

Your Ref:  
Our Ref: 049400

2 October 2020

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

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

To whom it may concern,

**Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) Draft Review Report**

We refer to the above matter and welcome this opportunity to comment on the *Corporations (Aboriginal and Torres Strait Islander Act 2006 Draft Review Report* (the “**Report**”) to the National Indigenous Australian’s Agency (“**NIAA**”).

Marrawah Law is a Supply Nation certified Indigenous legal practice recognised nationally as a leader in advising Aboriginal and Torres Strait Islander peoples<sup>1</sup>. Our lawyers have significant experience in advising and representing both Aboriginal and Torres Strait Islander peoples and proponents in matters concerning property, particularly native title, Aboriginal and Torres Strait Islander cultural heritage, and commercial matters. We provide legal services to many individuals, Aboriginal and Torres Strait Islander corporations, prescribed bodies corporate, non-for-profits, trusts and other corporate entities, as well as to numerous government entities.

Any amendments to the *Corporations (Aboriginal and Torres Strait Islander Act 2006 (Cth)* (the “**CATSI Act**”) would have an impact on the day to day activities of our clients. We consider it pertinent to provide this submission on behalf of our numerous Aboriginal and Torres Strait Islander corporate entities and the Registered Native Title Bodies Corporate (“**RNTBCs**”) we work with.

## 1. Feedback on the Report

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<sup>1</sup> Doyle’s Guide 2019- Leading Native Title Firm (second tier) and Leading Native Title Practitioners (recommended).



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We note that the Report was highly comprehensive and content dense. Some of the questions that the NIAA was seeking feedback on were easily overlooked as they were included in the body of the text. Many of our clients are in remote or discrete communities, with English as a second or third language. The highly detailed Report was not drafted in a way that our clients found easy to understand or provide feedback on.

We struggled to get our clients to review the draft report and provide us with any content. To assist our clients to be able to understand the importance of this review and have their concerns raised we had to prepare a simplified version. It would have been beneficial if the Report included a survey or factsheet to outline the questions in a simple manner for participants to provide a response.

## 2. Timeframe to review the Report

The consultation period was held during the nation-wide COVID-19 restrictions. Due to the restrictions, it was difficult to hold regular meetings with our clients to discuss the Report and receive meaningful feedback to contribute to the submissions. Given the significance of what was happening in the world, we found it difficult to get our clients to prioritise the report as many of them were involved in discussions about how to keep their communities safe with the constant changing of restrictions. As such, the review period was insufficient and even with the small extension of time has not taken into account the significant impact COVID-19 has had on the time and resources of many RNTBCs and not-for-profit CATSI Act corporations. The information sessions provided by NIAA were offered late in the consultation period and should have provided times further apart to give participants more opportunities to become familiar with online sessions and to understand the content given the significance of the Report.

The United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”) promotes the right of Indigenous peoples to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures. The UNDRIP also seeks to guarantee free, prior and informed consent before actions take place which will impact on the rights of Indigenous people.

The timeframe provided for consultation was not sufficient and does not take into consideration the importance of Aboriginal and Torres Strait Islander people’s right to free, prior and informed consent. We note that many of our clients were unable to put together their own submissions in the short timeframe provided by NIAA given the country and the world was grappling with a pandemic.

We have incorporated the concerns of some of our clients who were able to provide feedback to us in the timeframe. Even with the additional few weeks, only small handful of our clients felt they had enough of understanding of what the Report was asking to provide a response.

## 3. Objects of the CATSI Act

- (a) Do you think the CATSI Act works to support the needs and expectations of Aboriginal and Torres Strait Islander people?
- (b) Do you think the CATSI Act puts corporations on the same level with companies incorporated under the Corporations Act?
- (c) Do you think there is a need to change the powers of the Registrar that lets them take into consideration the traditions and circumstances of Aboriginal and Torres Strait Islander people?
- (d) Is the CATSI Act flexible enough to meet the needs of a whole range of different Aboriginal and Torres Strait Islander corporations?
- (e) How can the Registrar and ORIC better support corporations to pursue economic and community development opportunities?

