

The Senate

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Finance and Public Administration  
Legislation Committee

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

February 2019

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# **Recommendation**

## **Recommendation 1**

**2.79 The committee recommends that the Senate pass the bill.**



# Chapter 1

## Introduction

### Referral

1.1 On 5 December 2018, the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (the bill) was introduced into the Senate by the Assistant Minister for International Development and the Pacific, Senator the Hon Anne Ruston.<sup>1</sup>

1.2 On 6 December 2018, pursuant to the Senate Selection of Bills Committee Report, the bill was referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 11 February 2019.<sup>2</sup>

### Purpose of the bill

1.3 The bill seeks to address minor technical deficiencies in the Act, reduce unnecessary regulatory burden for Corporations (Aboriginal and Torres Strait Islanders Act (CATSI) corporations and maintain alignment with broader corporate law and regulation.<sup>3</sup>

### Conduct of the inquiry

1.4 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: [www.aph.gov.au/senate\\_fpa](http://www.aph.gov.au/senate_fpa).

1.5 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 18 January 2019. The committee continued to receive submissions after this date. Submissions received by the committee are listed at Appendix 1.

1.6 The committee thanks those who made submissions.

### Context of the bill

1.7 The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) came into effect on 1 July 2007 to provide Aboriginal and Torres Strait Islander corporations with a specialist regulatory framework, making it easier for Aboriginal and Torres Strait Islander groups to form and manage corporations. The CATSI Act mirrors many of the provisions of the *Corporations Act 2001* (Corporations Act), but provides the necessary flexibility and support needed to meet the unique needs of Aboriginal and Torres Strait Islander people.<sup>4</sup>

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1 *Senate Hansard*, 5 December 2018, p. 76.

2 *Journals of the Senate*, No 137—6 December 2018, p. 4478.

3 Explanatory Memorandum (EM), p. 4.

4 EM, p. 5.

## Technical Review

1.8 In 2017, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) commissioned an independent Technical Review of the CATSI Act. The review was led by law firm DLA Piper.<sup>5</sup>

1.9 The joint submission by the Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations (the PM&C/Registrar submission), advised that the Technical Review comprised a literature review, and with input from the Registrar, DLA Piper developed a discussion paper which identified key areas for consideration. The discussion paper was posted on the Registrar's website.<sup>6</sup>

1.10 As part of the Technical Review specialist Indigenous consultants, Inside Policy Pty Ltd and Winangali Pty Ltd, conducted a series of public consultations which included Indigenous representatives and representatives of CATSI corporations.<sup>7</sup>

1.11 The Technical Review found there were opportunities to reduce the regulatory burden and better align the regulation of CATSI organisations with similar entities regulated by the Corporations Act.<sup>8</sup>

1.12 The amendments in the bill are informed by the recommendations from the Technical Review. The PM&C/Registrar submission noted that following the Technical Review, the Registrar had conducted further consultation in 2018 on the implementation of the proposed amendments:

[The Office of the Registrar of Indigenous Corporations] continues to raise awareness and discuss the impact of the proposed amendments in regular meetings with individual corporations, and public forums such as native title conferences.<sup>9</sup>

## Objectives of the amendments

1.13 The objectives of the amendments are to:

- make it easier and less costly for Aboriginal and Torres Strait Islander corporations to register and operate under the CATSI Act, in particular to ensure that regulation is proportional to size and overregulation is not occurring;
- promote economic development by Indigenous people through CATSI corporations, by providing more flexibility to create business structures and operate more effectively in small communities;

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5 Second Reading Speech, *Senate Hansard*, 5 December 2018, p. 76.

6 Department of the Prime Minister and Cabinet and Registrar of Indigenous Corporations, *Submission 3*, p. 10.

7 Department of the Prime Minister and Cabinet and Registrar of Indigenous Corporations, *Submission 3*, p. 11.

8 EM, p. 5.

9 Department of the Prime Minister and Cabinet and Registrar of Indigenous Corporations, *Submission 3*, p. 3.

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- provide greater transparency of the experience and remuneration of senior management as a safeguard for members and communities;
  - better align the Registrar's compliance powers with those of the Australian Securities and Investments Commission, and to provide lower level powers for earlier intervention in less serious transgressions; and,
  - make minor technical amendments.<sup>10</sup>

### **Key provisions of the bill**

1.14 The following presents a broad overview of the main provisions of the bill.

#### ***Commencement***

1.15 The whole of the bill is to commence on 1 July 2019.<sup>11</sup>

#### ***Part 1***

1.16 Part 1 of the bill simplifies the classification structure of CATSI corporations. Currently the determination of a CATSI corporation's size as small, medium or large is determined by a tripartite test based on income, assets and the number of employees. The registration of a CATSI corporation as small, medium or large, will now be determined solely by consolidated revenue. The consolidated revenue of a CATSI corporation is calculated in accordance with accounting standard in force at the relevant time. Regulations will set the threshold revenue amounts for each category.

1.17 The new criterion for classification of CATSI corporations aligns with the criterion for determining size under the *Australian Charities and Not-for-profits Commission Act 2001* (ACNC Act).<sup>12</sup>

#### ***Part 2***

1.18 Part 2 of the bill addresses CATSI corporations' governance constitutions, also known as the Rule Books. To be registered as a CATSI corporation under the CATSI Act an Aboriginal and Torres Strait Islander corporation must create and abide by a constitution (the rule book). The CATSI Act provides a framework of rules as a basis for creating a constitution, but allows for some of those rules to be replaced, called 'replaceable rules'. Replaceable rules allow corporations to adopt good governance procedures or tailor their rule book to their particular circumstances.<sup>13</sup>

1.19 Replaceable rules are rules identified in the CATSI Act as 'replaceable rules'. Replaceable rules apply to a CATSI corporation by operation of the CATSI Act unless

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10 EM, p. 4.

11 Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Bill), cl. 2.

12 Bill, sch. 1. cl. 1–4; EM, p. 7.

13 Bill, sch. 1. cl. 5–53; EM, p. 9. See *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, Div. 57–5 for the list of governance rules identifying 'replaceable rules' and Div. 60 for the operative provisions concerning 'replaceable rules'.

replaced or modified by a CATSI corporation's constitution, with the potential consequence that members of a CATSI corporation may not be aware of all relevant internal rules applicable to their corporation because some are contained in the CATSI Act, and others in the Rule Book.<sup>14</sup>

1.20 The proposed amendments will now require all replaceable rules to be included in the constitution, whether or not the rules have been replaced or modified. CATSI corporations that are registered prior to the commencement date will have two years to comply with the new requirements. The amendments do not change the substantive content of internal governance rules that apply to CATSI corporations as at the date of commencement of the Act.<sup>15</sup>

1.21 Part 2 of the bill also empowers the Registrar to make model constitutions that comply with the internal governance requirements of the CATSI Act. The model constitutions will simplify and reduce the cost of registering a CATSI corporation or changing its constitution.<sup>16</sup>

1.22 The bill will also provide a process for the Registrar to reject an application for the registration of a CATSI corporation where the rule book is considered to lack the requisite clarity of language necessary for the certainty of the operation of the rules. In the event the Registrar refuses to register a CATSI corporation as not being fit for the purposes of the corporation, the CATSI corporation will be required to consult its membership. The membership can either:

- confirm the rules as drafted, which the Registrar must then approve if the constitution otherwise conforms with internal governance rules requirements; or,
- redraft the rules for consideration by the Registrar.<sup>17</sup>

### ***Part 3***

1.23 Chapter 7 of the CATSI Act currently provides that a CATSI corporation may be subject to an audit in specified circumstances. Part 3 of the bill introduces the review of financial reports as an alternative to the audit requirements outlined in Chapter 7. This approach is expected to be less expensive than an audit while continuing to provide an adequate level of independent financial supervision. The bill provides for the making of regulations that will allow for the conduct of a financial review, and expands the categories of practitioners who will be qualified to undertake the reviews beyond the restricted class of auditors.<sup>18</sup>

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14 Bill, sch. 1. cl. 5–53; EM, p. 9.

