



ICN 7355

SUBMISSION TO THE CATSI ACT REVIEW

SEPTEMBER 2020

This submission has been prepared by the CEO of
the Pika Wiya Aboriginal Health Corporation

ABOUT PIKA WIYA

In the early 1970's, members of the Davenport Community Council (at Davenport Community, in Port Augusta) having grave concerns for the health of their community, discussed and agreed to establish an Aboriginal Medical Service. Supported by Redfern Medical Service in Sydney, NSW, the Aboriginal Medical Service at Davenport was formed, with funding allocated by the World Council Churches for 3 months. The Service was complemented with the assistance of a Medical Officer who volunteered his time from his original position as Medical Officer at Redfern Medical Office, along with three 'Aboriginal Health Workers'.

In the 1980's, the Service went through a name change and Pika Wiya Health Service began operations. Pika Wiya Health Service Aboriginal Corporation (PWHSAC) is now a non-profit Community Controlled Health Service operating under the CATSI Act.

Pika Wiya is a membership organisation servicing clients in the areas serviced by Port Augusta Council, District Council of Flinders Ranges and includes the townships of Maree, Leigh Creek, Woomera, Roxby Downs, Andamooka, Copley and Nepabunna and the Aboriginal Community homelands managed by the Yartawarli Aboriginal Corporation.

There have been several instances where the work of Pika Wiya has come under scrutiny by ORIC and the Registrar and the corporation has had several governance issues and a frequent change-over of CEOs in the past.

The most recent being:

- A new Board of Directors appointed in September 2019;
- A letter received in December 2019 expressing an "intention to issue a notice under Subsection 439 -20(1) of the CATSI Act" to the Directors and Secretary identifying a range of non-compliance issues.

Each of the issues in the notice have been addressed.

A new CEO was appointed by the Board of Directors in August 2019 and during this time some considerable work has occurred in relation to working towards good governance practices.

The Board of Directors has appointed 3 new independent non member specialist directors and is:

- Conducting a Special General Meeting in October to present a series of special resolutions related to the adoption of a fully revised Rule Book and seeking to rename it a “constitution”
- Reviewing its Strategic Plan
- Finalising a revised Code of Conduct for the Board Members
- Finalising a revised Code of Conduct for Staff, in consultation with Staff
- Preparing a Terms of Reference for a Finance and Governance Committee and in due course appointing members to it
- Establishing a Risk Management Committee
- Preparing a Prospectus to identify partners to collaborate with in delivering services, conducting research etc

Examples of work being undertaken by the CEO include:

- Implementing an Organisational Plan
- Undertaking service level reviews
- Reviewing the Business Continuity Plan
- Reviewing operational policies and procedures
- Revising the Staff Code of Conduct
- Developing a community engagement plan for the Board to consider
- Preparing a workforce plan

Pika Wiya is also finalizing arrangements for:

- Establishing a Mens’ Shed
- Gaining Accreditation as a Registered Training Organisation

The services of Pika Wiya are extensive and can include the provision of:

- Drug and alcohol counselling and support
- Primary Health Care and referrals
- Counselling to “bring them back” addressing issues faced by our stolen generation
- Specialist clinics – diabetes management, podiatry, physiotherapy, respiratory health, optometry support, cardiac health support
- Kidney health and transplant awareness program
- Rheumatic Heart Disease program
- Trachoma program
- Sexual Health program
- Child health and immunisation program

- Antenatal health program
- Social Emotional Well Being program
- Commonwealth Home Support Program
- SA HACC program
- GP Respiratory Clinic

In addition, Pika Wiya has played a pivotal role in the COVID 19 pandemic offering health checks and isolation arrangements in collaboration with the local hospital and public health officials.

Pika Wiya currently has a budget of \$10m, received grants in the order of \$9.8m and has a staff of 76, including contractors for the delivery of primary health care services.

Attached is a map (Attachment 1) that sets out the geographic area of service delivery.

THE SUBMISSION

This submission has been prepared by the CEO and addresses the key areas that the Draft Report, 31 July 2020 has sought specific comment on, as relevant to Pika Wiya's operations.

OBJECTS OF THE CATSI ACT

Support for Members (2.42)

Feedback is sought on responses from the on-line survey which questioned whether the Registrar should have greater oversight over Prescribed Body Corporates, including the power to intervene in disputes.

Response:

This proposal would be supported, if intervention was undertaken in a manner that enables parties to the dispute to provide submissions and participate fully, including with the use of mediators or arbitrators.

Support for corporations (2.43 and 2.44)

The draft report seeks feedback as to whether more support could be provided for remote or very remote areas.

This section of the draft report queries the ability to better integrate governance structures with cultural practices to promote capacity building and corporation longevity.

