



AIATSIS

AIATSIS Submission
Review of the CATSI Act:
Phase Two

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The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to make a submission on the Draft Report of Corporations (Aboriginal and Torres Strait Islander Act) 2006 (Cth) (CATSI Act) Review (Draft Report).¹

AIATSIS is Australia's national institute dedicated to Aboriginal and Torres Strait Islander peoples' knowledge, societies and cultures. We are both the custodian of Australia's national collection of Aboriginal and Torres Strait Islander heritage materials and one of Australia's publicly funded research agencies. AIATSIS has legislative responsibility to provide leadership in Aboriginal and Torres Strait Islander research and provide advice to government on Aboriginal and Torres Strait Islander culture and heritage including native title, land and water management and Indigenous governance.

AIATSIS is committed to ensuring Indigenous knowledge, cultures and governance are respected, valued and empowered by the laws and policies that concern them.

The AIATSIS Native Title Research Unit (NTRU) was established 27 years ago and is an enduring a partnership between successive Commonwealth Indigenous affairs portfolio agencies and AIATSIS. AIATSIS has developed significant expertise and partnerships with Indigenous peoples and organisations on both the local level and internationally. Our work is underpinned by a commitment to cultural resurgence and enjoyment of the rights of Indigenous peoples. AIATSIS actively undertakes research on issues that impact on the governance and livelihoods of Aboriginal and Torres Strait Islander peoples.

Through the NTRU AIATSIS supports the native title sector and conducts research and analysis of the law, policy and practice of native title. AIATSIS also hosts the national Prescribed Body Corporation (PBC) Website, a high quality and easily accessible online information resource aimed at supporting native title corporation capability.²

Introduction

Since 2016, AIATSIS has contributed to a number of reviews of the CATSI Act including the *Technical Review of the CATSI Act (2017)* and *CATSI Review Phase 1 (2020)*. We will refer to the AIATSIS submissions for both of these reviews throughout this report.³

AIATSIS understands the purpose of the 2019-2020 comprehensive review is, in part, to address criticisms of the 2018 CATSI review and consider:

1 National Indigenous Australians Agency, CATSI Act review: Draft report, National Indigenous Australians Agency, 31 July 2020, viewed 9 September 2020, <https://www.niaa.gov.au/sites/default/files/publications/catsi-act-review-draft-report_0.pdf>.

2 <https://nativetitle.org.au/>

3 L Strelein, B Burbidge & C Hassing, AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, AIATSIS, Canberra, ACT, 31 October 2017.; AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

- whether the CATSI Act is meeting its objects and continues to be desirable as a special measure for the advancement and protection of Indigenous peoples as set out in the Act's preamble,
- whether the functions and powers of the Registrar of Indigenous Corporations are appropriate, effective and adequate,
- possible amendments to the CATSI Act to better support the regulation of CATSI corporations, and
- consider the consistency and interaction of the CATSI Act with other relevant legislation, including the Corporations Act, ACNC Act and NTA.⁴

This submission addresses a number of the detailed requests for feedback set out in the Draft Report and pays particular attention to the role of the CATSI Act as a dedicated legislative instrument for the incorporation of Registered Native Title Bodies Corporate (RNTBCs) often referred to as PBCs. In this submission we will focus on the needs and aspirations of RNTBCs and how any proposed changes to the CATSI Act may impact on these organisations. Our observations in this regard are drawn from the evidence base established through our RNTBC surveys and related research over two decades.

The 2020 *Closing the Gap Report* focuses on a commitment towards real partnerships between the Commonwealth and Aboriginal and Torres Strait Islander communities and emphasises the need for local action.

In 2020, there is a greater focus on partnership between governments and Aboriginal and Torres Strait Islander people. At the centre of this new way of working is local action, and a determination to make a difference and to achieve change. This *Closing the Gap* report points to the future, a new path where Aboriginal and Torres Strait Islander people share ownership to improve life outcomes for current and future generations. It closes off on an era of reporting against targets set by governments.⁵

In this light, AIATSIS welcomes the comprehensive review of the current CATSI Act and sees it an opportunity for Aboriginal and Torres Strait Islander peoples and their RNTBCs to have a real voice in the construction of any changes.

