SUBMISSION TO THE SENATE INQUIRY REGARDING AMENDMENT OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT

ON BEHALF OF:

THE FIRST NATIONS BAILAI, GURANG, GOORENG GOORENG, TARIBELANG BUNDA PEOPLE NATIVE TITLE ABORIGINAL CORPORATION

AND

THE INSTITUTE OF FIRST NATIONS GOVERNANCE PROFESSIONALS LTD

AUTHORS:

KERRIN ANDERSON

Director, Institute for First Nations Governance Professionals Ltd

MATTHEW COOKE

Chair, First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation

Contents

INTRODUCTION

This submission is provided on behalf of the First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation, (**FNBGGGTB PBC**) a Registered Native Title Body Corporate for Traditional Owners located in the Gladstone and Bundaberg region. The FNBGGGTB PBC is part of the Port Curtis Coral Coast corporate grouping which includes a separate trust with a corporate trustee incorporated under the Corporations Act, an operating company to undertake nation rebuilding community development being established under the Corporations Act and four Traditional Owner development corporations (one for each nation) all either incorporated under the Corporations Act or in the process of transferring from the CATSI Act to the Corporations Act.

In addition to their work with the FNBGGGTB PBC, the authors of the submission have an extensive background in working with and for First Nations community-controlled organisations in the native title, health and housing sectors, including working with both CATSI corporations and those incorporated under the Corporations Act and both are directors on the Institute for First Nations Governance Professionals.

The amendments proposed to the CATSI Act currently under consideration of the Senate arose from the comprehensive review into the CATSI Act (the **Review**) conducted by the National First Nations Australians Agency (**NIAA**). This review arose due to concerns expressed with a previous technical review of the CATSI Act and subsequent Bill that was introduced to amend the CATSI Act (**Technical Review**). In order to address the criticisms surrounding the previous Technical Review and Bill development process this comprehensive review was to deal with the following:

(a) whether the CATSI Act is meeting its objects and continues to be desirable as a special measure for the advancement and protection of Indigenous people as set out in the Act's preamble;

(b) whether the functions and powers of the Registrar of Indigenous Corporations are appropriate, effective and adequate;

(c) possible amendments to the CATSI Act to better support the regulation of CATSI corporations; and

(d) the consistency and interaction of the CATSI Act with other relevant legislation, including the Corporations Act, Australian Charities and Not-for-profits Commission Act (**ACNC Act**) and Native Title Act.

We made a submission to the Review and take the opportunity now to submit to the Senate some of the concerns we see with adopting the measures set forth in the Bill currently under consideration. Our concerns arise primarily due to the process for the Review, in particular its failure to deal properly with the objective in (a) above and to test the proposed amendments and new provisions in the proposed Bill to the special measures tests required under law.

In providing this submission we will refer extensively to the reasoning and positions adopted in the CATSI Act Review Final Report (**Final Report**). We also make reference to **First Nations Corporations** being any corporation owned and controlled by First Nations people regardless of which legislation they are incorporated under; and **CATSI Corporations** being First Nations Corporations incorporated under the CATSI Act.

EXECUTIVE SUMMARY

In summary this submission highlights the issues arising from the conduct of the Review into the CATSI Act regarding the legal analysis of the special measures requirements and therefore we submit that any amendments to the Act in the Bill under consideration of the Senate that arise from the Review are the result of a fundamentally flawed process. In particular:

- they perpetuate the notion of the CATSI Act as a legally justifiable special measure when that has not been properly considered and tested against the law regarding special measures despite it purportedly being a focus of the Review. In particular, the Review only considered whether the CATSI Act as a whole was justifiable as a special measure whereas the law requires every provision of the Act to be subjected to the special measures tests. As stated by the Australian Human Rights Commission:

  > *"While it is appropriate to consider the effect of legislation as a whole when determining whether it is a 'special measure', it is still*

necessary for its parts to be 'appropriate and adapted' to this purpose"[1]

None of the amendments or the new provisions proposed in the current Bill have been reviewed from the perspective of whether they meet the tests of being an appropriate special measure;

- the approach taken by the Review favours giving powers of regulation and control to the government (a negative discriminatory approach) versus an approach that focusses on what benefits and assistance can be provided to First Nations Corporations to aid them to overcome their disadvantages (a positive discriminatory approach). This is evident in the Bill before the Senate which imposes penalties of imprisonment (**eg amended section 330-10 proposed by the Bill**) when no such penalties exist under the Corporations Act;

- amendments in the proposed Bill are adding elements of further regulation in an already over-regulated sector (**eg new sections 333-10(4), 453-2 and 453-4 proposed by the Bill**) that will only encourage more CATSI Corporations to transfer from the CATSI Act to the Corporations Act as the benefits offered by ORIC are out-weighed by the regulatory over-reach;

- there are amendments that are inconsistent with rights of self-determination of First Nations People (**eg new section 69-35(3A) proposed by the Bill**); and

- as stated by the Australian Human Rights Commission:

  "the principle of proportionality requires a precise balancing of the impact of a measure with the stated intent of the measure. Is the proposed measure the only one, or the least restrictive one, which will achieve the stated intent of the measure?" [2]

  The Review simply took the position specified in the Review of the ACA Act in 2002 that no alternatives to a separate incorporation regime

[1] See Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission at paragraph 26 citing Gerhardy v Brown (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J))
[2] See Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission at paragraph 26 citing Gerhardy v Brown (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J))

would be suitable.[3] This is fundamentally flawed given that the Australian Charities and Not-for-profits Commission (**ACNC**) regime was introduced in 2012 and governs a majority of First Nations Corporations. The ACNC regime offers a compelling alternative option that would have First Nations Corporations incorporate under the Corporations Act (or Incorporated Associations Act), in the same way other entities incorporate, and the special needs of First Nations Corporations could be addressed in a similar way the special needs of charities and not-for-profits are taken into account under the ACNC Act. In our submission to the Review we proposed an alternative that was based on having First Nations Corporations incorporate under the Corporations Act or Incorporated Associations Acts of the States with a special regulatory assistance scheme (**Special Regulatory Assistance Scheme**) that assisted ***all*** First Nations Corporations (not just CATSI Corporations) to access the assistance they need to both understand and meet the relevant regulatory requirements that applied to them.[4] **However, despite the requirements of the law and proposing this alternative in our submission neither this nor any other alternatives were considered by the Review**; and

- as stated by the Australian Human Rights Commission a consideration of whether a law, action or program is justifiable as a special measure must:

> *"address the actual disadvantage of the targeted group and there must be a demonstrable link between the measure and its stated objective. To establish a demonstrable link a proposed measure must be supported by a reasonable evidence base that includes recent and reliable quantitative and qualitative data which establishes that the proposed measure is justifiable as necessary to achieving the stated intent of the proposed measure and enable the equal enjoyment of human rights, has a clear intent, effectively addresses the actual disadvantage of the target group and will have the intended impact/outcomes."*[5]

[3] Draft Report para 2.7
[4] See further discussion in Conclusion section of this submission p27-28
[5] See Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission at paragraph 30

> In simply adopting the positions of previous review in 2002 that were nearly 20 years out of date, **the Review failed to consider whether there was any recent and reliable quantitative and qualitative data establishing the CATSI Act as a justifiable special measure. Therefore any additional provisions being added under the proposed Bill cannot be justified as they are a continuation of a purported special measure that has not be shown to satisfy the legal requirements of a special measure**.

CATSI ACT AS A SPECIAL MEASURE

The principle failure of the Review related to how it considered the issue of whether the CATSI Act continued to be justifiable as a special measure under section 8 of the Racial Discrimination Act. When announcing the Review Minister Wyatt announced that the Review would consider whether the CATSI Act is achieving its objects, *particularly as a special measure under the Racial Discrimination Act*. [6] Thus the special measure justification was intended to be a particular focus of this Review.

Requirements for a Special Measure

In order for the CATSI Act and its provisions to be justifiable as a special measure under section 8 of the Racial Discrimination Act it must meet the tests of a special measure recognised at International Law as applied by the Australian Courts (**the special measure test**). These tests are clearly articulated by the Australian Human Rights Commission.[7]

As the CATSI Act is racially discriminatory, it is only legally justifiable if it is an act of positive discrimination that meets the legal requirements of a special measure. The Australian Courts have considered what is required in relation to such special measures and in *Vanstone v Clark [2005] FCAFC 189* the Court rejected the submission that once it is accepted that a particular provision of an act is a special measure, the different elements of the provision cannot be separately attacked as discriminatory. Justice Weinberg (at 208-209) stated that such a proposition:

> *"involves a strained, if not perverse, reading of s8 of the [Racial Discrimination Act], and would thwart rather than promote the intention*

[6] Final Report para 1.5
[7] See Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission

of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure"

It therefore follows that asserting that the CATSI Act itself is a special measure is insufficient to justify discriminatory provisions within the Act. The requirement laid down by the Court in Vanstone v Clark, is that ***every provision, and every element of every provision, in the CATSI Act must meet the test of being a special measure.*** If any individual provision or any part of a provision fails the test of being a special measure then it can be considered unjustified racial discrimination.