15 Bill, sch. 1. cl. 5–53; EM, p. 9.

16 Bill, sch. 1. cl. 5–53; EM, p. 10.

17 Bill, sch. 1. cl. 5–53; EM, p. 9.

18 Bill, sch. 1. cl. 54–128; EM, p. 16

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**Part 4**

1.24 Currently, subsection 246-5(1) of the CATSI Act requires that the majority of the directors of a CATSI corporation must be individuals who are Aboriginal and Torres Strait Islander persons. Subsection 246-5(3) further provides that a majority of the directors of the corporation must be members of the corporation. In short, a CATSI corporation is a legal entity of individuals who are members of the CATSI corporation. Accordingly, body corporates as legal entities distinct from their membership are not able to be directors of a CATSI corporation. Subsection 246-5(3) therefore has the effect of precluding a CATSI corporation establishing a wholly owned subsidiary. A corporation can be a member of a corporation, but a corporation that only has corporate members cannot satisfy subsection 246-5(3) of the CATSI Act.<sup>19</sup>

1.25 Part 4 of the bill amends the CATSI Act to remove impediments to body corporates establishing wholly-owned joint venture subsidiary CATSI corporations. The amendments will also allow two member CATSI corporations where one member is not an Aboriginal or Torres Strait Islander person, so long as the Aboriginal and Torres Strait Islander person has the casting vote.<sup>20</sup>

1.26 The effect of the proposed amendments will give CATSI corporations more flexibility in how they structure their affairs, and will enable CATSI corporations to be vehicles for economic and social development.<sup>21</sup>

**Part 5**

1.27 Part 5 of the bill removes the current obligation on all small CATSI corporations to hold an Annual General Meeting (AGM). The proposed amendments will enable small CATSI corporations to pass a special resolution to not hold the next one or two AGMs. The practical effect of such a resolution for a small CATSI corporation may be that its members may only formally meet once every three years.<sup>22</sup>

1.28 The proposed amendments recognise that the regulatory burden of an AGM is not warranted for many small corporations, for example, passive land-holding corporations. The amendments also seek to ameliorate the burden on small corporations in remote locations to achieve a quorum at an AGM where its membership is geographically dispersed.<sup>23</sup>

1.29 Once a special resolution is passed, the CATSI corporation is required to advise the Registrar of any material change in its circumstances. The Registrar is empowered to direct a CATSI corporation to hold an AGM if the Registrar is satisfied

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19 Bill, sch. 1. cl. 129–141; EM, p. 21.

20 Bill, sch. 1. cl. 129–141; EM, p. 21.

21 Bill, sch. 1. cl. 129–141; EM, p. 21.

22 Bill, sch.1 cl. 156; EM. p. 26.

23 Bill, sch. 1. cl. 142–170; EM, p. 24.

there is a need. All small CATSI corporations will continue to be required to lodge their general reports annually, and to provide these reports to members on request.<sup>24</sup>

### **Part 6**

1.30 Part 6 of the bill reforms the process for the cancellation of membership of a CATSI corporation when a member is not contactable. Having members who are not contactable poses difficulties for the governance of a corporation, and particularly for establishing quorum requirements for meetings.<sup>25</sup>

1.31 The CATSI Act currently provides that a membership of a CATSI corporation may be cancelled by special resolution at a general meeting if a corporation has not been able to contact that person at the member's registered address for a continuous period of two years prior to the general meeting. The corporation has made two or more reasonable attempts to otherwise contact the member.<sup>26</sup>

1.32 The proposed amendments reduce the minimum timeframe for establishing that a member is not contactable from two years to one year, as well as continuing to require a CATSI corporation to undertake reasonable steps to contact the member. The cancellation of a membership is by special resolution. Notice of cancellation must be provided to the last registered address for the member and the nominated alternative address. Non-compliance with the requirements is a strict liability offence.<sup>27</sup>

### **Part 7**

1.33 The CATSI Act provides that a CATSI corporation must prepare a general report annually, and sets out the information to be included in the general report. Part 7 of the bill amends the CATSI Act to include a provision which requires the CATSI corporation's general report to include information about the employment history of key management personnel of the CATSI corporation or an entity controlled by the CATSI corporation. The term 'key management personnel' has the same meaning as used in the accounting standards. The amendment seeks to increase the level of transparency of key management personnel employed by CATSI corporations. Non-compliance with the requirement is a strict liability offence.<sup>28</sup>

### **Part 8**

1.34 The current rules for related party transactions make it difficult for CATSI corporations, especially in small communities with extensive kinship ties and limited options for purchasing goods or services. Part 8 of the bill inserts a new provision which provides an exemption to small CATSI corporations from the requirement to obtain the approval of members to give a financial benefit to a related party in a financial year if the total amount of the financial benefit is less than an amount

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24 Bill, sch. 1. cl. 142–170; EM, p. 24.

25 EM, p. 30.

26 *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ss. 150–30(3).

27 Bill, sch. 1. cl. 171–180; EM, p. 30.

28 Bill, sch. 1. cl. 181–198

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prescribed in the regulations. The proposed amendment is based on section 213 of the Corporations Act.<sup>29</sup>

### **Part 9**

1.35 Part 9 deals with oversight of a CATSI corporation's financial management. Subsection 453–1 of the CATSI Act provides that the Registrar may cause an authorised officer to examine the books of CATSI corporation, or a related body corporate, and to report to the Registrar on the results of that examination by reference to a prescribed list of 'examinable matters'. Part 9 of the bill inserts a new subparagraph extending 'examinable matters' to include any irregularity in the management of a CATSI corporation's financial affairs.<sup>30</sup>

1.36 Part 9 of the bill also proposes to modify paragraph 487-5(1)(a) to provide that a CATSI corporation may be placed in special administration where the CATSI corporation is, or is likely to become, insolvent. Currently, the CATSI Act provides that a CATSI corporation can be put into special administration where it has 'traded at a loss' for a specified period of time.<sup>31</sup>

### **Part 10**

1.37 Section 546 of the CATSI Act deals with the voluntary deregistration of CATSI corporations and is similar to section 601AA of the Corporations Act. Voluntary deregistration is a cheaper and less complex process compared to a voluntary winding up. Part 10 of the bill seeks to make voluntary deregistration more accessible to a CATSI corporation.<sup>32</sup>

1.38 The bill proposes to vary the current requirement that all members of the CATSI corporation must agree to deregistration to a requirement for agreement to deregistration by special resolution. The bill also proposes a new subsection to allow for an application for deregistration to be made in circumstances where all the formal pre-conditions for voluntary deregistration may not have been met, but where the reasons for deregistration are persuasive.<sup>33</sup>

1.39 The proposed amendments also vary the process currently in place for the voluntary deregistration of a CATSI corporation by requiring as a precondition to the publishing of a notice in the Gazette of the deregistration, that the Registrar not be aware that any of the prescribed conditions for deregistration have not been met. Proposed new paragraph 546-1(4A) gives the Registrar a discretion to publish such a notice in the Gazette if the Registrar is satisfied it is justified, even though not all the conditions for deregistration have been met, except that a CATSI corporation cannot

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29 Bill, sch. 1. cl. 199–202, EM, p. 35

30 Bill, sch. 1. cl. 203–204; EM, p. 36.

31 Bill, sch. 1. cl. 203–204; EM, p. 36.

32 Bill, sch. 1. cl. 205–21; EM, p. 37.

33 Bill, sch. 1. cl. 205–21; EM, p. 37.

be deregistered if it is party to legal proceedings. The CATSI Act currently provides that a notice in the Gazette is not a legislative instrument.<sup>34</sup>

### ***Part 11***

1.40 Part 11 of the bill aligns some aspects of the Registrar's powers under the CATSI Act with the powers of the Australian Securities and Investment Commission under the *Australian Securities and Investment Commission Act 2001* (ASIC Act). The amendments extend to the Registrar the power to accept undertakings in connection to a matter in relation to which the Registrar has a power or function under the CATSI Act. The undertakings may be enforced in a court. The provision mirrors section 93AA of the ASIC Act. In a new provision, the Registrar's powers to examine the books of a CATSI corporation is extended to the Registrar having the power to examine the records of a CATSI corporation in circumstances where there is a suspected contravention of the terms of an undertaking.<sup>35</sup>

1.41 The proposed amendments to the CATSI Act also give the Registrar broader powers to require the production of books. The provisions are based on powers under the ASIC Act. Where the CATSI Act currently provides that a person could not be required to produce the records with a period of less than 14 days, under the proposed amendments the Registrar will now be empowered to require the immediate production of the books if it is reasonable in all the circumstances. The provision is to address concerns about the possible destruction, concealment and falsification of records.<sup>36</sup>

1.42 The Registrar will also have the power to require a person to state where the records of a CATSI corporation may be found, or to identify the person who last had possession or control of the records and where that person may be found. In relation to the power of the Registrar to require the production of the records of the CATSI corporation, the Registrar also has the power to require a person to identify the property of the CATSI corporation and to explain how the corporation has kept account of that property.<sup>37</sup>

1.43 The amendments also impose a legal duty to comply with the notices to produce, and impose a higher level of criminal responsibility in relation to offences for non-compliance. The proposed amendments reframe the offence for the failure to produce the records so it is no longer a strict liability offence, and create two new offences—an offence for the failure to comply with a notice to advise where the books may be found or who may be holding the books, and an offence for the failure to comply with a notice to identify the property of the CATSI corporation. The revised offence for the failure to comply with a notice to produce the books of a CATSI corporation is subject to the defence of reasonable excuse. The two new offences are subject to the defence of the person having stated the person's best knowledge or

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34 Bill, sch. 1. cl. 205–21; EM, p. 37.

