



To: Trish Carling
Finance and Public Administration Committee Secretariat

From: Francine McCarthy, Manager Native Title, on behalf of
Central Land Council

Re: Questions from Senator Dodson in relation to CATSI Bill

The CLC is grateful for the opportunity to answer further questions in relation to the CATSI Bill.

1. The CLC's submission on the exposure draft bill raised significant concerns about the framework for issuing infringement notices. What impact do you expect infringement notices to have on the corporations you support?

Many landholding corporations, including RNTBCs, hold substantial inalienable land assets but have no income, liquid assets or cash reserves. Most do not even have bank accounts. An infringement notice, even for a small sum, would be impossible for the corporation to pay. An unpaid notice then exposes the corporation to risks of administration or winding up, as well as requiring directors to consider issues of insolvent trading. The inalienable land assets held by these corporations would be put at risk.

Most directors of these corporations in central Australia receive no remuneration for their work, and live in deeply impoverished circumstances, often with little access to basic services. Infringement notices would punish them for participating in the work in managing land for the benefit of their traditional groups, in accordance with their traditions.

These impacts are misaligned with the purpose of the CATSI Act, as a special measure for the advancement of Indigenous peoples.

As with land holding corporations, RNTBC's directors are ultimately themselves the beneficial owners of the Aboriginal estate. It is counter-intuitive that Aboriginal landowners should be liable to financial penalties for doing their level best to comply with the legislative framework that Government has mandated. Whilst there may be provisions for negotiating penalties or 'working through' them, logistically, in remote Australia, this would be very difficult for many remote directors to pursue.

The CLC notes that despite our best efforts, the exigencies of remote living and the CLC's level of funding means that there are often a small number of corporations who are not compliant with minor administrative requirements under the CATSI Act. If these corporations are exposed to infringement penalties for minor administrative errors, the cascade of consequences represent a real threat to the Aboriginal estate, and a real risk of hardship for voluntary directors.

2. What concerns do you have about the level of discretion granted to the Registrar in administering infringement notices?

The level of discretion provided to the Registrar is significant. The CLC is concerned that unguided discretion granted to an individual is liable to the vicissitudes of the culture within that organisation at any given point in time. When dealing with legislation that is a special measure, the Parliament should not rely on the good character of individual office holders for decades to come. There should be appropriate guidance built into the framework of the legislation itself.

There is a risk that the issuing of infringement notices will, over time, become a routine practice that is carried out without any real regard being given to each corporation's circumstances. Certain administrative steps such as the lodging of annual reports with ORIC could be the subject of automated infringement notices, which may appear appropriate to a future Registrar who does not pay sufficient regard to the circumstances of corporations on the ground.

3. What is your experience with how the Registrar generally exercises its discretion, particularly in relation to RNTBCs?

The CLC notes that there has historically been a wide variety in the exercise of discretion over different tenures of Registrars. The current exemptions that allow reporting every 3 years for small corporations assisted by the CLC are very welcomed and practical under the circumstances. However, in our experience we are aware of at least one instance in years gone by of ORIC winding up a land holding corporation and pursuing directors for criminal prosecution in relation to minor administrative matters.

While the CLC has generally enjoyed a constructive relationship with ORIC in the administration of the Registrar's many discretions under the CATSI Act, it is not always the case that those discretions are exercised in a way that fully respects how traditional culture operates on the ground in remote Australia. For example, in the last calendar year a number of Central Australian corporations were provided extensions of only one or two months to hold their AGMs. These extensions ran over the hottest part of the desert summer, and also overlapped the period during which Law business was being carried out by many groups across the region.

Our experience is therefore that discretions cannot always be relied on, and are not always exercised consistently. In relation to a discretion as significant as the issuing of infringement notices, it is appropriate to impose guidelines for the Registrar.

4. Please expand on your recommendation of legislating a non-exhaustive list of considerations. What considerations do you think would be most important and how would this improve how the infringement scheme operates?

We note that the Registrar has agreed that legislating a non-exhaustive list of considerations would be acceptable to him. The CLC listed five considerations in our 9 August submission on the draft Bill. The CLC notes that each of these considerations are equally important, and should be considered together. They are:

- a. The gravity of the contravention of the Act;

- b. The person or corporation's administrative and financial capacity to pay or challenge the infringement notice;
- c. Health, educational, cultural, financial and geographical constraints which are relevant to the contravention of the Act;
- d. The likely impact of the issuing of a notice on a person or corporation's solvency and a corporation's ability to continue to carry out its functions; and
- e. Whether other interventions are more likely to promote the relevant corporation's compliance with the CATSI Act.

These considerations would improve the infringement scheme's operation, as they account for the huge diversity of corporations which fall under the Registrar's remit. This list would incorporate principles of individualised justice into the legislation, entrenching basic protections which are widely applied in other jurisdictions, such as criminal jurisdictions across the country.

5. Would you also support an amendment to confirm that the Registrar's discretion to issue infringement notices should be used as a last resort where other less intrusive approaches have failed?

The CLC would support such an amendment, and we note that the Registrar has advised the Committee that this proposal also has his support. It is far more preferable that other avenues be pursued as a matter of priority that have a capacity-building and preventative approach, such as:

- Governance audits;
- Compliance notices and "management letters";
- Requiring a corporation to respond to identified anomalies;
- Attending general meetings to directly discuss issues;
- Issuing warnings;
- Accepting enforceable undertakings; and
- Making an administrative finding that a breach has occurred, with public notice of a finding (with reasons) made available on the Corporation's public documents on the ORIC website.

6. Apart from the provisions relating to infringement notices, are there other aspects of the bill that the CLC is concerned about? What if any amendments should be made?

The primary concerns relating to the proposed amendments are contained in the CLC's 9 August submission on the draft Bill, and the CLC does not wish to add any new matters. The CLC is very concerned that a number of the proposed amendments will be unworkable, or create meaningless red tape, on the ground in remote Australia.

7. Are there any other reforms that you think should be made to the CATSI Act that haven't been considered or pursued in the review process?

The CLC agrees with the Registrar's comments to the Committee on the importance of the provision of training to corporations. This is one important component of the fundamental

obligation of Government to properly resource the country's Indigenous landowners to appropriately manage their country.

The CLC submits that the provision of widely-available governance training packages to RNTBCs in our region would be of great benefit to our constituents, and assist more meaningfully with good governance, resulting in better outcomes for Aboriginal people in central Australia. The CLC notes that the corporate plan published this year by ORIC outlined a significant shift towards providing greater support to corporations, in a more 'preventative approach' to regulation. The CLC suggests that this is not reflected in the current proposed amendments, and would welcome more reform and funding in this area.

Francine McCarthy

Manager Native Title

On behalf of the Central Land Council