

Submission to National Indigenous Australian Agency

CATSI Act Review

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INTRODUCTION

This submission is in response to the issue raised by the CATSI Act Review Draft Report. The aim of this submission is to provide an informed debate on the key issues considered by the Draft Report. Some of the suggestions that have been provided are of a policy nature and observe the need to empower Aboriginal and Torres Strait Islander Corporations (CATSI Corporations) to provide them with more flexibility and to remove unnecessary red tape attached to the running of these entities.

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

SUMMARY OF OBSERVATIONS MADE IN THIS SUBMISSION

This submission makes the following recommendations:

- The *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act)* should be retained as it has the potential to play an important role in closing the gap and empowering Indigenous people;
- The objects of the *CATSI Act* require a review: The legislation should incorporate as part of its objectives building capacity and promoting Indigenous values;
- Support the introduction of more powers to ORIC including the introduction of enforceable undertakings as a sanction.
- Recommend a review of the replaceable rules in the *CATSI Act* to allow for more flexibility in the running of CATSI corporations;
- Change the rules attached to the composition of the board to make them more streamline and more aligned with the rules in the *Corporations Act 2001 (Cth)*;
- There is no need to introduce a definition of CEO. CEOs fall under the definition of officers of the corporation and as such have a clear set of rules that apply to them;
- Reform the provisions attached to related party transactions;
- Review the need for Annual General Meetings for small corporations; and
- No change to the name of 'special administration' is required or recommended.

CHAPTER 2: OBJECT OF THE CATSI ACT

Do you agree that the CATSI Act should be retained?

The *CATSI Act* plays a crucial role in promoting indigenous endeavours and as such should be retained. However, it is important to reflect on how the legislation could better empower both not-for-profit as well as for-profit indigenous businesses. As such the review is timely and very important and hopefully will result in reforms that will promote self-determination of Indigenous people.

Objects of the Act

One of the key matters that should be reviewed is the object of the statute. Under s 1-25 of the *CATSI Act*, the current object is the following:

- (a) provide for the Registrar of Aboriginal and Torres Strait Islander Corporations; and
- (b) provide for the Registrar's functions and powers; and
- (c) provide for the incorporation, operation and regulation of those bodies that it is appropriate for this Act to cover; and
- (d) without limiting paragraph (c)—provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate; and
- (e) provide for the duties of officers of Aboriginal and Torres Strait Islander corporations and regulate those officers in the performance of those duties.

This object should be revised as it is currently very technical and does not reflect the spirit of the legislation or the purpose for which it was established. While this section refers to 'Aboriginal and Torres Strait Islander corporations' and 'native title body corporate', it appears that ensuring such corporations take Indigenous culture, customs and traditions into account is not one of the objects of the Act. Rather, the section is modelled on the *Australian Securities and Investments Commission Act 2001* (Cth).¹

As the Draft Report has noted, the legislation does not only provide provisions for the incorporation of CATSI corporations, but it is also designed to build capacity and promote Indigenous cultural values and practices. Currently, reference to this is done indirectly in one key place: Section 658-65 notes that, as part of its role, the Registrar will 'have regard to Aboriginal and Torres Strait Islander tradition and circumstance.' This wording should also be part of the objectives of the legislation. This would put the legislation more in line with its Explanatory Memorandum which states that 'these objects are designed to recognise that Aboriginal and Torres Strait Islander peoples in some circumstances have special needs for incorporation, assistance, monitoring and regulation which the *Corporations Act* is unable to adequately meet as it exists primarily to provide uniform incorporation and regulation of trading corporations'.²

¹ Revised Explanatory Memorandum, the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth), 34.

² Ibid 21.

Do you think that there should be a requirement in the CATSI Act that is reviewed at regular intervals? Would you agree with a 10 year interval?

The legislation should be reviewed regularly to ensure it still meets its purpose. Further it needs to evolve with the times and the needs of Indigenous people. This will ensure that the legislation remains relevant, up-to date and able to adapt to new circumstances. A 10 year interval is appropriate as it allows for consistency and stability to be there while providing an opportunity for the law to be revisited to ensure it still meets its purpose.

Is the CATSI Act meeting the needs and expectations of Aboriginal and Torres Strait Islander people?

