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Ms Sarah Redden
Committee Secretary
Senate Finance and Public Administration Legislation Committee
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Dear Ms Redden

Submission to the Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

Thank you for the opportunity to make a submission to the Inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (the Bill). I would like to point out that while I have had no formal role in the comprehensive review of *the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (*CATSI Act), or the development of the amendment Bill, I fully support all the measures in the Bill and welcome the benefits it represents for CATSI corporations.

I also acknowledge the staff from the Office of the Registrar of Indigenous Corporations (ORIC) that supported the review and development of the Bill.

I first commenced in this role on 18 December 2018, just days after the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (2018 Bill) was introduced into the Senate. Much of the early months in this role was taken up with working with key stakeholders, listening to their concerns about the Bill and negotiating changes that would be acceptable to all. Unfortunately, Parliament was prorogued ahead of the 2019 general election before the Bill could be passed.

In the intervening three years, I have administered the CATSI Act, and have seen and experienced first-hand some of the limitations of the current Act. From

the perspective of a regulator the Bill addresses some of the major restrictions in the current Act that:

- impede economic development among CATSI corporations
- make managing membership bases more difficult
- put financial viability of struggling corporations at risk
- create unnecessary cost burdens for small passive corporations
- create inconsistencies between the rules for CATSI corporations and those of companies regulated under the *Corporations Act 2001* (Corporations Act)
- restrict transparency for members and the regulator.

I welcome the changes that will allow the straightforward establishment of subsidiaries and joint ventures. Under the Act as it currently stands, corporations wishing to establish a CATSI subsidiary must undertake a convoluted process. As a result, many corporations establish subsidiaries under the Corporations Act subjecting themselves to multiple regulatory and reporting frameworks and preventing ORIC from being able to support the subsidiary such as by providing director training, and helping develop a rule book.

The introduction of a number of new replaceable rules is one of the cleverest aspects of this Bill. For example, corporations that are not Registered Native Title Bodies Corporate (RNTBCs) will be able to determine the number of contact attempts and the period of time a member fails to respond to attempted contact, in order to cancel membership on the grounds of being uncontactable. Non-RNTBC corporations will also be able to limit the ability of directors to reject a membership application and create a dispute resolution process for rejected membership applicants. Using replaceable rules in this way retains the self-determination of corporations, whilst also allowing them to create rules that take into account the circumstances of their corporation and community.

Special administration is one of the most valuable functions of my role and the CATSI Act. Special administrators often spend a lot of time working with funding bodies, and other creditors to convince them not to cancel grants or contracts, but to trust in the integrity of the special administration process to return a struggling corporation to health. Although it's a relatively small change, the measure that will prevent the cancellation of contracts for corporations that are placed under special administration will make a significant difference and contribute to the ongoing financial viability of those corporations. This enables special administrators to start the process with confidence knowing that they are not taking on unmanageable risks and can avoid liquidation.

The removal of the 'show cause' notice when the majority of directors request the Registrar to appoint a special administrator was another small but important change. It means that a corporation experiencing immediate, and in some cases urgent, financial or governance difficulties can get the help it needs right away, rather than having to go through the motions of a redundant unnecessary process. Often by the time the directors seek special administration, the corporation is paralysed by disputes, or on the edge of insolvency. A few weeks can make a significant difference in that situation.

ORIC regulates a small but substantial number of corporations that are small, receive little or no income, are run by volunteers and do not conduct business. Commonly, these are corporations that have been established purely to hold land on behalf of a group; other times the corporation has been established in anticipation of a need, but is not yet actively operating (e.g. the funding grant has not yet been made). The financial and administrative

impost on these corporations of holding an Annual General Meeting (AGM) every year is excessively disproportionate to the benefit and the risk involved. I regularly receive requests to exempt these corporations from their meeting obligations on the grounds that they do not have the funds to conduct an AGM. As a special measure and beneficial legislation, the governance requirements of the CATSI Act should not put corporations at risk of insolvency. I applaud the introduction of a measure to allow these corporations the autonomy to pass a special resolution not to hold an AGM for up to two years.

