VICTORIAN ABORIGINAL
HERITAGE COUNCIL

Office of the
Victorian Aboriginal
Heritage Council

Level 3, 3 Treasury Place
East Melbourne
Victoria 3002

T: 03 7004 7198
E: vahc@dpc.vic.gov.au

The Officer in Charge
CATSI Act Review
National Indigenous Australians Agency
PO Box 2191
Canberra ACT 2600

Via email only to; CATSIActReview@niaa.gov.au

Victorian Aboriginal Heritage Council Submission to the CATSI Act Review Phase 2

The Victorian Aboriginal Heritage Council (Council) welcomes the opportunity to make this submission to the 2020 Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth.) (CATSI).

By way of context, Council is a statutory body corporate established under s 130 of the *Aboriginal Heritage Act 2006* (Vic.) (AHA). It comprises up to 11 Victorian Traditional Owners expert in Aboriginal Cultural Heritage matters who are appointed by the Victorian Minister for Aboriginal Affairs. One of Council's main functions is the appointment, management, oversight and supervision of Registered Aboriginal Parties (RAPs) under the AHA. RAPs are local Traditional Owner corporations that discharge statutory functions *inter alia* in relation to the grant of authorisation of interference with Aboriginal Cultural Heritage within the area for which they are appointed. A Traditional Owner corporation is required to be incorporated under CATSI in order to be appointed as a RAP pursuant to s 150(2) of the AHA.

Accordingly, for Victoria's Traditional Owners to be in a position to exercise statutory powers in the protection of their cultural heritage they are *required* to incorporate under CATSI. As such for Victoria's Traditional Owners to be able to ensure their continued ability to undertake their cultural practices and ensure their international recognised rights in the protection and management of their cultural heritage they *must* incorporate under CATSI. Incorporation under CATSI for Victoria's Traditional Owners is not a voluntary activity but a mandatory step in the discharge of their cultural obligations.

Having reviewed the CATSI Act Review Draft Report produced as a result of Phase 1 of the Review it is apparent that overwhelmingly the proposals contained in it are in substance the same proposals that were agitated in Phase 1 of the Review. In turn the proposals contained in Phase 1 of the CATSI Act Review were substantially identical to those proposals that were contained in the now lapsed *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018*. Likewise, many of the proposals contained in that Bill originated in the Technical Review" undertaken by DLA Piper. Given this persistent repetition in proposals, despite frequent opposition to many of these that is articulated by Aboriginal and Torres Strait Islander peoples and their organisations it should come as little surprise that Council's responses to those proposals remain identical to that put

forward in its submission to Phase 1 of the current CATSI Act Review. This noted, Council's submission to the current Phase of the Review is attached.

If you have any further queries in relation to the content of this submission please do not hesitate to contact the Director of the Office of the Victorian Aboriginal Heritage Council, Dr Matthew Storey, at matthew.storey@dpc.vic.gov.au or on 0419 578 504.

Yours faithfully

Rodney Carter
Chairperson
Victorian Aboriginal Heritage Council

2 October 2020

Victorian Aboriginal Heritage Council
Submission to Phase 2 of the 2020 Review of the
Corporations (Aboriginal and Torres Strait Islander) Act 2006

Introduction and Context

As noted in the covering correspondence to this submission, under section 150 (2) of the *Aboriginal Heritage Act 2006* (AHA) for Victoria's Traditional Owners to be in a position to exercise statutory powers in the protection of their cultural heritage they are *required* to form a corporation which is appointed as a Registered Aboriginal Party (RAP) under the AHA. A RAP is required to incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth.) (CATSI). As such for Victoria's Traditional Owners to be able to ensure statutory protection around their continued ability to undertake their cultural practices and ensure their internationally recognised rights in the protection and management of their cultural heritage they *must* incorporate under CATSI. Incorporation under CATSI for Victoria's Traditional Owners is not a voluntary activity but a mandatory step in the discharge of their cultural obligations.

This point brings this submission to its first substantive point.

