

Attachment C – Summary of Technical Review Recommendations

RECOMMENDATIONS FROM THE TECHNICAL REVIEW OF THE CATSI ACT

Topic	Ref.	Recommendation	Response
Classification of CATSI corporations	1	The classification of CATSI corporations be simplified by removing the assets and employees tests. It is recommended that classification be based on annual revenue in line with the classification for companies limited by guarantee and that used by the ACNC.	<u>Supported.</u>
	2	The CATSI Act should embody a three tiered model based on revenue with small companies below \$250,000 of revenue having significantly lesser obligations. It is recommended that the threshold be aligned with requirements for companies limited by guarantee (i.e. revenue of \$250,000, below \$1m and \$1m and above), that the deductible gift recipient requirement not be replicated and the same reporting requirements apply as for companies limited by guarantee.	<u>Supported.</u>
Rule books and replaceable rules	3	It is recommended that the replaceable rules be removed from the CATSI Act, but be replaced by one or more plain English model rule books. These model rule books would be default constitutions for a CATSI corporation. Further, it is recommended that there be at least one model rule book for RNTBCs and one for other corporations.	<u>Supported.</u>
	4	It is recommended that the Registrar be granted the power to refuse to register a rule book if, in the Registrar's opinion, it is deemed "not fit for purpose" for the CATSI corporation. Where such a determination occurs the members must either confirm adoption of the rule book in its current state or provide a re-drafted rule book, which the Registrar must approve (subject to the other requirements for registration being satisfied).	<u>Supported.</u>
Prohibited names	5	<p>That, other than as expressly required by State or Territory law, the CATSI Act or the CATSI Regulations be amended to prohibit the use of the following terms in the name of an incorporated entity that is not registered under the CATSI Act as a CATSI corporation.</p> <ol style="list-style-type: none"> 1. Aboriginal Corporation; 2. Torres Strait Islander Corporation; 3. Indigenous Corporation; 4. Aboriginal and Torres Strait Islander Corporation; or 5. Torres Strait Islander and Aboriginal Corporation. 	<p><u>Supported.</u></p> <p>(Will be progressed through the <i>Corporations Act 2001</i>)</p>

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Corporate structures	6	<p>It is recommended that in order to promote greater flexibility in the design of corporate structures for CATSI corporations, which would, in turn, promote increased economic activity, that:</p> <ol style="list-style-type: none"> 1. CATSI corporations be permitted to wholly-own other CATSI corporations as the sole corporate member, unless this is expressly prohibited by the CATSI corporation in its rule book; 2. That where a CATSI Act corporation is established with 2 members, one of which is not Aboriginal or Torres Strait Islander person, that the requirement in section 246-5(2) of the CATSI Act that a majority of directors to be Aboriginal or Torres Strait Islander persons be removed where the director that is an Aboriginal or Torres Strait Islander person has a casting (deciding) vote; and 3. an entity or group of entities be permitted to establish a CATSI corporation as a subsidiary, or joint venture entity, if that entity, or each member in the group of entities, at all times, satisfies the Indigeneity requirement in section 29-5 of the CATSI Act (and the requirements prescribed by the CATSI Regulations) when the underlying membership is assessed. 	<u>Supported.</u>
Resolution to not hold an AGM	7	<p>The CATSI Act should be amended to allow for small CATSI corporations to have the power to pass a special resolution not to have an AGM for up to three years, provided that:</p> <ol style="list-style-type: none"> 1. the directors do not vote on that resolution; and 2. the corporation is obliged to advise the Registrar if there is any material change in its circumstances. 	<u>Supported.</u>
	8	<p>The CATSI Act should be amended to give the Registrar the power to call and hold a general meeting of the corporation where the Registrar decides that it is reasonable to do.</p>	<u>Supported.</u>
Automatic extensions of time	9	<p>It is recommended that an amendment to the CATSI Act be made to allow for an automatic once-only extension of time for a period of 30 days (or such longer period permitted by regulation) to hold a particular AGM, where a CATSI corporation:</p> <ol style="list-style-type: none"> 1. reports that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and 2. the CATSI corporation has not notified an automatic extension of time more than three years in a row. 	<u>Supported.</u>
	10	<p>It is recommended that the CATSI Act be amended to allow for an automatic extension of time for a period of 30 days (or such longer period as permitted by regulation) reporting and lodgement of reports under Division 348 of the CATSI Act, in the case of death, natural disaster and certain cultural activities in Indigenous communities.</p>	<u>Supported.</u>