Response:

Pika Wiya does provide support to remote areas which brings a series of challenges in relation to:

- Enabling participation at membership meetings, including via technology – the Pika Wiya Rule Book enables this to occur
- Outreach services that are costly to deliver to generally a small group of clients
- Access to an appropriately qualified the workforce (or contractors) required to provide the service in an ongoing way

The issue of governance structures that reflect cultural practices is an area of particular interest to Pika Wiya especially given its current review of the Rule Book.

Governance structures should provide a sufficient level of flexibility to undertake the work required with a reasonable level of accountability to the membership.

Capacity Building (2.45)

This segment of the draft report considers strategies to enhance the understanding of directors and members regarding the CATSI Act, including their roles and responsibilities.

Response:

With the current review of the Rule Book being undertaken by Pika Wiya, the Board and the Working Group that it formed have gained a much greater understanding of the requirements of the CATSI Act as it relates to the operations of the Corporation.

They have considered the current Rule Book clause by clause and identified the issues that the members, board and the staff have experienced that could be addressed to enhance confidence in the way it operates and demonstrates good governance.

The Rule Book has been completely rewritten and the board has considered the new constitution and the special resolutions on a clause by clause basis. This has been a very valuable exercise and guidance has been provided by a consultant and the Pika Wiya legal advisor. We also sought initial feedback from ORIC of the proposed changes which has been invaluable.

Consideration could be given to how the Registrar and ORIC could establish:

- Minimum training requirements for all directors of boards covering basic governance issues such as board meeting procedures, conflicts of interest, management of confidential information, engagement with members, financial management, CEO performance management, relationships between boards and the CEO/staff. This training could be made mandatory and be completed within say 6 months of appointment as a director;
- Better understanding of the role and relationship between staff of the Corporation and the role of the board;
- Requirement for the adoption of culturally safe statements to be adopted at a meeting of a board or its membership prior to the conduct of a meeting;
- Requirement for the adoption of codes of conduct for members - a matter that Pika Wiya is seeking in its review of the Rule Book. Codes already exist for staff and the board and are currently being reviewed;
- ORIC offering information sessions for members and production of materials that can be placed on a corporation's webpage to assist members to clarify their roles and responsibilities;
- ORIC to continue to be available to corporations and their members to clarify matters and where appropriate offer support and guidance to address issues as and when they arise;
- A requirement for ORIC or the Registrar to address a meeting of members when a corporation has been investigated in order to clarify for members the scope of issues that have been raised, the investigations that have taken place, the actions that are required to be taken by the Corporation, including reporting requirements. This

approach may assist members to have a better understanding of the issues that have been addressed and provide an assurance that the corporation is now (or on the path to) operating effectively.

There would also be value to offer leadership development programs for young and other potential aspiring board members.

POWERS AND FUNCTIONS OF THE REGISTRAR

Broader suit of regulatory powers (3.4 – 3.7)

The issue of the restricted powers of the Registrar when compared to the Australian Securities and Investment Commission was raised in the report. One area of difference identified was the steps to be taken if reports are not lodged.

Response:

The ability for the Registrar to issue a notice is supported, however, in relation to an infringement notice, it would be undesirable for a corporation to expend grant funds on fines. If this was to be introduced a requirement for advising on where the funds were drawn from may need to be considered. Is it possible to consider the introduction of a series of “intent notices” before the issuing of an infringement notice?

The principle of responding in a “proportionate manner” to the breach is supported.

In relation to the role of the Registrar in dispute resolution, this is supported, however natural justice needs to continue to be afforded to the parties.

Enforceable undertakings (3.9 – 3.11)

Feedback was sought on a proposal to enable an “enforceable undertaking” as an administrative settlement to a matter to avoid civil court action, provide practical outcomes and deal with minor matters. It is also noted that this undertaking could be utilized following a report from an authorized officer appointed by the Registrar.

Response:

Support the adoption of an “enforceable undertaking” approach.

Notice Period (3.14)

This proposal seeks to align the powers of the Registrar with that of ASIC in that the notice period for the production of books is not confined to the current 14 days. It is proposed that the Registrar determine the appropriate timeframe, given the nature of the information being sought to be produced.

Response:

Removing the “14 days’ notice” period is supported and for it to be replaced with a more considered timeframe, being determined by the Registrar, based on the issue. In making this determination the Registrar should have regard to the size of the organization and its access to support in compiling information in the manner sought by the Registrar.

Issuing of Notices (3.15)

The proposal to align the powers of the Registrar with that of ATSIIC in relation to issuing notices to other persons or an entity when seeking the production of books, including compelling the production of the books.

Response:

The proposal to provide alignment of powers is supported.

Accessing and reviewing a corporation’s books (3.16)

It is proposed to give to the Registrar the same powers as the authorized officer to use the books that are produced or seized under a warrant for a proceeding under the Act. In addition it is proposed that the authorized officer be able to request information, explanations and other assistance from a company officer, as well as the person who produced the books to the authorized officer or who was a party to the compilation of the books.