- We do not agree that the CATSI Act in its current form works to support the needs and expectations of Aboriginal and Torres Strait Islander people. Rather, it has been interpreted and applied in a way that creates barriers and issues for Aboriginal and Torres Strait Islander people to achieve economic independence.
- The CATSI Act is largely modelled from the *Corporations Act 2001* (Cth), creating a situation where many of the replaceable rules and requirements are not culturally appropriate and at times creates tension with traditional law and customs.
- We agree that there is a need to change the powers of the Registrar. Any change to the Registrar's powers needs to ensure that the traditions and customs of Aboriginal and Torres Strait Islander peoples' are respected and protected. We look forward to reviewing and providing feedback on these proposed amendments.
- We suggest that there needs to be additional special measures in the CATSI Act to provide better support for social and economic opportunities for CATSI corporations and RNTBCs.
- In our experience, entities incorporated under the CATSI Act are not on an even playing field with entities incorporated under the *Corporations Act 2001* (Cth). There is also a lack of awareness amongst government organisations regarding CATSI corporations. This in some circumstances has created a perception that they are somehow inferior to other corporations and are not geared for economic development.

### 3.1 Protection for members

Should the Registrar have greater oversight of Prescribed Bodies Corporate ("PBCs") including the power to intervene in disputes?

- Rather than greater oversight of PBCs, there needs to be greater investment in culturally appropriate 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.
- We recommend that the powers and functions of the Registrar should not be based on the power to intervene, but rather be made available to CATSI corporations if they choose to request assistance. There should be a clear process including details as to who can request the assistance and each step to include a timeframe as part of the process.

### 3.2 Support for corporations

(a) Do changes need to be made to better support corporations operating in remote or very remote areas?

(b) Should governance structures include traditional and cultural customs of Aboriginal and Torres Strait Islander people?

- We support the use of technology and online measures to reduce meeting costs, increase flexibility and options available to CATSI corporations to manage their affairs. These options may assist CATSI corporations in remote and regional areas depending on their accessibility to internet and technology (e.g laptops, tablets, smartphones).
- We recommend that the CATSI Act allow CATSI corporations to be able to explore the following technology options:

- (a) Online communications such as social media;
- (b) Virtual meetings (e.g Microsoft Teams, Zoom);
- (c) Online voting systems for decision-making (e.g SurveyMonkey, online polls);
- (d) Online reporting forms via the ORIC website; and
- (e) Information sessions or workshops by ORIC held virtually.

### 3.3 Capacity Building

- (a) How can the Registrar and ORIC further develop the capacity of corporations?
- (b) What can the Registrar and ORIC do to make sure that directors and members understand their roles and rights as well as those of others?

- We recommend that ORIC could provide culturally appropriate resources to support CATSI corporations and RNTBCs to build their capacity and capability by holding face-to-face information sessions and workshops and providing factsheets on:
  - (a) Legal obligations under the CATSI Act and NTA;
  - (b) Distinction between CATSI Act compliance and native title functions;
  - (c) Replaceable rules for rule books;
  - (d) Dispute management resources and resolution processes to support CATSI corporations and RNTBC's with internal disputes;
  - (e) RNTBC specific training sessions;
  - (f) Requirements and processes for holding general meetings and AGMs; and
  - (g) Reporting obligations.
- We recommend that CATSI corporations be offered training relating to operating a business. This could link with existing programs run by various institutions across the country such as the Murra Indigenous Business Program administered by the Melbourne Business School.

### 4. Powers and Functions of the Registrar

- (a) Are there any alternative dispute resolution powers that the Registrar could have to resolve disputes outside the court system?
- (b) Do you know of any extra powers that other Commonwealth agencies have that would assist the Registrar to better support CATSI corporations?
  - (i). Which powers would be most appropriate and why?
  - (ii). Should these powers be included for the Registrar or changed in some way to better support CATSI corporations?
- (c) Do you think the current dispute resolution powers of the Registrar are enough or do you think they could be improved?

- We do not agree that the current resolution powers of the Registrar are working.
- We agree that the Registrar should have extra powers to support CATSI Corporations such as the issuing of fines/infringement notices for non-compliance with obligations.

### 5. Governance

## 5.1 Contact Details

- (a) Should corporations be able to decide the type of contact that would be acceptable when contacting member?
- (b) Would social media and community noticeboards be acceptable forms of contact?
- (c) How should corporations make this decision? Should it be made through a resolution at a general meeting?

- We support the suggestion to use alternative contact details (social media/noticeboards) to make it easier for corporations to contact their members and ensure that their members are kept informed about the affairs of the corporation.
- We recommend that the CATSI corporations and RNTBCs should make a decision at a general meeting on what contact methods will best suit their corporation and membership base.

