



*Keriba Gesep; Ngalpun Mabaygal; Yumi Time  
Our Homeland; Our People; Our Time*

2 October 2020

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

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

Dear Sir / Madam

## **Response to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* Draft Review Report**

### **Background**

Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation (“GBK”) is the peak body of all Registered Native Title Bodies Corporates (“PBCs”) in the region. GBK is a not for profit organisation that was registered with the Office of the Registrar of Indigenous Corporations (“ORIC”) in 2012. GBK has been operating with a volunteer board, and minimal support and funding to progress the aspirations of First Nations Peoples.

In the region, the Federal Court of Australia has recognised 26 determinations of exclusive native title rights and interests covering 18 inhabited islands, numerous uninhabited islands and 44,000km<sup>2</sup> of non-exclusive native title rights and interests of sea country. Our native title rights and interests recognise that our society has existed since time immemorial governed by our laws and customs unique to us. Those laws and customs govern our daily life and the use and ownership of land and waters of our communities.

Each PBC within the five nation groups Kemer Kemer Meriam, Gudamalualgal, Malualgal, Kulkalgal and Kaiwalagal are a member of GBK. Torres Strait and Aboriginal Land trusts are also eligible to become members. This membership base provides us with an unparalleled level of cultural authority in the Torres Strait Region from both Aboriginal law and custom and Torres Strait Ailan Kastom.

The Torres Strait is a unique part of Queensland and Australia. Whilst all communities have their own unique challenges, strengths, and opportunities, we are the only part of Queensland and Australia that shares an international border and is directly impacted by rights protected under the Torres Strait Treaty. As our organisation is driven by traditional owners, we are best placed to understand the complexities of our region. We want to drive initiatives in a strengths-based, community-led approach to enable positive change, improve national statistics of inequality and build sustainable communities.

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As the peak body of all Registered Native Title Bodies Corporates (“PBCs”) in the region, GBK is a demonstration by the traditional owners that we have organised ourselves for political, economic, social, and cultural enhancement. Our role brings Torres Strait cultural, professional integrity and respect to all dealings with traditional owners at community and regional levels. GBK’s involvement in consultations and developments in the region ensures that our traditional owners are informed and involved in decisions affecting them and their lands, seas, and resources. This enables them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs.

### **National Native Title Council Response**

As a member of the National Native Title Council (“NNTC”), we have had an opportunity to review their response and endorse the suggestions they have put forward. However, as the peak body of all PBCs in the Torres Strait, we have some additional points we need to make given the challenges we face in our unique region.

### **Format and timeframe**

We would like to echo the sentiments of the NNTC regarding the inadequacy of the consultation period provided by NIAA. During this period, our region was subject to the Remote Communities Determination. This Determination imposed significant restrictions on travel between communities in our region and on how our communities went about their daily lives.

With many of our PBCs holding native title since the early 2000s, our PBCs have extensive experience in operating under the CATSI Act. However, during this time, we have been unable to spend time with each of our PBCs to explain the intent and purpose of the review and seek their input. As such, we agree that the timeframe provided failed to take into consideration the unique circumstances we, the rest of Australia and the world were grappling with.

### **Separate Division for RNTBCs**

We adopt and support the position put forward by the NNTC regarding the need for recurrent funding for PBCs. Rather than greater oversight of PBCs, there needs to be greater investment in training and capacity development of the directors of PBCs and their staff. PBCs are a statutory construct and have no choice in being incorporated under the CATSI Act or regulated by ORIC. This is a huge burden carried by many directors on a volunteer basis.

PBCs are unique from other Indigenous corporations with a particular set of legal obligations under the *Native Title Act 1993* (Cth) (“NTA”), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) and the CATSI Act.

For example, the NTA sets out a framework and procedures for PBCs regarding the holding and managing of native title. In practice this has produced and perpetuated legal relationships of great complexity. This includes setting out specific functions and obligations of PBCs.

By law, the PBC cannot enter an ILUA unless it has first consulted with, and obtained the consent of, the affected common law native title holders. The decision about whether to give that consent must be made in accordance with any traditional law decision-making requirements.

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In the Torres Strait, traditional laws and customs require the common law native title holders for the parcels of traditional land affected by, to be identified, informed, and consulted before they can give their consent. All land on the islands in the Torres Strait, including those areas covered by existing infrastructure, and in the intertidal zone, is owned by named individuals who have inherited the land on behalf of their families.

Identification with a family provides the main avenue by which any individual claims ownership of land. Areas of land are defined by boundaries and are named. Permission must be obtained from the responsible landowner before any land can be utilised for any purpose by a person other than the landowner or her/his family who may be holding the land in trust.