To a certain extent, the legislation is meeting the need of not-for-profit indigenous entities. However, it requires revision and updates to allow it to meet the need for for-profit indigenous business entities. This is evident by the fact that there are very few for profit entities registered under it.

Is the CATSI Act putting CATSI corporations on an even playing field with companies incorporated under the Corporations Act? Is the CATSI Act flexible enough to meet the needs of a whole range of different Aboriginal and Torres Strait Islander corporations?

The answer to this question really varies depending on the need of the corporation.

On the positive side, the Registrar, unlike ASIC, actively build capacity of indigenous entities through education and support. Through this support, the Act does allow the CATSI corporations to be on an even playing field with companies incorporated under the *Corporations Act 2001* (Cth).

However, beyond that support, the *CATSI Act* is more cumbersome than the *Corporations Act* for both not for profit and for profit entities. Very few CATSI corporations are for-profit. The reason behind this is that the legislation does not fully support business entrepreneurship on a number of fronts:

- There is no clear distinction from a governance perspective regarding running a not-for-profit entity and a for-profit business. This distinction is needed as, for example holding annual general meetings is key in the context of not-for-profit organisation as it is one way for the entity to be held accountable to its membership regarding the public benefit it is providing. However, in a for-profit business, depending on the size of the organisation, this level of accountability may not be required. Further, the *Corporations Act 2001* (Cth) has more replaceable rules than the *CATSI Act* and as such provides more flexibility for companies to decide how they wish to be run.
- The *CATSI Act* provides the Registrar with a range of powers that may intrude in the day to day running of the corporation. These powers include special administration, oppression and approval of constitutions. While some of these measures may be appropriate in a not-for profit setting, they should not apply to a for-profit entity. Accordingly, a dual regime needs to be created under the *CATSI Act* by which there is one set of rules that regulate for-profit entities and one set of rules for not-for-profit entities. It is key to remember that these two different entities have different needs.

Lastly, as most CATSI corporations are not-for-profit entities, it is important for the governance rules of these entities to be compared with the governance rules that apply for ACNC entities to make sure there is an even playing field between them.

Are there opportunities for changes to the CATSI Act to better cater to the traditional and cultural customs of Aboriginal and Torres Strait Islander people?

Yes, there are opportunities to change the *CATSI Act* to allow the legislation to better cater for traditional and cultural customs of Aboriginal and Torres Strait Islander people. This can be done by:

- Adjusting the object of the *CATSI Act* to include respect of traditional and cultural customs of Aboriginal and Torres Strait Islander people
- Broaden the scope of replaceable rule.
- Allow for traditional and cultural customs to play a more important role in the running of CATSI Corporations.

How can the Registrar and ORIC further develop the capacity of corporations, including ensuring that directors and members have a sound understanding of their roles and rights as well as those of others?

The Registrar and ORIC are building capacity by providing support for corporations through public education programs. However it appears that there are limits to these programs. For instance, during the consultation stage for this review, there were questions raised regarding the efficacy of these programs and whether they lead to true change. Alleged instances have been reported in which the directors who completed ORIC courses have chosen to ignore concepts covered by the program. Accordingly, it is important for the Registrar to review its education programs to assess the extent to which they meet the needs and expectation of the participants. This will allow for the regulator to understand whether there is a disconnect between the educational program provided and reality

CHAPTER 3: POWERS AND FUNCTIONS OF THE REGISTRAR

Do you agree the powers of the Registrar should be expanded to include a suite of lower level discretionary powers, modelled on those of ASIC, including the power to issue fines?