## 5.2 Redaction of member details

- (a) Does your corporation support removing personal information of members being taken off a corporation's register of members? If so, how do you think this change should happen?
- (b) Should the member have to request their information be removed from the register, or in some circumstances, should the corporation be able to make such a decision on behalf of the member?

- We support members having the right to redact their personal information from a register by submitting a request to their corporation directly.
- We agree that the personal information of members should be confidential to the corporation and not to be shared with ORIC unless the member has given consent for their personal details to be shared with ORIC.
- We agree that details about a member that are publicly available should be able to be redacted if that member makes a request to remove their personal information.

## 5.3 Membership approval

- (a) Should the CATSI Act include a timeframe that corporations need to decide about membership applications?
- (b) If so, what would be a reasonable timeframe?

- We do not support introducing a legislative timeframe under the CASI Act for members to consider membership applications as this requirement may be burdensome to CATSI corporations with their current compliance obligations.
- We would recommend that CATSI corporations include a timeframe in their Rule Books if they wish to decide on a timeframe to consider membership applications that would suit their corporation.

#### 5.4 Membership cancellation

If a member is not able to be contacted in 2 years a corporation can cancel their membership.

- (a) Do you think this is too long?
- (b) Do you think it should be shorter time for example 11 months?
- (c) How many times should the corporation try to contact the member and is there a way that they should contact them?

- CATSI corporations should determine the appropriate timeframe for cancellation of memberships . We consider a minimum period of 12 months to be appropriate.

#### 5.5 Meetings

- (a) Should small corporations be allowed to pass a special resolution to hold their AGM every three years after their most recent AGM? If so, should directors be able to vote on this resolution?
- (b) Do you want the special rules that allows corporations maximum flexibility to hold meetings using any suitable technology, including social media platforms, online platforms, mobile platforms, or other application to be allowed under the CATSI Act?

- We do support the recommendation that small corporations can pass a resolution to postpone their AGM up to three years.

#### 5.6 General Meetings

- (a) Should there be greater clarification in relation to the conduct and cancellation of general meetings? For example, if there is a need to cancel the meeting because of sorry business in a community.
- (b) Should the number of proxies that one member can hold—which is currently three—be reduced? Do you think this is burdensome on corporations?

- We recommend that ORIC holds face-to-face information sessions and workshops and providing factsheets on the reasons for cancelling general meetings and the unforeseeable circumstances that might arise to prevent the general meeting from occurring. Face-to-face meetings are important for Aboriginal and Torres Strait Islander peoples to have oral conversations and be interactive and learn in the meetings.
- We suggest that Division 201 of the CATSI Act be amended to include cultural reasons such as Sorry Business that may cause a general meeting to be cancelled and postponed.

#### 5.7 Audit Committees

Should large corporations be required to establish audit committees to advise the board of directors on financial matters?

- We do not agree that audit committees should be a statutory requirement under the CATSI Act. The CATSI corporation and RNTBC Boards should voluntarily make a decision if they choose to have an audit committee.



- We recommend that ORIC holds information sessions and workshops with CATSI corporations and RNTBC directors to ensure they understand their duties and roles in relation to auditing and reporting.

## 5.8 Reporting

- (a) Should corporations that are inactive be subject to reduced reporting and audit requirements under the CATSI Act?  
(b) What does an inactive corporation mean to you?

- We agree that the reporting obligations for inactive corporations should be reduced.

## 5.9 Rule Books

- (a) Should rule books be simplified and made easier to understand?  
(b) What would the rule books look like?

- We agree that amendments to rule books should be made easier and simpler for members and common law holders to understand the rules and processes.
- We recommend that rule books need to include examples about how the rules will operate and flowcharts of the processes to make it easy for RNTBCs to understand.

## 6. Executive Performance

- (a) Should medium and large corporations have the capacity to publish CEO and other senior executives' work history in Annual Reports?  
(b) How to handle the situation where there are multiple CEOs throughout the year?  
(c) How can the work history be confirmed before publishing?  
(d) Should the meaning of the CEO function specify that a CEO does not have to be an employee of the corporation, but is anyone who undertakes a CEO function which may include a contractor/consultant?