35 Bill, sch. 1. cl. 211–231; EM, p. 39.

36 Bill, sch. 1. cl. 211–231; EM, p. 39.

37 Bill, sch. 1. cl. 211–231; EM, p. 39.

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belief, or reasonable excuse. All the proposed offences require proof of all the fault elements of the offence beyond reasonable doubt with the defence carrying the evidential burden of proof. Each offence carries the penalty of 100 penalty units or imprisonment for two years, or both. The offences mirror provisions in the ASIC Act.<sup>38</sup>

### ***Parts 12***

1.44 Part 12 concerns the publication of notices.<sup>39</sup>

### ***Part 13***

1.45 Part 13 enables a CATSI corporation to engage an independent director, being a person who is not a member of the CATSI corporation and/or an individual who is not an Aboriginal or Torres Strait Islander person, provided the appointment does not exceed one year. The provision enables the appointment of a person who can bring relevant knowledge skills and experience to the CATSI corporation.<sup>40</sup>

### ***Part 14***

1.46 Part 14 of the bill inserts a new division to the effect that auditors have qualified privilege in legal proceedings for defamation or, in the absence of malice, the auditor is not liable in an action for defamation. The provision is based on section 1289 of the Corporations Act.<sup>41</sup>

### ***Part 15***

1.47 Part 15 of the bill modifies the requirement for a resolution of a CATSI corporation to be in the 'same' terms as a proposed resolution set out in the notice lodged in accordance with the CATSI Act. The proposed amendment requires the resolution to be 'the same in all material respects'. The amendment provides for the circumstance that a resolution not be invalidated by reason only of immaterial differences between a resolution and a proposed resolution.<sup>42</sup>

### ***Part 16***

1.48 Part 16 of the bill removes the requirement for a show cause procedure in circumstances where the directors of a CATSI corporation unanimously request the Registrar to place the CATSI corporation under special administration.<sup>43</sup>

### ***Part 17***

1.49 Part 17 of the bill deals with insolvency. The proposed amendments create two new presumptions of insolvency that are unique to the CATSI Act. A CATSI

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38 Bill, sch. 1. cl. 211–231; EM, p. 39.

39 Bill, sch. 1. cl. 232–237; EM, p. 42.

40 Bill, sch. 1. cl. 238–244; EM, p. 43.

41 Bill, sch. 1. cl. 245–249; EM, p. 44.

42 Bill, sch. 1. cl. 250–253; EM, p. 45.

43 Bill, sch. 1. 254–256; EM, p. 46.

corporation can be presumed to be insolvent if an authorised officer has stated in a report to the register an opinion that a CATSI corporation has failed to keep the requisite financial records, or to retain financial records for seven years, subject to the CATSI corporation being given 14 days to produce the records. A CATSI corporation can also be presumed to be insolvent if a special administrator for the corporation has stated in a report to the Registrar the opinion that the corporation has failed to keep the requisite financial records, or to retain financial records for seven years.<sup>44</sup>

1.50 The amendments also have the effect that it is no longer necessary for the Registrar to seek the leave of the court to apply for an order for the winding up of a corporation because of insolvency. A proposed amendment provides that where an application is made to wind up a CATSI corporation and the court is satisfied the CATSI corporation is insolvent, the court may order the corporation be wound up for insolvency. The proposed amendment is based on section 459B of the Corporations Act to the extent it relates to section 234 of the Corporations Act upon which section 166-10 of the CATSI Act is based.

### ***Part 18***

1.51 Part 18 of the bill inserts a new section dealing with conflicting duties under state or territory legislation. The potential for conflicting duties arises in the context of CATSI corporations that have been granted rights and interests in land under state or territory legislation to be held in trust for the benefit of the Aboriginal and Torres Strait Islander people. In particular, a conflict of duties potentially arises between a director's duties under the CATSI Act, and duties in relation to a person or persons for whose benefit the land is held and who may not be members of the CATSI corporation.

1.52 The proposed amendment provides that acts done in good faith with the belief that the act is necessary to comply with prescribed State and Territory legislation, will not contravene the care and diligence, good faith, use of position and use of information ensure that acts done in good faith provisions of the CATSI Act.<sup>45</sup>

### ***Part 19***

1.53 Part 19 addresses minor technical amendments concerning machinery provisions.<sup>46</sup>

## **Financial implications**

1.54 The bill has no financial impact.<sup>47</sup>

## **Compatibility with human rights**

1.55 In reducing the compliance burden on CATSI corporations, and strengthening transparency, the bill indirectly advances the right to self-determination and economic

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44 Bill, sch. 1, cl. 257–263; EM, p. 47.

45 Bill, sch.1 cl. 264–269; EM, p. 49.

46 Bill, sch. 1. cl. 270–277; EM, p. 49.

47 EM, p. 5.

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development and the right to enjoy and benefit from culture, and the right to privacy. The bill indirectly engages the rights to equality and non-discrimination by improving the efficacy of an existing special measure for the advancement and protection of Aboriginal and Torres Strait Islanders.<sup>48</sup>

### **Consideration of the bill by other committees**

#### *Senate Standing Committee for the Scrutiny of Bills*

1.56 At the time of referral of the bill to the Finance and Public Administration Legislation Committee, the Senate Standing Committee for the Scrutiny of Bills had not considered the bill.<sup>49</sup>

#### *Parliamentary Joint Committee on Human Rights*

1.57 At the time of writing, the Parliamentary Joint Committee on Human Rights had not reported on the bill.<sup>50</sup>

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48 EM, p. 56.

49 Senate Standing Committee for the Scrutiny of Bills, *Index of Bills considered by the committee*, 2018, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Index\\_of\\_Bills](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Index_of_Bills) (accessed 1 February 2019).

50 Parliamentary Joint Committee on Human Rights, *Index of Bills and Legislative Instruments*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Index\\_of\\_bills\\_and\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments) (accessed 1 February 2019).



# Chapter 2

## Key issues

2.1 Submissions were generally supportive of measures in the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (the bill) to alleviate the regulatory burden on CATSI corporations, as well as the measures which provide rights as a basis for economic and community development of Indigenous communities.<sup>1</sup>

2.2 This chapter of the report discusses the key issues raised in submissions and is divided into two sections:

- the scope of the Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) and the extent of subsequent consultations on the bill; and,
- specific issues concerning the provisions of the proposed bill.

### **The Technical Review and consultations on the bill**

2.3 The joint submission by the Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations (the PM&C/Registrar submission) advised that widespread consultation was undertaken to inform the development of the recommendations of the Technical Review, and that the Registrar engaged in a further consultation process in 2018 on the implementation of the proposed recommendations.<sup>2</sup>

2.4 The PM&C/Registrar submission stated that approximately 600 people and 70 corporations have been involved in consultations, and the Registrar had received 45 written submissions. Moreover, as noted in Chapter 1, the Office of the Registrar of Indigenous Corporations (ORIC) continued to raise awareness and discuss the impact of the proposed amendments in regular meetings with individual corporations, and public forums such as native title conference.<sup>3</sup>

2.5 The PM&C/Registrar submission summarised feedback on the amendments:

On the whole, stakeholders were positive about the proposed amendments, and in particular welcomed the increased transparency and reduced red tape. In some cases, feedback from stakeholders helped to reframe the

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1 For example: Law Council of Australia, *Submission 8*, p. 1; Aboriginal Peak Organisations Northern Territory, *Submission 7*, p. 1.

2 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 3.

3 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 3.

policy position, and in others, will contribute to the effective implementation and operation of the amendments.<sup>4</sup>

### *Scope of the Technical Review*

2.6 However, submissions argued that the Technical Review of the CATSI Act undertaken by DLA Piper on behalf of ORIC, the recommendations from which formed the basis of the amendments in the bill, was too narrow in scope and lacked transparency.<sup>5</sup>

2.7 The National Aboriginal Community Controlled Health Organisation (NACCHO) stated that after 12 years, the CATSI Act needed a comprehensive and transparent review conducted in a way that the Australian Government normally reviews legislation of importance and has a strong focus on collecting evidence. NACCHO concluded:

Unfortunately, the technical review that has been undertaken has had a narrow focus and has not been transparent or allowed our peoples to be involved as a partner including participating in decision-making.<sup>6</sup>

2.8 NACCHO observed that Indigenous stakeholders were not consulted on the decision to undertake the Technical Review or to determine its terms of reference, and that the Technical Review itself was undertaken by an external non-Indigenous legal firm engaged by the Registrar. NACCHO contended that the Technical Review should have been undertaken by the Department of the Prime Minister and Cabinet [rather than the Registrar] to avoid any perceived conflict of interest.<sup>7</sup>

2.9 Peak Indigenous bodies indicated a preference for a comprehensive review of the CATSI Act in the context of the CATSI Act being a 'special measure' for the purposes of the *Racial Discrimination Act 1975* (RDA).<sup>8</sup> The NNTC observed that the

4 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 3.

5 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 6. See also, National Native Title Council, *Submission 2*, p. 4, and *Supplementary Submission*, p. 2.

The Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) is an independent statutory office holder appointed by the Minister for Indigenous Affairs: see *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ss. 653-1(1). The Office of the Registrar of Indigenous Corporations (ORIC) was previously known as the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (which remains the statutory title under the CATSI Act) and the Office of the Registrar of Aboriginal Corporations (1977–2007). The name ORIC was adopted from 1 May 2008. ORIC's purpose is to effectively administer the CATSI Act: see <http://www.oric.gov.au/about-us>.

6 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 8. See also, National Native Title Council, *Submission 2*, pp. 3–4.

7 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 5. See also, Aboriginal Peak Organisations Northern Territory, *Submission 7*, p. 2.

8 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 5; National Native Title Council, *Submission 2*, p. 3; Aboriginal Peak Organisations Northern Territory, *Submission 7*, p. 2.