It is important for regulators to have a suite of low, medium as well as high ranging sanctions at their disposal. This diversity may allow the Registrar to apply responsive regulation to deal with breaches of the law. As Braithwaite noted, both punishment and persuasion work to limit violations of the law. Punishment by itself is not an effective method of business regulation, because the harm that can be caused is often not addressed by up-to-date laws. To ensure regulatory effectiveness, the regulator should impose punishment when needed, but use persuasion whenever possible.³

Consequently, a mix of enforcement strategies and sanctions are needed. A regulatory body that has only one sanction, which cannot politically or legally be used in some situations, will not be able to deliver a “punishment payoff”, since it is easy for the rational offending firm to

³ John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York State, 1985), 117-118.

calculate the cost-benefit of breaking the law. On the other hand, when a regulator has a number of weapons available for any particular offence, the information costs of calculating these probabilities will be discouragingly high, even for a large company with a legal team at its disposal.⁴ The information costs discussed mean that the regulator with an “enforcement pyramid” may have superior resources with which it can bargain. Compliance is most likely when an agency displays an explicit enforcement pyramid. Braithwaite and Ayres describe such an enforcement pyramid in their *Responsive Regulation: Transcending the Deregulatory Debate*.⁵

As depicted below, the base of the pyramid represents the attempts to coax compliance by persuasion. The next stage of enforcement is the warning that actions might be taken if the violation continues. If this fails to secure compliance, civil penalties will come into play followed by criminal prosecutions. If these methods do not work to secure compliance, then the regulator might suspend temporarily the offender’s license to operate. If all fails, permanent revocation of the license is the last step taken by the agency. This escalation of sanctions is sketched in the form of a pyramid.

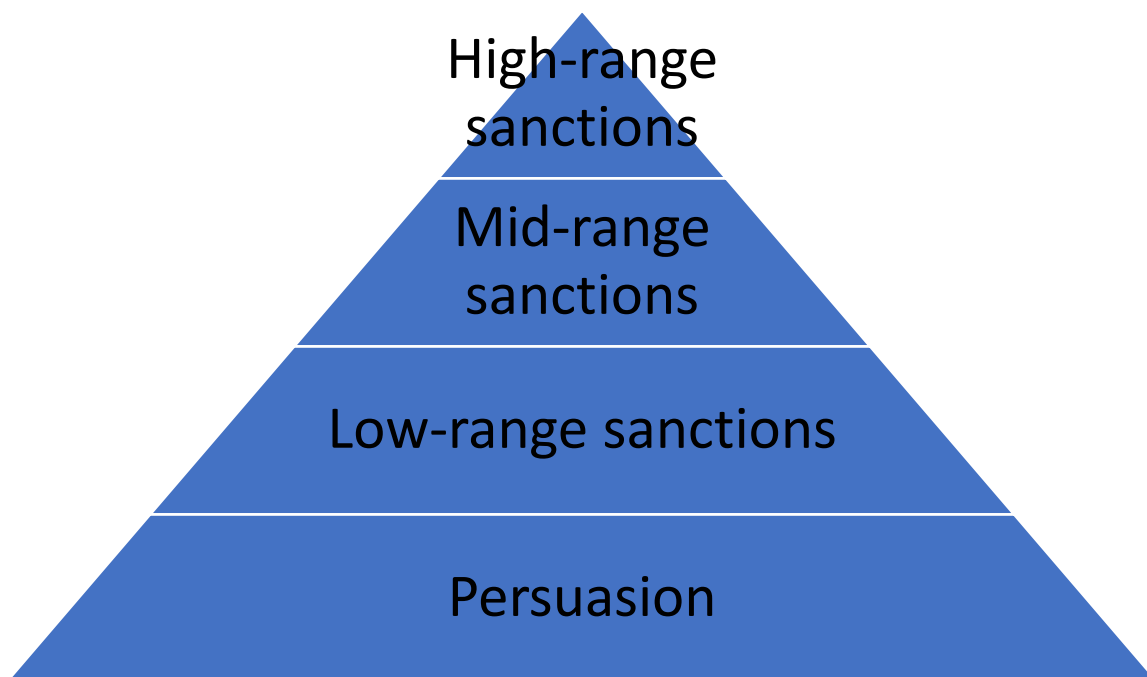


Figure 1 - Enforcement pyramid (Braithwaite and Ayres)

The width of each layer represents the proportion of enforcement activities at that level. The explanation for the varying size is simple. If the regulator can plausibly threaten to match any non-compliance by moving successfully up the pyramid, then most of the regulator’s work will be done effectively at the bottom layers of the pyramid. The lighter sanctions will dissuade the regulated entity from continuing its illegal activities because it will not want the regulator to use its strong sanctions. Put another way, when there is an equilibrium between harsh and soft sanctions, the regulator attains the result needed by speaking softly.⁶

⁴ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), 36.