The land was owned by ancestors and is inherited by their descendants. Knowledge about places is passed on through naming, by the recounting of stories which connect significant sites to ancestral people and beings, and by regular use. People are connected to named places through their membership of families. Permission to use someone else's land, needs to be obtained from the owner. Land should not be used until permission has been granted. Failure to recognise ownership of land and resources results in disputes.

It is on the strength of these continuing laws and customs that the Torres Strait Islanders have successfully settled native title of almost all the land and sea over which they assert ownership and secured a level of autonomy that is unique in Australia.

The PBC is not merely the external contact point for parties wanting access and native title lands or to acquire an interest in the area. The PBC must also manage the communal title in a manner that accords with and allow space for the operation of traditional laws and customs.<sup>1</sup>

Within any society, the distribution of property to individuals is mediated against community needs for resources. The duality of navigating the private interests of individual landholders and the communal title to the land requires the PBC to play a mediating as well as a representative role.

This poses a difficult task for directors of the PBC for to ensure that its governance has legitimacy it must operate consistently with traditional law and custom. The PBC is constantly required to manage competing interests between the needs of the community and preserving the native title rights and interests of the common law native title holders.

For these reasons we support the NNTC's proposal that the review should include a separate division of the CATSI Act for PBCs. Having one division that captures the additional information relevant to PBCs would assist PBCs in navigating such legally difficult terrain. A separate division of the CATSI Act for PBCs would also streamline regulation powers specific to PBCs and reduce consultation costs for future reform processes targeted for PBCs.

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<sup>1</sup> Toni Bauman, Lisa M Strelein and Jessica K Weir (eds) *Living with native title: the experience of registered native title corporations* (AIATSIS, 2013).

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## **Transparency around native title monies**

We support the need for greater transparency in decision-making and recording/reporting obligations around the management of native title payments and monies (e.g. native title compensation payments).

We agree that there needs to be an improved structure PBCs supports the transparent and accountable management of native title monies for PBC's economic and social development needs.

## **Benefit management structures**

We agree that there is a need for specific corporate structures for native title benefits. We note that there needs to be a better and less complex option available for PBC's to be able to use the native title monies to support economic and social development for their communities.

## **Recording, reporting and decision-making**

We do not support the need for greater and more detailed regulations and requirements to achieve transparency and accountability.

We recommend that there needs to be an appropriate balance between increased regulations and reporting obligations. This balance needs to ensure that PBC members and common law holders maintain their right to self-determination on how they manage their native title benefits and monies.

We do not support the suggestion that decisions about how native title monies can be invested or utilised should be defined as a 'native title decisions' under the PBC Regulations. The PBC Regulations currently includes a lengthy process for consultation and consent to make native title decisions. The consultation and consent process are not suitable for making frequent decisions at relatively short notices regarding the use of native title benefits and monies.

We recommend that an alternative and time-effective process needs to be developed to ensure that decisions about native title benefits and monies are made (e.g. internal policies and procedures for consultation and consent).

We suggest that ORIC should provide face-to-face advice and training to PBCs about their compliance with the PBC Regulations. This will ensure that PBC members and common law holders will understand their obligations under the PBC Regulations. More information is needed to address the limit of ORIC's regulatory oversight.

## **Regulatory framework and enforcement powers to have consideration to the traditions and circumstances of Aboriginal and Torres Strait Islander people**

In theory we support this suggestion. However, as set out above the role of PBCs within communities is complex. Before we can provide further comment we would like to see if proposed changes will provide sufficient flexibility that these can be tailor to suit each PBC and the laws and customs of their native title holders.

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## **Capacity building**

We recommend that ORIC could provide resources to us a regional peak body for the PBCs in the Torres Strait. We are best placed to support our PBCs to build their capacity and capability. This is because we have an intimate understanding of the challenges and obstacles they face with their responsibilities as PBCs under the NTA and the PBC Regulations. We also have firsthand experience of the challenges and constant struggles in complying with the reporting and governance requirements of the CATSI Act given our limited access to suitable resources and the remoteness of our region.

## **Members**

It is important for PBCs who are remote to be able to use a variety of online and physical communication methods to best suit their members. Many of the members of our PBCs must move to the mainland for work or health reasons. Depending on where the members are located, each of our PBCs employs a variety of methods to suit the varying demographics of their members.

We believe that the personal information of our members and our PBC members should be confidential. This is to ensure the personal safety and rights of members are protected. We believe that this information should be confidential to the PBC only and not be shared with ORIC. This information can be provided to ORIC on request and with permission from the member.

