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Senator Claire Chandler
Chair
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600
Email: fpa.sen@aph.gov.au

Dear Senator

Submission on the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021*

The Kimberley Land Council (**KLC**) is the representative Aboriginal/Torres Strait Islander body for the Kimberley region and under s 203AD of the *Native Title Act 1993* (Cth) (**NTA**). The KLC has statutory functions and provides advice and assistance in relation to governance and compliance to Registered Native Title Bodies Corporate (**RNTBCs**) in the Kimberley region. The KLC is also itself a community-based organisation incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**).

The KLC makes this submission on the *Corporations (Aboriginal and Torres Strait Islander) (CATSI) Amendment Bill (CATSI Amendment Bill)* with regard to its statutory functions under the NTA, its own corporation governance obligations under the CATSI Act, and the interests of native title holders and their representative organisations more broadly.

The KLC has reviewed the submission of the National Native Title Council (**NNTC Submission**) on the CATSI Amendment Bill. The KLC supports that submission in its entirety, and also makes the following additional submissions. This submission also refers to KLC's earlier submissions made on 2 October 2020 on the *CATSI Act Review – Draft Report (KLC CATSI Act Review Submission)* and on 8 August 2021 to the National Indigenous Australia's Agency in response to the exposure draft of the CATSI Amendment Bill. The KLC understands that the CATSI Amendment Bill is in almost identical terms to the Exposure Draft and the following submissions were also made in response to the Exposure Draft.

CATSI Act as a “special measure” under the *Racial Discrimination Act 1975* (Cth)

- 1 The KLC supports the CATSI Act as a special measure under the *Racial Discrimination Act 1975* (Cth) (**RDA**). The CATSI Act's effectiveness, and qualification, as a special measure under s 8 of the RDA depends on whether it operates to facilitate the advancement of Aboriginal and Torres Strait Islander people. If the CATSI Act regulates Aboriginal and

Torres Strait Islander people (through their corporations) differently to other sectors of the community and that regulation confers a benefit,¹ it qualifies as a special measure. However, if the CATSI Act or any part of it disadvantages Aboriginal and Torres Strait Islander people in a way that other sectors of the community are not disadvantaged, the CATSI Act may be a measure which is racially discriminatory and not a special measure, and therefore liable to be struck down under the RDA.

Separate Division / Chapter for RNTBCs

- 2 Further to the NNTC Submission, the KLC submits that the CATSI Act should have a separate division dedicated to provisions which are specific to RNTBCs. The KLC also submits that the CATSI Act does not presently sufficiently recognise the unique characteristics and circumstances of RNTBCs and, as such, cannot adequately regulate those entities. These unique characteristics and circumstances include the following.
- (a) Regulation of corporations by both the common law and statute assumes that a corporation is brought into existence because of a *decision* by founding members that a corporate form is the appropriate way to achieve their common purpose. This *choice* is absent from the circumstances leading to the incorporation of RNTBCs. In the case of PBCs, common law holders are compelled to nominate a corporation to be the prescribed body corporate to hold native title rights and interests on trust or act as agent of the common law holders.
 - (b) Many RNTBCs are brought into existence without any capacity to comply with basic legal obligations arising under both the NTA and the CATSI Act. This means that from day one, without support from third parties, they are effectively counting down to non-compliance and potential administration or deregistration.
 - (c) Mandatory meeting requirements are particularly onerous for RNTBCs and often serve no purpose whatsoever if the only business of the corporation is to hold on trust or act as agent in respect of native title rights and interests. In such cases, the RNTBC will have no business to report to members other than a generic general report and the election of directors until the next AGM.
 - (d) RNTBCs have obligations to non-members and are also governed by more than one system of laws. The legal pluralism which governs the conduct of RNTBCs is not sufficiently provided for in the CATSI Act.
- 3 For these reasons, the KLC submits that separate regulation of RNTBCs is required. At a bare minimum, this separate regulation should be done through a stand-alone Part of the CATSI Act dealing with RNTBCs.

Mandatory requirement to consider membership applications within 6 months

- 4 A mandatory 6 month period to consider and determine membership applications is not

¹ *Gehardy v Brown* (1985) 159 CLR 70, 133 (Brennan J).

realistic for RNTBCs given:

- (a) the lack of sufficient funding to support meetings more often than the business of the corporation requires;
- (b) meeting solely to consider one or more membership applications cannot be justified as a proper use of scarce funding; and
- (c) the need for RNTBCs to often seek further information before making a decision on a membership application. This information may be held by third parties and obtaining that information within a 6 month time period is unlikely to be within the control of the RNTBC.

- 5 A mandated 6 month period to determine membership applications is likely to be subject to significant non-compliance by underfunded RNTBCs. The KLC submits that, if the purpose of the regulation is to require a corporation to actively address membership applications within a reasonable time having regard to the resources and circumstances of the corporation, this could be better achieved by mandating that the corporation must *consider* a member application at the next directors' meeting after that application is received and at each subsequent directors' meeting until the application is determined.

Altering the place, date or time of a general meeting

- 6 The KLC supports the flexibility introduced by s201-37, however as submitted in the *KLC CATSI Act Review Submission*, the 30 day time period within which a new AGM must be called is not sufficiently flexible to take into account the circumstances that determine when and where a meeting can be held. The KLC repeats its earlier submission that this time period should be at least 60 days.

Virtual meetings

- 7 The KLC supports provisions to allow corporations to hold meetings using technology and submits that this should be extended to directors' meetings. At present, directors may only meet using technology if all directors provide their prior consent. The KLC submits that directors' meetings are as amendable, if not more so, to being conducted using technology and the flexibility to do so would significantly decrease the cost of regulatory compliance for CATSI Act corporations, particularly in remote regions.

Reporting of remuneration of 'key management personnel'

- 8 KLC notes the proposed amendments to the CATSI Act requiring CATSI Act corporations to table remuneration reports at AGMs which disclose the remuneration (salary and benefits) paid to "key management personnel". "Key management personnel" are defined by the Australian Accounting Standards.

***Key management personnel* are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.**

- 9 While the regulations will prescribe the circumstances in which these reports will be



required, the regulations have not been released and therefore KLC makes this submission without access to full information on its proposed operation.

- 10 The *KLC CATSI Act Review Submission* submitted that reporting requirements for executive officers of Aboriginal and Torres Strait Islander corporations should be no more onerous than reporting requirements for **Corporations Act 2001** (Cth) corporations. The proposed amendments in the CATSI Amendment Bill exceed the level of regulation that applies to most *Corporations Act* corporations as s 300A of the *Corporations Act*, which requires remuneration reports of “key management personnel” be included in directors’ reports, applies only to listed companies. CATSI Act corporations are not analogous to listed companies and the imposition of reporting requirements similar to those of listed companies is not justified and will be unreasonably onerous.
- 11 Furthermore, and as submitted in the *KLC CATSI Act Review Submission*, the effect of these provisions may be to deter appropriately skilled and experienced candidates from accepting positions with RNTBCs and other corporations regulated by the CATSI Act. Recruitment of suitable candidates to CEO and other executive management positions in remote areas is already challenging and mandatory reporting of remuneration benefits may act as a deterrent to potential candidates as it requires reporting of their confidential and private information that would not occur if they were employed in the private sector (other than listed corporations).
- 12 For these reasons, the KLC submits that mandatory reporting of remuneration of key management personnel should not be implemented. In the alternative, consideration should be given as to whether the intended purpose of the sections could be better achieved through a voluntary disclosure regime.

Yours sincerely

 **Tyronne Garstone**
Chief Executive Officer
Kimberley Land Council