The Draft Report contains well over one hundred questions, proposals and requests for general feedback. The CATSI Act is complex and interacts with a number of other legislations and any review requires proper consideration. Along with the vast number of questions asked in the Draft Report, Phase Two consultations were carried out in a COVID-restricted environment. Given these complexities and circumstances, AIATSIS considers a longer timeframe for consultation more appropriate. The review is rightfully

⁴ National Indigenous Australians Agency, CATSI Act review: Draft report, 31 July 2020, p. 64.

⁵ *Closing the Gap Report 2020*, Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2020, p. 5.

comprehensive and complex. However, many RNTBCs and other Aboriginal and Torres Strait Islander corporations may not have adequate time or, most importantly, resources to give considered policy advice in the short period of time available. Further consultation and appropriate resourcing of RNTBCs and other Aboriginal and Torres Strait Islander corporations will result in meaningful participation and shared ownership of any CATSI Act changes.

With secure and appropriate resourcing⁶, many RNTBCs are in a central position to be a positive force of local action to improve life outcomes for current and future generations of Aboriginal and Torres Strait Islander peoples. The *Closing the Gap Report* gives an example of an RNTBC, the Gurindji Aboriginal Corporation, working in a multi-agency partnership towards positive and tangible outcomes for the community,

The partnership has resulted in six new local jobs and delivery of key infrastructure projects to upgrade housing and community facilities. It also supports the continuation of the Freedom Day Festival celebrating local culture and history, commemorating the Wave Hill walk off which put Aboriginal land rights onto the national agenda in the 1960s, and is a significant source of revenue for the community.⁷

As shown by the work of the Gurindji Aboriginal Corporation, and discussed further below, RNTBCs are more than simply membership bodies. RNTBCs have complex roles holding and managing native title rights and interests and, for example, running commercial enterprises or managing infrastructure while simultaneously fulfilling cultural responsibilities to maintain and preserve their group's Indigenous law and culture. This submission focuses on the complex position of RNTBCs and looks to how the CATSI Act can properly support the ambitions and goals of these unique organisations.

CATSI Act Review Draft Report

Due to the extensive nature of the review and the time available for comment, this submission will prioritise its address according to relevance and importance for RNTBCs. This submission will follow the chapter headings and refer to the specific paragraph numbers found in the Draft Report.

⁶ See for example the NNTC call for \$300,000 recurrent funding per annum for three years for all RNTBCs, NNTC 2019 Pre-Budget Submission <https://nntc.com.au/submissions/>

⁷ *Closing the Gap Report 2020*, p. 10.

2. Objects of the CATSI Act

2.1-2.40 The CATSI Act as a special measure

The CATSI Act is intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders.⁸ Special measures are designed to 'secure the disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.⁹

AIATSIS supports retaining the CATSI Act as a special measure and continues to view the CATSI Act as a vehicle for the advancement of Aboriginal and Torres Strait Islander people's goals and aspirations. This beneficial purpose must guide reform.

In fulfilling this purpose, the CATSI Act must ensure principles of non-discrimination and substantive equality for Aboriginal and Torres Strait Islander people incorporating under the CATSI Act. That is, the Act and its administration must take into account relevant differences (for example accommodating unique cultural or legal contexts such as native title) and disregard irrelevant differences (for example reporting or disclosure requirements that are not expected of corporations incorporated under the Corporations Act).

We note our previous submission that,

Each reform, and the package as a whole, must facilitate and provide a vehicle for contemporary Aboriginal and Torres Strait Islander aspirations for self-determination and self-management; they must recognise and value Indigenous peoples' knowledge and ways of governing, free from discrimination and regulatory overburden.¹⁰

Each proposed reform should be a positive step towards greater enjoyment of Aboriginal and Torres Strait Islander peoples' rights. Reforms need to be evaluated, from the perspective of how it is advantageous for Aboriginal and Torres Strait Islander corporations.

⁸ National Indigenous Australians Agency, CATSI Act review: Draft report, p. 12.

