



*spirit
of
Change*

25 January 2019

Senator James Paterson
Chair,
Senate Finance and Public Administration Legislation Committee
PO BOX 6100
Parliament House
Canberra ACT 2600

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

Dear Senator

***NNTC Supplementary Submission:
Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening
Governance and Transparency) Bill 2018***

Introduction

The National Native Title Council (NNTC) made a submission to the current Inquiry dated 18 January 2019 (the Primary NNTC Submission). This Supplementary Submission is made to clarify and respond to a number of matters raised in the joint submission from the

Department of Prime Minister and Cabinet and the Registrar of Aboriginal and Torres Strait Islander Corporations made on 22 January 2019 (the “Departmental Submission”).

In large part the Departmental Submission merely restates material contained in the Explanatory Memorandum to the Bill. However, it does so in a manner that clouds the nature of consultations that have occurred in the development of the Bill. The Departmental Submission also asserts benefits associated with the measures contained in the Bill without factual foundation and does not address the overwhelming need for a broader review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, (CATSI).

Given these matters the NNTC considers it appropriate to make this Supplementary Submission.

The Technical Review

The Departmental Submission attaches the DLA Piper Technical Review Report. It is notable to the NNTC that the content of the DLA Piper Technical Review Report has been released only through the Committee Inquiry Submission process and only after the advertised closing date for submissions to the Committee’s Inquiry had passed. The Technical Review report runs to over 250 pages. Notably, the Technical Review Report appears to have been produced in 2017 but is otherwise undated. There was ample opportunity to release the Technical Review as part of the Bill development process and yet this did not occur.

It is manifestly unreasonable for the Departmental Submission to now provide this material for consideration by the Committee while denying affected Indigenous communities and corporations any opportunity to respond to the matters contained in it

This noted, the Technical Review’s Terms of Reference are found at paragraph 2.7 (p 22) of the Report. It is clear from these Terms of Reference that the Technical Review was (as its name suggests) limited in the scope of matters under consideration. This is made abundantly clear by the limited and pointed proposals canvassed in the Discussion Paper contained at Appendix A of the Technical Review Report. The Technical Review did not provide a forum to consider the broader review of CATSI as recommended by the NNTC in its 18 January submission and throughout the Technical Review and subsequent ORIC Discussion Paper consultation processes.

Further, an examination of the “Consultation Report” contained at Appendix B of the Technical Review report reveals that of the limited proposals that were discussed, many were either not supported, supported only in part, or never discussed.

In short, the Technical Review supports the NNTC’s view that there has been no opportunity for input from affected Indigenous communities and corporations regarding

broader desirable amendments to CATSI and provides highly questionable basis for the implication in the Departmental Submission of Indigenous support for the proposals that are contained in the Bill.

Other aspects of the Departmental Submission

The Departmental Submission also asserts (par 3.34, p 12) “[g]enerally, stakeholder response was positive in regard the proposed changes”. There is no indication of the basis for this assertion. Certainly, the Departmental Submission outlines the process of consultation around the limited matters contained in the Discussion Paper. However, consultation is not a necessary indication of consent. In the consultations that the NNTC and its members were involved in, many of the specific proposals contained in the Discussion Paper were flatly rejected. These matters are reflected in the Primary NNTC Submission. This rejection is not glossed over in the Departmental Submission, it is simply ignored.

Further, The Departmental Submission frequently substitutes what should be a factual foundation for proposals with assertion and anonymous anecdote. Paragraph 2.6 (p 7 – Increase the transparency of senior management arrangements) provides an example.

The paragraph states:

There is a growing trend across the Indigenous and non-Indigenous corporate sectors for greater transparency and accountability of CEOs and senior management. ORIC regularly receives complaints and feedback from CATSI corporation members about the lack of senior management remuneration.

This is the justification for a proposed mandatory requirement for inclusion of remuneration and employment history reports in CATSI corporations’ annual reports. The only equivalent regulatory requirement is found in those applicable Australian Stock Exchange listed public companies under the *Corporation Act*. As such the statement “[t]here is a growing trend across the Indigenous and non-Indigenous corporate sectors for greater transparency and accountability of CEOs and senior management” is a disingenuous attempt to justify this measure by suggesting it is merely the adoption of some broader community standard. It is not. The further “justification” about regular complaints is simply anecdotal. How many complaints? How regularly? Do the complaints have foundation? Have the complainants raised their concerns within the corporation? It is designed to give the impression the measure is supported by affected Indigenous communities and corporations. Yet in the Technical Review and Discussion Paper consultations that the NNTC has attended, this proposal has been universally rejected by participants. This opposition is ignored in the Departmental Submission.

The Committee is asked to consider whether the content of paragraph 2.6 would serve as sufficient justification for imposing such a measure in the broader community. It may be in the nature of a modern bureaucracy to seek to impose increasing regulatory requirements and seek increasing amounts of information. However, a key function of the Parliament is to balance the ambitions of the bureaucracy with the protection of citizens rights, including the right not to be the subject of racial discrimination.

Matters not Traversed

The Departmental Submission is not comprehensive. There is no discussion of the proposals contained in, for example, Part 17 (Insolvency). This proposal was included in the Technical Review Report but, as noted in the NNTC 18 January Submission, was never the subject of consultations (at least any that the NNTC was aware of) in relation to either the Technical Review or Discussion Paper. Also, as noted in the Primary NNTC Submission, the Part proposes the imposition of presumptions of insolvency that would apply only to CATSI corporations. That is to say, the Part proposes racially discriminatory measures. Yet these measures have not been discussed with affected Indigenous communities and corporations. It is disturbing that the Departmental Submission is seeking to have the Parliament impose racially discriminatory provisions without alerting the Legislature to this fact.

Conclusion

As noted in the introduction to this Supplementary Submission, the Departmental Submission largely replicates the material contained in the Explanatory Memorandum. It also seeks to justify the proposals contained in the Bill through an implication that these proposals have been well covered (and by further implication supported) in the Technical Review and Discussion Paper consultation process. The main purpose of this Supplementary Submission is to alert the Committee to the fact that these implications are unfounded.

As was noted in the Primary NNTC Submission, the NNTC has a demonstrated record of working closely with the Government to assist in the development of improved policy and legislative reforms that will better support Indigenous controlled organisations and empower their communities. Appropriate improvements to CATSI have the potential to provide meaningful rights as a basis for economic and community development for Aboriginal and Torres Strait Islander Peoples.

The NNTC believes a number of the provisions of the Bill have the potential to support these outcomes. These provisions are identified in the Primary NNTC Submission. The NNTC

would therefore support their inclusion in a CATSI Amendment Bill that was the result of a comprehensive review of CATSI undertaken with full consultation and that resulted in a Bill that had the support of affected Indigenous communities and corporations. Unfortunately, the current Bill does not fulfil these criteria.

The NNTC remains happy to assist the Committee in any further aspects of its current inquiry that the Committee sees as appropriate.

Yours faithfully

Mr Jamie Lowe
Chairperson