Response:

The proposal to broaden the powers of the Registrar and to enable greater access to officers and persons in relation to explanations etc of the books is supported.

Subjects of Powers (3.18)

This proposal relates to the Registrar having the same powers as ATSIIC in relation to a body corporate being extended to a person who is, or has been, an officer or employee of the body corporate.

Response:

This proposal is supported, however consideration should be given as to whether there should be some statutory time limit established on this access. Appropriate protections, commensurate to their role they may have played in a matter should also be considered.

Further Ideas (3.20 – 3.21)

These proposals relate to additional powers of the Registrar to support corporations in relation to disputes.

Response:

This proposal is supported.

GOVERNANCE

MEMBERSHIP MANGEMENT

Contact details (4.5 – 4.7)

This proposal addresses the requirement to have an up to date register of members' contact details and raises the issue of the inclusion in the register of alternative contact details. It also highlights that contact details should be electronic not only a mail address. It is also proposed that an obligation be placed on the corporation to attempt to contact members who have been previously uncontactable in the past 11 months.

Response:

The proposal to extend options to retain contact details through alternative contact person and electronic means is supported. Pika Wiya has a substantial lack of return rate when issuing information to registered addresses and uses other avenues as well ie print media, website and Facebook to provide notice of meetings and opportunities to engage.

It is not supported that a further obligation be placed on the corporation to attempt to contact members – it is considered that the above additional contact detail options would suffice. Social media can also be used to alert members to issues for which feedback is sought or to flag an up and coming meeting.

Contacting members (4.8.)

Feedback is sought on enabling corporations to consider the best means for contacting their members, including email, Facebook, community notice boards or other means.

Response:

This proposal is strongly supported. Pika Wika believes since it has established more social media avenues the outcome of contact with members has increased.

Redaction of member details (4.9 – 4.10)

This proposal relates to the position of ORIC to no longer publish member addresses by default on its website and the proposal to redact personal information from membership registers in the interests of ensuring safety of members. Various questions were posed for feedback in the draft report.

Response:

Pika Wiya supports redacting of information without seeking the approval of the member for a public register, as this removes the administrative obligation on the corporation and avoids mistakes occurring if requests for removal are not addressed in a timely manner or missed altogether.

Members seeking to organize a meeting could be managed as follows:

- The members be required to make the request to the corporation and in doing so must comply with the request, with ORIC engaged if a member believes that the request has not been fulfilled by the corporation; or
- If the register were to be provided to a member, they would be required to sign a declaration to use the register for the purpose intended and be subject to prosecution for any misuse.

It is also considered that this could be a matter for a corporation's Rule Book to determine, with the approval of its members and guidance from ORIC.

Membership approval (4.11 – 4.14)

This proposal seeks feedback about whether a board should have a statutory timeframe in which to determine membership approval e.g. 3 months. Further, where a board doesn't agree to a membership application, the matter could be put to the members for determination and this may be initiated by the applicant. Further, there is a proposal for the membership where challenging a membership approval, to be subject to a specific timeframe and a specified quorum required at the meeting at which the matter is considered.

Response:

It is agreed that a statutory timeframe should be required and 3 months seems reasonable.

The matter of seeking to have a non-approval challenged by the applicant is supported but it is considered that this challenge should be subject to advice from ORIC upon referral of the corporation and final decision of the Board. It is also suggested that 75% of the members voting on the resolution would trigger reconsideration.

It is further suggested that the manner in which this occurs could be more fully spelt out in the Rule Book of the Corporation with the CATSI Act providing guidance on the issues to be considered.

Membership Cancellation (4.15 – 4.17)

This proposal relates to the period of non-contactable time, currently 2 years, potentially being reduced. It also links to the previous proposals around the nature of the contact information required and what represents a reasonable attempt by a corporation to contact a member before cancelling membership.

Response:

It is considered that the 2 year period is acceptable, having regard to the points made in 4.8 (above).

The current review of the Pika Wiya Rule Book has raised the matter of mental capacity of a member as there is concern of abuse of the member's vote through proxy or other avenues. The members will consider this matter at the October Special General Meeting where their support or otherwise will be tested. Consideration of this matter as part of this Act review may be worthy.

CORPORATE STRUCTURES

Subsidiaries and joint ventures (4.19 - 4.21)

The draft report recognizes that establishing wholly-owned subsidiaries under the Act is difficult as the majority of corporations must also be members of the corporation and while members can be individual or body corporates, directors must be individuals ie natural persons.

Response:

The proposal to enable the establishment of wholly-owned subsidiaries is supported, including the proposal to only be prevented from doing so if a Rule Book so requires. The enabling of an individual or group of entities to form a subsidiary or joint venture as long as Indigeneity requirements in section 29-5 of the Act are met is also supported.