⁹ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4). For a definition of special measure see: *Maloney v The Queen* [2013] HCA 28 and *Gerhardy v Brown* [1985] HCA 11.

¹⁰ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p.3 see also pp4-7.

2.41 Whether the CATSI Act is flexible enough to meet the needs of a whole range of different Aboriginal and Torres Strait Islander corporations

The CATSI Act is not flexible enough to meet the needs of the varied types of Aboriginal and Torres Strait Islander corporations as it is currently structured. Of particular concern is the specific and unique needs of RNTBCs.

As with previous submissions AIATSIS support the view, shared by the National Native Title Council (NNTC), that a separate chapter or division of the CATSI Act is required to cater for the specific needs of RNTBCs.¹¹

While the CATSI Act contains a number of provisions for RNTBCs, the incorporation model continues to pose considerable challenges for these organisations, particularly considering the need for greater autonomy and self-government to support the movement towards treaty and agreed settlements.¹²

RNTBCs are unique as compared to other CATSI corporations for a number of reasons including:

- rather than being voluntary incorporations, common law native title holding groups are mandated, under the *Native Title Act 1993 (Cth)* (NTA), to incorporate under the CATSI Act
- under the NTA RNTBCs hold or manage native title interests on behalf of a native title group according to the laws and customs of that group and, as such, operate in a an environment of *de facto* legal pluralism
- by virtue of the NTA, its regulations and the common law, RNTBCs have special fiduciary obligations to the native title group for whom they hold or manage rights. These obligations are distinct from and may conflict with fiduciary obligations of Directors to corporation members under Corporations Law
- in their role of managing and holding native title RNTBCs are increasingly required to, and often aspire to, fulfil more governmental and adjudicative roles, for example in making and/or enforcing decisions about the intramural allocation, enjoyment or impairment of native title rights and interests of individuals and groups.

¹¹ AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 4.

¹² L Strein & B Burbidge, AIATSIS submission: Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) review - Phase 1, AIATSIS, Canberra, ACT, 12 February 2020, p. 1.

The CATSI Act Explanatory Memorandum notes the need to provide,

...sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups.¹³

While this presumption of flexibility may have been aimed at the cultural context in which many or all Aboriginal and Torres Strait Islander corporations operate, the need is particularly pertinent for the group of CATSI corporations that are RNTBCs.

As previous submissions have outlined,¹⁴ because of their native title responsibilities RNTBCs must also deal with, complex interactions with equity, property law, administrative law, planning law, environmental law, resources law, land law, taxation, trusts, occupational health and safety, employment law, and the many other legal obligations that emerge across native title operations.

A separate chapter for RNTBCs can go some way towards supporting these complex responsibilities and better recognise and accommodate for the rights of Aboriginal and Torres Strait Islander peoples to choose the most appropriate governance structures to meet their needs and increase their ability to self-determine and self-manage.¹⁵

RNTBCs are not just conduits for land clearances, they perform a number of activities to further the goals and aspirations of their members and the wider native title holding group and are a vehicle for actively maintaining and asserting rights and interests in country according to the laws and customs of the group.¹⁶

RNTBCs engage in varied activities. They may be, for example, negotiating with local councils, running various commercial enterprises, cultural heritage branches or charitable trusts. They run ranger groups, other land management organisations, art centres or tourist enterprises. They may have elder or other Indigenous governance structures sitting alongside or integrated with their corporate governance structures.¹⁷

RNTBCs are entrusted with maintaining, preserving and advancing Indigenous law and culture and would benefit from a framework that better supports the governmental role they hold or aspire to hold.

One RNTBC's vision statement exemplifies the deep commitment to culture and community wellbeing that many of these organisations have,

13 Explanatory Memorandum Corporations (Aboriginal and Torres Strait Islander) Bill 2006, The Parliament of the Commonwealth of Australia, House of Representatives, 2004-5., p. 8.

14 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 6.

15 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, pp. 6–7.

16 See for example, T Bauman, LM Strelein & JK Weir (eds), *Living with native title: the experiences of registered native title corporations*, AIATSIS Research Publications, Canberra, 2013, p. 6.