CATSI Act has not been the subject of a comprehensive review since its commencement in 2006, and sought a review of the Act to ensure its operation is appropriate and adapted to facilitate the advancement of Australia's Indigenous people.<sup>9</sup> Whether the provisions of the bill constitute special measures is discussed further below.

### *Consultations on the bill*

2.10 Peak Indigenous body submissions argued that additional consultation was required on the bill and contended that the consultation undertaken for the Technical Review was not sufficient or appropriate for this purpose.<sup>10</sup> NACCHO stated:

The process for reviewing the CATSI Act and drafting the Bill has not been conducted to the standard that would be expected of national legislation that goes to supporting a national priority, it hasn't incorporated self-determination and the process has effectively ignored the fact that the CATSI Act is a special measure. The Bill does not have the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.<sup>11</sup>

2.11 The Law Council of Australia stated 'it is important to appreciate that a number of provisions of both the CATSI Act and the Bill are racially discriminatory as they set up a different legal regime for Aboriginal and Torres Strait Islander corporations'.<sup>12</sup> The Law Council continued:

A consequence of this is that such provisions do not offend [the International Convention for the Elimination of All Forms of Racial Discrimination (CERD)] or the RDA only if they can constitute a legitimate 'special measure' in the manner provided for in the CERD and in the RDA. In this context, the matter must facilitate the advancement of Australia's First Peoples.<sup>13</sup>

2.12 The Law Council noted that the bill had not been made available to CATSI corporations or other Aboriginal and Torres Strait Islander bodies prior to its introduction to Parliament. The Law Council stated that it is arguable that the bill was not subject to adequate consultation with the affected group, relevant to the 'special measures' criteria in the CERD and RDA necessary to ensure that the provisions reflect the wishes of the group and are appropriately designed and effective in achieving the objective of advancing Australia's First Peoples.<sup>14</sup>

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9 National Native Title Council, *Submission 2*, p. 3.

10 National Native Title Council, *Submission 2*, p. 6. See also, National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 6; Aboriginal Peak Organisations, *Submission 7*, p. 1.

11 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 5.

12 Law Council of Australia, *Submission 8*, p. 2.

13 Law Council of Australia, *Submission 8*, p. 2.

14 Law Council of Australia, *Submission 8*, p. 2.

2.13 The Law Council also expressed its concern that the treatment of a special measure in the Explanatory Memorandum is insufficient:

the treatment of 'special measure' in the Explanatory Memorandum of the Bill...is highly restricted and does not adequately explain or provide justification regarding how it is that many of the measures in the Bill, while discriminatory, do not offend the CERD or the RDA because they are 'special measures'.<sup>15</sup>

2.14 The PM&C/Registrar submission commented that, while the bill aligns with modern corporate governance standards and corporations law, it takes account of the special risks and requirements of the Indigenous corporate sector.<sup>16</sup>

#### *The Native Title Legislation Amendment Bill 2018*

2.15 Submissions also expressed concern that there is a significant overlap between the exposure draft of the Native Title Legislation Amendment (NTL Amendment) Bill 2018 and provisions of the CATSI bill.<sup>17</sup> The National Native Title Council (NNTC) stated the NTL Amendment Bill, expected to be introduced into Parliament in February 2019, proposes amendments to the CATSI Act to give the Registrar the ability to appoint a special administrator to a Registered Native Title Body Corporates and deals with issues of internal governance of Prescribed Body Corporates (PBCs). The NNTC noted that the CATSI bill covers similar issues for non-PBC CATSI corporations, and therefore the two bills should be considered concurrently by the Parliament.<sup>18</sup>

### **Specific issues concerning the bill**

2.16 Submissions commented on particular aspects of the bill which in their view require further consideration:

- the classification structure of Corporations (Aboriginal and Torres Strait Islander) (CATSI) corporations;
- the constitution;
- the review of financial reports;
- subsidiaries and other entities;

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15 Law Council of Australia, *Submission 8*, p. 2. See also, National Native Title Council, *Submission 2*, p. 5.

16 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 3.

17 An exposure draft of the Native Title Amendment Legislation Bill 2018 was released for comment on 29 October 2018, see Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, and Hon Christian Porter MP, Attorney-General, 'Reforms to the native title system', Media Release, 29 October 2018, available at: <https://ministers.pmc.gov.au/scullion/2018/reforms-native-title-system> (accessed 5 February 2019).

18 National Native Title Council, *Submission 2*, p. 5. See also, Law Council of Australia, *Submission 8*, p. 5.

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- annual general meetings;
  - cancellation of membership of a CATSI Corporation;
  - strict liability offences;
  - use of regulations;
  - key management personnel;
  - related party transactions;
  - special administration; and
  - insolvency.

### *The classification structure of CATSI corporations*

2.17 Currently the determination of the size of a CATSI corporation as small, medium or large is a tripartite test based on income, assets and the number of employees. The amendments propose the determination of the size of a CATSI corporation to be based solely on revenue.

2.18 The PM&C/Registrar submission stated that the proposed amendments will simplify governance and reporting obligations for CATSI corporations and reduce the risk of over regulation. The PM&C/Registrar submission explained the problem arising under the current legislation:

The test is complicated, where corporations need to meet any two of the criteria, and, because the thresholds for small corporations are lower than some other regulatory frameworks, there is a risk that, comparatively, some corporations may be overregulated.

Further complexity arises through a second test to determine a corporation's annual reporting obligations—a test of size and income. For example, a corporation may be classified as small due to assets and employee numbers, but it may be required to report as a medium or large corporation because its income exceeds the relevant thresholds.<sup>19</sup>

2.19 The Cape York Land Council Aboriginal Corporation (CYLC) supported the proposed amendments to determine the size of a CATSI corporations based only on revenue. The CYLC agreed with the Registrar's recommendation that the thresholds to apply should be:

- a small corporation: up to \$250 000;
- a medium corporation: \$250 000 to \$1 million; and,
- a large corporation: in excess of \$1 million.<sup>20</sup>

2.20 Indigenous Business Solutions, however, suggested that as CATSI corporations expand their activities and reduce their dependence on grants funding,

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19 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 4.

20 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 1.

revenue may become a less representative measure of the size of a CATSI corporation. Indigenous Business Solutions suggested that consideration be given to including an additional benchmark of 'consolidated gross assets of not less than' a prescribed amount.<sup>21</sup>

2.21 The NNTC noted that the prescribed amounts suggested by the Registrar equate to the threshold prescribed in the *Corporations Act 2001* (Corporations Act) for a company limited by guarantee, which are the same thresholds applied by the Australian Charities and Not for Profit Commission (ACNC). The NNTC noted that the explanatory memorandum notes that 70 per cent of CATSI corporations are not ACNC registered.<sup>22</sup>

2.22 The NNTC considered the equation of CATSI corporations with companies limited by guarantee to be inappropriate, on the basis that not all CATSI corporations are established for public or community purposes as is usually the case of companies limited by guarantee. The NNTC stated that many CATSI corporations are established for private business purposes, and therefore equate more closely with Proprietary Limited Corporations under the Corporations Act. The NNTC noted that Proprietary Limited Corporations have only two classifications—small (revenue less than \$12.5 million) and large (revenue greater than \$12.5 million).<sup>23</sup>

2.23 The NNTC considered that while the proposed amendments may potentially reduce the reporting requirements of small CATSI corporations, the amendments also have the potential to increase the reporting obligations for a number of current medium sized CATSI corporations.<sup>24</sup>

### ***The constitution***

2.24 The bill proposes that all 'replaceable rules' be included in the constitution of a CATSI corporation. The bill also proposes that the Registrar be empowered to make model constitutions and to reject an application for the registration of a CATSI corporation where the rule book is considered to be 'not fit for the purpose' of a CATSI corporation.<sup>25</sup>

### ***Replaceable rules***

2.25 The PM&C/Registrar submission stated that CATSI corporations with rules held in multiple locations and/or rules which are not fit for purpose face increased risk of governance difficulties, misunderstandings, potential breaches and disputes. The

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21 Indigenous Business Solutions Pty Ltd, *Submission 1*, p. 1.

22 National Native Title Council, *Submission 2*, p. 6.

23 National Native Title Council, *Submission 2*, p. 6.

24 National Native Title Council, *Submission 2*, p. 6.

25 Explanatory Memorandum, p. 9.

PM&C/Registrar submission advised that proposed amendments are designed to mitigate these risks.<sup>26</sup>

2.26 The CYLC supported the proposed amendments to the extent that the rule book should include all replaceable rules in one location as this would assist directors and members of CATSI corporations to understand the rules that govern their corporation. However, both the NNTC and the CYLC expressed concern that the requirement to lodge amended rule books incorporating the replaceable rules within a two year period should not be retrospective as it will pose a significant burden on many corporations. Each suggested the obligation should be prospective.<sup>27</sup>

2.27 The NNTC indicated that the proposed amendments would place an unnecessary burden on all the existing 3 300 CATSI corporations, each of which would be required to hold Special General Meetings to replicate rules that are contained in the CATSI Act into their rule books.<sup>28</sup> Similarly, the CYLC also sought clarification that lodging an amended rule book to include all replaceable rules would not require a special resolution passed by members in a general meeting.<sup>29</sup>

*Registrar's discretion to determine whether a rule book is 'fit for purpose'*

2.28 The PM&C/Registrar submission stated that the proposed amendment giving the Registrar the discretion to refuse an application for registration of a CATSI corporation where the Registrar considers the rule book is 'not fit for purpose' strikes a balance between the Registrar's interests in ensuring constitutions are fit for purpose, and the interests of members in ultimately determining the most suitable governance arrangements for their corporation.<sup>30</sup>

2.29 The NNTC expressed concern over the proposed amendment. The NNTC argued that there was little clarity in the bill about the operation of the provision, and noted the explanatory memorandum explained the provision only in terms of how the rules are expressed. The NNTC also referred to the dispute resolution method of requiring the applicant CATSI corporation to conduct a Special General Meeting to debate the Registrar's determination that a rule book is not fit for purpose places a significant onus on the CATSI corporation.<sup>31</sup>

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26 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 5.