Two-Member Corporations (4.22 – 4.23)

This section relates to the formation of a corporation where there are only 2 members and the requirement for one to be an Aboriginal or Torres Strait Islander. It raises the conflict of current provisions in relation to the requirement for the directors to be majority Aboriginal or Torres Strait Islander. The review proposes to remove the majority requirement in 2 member corporations and having the only voting member being the Aboriginal or Torres Strait Islander person.

Response:

This proposal is not one that is envisaged within the context of current operations of Pika Wiya and no comment is provided, however it seems reasonable.

Complex Structures (4.24 – 4.25)

This issue relates primarily to structures found in the native title area.

Response:

Pika Wiya is not a native title corporation and has no comment on this matter.

Support for particular types of structures (4.26 – 4.27)

This proposal was seeking feedback on whether the Act could better support profit driven entities. It has been suggested that the Act does not seem to align with the policy of Supply Nation certification and specifically the Indigeneity requirement. Profit distribution and clarity of ownership through shareholdings are provided as examples of areas of lack of alignment. It was also noted that there is an increasing number of single member corporations being formed and further help might be needed by these corporations.

Response:

Pika Wiya has no comment to provide in this area.

SIZE CLASSIFICATION

This section addresses items 4.28 – 4.34 and covers the Act requirements for small, medium and large corporations, including reporting arrangements. It also confirms that size of income, assets and number of employees is the current criteria for determining size.

Comment is sought as to whether better alignment should be to the Australian Charities and Not-for-Profit Commission's (ACNC) where the emphasis is primarily on income.

Specific comment has been sought on the nature of the sizes, whether there should be only a small and large category and what criteria should be included.

Feedback is sought on the administrative burden placed on corporations, especially a small corporation.

Response:

The use of income, assets and number of employees is supported as criteria useful to use in relation to determining size and complexity. It might be worthwhile considering other factors such as size of the membership and geographic area of coverage for the delivery of services. Consideration could also be given to applying a weighting to the various criteria.

Reporting requirements should be commensurate with the size of the corporation and removal of administrative burden is important, however, financial accountability should not be comprised in any decision taken.

MEETINGS

Annual General Meetings

It was noted in the report that on average around 9% of corporations apply for an extension of around 30 days to delay holding their AGM. These delays were generally due to a death in the community, natural disaster, cultural activity, a delay in the audit or awaiting another event.

Comment has been sought on whether a small corporation should be enabled to pass a members' special resolution to not hold an AGM for up to 3 years as

long as the directors don't vote on the resolution and advice to the Registrar can materially change the circumstances. This proposal would have a further condition in that the Registrar would have the power under certain circumstances to require a general meeting to be held e.g. where members have made a significant number of complaints, no opportunity has been provided by members to ask questions of directors etc.

Response:

For a small corporation, this proposal is generally supported however it is considered that 3 years may be too long a period, 2 years may be more suitable. The proposal should also include the potential for intervention by the Registrar where appropriate.

Audit Committees (4.44)

This proposal is to require the formation of an audit committee for large corporations so as to provide another layer of accountability and for the committee to advise the directors on financial matters.

Response:

Pika Wiya supports this proposal and is currently forming a Finance and Governance Committee and a Risk Management Committee. The requirement for some independent specialist members to be included on this Committee, that are not current board directors is further proposed.

Reporting (4.45 – 4.48)

The proposals included in this section relate to the ability for a corporation to seek an extension of time to comply with the provision of reports to the Registrar within 6 months of the end of the financial year. It is further proposed that the ability to seek an extension be linked to the same matters enabling a delay of the AGM ie a community death, natural disaster and certain activities in the community.

Further it is proposed that the same reports provided to the Registrar are provided to the membership. Feedback was also sought on whether “dormant” corporations should be subject to the same reporting arrangements.

Response:

Pika Wiya’s current Rule Book requires AGM business to present reports of a “general, financial, directors” nature and would support the alignment of reports to the Registrar also being provided to the membership at its AGM. It is also supported that any delay in providing reports be aligned with the circumstances for seeking 30 days delay to the conduct of the AGM.

Rule books (4.49 - 4.55)

The proposals included in this segment deal with the matters of updating rule books so that they reflect changes in the Act and whether rule books can be automatically changed to reflect new Act requirements. The role of the Registrar is also highlighted in relation to agreeing to changes, making their own initiated changes and whether the Registrar should be given the power to reject a rule book that is inconsistent to those made by a special administrator. There is also comment sought about the manner in which rule books can be made more easier for members to read.