17 See [Robe River Kuruma Aboriginal Corporation](#) and [Yawuru PBC](#) for examples of traditional owner or elder council in governance structures and the varied activities a RNTBC carries out.

[w]orking together as a community to establish a solid foundation towards independence, community wellbeing, and cultural identity now and for future generations.¹⁸

The link between native title, cultural identity and wellbeing is well established with a number of examples found in AIATSIS' *Living with Native Title*.¹⁹ Case studies show,

holistic approaches of native title holders to native title ...reveal[ing] how the protection and promotion of traditional laws and customs that give rise to native title rights to land and waters are inextricably linked with other social and emotional wellbeing and economic outcomes.²⁰

This inseparable link between culture and wellbeing is also recognised in the *Closing the Gap Report* which highlights, for example, the interrelated aspects of employment status and 'outcomes for health, social and emotional wellbeing, and living standards'.²¹

Because of the unique status of native title holders and their corporations as polities and a site of the maintenance of law and culture many RNTBCs also have the potential to make a real and positive impact on Aboriginal and Torres Strait Islander people's health inequity. Strong, well-resourced and supported RNTBCs could have a positive impact on members and native title holders health outcomes 'by harnessing the strength of culture as an underlying determinant of good health through identity and belonging, supportive relationships, resilience and wellbeing'.²²

Involvement in Indigenous language programs is one example of the varied work RNTBCs do to maintain, express and strengthen culture and have a positive impact on Aboriginal and Torres Strait Islander people's health and wellbeing.²³

AIATSIS has previously stated there is a need for the CATSI Act to adapt and recognise native title holders, and their representative corporations, as polities rather than simply member organisations.²⁴ A separate chapter for RNTBs will cater for the specific needs and circumstances of these corporations and reduce costs by streamlining resources and information.

18 [Robe River Kuruma Aboriginal Corporation](#)

19 eds Bauman et al., *Living with native title: the experiences of registered native title corporations*.

20 eds Bauman et al., *Living with native title: the experiences of registered native title corporations*, pp. 6–7.

21 *Closing the Gap Report 2020*, p. 66.

22 *Closing the Gap Report 2020*, p. 8.

23 See examples of RNTBC language work at <https://nativetitle.org.au/learn/role-and-function-pbc/maintaining-land-and-heritage/language-work-pbcs>; and recent data on the impact on language and wellbeing in Y Dinku, F Markham, D Venn, D Angelo, J Simpson, C O'Shannessy, J Hunt & T Dreise, 'Language use is connected to indicators of wellbeing: Evidence from the National Aboriginal and Torres Strait Islander Social Survey 2014/15', Canberra, ACT: Australian National University, Centre for Aboriginal Economic Policy Research (CAEPR), 2020, viewed 15 September 2020, <<https://openresearch-repository.anu.edu.au/handle/1885/186511>>, p. 37.

24 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 7.

AIATSIS recognises that the creation of a separate chapter will require further negotiation, consultation and co-design with Aboriginal and Torres Strait Islander peoples. However, as noted in our previous submission, a separate division is not a new concept.

The Aboriginal Councils and Associations Act 1976 (Cth) (ACA Act) sought to provide Aboriginal and Torres Strait Islander Australians with a quick and flexible mode of incorporation by providing two options for incorporation, including a council's division.²⁵

Many RNTBCs are already making a significant impact in their local communities and many others, with adequate resourcing and the support of an appropriate framework in the form of a separate CATSI Act chapter, have a real potential to make a difference in the outcomes of Aboriginal and Torres Strait Islander communities.

2.45 Develop the capacity of corporations, directors and members

AIATSIS welcomes support for CATSI corporations in the form of increased funding and other targeted resources that provide information and education about corporate governance, dispute management, roles, responsibilities and rights. This is of particular relevance for RNTBCs who have dual responsibilities to members and the wider native title holders and is essential to achieving good corporate governance for RNTBCs.