⁵ *Ibid*, 35-36.

⁶ *Ibid*.

In summary, the basic idea of responsive regulation is that governments should respond to the conduct of those they seek to regulate in deciding whether a more or less interventionist approach is needed. It is better to start with dialogue and then go up in severity. This approach will especially be useful to the Registrar as enforcement without persuasion may result in resentment by the regulated community.

Do you agree that the Registrar should be able to accept enforceable undertakings?

An enforceable undertaking can be described as a promise enforceable in court.⁷ It takes the form of a settlement in which the alleged offender (who may be called “the promisor”) and the regulator start their negotiation in relation to the alleged breach. The regulator usually has wide latitude to negotiate and accept outcomes similar to those remedies available to the Court in many respects, and also remedies not normally within the Court’s power, so long as the undertaking is accepted ‘in connection with a matter in relation to which’ the regulator has a power or function.⁸ Further, the statute may allow the Court to make orders to enforce an undertaking that would ordinarily not be within its power to make.

This sanction will be an asset for the Registrar as it forms a bridge between the strategies of persuasion and enforcement. On the one hand, the sanction is based on negotiation between the regulator and the alleged offender. Such negotiations may lead to the settlement of the matter through the acceptance of an enforceable undertaking. The use of persuasion over other enforcement strategies is often a more effective use of a regulator’s limited resources.⁹ In addition, the sanction can be healing as it may be restorative in nature and accordingly make a difference in the affected communities. Further, an enforceable undertaking may lead to greater education for the alleged offender and the broader community.

On the other hand, if an enforceable undertaking is not complied with, the regulator may enforce the undertaking in court. The enforcement option gives the regulator an edge because such an option maximises the chances that an undertaking will be complied with. Rational people will be aware that non-compliance with an undertaking can lead to enforcement. This threat may diminish the likelihood that a promisor will not comply with the terms of his or her undertaking.¹⁰

Accordingly, the Registrar would benefit from the introduction of this sanction. This sanction is more useful than the introduction of an infringement notice which may be viewed as a cost of business.¹¹

⁷ Marina Nehme, ‘Enforceable Undertakings and the Court System’ (2008) 26(3) *Company and Securities Law Journal* 147.

⁸ *Ibid.*

⁹ Braithwaite, n 3, 109.

¹⁰ *Ibid.*, 118.

¹¹ For disadvantages of infringement notices, see for example: Marina Nehme, Margaret Hyland and Michael Adams, ‘Enforcement of Continuous Disclosure: The Use of Infringement Notice and Alternative Sanctions’ (2007) 21 *Australian Journal of Corporate Law* 112.

CHAPTER 4: GOVERNANCE

Should corporations collect members' phone numbers and email addresses to make it easier to contact them? Should corporations record members' alternative contact details and use them for issuing notices of meetings as well as other communication with members, including when considering cancelling membership? – Should corporations be able to determine the nature of acceptable contact when contacting members?

This is an initiative that may be desirable, but it should be left at the discretion of the organisation. Members should have a key role in making decisions on these matters. It is important for the legislation not to become prescriptive but leave it to the CATSI corporation to decide what is most appropriate to its situation. One-size-fits-all approach is not recommended.

Should members' personal information be redacted from a corporation's register of members in certain circumstances and if so, how should this change be implemented? Should the relevant member have to request that their information be redacted from the register, or in some circumstances, should the corporation be able to make such a decision on behalf of the member? If members are required to submit a redaction request, should the request be submitted to the corporation or in some circumstances, could it be submitted to the Registrar directly? Should there be a threshold for requesting the redaction of personal information, such as personal safety? Should some of the points above be matters for corporations to decide?

Under certain circumstances, members' personal information should be redacted from a corporation's register of member. Accordingly, it may be needed to introduce a provision regarding this in the legislation. However, the decision to redact information and the circumstances under which this occurs should be left to the corporation with an option of a review by the Registrar. It is key not to make the legislation more prescriptive.

How would members be able to organise a meeting without access to the personal information of other members? How should such a request be recorded?