CATSI is *prima facie* racially discriminatory

CATSI is necessarily racially discriminatory. It is saved from offending the *International Convention for the Elimination of All Forms of Racial Discrimination* ("the Convention" and therefore the *Racial Discrimination Act 1975 Cth* - the "RDA") only if they can be characterised as a legitimate "special measure" under the Convention. This fact is acknowledged in the CATSI Preamble. To satisfy the definition of a special measure it is necessary for a measure to facilitate the advancement of the relevant disadvantaged group. Council submits that it is imperative that the Review bear in mind the fact of the racially discriminatory nature of CATSI and the requirement for each of the measures contained in it, (and in any Bill arising from the Review) to be able to be legitimately characterised as a special measure in order to avoid offending the RDA and the Convention.

This conclusion carries with it two implications. First, particularly after 12 years of operation, it is appropriate that CATSI be the subject of the current comprehensive review to ensure that it is in operation "appropriate and adapted" to facilitate the advancement of Australia's Indigenous Peoples.

A number of matters spring to mind as relevant to such a broad review of CATSI. The first is that there needs to be a comprehensive analysis of the areas where the provisions of CATSI impose obligations that are divergent from those contained in the *Corporations Act 2001* (Cth.) ("CA"). Each such divergence then needs to be justified as a "special measure" in accordance with the criteria described below. Second, is that the appropriateness of the fundamental equation between a CATSI corporation and a company limited by guarantee under the CA, particularly in the context of a rapidly expanding Indigenous private sector needs to be assessed. Third, areas where legitimate additional special measures are desirable should be considered.

In regard to the justification of divergences between the current CATSI as well as any proposal for its amendment and the equivalent provisions of the CA (noting the questionable assumption of a CATSI corporation as equivalent of company limited by guarantee under the CA) regard should be had to the relevant jurisprudence regarding special measures under both the RDA and the Convention.

In *Gerhardy v Brown* (1985) 159 CLR 70 (*Gerhardy*) Justice Brennan identified four indicia of a legitimate special measure in the following passage:[1]

> A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.

In his analysis of these indicia Brennan J makes a number of points relevant to CATSI. First, "the beneficiaries of the special measure are natural persons not corporations".[2] His Honour notes in this context that a benefit conferred on an (Indigenous) corporation may lead to benefits to natural persons. Second, that the purpose of a special measure may be gleaned from the terms of the legislation (if relevant) and other circumstances and, finally, that the question of whether a measure leads to "advancement" of a group can only be made by reference to the wishes of that group.[3]

The analysis of 'special measures" contained in *Gerhardy* was more recently affirmed by the High Court in *Maloney v The Queen.*[4] It is noted the majority of the Court in *Maloney* did not see the requirement to have regard to wishes of the group as extending to a requirement for consent for a measure to be a special measure under the RDA, this conclusion is at odds with current jurisprudence regarding special measures under the Convention[5]. Accordingly, the Review is under an obligation to ensure that its outcomes are considered not only with reference to the wishes of relevant Aboriginal and Torres Strait Islander peoples but also with regard to manifestation of their consent to any current or proposed racially discriminatory provisions.

It is worth stating quite explicitly the converse of the discussion above regarding special measures. That is quite simply that in any instance where the provisions of CATSI impose a regulatory obligation or limitation on a CATSI corporation that an equivalent corporation under the CA is not subject to, that obligation or limitation is racially discriminatory and offensive.

With this preliminary point made this submission will move to consider some particular aspects of CATSI which are identified in the Draft Report.

---

[1] *Gerhardy,*133 (Brennan J).
[2] Ibid.
[3] Ibid 135.
[4] (2013) 252 CLR 168 (*Maloney*).
[5] See, Patrick Wall, The High Court of Australia's Approach to International Law and its Use of International Legal Materials in *Maloney v The Queen Melbourne Journal of International Law* (2014) [15](1) at 17-18.

Meeting Requirements and Corporation Size Classifications

The Draft Report at 4.28 – 4.34 discusses this matter.

CATSI classifies corporations as small, medium or large based on an assessment of gross operating income, consolidated gross assets and number of employees. The relevant amounts are prescribed in the regulations.

Reforms proposed in the 2018 Bill altered the basis of classification to be based purely on revenue. The specific revenue thresholds were said to be prescribed in the Regulations. ORIC had suggested that it is intended the prescribed amounts will equate with the levels prescribed in relation to the CA for companies limited by guarantee. These are: small – less than $250,000; medium – between $250,000 and $1 million; and, large – above $1 million.