I am aware that some stakeholders disagree with this measure. Noting that it is voluntary, not mandatory, I would like to also point out the complimentary provisions in the measure which provide additional safeguards. Corporations must still lodge their general report during a period in which they have voted not to hold an AGM, and they must advise my office if they have a significant change of circumstances. Members can still exercise their right to request a meeting if they feel a need, and I can require corporations to hold an AGM should the circumstances warrant it. Effective regulation involves a constant calculation of risk and I am confident these are adequate and proportionate safeguards.

I was happy to note a number of provisions that provide greater alignment and consistency between the CATSI Act and the Corporations Act. The CATSI Act mirrors many requirements of the Corporations Act, while providing the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander people. It's important to ensure that CATSI corporations and the people who create them continue to be able to access the benefits provided by changes to mirrored provisions of the Corporations Act. The changes to the whistle blower provisions are particularly valuable.

Over the last twelve months my office and I have focussed on three corporate functions which are commonly associated with disputes, complaints and special administration: membership and membership disputes; transparency– particularly around native title benefits; and financial literacy and reporting.

The measures in this Bill will go some way towards mitigating the first issue, particularly the provision setting a time limit for deciding a membership application. The vast majority of complaints taken by my office relate to membership disputes. Replaceable rules for processes for resolving disputes around memberships are welcomed.

Transparency has become a key focus of my office over the last twelve months, and arises as an issue across the spectrum of corporate governance. One area that is particularly problematic is transparency in relation to native title benefits, especially when those benefits are held in unrelated entities. This issue was addressed in the review, but is to be the subject of a further targeted review to consider the approach. I look forward to participating in that process.

Remuneration of directors and senior executives of CATSI corporations is the other area of complaint and dispute, and that most associated with major prosecution. It saddens and appals me that a few unscrupulous people will take advantage of some of the most vulnerable people in our community for financial gain. I am pleased to see that the National Indigenous Australians Agency has persevered with the measure first proposed in the 2018 Bill to report on the remuneration of senior executives, noting that this proposal has been modified so that reporting would not be made public, but would be available to members through a new remuneration report. I consider that the compromise represents a genuine commitment to consultation and co-design on behalf of the Agency, and a real win for members who wish to know how their corporation is spending its funds.

I understand that some will criticise this measure as setting a higher standard for CATSI corporations than for commensurate companies under the Corporations Act. As a special measure the CATSI Act is designed for the advancement and protection of Indigenous people. What better protection than putting in place safeguards that prevent someone taking financial advantage of vulnerable people?

On the other hand, the remuneration report will also be provided to the Registrar who will use the information to develop a de-identified benchmark remuneration report that will support corporation directors to determine appropriate salary levels when recruiting senior executives. ORIC often receives requests from directors to provide guidance around remuneration setting so this will be a welcome resource.

In anticipation of the enactment of the Bill, ORIC has already been putting in place measures to increase transparency that don't require legislative change. Financial literacy and reporting has been a focus of ORIC in recent months. We have designed a new Financial Literacy training course although due to COVID restrictions have not had the opportunity to run many courses as yet. We also identified that many corporations were reporting incorrectly in their financial reporting, and we have been working with all our corporations to transition from special purpose financial reporting to general purpose financial reporting. This provides a greater level of detail to members about the financial status of the corporation.

The most constructive measure in the Bill in my opinion is providing for the redaction of members' personal information on request. Once again, this derives from a measure in the 2018 Bill that allowed for redaction where a member's personal safety was deemed to be at risk. The measure in this Bill does not require justification – something I, and I know all stakeholders, will welcome. The public availability of members' personal information is one of the most pervasive grievances ORIC encounters.

Another very constructive measure that will provide a sense of optimism and hope to members is the establishment of the special account for the protection of assets. This should be seen as a genuine win for Aboriginal and Torres Strait Islanders generally. It's so important to ensure that assets that belong to Aboriginal and Torres Strait Islander people stay with them and are not allowed to deteriorate or be compromised because of lack of funds. I applaud the Government for their decision to maintain the Indigenous estate.

