



Cape York Land Council Aboriginal Corporation

ICN 1163 | ABN 22 965 382 705

22 January 2019

Senate Finance and Public Administration Committees

PO Box 6100

Parliament House

Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Sir/Madam

Re: Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018

The Cape York Land Council (CYLC) is the Native Title Representative Body (NTRB) for Cape York Peninsula land and seas. In our NTRB role we fulfil statutory functions under the *Native Title Act 1993* (Cth). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances. In this capacity CYLC provides the following submissions to your committee that is conducting an inquiry, and will provide a report, on the *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* (CATSI amendment Bill).

Part 1: Classification of Aboriginal and Torres Strait Islander Corporations

CYLC supports the amendments to simplify the classification system for corporations. We note that the sole test for the three kinds of corporation depends on the consolidated revenue for the financial year of the corporation and the entities it controls, which is to be prescribed by regulation. We note that we agreed with the proposal put forward during the consultations undertaken by the Office of the Registrar of Indigenous Corporations (ORIC) that the following thresholds should apply:

- small corporation: up to \$250,000.00
- medium corporations: \$250,000.00 to \$1million
- large corporations: \$1million +

Part 2: Constitutions [rule books]

Replaceable rules to be incorporated within rule books

CYLC supports the proposal that rule books for corporations registered after the CATSI amendment Bill commences should include all of the "replaceable rules" from the CATSI Act. We agree that it is a good initiative for a corporation's rules to be all in the one place, as this will assist Directors and members to understand the rules that govern their corporations.

We note that there is a period of two years for existing corporations to lodge an amended rule book that incorporates any of the replaceable rules that apply to their corporation. This will pose a significant burden for many corporations and we do not support this requirement being made retrospective.

We would support that if an existing corporation amends its rule book following commencement of the CATSI Amendment Bill, it should be required to lodge an amended rule book which incorporates the replaceable rules.

We also urge Parliament to clarify that lodging an amended rule book to include all of the replaceable rules will not require a special resolution passed by members in general meeting. This could be accomplished by amending s. 69-5 to clarify that amending a rule book to include the replaceable rules will not require a special resolution.

Registrar's power to refuse to register rule books that are not fit for purpose

These amendments add an additional requirement for corporations applying to be registered and for existing corporations seeking to amend their rule books. The Registrar is to be given the power to refuse registration if he/she is satisfied that a constitution is not fit for the purposes of the corporation. If the Registrar decides that a constitution is not fit for purpose, the members of an existing corporation must have the Registrar's views debated at a special general meeting and the Registrar will only be required to register the constitution if a special resolution is passed that the Registrar's advice was provided to the members and the members consent to the Registrar being advised that the constitution is fit for purpose despite the Registrar's view. If the Registrar has expressed the view that a new corporation's constitution is not fit for purpose, the group applying to register the corporation must provide the written consent of at least 75% of the persons who have consented to become members of the corporation.

CYLC does not agree with such a significant yet ill-defined power being given to the Registrar. We note that the existing legislation already gives the Registrar the power to refuse registration where a rule book does not satisfy the requirements of the CATSI Act. We are concerned that further regulatory oversight by the Registrar will add significantly to the costs for Indigenous groups seeking registration as a CATSI corporation or to amend existing constitutions, particularly in light of the proposal for all corporations to update their existing rule books to include the replaceable rules.

There is no detail in the proposed legislation to guide how the Registrar would apply this new discretion to refuse registration of rule books that are not "fit for purpose", beyond a brief statement in the Explanatory Memorandum which offers the example of "uncertainty in the operation of the rules resulting from undue complexity or poor drafting."

We believe that this proposal could fetter the rights of Indigenous peoples to organise their affairs and governance structures in the manner that they consider best suits their particular circumstances and the operation of their traditional laws and customs, including, where applicable, to ensure there is compliance with the terms of a native title determination that relates to the Corporation.

The process for resolving the Registrar's view about perceived "unfit for purpose" constitutions places a significant regulatory onus on Indigenous persons to put the matter to a special general meeting for consideration or to secure written consent from 75% of the members for a proposed new corporation. This appears to us to be both unfair and discriminatory. We note that there are no similar requirements imposed on Corporation Act corporations.

We are also concerned that these requirements will be difficult if not impossible for the Registrar to implement in a consistent, fair and orderly way given the huge diversity of Indigenous groups and their corporate structures across the nation.