These classification levels are also those utilised by the Australian Charities and Not for Profit Commission (ACNC). The Explanatory Memorandum to the 2018 Bill noted that 30% of CATSI Corporations are also registered with the ACNC. Of course, this fact also means that **70%** of CATSI Corporations are ***not*** ACNC registered.

The principle that the reporting requirements of CATSI corporations should equate to those of CA corporations is generally supported by Council. However, the proposed amendments raise some concerns. First, while it has the potential to reduce the reporting requirements for some small corporations it also has the potential to increase the reporting requirements for a number of current mid-size corporations. Often Victorian RAPs fall within this mid-size classification.

Second, and more fundamentally, the equation of all CATSI corporations with companies limited by guarantee under the CA is inappropriate. While all CATSI corporations have a member (as opposed to shareholder) structure as do companies limited by guarantee under the CA not all CATSI corporations are established for public or community purposes as is usually the case with companies limited by guarantee.

Many CATSI corporations are established for private business purposes. These companies equate more closely with Proprietary Limited corporations under the CA. In respect of a Proprietary Limited corporation the CA has only two classifications; small (revenue < $12.5m) and large (revenue > $12.5m). The proposed amendment would only operate to continue or increase the regulatory burden on CATSI corporations of this nature. In addition, it continues the false perception that CATSI corporations are necessarily “social enterprises” when this is manifestly not the case as indicated by the fact that 70% of CATSI corporations are **not** ACNC registered.

Subsidiaries and other entities and Related Third party Transactions

The Draft Report at 4.19 – 4.21 discusses this matter.

The 2018 Bill also proposed provisions to facilitate the creation of subsidiary corporations and joint ventures. Provisions of this nature would place CATSI corporations in a position of greater equivalence to CA corporations and facilitate economic development within Indigenous communities and the entrepreneurial activity of Indigenous people.

The current CATSI Part 6-6 (Member approval needed for related party benefit) is an example of the racism redolent in the Act. CATSI s 284-1 prohibits related party transactions without approval at a general meeting except in circumstances set out in Division 287. The only equivalent provisions apply to public companies under the CA and to ACNC registered corporations. In the latter case the requirements of the ACNC are that a registered charity must uphold the relevant ACNC governance standard (5) and the disclosure requirements contained in Accounting Standard AASB 124.

Council submits that an appropriate mechanism for facilitating legitimate related third-party transactions by CATSI corporations while still ensuring transparency and accountability would be to adopt the approach applying to corporations limited by guarantee under the Corporations Act. This approach permits such transactions in situations where the transaction is arm's length or legitimate remuneration for services provided. Such transaction must be noted in the corporation's accounts under existing Accounting Standards.

Relevance of the Technical Review

The Draft Report at 1.18 – 1.21 discusses this matter.

The 2020 review website makes reference to the (apparently) 2017 "Technical Review" undertaken by DLA Piper. The Review document from the Technical Review was only made publicly available following the Parliamentary Committee processes around the 2018 Bill.
The Technical Review's Terms of Reference are found at paragraph 2.7 (p 22) of the Report. It is clear from these Terms of Reference that the Technical Review was (as its name suggests) limited in the scope of matters under consideration. This is made abundantly clear by the limited and pointed proposals canvassed in the Discussion Paper contained at Appendix A of the Technical Review Report. The Technical Review did not provide a forum to consider the broader review of CATSI as is currently being undertaken.

Further, an examination of the "Consultation Report" contained at Appendix B of the Technical Review report reveals that of the limited proposals that were discussed, many were either not supported, supported only in part, or never discussed. In light of this Council submits that the Technical Review provides an unsatisfactory evidential base from which to base any relevant inquiries under the current Review.

Conclusion

As noted, Council welcomes this opportunity to have input into the 2020 Review process. Council would be pleased to participate in any consultations following the Phase 2 Review outcomes leading to development of a further proposed CATSI Amendment Bill.

If you have any further queries in relation to the content of this submission please do not hesitate to contact the Director of the Office of the Victorian Aboriginal Heritage Council, Dr Matthew Storey, at matthew.storey@dpc.vic.gov.au or on 0419 578 504.