Being 14 years old, ORIC regularly encounters limitations with the CATSI Act because there has not been an opportunity to reflect advances in technology and modern regulatory practices. This Bill provides an opportunity to update the Act in a range of ways, to take account of advances in technology, and to institute things such as virtual meetings and voting. I introduced special rules to enable corporations to continue functioning during the COVID-19 pandemic restrictions. Corporations provided positive feedback about the rules including that the enabled them to meet more frequently and have more people participate in meetings. These special rules have been made permanent through this Bill which is a real step forward for CATSI Corporations.

The most basic and significant amendment in the Bill is the provision which requires a review of the CATSI Act every seven years. This is fundamental to a special measure and critical to ensure the Act stays relevant to the needs of Aboriginal and Torres Strait Islander peoples. The Bill allows 18 months for the review to be completed, which provides an appropriate amount of time to conduct widespread consultation and thorough assessment of feedback.

I note that some submissions have criticised the 18 month period, and the seven year interval, recommending that if the review cannot be completed within 6 months, the interval should be longer. One of the authors of those submissions was one of the primary proponents for conducting a comprehensive review in 2018, and that feedback among others lead to this most recent review. This review has taken 18 months to complete and yet the same author has complained about the 'cursory approach to engagement' shown throughout the review. I feel strongly that both the length of time for the review and the interval are appropriate to ensure a comprehensive review, enveloping a broad engagement and consultation strategy.

Further, I know that others will also be critical of the consultation in this process. On the contrary, I applaud the National Indigenous Australians Agency for the consultation program that was undertaken as part of the review particularly under the very trying circumstances of a global pandemic. Three separate phases of consultation were offered, over 22 weeks, through a variety of channels and formats, with a significant report written after each phase. I hope the Committee will agree when I say, that's not the definition of 'cursory'. I note that only 35 per cent of registered participants actually attended the virtual sessions in the second phase of consultation two. The Agency can only provide the opportunity for consultation, it cannot make people participate. That being said I was pleased that the review was able to engage a broad cross section of ORIC's 3,300 regulated population, including a number corporations that may not have the support of a peak body.

I am disappointed that those organisations that lodge consecutive submissions criticising the consultation process, without acknowledging the work and effort that has gone into the process, or the changes that have been made as a result of consultation, have not reached out to me as the Registrar to seek to understand why the proposed changes put forward by the Agency will support corporations on the ground, streamlining and simplifying their compliance obligations, bringing benefits to the communities they serve. Some of the measures in this Bill will have been the subject (in one form or another) of up to four consultation processes since 2017.

It was incumbent on me to remain at arm's length from the review process since it considered whether my powers and functions as the Registrar were adequate and effective. I welcome the provisions in the Bill that will provide me with additional powers to address non-compliance. One of the major limitations I, and my office, experience at present is that our only redress for some relatively minor forms of non-compliance is to do nothing or take legal action. Prosecution for failing to lodge a form, is counter-intuitive to my role as a beneficial regulator not to mention costly, administratively burdensome and relatively ineffective.

The ability to accept enforceable undertakings will be particularly valuable and enhances the beneficial regulator role since it relies on a trust relationship between myself and the corporation. In her submission to the exposure draft, Dr Marina Nehme noted that the introduction of enforceable undertakings would allow the Registrar to deal with certain conduct in a restorative healing way that is currently not possible.

The ability to use infringement notices will also provide an additional tool to our regulatory toolbox. I acknowledge the comments made by many contributors to the review that such tools must be used thoughtfully, proportionately, and as a last resort. My office has already commenced reviewing all of the guidance products we provide to take account of the changes made by the Bill so that people will have information about how and in what circumstances these new powers will be executed. However, I would also

like to reassure the Committee that these additional tools will be used with discretion and only after all other avenues of support and persuasion have been exhausted.

The measures in the Bill have been generally welcomed by stakeholders, some more so than others. The Bill has been around in one form or another since 2018, and has been subject to more scrutiny and more consultation than many other pieces of legislation. It's time for action. I respectfully request that the Committee recommend passage of the Bill so that CATSI corporations can harvest the benefits these changes will bring, in particular, the support for economic development.

Yours sincerely

Selwyn Button
Registrar