RNTBC governance training needs to be culturally appropriate, specific and purpose built for the complex needs of native title corporations. There is currently a gap in the certificate level accredited training (particularly targeted at younger native title holders) to learn the complex business of RNTBCs.

ORIC may not be the appropriate body to deliver training beyond the basic board roles and responsibilities currently available. But, for RNTBCs, this training is inadequate and, if not delivered by trainers with a strong knowledge of native title law, can even be misleading.

3. Powers and Functions of the Registrar

3.4-3.8 Expanded regulatory powers

AIATSIS suggests that further information and details are needed on what the lower level discretionary powers might be before they can be properly considered and debated.

While AIATSIS agrees that it may be of benefit for the Registrar to have flexibility to exercise less heavy handed or severe responses to minor breaches we are concerned with how increased powers may interact with the current CATSI Act.

AIATSIS supports the Central Land Council's (CLC) call to de-criminalise the CATSI ACT, found in their current submission. AIATSIS notes that the CLC submission includes a

²⁵ Strelein & Burbidge, AIATSIS submission: Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) review - Phase 1, p. 1.

number of examples of minor administrative compliance offences, such as failure to include a corporations ICN on a letterhead and failure to display a corporation's name and ICN at every place open to the public where it carries on business. These are just a few of the 166 offences found in the CATSI Act.

AIATSIS agrees with the CLC that this compliance regime may place an unnecessary, often culturally inappropriate and unfair administrative and financial burden on smaller, under-resourced corporations.

As with previous submissions AIATSIS supports the use of penalties for serious offences such as gross negligence and dishonesty.²⁶

AIATSIS supports the CLCs suggestion that the primary function of the Registrar should be education and support for corporations rather than a punitive one. AIATSIS suggests that further regulatory powers for the Registrar, including the power to issue fines, should be paired with de-criminalisation of the CATSI Act.

3.21 Dispute resolution powers of the Registrar

AIATSIS is of the view that arbitration or dispute management by the Registrar should be offered as an optional service for RNTBCs.

We refer to our previous submission concerning the powers of the Registrar in relation to dispute management.

The Registrar could provide support for requests of an independent facilitator, mediator or arbitrator and develop a network of experts to provide independent advice to CATSI Corporation boards about their roles, responsibilities, rights and obligations under the CATSI Act and their own rules. A greater emphasis on facilitation of good governance could assist in building the confidence of corporations in their own governance and their ability to manage conflict. Facilitators may be better able to successfully achieve a voluntary resolution of issues in ways that build, long term organisational resilience, without any further need for interventions such as mediation or arbitration or other more serious action by the Registrar or the Courts.

Where matters remain unresolved, the Registrar could play a role in appointing an arbitrator and managing the arbitration process. Under a CATSI Corporation's rules the Registrar may be required to arbitrate when a dispute arises. There does not appear to be any specific legal

²⁶ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, pp. 16–17.

impediment to the Registrar having a role in mediation as well as arbitration, with the possible exception of conflict of interest.

There are a number of limitations in only examining the dispute management rules to gauge an understanding of how RNTBCs manage and resolve disputes, for example many disputes may be avoided or mitigated through strong decision-making processes or there may be additional processes that RNTBCs utilise that they do not outline or describe within the confines of their rulebook. Disputes can be complex and multifaceted and not captured by the parameters of the constitution. Further engagement with RNTBCs is required in this area. Many answers lie in the provision of strong examples of good decision making that avoid the occurrence of and subsequent management of disputes.

It is of particular concern when anecdotal or small samples are used to derive 'rules' for what constitutes good governance and decision-making. For example, an intervention or circuit breaker in one dispute (e.g. radically changing the rules for appointment of directors away from representational election to general election) may work to build stronger decision making in one circumstance, but those same governance structures may be a source of strength in decision-making in another. Building strong decision making and dispute management within corporations requires bespoke processes and outcomes that are designed and owned by the members (and native title holders in the case of RNTBCs), but they need to be supported by accessible and culturally capable expertise and advice.²⁷

AIATSIS encourages appropriate resources for RNTBCs to engage in dispute management while continuing to operate. It is important to reiterate that building strong decision making and dispute management within RNTBCs requires unique and tailored processes that are mindful of the nature of native title disputes, and fully embrace the governance traditions, values and ethics of individual native title groups.²⁸

27 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006.pp43-44

28 See for example the Taungurung Decision Making Guide created in partnership with AIATSIS and the Taungurung Land and Water Council B Burbidge & T Bauman, Taungurung Decision-Making Guide, AIATSIS, Canberra, 2019.