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Reports at AGM	11	It is recommended that an equivalent to section 317(1) of the Corporations Act be included in the CATSI Act, requiring the relevant reports to be presented to an AGM, if the company is required to have one. However, an equivalent to section 317(1A) should be included but, in fact, be broader and exempt small companies from the requirement.	<u>Supported.</u>
Auditors	12	It is recommended that: <ol style="list-style-type: none"> 1. equivalent provisions to those the Corporations Act be included in the CATSI Act so that auditors are given qualified privilege in their communication, whether written or oral, to the Registrar; and 2. a new Regulation 33(3) be included in the CATSI Act Regulations that the directors can fill a casual vacancy in the auditors of the corporation. Such an auditor will hold that position until the next AGM, where the members can confirm the appointment or appoint new auditors. 	<u>Supported.</u>
Alternative contact details	13	It is recommended that the CATSI Act is amended to oblige the corporation, where an alternative contact method has been nominated by the member, to ensure that the relevant information is recorded in a register separate to the Register of Members and stored with the corporation’s other records.	<u>Supported.</u>
Contact details and cancellation of membership	14	It is recommended that the CATSI Act is amended as follows: <ol style="list-style-type: none"> 1. section 150-25(3) of the CATSI Act be amended to oblige the corporation to attempt to contact the potentially uncontactable member by using any alternative contact details nominated by that member for the purposes of receiving a notice of meeting, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months; 2. section 150-25(3) of the CATSI Act be amended to oblige the corporation, where no alternative contact method has been nominated by the member in accordance with section 201-25(3), to attempt to contact the potentially uncontactable member by any other means that the corporation’s rule book (if any) permits, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months; 3. section 150-25(3) be further amended to provide that section 150-25(3)(c) will not be satisfied unless: <ol style="list-style-type: none"> a. at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 1 above (but only where the member has nominated such an alternative contact method); or 	<u>Supported.</u>

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		<p>b. where the member has not nominated such an alternative contact method, where at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 2 above (but only where this is provided for in the corporation’s rule book);</p> <p>4. section 150-25(3) be further amended to replace the phrase “a continuous period of 2 years prior to the meeting” in section 150-25(3)(b) with the phrase “a continuous period of 12 months prior to the meeting”;</p> <p>5. section 150-25(3) be further amended to replace the phrase “2 year period” in section 150-25(3)(c) with the phrase “12 month period”; and</p> <p>6. section 150-25(4) of the CATSI Act be amended to oblige the corporation’s directors to send a copy of the resolution:</p> <p>a. to the address for the member that is entered on the Register of Members; and</p> <p>b. where the member has nominated a postal address, fax number or email address for the purposes of receiving a notice of meeting, to at least one of those nominated addresses or fax numbers.</p>	
Privacy of members	15	It is recommended that the CATSI Act be amended so that where a company officer considers that disclosure of details on the Register of Members would compromise a person's safety the corporation is allowed to redact the relevant information. The relevant information could go beyond the affected member's address and could apply to other members' information where such disclosure could compromise affected member's or another person's safety.	<u>Supported.</u>
	16	It is recommended that the applicant seeking such information should have a right to request the Registrar order the CATSI corporation to release the information (and the applicant be required to justify the need for the information and that no member's safety will be compromised).	<u>Supported.</u>
Registering CEOs and senior executives	17	It is recommended that CATSI corporations include their CEOs and senior executives' names, addresses, contact details and employment history over the last ten years in their annual reports.	<u>Supported.</u>
Remuneration / benefits	18	Other than small CATSI corporations, the CATSI Act should be amended so that CATSI corporations provide their director, CEO and senior management salary and benefits packages to the Registrar. The Registrar should collect remuneration/benefits data and disseminate de-identified information about director, CEO and senior management remuneration, in such categories as the Registrar considers appropriate.	<u>Supported.</u>