Response:

Pika Wiya is currently undertaking a comprehensive review of its rule book and proposing to rename it a “constitution”. The matter of making it easier to read has been an important issue in the review. To support consideration of the proposed new constitution at the Special General Meeting, a facilitator has been appointed to support discussions about proposals and the asking of questions regarding the operation of the new constitution. The Pika Wiya legal advisor will also be present to answer questions and to advise on meeting procedures, where required.

It is difficult for a legal document of this nature being made more easier to read. Perhaps what could be provided is a “guide to reading” the constitution which is made available to members.

The proposal for automatic changes to occur as replacement rules might be problematic as it would be hard for corporations and their members to keep up to date with changes. If support could be given for an automatic rule book update and this was not taking place on an annual basis but rather a quarterly or other cycle, this might be less problematic.

FURTHER IDEAS

This segment of the draft report seeks feedback on whether there could be some streamlining of requirements for corporations that are also registered charities enabling flexible governance arrangements being introduced. There are also proposals included regarding the number of proxy votes allowed to be held by a member under the Act, currently 3, with this potentially being reduced.

Response:

Pika Wiya has no comment in relation to the alignment of governance arrangements between charities and Act corporations – although it seems to make some sense if it can be achieved.

The matter of proxies has been a key issue in our rule book review. Currently the rule book for Pika Wiya only enables one proxy member per member. The board has been keen to remove proxies as they consider the ability to manage them to be difficult. This matter will be put to the members at the Special General Meeting in October 2020.

5. OFFICERS OF CORPORATIONS

Executive Remuneration (5.4 – 5.13)

This segment of the draft report seeks feedback on a range of issues associated to the provision of information to members (or not) of the remuneration of directors, CEOs and senior staff. If this is supported, feedback is sought about how that reporting should occur. In addition, there is a proposal for the Registrar to hold information, deidentified, about director remuneration and

salary packages of CEOs and senior staff that could be accessed by corporations.

Response:

Pika Wiya recently undertook a review of its CEO salary and it was difficult to gain information from other similar sized corporations regarding salary and package arrangements for their CEOs. The introduction of bands connected to size with deidentified data of corporations is supported. Data needs to be aligned with the size of corporations and recognition of the salary differences experienced between states based on cost of living pressure differentials that can be quite substantial e.g. between SA and NSW.

The matter of public disclosure of remuneration paid to directors is supported. The current rule book for Pika Wiya does not enable remuneration to be paid to directors, however the revised constitution is proposing that remuneration can occur if supported by members. A report to members that includes Registrar data would better inform members about appropriate remuneration.

In relation to the provision of public information about the CEO and senior managers' remuneration packages, the favoured response would be for these positions to be placed within bands and that is what is reported.

In setting any bands for the payment of CEO and senior officer salary and benefits, consideration also needs to be given to matters such as access to training/professional development allowances, rent relief, vehicle support etc.

In addition, if bands were to be adopted by the Registrar for directors, CEOs and senior staff there should be a process of consultation with the corporations prior to the setting of the bands and as they are reviewed. Consideration could also be given to CPI adjustments made on an annual basis.

Director remuneration (5.14 – 5.16)

The report reflects that remuneration can only be paid to directors if it is provided for in the rule book and further recognizes that the members determine the level of remuneration. It is proposed that the remuneration of directors be included in the annual financial reports.

Response:

The current review of the rule book being undertaken by Pika Wiya is introducing the potential for remuneration, if adopted by members, and recognizes a potential different payment being made to the chairperson, deputy chairperson and directors. The current rule book does not provide for payment to directors.

The review is further seeking to include a requirement that a director is not paid unless they have participated in at least 85% of each meeting for which they are able to gain a payment.

This 85% meeting participation benchmark is suggested as an additional consideration for the Act review.

It is supported that the remuneration be included in annual financial reports.

Executive Performance (5.17 – 5.19)

This section deals with access to information about the performance of the CEO, particularly in other corporations and aligning the Director Identification Number to be allocated to all directors to also apply to CEOs so that tracking can occur. It further seeks information on support for annual reports to include an up to 10 year history of the employment of the CEO of the corporation. These proposals identify the difficulties in persons moving between corporations when their performance has not been satisfactory and seeking some mechanism to ensure appointments at this level get made with the best information available.

Response:

The concept of the identifying number is supported.

The only caution in relation to the issue of performance information of the CEO is in the genuine situation where the CEO for no real performance issue is targeted by an incoming board for removal.

It is certainly supported that where there are sound reasons for dismissal or mismanagement, including investigations that find the performance of the CEO to be inappropriate, this information should be accessible to future employers. There needs to be caution, however, in the way information is presented as liability and confidentiality may get in the way. This proposal may therefore be difficult to achieve.

It is also supported that boards should have an up to date and professional processes for CEO performance review conducted on an annual basis and this might be an area where ORIC could provide support for boards and where resources might be made valuable. These reviews should be undertaken by an external person to the board and conducted by an appropriately qualified person.

