Commonwealth to invest in the operational and business capacity of PBCs to ensure they are able to fulfil their legal and compliance obligations but also support the economic, cultural and community aspirations of traditional owners. ETNTAC notes that functional and appropriately resourced PBCs increase the efficiency and functionality of native title and allow native title to be leverage to create enhanced economic, social and cultural outcomes for Indigenous people.

2. Powers of Registrar and Rights of Members

ETNTAC supports measures in the CATSI Act aimed at protecting the rights of members but is cautious about any additional powers that would be proposed to be granted to the Registrar to intervene in a corporations affairs. ETNTAC notes that the role of the Registrar should be to work with and build the capacity of corporations and also to assist educate members in relation to the



challenges faced by corporations. Any decision by the Registrar to step in or appoint a registrar should be an action of last resort.

ETNTAC notes that there may be some role for Native Title Representative Bodies to be involved in dispute resolution and that it is important that any decision made or actions taken by the Registrar are made in a regional context and with a solid understanding of the particular nature of the issues in dispute. ETNTAC further notes that issues around membership are complex, particularly in the native title context and would benefit from review with the particular circumstances of PBCs in mind.

3. Reporting Requirements

ETNTAC supports strong reporting requirements on Aboriginal and Torres Strait Islander Corporations but notes that any reporting should be proportionate to the size and scale of operations within a corporation and should not be more onerous than that required by ASIC of non-Indigenous corporations.

ETNTAC notes that there are a number of recommendations around executive and director remuneration in the draft report and whilst supportive of measures to increase transparency, ETNTAC also notes that the consequences of any obligations to report on executive and directors remunerations needs to be carefully considered, particularly if it makes attracting and maintaining quality executive staff more difficult in Aboriginal and Torres Strait Islander corporations. ETNTAC does agree that the quality and performance of executive staff in PBCs is critical and that there should be a concerted effort to build the capacity of Indigenous people themselves so that they are able to take executive positions in their own corporations.

4. Provisions relating to Registered Native Title Bodies Corporate

As referred to earlier, ETNTAC supports the NNTC's position that there needs to be a separate chapter or division in the CATSI Act which applies to PBCs.

Whilst it is important that there is transparency around native title monies, it is also important that native title corporations are able to make decisions commercially in a timely manner to optimise the financial position of members and native title holders. Any measures that are designed to improve accountability and transparency around the use of native title monies need to be carefully considered and balanced against the need for native title corporations to make decisions in a commercial manner and to not be disadvantaged because of their Indigenous status.

ETNTAC also supports the NNTC's comments in relation to simplifying and harmonising legal and regulatory obligations around the management of native title monies and benefits. Whilst each native title corporation is different, there are clear synergies and commonalities in the implementation of benefits management structures which could be developed and made available to reduce costs and clarify the regulation of native title monies and benefits.



5. Dispute Resolution

ETNTAC supports simplified and culturally appropriate dispute resolution processes and in particular the NNTC's proposals which recommends a suite of dispute resolution options including processes that utilise independent Aboriginal and Torres Strait Islander alternative dispute resolution experts. ETNTAC also notes that any outside efforts to resolve disputes needs to be mindful of the regional context of the dispute and also, for native title disputes, the ethnographic and legal basis of native title determinations.

ETNTAC does not support the current proposals around a system of arbitration for disputes.

6. Special Administration

ETNTAC supports the comments of the NNTC in relation to Special Administration, Insolvency and Winding Up.

ETNTAC notes the special status of PBCs and recommends that there needs to be special provisions in relation to how issues around insolvency or dysfunction are addressed within PBC. Any measures which allow PBCs to be placed into special administration needs to be balanced against the important role of PBCs in managing native title and cultural impacts and the consequences of decisions that are made during period where an administrator may be in control.

Finally ETNTAC notes that it has been subject to a number of ORIC examinations by virtue of its size and that such examinations are onerous and resource intensive. The fact that examinations have occurred has also created misunderstanding in the community which confusion around the reasons for such examinations occurring. Consideration should be had to how often routine examinations are conducted and also how such examinations are reported, particularly where there are no issues or irregularities uncovered.

Please do not hesitate to contact me if you have any further questions.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Peter Bednall', located below the text 'Yours sincerely,'.

Peter Bednall

Chief Executive Officer

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