Given the remoteness of our region and the limited access to resources satisfying some of the timeframes in the CATSI Act proves difficult. We do not support introducing a statutory timeframe for members to consider membership applications. This will create an unnecessary burden for our PBCs. Boards require time and resources to consider membership applications and this needs to be supported.

## **Meetings**

We support the recommendation that small corporations can pass a resolution to postpone their AGM up to three years for those corporations that have little money or activity to report. Many of our PBCs which hold native title over uninhabited islands have sought exemptions to allow them holding AGMs every second year. This has worked well as it has been able to reduce the burden on these PBCs who receive very little support and resources to function.

We support the recommendation to include postponement of meetings to accommodate cultural matters, such as sorry business. This is something we are acutely aware of in the Torres Strait. However, any wording should allow for each organisation flexibility to determine the appropriate timeframe. ORIC could provide a factsheet or supporting documentation that provides guidance on what a reasonable unexpected event may include and a maximum timeframe.

## **Rule Books**

We believe that amendments to rule books need to provide the most flexibility for individual corporations. For example, some PBCs prefer lots of detail in their rule books particularly around the steps for dealing with a decision that affects native title land or how to resolve a dispute between native title holders about land ownership. Other PBCs prefer a simpler rule book with more detail provided in their accompanying policies and processes. This should be up to the PBC and their native title holders to make this choice and amend their rule book to suit them.

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## **Officers**

We support the NNTC's submission that the provision of director and senior executive remuneration, work history and other personal information should not be mandated and should only be provided on a voluntary basis. We support the NNTC's recommendation that if members wish to know and approve director remuneration, they can add a clause to their rule book that includes member approval for remuneration (s252-1(2)).

## **Related party provisions**

This is a complicated issue in our small communities. We have some concerns with the practical implementation of the arm's length approach. This is because in our communities many of our directors and members wear many hats and are often involved in multiple organisations or entities that provide services to our communities. Approval for entering into a commercial agreement with an entity that may be involved in the RNTBC, at a general meeting is not practical or timely. In this case, an exemption from the Registrar would be a suitable approach to ensure that local Indigenous businesses are not discriminated against by the CATSI Act.

## **Appointment of Directors and other Director requirements**

We did not have enough time to workshop this with our members to see how including these amendments would be a benefit or create another challenge. We are interested in considering recommendations put forward by other PBCs.

## **Sharing of information for research purposes**

We do not support a proposal that 'protected information' collected by the Registrar may be shared more broadly in de-identified form with researchers, academics, and peak bodies. This information belongs to the corporations and their members. Any requests for access to this information should be made to the corporations. ORIC could develop an ethics or researcher policy guide that could be adopted and used by corporations.

## **Whistle-blower protection**

We support the whistle-blower provisions being expanded in line with those introduced in the *Corporations Act* in 2019 to deter corporate and financial misconduct and wrongdoing. Any amendments should include an appropriate exemption that is comparable to the exemption provided under the *Corporations Act* for companies limited by guarantee that are operated on a not-for-profit basis and have a consolidated revenue of less than \$1 million.

## **ORIC examinations**

We support amending the CATSI Act to require the issuing of finalisation letters and compliance outcome letters to clarify current and proposed practice by ORIC and the Registrar in relation to examination outcomes under the Act.



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## **Auditor provisions**

We support amending the CATSI Regulations to outline a suitable process for corporations to follow when they need to replace an auditor who has resigned.

We support the recommendation by the NNTC for an appropriate amendment to the CATSI Act to provide auditors with qualified privilege in relation to specific actions they may undertake in the course of their duties.

## **Dispute Resolution**

We support the suggestion that ORIC have powers to arbitrate disputes that are unable to be resolved internally by the PBCs that relate to governance issues or compliance with the CATSI Act. For disputes that relate to intramural issues around land ownership this is best dealt with by the PBC and the native title holders developing their own internal process that reflects their laws and customs.

We recommend that PBCs should be able to voluntarily decide whether to use ORIC's arbitration services. We also suggest that ORIC would need to have independent Aboriginal and Torres Strait Islander dispute resolution experts to facilitate/assist with the arbitration to ensure it is culturally appropriate for PBCs.

We agree with the NNTC's submission that resourcing is a major factor for successful dispute management. Dispute management can be resource intensive and these costs need to be kept in mind when drafting any dispute management or resolution clauses. In addition, PBCs need to be adequately resourced to deal with disputes in a culturally appropriate way of their choosing.

## **Conclusion**

We thank you for your consideration of our submission.

For further information about this submission please contact Rachelle Singleton on 0417 188 726 or email [rachelle.singleton@gbkcorp.com.au](mailto:rachelle.singleton@gbkcorp.com.au).

Au Esoau, Koeyma Eso, Many Thanks



Lui Ned David

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