Related party provisions (5.24 – 5.34)

This section deals with transparency where board directors may be providing goods and services to the corporation that they are director in or to associated bodies to the corporation. It raises the issue of where in small communities limited providers might be available and regard needs to be given to this. The “related party” definition being used in this section relates to an individual or an entity e.g. a body corporate or a partnership and includes directors, their immediate family members or corporations/entities that they control.

The Act defines “related parties” and also provides examples of the giving of a financial benefit to or from a related party, including issues such as: finance or property; buying/selling an asset; leasing an asset or receiving a service; issuing securities or granting an option; and in taking up or releasing an option.

It is recognized that there is a rigorous process required in considering these matters and some corporations may be under-resourced to undertake what is required and conflicts can occur.

Member approval is central to the Act provisions and the Corporations Act has been considered noting that some provisions are not adopted in the CATSI Act. It is also recognized that the Act enables the Registrar to exempt some corporations in certain circumstances ie not having to comply with the Act. Options for removal of the administrative burden on small corporations was particularly considered important.

\$5,000 is suggested (or similar) in the Act is proposed to be used as the trigger for the related party provisions.

The matter of remuneration of directors is also included in this section and relates to provisions in the Act enabling a ‘reasonable’ amount to be determined by persons other than through member approval. These

provisions were considered somewhat confusing and could be made more clear.

Response

The principle of ensuring that conflicts do not exist and robust consideration of issues that could involve related parties are put to members for decision is supported. However, the consideration of a matter like this at a corporation needs to be carefully managed and the debate by members needs to be based on facts.

It is accepted that the role of the Registrar to provide exemptions is valuable and that small and remote communities should probably not be held to the same level of accountability. It is supported that exemptions be further considered with the Registrar central to any exemptions being provided. Annual reports must include the nature of related party matters experienced by corporations.

The proposal for a \$5,000 trigger needs further clarification as to whether this is an annual figure or an individual matter figure.

It is agreed that greater clarity is required in the Act.

The previous discussion around bands for directors payments would remove potential confusion and enable members to adopt a figure within the band. It is considered appropriate for transparency reasons for members to make the determination of director remuneration.

Appointment of directors and other director requirements (5.39 – 5.47)

Proposals in this section recognize that some corporations may well be made up of staff and the provisions in the Act not enabling a majority of staff members to be directors causes issues in industries such as the arts and that the Registrar could be enabled to grant exemptions and/or conditions. Restrictions on the number of family members on boards and increasing the number of skill-based board independent directors is suggested as perhaps being a requirement.

The Act only enables the appointment of independent specialist board members where the rule book provides for it and recognized that there is an

increasing number of corporate organisations appointing skilled base independent members. There is also the suggestion that independent directors be mandated for large corporations and feedback is sought on any issues this may present.

Another proposal is the inclusion of a defence for directors for complying with traditional Aboriginal customs of their tribal group, the introduction of customs and practices which directors and officers must follow and providing absolution from breaches of duty that would otherwise occur.

Feedback is also sought as to whether the definition of “director” and “officer” of the corporation where currently the definition of a director is also subsumed in the definition of an officer.

Feedback is sought as to whether the Act’s current definition of “CEOs (CEOs functions)” and “officers” provides sufficient flexibility when considering who “senior executives are”.

Response:

The current definition of an “officer” in the Act is confusing in that a director can also be an officer and the CEO of the corporation. Section 683 also further confuses these definitions when attempting to define decision making roles and requires amendment.

Pika Wiya’s rule book enables the appointment of up to 3 specialist independent directors who have just been appointed and are adding tremendous value to the corporation. They are not in the majority and whilst there are different views held by many about the “skill based” board as opposed to the “member based” board there is the desirability to seek a good balance.

Elections of directors are not always undertaken based on their skill but rather standing in the community – it is hoped that both matters factor into the determination by the members as to who they elect.

The new constitution being promoted by the current Pika Wiya board will seek members at the special meeting in October 2020 to include a template for a candidate’s statement that will assist members to determine the skills that candidates might bring to the board membership.

The current rule book and the proposed new constitution also limits board positions to only one family member and prevents a board director being a relative of the CEO and members of the senior management team.

The new constitution being proposed by the Board of Pika Wiya is including a clear role statement for the CEO as the Act does not provide an adequate outline of this position. The Secretary role can often be undertaken by the CEO and it is questionable why there is a need for this position in addition to the CEO role.

MODERNISING THE CATSI ACT

Disclose, storage and publishing of information (6.2)

The Act has specific provisions in relation to the management and publishing of information by corporations and the Registrar.

Response

These provisions are supported.

Protected information (6.3)

It is proposed to amend the Act to prescribe who is permitted to receive protected information ie in more detail. Currently the Act enables protected information to be provided in certain circumstances, including to ASIC.