- We do not support the publication of any personal information, including work histories of CEOs and other senior executives unless it is voluntarily provided by the individual. The Board of the CATSI corporation and RNTBC can request the work history and references of the individual applying for a CEO or senior executive role.
- We suggest that ORIC supports the autonomy and right to self-determination of the Board's decision-making by providing face-to-face information sessions and workshops to offer guidance on employment and recruitment processes.
- We suggest that ORIC allows the Boards of CATSI corporations and RNTBCs to request from ORIC work histories/records of the individuals who are applying for a position as CEO or a senior executive role.
- We support the recommendation that the meaning of CEO should be defined to prevent any confusions about the role and functions of the CEO.
- In addition to the above questions, we do not support the implementation of Director Identification Number ("D.I.N") for directors of CATSI corporations and RNTBCs. The use of DIN is another obligation that directors will need to comply with. We note that directors of CATSI corporations that are in remote and regional locations and Elders

will find it difficult to register for a DIN.

## 7. Registered Native Title Bodies Corporate

The Report acknowledges that RNTBCs are a special form of CATSI corporation established under the CATSI Act. RNTBC's are required to meet their legal obligations under the CATSI Act, *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

We note that RNTBCs are a critical part of the native title system and they perform important functions for and on behalf of their members and common law holders of native title. 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

### 7.1 Transparency around native title monies

The Registrar could hold a Register of Trust Deeds ensuring accessibility and transparency for members and common law holders and could require regular reporting on trust activity. Would this be a useful provision and whether it would increase transparency for stakeholders?

- 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 mining royalties and native title compensation payments).
- We agree that there needs to be an improved structure that supports the transparent and accountable management of native title monies for RNTBC's economic and social development needs.
- We note that more information needs to be provided about whether creating trusts and a register of trust deeds under the CATSI Act would be voluntary or mandatory.

### 7.2 Benefit management structures

Is there a need for specific corporate structures for native title benefits management, or have these been overtaken by reforms to charitable status and better practice in benefits 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 RNTBCs to be able to use the native title monies to support economic and social development for their communities.



### 7.3 Recording, reporting and decision-making

(a) Should there be a financial threshold where reporting requirements are triggered to avoid undue regulatory burden.

(b) Should a reporting obligation be extended to any entity that is related to a RNTBC that is holding monies (above a certain threshold) derived from native title? What would a relevant threshold look like?

(c) Can you see any issues with extending ORICs role to include overseeing part of the PBC Regulations such as the making of native title decisions on native title monies? If so, should there be a limit about what ORIC could do?

- We do not support the need for greater and more detailed regulations and requirements in order 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 RNTBC's 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 is 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 RNTBCs about their compliance with the PBC Regulations. This will ensure that RNTBC 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.

### 7.4 Dispute Resolution

(a) Who should have the power and responsibility to help RNTBCs with resolving disputes?

(b) Would additional enforcement powers for ORIC to arbitrate decisions be needed?

- We recommend that ORIC provide RNTBCs with face-to-face training and information sessions about dispute resolution processes to ensure that RNTBCs can continue to operate and carry out its functions.
- We support the suggestion that ORIC have powers to arbitrate disputes that are unable to be resolved internally by the RNTBCs.
- 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 RNTBC's 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 RNTBCs.

### 7.5 RNTBC Model Rule Book

- (a) Should there be a specific RNTBC model rule book that offers sample rules to assist groups to develop their own rules, promote good practices, and enable a 'default' set of rules for newly established RNTBCs?
- (b) Are there any other regulatory reforms required to ensure transparent and accountable RNTBC decision-making?
- (c) Are there any other regulatory or legislative reforms that should be considered to improve transparency and accountability around native title benefits?
- (d) Given the diversity of RNTBCs (size, assets, locations, capacity, stand-alone or part of corporate structure etc.) how might any additional regulation be tailored to ensure implementation is cost neutral? Is the size classification for CATSI corporations relevant in the context of the PBC Regulations or do other reporting thresholds need to be developed?

- We support the recommendation for a RNTBC model rule book to be developed to assist RNTBCs. We suggest that the RNTBC model rule book includes examples about how the rules will operate and flowcharts of the processes to make it easy for RNTBCs to understand.
- We recommend that the model rule book should be developed in consultation with RNTBCs as it needs to be practical and simple to ensure RNTBC's can follow the rules and implement good governance practices.

### 7.6 RNTBC name change registration on the National Native Title Register

Should the NTA be amended to enable an amendment of the NNTR by the Registrar of the NNTT?

- We agree that the NTA should be amended to allow a name change to be carried over from the CATSI register to the NNTT maintained by the NNTR.

### Conclusion

We thank you for your consideration of our submission.

Should you have any questions in relation to our submission please do not hesitate to contact our office.

Yours sincerely



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