Model constitutions

This amendment provides for the Registrar to make model constitutions, including for different classes of corporations.

Neither the Bill nor the explanatory memorandum provides guidance as to how this amendment will interact with other provisions, including those giving the Registrar the power to refuse to register constitutions which are not, in his/her opinion “fit for purpose”. Is it the case that an Indigenous corporation which does not adopt a model constitution will find itself subject to a refusal to register under the proposed “fit for purpose” provisions? If that is the intent we would resist this as an unreasonable fetter upon Indigenous groups to freely establish their own corporate structures.

We recommend that the Committee ask ORIC for additional information to explain what is proposed in relation to this amendment.

Part 3: Review of financial reports

CYLC supports review of financial reports as an alternative to audit. We note that the Bill provides that regulations under the Act may prescribe circumstances in which a financial report, or a part of it, may be reviewed instead of audited. We ask the Committee to identify what these circumstances may be. We also ask the Committee to request information from ORIC as to how a review will be less expensive and burdensome than an audit.

Part 4: Subsidiaries and other entities

The amendments proposed in this section will remove impediments to body corporates establishing wholly-owned or joint venture subsidiary corporations under the CATSI Act.

In summary, these kinds of corporations will be exempted from the member and director quotas that apply to ordinary CATSI corporations. The amendments will permit one member only if the corporation is a wholly owned subsidiary of an ATSI corporation and will permit two members if the corporation is a joint venture subsidiary corporations, provided the Aboriginal or Torres Strait Islander member has a casting vote. There is also a relaxation of the rules relating to directors by removing the requirement that a majority of directors must be members of the corporation where the corporation is a wholly-owned subsidiary of an ATSI corporation or a corporation whose only members are bodies corporate. There is also provision for corporations with two directors, one of whom may be non-Indigenous director, provided the Aboriginal or Torres Strait Islander director has a casting vote.

We can see that giving greater flexibility to CATSI corporations in how they structure their affairs will promote economic diversification and enrichment. For this reason we support these amendments.

Part 5: Meeting and reporting obligations

On balance, CYLC supports the proposals to lessen the regulatory burden on small corporations. The proposals will allow small corporations to pass a special resolution to not hold the next one or two AGMs and to also pass a special resolution changing the corporation’s constitution to allow directors of the corporation to be appointed for a period not exceeding 3 years (which additional term will match the period for which the corporation proposes not to hold its AGMs).

We note the following safeguards are proposed:

- if there is a material change in the affairs of the corporation, notice must be given to ORIC within 28 days;
 - the Registrar will have the power to cease permission for AGMs not to be held, if the Registrar alters the size of the corporation or decides there is a need for AGMs to be held annually or the corporation is placed under special administration;
 - if there are members of the corporation who are not directors, the directors are not allowed to vote on the resolution, unless the Registrar by written notice permits them to vote;
 - resolutions of this kind cannot be passed by circulating resolution;
 - the corporation may only pass the special resolution if each of the directors is also appointed for a term of 3 years, where the resolution is not to hold the next 2 AGMs or for at least 2 years, in all other cases;
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- all small corporations must lodge their general reports annually and provide these reports to members on request.

We do not agree with the proposals for strict liability offences if a corporation fails to notify ORIC of a material change to its affairs.

We are concerned that the proposals have the potential to disenfranchise members and believe that additional safeguards are warranted. We recommend that a corporation must hold an annual general meeting on notice from the Registrar, if the Registrar receives a written request signed by at least 5 members or 5% of the membership (whichever is the lesser) that the members require an annual general meeting of the corporation, notwithstanding that there is a special resolution in place exempting the Corporation from this requirement. The written request to the Registrar need not set out a reason for requiring the corporation to hold the annual general meeting.

We note also the proposals for a one-off 30 day extension for the time for lodging annual reports and holding the AGM, with which we agree.

Although we agree with the proposal that the directors must lay before the AGM any prescribed reports for the relevant financial year, we do not agree with the imposition of a strict liability offence for failing to comply with this new provision.

Part 6: Members and membership

The first proposal is to extend the bases for cancelling membership of non-contactable members. This will include:

- reducing from 2 years to 12 months the time during which a member is not contactable as a basis for cancelling a person's membership of a corporation;
- introducing a new requirement that the reasonable attempts to contact prior to a decision to cancel membership must include attempts to contact the person at his/her nominated alternative addresses or means of contact, to that identified in the membership register, with at least one of the attempts being made in the 3 months before the meeting proposed to consider cancellation of a person's membership;
- introducing a new requirement that following the meeting which cancels a person's membership, notice of this must be given to both their membership register address and also to their nominated alternative addresses or means of contact. If there are more than three alternative addresses or means of contact, the cancellation notice is to be given to three of these.