An Act and its provisions cannot be justified as a special measure simply by stating that it has an overall objective of being a measure of positive discrimination, which was the approach taken by the Review.[8] Rather, the Act itself and *every provision in it* must meet the very strict criteria imposed as the test of a special measure. These arise from the International Convention on the Elimination of All Forms of Racial Discrimination Article 1(4) as cited in the Final Report[9], which have been applied by the Courts in an Australian context[10]:

(a) Does it have ***the sole purpose*** of securing ***adequate advancement or protection*** of First Nations Australians (**sole purpose test**). If this is used as the justification for the CATSI Act, it must be shown that it is, ***in fact as demonstrated by an evidence base***, securing adequate advancement or protection of First Nations Australians, in manner that ***could not otherwise be achieved without the special measure***; and

(b) Is it ***necessary*** to ensure First Nations Australians have ***equal enjoyment*** or exercise of human rights and fundamental freedoms[11] It must support First Nations Australians to overcome entrenched discrimination so they can have similar access to opportunities as others in the community[12]. It must enable First Nations Australians to enjoy ***on an equal basis*** with other Australians the same legal facilities and

[8] Final Report section 2
[9] Final Report para 2.2.
[10] See Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission
[11] Final Report para 2.2
[12] Final Report para 1.7

attendance socio-economic benefits that incorporation confer[13] (**equality test**); and

(c) It must not lead to the ongoing maintenance of separate rights for different racial groups [14]– that is, does there ***continue to be a need*** for the CATSI Act and/or the relevant provision in question?[15] (**continued need test**).

It should be particularly noted that ***a special measure must satisfy all three of these elements*** for it to be justifiable as a special measure. If it fails any one of these tests then it is not defensible as a special measure.

Additional Criteria

In addition to the special measure test outlined above there are other equally important tests that the CATSI Act should meet that are directly related to it being a special measure as follows:

(a) Does it ***advance self-determination*** for First Nations People?[16] Does it achieve the right balance of providing regulatory safeguards without impinging on the autonomy of the corporation?[17] (**self-determination test**). This test is based on the right to self-determination under Article 3 of the UN Declaration on the Rights of First Nations Peoples (UNDRIP).

(b) Does it or can it be used to ***negatively discriminate*** against First Nations Australians? (**negative discrimination test**). This is directly related to the requirement that a special measure be 'positive' discrimination.

(c) Are the identified ***special incorporation needs*** of First Nations Australians better met by a separate incorporation statute and regulator?[18] Does it provide sufficient flexibility to accommodate specific cultural practices and tailoring to reflect the particular needs or circumstances of individual groups?[19] (**special needs test**)

[13] Final Report para 1.13
[14] Final Report para 2.2
[15] Final Report para 1.8
[16] Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission para 15
[17] Final Report para 1.21
[18] Final Report para 1.12
[19] Final Report para 1.15

Application by the Review

The Review, in considering this issue, looked generally at whether there was a need for special support of First Nations corporations given their function and the disadvantages suffered by First Nations People. However, the way it approached the consideration of the special measure requirements failed to apply the standards required by International Law, as interpreted by Australian Courts. It only broadly considered whether the objects of the CATSI Act and the over-arching special needs of First Nations Corporations were sufficient to justify the CATSI Act as a special measure. While there is no doubt there is need for a special measure to support First Nations Corporations, the Review failed to consider whether the CATSI Act properly met the legal requirements for a special measure and it failed to give thorough consideration to alternative, less discriminatory, options that may be available to achieve the desired outcomes.

Section 2 of the Report deals largely with the CATSI Act being justified as a special measure under the Racial Discrimination Act. It states that "[It] is designed to be a modern incorporation statute that provides flexibility to corporations to operate in ways that reflect cultural practices"[20] In our view the CATSI Act is quite the opposite of this. Its stipulations of the structure and internal governance rules that a CATSI Corporation is required to have makes for a very rigid structure with very little flexibility. Further, forcing First Nations Corporations into this particular form of corporate and board structure with specific, largely unchangeable internal governance rules erodes their ability to choose how they run themselves and therefore erodes self-determination. The strictures of the Act mean many First Nations Corporations chose not to incorporate under the CATSI Act and therefore are unable to access some of the benefits it confers.

The Draft Report of the NIAA Review stated:

> *Being a special measure, the CATSI Act is a form of positive discrimination. As such, it is unlikely that removing the CATSI Act would be beneficial for Aboriginal and Torres Strait Islander corporations and alternative models proposed in survey responses substituted one type of special measure for another under the Corporations Act. The Review of the ACA Act in 2002 also found alternative statutes would not provide*

[20] Final Report para 2.5

> *the same level of support or meet the incorporation needs of Aboriginal and Torres Strait Islander people.* [21]

This is a fundamental flaw in the approach taken by this Review as it does not itself actually question the findings of a Review that was conducted almost 20 years ago to determine whether this is still the case today. Importantly, in the period since that Review, the ACNC has been established, which provides a successful precedent for establishing special regulatory regimes for corporations incorporated under the Corporations Act.

Further, the Draft Report draws the conclusion that the mere fact that the CATSI Act is stated as being a "special measure" in its preamble it is therefore a form of positive discrimination.[22] Notably, this section was omitted from the Final Report but nevertheless it highlights that what the NIAA failed to do was actually ***apply*** the special measure test to the existing provisions or to any of the proposed reforms. The Review fails therefore at the most basic and fundamental level to be a true review of the CATSI Act as a special measure.

Applying the approach of the Australian Courts as cited above, it is not sufficient to simply reach a conclusion that a separate Act for incorporation of First Nations corporations is justifiable as a special measure. ***Every provision of the Act must be considered and the special measures test applied to every provision and every component of a provision to determine whether it is justifiable as a special measure.***

The importance of taking this approach can be seen when examining the penalties that apply for breach of provisions of the CATSI Act. **In many cases, the CATSI Act imposes penalties of imprisonment where equivalent provisions of the Corporations Act or ACNC Act do not. Examples of this are set out in Annexure A and include some provisions of the current Bill before the Senate. How can imprisonment be justified as a case of special positive discrimination when non-First Nations People are not subject to the same punishment?** The review attempted to justify it by saying the Registrar had used the power judiciously in the past and maintained that access to this power would enable the Registrar to not only prosecute people or corporations when appropriate but also to use this power as a deterrent, consistent with better practice modern regulatory administration. If this is the

[21] Draft Report para 2.7
[22] Draft Report para 2.7

case why don't the equivalent provisions in the Corporations/ACNC Act have imprisonment as a penalty? **The failure of the Review to subject each provision of the Act and each of the amendments and new provisions it proposes under the Bill before the Senate to the special measures tests means it has not been demonstrated that they are in fact special measures. It is our submission that until a thorough analysis of whether the provisions of the proposed Bill before the Senate meet the special measures test required by law it would be improper for them to be adopted**.

The status of the CATSI Act as a special measure under section 8 of the Racial Discrimination Act warranted a full and thorough consideration of all aspects of the special measure standards required by law and how they applied to the CATSI Act and its provisions. However, the coverage given in the Final Report focussed on the over-arching special needs of First Nations Corporations that justified a special measure. While it is important to understand the social reasons that potentially justify a special measure being taken, any purported action of positive discrimination taken in response to address those social reasons must satisfy the legal requirements of a special measure in order to fall under section 8 of the Racial Discrimination Act.

While the Review did not undertake a full and proper analysis of the law relating to special measures and how it applied to the CATSI Act and its individual provisions,[23] it did focus on identifying the social reasons that justified a special measure being adopted. It concluded that the CATSI Act was justified due to the existence of these social reasons without considering whether this particular response (ie regulation and control via a separate incorporation statute and regulator) properly met all the legal requirements of a special measure. Simply adopting the rationale of the 2002 review that no alternative was properly available is not an appropriate response. As cited above, the law requires that a proposed measure must be supported by a reasonable evidence base that includes ***recent and reliable*** quantitative and qualitative data which establishes that the proposed measure is justifiable.[24] **Given there was no attempt to ascertain whether the amendments and new provisions proposed by the Bill were justified over alternative measures, the proposed Bill cannot reasonably be accepted as an appropriate special**

[23] See Final Report Section 2

[24] See page 7 of this submission and Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission at paragraph 30

measure without further review to ensure that the special measure tests are satisfied.

SPECIAL NEEDS JUSTIFICATIONS

In addition to failing to consider the legal requirements for a special measure as applied to the CATSI Act and its provisions, there was a further fundamental failure when the Review considered the special needs that justified the CATSI Act as a special measure in that it failed to properly apply the legal tests to each of the justifications and in particular it failed to consider what alternative, less discriminatory options may be available. There must be an ongoing need for the CATSI Act to justify it remaining as a special measure. There must be no alternative, less discriminatory way of addressing the disadvantages suffered by First Nations People and promote their advancement.

Community Controlled Essential Services Justification

The Review viewed CATSI Corporations primarily through the lens of them as community-controlled organisations delivering essential services to the community.[25] This is treated as a justification for regulating them to safeguard the interest of the members and communities that rely on the essential services.[26] However, this fails to recognise that there are many community-controlled organisations delivering essential services to First Nations communities that are incorporated under the Corporations Act. There is no *need* for the CATSI Act to do this. In particular, many Aboriginal Community-Controlled Health Organisations are incorporated under the Corporations Act.[27] These organisations successfully deliver services without any special regulatory oversight beyond that of any other corporation in Australia. Therefore the notion that the delivery of essential services to First Nations communities somehow justifies regulating First Nations Corporations in a manner different to other corporations cannot be sustained.