Under the *CATSI Act*, members do not currently have the power to organise a meeting. Meetings are called by the directors at the request of the members.¹² Accordingly, the fact that members may not be able to access the addresses of members does not have an impact on the organisation of the meetings.

One elements that this review may wish to consider is s 201-10. Subsection 1 of this provision notes the following:

If the directors resolve:

- (a) that the request under section 201-5 is frivolous or unreasonable; or
- (b) that complying with the request would be contrary to the interests of the members as a whole;

a director, on behalf of all of the directors, may apply to the Registrar for permission to deny the request.

¹² See *CATSI Act*, ss 201-1 and 201-5.

This limitation may be viewed as too broad, especially as it reference the fact that the request may ‘be contrary to the interests of the members as a whole’. This language has strong links to oppression and may mean different things to different people.

This provision is further not required as s 201-55 (which is adapted from s 249Q of the *Corporations Act 2001* (Cth)) notes that ‘A meeting must be held for proper purpose.’ Another provision may be added: ‘In case of conflict regarding whether the proposed motion is proper purpose, the Registrar may intervene to clarify the appropriateness of the motion.’

Note: Under the *Corporations Act 2001* (Cth), a meeting may not be considered for proper purpose if the proposed meeting relates to harassment or deals with management decisions that are not within members’ purview.¹³ This interpretation should form part of ORIC’s guideline regarding this matter.

Should the CATSI Act include a statutory timeframe within which corporations need to consider membership applications and if so, the appropriate length of such a timeframe?

A statutory timeframe is desirable. The statutory framework should either be:

- Two months; or
- The next board of directors’ meeting

whichever event comes first.

Should a membership applicant be able to call a member’s meeting to reconsider a rejected application? If so, should there be a specified timeframe and quorum? Should a member be able to challenge the acceptance of a membership application? If so, should there be a specified timeframe and quorum?

Membership applicant should not be able to call for members’ meeting for the simple reason that they are not members and as such do not have that right. In case of membership dispute, this could be solved through mediation or court action.

For the purpose of cancelling memberships: Should the non-contactable period be reduced from two years? – If so, what would be an appropriate period? How many attempts should be made to contact a potentially uncontactable member? – How long should there be between each attempt? What are acceptable forms of attempted contact?

It may be desirable for the non-contactable period to be reduced from two years. However, instead of being prescriptive about this, s 150-25 should be a replaceable rule. Members and in turn the corporation should be deciding the appropriate period for cancellation of membership. This is needed to ensure flexibility of the law and acknowledge the reality that one size may not fit all.

Additionally, if the legislation is reframed to promote the setting-up of for-profit entities, a cancellation of membership due to non-contactable period may not be appropriate. Accordingly, the provision regarding this notion should be a replaceable rule.

¹³ See for example, *Humes Ltd v Unity APA Ltd* [1987] VR 474; *NRMA Ltd v Parker* (1986) 11 ACLR 1; *Windsor v The National Mutual Life Association of Australasia* (1992) 10 ACLC 509.

Corporate structures

Should the CATSI Act make it easier for a: corporation to establish a wholly-owned subsidiary CATSI corporation unless prohibited by its rule book; and group of entities to establish a CATSI corporation, similar to a joint venture where the majority Indigenous membership requirement (the 'Indigeneity requirement') is met by the parent entity or group of entities?

The *CATSI Act* should be reviewed to make it easier for CATSI Corporations to not only set up wholly owned subsidiaries but also any subsidiary. Subsidiaries should be given an exemption from s 246-5 (3) which notes that the majority of directors must be members in the corporation.

On a broader note, s 246-5(3) should be revoked. It should be up to the organisation to decide whether they wish the majority of the directors to be members or not.

The *CATSI Act* should not legislate provisions regarding joint venture. This form of business is not a separate legal entity but is a contractual arrangement between entities. Consequently, the Registrar and the legislation should not take part in this matter as it relates to freedom of contract. Decisions regarding joint venture should be left with the CATSI Corporations. An indigeneity requirement is not needed or relevant in case of joint venture. It is up to the CATSI Corporation to decide who they wish to enter into a contract with.