Response:

This proposal is supported.

Providing notices (6.4 – 6.5)

Current provisions of the Act require publication of notices in the Australian Government Gazette or in a newspaper. In addition, the Registrar is not permitted to provide information electronically but rather in person or by post. It is proposed to enable electronic transfer of information and notices to appear on the webpage.

Response:

This proposal is supported.

Information storage (6.6.)

It is proposed to change the Act to enable corporations to store information on the cloud with appropriate security and meeting privacy requirements.

Response:

This proposal is supported.

Sharing data for research purposes (6.7 – 6.9)

The Registrar and ORIC are not in a position to share protected information with research organisations and it is proposed that they should be able to do so in a manner that de-identifies that information, where deemed valuable or appropriate.

Response:

This proposal is supported.

Contact information (6.10 – 6.11)

This section includes proposals for director contact information to be also made available in relation to their electronic contact details and when they hold a position on two corporations, with one providing updated information, the other is automatically updated.

Response:

This proposal is supported.

Consistent approach in relation to false and/or misleading information (6.12 – 6.13)

The Act makes it an offence to provide false and/or misleading information about a corporation's affairs to its members and other key stakeholders. This includes documents required by or for the purpose of the Act or lodged or submitted to the Registrar, without taking reasonable steps to avoid this situation. In addition, the offences for making false and/or misleading

statements are inconsistent with the Corporations Act and it is proposed to align them.

Response:

These proposals are supported.

Whistleblower protection (6.14)

To promote greater consistency between the Corporations Act and the CATSI Act in relation to the protection for whistleblowers it is proposed to incorporate recent 2019 changes to the Corporations Act into the CATSI Act.

Response:

This proposal is supported.

ORIC examinations of CATSI corporations (6.15 – 6.17)

Currently ORIC conducts examinations to assess corporate governance and financial health of corporations which includes the Registrar issuing compliance notices requiring rectification of less serious compliance matters; or “show cause” notices where there are more serious concerns requiring the corporation to explain why it should not be placed into special administration; or a “management letter” advising the corporation of the conclusion of an examination and highlighting minor concerns and opportunities for better practice. There is confusion around the “management letter” given the similar language used in audits and the Act does not require the Registrar to issue anything to confirm the completion of an examination. It is proposed that the Registrar provide a “finalization letter” if a compliance notice or “show cause” notice is not issued at the conclusion of an examination.

Response

These proposals are supported.

Auditor provisions (6.19 – 6.20)

The CATSI Act regulations include a range of provisions related to the appointment and conduct of audits and the resignation of an auditor, but there is no regulation outlining the process for the appointment of an auditor upon resignation of the current auditor. Further, and to align with the Corporations Act, it is proposed to provide qualified privilege to the auditor so that they can feel free to raise issues of concern appropriately and for such privilege to operate in defense of defamation.

Response:

These proposals are supported with the appointment of an auditor on the resignation of the previous auditor to be subject to a tender process, where there is no conflict in the appointment of a further auditor. Consideration needs to be given to the group that makes such an appointment. The Pika Wiya rule book currently provides at an AGM for the appointment of the new auditor to be confirmed. If the resignation should occur outside of the AGM there needs to be the ability of the board of directors to appoint the auditor albeit on perhaps a shorter term than usual with the confirmation then sought from the members at a AGM.

Payment controls (6.21)

The report includes a proposal to bring the provisions for payment controls up to date by providing electronic payments.

Response:

This proposal is supported.

Further ideas (6.23 – 24)

It is proposed to change the titles of the Registrar and ORIC given the way they are generally referenced.

Response:

These proposals are supported.

REGISTERED NATIVE TITLE BODIES CORPORATE

As Pika Wiya is not one of these bodies it is not considered to be informed sufficiently to make any comment in this section of the report.

SPECIAL ACCOUNT: UNCLAIMED MONEY ACCOUNT AND PROTECTION OF ASSETS

This section of the draft report sets out the challenges for the Registrar in managing property that falls within its jurisdiction due to the de-registration of a corporation. Challenges exist in terms of “good citizen” activities like removing vegetation, bushfire management, ensuring the asset maintains its value etc. It notes that the proceeds of the sale of these properties, after 6 years, becomes part of the Consolidated Revenue Fund if there are no identified beneficiaries to receive the funds.

It is proposed that the CATSI Act be altered to enable access to the Fund to maintain assets held by the Registrar to protect the assets and the properties and communities they are in, except the payment of outstanding rates.

Response:

This proposal is supported with the appropriate transparency in the expenditure of funds being put in place.