As previously stated, many Aboriginal Medical Services are incorporated under the Corporations Act and remain First Nations controlled simply by virtue of including such a provision in their constitution. This is an example of true self-determination. They have chosen this form, rather than it being mandated.

[25] Final Report para1.20; para 2.7
[26] Final Report para 1.21
[27] For example, Nhulundu Health Service, Charleville and Western Areas Aboriginal and Torres Strait Islander Community Health, Institute for Urban First Nations Health; Goolburri Aboriginal Health Advancement Company, Cherbourg Regional Aboriginal and Islander Community Controlled Health Service.

Therefore the essential services justification does not meet the special measure test as it:

- **fails the equality test**: it is not ***necessary*** to enable First Nations Australians to enjoy *on an equal basis with other Australians* the same benefits of incorporation; and
- **fails the continued need test**: there is ***no need*** for maintaining separate rights for different racial groups to enable First Nations Australians to provide community-controlled essential services;

as First Nations Australians are able to, and do, avail themselves of the Corporations Act to provide community-controlled essential services, with provisions in their constitutions used to ensure they maintain First Nations community-control.

It therefore **fails the special measures test**. There is no need for a special incorporation statute as the existing use of the Corporations Act by many First Nations community-controlled organisations (**ICC Corporations**) shows it can be used to adequately address this need without having a racially-segregated separate incorporation statute. In fact, ***the essential services justification is a reason to repeal the CATSI Act and replace it with a Special Regulatory Assistance Scheme as it would enable all ICC Corporations that provide essential services to First Nations communities to gain the benefit of special regulatory assistance, not just those incorporated under the CATSI Act***.

A further concern arising from the way the Review viewed CATSI Corporations through the essential services lens is that it repeatedly proposed regulatory standards that were akin to publicly-listed companies that have safeguards to protect shareholders. This extreme approach to regulating CATSI Corporations cannot be justified. There are many charities and private companies that provide essential services to their members and communities and they are not subject to such high regulatory standards. To treat CATSI Corporations in this manner is negative racial discrimination. **A very good example of this is the proposed new clause 333-10(4) in the current Bill that requires CATSI Corporations to provide remuneration reports for their key management personnel**. The only other companies required to provide such reports are publicly listed corporations.

In paragraph 2.8 the Report cites Article 18 of UNDRIP regarding the right of First Nations people to participate in decision-making, including *the right to*

maintain and develop their own decision-making structures. This is fundamental to the right of self-determination. The CATSI Act is inconsistent with this Article as it mandates the type of corporate and decision-making structure that a CATSI Corporation must have. An example of this is cited in the next paragraph 2.9 where the Report goes on to point out that the CATSI Act *requires* that a majority of directors are First Nations. This is taking away the right of First Nations people to determine their own decision-making structure.

The approach any single First Nations Corporation takes may depend entirely on the type of business and activities the First Nations Corporation is undertaking. The requirement in the CATSI Act for majority First Nations member directors appears to be based on the assumption that all First Nations Corporations are providing essential services to First Nations communities and therefore should be community-controlled, which is an entirely invalid assumption. ***On this basis, the CATSI Act is in fact contrary to Article 18 of UNDRIP, does not advance self-determination and amounts to over-regulation. It fails to fully address the incorporation needs of all First Nations Australians and focusses on ICC Corporations providing essential services as a justification to impose rigid and inflexible governance rules on all First Nations Corporations.***

As an example, an First Nations owned business may decide that they would like to have equal amounts of First Nations and skills-based independent directors or even more skills-based directors than First Nations directors. The benefit of this is that it enables First Nations Corporations to get access to skilled directors and business people to maximise the success and returns to the First Nations owners and it enables the First Nations members of the Board to learn from them and build their own capability. **The need for skills-based Directors is behind the new provision s246-17 in the proposed Bill, however, true self-determination would dictate that a CATSI Corporation could have as many skills-based directors as it desires and not have the composition of the Board dictated by requirements under the Act.**

Culture and Traditions Justification

One of the main justifications cited for having the separate CATSI Act is that it enables First Nations Corporations to take into account the particular cultures and traditions of First Nations People. Paragraphs 2.9 and 2.10 of the Report

cite examples of how the CATSI Act enables First Nations Corporations to run in a culturally appropriate manner including:

- Holding meetings and having their books in a language other than English as long as an English language translation is available. This is not a justification for the CATSI Act. The Corporations Act could easily address this and already does so for example in s287, which provides:

  Language requirements
  (1) The financial records may be kept in any language.
  (2) An English translation of financial records not kept in English must be made available within a reasonable time to a person who:
  (a) is entitled to inspect the records; and
  (b) asks for the English translation.

- Allowing for the inclusion of rules in the Rule book that take into account First Nations traditions and customs. This can also be achieved under the Corporations Act. There is nothing that prevents the constitution of a company incorporated under the Corporations Act from including such provisions and in the case of many ICC Corporations incorporated under the Corporations Act their constitutions do this. This is therefore not a justification for having a separate incorporation statute.

- Requiring the Registrar to take into account First Nations traditions and circumstances in performing his or her functions. This could easily be provided for under the Corporations Act and does not justify a separate incorporation statute.

None of the cited examples requires a separate incorporation statute for First Nations Corporations. Most can, and often are, addressed within the existing Corporations Act and ACNC Act regime by ICC Corporations incorporated under the Corporations Act. Those that cannot, could be more readily addressed through minor changes to the Corporations Act and the ACNC Act and the Special Regulatory Assistance Scheme[28] we have proposed rather that requiring a separate incorporation statute.

Protection for Members

The Report states that this is one of the key concepts underpinning the CATSI Act[29] and that this is achieved by *requiring* a majority of directors are

[28] See further discussion in Conclusion section of this submission p32-34
[29] Final Report para 2.11

members.[30] This is a flawed concept as it:

- **Conflicts with UNDRIP**: By making this a requirement, it conflicts with Articles 18 and 23 of UNDRIP that state that First Nations people have the right to maintain and develop their own decision-making structures. First Nations Corporations should therefore have the right to choose their own decision-making structure and whether the directors are required to be members or not. If they wish it to be the case, they can achieve this by including it in their constitution, and in fact, this is what many ICC Corporations incorporated under the Corporations Act do.
- **There is no special need for CATSI Act to achieve this**: This requirement is based on the assumption that the members of First Nations Corporations require better "protection" than what is available under the Corporations Act and ACNC Act. The previously cited justification for this appears to be the fact that First Nations Corporations often provide essential services to their communities. However, as pointed out previously not all First Nations Corporations do this. It also fails to take into account that the protections can be adequately achieved within constitutions and provisions under the Corporations Act and ACNC Act as is the case with the many ICC Corporations incorporated under the Corporations Act that provide essential services to their communities.

Paragraph 2.13 of the Report goes on to point out the role of the Registrar in protecting members by:

- **providing advice** on registration, rules and operation of an First Nations Corporation. In this role the Registrar acts as a source of independent information. We recognise this as an important function. However, it can be achieved under our proposed Special Regulatory Assistance Scheme with all First Nations Corporations incorporated under the Corporations Act, without the need for the CATSI Act. In fact it would allow all First Nations Corporations to receive this benefit not just CATSI Corporations.
- **Assistance with resolving disputes.** We also recognise this as an important function that could be achieved under our proposed new Special Regulatory Assistance Scheme. It does not justify having a completely separate incorporation regime for First Nations Corporations

[30] Final Report para 2.12

and could again be achieved through a Special Regulatory Assistance Scheme for all First Nations Corporations not just CATSI Corporations.

On this basis, the "need" for the CATSI Act to protect members fails to satisfy the tests for a special measure as it:

- **fails the equality test**: it is *not necessary* for equal enjoyment of the benefits of incorporation; and
- **fails the special needs test**: a separate incorporation statute is not justified;

as most member protections can be achieved without needing to have them incorporated other than under the Corporations Act like every other Australian corporation. The special role of the Registrar in providing advice and resolving disputes can be provided for under the Special Regulatory Assistance Scheme proposed.

Support for Corporations

The Report cites the Review of the ACA Act as noting there was a need for a system that was more responsive to the difficulties of the members and directors of First Nations Corporations and where there was a more active form of assistance to the corporation to meet the relevant legislative standards or avoid insolvency.[31] We largely agree with this statement. However, we do not believe this is a reasonable justification for a separate incorporation statute when it can be better achieved through a Special Regulatory Assistance Scheme.

Special Administration

The availability of the unique special administration provisions under the CATSI Act is cited as one of the reasons justifying a separate incorporation regime. However, there is nothing within these provisions that could not be addressed, and in a manner more consistent with the rights of self-determination, under a new Special Regulatory Assistance Scheme. Further, in our view there are some fundamental issues with the special administration regime that cannot be justified under the special measure tests.