Should the CATSI Act be amended to require corporations to include in their annual report to the Registrar: information about their corporate structure, for example, where the CATSI corporation has associated subsidiaries and/or trusts? the names of the key management personnel such as the Chief Executive Officer (CEO), Chief Operating Officer and Chief Financial Officer within that structure?

Annual reports are an important source of information for members. Accordingly, it is important that they include information regarding subsidiaries, trusts and names of key management personnel. This will enhance transparency and accountability of the organisation.

Can the CATSI Act better support profit driven entities and if so, what would this support look like?

Currently, the majority of CATSI corporations are not-for-profit entities. The legislation may promote for-profit entities by creating a new class of corporations with a different less prescriptive set of rules. For instance, special administration may not be appropriate in those settings, but a form of voluntary administration would be. More replaceable rules may be desired (currently this number is very small compared to the ones under the *Corporations Act 2001* (Cth)). The Registrar should have less ground for intervention in the affairs of the corporation. The Registrar's role should be mainly limited to building capacity of these organisations and holding directors and their organisation accountable when appropriate.

Should the size classification framework under the CATSI be the same as the Australian Charities and Not-for-profits Commission; that is, based on revenue only? – Should there be only two sizes: small and large? – What would be the criteria and thresholds if there were only two sizes?

A review of the classification is needed. However, applying the ACNC regime may not be appropriate as that regime is more relevant for charities and not for other business structures.

A dual classification regime may be appropriate:

- one for charities akin to the ACNC regime: this may also help reduce red tape.
- One for other types of entities (especially for-profit entities if there is a desire to promote this form of business within the *CATSI Act*)

Should corporations be able to access an automatic 30-day time extension to hold a particular AGM where the corporation?

An automatic 30-day time extension is desired in case of death on the community, natural disaster, cultural activity or unavoidable delay in the audit. This will allow flexibility to organisation to fulfil their obligations within a culturally appropriate setting. The Registrar should play little to no role in this matter. This will further allow the Registrar to redirect its resources to more pressing matters.

Should the Registrar be able to cancel meetings after they have been called so that corporations don't need to seek a court order?

The law needs to be changed to provide flexibility regarding this matter. Organisations should be able to cancel their meetings without court order or Registrar approval. While there may be instances while such cancellation is made in bad faith, it is important not to treat all corporations as bad apples. CATSI Corporations should be empowered to make decisions regarding these matters. A meeting may be cancelled for a number of appropriate reasons. In instances of bad faith, the Registrar should be provided with the power to investigate and intervene in the matter.

Should small corporations be able to pass a resolution to not hold an AGM up to three years from their most recent AGM?

Small corporations should have a choice on whether to run an AGM or not. The provision regarding this matter should be a replaceable rule. Each small corporation is entitled to decide, based on its circumstances whether there is a need for an AGM. Members of a corporation may still be able to call for meetings when needed.¹⁴ Further, making this rule a replaceable rule may also encourage the setting up of for-profit CATSI corporations under the *CATSI Act*. These entities need greater flexibility under the *CATSI Act* to thrive.

¹⁴ See for example *CATSI Act*, s 201-5.

Should arrangements such as virtual AGMs, introduced in response to COVID-19, be explicitly allowed under the CATSI Act?

Virtual AGMs meetings should be allowed under the *CATSI Act* as an option. It will be up to the CATSI corporation to decide whether it wishes to use this option or not.

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

It should be up to large corporations to decide whether they wish to establish an audit committee. This should not be a legal requirement. This is a matter of governance and the corporation is in best placed to decide on this matter.

Rulebooks – Should all replaceable rules be included in rule books whether they have been adopted as they are, or are modified or replaced unless the rules are irrelevant?

One of the key things that should be understood by people setting up corporations is the working of the rule book including which provisions are classified as replaceable rules. Accordingly, instead of adding more requirement on how rule books are created and what they should include, people setting up the rule book need to fully understand and appreciate the purpose of rule book and how these rule books may allow for Indigenous culture and tradition to be incorporated within the organisation. The Registrar can play a crucial education role in this regard. Further more regulation without understanding of the purpose of the rule book will not really lead to greater compliance or understanding of the legislative requirement. It will just make the rule books more complex.

Should the number of proxies that one member can hold—which is currently three—be reduced?