We do not agree with reducing the time for a person not being contactable from 2 years to 12 months to trigger the process for cancelling a person's membership. We do agree with the new requirements for using reasonable attempts to contact persons at their nominated alternative addresses or means of contact.

The second proposal is to introduce new provisions to protect a person's personal safety by allowing particular information about a member or former member to be redacted, if the directors decide that this is necessary. This may be over-ridden by the Registrar on written application and if the Registrar decides that the person has a genuine need to inspect the register or the particular information and no-one's safety will be put at risk as a result. We support these proposals to protect the privacy of members.

Part 7: Key management personnel

The purpose of the proposed amendments is to "increase the level of transparency of key management personnel employed by CATSI corporations" by enabling regulations that "require

information about key management personnel employment history and remuneration to be reported in a remuneration report”.¹

We do not support these heavy-handed and draconian measures. We note that there is nothing in the Corporations Act which would require corporations, other than those listed on the stock exchange, to reveal this kind of information. This to our mind highlights the discriminatory nature of the proposed amendments. It is also a significant concern that the ambit of the new proposals will be governed by regulation, the content and scope of which have not been released. We urge the committee not to recommend the passage of the proposed new laws.

Part 8: Related third parties

CYLC supports the proposal to exempt small corporations from the requirement to obtain member approval for financial benefits being provided to related parties in a financial year if the total amount of the financial benefit is less than an amount prescribed in (yet to be released) regulations. We note that the ORIC discussion paper indicated a limit of \$5,000.00 per related party per financial year. We also support the proposal to allow the Registrar to exempt corporations from seeking member approval if the Registrar is satisfied that this will not cause detriment to the corporation.

Part 9: Special administration

We support the proposed amendments to allow reporting of irregularities in the management of the corporation’s financial affairs to the Registrar by an authorised officer of the corporation and to clarify that irregularities of these kinds may be the subject of an examination report by the Registrar of a corporation’s books.

We also support the proposed modification of one of the grounds for determining that a corporation is to be placed under special administration from the more stringent trading at a loss for at least six months in a 12 month period to the corporation being “insolvent or likely to become insolvent at some future time”.

Part 10: Voluntary deregistration

CYLC supports making it easier for corporations to be voluntarily deregistered as opposed to the more complex and expensive voluntary winding up process.

Part 11: Investigation and enforcement

CYLC supports the proposed introduction of lower level powers to aid investigation and enforcement, including the use of enforceable undertakings, in alignment with the powers of ASIC under the ASIC Act.

Part 12: Publication of notices

CYLC supports the proposed dispensing of publishing notices in the Gazette with publication of ORIC’s website.

Part 13: Independent directors

CYLC supports the proposed amendments which will allow the appointment of non-member and non-Indigenous persons as directors of the corporation for a term not exceeding 1 year.

Part 14: Qualified privilege for auditors

CYLC supports the proposed introduction of qualified privilege for auditors.

¹ Explanatory Memorandum, p. 33.

Part 15: Resolutions to be the same in all material respects

CYLC supports these proposed amendments, which save resolutions concerning related party benefits from invalidity where there are unimportant variations in wording between the notice for the meeting at which the resolution is considered and the resolution that is passed.

Part 16: Unanimous requests for special administration

CYLC supports dispensing with the formal show cause process for placing a corporation into special administration if all the directors request the Registrar in writing to appoint a special administrator.

Part 17: Insolvency

CYLC does not support the planned introduction of extra grounds for a presumption of insolvency where there is evidence that a corporation has failed to keep financial records. This appears to us to be a discriminatory and unwarranted measure.

Part 18: Conflicting duties under State or Territory legislation

CYLC supports this amendment, which will provide that acts done under in good faith and in the belief that the act is necessary to comply with State or Territory legislation, will not contravene the care and diligence, good faith, use of position and use of information obligations in the CATSI Act.

Part 19: Minor technical amendments

None of the proposed amendments in this part appear controversial.

Thank you for the opportunity to provide comments on the CATSI Amendment Bill. If you wish to discuss any matters raised in this submission please do not hesitate to contact me.

Yours sincerely,

Richie Ah Mat
Chair
Cape York Land Council