Firstly, the way special administration operates is that when a special administrator is appointed (quite often a non-First Nations person) he or she takes control of the corporation. The special administrator then runs the

[31] Final Report para 2.16

corporation for a period of time before making the decision to either wind it up or hand it back to control of the community, which the Report states happens in 90 percent of the cases. The issues with this are that by giving the special administrator control of the corporation:

- it is fundamentally inconsistent with Articles 18 and 23 of UNDRIP and the rights of self-determination of First Nations People;
- it fails to act as a learning experience for the corporation, its management and its board thus First Nations Corporations can end up back in special administration for a second or third time.[32] In ORIC's research paper in 2010 that identified the leading causes of failure of First Nations Corporations it found that most failed as a result of poor management or poor corporate governance.[33] The process of special administration focusses on taking control to rectify issues and does nothing to build the capacity of First Nations Peoples to better manage and govern their corporations;
- it acts as a deterrent for First Nations Corporations to seek assistance early when they are facing difficulties as by bringing their issues to the attention of ORIC, the Registrar can step in and appoint a special administrator resulting in them losing control of their corporations. This can potentially have the adverse effect that by the time a corporation is put into special administration it is in a far worse position than it would otherwise be had it sought assistance when it first began facing difficulties; and
- it is a negative discriminatory measure as no other corporations in Australia can be taken over by a regulator in this manner without the consent of the Board or members.

We do not deny the importance of the special administration process, and it is the one part of the CATSI Act that can be justified as a special measure as it is designed for securing the advancement and protection of First Nations Australians, it does assist them to overcome entrenched discrimination and disadvantages and there is an ongoing need for it. However, it does not justify

[32] For example, Many Rivers Regional Housing Management Services Aboriginal Corporation; Mitakoodi Aboriginal Corporation
[33] ORIC Research Paper "Analysing the Key Characteristics in First Nations Corporate Failure" Australian Government 2010 p6

having a separate incorporation statute as it could easily be accommodated as a special measure under the Corporations Act.

While there is an identified special need for special administration-like provisions, this need does not require a whole separate incorporation regime to be effective. Rather, it could be built into the Special Regulatory Assistance Scheme[34] and operate as an special assistance measure (a positive discriminatory measure) rather than an assumption of control by the regulator (a negative discriminatory measure). If it functioned so that the Board retained control but were under advice from the special administrator, it would encourage more corporations to seek assistance earlier; it would enable the directors to learn from the experience and it would be consistent with the rights of self-determination of First Nations Australians.

Registrars powers to safeguard remote and very remote corporations

The Report draws attention to provisions of the CATSI Act that take account of remoteness of First Nations Corporations including:

- conferring jurisdiction to a broad ranges of courts to hear CATSI Act matters to enable those in remote locations to access state and local courts;
- enabling appointment of qualified persons who are not government employees as authorised officers in remote areas; and
- allowing elections by postal ballots.

All these requirements could be accommodated within changes to the Corporations Act as applied to registered First Nations Corporations that are located in remote or very remote areas. In fact, it would be preferable to have this as it would allow all First Nations Corporations in remote and very remote areas to access these benefits not just CATSI Corporations. As it is, there are First Nations Corporations registered under the Corporations Act that do not have these special safeguards available to them.

Rule Books

The Report states that it is a unique requirement to the CATSI Act that corporations must have Rule books that operate as a contract between the members and directors of the corporations. This is not unique to CATSI Act at

[34] See further discussion in Conclusion section of this submission p32-34

all. All corporations incorporated under the Corporations Act are required to have constitutions that operate as a contract between the members and directors of the corporations. It cannot therefore be considered a reason for requiring the separate CATSI Act.

Power to change Rule Book

The Report cites the positive benefit of the Registrar being able to change a corporation's Rule book as a means of allowing special rules for meetings during the COVID 19 pandemic.[35] It should be pointed out that ASIC also made special measures in this regard. In general, the fact that the Registrar and special administrator can change a Rule book, along with the fact that the Rule book must be approved by the Registrar and the Registrar is required to approve changes to the Rule books are negative discrimination provisions of the CATSI Act as corporations incorporated under the Corporations Act do not have any of these requirements and there is no justification for these provisions as a special measure. They do not satisfy the sole purpose test, they are not necessary to overcome entrenched discrimination or provide equal access to benefits and there is not continuing need for them. **In this regard the proposed new clause 69-30(3A) in the current Bill further entrenches this negative discrimination.**

Capacity Building

As the Report notes an important benefit to CATSI Corporations is access to education and training programs[36]. This is definitely a positive discriminatory aspect to the regulation of CATSI Corporations that satisfies the special measure test. The real issue here is that not all First Nations Corporations who would benefit from these programs are able to access them due to the fact that some elect to incorporate under the Corporations Act to escape the inflexible over-regulation of the CATSI Act. It would be far better to enable all First Nations Corporations to access these capacity building programs and this would be possible under our proposed Special Regulatory Assistance Scheme.

Social Disadvantage

The Report identifies the special disadvantages that can impact on the ability of First Nations People to form and run corporations including lower levels of education, low employment rates, English language challenges, poverty,

[35] Final Report para 4-132
[36] Final Report para 2-25

trauma and violence.[37] These disadvantages unquestionably justify special measures to assist First Nations People overcoming these when running their corporations. However, we contend this is best achieved through a Special Regulatory Assistance Scheme (a positive discriminatory measure) rather than through imposing a whole different, more rigid set of laws, controls and harsher penalties around First Nations Corporations (negative discrimination).

Cultural Values and Practices

The need to accommodate the special cultural values, traditions and practices of First Nations People in the way they are able to run corporations is important. However, the whole concept of incorporation is anathema to First Nations Peoples and is often at odds with their cultural values and practices.[38] To the extent that allowance can be made for cultural values and practices this can be done within either the constitution of the corporation under the Corporations Act or accommodated within variations to the Corporations Act for registered First Nations Corporations under the Special Regulatory Assistance Scheme without the need for a separate incorporation statute. For the particular circumstances of Native Title PBCs these can, and are already, accommodated within the Native Title Act and the Native Title (Prescribed Body Corporate) Regulations.

Nature of Corporations

The Report refers to the requirements via legislation or government policy for some corporations to be formed as CATSI Corporations.[39] This is, in and of itself, racially discriminatory and facilitates governments making racially discriminatory policies that are not justifiable as special measures. Why, for example, should corporations in receipt of Indigenous Advancement Strategy (IAS) funds of $500,000 or more be required to incorporate under the CATSI Act when non-First Nations organisations in receipt of the same amount of IAS funds are not? The justification given is that it means that they are subject to regulatory oversight of ORIC, which has far greater powers of intervention and takeover of a corporation than ASIC or the ACNC thus offering greater protection of government funding. This is not an acceptable reason under the special measure test as its purpose is to protect government funding rather

[37] Final Report para 2.29
[38] For example, the values and practices of kinship vs laws relating to related party benefits and conflicts of interest in corporations.
[39] Final Report para 2.39

than to secure the advancement, protection or disadvantage of First Nations Australians. Accordingly, this cannot be justified as a special measure in any way and is negative racial discrimination. Why can't First Nations Corporations incorporated under the Corporations Act have access to these grants on the same terms as non-First Nations corporations?

Similarly, the NSW government has taken an arbitrary policy position that First Nations housing corporations incorporated under the CATSI Act cannot manage more than 500 properties. If a First Nations housing corporation is incorporated under the Corporations Act this does not apply. This is again negative racial discrimination and is not in any way a special measure designed to address the advancement, protection or disadvantage of First Nations Peoples.

These are examples of racial discrimination in its worst form that the CATSI Act indirectly permits governments to perpetuate through policies that single out CATSI Corporations. Further, this rationale for having the CATSI Act is simply self-fulfilling. If the CATSI Act did not exist then these requirements could not exist and the ability of governments to formulate policies that amount to negative racial discrimination utilising the CATSI Act as a distinguishing feature would be removed.

Corporations Functions

This section of the Report identifies a special incorporation need based on the functions that First Nations Corporations fulfil. Again it refers to First Nations Corporations providing essential services. As has been detailed previously in this submission, this is not a special need that justifies the CATSI Act as many ICC Corporations incorporated under the Corporations Act fulfil the function of providing essential services to First Nations communities.

Conclusion

In summary, none of the reasons identified in Section 2 of the Report justify the need for a separate incorporation statute for First Nations Peoples. It is not supporting First Nations Australians to overcome entrenched discrimination and disadvantage. In actual fact, it is entrenching discrimination further in a self-perpetuating cycle. It entrenches a negative discriminatory approach to CATSI Corporations (in that it is far more rigid, inflexible and over-regulated with extraordinary powers of control given to the Registrar and it facilitates discriminatory government policy) without demonstrating that there

is a special or continuing need for it when all the purported rationales for the CATSI Act can be easily achieved under the Corporations Act and a Special Regulatory Assistance Scheme.

Further strengthening of the CATSI Act under many of the proposed amendments in the Bill before the Senate will only see more First Nations Corporations move away from the inflexibility and discrimination in favour of incorporation under the Corporations Act. This means they will be unable to access the few true benefits that are given to CATSI Corporations in the form of:

- capacity building, education and training programs;
- special administration measures;
- advice on compliance matters; and
- dispute resolution.

All First Nations Corporations should be enabled to access these benefits as they all suffer from the same disadvantages and need access to these special measures. Having a separate incorporation statute in the form of the CATSI Act draws an artificial and unnecessary distinction between First Nations Corporations that can access them and those that cannot.