27 Cape York Land Council Aboriginal Corporation, *Submission 5*, pp. 1–2; National Native Title Council, *Submission 2*, p. 7.

28 National Native Title Council, *Submission 2*, p. 7. See also, Law Council of Australia, *Submission 8*, p. 3.

29 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 1–2; National Native Title Council, *Submission 2*, p. 7. See also, Law Council of Australia, *Submission 8*, p. 3.

30 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 5.

31 National Native Title Council, *Submission 2*, pp. 7–8. See also, Dr. Marina Nehme, *Submission 4*, p. 3.

2.30 The NNTC considered the proposed amendments to be potentially at odds with the basis of a native title determination:

...Additionally, the NNTC is concerned about the method by which any dispute over fit for purpose might be resolved, requiring a significant onus on the corporation (Item 19).

If the experience with PBC rule books is anything to go by, some aspects of the rules will be very dependent on the group involved. Some operate effectively with relatively simple rules - while others prefer higher levels of prescription. It is worrying to think that there is a mechanism at the threshold of creating a corporation that is potentially at odds with the basis of a native title determination. It's conceivable that there will be differing views on levels of prescription over details such as membership – which to a very large degree will be established by the native title determination itself. Again, the number of directors and rules for meetings will have some direct links to the determination and the NNTC thinks that there needs to be some more clarity about how this test would be applied.<sup>32</sup>

2.31 The CYLC opposed the proposed amendments relating to the rule book. The CYLC is concerned that there is no detail in the bill to guide how the Registrar would apply the discretion to refuse an application for registration of CATSI corporations based on rule books that are determined to be not fit for purpose. The CYLC stated that it does not agree with such a significant yet ill-defined power being given to the Registrar and the process for resolving the Registrar's view is onerous.<sup>33</sup>

2.32 The CYLC commented:

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.<sup>34</sup>

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32 National Native Title Council, *Submission 2*, p. 8.

33 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 2.

34 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 2.

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### *Model constitutions*

2.33 Submissions expressed concern that neither the bill nor the explanatory memorandum provided guidance on how the proposed amendments concerning model constitutions are to operate.<sup>35</sup> The NNTC stated that, while an off the shelf approach has an obvious attraction, it is concerned that a CATSI corporation which does not adopt a model constitution might find its application for registration refused on the basis of not being 'fit for purpose'.<sup>36</sup>

2.34 The PM&C/Registrar submission advised that the bill allows a transition of two years from the date of commencement of the bill for CATSI corporations to make the necessary changes. The Registrar is to provide support to corporations in making the changes to their rule books. The Registrar has indicated that it will not be imposing any fees or charges on corporations who use template rule books, or for assisting CATSI corporations to change or amend their rule books.<sup>37</sup>

### *The review of financial reports*

2.35 The proposed amendments introduce the option of a review of financial reports as an alternative to an audit on the basis that reviews offer a less expensive alternative to an audit while maintaining an adequate level of independent assurance of financial information. Regulations are to be made to allow for the conduct of reviews.<sup>38</sup>

2.36 The PM&C/Registrar submission advised that the purpose of the proposed amendments, together with proposed amendments to the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (the Regulations), is to reduce the regulatory burden for medium corporations by allowing reviews of financial statements as an alternative to audits. The PM&C/Registrar submission stated that financial reviews offer a less expensive alternative to an audit while maintaining a level of independent assurance of financial information. The PM&C/Registrar submission observed that the measure:

...aligns the reporting requirements under the CATSI Act with the Corporations Act following the reforms of the Corporations Amendment (Corporate Reporting Reform) Act 2010, which introduced reviews as an option for medium sized companies limited by guarantee. It also aligns the CATSI Act with the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act).<sup>39</sup>

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35 National Native Title Council, *Submission 2*, p. 8; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3; Dr Marina Nehme, *Submission 4*, p. 3.

36 National Native Title Council, *Submission 2*, p. 8. See also: Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3; Dr. Marina Nehme, *Submission 4*, p. 3.

37 Department of the Prime Minister and the Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 5.

38 EM, p. 16.

39 Department of the Prime Minister and the Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 5.

2.37 The NNTC agreed with the principle of applying an equal level of regulatory burden on a CATSI corporation as compared to a Corporations Act corporation.<sup>40</sup> The CYLC supported the review of financial reports as an alternative to an audit.<sup>41</sup>

2.38 However, submissions also sought clarification as to the circumstances in which records would be subject to a financial review as opposed to an audit, noting that regulations have not yet been made.<sup>42</sup> In its view, the CYLC considered the Registrar should explain how a financial review of the records would be less expensive than an audit.<sup>43</sup>

2.39 Indigenous Business Solutions noted that financial review procedures may not provide the necessary assurance on the fair presentation of financial statements or adequately address issues of statutory compliance. Indigenous Business Solutions also commented on the challenge facing an auditor required to undertake the first audit of the records of a CATSI corporation that has previously only undertaken financial reviews.<sup>44</sup>

#### *Subsidiaries and other entities*

2.40 The PM&C/Registrar submission stated that modern corporations use a variety of business structures, including subsidiaries, to help manage economic opportunity and risk, and to enter into joint ventures. The PM&C/Registrar submission contended that the proposed amendments allow for wholly corporate memberships by relaxing the requirement for directors to be members of CATSI corporations. The PM&C/Registrar submission stated the issues as follows:

Currently registering a CATSI corporation as a subsidiary or joint venture is difficult due to the requirement that a majority of the directors must be members of the corporation. This requirement prevents wholly corporate memberships because there must be individual members who can be appointed as directors. Consequently, it is complex for a CATSI corporation to be a wholly-owned subsidiary of another CATSI corporation. It is similarly complex for a CATSI corporation to be held by two or more bodies corporate as a joint venture vehicle. As a result, many CATSI corporations currently use companies under the Corporations Act 2001 (Corporations Act) to form these types of business structures, which subjects those CATSI corporations to separate regulatory frameworks.<sup>45</sup>

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40 National Native Title Council, *Submission 2*, pp. 8–9.

41 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3.

42 See: National Native Title Council, *Submission 2*, p. 8; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3; Dr. Marina Nehme, *Submission 4*, p. 3.

43 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3.

44 Indigenous Business Solutions, *Submission 1*, p. 1. See also: Dr Marine Nehme, *Submission 4*, p. 4.

45 Department of the Prime Minister and the Cabinet, and the Registrar for Indigenous Corporations, *Submission 3*, p. 7.

2.41 Submissions were generally supportive of the objectives of the proposed amendments. Indigenous Business Solutions considered it to be logical that the scope of the Registrar's regulatory reach should be extended to the activities of subsidiary entities in so far as the current arrangement give scope for CATSI corporations to 'fly under the radar' with respect to issues relating to CATSI Act compliance.<sup>46</sup>

2.42 The NNTC noted that the amendments would place CATSI corporations in a position of greater equivalence with Corporation Act corporations and facilitate economic development with Indigenous communities and the entrepreneurial activity of Indigenous people.<sup>47</sup>

### ***Annual General Meetings***

2.43 The proposed amendments to the bill remove the current obligation on small CATSI corporations to hold annual general meetings (AGMs).

2.44 The PM&C/Registrar submission stated that substantial savings will be realised through amendments which allow small corporations the choice to pass a special resolution to not hold their next one or two AGMs. The submission advised that the Technical Review found that one of the most significant compliance burdens for corporations was the requirement to hold an AGM, noting that remotely located corporations with a dispersed membership often found it difficult to achieve a quorum.<sup>48</sup>

2.45 The NACCHO stated that it does not support the proposed amendments that would permit small corporations from holding AGMs. NACCHO contended that AGMs provide a touch point for the communities that the corporations serve and provide the best way for members to ask questions about their management and the performance of the corporation.<sup>49</sup>

2.46 The NNTC similarly reported that other peak Indigenous bodies whose membership largely comprises CATSI corporations have expressed concern over the prospect of defined 'small' CATSI corporations being able to avoid AGMs.<sup>50</sup> The NNTC stated:

The NNTC believes there is value in proposals that are intended to provide mechanisms to reduce the regulatory and reporting burden on (particularly) small CATSI corporations. As such, the NNTC believes the proposals to give some flexibility in reporting and staging of meetings has merit. However, as it stands, the Bill inserts a whole new architecture of rules (Items 142-147) in order to navigate a path to an arrangement that suits the

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46 Indigenous Business Solutions, *Submission 1*, pp. 1–2.