SPECIAL ADMINISTRATION, INSOLVENCY AND WINDING UP OF CATSI CORPORATIONS

SPECIAL ADMINISTRATION

Title of special administration (9.4 – 9.6)

Feedback is sought about the negative interpretation placed on a corporation going into special administration and the impact that this can have on funding bodies for which a corporation is seeking to engage or has engaged with. The special administration provides for a corporation to address issues that have caused it financial or governance stress and should not be seen as a negative situation in all instances.

Response:

Changing the name of a special administration for the reasons identified is supported.

APPOINTING SPECIAL ADMINSTRATORS

Show cause' process (9.7 – 9.12)

Feedback is sought regarding circumstances where all the directors of a corporation seek the Registrar to put the corporation into special administration. It is proposed that it should be able to do so without the Registrar having to go through the process of “show cause” which requires the corporation to give reasons why the process should not take place. The Act also enables a majority of directors to request an administrator to be put in place which of itself would suggest the “show cause” requirement is not needed in these circumstances. It has also been suggested that the “show cause” process enables time for a corporation to destroy files or other relevant information and this should be avoided where possible.

Response:

In circumstances where all or the majority of directors seek to have the Registrar put in an administrator it is agreed that the “show cause” requirements should not be required. It is noted that there is the risk of a corporation destroying evidence but it appears appropriate for a corporation to demonstrate within a reasonable time if it believes that the intervention of a special administrator is not necessary or required. Perhaps attention could be given to the timeframe for a response and the manner in which the notification is provided.

Grounds for appointment (9.12 – 9.15)

This section considers the matter of the grounds for appointment of a special administrator being when the corporation is trading at a loss for at least 6 months of the last 12 months. It is noted that grant funding cycles may put a corporation into this situation that will be rectified when the funding cycle kicks

back in and that this requirement is therefore not appropriate in all circumstances and for all corporations. It is proposed to change the ground to be one of an “irregularity in the management of the corporation’s financial affairs”. It is further suggested that the notice requirements be able to be provided electronically.

Response:

This proposal is supported.

Examination of affairs and financial matters (9.17 – 9.23)

The Act currently doesn’t enable an authorized officer to report on an irregularity in the operations of a corporation of a financial nature which in itself could trigger support from the Registrar to assist the corporation to deal with a matter. There is a proposal for the special administrator being able to be called in on the strength of the authorized officer’s report or other actions being able to be taken to support the corporation to regroup.

Response:

This proposal is supported. The annual report of the Registrar should state actions taken in this regard.

Insolvency and winding up (9.24 -9.27)

The role that the CATSI Act plays in assisting with winding up or involved in insolvency sets out requirements for directors and actions to be taken by the Registrar. It is noted that a corporation can be assisted to get back into operation through the provisions in the Act.

Response:

The continuation of the provisions in relation to insolvency and winding up are supported. The annual report of the Registrar should state actions taken in this regard.

Rebuttable presumptions of insolvency (9.28 – 9.34)

This section considers the introduction of a provision that is not in the Corporations Act but is designed to avoid long drawn out court arrangements where this would be required. The proposal is to use an authorized officer to make some assessments about the ability of the corporation to remain in operation and on the strength of this assessment a determination is made more quickly by a court, if required. The proposal seeks to introduce presumption of insolvency where a corporation has failed to keep adequate financial records and feedback is sought on what standard should be in place to ensure that it is applied fairly.

Response

This proposal calls into account the quality of an audit that has been undertaken and the 7 year period seems to be reasonable. It raises the issue, previously mentioned, about the ability of auditors or persons associated to speak with or be required to provide information to the authorized officer.

It would be more appropriate if earlier triggers were used to assess the situation and another criteria was introduced ie where recommendations by the Registrar, auditor or other specialist are not adhered to (within reasonable timeframes) actions are taken.

Registrar to seek leave of the court (9.35 – 9.36)

This proposal seeks to remove the requirement for the Registrar to seek leave of the court to demonstrate that a corporation is insolvent. This requires both the seeking of leave to have the matter considered and also the evidence to do so along with the winding up. It is proposed that the Registrar be given the ability to avoid seeking leave and go straight to the court with the wind up evidence.

Response:

This matter is supported as long as there is clear accountability on the Registrar to prove that the corporation should be wound up. An annual report of the Registrar should state actions taken in this regard and why.

Voluntary deregistration (9.37 – 9.40)

It is proposed to provide a lower threshold for the voluntary deregistration of a corporation. It is noted that corporations seek deregistration when they are no longer required or they are functioning ineffectively. Currently all members of the corporation are required to agree to the voluntary deregistration which is hard to achieve when members become disengaged and are hard to find.

Response:

This proposal is supported with demonstrated evidence about why deregistration is being sought. Annual reports of the Registrar should provide information on deregistration of corporations in that year.

Insolvent trustee corporations (9.41 – 9.46)

This section is seeking feedback on dealing with insolvent trustee corporations.

Response:

Pika Wiya has no response to this issue.