OTHER CONCERNS WITH THE REVIEW AND PROPOSED AMENDMENTS TO CATSI ACT

We also take the opportunity to raise the following over-arching concerns in relation to the conduct of the Review, the operation of the CATSI Act and proposed further amendments to it.

Conflicts of Interest

The Review was led by the National Indigenous Australians Agency, which is not an impartial body given that it employs the personnel of the Office of the Registrar of Indigenous Corporations and therefore has a vested interest in ensuring the CATSI Act and ORIC remain in place. Similarly, the Steering Committee included senior officials from ORIC. **We would therefore submit that the amendment proposed that includes a new clause 643-1 dealing with future reviews should stipulate that those reviews should be conducted by persons independent of the agencies that administer the Act.**

Over-regulation

The Review focusses on regulatory oversight and control as being the means of achieving the stated goals of the special measure ***without any consideration of how those goals may be achieved by other alternative and more effective means of overcoming disadvantage,*** for example by providing more applied education and training, increasing organisational capacity development and mentoring and providing legal and governance assistance. This approach fails to consider the sole purpose test required for the CATSI Act to be justifiable as a special measure as it must be demonstrated that securing adequate advancement or protection of First Nations Australians, ***could not otherwise be achieved without having a separate Act for incorporation of First Nations corporations.*** The focus on regulation, control and penalties for non-compliance can be viewed as having an ulterior purpose of providing the government with extra oversight and extraordinary powers in relation to CATSI Corporations, which is particularly the case with Native Title RNTBCs.

This focus on regulation is why many consider the CATSI Act to be racist as it suggests that First Nations People cannot be trusted to govern their own organisations without the added scrutiny of a dedicated regulator who is given extraordinary powers of control over them. First Nations People face significant disadvantages when trying to operate corporate entities due to lower levels of education, poor English language skills, lateral violence, remoteness and cultural differences. ***Special laws and regulations do not in and of themselves address these disadvantages and in fact perpetuate them by requiring First Nations Australians to understand a different and more complex regulatory regime than faced by non-First Nations Australians***. If the focus truly was on overcoming the disadvantages and challenges that First Nations People face when dealing with complex legal and regulatory corporation frameworks, ***then resources would be better directed to developing their capacity to address these disadvantages and enabling them to overcome these challenges within the existing corporate frameworks available to all Australians*** rather than burdening them with even more legalities and regulation in the form of the CATSI Act and ORIC overlayed in most cases by a second regulator, the ACNC.

This is particularly the case with RNTBCs. They are subject to one of the most complex regulatory environments of any corporation in Australia as they must deal with ORIC and the CATSI Act, the ACNC and the ACNC Act and the Native

Title Act and Native Title (Prescribed Body Corporate) Regulations in addition to laws relating to trusts and trustees. This approach of greater regulation and control (vs special assistance) is directly contrary to the special needs of First Nations Australians to overcome the disadvantages they face as detailed above***. It only serves to further increase the disadvantages by creating a regulatory regime that is so complex even highly educated non-First Nations Australians have difficulty understanding it.*** This highlights the fact that this approach does not satisfy the equality aspect of the special measures test and is in reality negative racial discrimination.

The recent focus on issues in governance for First Nations organisations in the media has highlighted this issue. Jamie Lowe, a Gundjitmara Djabwurrung man and chief executive of the National Native Title Council, highlighted the impact of excessive regulatory burden faced by RNTBCs in a recent article in the Guardian:

> *"There's a huge cultural responsibility, let alone a statutory responsibility under the act," Lowe said. "So you put those two together, and then you give them zero money, there's going to be issues bound to happen.*
>
> *"If that's not a recipe for disaster I don't know what it is."*
>
> *The regulatory obligations are particularly onerous in the Pilbara, where new developments continually trigger new statutory responsibilities. Lowe said they would become even more difficult if the Western Australian government passes proposed new cultural heritage laws which will rely on the PBCs to take on more work.*
>
> *"When someone wants to do some activity up the road there, the PBC is not even resourced to employ a person to take a phone call," Lowe said.*
>
> *"They say, 'oh these mob, they don't know how to govern' – we put it all on the mob and* ***it's not on the mob at all. It's on the operating environment and the legislation that they're trying to deal with****."*[40] *(emphasis added).*

[40] https://www.theguardian.com/australia-news/2021/aug/03/rio-tintos-alleged-underpayment-of-traditional-owners-of-wa-mine-area-sparks-calls-for-widespread-review

The whole system of regulation of First Nations Corporations as a whole needs to be examined with a critical focus on the impact of over-regulation and the means of creating special measures that are available to all First Nations Corporations (and not just CATSI Corporations). The response of successive governments to issues with governance of First Nations Corporations has been to keep increasing regulation and putting more and more constraints on how they may be structured and governed and giving more and more powers to the Registrar, which is at odds with both self-determination and the CATSI Act as a special measure. The attitude of government appears to be that if First Nations Corporations want access to the benefits offered by ORIC then they must subject themselves to the greater scrutiny of the CATSI Act as the trade-off. This is not a true special measure.

Further, the special measures offered under the CATSI Act are supposedly designed to overcome the disadvantages suffered by First Nations People, but in fact have created a regulatory system so complex that First Nations People, ***precisely because they are suffering from those entrenched disadvantages,*** struggle to understand and meet the governance requirements. ***It is a system that is designed to lead to governance failures by failing to take into account the disadvantage that burdens First Nations People and fails to resource them to procure the necessary assistance and expertise needed to navigate the complexities of the regulatory requirements***.

Incentive to transfer

The more rigid the requirements imposed on CATSI Corporations the more incentive there is for First Nations Corporations to move away from the CATSI Act and over to the Corporations Act. The availability of the transition provisions in the CATSI Act has enabled First Nations Corporations who feel increasingly that the CATSI Act is racist and that they are over-regulated and constrained by it, to transfer across. These same concerns lead RNTBCs to set up complex structures with trusts and operating companies under the Corporations Act in order to move the bulk of their assets and operations outside the scope of the CATSI Act.[41] This denies many First Nations Corporations access to the benefits, in particular in governance support, that are offered to corporations under the CATSI Act. Understandably, many organisations are concluding that the benefits offered are outweighed by the regulatory over-reach.

[41] For example, the First Nations Bailai, Gurang, Gooreng Gooreng Taribelang Bunda People Aboriginal Corporation and Bigambul Native Title Aboriginal Corporation.

The right of First Nations People to determine their own decision-making structures

The Report makes reference two articles of UNDRIP[42] :

- Article 18 which provides:
  First Nations peoples have the right to participate in decision-making in matters which would affect their rights, ***through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own First Nations decision-making institutions****. (emphasis added)*
- Article 23 which provides:
  First Nations peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, First Nations peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, ***to administer such programmes through their own institutions****.(emphasis added)*

The Report incorrectly draws the conclusion from these Articles that this requires the First Nations Corporations that provide health, housing and other economic and social programmes affecting them to be community-controlled with a majority of directors being members. This is used as a justification for the controls the CATSI Act imposes on membership and boards of CATSI Corporations. ***This completely overrides the right of First Nations people under these Articles to create their own decision-making institutions and to participate in decision-making through representatives chosen by themselves in accordance with their own procedures***.

The CATSI Act, by placing restrictions on how CATSI Corporations may be structured, how boards may be composed and how boards must make decisions, is fundamentally at odds with the right of First Nations People to choose these things for themselves. **While there are some provisions in the new Bill that appear to create greater leniency, such as the amendment to the membership requirement to allow for corporate members and the creation of subsidiaries, it is our contention that these should not be required because the restrictions should not be there in the first place**.

[42] Final Report paras 2.6 and 2.8

The Australian Human Rights Commission cites legal academic Warwick McKean:

> *"It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared.* ***Such measures must be strictly compensatory*** *and not permanent or else they will become discriminatory.* ***It is important that these measures should be optional and not against the will of the particular groups affected,*** *and they must be frequently reconsidered to ensure that they do not degenerate into discrimination" {emphasis added)*[43]

It is of significant concern that First Nations People are forced into incorporating under the CATSI Act rather than the Corporations Act for Native Title RNTBCs. This is fundamentally inconsistent with the rights of First Nations People to choose their own decision-making structures and creates a situation within Native Title where complex legal structures are adopted to ensure only the minimum that is required to be under the CATSI Act is left there and all other assets and functions are shifted out of the RNTBC into other entities incorporated under the Corporations Act.

CONCLUSION

It is our submission that the Bill before the Senate should be rejected as a result of the failure of the Review to properly consider whether the CATSI Act as a whole is legally (not just socially) justifiable as a special measure and the failure of it to consider each of the provisions in the Bill against the special measures test to determine that they each stand alone as justifiable special measures.