This matter should be left at the discretion of the corporation and the provision should be a replaceable rule. Each corporation should decide on the matter of proxies including the number of proxies allowed.

CHAPTER 5: OFFICERS OF CORPORATIONS

Should the details and amounts of CEO's and other senior managers' remuneration packages, including other material benefits be reported in corporations' Annual Reports?

This is a desired measure as it will provide for more transparency and accountability within the organisation. Further the requirement is not onerous and represents good practice. Each senior manager should have any remuneration received as part of their role disclosed.

Consolidated reporting – Members should also have visibility over remuneration paid to key personnel of related entities. Should that information be reported in annual reports and include corporate structure including subsidiaries, key personnel and their remuneration?

Yes, it should be. This will ensure transparency and accountability to members.

Should CATSI corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar, so that the Registrar can publish de-identified information by salary bands?

The publication of de-identified information by salary bands can be very useful to CATSI corporation as it may allow them to get a picture of the fees charged to senior management by their peers. However, the corporation should not have an obligation imposed on it to supply that information to ORIC. As noted previously, the information regarding remuneration should be in the annual report which are lodge with the Registrar (s 348-1(1)). This will allow the Registrar to get the information through the documentation. Accordingly, it will be up to the Registrar to collect that data.

Should CATSI corporations report on how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar? And the number of meetings attended?

The remuneration of directors should be disclosed to members in the annual report. The same can be said to the number of meeting held by the directors. This will enhance transparency, accountability and good corporate governance within the corporations.

Executive performance – As a minimum requirement, should all corporations include the names of key management personnel (CEO, Chief Financial Officer and Chief Operating Officer) and their qualifications in their Annual Reports?

This information should be left up to the corporation to decide. There is no need to disclose more than the remuneration of the key management personnel. Their qualifications are not required as an amount of trust should be there in the directors. They have a duty of care to run the organisation properly. This would include the appointment of the company's senior management personnel.

Should medium and large corporations include the 10-year employment history of their CEO and senior executive in their Annual Report? Do medium and large corporations have the capacity to publish CEO and other senior executives' work history in Annual Reports?

No this is not needed for the above noted reasons. Further, there is no similar legislative requirement in other corporate legislations. The legislation should not be prescriptive in this regard. If members loose confidence in the choices the directors are making regarding key management personnel then members should remove the directors from their position and appoint directors that they can trust.

Should the meaning of the CEO function be clarified in the CATSI Act to specify that a CEO does not have to be an employee of the corporation?

This requirement will make the legislation more convoluted and complex. It does not fit with the need to simplify the law. A CEO already falls under the definition of officer and this is enough as an officer has a range of duties imposed on them akin to the one that apply to directors.

Should corporations be required to advise ORIC within 28 days of when there is a change to key management personnel?

This legislative requirement is not needed and is too prescriptive. ORIC only needs to be advised regarding changes to the directorship of the corporation.

Related party provisions – Should the related party provisions in the CATSI Act be revised?

The provisions regarding related party transactions should be revised. While the provisions protect against nepotism, they add unreasonable cost to a CATSI corporation. One question to consider relates to the appropriateness of such provisions in the context of kinship and remote communities.

This provision is not appropriate as such in a number of contexts. Consequently, I recommend altering the provision to require the following:

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

This will remove red tape attached to related benefit provisions while providing the necessary protection to members. Exceptions should be introduced linked to urgent repairs for instance.

Appointment of directors and other requirements – Should the Registrar be able to grant exemptions to the requirement that the majority of the directors of a CATSI corporation must not be employees? What conditions would be appropriate to support an exemption to the requirement? Should there be controls around board membership and composition? What sort of controls should be considered? How would this be managed in remote communities, where for instance restrictions on numbers of family members could cause major difficulties?

This review provides an opportunity to relax some of the current restrictions that apply on directors. Instead of adding restrictions and creating exemption and making the legislation more complex, the review should consider allowing the corporation to set up their expectations regarding board membership and composition in their rule book. This will once again highlight to the CATSI corporation the importance of the rule book. Lastly, the current proposal to add more restrictions on the composition of the board infringes on self-determination.

Should the CATSI Act be amended to allow corporations to appoint independent directors without an explicit rule in their rule book?