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Director training	19	It is recommended that CATSI corporations not be required to mandate director training for current or incoming directors, but that all CATSI corporations be encouraged and supported to ensure that all directors have the necessary skills to manage their responsibilities.	<u>Supported.</u>
Independent directors	20	It is recommended that the CATSI Act be amended to reverse the prohibition on the appointment of independent directors unless the rule book provides for their appointment to the default position that all CATSI corporations may appoint independent directors unless their rule book expressly provides otherwise.	<u>Supported.</u>
Related party transactions	21	It is recommended that the provisions relating to restrictions on related party dealings be retained, but that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions, where it would be beneficial to the affected director and in no way detrimental to the members of the CATSI Act corporation.	<u>Supported.</u>
	22	It is recommended that: <ol style="list-style-type: none"> 1. a threshold for transactions that trigger the related party transactions provisions in the CATSI Act be introduced for small CATSI corporations. A de minimis exception of \$5,000 or such other amount as may be prescribed in regulations from time to time should apply. However, we further recommend that all related party benefits be described in appropriate in an annual report that is provided to members and the Registrar. 2. section 290-30 of the CATSI Act be amended to require that the resolution put to members at the meeting be "materially the same" as the resolution in the notice of meeting, and that the regulations made under the CATSI Act may prescribe how the concept of "materiality" is to be determined. 	<u>Supported.</u>
Special Administration	23	It is recommended that: <ol style="list-style-type: none"> 1. section 453-1 of the CATSI Act (examination of books) should include as a matter to be reported on whether: <ol style="list-style-type: none"> a. the corporation is insolvent (as statutorily defined); and b. whether the corporation has traded at a loss for at least 6 months in the last 12 months. 2. paragraph (a) of section 487-5 of the CATSI Act be repealed and replaced by a new paragraph to read '<i>(a) the authorised officer appointed under section 453-1 has reported to the Registrar that:</i> <ol style="list-style-type: none"> i. <i>the corporation is insolvent; or</i> ii. <i>the corporation has traded at a loss for at least 6 months during the period of 12 months prior to reporting to the Registrar.'</i> 	<u>Supported.</u>

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	24	It is recommended that where all the directors request the appointment of a special administrator, the Registrar need not prepare and serve a <i>'show cause notice'</i> . It is recommended therefore that section 487-10(2) be amended to include as an additional circumstance where the <i>'show cause notice'</i> may be dispensed with, a request by all the corporation's directors for the Registrar to appoint a special administrator.	<u>Supported.</u>
	25	It is recommended that three additional grounds be included in section 487-5 as follows: 1. The corporation has no directors. 2. Where in the opinion of the Registrar: a. there is doubt as to whether the board of directors is validly constituted; b. that doubt, when it first came to the attention of the Registrar (the date), is not resolved either within 21 days of the date, or such longer period as the Registrar may, in writing to the corporation allow; and c. the expanded paragraph (a) as suggested above (in recommendation 23.2). 3. Where all the directors of the corporation request in writing that the Registrar appoints a special administrator.	<u>Supported.</u>
	26	It is further recommend that the following be additional grounds for appointment of a Special Administrator: 1. breach of the Native title legislation; and 2. substantial or repeated breaches of the prohibition on related party transactions.	<u>Supported.</u>
	27	It is recommended to abolish the current gazetting and advertising requirements in subsections 493-1(4) and (5) and replace them with a requirement of notification, as soon as practicable, on the ORIC webpage, with consequential amendments to section 694-95(2)(b) (failure to gazette and publish in a newspaper being a contravention of the CATSI Act) and Division 700 (Dictionary) in respect of the definitions of <i>'national newspaper'</i> and <i>'daily newspaper'</i> .	<u>Supported.</u>
Presumptions of insolvency and winding up	28	Section 526-35(3) of CATSI Act imports, among other Parts of the Corporation Act, Part 5.7B (relating to voidable transactions), which contains a presumption of insolvency. It is recommended that the presumption of insolvency applies, for the purpose of section 526-5(i), in either of the following circumstances:	<u>Supported.</u>