We have a significant concern that when applying the legal tests of what is justifiable as a special measure it is difficult to see how the CATSI Act can be justified as:

- **it fails the sole purpose test** as it is also used by governments to maintain greater oversight and control of the funding, monies and assets of First Nations Corporations than what is imposed on non-First Nations

[43] Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth) (2011) | Australian Human Rights Commission para 5 citing Warwick McKean, *Equality and Discrimination under International Law* (1983) 288, as cited by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 130.

corporations as is shown by the rules relating to the Indigenous Advancement Strategy grants and the rules around RNTBCs. Further, the lack of flexibility and the rigid rules around how a CATSI Corporation is established and operated actually impede its ability to participate in economic development activities and therefore impedes the advancement of First Nations People;

- **it fails the equality test** as it is not *necessary* to ensure First Nations Australians have equal access to the benefits of incorporation. This can readily be done within the existing framework of the Corporations Act with special provisions for First Nations Corporations in the same way charities are dealt with in the ACNC Act. It does not enable First Nations Australians to enjoy on an equal basis with other Australians the same legal facilities of incorporation. Rather, ***it creates a wholly separate legal regime to other Australians that is far more stringent and inflexible and that grants far greater powers of intervention and control of corporations than the standard provisions of the Corporations Act***;
- **it fails the continued need test** as there is no *need* to maintain a wholly separate incorporation regime for First Nations People. The special needs of First Nations Corporations can all be addressed within the existing regulatory framework of the Corporations Act in a manner similar to the ACNC Act;
- **it does not advance self-determination** due to the regulatory overreach of the government in the form of ORIC and the Registrar where even things as fundamental as the right of First Nations Australians under Article 18 of UNDRIP to be able to determine their own decision-making structures is fundamentally undermined by the limits imposed on what goes in the constitution of a CATSI Corporation in the form of the internal governance rules and the fact that the constitution must be approved by the Registrar;
- **it negatively discriminates** against First Nations Australians by giving the Regulator far greater powers of intervention and control over CATSI Corporations and it also enables governments to pass policies that negatively discriminate against First Nations Australians by targeting CATSI Corporations; and

- **there are no identified special needs** of First Nations Australians that are better satisfied by having a separate incorporation statute. Special regulatory assistance can be used to address the disadvantages suffered by First Nations Australians and the Corporations Act can be amended in the same way the ACNC Act amends it for charities to accommodate cultural practices and traditions and particular needs of First Nations People.

Our concern is that rather than working to reduce disadvantage for First Nations Australians in running corporations, the CATSI Act and the additional recommended changes from the Review, including those in the current Bill before the Senate, will:

- **result in further regulation of an already over-regulated sector;**
- **entrench inequality and racially discriminatory practices;**
- **create an even more rigid and inflexible corporate structure;**
- **erode self-determination even further; and**
- **fail to address the special needs of First Nations Australians.**

The primary focus of the CATSI Act is regulating First Nations Corporations differently to other corporations. As such the focus is not specifically on positive discriminatory actions that address disadvantages and equal access to use of corporations (the carrot approach) but rather the negative discrimination approach of laws and regulations that apply greater controls, less flexible corporate structures and punish them for non-compliance (the stick approach). ***The difficulty with the stick approach is that no matter how big you make the stick, if the inherent disadvantages suffered by First Nations Australians impede their understanding of what the rules are relating to how and when the stick will be used, the approach fails.*** In this way the concept of the CATSI Act fails First Nations Australians.

The only rationale that justifies taking this approach (vs a special regulatory assistance approach) is the assumption that due to the disadvantages First Nations Australians face, greater governmental control, regulation and powers of intervention are required for their corporations. However, greater governmental control, regulation and intervention does not address the disadvantages suffered by First Nations people running corporations, it simply

allows the government to step in and punish or override them when the Regulator sees fit.

We are of the view that a further review should be instructed to properly consider the legal requirements of a special measure and how it applies to the CATSI Act and every provision within it. This review should be conducted by persons with legal qualifications who are outside the NIAA and ORIC structures to ensure independence.

Any review should also be asked to consider alternative approaches that may be less discriminatory. It is our position that the major difference between the most recent Review and previous reviews of the CATSI Act is that Australia now has the Australian Charities and Not-for-Profit Commission Act. The establishment of the ACNC was in recognition that charities are often run by volunteers and have limited resources which they prefer to direct to satisfying their objects than on compliance costs and therefore have a need for special assistance. Treating charities in this manner establishes a precedent for how special needs corporations are dealt with.

It offers a viable and preferred means of dealing with First Nations Corporations as it ensures they are treated equally to other corporations by being incorporated under the Corporations Act with variations and special regulatory assistance to address their special needs. It is therefore not justifiable, and demonstrates *there is no need*, to maintain a wholly separate incorporation regime, particularly when a precedent exists for addressing special needs corporations within the existing corporations framework. ***The fact that the Review simply takes the position specified in the Review of the ACA Act in 2002 that no alternatives to a separate incorporation regime would be suitable is fundamentally flawed given that the ACNC regime was not introduced until 2012.***

The ACNC provides an example of how First Nations corporations may be able to incorporate under the Corporations Act and, if they satisfy certain criteria, register as First Nations corporations in a manner similar to how charities are registered under the ACNC Act. The criteria for registration as an First Nations Organisation should be as simple as being majority First Nations owned. They would also be able to register as charities if they met the relevant criteria.

This would enable all First Nations Corporations to have the benefit of a special form of regulatory assistance required to overcome the disadvantages and

enable First Nations Australians to use corporations (namely, the same corporations as every other Australian has access to) more effectively. This Special Regulatory Assistance Scheme could be administered by a specifically created First Nations Corporations Commission and could be overseen by a Commissioner for First Nations Corporations.

This proposal preserves a function for the government in administering and overseeing the Special Regulatory Assistance Scheme without the need or complications of having a whole separate incorporation statute and regulatory regime. The regulator of a registered First Nations Organisation would be either ASIC or the ACNC, in the same manner as any other Australian corporation, thus reducing the complexity of having multiple regulators, which is currently the case for many CATSI Corporations who are regulated by both ORIC and the ACNC.

Further, rather than having the expense of maintaining a separate regulator, the resources currently used to maintain ORIC and oversee the CATSI Act, could be diverted to providing the Special Regulatory Assistance Scheme to registered First Nations Corporations that would be specifically aimed at overcoming the disadvantages and challenges they face. For example, once a corporation was registered as an First Nations Corporation it would be entitled to obtain the benefit of specific corporate capacity development services including:

- applied governance education and training;
- organisational capacity development and mentoring;
- special administrative assistance;
- legal and governance guidance and assistance; and
- dispute resolution services.

Capacity building as a means of addressing the disadvantages faced by First Nations Australians making effective use of corporations was quite definitely a secondary focus of the Review of the CATSI Act, which is understandable given it is not actually contained in the CATSI Act itself. ***The use of positive discriminatory actions such as education, training, mentoring and other capacity building measures to address the disadvantages of First Nations Australians should be the primary focus of any regime that treats First Nations Corporations different to other corporations.*** Setting up an First Nations Corporations Commission with a focus on Special Regulatory

Assistance Scheme would achieve this in a similar way that the ACNC provides special regulatory assistance to charities.

This approach would mean that **ALL** First Nations Corporations who are providing essential services to First Nations Australians could access these services ***without the artificial discrimination that currently exists between those incorporated under the CATSI Act and those incorporated under the Corporations Act.*** It could also potentially be extended to those that operate as Incorporated Associations or Co-operatives.

We acknowledge that there are some special needs that would need to be specifically addressed in any such new regime. In the same way the ACNC Act amends particular provisions of the Corporations Act for charities, registered First Nations Corporations could be subject to special rules that amend the Corporations Act to take into account the particular traditions and cultural requirements of First Nations Corporations. For example, extensions of timeframes to hold AGMs where there is sorry business or other cultural requirements. Further the particular, special role played by RNTBCs could also be addressed in this manner and/or through the PBC Regulations under the Native Title Act

The benefit of the approach we are proposing is that there would be significant advantages to a corporation that meets the criteria to be a registered First Nations Corporation with virtually none of the downsides of the highly rigid and over-regulated corporate structure under the CATSI Act. This would encourage all First Nations Corporations to register and gain the benefits of doing so. The current CATSI Act acts as a disincentive to operate as a CATSI Corporation so many First Nation Corporations that would otherwise benefit greatly from additional assistance choose to forego that in favour of the more flexible and less discriminatory regulatory regimes of ASIC and the ACNC.

A further strengthening of the CATSI Act, such as some of the proposed provisions in this Bill, will only serve to drive more First Nations Corporations to either incorporate under the Corporations Act or, particularly in the case of RNTBCs where that is not possible, to establish separate entities outside of the CATSI Act, to avoid the strictures and regulatory overreach of the CATSI Act and ORIC. This has the opposite effect of addressing the special needs and disadvantages First Nations Australians face in utilising corporations as it takes them outside the beneficial aspects offered by ORIC in the form of capacity building, special regulatory assistance and dispute resolution. This is a major

failure that directly results from having the wholly separate incorporation regime for First Nations Corporations under the CATSI Act.

Finally, the CATSI Act suffers from focussing on a specific type of First Nations Corporation – a community-controlled First Nations Corporation that provides essential services to First Nations communities or manages benefits on their behalf. The internal governance rules in the CATSI Act are specifically tailored to this type of First Nations Corporation and therefore lack the flexibility required for other types of First Nations Corporations.

In particular, First Nations businesses operated for the purpose of social, cultural or economic development or other for-profit activities are severely hampered by the constraints imposed under the CATSI Act. It is also a reason for these type of community development activities of Native Title RNTBCs to be set up in corporations incorporated under the Corporations Act.