Yes, it should. Having independent directors may be beneficial to corporations. Accordingly, restrictions regarding this matter in the *CATSI Act* should be removed.

Should independent directors be mandated for large corporations?

No, independent directors should not be mandated in any type of corporation. This and other matters relating to composition of the board should be decided by the corporation and its members.

Do the current CATSI Act definitions of ‘CEOs (CEO functions)’ and ‘officers’ provide sufficient flexibility when considering who ‘senior executives’ are?

Yes, it does as noted previously.

What do you think about these suggestions to incorporate culture and tradition into the operation of corporations through changes to directors’ duties and rule books by providing: A defence for directors or officers who are complying with traditional Aboriginal customs or practices of their tribal group? That a corporation may specify in its rules a range of traditional customs and practices, which the directors and officers may follow and that would form the basis of a safe harbour. This would mean that if the directors acted within the scope of the rules, they would be absolved from any breaches of duty that would otherwise occur?

The above suggestions are all worthwhile as they will distinguish the *CATSI Act* from the mainstream corporate legislation in term of director duties. It will allow for the incorporation of culture and traditions within the operation of the *CATSI* corporation. This would be a positive move as it may also encourage other for-profit entities to register under the *CATSI Act* as the legislation may be viewed as a way to promote Indigenous values.

CHAPTER 6: MODERNISING THE CATSI ACT

Disclosure, storage and publishing of information – Should the Registrar be able to use electronic means, such as email, when required to notify people or corporations directly?

This should be an option for the relevant people to opt in to.

Should the CATSI Act be amended to enable corporations to store their information on cloud servers noting that they would need to take reasonable steps to ensure that the information was secure and met any relevant privacy requirements?

The *CATSI Act* should not intervene in this matter. The legislation should be neutral regarding technology. *CATSI* corporations should have the choice to use technology that may be available when needed.¹⁵

Sharing data for research purposes – Should the Registrar be able to share de-identified data and information with stakeholders such as researchers, academics and peak bodies among others?

The Registrar should have the discretion to share de-identified data and information for the purpose of research. This is a common practice with other regulators. Further, research into *CATSI* corporations is important for future reform in this area. It will ensure that the reforms are based on sound empirical evidence.

The Registrar can put conditions when appropriate on the use of the data. For example, the identity of the corporations should not be compromised.

¹⁵ See for example, Lyria Bennett Moses, ‘Recurring Dilemmas: The Law’s Race to Keep Up With Technological Change’ [2007] *University of New South Wales Law Review* 21.

However, legislative change is not needed. The Registrar just need to use its discretion regarding this matter.

CHAPTER 9: SPECIAL ADMINISTRATION, INSOLVENCY AND WINDING UP

Should the title of special administration be changed?

The title of ‘special administration’ should not be changed. Concerns raised regarding the terminology ‘special administration’ are not necessarily linked to its name but are most likely linked to the fact that an external person is being brought in the organisation because of a particular problem which could be mismanagement by directors or financial difficulty. Accordingly, changing the name even to something like ‘Redress scheme’ will not remove these concerns. The Registrar should play a key role in changing perceptions of people regarding special administration through education.

Insolvency and winding up - - Should the CATSI Act be amended to include a rebuttable presumption of insolvency?

Rebuttable presumption of insolvency should be introduced under the *CATSI Act*. These provisions should be akin to the one under the winding up provisions present under the *Corporations Act 2001* (Cth), not the one attached to s 588G of the *Corporations Act 2001* (Cth).

CONCLUSION

The *CATSI Act* has the potential to close the gap and empower Indigenous people to set up both for-profit and not-for-profit entities that are the embodiment of Indigenous values and culture. However, for this to occur, there is a need to make substantial changes in the legislation. For instance, the object of the Act needs to be reflective of the desired purpose of the legislation which is linked to building capacity and promoting Indigenous values. Further, governance rules need to be less restrictive.

Lastly, the introduction of a range of new sanctions into the legislation is a positive move as it will allow the Registrar to rely on the best likely remedy to achieve the outcome most suited for the situation. Enforceable undertaking is one such sanction: It is a versatile sanction that may lead to restorative justice and may be used in a way that promotes Indigenous values and culture.

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