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		<ol style="list-style-type: none"> 1. Where the authorised person reports to the Registrar under section 453-1 that either of the circumstances set out above exist; or 2. Where the special administrator forms that opinion. 	
	29	It is recommended that, as the presumption is rebuttable, the corporation be afforded an opportunity to rebut if possible the presumption by for example being given 14 days to produce the records.	<u>Supported.</u>
	30	It is recommended that the six presumptions of insolvency contained in Corporations Act, section 459C be incorporated into the CATSI Act for the purpose of better defining and more easily proving insolvency.	<u>Supported.</u>
	31	It is recommended that the Registrar or a director may apply to wind up a corporation on the grounds that it is insolvent with the requirement for obtaining the leave of the court be removed.	<u>Supported.</u>
External Administration	32 *	Subject to the exceptions referred to in the next sub-paragraphs, the provisions in the CATSI Act which link into the external administration area of the Corporations Act ¹ should refer to the provisions of the Corporations Act and the Corporations Regulations as they stood immediately before the commencement of the Insolvency Law Reform Act 2016 (ILRA) i.e. on 28 February 2017, with some exceptions.	<u>Not Supported.</u>
Recommendations on 'ipso facto' and 'safe harbour' provisions	33	<p>It is recommended, despite some drafting issues, to incorporate into the CATSI Act the proposals in the recently enacted <i>Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017</i> ("safe harbour" and "ipso facto" provisions).</p> <ol style="list-style-type: none"> 1. The 'safe harbour' legislation: an amendment to the CATSI Act will be required to incorporate a new section 588GA which was not in force as at 28 February 2017. This can be done by an amendment to section 531-1(3)(a). 2. The ipso facto provisions: these provisions are incorporated at the end of Corporations Act Part 5.1 (Amalgamations and Reconstructions) with the new section numbers just running on. The new sections are all incorporated in Part 5.1. 	<u>Not Supported.</u>
Insolvent trading corporations which are trustees	34 *	It is recommended there be amendments to the CATSI Act relating to the winding up of an insolvent corporate trustee which has traded in its trustee capacity only and not in any personal capacity.	<u>Not Supported.</u>
	35 *	It is recommended that amendments to the CATSI Act be made relating to a trustee corporation that has traded in any other capacity i.e. traded both in a personal capacity and as a trustee or traded as a trustee	<u>Not Supported.</u>

¹ CATSI Act, sections 516-1, 521-1, 526-35, 526-40, 531-1 and 536-1.

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		of more than one insolvent trust or traded as a trustee of multiple trading trusts, some of which were solvent and other of which were insolvent.	
	36 *	It is recommended that to deal with insolvent corporate trustees that amendments be made to enable voluntary administration to be better aligned with the Corporations Act.	<u>Not Supported.</u>
	37 *	It is recommended that amendments to address issues arising under sections 433 and 561 be made to the CATSI Act.	<u>Not Supported.</u>
	38 *	It is recommended that the Commonwealth discuss amendments with States and Territories to their trust legislation to deal with any potential Constitutional issue which might arise.	<u>Not Supported.</u>
Deregistering corporations	39	It is recommended that with the exception of the criterion relating to the corporation being a party to legal proceedings, the Registrar be given a power, at the request of the applicant, to waive one or more of the deregistration criteria.	<u>Not Supported.</u>
	40	It is recommended that section 546-1 CATSI Act be amended to give the Registrar absolute discretion to relieve a voluntary deregistration applicant of strict compliance with the criteria set out in subsection 546-1(2), (other than that concerning the corporation being a party to legal proceedings).	<u>Supported.</u>
	41	It is recommended that only a special resolution of members of the corporation be required for a de-registration.	<u>Supported.</u>
Miscellaneous	42	It is recommended that section 6-50 of the CATSI Act be redrafted to deal with definitional problems relating to the term "administrator".	<u>Supported.</u>
Disclaimer of property	43	It is recommended that the CATSI Act be amended so that the Registrar is given a power to disclaim any property vested in the Registrar under section 546-20 of the CATSI Act within 120 days of the Registrar having actual knowledge that the property has so vested. The disclaimer is to be effected by notice published on the ORIC website and is to relieve the Registrar of all rights and liabilities in respect of the property whether any such liabilities are present or future, certain or contingent, ascertained or sounding only in damages.	<u>Supported.</u>
Oversight of the PBC Regulations	44	It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that RNTBCs are fulfilling their obligations to common law holders to the same extent as members.	Recommendations 44 – 64 were considered as part of the amendments to the <i>Native Title Act 1993</i> .
Register of Common Law Holders	45	It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain a 'Register of Common Law Holders', in addition to their Register of Members.	
	46	It is recommended that inclusion on the Register of Common Law Holders be by application, in a manner similar to membership applications for the corporation, save that the eligibility requirements	

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		must be limited to age (15 years) and whether or not that person is a common law holder of the relevant native title.	
	47	It is recommended that directors may not refuse to accept an application if the eligibility requirements are met, that the directors be required to give notice where a person is considered not to meet eligibility requirements and that consideration be given to conferring powers upon the National Native Title Tribunal in relation to the resolution of disputes regarding whether or not a person is a common law holder of the relevant native title.	
	48	It is recommended that a person not be able to be removed from the Register of Common Law Holders, except where uncontactable.	
	49	It is recommended that the Register of Common Law Holders should be available for inspection by the public.	
	50	It is recommended that the Registrar should have the same powers in relation to the Register of Common Law Holders, as in relation to the Register of Members (and the Register of Former Members).	
	51	It is recommended that native title representative bodies and native title service providers be required to provide RNTBCs with extant information prepared in connection with, or filed in, native title proceedings in order to allow RNTBCs to keep a Register of Common Law Holders, such as connection reports.	
	52	It is recommended that persons on the Register of Common Law Holders maintained by a RNTBC who are not members of that RNTBC automatically qualify as observers in respect of that RNTBC.	
Membership	53	It is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure both that rule books are complied with in relation to the revocation of membership of individuals.	
Rule Books	54	It is recommended that the CATSI Act be amended to provide a power for the Registrar to refuse to amend an RNTBC's rule book in circumstances where the amendment would result in the RNTBC no longer meeting the requirements of regulation 4(2) of the PBC Regulations.	
Native Title Decisions and Directions	55	It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain: <ol style="list-style-type: none"> 1. a 'Register of Native Title Decisions'; and 2. a 'Register of Trust Money Directions'. 	