47 National Native Title Council, *Submission 2*, p. 9. See also, Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3.

48 Department of the Prime Minister and the Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 6.

49 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 6.

50 National Native Title Council, *Submission 2*, p. 9.

circumstances. The NNTC is not convinced that the balance between flexibility and allowing members to be properly enfranchised has been struck with the current proposals. There simply has not been enough time to test them across a diverse field of potential application. We note in particular that the provisions would apply to the many small native title holding corporations (PBCs).<sup>51</sup>

2.47 The CYLC supported proposed amendments that lessen the regulatory burden on small CATSI corporations, but is concerned that the proposed amendment concerning AGMs has the potential to disenfranchise members. The CYLC considered further safeguards are needed.<sup>52</sup>

***Cancellation of membership when a member is not contactable***

2.48 The proposed amendments reduce the minimum timeframe for the cancellation of the membership of a CATSI corporation from two years to one year where the member has not been contactable.

2.49 The PM&C/Registrar submission advised that having members who are not contactable can cause difficulties for a CATSI corporation in terms of its ability to meet quorum requirements for meetings, which can, in turn affect governance of the corporation and its ability to conduct its affairs effectively in the interests of all members. The PM&C/Registrar submission observed that the protracted time frame of two years under the current legislation to make contact with a member takes valuable administrative resources, hence the proposal to reduce the period to 12 months to establish that a member is not contactable. A corporation will be required to take reasonable steps to contact the member.<sup>53</sup>

2.50 The NNTC expressed serious concern about how the proposed amendments for the cancellation of membership might operate. The NNTC particularly stated that native title holders might be denied the expression of rights declared theirs by the Federal Court of Australia. The NNTC did not support the proposed redaction process, and continues to object, as a matter of principle, to membership lists being made public.<sup>54</sup>

2.51 The CYLC also did not agree that the timeframe for the cancellation of non-contactable members should be reduced from two years to twelve months, though the CYLC did agree with the proposed amendments concerning 'reasonable attempts' to contact individuals at their nominated alternative addresses or means of contact.<sup>55</sup>

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51 National Native Title Council, *Submission 2*, p. 9.

52 Cape York Land Council, *Submission 5*, p. 3.

53 Department of the Prime Minister and Cabinet, and the Registrar for Indigenous Corporation, *Submission 3*, p. 7.

54 National Native Title Council, *Submission 2*, p. 10.

55 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 4.

### ***Strict liability offences***

2.52 The PM&C/Registrar submission stated that the introduction of strict liability offences is justified on the grounds of the regulatory nature of the offence and its consistency with the CATSI Act's enforcement regime, and the comparatively low maximum penalty of 10 penalty units.<sup>56</sup>

2.53 The NNTC has expressed concern over the introduction of strict liability offences, questioning whether:

...the criminalising of a failure to comply with the technical requirements of CATSI (Item 169, proposed s 349-1) can legitimately be characterised as a 'special measure' for the purposes of the *Racial Discrimination Act 1975* (RDA).<sup>57</sup>

2.54 The CYLC also does not agree with the introduction of strict liability offences if a CATSI corporation fails to notify the Registrar of a material change to its affairs.<sup>58</sup> Dr Marina Nehme, Senior Lecturer, Law Faculty, University of New South Wales, noted that clarification is needed as to what constitutes 'a material change in circumstances' if a breach of the requirement gives rise to a strict liability offence.<sup>59</sup>

2.55 NACCHO stated that it was concerned that the penalty provisions are difficult to understand and appear to be at the absolute discretion of the Registrar.<sup>60</sup>

### ***Key management personnel***

2.56 The amendments proposed in the bill will provide for regulations to prescribe that corporations will be required to report the employment history and remuneration of senior management as part of their annual reports.<sup>61</sup>

2.57 The PM&C/Registrar submission stated that there is a growing trend across the Indigenous and non-Indigenous corporate sector for greater transparency and accountability of Chief Executive Officers and senior management, particularly with respect to remuneration. The PM&C/Registrar submission commented that the bill responds to these concerns by providing a level of transparency around remuneration and the employment history that will assist members in evaluating the management of their corporation.<sup>62</sup>

2.58 The NNTC agreed that there is value in the CATSI corporation sector having comparative information regarding the remuneration of senior executives, however,

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56 EM, p. 31.

57 National Native Title Council, *Submission 2*, p. 9.

58 Cape York Land Council Aboriginal Corporation, *Submission 5*, pp. 3–4.

59 Dr Marina Nehme, *Submission 4*, p. 5.

60 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 7.

61 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, pp. 7–8.

62 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 7.

the NNTC considered the collection of information should be undertaken on a voluntary basis and provided in an aggregated form without the need for legislation.<sup>63</sup> The Aboriginal Peak Organisations Northern Territory (APO NT) concurred with the NNTC stating that an appropriate measure would be for the Registrar to be able to establish an indicative salary bandwidth as a way to benchmark an industry standard.<sup>64</sup>

2.59 The CYLC stated that the Corporations Act did not require corporations other than those listed on the Australian Stock Exchange (ASX) to reveal this kind of information.<sup>65</sup> The NNTC makes a similar point, expressing concern that the attempted equivalence of a CATSI corporation with an ASX listed public company is to apply a double standard.<sup>66</sup>

2.60 More generally, NACCHO expressed its concern the proposed bill makes significant use of regulations to deal with contentious issues though the regulations have yet to be drafted:

Part 7 is also an example of the use of regulations to deal with many significant and contentious issues within the Bill. In consultations around the earlier Discussion Paper no reference was made by the Office of the Registrar of Indigenous Corporations (ORIC) to this intended device and the proposed regulations are not presented as part of the Bill and therefore the subject (at this time) of parliamentary scrutiny in the context of the passage of the Bill. The NNTC has been given no indication as to the proposed consultation process in relation to these proposed regulations. Given the experience to date of the CATSI amendment process, this is a matter of great concern.<sup>67</sup>

### ***Related party transactions***

2.61 The PM&C/Registrar submission stated that under the current rules, corporations engaging in a transaction with a related third party are required to hold a general meeting and seek member approval, resulting in a considerable administrative burden. The PM&C/Registrar submission noted that in small communities with extensive kinship ties and limited options for purchasing goods or services, avoiding related party transactions can be difficult, costly, and have negative impacts for the entire community.<sup>68</sup>

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63 National Native Title Council, *Submission 2*, p. 10. See also, Dr Marina Nehme, *Submission 4*, pp. 5–6.

64 Aboriginal Peak Organisations Northern Territory, *Submission 7*, p. 2.

65 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 5.

66 National Native Title Council, *Submission 2*, p. 10.

67 National Native Title Council, *Submission 2*, pp. 10–11; see also: National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 7; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 5.

68 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 8.

2.62 The bill proposes to exempt small corporations from seeking member approval if the benefit for that related party is less than a threshold specified in the regulations (proposed to be \$5 000) in either a single transaction or all transactions in one financial year. Corporations will also be able to apply for exemptions from seeking member approval in cases where there would be no disadvantage to members of the corporation.<sup>69</sup>

2.63 The CYLC supported the proposals to exempt small CATSI corporations from the current restrictions on related third party transactions.<sup>70</sup> However, the NNTC considered a more appropriate mechanism for facilitating legitimate third party transactions by CATSI corporations while ensuring transparency and accountability would be to adopt the approach taken by Corporations Act to corporations limited by guarantee. This approach permits transactions at arm's length or legitimate remuneration for services provided, with the transactions being noted in the corporation's accounts under the existing Accounting Standards. The NNTC states that the application of any other standard is not appropriate.<sup>71</sup>

2.64 Indigenous Business Solutions stated that the proposed amendments dealing with related third party transactions do not have the desired effect of promoting the advancement of Aboriginal economic development. Indigenous Business Solutions also noted that related third party transactions should be permitted when conducted at arm's length on normal commercial terms.<sup>72</sup>

### ***Special administration***

2.65 The proposed amendments seek to clarify the 'examinable matters' of a CATSI corporation. The proposed amendments modifies one of the grounds for determining that a CATSI corporation is to be placed under special administration to cover the circumstance where there is any irregularity in the management of the CATSI corporation's financial affairs. The amendment also provides a new ground of financial distress as a ground for determining a CATSI corporation is likely to become insolvent. Likely insolvency is said to be a more relevant measure than is currently provided by the CATSI Act.<sup>73</sup>

2.66 The NNTC expressed concern that the proposed amendments vest an unconstrained discretion in the Registrar to appoint a special administrator.<sup>74</sup>

2.67 The Law Council of Australia stated that the grounds for the appointment of a special administrator under the CATSI Act are broader than those for receivership or voluntary administration under the Corporations Act, on the basis that the provision

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69 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations, *Submission 3*, p. 8.

70 Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 5.