The research on best practice in First Nations governance advocates a nation rebuilding approach with a focus on social, cultural and economic development activities. This approach is advocated by ORIC itself. However, the CATSI Act regime remains fundamentally incompatible with this approach due its inflexibility and over-regulation.[44] Our proposal to allow First Nations Corporations to incorporate under the Corporations Act overcomes the issue of there being only one type of corporate structure, best suited to a public good ICC Corporation, available under the CATSI Act. If First Nations Corporations are able to incorporate under the Corporations Act they can choose the most appropriate corporate structure based on their activities and purpose including proprietary companies limited by shares that are suited to private for-profit First Nations businesses and companies limited by guarantee, best suited to public good ICC Corporations.

For the reasons outlined above, we believe that strengthening the CATSI Act as proposed by the Review and included in a number of provisions in the Bill, without a proper review that fully and thoroughly analyses:

[44] When one of the authors attended the Native Nations Institute course on the Nation Rebuilding approach to First Nations Governance at the University of Arizona, in discussing the comparative positions of First Nations governance in Australia, New Zealand, USA and Canada they depicted a linear graph with USA, Canada and New Zealand at one end of the scale at the forefront in their approach to best practice in First Nations governance and Australia at the opposite end of the scale lagging a significant way behind these other countries. The CATSI Act is a significant contributor to this.

- **the legal requirements for a special measure and how this applies not only to the CATSI Act as a whole but every provision of the CATSI Act as required by Australian law; and**
- **alternative options that may be less discriminatory and may result in equal or better outcomes for ALL First Nations Corporations**

is perpetuating a system regulation and control that is far more stringent and inflexible than other corporations face is a negative discriminatory practice.

All the issues that have been highlighted with governance of First Nations Corporations will not be addressed by simply increasing regulatory controls. A fundamental shift in approach is necessary to prevent the need for First Nations Corporations to trade off flexibility and equal regulatory treatment under the Corporations Act against access to the benefits and assistance provided by ORIC.

The authors of the submission are available to be contacted if questions arise in relation to this submission.

ANNEXURE A

Comparative table of equivalent provisions with applicable penalties under the Corporations (Aboriginal and Torres Strait Islander) Act versus the Australian Charities and Not-for-Profits Act and Corporations Act

CATSI ACT	ACNC ACT/CORPS ACT
CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 - SECT 348.1 **AS AMENDED BY THIS BILL** **Lodging annual reports with the Registrar** (1) An Aboriginal and Torres Strait Islander corporation that has to prepare or obtain a report under this Part (other than a general report) must lodge the report with the Registrar within the time for lodgement under subsection (3) (as extended under section 348-3, if applicable). **Penalty: 25 penalty units or imprisonment for 6 months, or both.** **Note: A secretary of an Aboriginal and Torres Strait Islander corporation may be liable for a civil penalty for a contravention of this section. See sections 265-40 and 386-10.** (2) An offence against subsection (1) is **an offence of strict liability**. (3) The time for lodgment is: (a) within 6 months after the end of the financial year if the report is: (i) a financial report for a financial year; or (ii) a directors' report for a financial year;	AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION ACT 2012 - SECT 175.35 **Liability to penalty** An entity is liable to an **administrative penalty** if: (a) the entity is required under this Act to give a report, return, notice, statement or other document to the Commissioner in the approved form by a particular day; and (b) the entity does not give the report, return, notice, statement or document to the Commissioner in the approved form by that day. **s175-40** **Amount of penalty** (1) The amount of the penalty is: (a) if the entity is a medium registered entity--double the base penalty amount; or (b) if the entity is a large registered entity--5 times the base penalty amount; or (c) otherwise--the base penalty amount. (2) The ***base penalty***

(iia) a remuneration report for a financial year; or

(iii) an auditor's report on a financial report for a financial year; or

(b) the time provided for by:

(i) the regulations if the report is any other section 333-5 report ; or

(ii) the determination by the Registrar under section 336-1 or 336-5 if the report is not a section 333-5 report .

PROPOSED AMENDED SECTION 330-10 UNDER CURRENT BILL

330-10 General report to be lodged with Registrar

(1) The corporation must lodge the general report with the Registrar within the time for lodgment under subsection (2) (as extended under section 330-15, if applicable).

Penalty: 25 penalty units or imprisonment for 6 months, or both.

Note: A secretary of an Aboriginal and Torres Strait Islander corporation may be liable for a civil penalty for a contravention of this section. See sections 265-40 and 386-10.

amount under this Subdivision is 1 penalty unit for each period of 28 days or part of a period of 28 days:

(a) starting on the day when the report, return, notice, statement or other document is due; and

(b) ending when the entity gives it;

(**up to a maximum of 5 penalty units**).

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Example: An entity lodges a return 31 days late. The base penalty amount under subsection (2) is 2 penalty units.

(3) In working out the base penalty amount, the amount of a penalty unit is the amount applying at the start of the relevant 28-day period.

(4) The fact that the entity has not yet given the relevant report, return, notice or other document does not prevent the Commissioner notifying the entity that it is liable to an administrative penalty under this Subdivision. That penalty may be later increased under this section.

CORPORATIONS ACT 2001 - SECT

	319 **Lodgment of annual reports with ASIC** (1) A company, registered scheme or disclosing entity that has to prepare or obtain a report for a financial year under Division 1 must lodge the report with ASIC. This obligation extends to a concise report provided to members under section 314. (1AA) A notified foreign passport fund must lodge each of the following with ASIC for each financial year for the fund: (a) a copy of a report for the fund for the year, prepared in accordance with the financial reporting requirements applying to the fund under the Passport Rules for the home economy for the fund; (b) a copy of each auditor's report that relates to the report mentioned in paragraph (a). **(1A) An offence based on subsection (1) or (1AA) is an offence of strict liability.** **Schedule 3 – 60 penalty units** (2) Subsection (1) does not apply to: (a) a small proprietary company that prepares a report in response to: (i) a shareholder direction under section 293; or

	(ii) an ASIC direction under section 294; if paragraph 292(2)(c) (about having CSF shareholders) does not also apply to the company for the financial year; and (b) a small company limited by guarantee that prepares a report in response to a member direction under section 294A or an ASIC direction under section 294B. (3) The time for lodgment is: (a) within 3 months after the end of the financial year for a disclosing entity, registered scheme or notified foreign passport fund; and (b) within 4 months after the end of the financial year for anyone else.
CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 - SECT 88.5 **Registrar's power to direct corporation to change its name** (1) The Registrar may direct an Aboriginal and Torres Strait Islander corporation in writing to change its name within 2 months if: (a) the name should not have been registered; or (b) the corporation has breached a condition under subsection 85-5(3) on the availability of the name; or	CORPORATIONS ACT 2001 - SECT 158 **ASIC's power to direct company to change its name** (1) ASIC may direct a company in writing to change its name within 2 months if: (a) the name should not have been registered; or (b) the company has breached a condition nder subsection 147(3) on the availability of the name; or (c) a consent given under subsection 147(4) to use or

(c) a consent given under subsection 85-5(4) to use or assume the name has been withdrawn; or (d) the corporation has breached a condition on a consent given under subsection 85-5(4); or (e) the corporation ceases to be permitted to use or assume the name (as referred to in paragraph 85-5(4)(b)). (2) The corporation must comply with the direction within 2 months after being given it by doing everything necessary to change its name under section 88-1. **Penalty: 50 penalty units or 12 months imprisonment , or both.** (3) If the corporation does not comply with subsection (2), the Registrar may change the corporation's name to its ICN and any other words that section 85-1 requires, by altering the details of the corporation's registration to reflect the change. (4) A change of name under subsection (3) takes effect when the Registrar alters the details of the corporation's registration. (5) An offence against subsection (2) is an offence of strict liability. Note: For *strict liability* , see section 6.1 of the *Criminal Code* . (6) A direction under subsection (1) is not a legislative instrument.	assume the name has been withdrawn; or (d) the company has breached a condition on a consent given under subsection 147(4); or (e) the company ceases to be permitted to use or assume the name (as referred to in paragraph 147(4)(b)). (2) The company must comply with the direction within 2 months after being given it by doing everything necessary to change its name under section 157. (**2A) An offence based on subsection (2) is an offence of strict liability.** Note: For *strict liability* , see section 6.1 of the *Criminal Code* . (3) If the company does not comply with subsection (2), ASIC may change the company's name to its ACN and any other words that section 148 requires, by altering the details of the company's registration to reflect the change. (4) A change of name under subsection (3) takes effect when ASIC alters the details of the company's registration. **Schedule 3 – Penalty for breach of s158(2) is 120 penalty units**
CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 -	CORPORATIONS ACT 2001 - SECT

SECT 322.20	289
Place where records are kept (1) If an Aboriginal and Torres Strait Islander corporation is registered as a large corporation, the records that the corporation is required to keep under this Division must be kept at the corporation's registered office. **Penalty: 25 penalty units or imprisonment for 6 months, or both.** (2) If an Aboriginal and Torres Strait Islander corporation is registered as a small or medium corporation, the records that the corporation is required to keep under this Division must be kept at the corporation's document access address. **Penalty: 25 penalty units or imprisonment for 6 months, or both.** (3) An offence against subsection (1) or (2) is an offence of strict liability.	**Place where records are kept** (1) A company, registered scheme or disclosing entity may decide where to keep the financial records. Records kept outside this jurisdiction (2) If financial records about particular matters are kept outside this jurisdiction, sufficient written information about those matters must be kept in this jurisdiction to enable true and fair financial statements to be prepared. The company, registered scheme or disclosing entity must give ASIC written notice in the prescribed form of the place where the information is kept. **(2A) An offence based on subsection (2) is an offence of strict liability.** **Schedule 3 – penalty is 60 penalty units**

CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 - SECT 407.5 **Registrar may require additional information** (1) The Registrar may require a person who submits a document for lodgment to: (a) produce to the Registrar such other document; or (b) give the Registrar such information; as the Registrar thinks necessary in order to form an opinion whether he or she may refuse to receive or register the submitted document. (2) A person must comply with a requirement under subsection (1). (3) A person commits an offence if the person contravenes subsection (2). **Penalty: 50 penalty units or imprisonment for 12 months, or both.** **(4) An offence against subsection (3) is an offence of strict liability.**	NO EQUIVALENT IN EITHER ACNC OR CORPORATIONS ACT.
CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 - SECT 290.35 **Voting by or on behalf of related party interested in proposed resolution** (1) At a general meeting, a vote on a	CORPORATIONS ACT 2001 - SECT 224 **Voting by or on behalf of related party interested in proposed resolution** (1) At a general meeting, a vote on a proposed resolution under this Division must not be cast (in any

proposed resolution under this Division must not be cast (in any capacity) by or on behalf of: (a) a related party of the corporation to whom the resolution would permit a financial benefit to be given; or (b) an associate of such a related party. (2) Subsection (1) does not prevent the casting of a vote if: (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and (b) it is not cast on behalf of a related party or associate of a kind referred to in subsection (1). (3) The regulations may prescribe cases where subsection (1) does not apply. (4) The Registrar may by writing declare that: (a) subsection (1) does not apply to a specified proposed resolution; or (b) subsection (1) does not prevent the casting of a vote, on a specified proposed resolution, by a specified entity, or on behalf of a specified entity; but may only do so if satisfied that	capacity) by or on behalf of: (a) a related party of the public company to whom the resolution would permit a financial benefit to be given; or (b) an associate of such a related party. (2) Subsection (1) does not prevent the casting of a vote if: (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and (b) it is not cast on behalf of a related party or associate of a kind referred to in subsection (1). (3) The regulations may prescribe cases where subsection (1) does not apply. (4) ASIC may by writing declare that: (a) subsection (1) does not apply to a specified proposed resolution; or (b) subsection (1) does not prevent the casting of a vote, on a specified proposed resolution, by a specified entity, or on behalf of a specified entity; but may only do so if satisfied that the declaration will not cause unfair prejudice to the interests of any

the declaration will not cause unfair prejudice to the interests of any member of the corporation. (5) A declaration in force under subsection (4) has effect accordingly. (6) A declaration under subsection (4) is not a legislative instrument. (7) If a vote is cast in contravention of subsection (1), the related party or associate, as the case may be, contravenes this subsection, whether or not the proposed resolution is passed. **Penalty: 200 penalty units or imprisonment for 5 years, or both.** (8) For the purposes of this section, a vote is cast on behalf of an entity if, and only if, it is cast: (a) as proxy for the entity; or (b) otherwise on behalf of the entity; or (c) in respect of a share in respect of which the entity has: (i) power to vote; or (ii) power to exercise, or control the exercise of, a right to vote. (9) Subject to subsection 290-40(1), a contravention of this section does not affect the validity of a resolution.	member of the public company. (5) A declaration in force under subsection (4) has effect accordingly. (6) If a vote is cast in contravention of subsection (1), the related party or associate, as the case may be, contravenes this subsection, whether or not the proposed resolution is passed. (7) For the purposes of this section, a vote is cast on behalf of an entity if, and only if, it is cast: (a) as proxy for the entity; or (b) otherwise on behalf of the entity; or (c) in respect of a share in respect of which the entity has: (i) power to vote; or (ii) power to exercise, or control the exercise of, a right to vote. (8) Subject to subsection 225(1), a contravention of this section does not affect the validity of a resolution. (9) Subject to Part 1.1A, this section has effect despite: (a) anything else in: (i) this Act; or (ii) any other law (including the general law) of a State or Territory; or

(10) This section has effect despite: (a) anything else in: (i) this Act; or (ii) any other law (including the general law) of a State or Territory; or (b) anything in a body corporate's constitution.	(b) anything in a body corporate's constitution.
NEW PROVISION IN THIS BILL **180-37 Register of members to be given to the Registrar annually** (1) After the end of each financial year, the corporation must give the Registrar, within the period provided by subsection (2): (a) a copy of the register of members as at the end of the financial year; and (b) if the corporation is required by section 180-27 to have a redacted copy of the register of members—the redacted copy as at the end of the financial year. (2) The copy or copies must be given to the Registrar: (a) within 6 months after the end of the financial year; or (b) such longer period as is prescribed by the regulations.	CORPORATIONS ACT 2001 - SECT 178A **Notice of change to member register** (1) A proprietary company must notify ASIC within the time determined under section 178D and in the prescribed form, if: (a) it is required to add or alter a particular in the register it maintains under section 169; and (b) the particular is one required to be kept under any of the following: (i) subsection 169(1) (name and address and date of entry of member's name into register); (ii) paragraph 169(3)(b) (number of shares in each allotment to the member); (iii) paragraph 169(3)(c) (the number of shares held by the member); (iv) paragraph 169(3)(d) (the class of shares held by the member); (v) paragraph 169(3)(ea) (the amount paid on the member's

(3) An Aboriginal and Torres Strait Islander corporation commits an offence of strict liability if it contravenes subsection (1). **Penalty: 25 penalty units or imprisonment for 6 months, or both.** Note: A secretary of an Aboriginal and Torres Strait Islander corporation may be liable for a civil penalty for a contravention of this section. See sections 265-40 and 386-10.	shares); (vi) paragraph 169(3)(eb) (whether the member's shares are fully paid); (vii) paragraph 169(3)(f) (the amount unpaid, if any, on the member's shares); (viii) subsection 169(5A) (statement whether any of the member's shares are held beneficially); (ix) subsection 169(6AA) (shares issued as a result of CSF offers). (2) An offence based on subsection (1) is an offence of strict liability. Schedule 3 Penalty – 60 Penalty units
NEW PROVISION IN THE BILL (3A) An Aboriginal and Torres Strait Islander corporation must lodge with the Registrar a notice of the personal details of a person performing a chief executive officer function or chief financial officer function in relation to the corporation within 28 days after the person begins to perform that function. **Penalty:10 penalty units**.	NO EQUIVALENT
NEW PROVISION IN THE BILL **453-2 Notice to produce books** *Aboriginal and Torres Strait Islander*	NO EQUIVALENT

corporation or person connected to corporation (1) The Registrar may, by notice given to any of the following persons: (a) an Aboriginal and Torres Strait Islander corporation; (b) a person who is or has been: (i) an officer of an Aboriginal and Torres Strait Islander corporation; or (ii) an employee or agent of an Aboriginal and Torres Strait Islander corporation; or (iii) a banker or solicitor for an Aboriginal and Torres Strait Islander corporation; or (iv) an auditor of an Aboriginal and Torres Strait Islander corporation; (c) a person who is acting, or has acted, in any other capacity on behalf of an Aboriginal and Torres Strait Islander corporation; require the production of specified books relating to the affairs of the corporation. The person must comply with the requirement. *Person in possession of books*	

(2) The Registrar may, by notice given to a person, require the production of specified books that are in the person's possession and that relate to the affairs of an Aboriginal and Torres Strait Islander corporation or a related body corporate or connected entity. The person must comply with the requirement. *Notice* (3) A notice under this section: (a) must be in writing; and (b) must specify the person to whom the books are to be produced, who must be either the Registrar or a specified authorised officer; and (c) must specify the place and time for production of the books, which must be reasonable in all the circumstances. (4) A notice under this section may specify that books are to be produced immediately, if it is reasonable in all the circumstances for the Registrar to require a person to do so. *Offence* (5) A person commits an offence	

if: (a) the person is given a notice under this section; and (b) the person does an act or omits to do an act; and (c) the result is that a requirement in the notice is not complied with. **Penalty: 100 penalty units or imprisonment for 2 years, or both.**	
NEW PROVISION IN THIS BILL **453-4 Registrar's power to require identification of property** (1) If, under section 453-2, the Registrar has the power to require a person to produce books relating to the affairs of an Aboriginal and Torres Strait Islander corporation, the Registrar may, whether or not the Registrar exercises that power, by written notice given to the person, require the person: (a) to identify property of the corporation; and (b) to explain how the corporation has kept account of that property. The person must comply with the requirement. (2) A person commits an offence	NO EQUIVALENT

if: (a) the person is given a notice under subsection (1); and (b) the person does an act or omits to do an act; and (c) the result is that a requirement in the notice is not complied with. **Penalty: 100 penalty units or imprisonment for 2 years, or both.** (3) Subsection (2) does not apply to the extent that: (a) the person has, to the extent that the person is capable of doing so, performed the acts referred to in paragraphs (1)(a) and (b); or (b) the person has a reasonable excuse. Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).	

.