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	56	It is recommended that the CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.
	57	It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by members and common law holders.
	58	It is recommended that RNTBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations in the relevant decision).
	59	It is recommended that the Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).
Fees for Native Title Services	60	It is recommended that consideration be given to amending the CATSI Act to require RNTBCs to publish a schedule of fees and charges for the matters specified in regulation 20 of the PBC Regulations, noting that the fees are likely to be variable depending on region, the nature of the relevant service and the nature of the proposed future act.
	61	It is recommended that the CATSI Act be amended to require the Registrar to maintain a register of opinions given under regulation 22 of the PBC Regulations in relation to fees charged by RNTBCs. We do not recommend that the Registrar be given the power to set such fees.
Native Title Benefits	62	It is recommended that the CATSI Act be amended to require RNTBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the <i>Income Tax Assessment Act 1997</i> (Cth)) received by the RNTBC.
	63	It is recommended that the CATSI Act be amended to require RNTBCs to include, in their consolidated financial accounts and reports, details of 'native title benefits' held by third parties (e.g. trustees) derived from native title rights and interests of which that RNTBC is trustee or acts as agent of the relevant common law holders (as applicable). This requirement should be supported by a requirement for third parties to provide relevant information to RNTBCs in order to prepare audited consolidated financial accounts taking into account 'native title benefits' held by third parties, in circumstances where a failure to do so will constitute a statutory offence.
Alignment with the Native Title Act	64	It is recommended that consideration be given to extending protections equivalent to those provided to RNTBCs under section 265-20 of the CATSI Act to other CATSI corporations where CATSI corporations are required to hold land on behalf of Indigenous persons under State or Territory

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		legislation in a manner that may give rise to potential conflicts between duties under the CATSI Act and duties under State or Territory legislation.	
The Registrar's Powers	65	It is recommended that the Registrar be given the power to impose an appropriate late fee in response to a breach of the CATSI Act.	<u>Supported.</u>
	66	It is recommended that the CATSI Act is amended so that: <ol style="list-style-type: none"> 1. the Registrar has similar powers to ASIC and is able to require actions in less than 14 days where it is considered reasonable in the circumstances to do so. 2. to the extent the investigatory powers of the Registrar are not equivalent to those of ASIC under the ASIC Act, that the CATSI Act be amended to provide the Registrar with such powers. 	<u>Supported.</u>
	67	It is recommended that the Registrar is given a broader range of powers in this regard, including the power to impose a fine on the CATSI corporation and/or its directors, in circumstances where the Registrar reasonably considers that there has been a failure to comply with a compliance notice issued by the Registrar (where the Registrar does not propose to appoint a Special Administrator to the CATSI corporation).	<u>Supported.</u>
	68	It is recommended that the Registrar be given equivalent powers to ASIC to accept enforceable undertakings from relevant persons and take action to enforce such undertakings.	<u>Supported.</u>
Freedom of Information	69	It is recommended that: <ol style="list-style-type: none"> 1. the CATSI Act be amended so that all exempt documents under the CATSI Act are treated as exempt documents under the FOI Act. 2. if the <i>Treasury Laws Amendment (Whistleblowers) Bill 2017</i> is passed in Parliament and retains its current form relating to the protection of whistleblowers, the CATSI Act should be amended to reflect the new provisions in the Corporations Act for the protection of whistleblowers, and 3. if that Bill is not passed or does not contain the current protections, a new provision be inserted into the CATSI Act stating that the FOI Act does not apply to a document which discloses information relating to a whistleblower's identity or is likely to lead to the identification of a whistleblower. 	<u>Supported.</u>

Notes: *denotes where the recommendation has been summarised for brevity. The full text of the recommendation is available in the Technical Review.