71 National Native Title Council, *Submission 2*, p. 11.

72 Indigenous Business Solutions, *Submission 1*, p. 2.

73 EM, p. 36

74 National Native Title Council, *Submission 2*, p. 11.

was a special measure. The Law Council did not oppose a more proactive approach to the appointment of a special administrator, but considered the grounds for such an appointment should be as least restrictive and as specific as possible.<sup>75</sup>

### ***Insolvency***

2.68 The NNTC observed that the PM&C/Registrar submission provided no discussion on the proposals to amend the insolvency provisions.<sup>76</sup> The explanatory memorandum advised the creation of two new presumptions of insolvency.<sup>77</sup>

2.69 The NNTC contended that there is no justification for the proposed amendments, stating:

This proposal was included in the Technical Review Report but, as noted in the [NNTC's primary 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...<sup>78</sup>

2.70 The NNTC considered the proposed amendments would create a presumption of insolvency in situations that are not applicable to Corporations Act corporations. The NNTC further considered that the raising of a presumption of insolvency in situations where a CATSI corporation's failure may only be minor or technical is excessive and unwarranted.<sup>79</sup>

### **Committee view**

2.71 The committee notes that the proposed amendments to the CATSI Act arise after over a decade of the operation of the Act, and draw upon the extensive Technical Review undertaken by DLA Piper. The committee understands that there is support for a broader review of the CATSI Act to ensure that it remains relevant and effective into the future, and a desire for further consultation on the bill. However, in the committee's view the Technical Review, and the consultations undertaken as part of that review, are a comprehensive basis for the amendments in the bill.

2.72 The committee notes that submissions are supportive of measures that reduce the regulatory burden on CATSI corporations. The committee strongly supports the primary purpose of the bill, which is to improve the regulatory framework on CATSI corporations by reducing unnecessary administrative burden, increasing the

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75 Law Council of Australia, *Submission 8*, p. 4.

76 National Native Title Council, *Supplementary Submission 2*, p. 4.

77 EM. p. 47.

78 National Native Title Council, *Supplementary Submission 2*, p. 4.

79 National Native Title Council, *Submission 2*, p. 10. See also: Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 6.

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transparency of governance arrangements, and aligning the CATSI Act with the broader corporations' law.

2.73 The committee notes that Indigenous communities generally support the proposed amendments which determine the size of a CATSI corporation based on a sole test of revenue to replace the current more complex tripartite test based on income, assets and the number of employees. The committee supports the simplified approach.

2.74 The committee considers the proposals that require CATSI corporations rule books be updated to contain replaceable rules in the one document to be a necessary and important measure to improve governance. The committee also supports proposals that enable the Registrar to provide 'model constitutions' to assist CATSI corporations to register under the CATSI Act, and to otherwise assist CATSI corporations in the drafting of their rule books.

2.75 The committee sees merit in a number of provisions that allow CATSI corporations greater flexibility in the management of their internal affairs, or which reduce the administrative or financial burden on a CATSI corporation. The capacity for a CATSI corporation to undertake an annual financial review rather than an annual audit of its records is helpful in this regard, as are the proposals concerning the option for a CATSI corporation to defer one of two annual general meetings by special resolution, and the variation to the rules governing the cancellation of the membership of a CATSI corporation. These provisions are subject to appropriate safeguards.

2.76 Provisions which enable CATSI corporations to establish subsidiary entities are a much needed update to the CATSI Act. The committee supports these provisions in that they provide the means for Indigenous communities to pursue economic goals for the community. The committee similarly supports the provision dealing with related party transactions as the measures are practical and accord with commercial reality. These amendments are supported by the greater transparency and accountability afforded by the provisions governing the disclosure of the employment history and remuneration of key management personnel.

2.77 Finally, the committee generally agrees with the provisions of the bill which seek to strengthen processes for special administration and insolvency of CATSI corporations. The committee considers that further discussion of these aspects of the bill may be useful.

2.78 The committee notes the comments of Indigenous bodies as to the operation of the various provisions of the bill in practice, and suggestions for the fine-tuning of aspects of the bill, notably with respect to the introduction of strict liability offences and the drafting of regulations. The committee is supportive of the Australian Government undertaking further consultation with the Indigenous community to address these matters as part of the process of the implementation of the bill.

**Recommendation 1**

**2.79 The committee recommends that the Senate pass the bill.**

**Senator James Paterson  
Chair**

## **Dissenting Report by Labor Senators**

1.1 Labor senators oppose the recommendation by the majority of the committee supporting the passage of this legislation at this time.

1.2 Almost every submission made to this inquiry has highlighted the network of complex policy, constitutional, and cultural issues raised by this legislation. Many of these issues remain unresolved. The Parliamentary Joint Committee on Human Rights is also yet to report on this legislation, as was acknowledged in the majority report above.

1.3 Numerous parliamentarians (including members of this committee) have received representations from Aboriginal and Torres Strait Islander peak bodies requesting that this committee seek an extension of the reporting deadline. The legislation was referred for inquiry shortly before the holiday season. Affected organisations have reported difficulties in arranging the documents, information and personnel they needed to properly engage with this inquiry.

1.4 Labor senators believe there are reasonable grounds for this inquiry to have continued for longer. The government have not provided any compelling reasons for why the legislation needs to be progressed on its current timeline. Given the unresolved concerns raised by the Aboriginal and Torres Strait Islander peaks, this committee ought not recommend passage of the legislation at this stage.

**Senator Jenny McAllister**  
**Deputy Chair**

**Senator Kimberley Kitching**



# Dissenting Report by the Australian Greens

1.1 The Australian Greens cannot support this Bill as we oppose many of the measures contained in the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (the Bill). There are a number of provisions in this Bill that are extremely concerning and do not have the support of First Nations organisations.

1.2 This Bill amends the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) by making changes to:

- The classification of CATSI corporations
- The making of constitutions
- Review of financial reports
- Subsidiaries and other entities
- Meeting and reporting obligations
- Members and membership
- Key management personnel
- Related party transactions
- Special administration
- Voluntary deregistration
- Investigation and enforcement
- Publication of notices
- Independent directors
- Qualified privilege for auditors
- Resolutions
- Unanimous requires for special administration
- Insolvency
- Conflicting duties under state or territory legislation, and
- Minor technical amendments.

1.3 The Australian Greens note the limited timeframe within which individuals and organisations could lodge submissions, which is particularly concerning given the length and technical nature of the Bill.

## **Lack of consultation**

1.4 A key concern for many submitters was the lack of thorough consultation with First Nations peoples. The proposed amendments were informed by the Technical Review of the CATSI Act, which was undertaken by law firm DLA Piper Australia in 2017. The Australian Greens share concerns that the Technical Review was only

publically released as part of the Department of Prime Minister and Cabinet's submission to the inquiry, and not during consultations. Unfortunately the Majority report views the Technical Review and consultations as an adequate basis for making amendments to the CATSI Act and fails to acknowledge the concerns of many submitters.

1.5 The National Native Title Council (NNTC), the peak body for the native title sector, says in its submission:

...the Bill before the Committee has not been the subject of consultation adequate to reasonably satisfy the Committee that it represents the wishes of the affected group or that it is appropriate and adapted to facilitate the advancement of Australia's Indigenous Peoples.<sup>1</sup>

1.6 The National Aboriginal Community Controlled Health Organisation (NACCHO) notes there was a lack of consultation regarding the Technical Review, the terms of reference and steering committee:

...the participation of Aboriginal and Torres Strait Islander peoples in the review and preparation of amendments was very limited. The review was undertaken by an external non-Indigenous legal firm engaged by the Registrar...Indigenous stakeholders were not represented on the steering committee, made up of public servants only and had no opportunity to comment on the findings of the review.<sup>2</sup>

1.7 Further, NACCHO notes the impact of not receiving the Technical Review earlier:

No consultation report has been produced and there is no way for Indigenous stakeholders to know what feedback was provided and the extent to which it was considered by the Government in making decisions.<sup>3</sup>

1.8 The Law Council of Australia also notes the Bill has not been subject to sufficient consultation in its submission:

Further, the Law Council is advised that the Bill was not made available to CATSI corporations or other Aboriginal and Torres Strait Islander bodies prior to its introduction to Parliament. It also notes the short submission period and the differences between the Bill and the ORIC Discussion Paper. It is arguable that the Bill has not been subject to adequate consultation with the affected group, relevant to the 'special measures' criteria in the CERD and RDA.<sup>4</sup>

1.9 The Australian Greens share concerns about lack of adequate consultation with First Nations peoples. Given the CATSI Act is a special measure for the purposes

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1 National Native Title Council, *Submission 2*, p. 5.

2 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 5.

3 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 6.

4 Law Council of Australia, *Submission 8*, p. 2.

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of the *Racial Discrimination Act 1975*, full and proper consultation with affected First Nations peoples is essential.

### **Reporting on key management personnel**

1.10 The Australian Greens have concerns regarding subsection 330-5(1B) and 333-10(4) of the Bill, which enable the Regulations to require reporting on the employment history and remuneration of key management personnel. The *Corporations Act 2001* does not impose similar requirements.

1.11 The Australian Greens stand with peak First Nations organisations to oppose the racially discriminatory nature of these amendments. The Majority report fails to acknowledge the discriminatory nature of these amendments and claims they provide greater transparency.

1.12 The NNTC says in its submission:

The amendments proposed in Part 7 authorise the mandatory collection and disclosure of remuneration information in relation to “key management personnel” in CATSI corporations. There is no equivalent power with respect to CA corporations generally. Therefore, the provision is an example of racial discrimination.<sup>5</sup>

1.13 The Cape York Land Council says in its submission:

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.<sup>6</sup>

1.14 NACCHO says in its submission:

If it is not appropriate to introduce this measure for mainstream companies similar in size and nature to CATSI corporations, the Government needs to explain why. Otherwise, there is a serious risk that Indigenous stakeholders will perceive this measure as racially discriminatory whatever the intentions of the Government.<sup>7</sup>

### **Constitutions (rule books)**

1.15 There are concerns around the requirement for all CATSI corporations to include all replaceable rules within their constitutions (rule books) within two years. The Australian Greens are particularly concerned about the retrospective nature of this amendment which would place a significant burden on many CATSI corporations.

1.16 In its submission the Law Council of Australia says:

The Law Council is concerned that this requirement could potentially place an unreasonable and unnecessary burden on each and every one of the some

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5 National Native Title Council, *Submission 2*, p. 5.

6 Cape York Land Council, *Submission 5*, p. 5.

7 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 7.

3,300 CATSI corporations that presently exist because such requirement could necessitate all such CATSI corporations throughout Australia to hold Special General Meetings to replicate rules already contained in CATSI corporations into their own Rule Books within two years, and this would be necessary irrespective of whether the present rules of such CATSI corporations have caused any confusion in the past or are in any way ambiguous in their present format.<sup>8</sup>

1.17 The NNTC says in its submission:

However, the NNTC submits the current proposal imposes a significant and unnecessary burden on all the existing 3,300 CATSI corporations. Under the proposal all existing CATSI corporations across the country would be obliged to hold Special General Meetings to replicate rules already contained in CATSI into their rule books within two years. This obligation would arise whether or not there is any evidence the existing structure has caused any confusion.<sup>9</sup>

1.18 The Cape York Land Council says:

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.<sup>10</sup>

### **Additional powers for the Registrar**

1.19 The Australian Greens are concerned about the additional powers provided to the CATSI Registrar. Part 2 of the Bill provides the Registrar with the power to reject a corporation's application for registration or constitutional change if it thinks the constitution is not fit for purpose. The *Corporations Act 2001* does not impose similar requirements.

1.20 The NNTC says in its submission:

The NNTC also has concerns with Item 7, which adds an additional discretion for the Registrar to exercise when assessing an application for Registration. Currently the Registrar can exercise a discretion in assessing an application for registration essentially to determine whether a proposed Rule Book satisfies the requirements of CATSI. The proposed additional discretion would allow the Registrar to refuse an application for registration on the basis that the Registrar had formed a view that the proposed Rule Book was not 'fit for purpose'.<sup>11</sup>

1.21 In its submission, the Cape York Land Council comments on the increased costs associated with additional regulatory oversight by the Registrar. It says:

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8 The Law Council of Australia, *Submission 8*, p. 3.

9 National Native Title Council, *Submission 2*, p. 7.

10 Cape York Land Council, *Submission 5*, pp. 1–2.

11 National Native Title Council, *Submission 2*, p. 7.

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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...<sup>12</sup>

1.22 Further, the Cape York Land Council raises the issue of the regulatory burden being placed on CATSI corporations if a constitution is deemed “unfit for purpose”:

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.<sup>13</sup>

### **Liability offences**

1.23 The Australian Greens are concerned about section 201-185 of the Bill, which introduces strict liability offences should a corporation fail to give the Registrar written notice of a change in material affairs within 28 days.

1.24 The Cape York Land Council says in its submission:

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.<sup>14</sup>

1.25 Dr Marina Nehme, Senior Lecturer, Law Faculty, University of New South Wales, says:

Lastly, clarification is needed regarding what constitute material change in the context of the proposed s 201-185. For a Bill that is designed to make the law more accessible, there are several provisions, including this one, that may result in more questions than answers. Such answers are especially needed as a breach of the proposed s 201-185 is a strict liability offence.<sup>15</sup>

### **The use of Regulations**

1.26 A number of key amendments have been left to be clarified by the Regulations, instead of being outlined in the Bill. The Australian Greens share concerns about defining key amendments in the Regulations, particularly given the draft Regulations were not included in the consultation process and have not yet been released.

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12 Cape York Land Council, *Submission 5*, p. 2.

13 Cape York Land Council, *Submission 5*, p. 2.

14 Cape York Land Council, *Submission 5*, p. 4.

15 Dr Marina Nehme, *Submission 4*, p. 4.

1.27 NACCHO says in its submission:

There is also significant use made of regulations in the Bill which was not referred to at all in the consultations. ORIC's summary of the legislative proposals is misleading in that it does not make any reference to regulations being used. The regulations also appear to go to contentious matters in some cases such as the new requirement for remuneration reports. In the meantime, we have no idea of when the regulations are to be introduced and whether there will be any consultations with Indigenous stakeholders beforehand.<sup>16</sup>

1.28 The NNTC says in its submission:

Part 7 is also an example of the use of regulations to deal with many significant and contentious issues within the Bill. In consultations around the earlier Discussion Paper no reference was made by ORIC to this intended device and the proposed regulations are not presented as part of the Bill and therefore the subject (at this time) of parliamentary scrutiny in the context of the passage of the Bill.<sup>17</sup>

1.29 Dr Marina Nehme, Senior Lecturer, Law Faculty, University of New South Wales, says:

The Bill proposes to enable the regulation to require information about key management personnel employment history as well as remuneration to be disclosed. The desire behind such a provision is to increase the level of transparency within a corporation. I find it concerning that the regulation is the one that would be outlining such a requirement. This should be clearly stated in the legislation.<sup>18</sup>

## **Insolvency**

1.30 The Australian Greens have concerns about section 526-12 of the Bill which introduces two new presumptions of insolvency. Under these amendments, a CATSI corporation is presumed to be insolvent if a corporation fails to keep or retain financial records. Several submitters highlighted the racially discriminatory nature of these amendments.

1.31 The Cape York Land Council says in its submission:

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.<sup>19</sup>

1.32 In its submission, the NNTC says:

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16 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 7.

17 National Native Title Council, *Submission 2*, p. 10.

18 Dr Marina Nehme, *Submission 4*, p. 5.

19 Cape York Land Council, *Submission 5*, p. 6.

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The NNTC submits that the raising of a presumption of insolvency in situations where a CATSI corporation may have only failed to comply with these provisions in a minor and technical fashion is excessive and unwarranted. The application of this presumption solely to CATSI corporations is racist. The justification for the proposal is non-existent. The provision is opposed.<sup>20</sup>

### **Annual general meetings**

1.33 The Bill removes the current requirement for small CATSI corporations to hold annual general meetings. Several submitters raised concerns about the impact of small CATSI corporations being able to avoid holding annual general meetings.

1.34 NACCHO comments on the purpose of annual general meetings as a touch point between CATSI corporations and communities. It says:

While the period for small corporations not to have an AGM has been reduced from the original proposal of three years to two years in the amendments, we believe that corporations that are active in Indigenous communities, even if the consolidated revenue is only \$250,000, must hold Annual General Meetings. They serve as a touch point for the communities the corporations serve and provide the best way for members to ask questions about their management and results.<sup>21</sup>

1.35 The NNTC highlights that while there is merit to providing flexibility in reporting and staging meetings, it recognises that other First Nations organisations had concerns with this amendment:

In support of these doubts the NNTC notes that other peak Indigenous organisations whose membership largely comprises CATSI corporations (for example the National Aboriginal Controlled Community Health Organisations) have expressed significant concern around the prospect of (defined) small CATSI corporations being able to avoid holding AGMs.<sup>22</sup>

1.36 These examples demonstrate the Government does not understand the circumstances and needs of CATSI corporations.

### **Conclusion**

1.37 The Australian Greens acknowledge many submitters supported several amendments in the Bill, including changes to the publication of notices, qualified privilege for auditors, conflicting duties under State or Territory legislation, and minor technical amendments. However, this does not outweigh the significant concerns held around the lack of consultation with First Nations peoples and the racially discriminatory amendments proposed.

1.38 The Majority Report fails to acknowledge the lack of consultation with First Nations people as an issue in the inquiry, despite the number of peak First Nations

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20 National Native Title Council, *Submission 2*, pp. 13–14.

21 National Aboriginal Community Controlled Health Organisation, *Submission 6*, p. 6.

22 National Native Title Council, *Submission 2*, p. 9.

organisations and CATSI corporations that expressed significant concerns with the Bill. The Australian Greens do not see the Majority Report's suggestion for fine-tuning aspects of the Bill as sufficient.

1.39 The Australian Greens join with the range of stakeholders, including CATSI corporations, who oppose the Bill. The Australian Greens acknowledge there is support for a review of the CATSI Act and call on the Government to undertake a full and comprehensive review of the CATSI Act in consultation with First Nations peoples.

### **Recommendation 1**

**1.40 The Bill not be passed.**

**Senator Rachel Siewert**

# **Appendix 1**

## **Submissions**

### **Submissions**

- 1 Indigenous Business Solutions
- 2 National Native Title Council
- 3 Department of the Prime Minister and Cabinet and the Registrar of Indigenous Corporations
- 4 Dr Marina Nehme
- 5 Cape York Land Council Aboriginal Corporation
- 6 National Aboriginal Community Controlled Health Organisation
- 7 Aboriginal Peak Organisations Northern Territory
- 8 Law Council of Australia