4. Governance

4.5 and 4.7 Membership management and contact details

As found in our previous submission AIATSIS does not believe that additional information should be provided to the register unless offered voluntarily by the RNTBC. Updating contact details is a responsibility that should be borne by members and their families.²⁹

4.8 Nature of contact

AIATSIS agrees that individual RNTBCs should determine the contact that they find acceptable to their members and the wider native title group.

4.9-10 Redaction of personal information from public and corporation registers

AIATSIS is concerned about personal information being available on a public register particularly in circumstances where individuals may, for example, be experiencing or at risk of family violence.

AIATSIS agrees that members' details should be redacted from the public register.

Personal privacy issues are of concern and AIATSIS suggests further consultation with RNTBCs regarding keeping personal information on their member registers. One solution may include limiting access to member registers and clear privacy policies.

AIATSIS is concerned that any complicated redaction processes, particularly for those who have personal safety fears from family violence, creates an unnecessary burden for those in an already vulnerable position.

4.11 Membership application timeframe

AIATSIS does not agree that there should be a statutory timeframe to consider membership applications. Membership is a matter for the individual RNTBC and their internal processes and may require extended periods for research and consideration.

4.12-14 Membership applications and disputes

AIATSIS does not agree that membership applications or dispute processes should be legislated. This is an opportunity for RNTBCs to determine their own processes and be supported by a model rule book with replaceable rules (see section 4.55). We repeat our comments from the 2017 submission that,

The NTA and reg 4 of PBC Regulations requires that the members of the native title corporation at the time of registration and at all times after

²⁹ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, pp. pp21-22.

registration must all be members of the determined native title holding group or persons (or class of persons) agreed by the native title holding group. A presumption of eligibility of native title holders to become members is therefore legislatively mandated.³⁰

We repeat our suggestions that providing guidance,

including through the replaceable rules system for RNTBCs that reverses or qualifies the standard presumption of an absolute discretion on the part of directors to accept or reject membership. For example, model rules for RNTBCs could include a rule that directors cannot unreasonably deny membership to a native title holder. It is important to note that this will not resolve disputes about who is a member of the native title group. Further guidance through policy and procedure and informed practice could support directors' decision making in relation to membership. For example, policy guides should set out the kind of information to which a Board may have reference in determining membership, such as connection material, genealogies, expert advice, advice from the NTRB, historical documents, etc. Such guides also assist in improving understanding among RNTBCs about the seriousness of the decisions concerning membership.³¹

4.15-4.17 Membership cancellation

AIATSIS does not agree that membership cancellation or suspension should be legislated. Cancellation or suspension of a native title holder's membership is a matter for the individual RNTBC and their internal processes. This is another example where a RNTBC specific rule book would be of great use to RNTBCs. A RNTBC model rule book should be clear that membership suspension or removal does not affect native title rights and interests.

4.19-20 Subsidiaries and joint ventures

We repeat our previous submission comments.

AIATSIS supports amendments to the CATSI Act that facilitate the incorporation of wholly owned CATSI Corporations as subsidiaries so that several CATSI Corporations and Corporations regulated by ASIC (ASIC Corporations) can incorporate a company to be jointly owned by them such as a joint venture...

30 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 32.

31 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 33.

AIATSIS supports further research as to the adaptation of section 265-35 CATSI (which reflects section 187 Corporations Act 2001 (Cth) and director's obligations with respect to their extension to parent companies). Any further modification so as to appropriately tailor the provisions to the specific socio-cultural requirements and corporate structures of CATSI Corporations will require further analysis and negotiation with CATSI Corporations themselves and more broadly-the native title sector.

In general, the CATSI Act provides an appropriate vehicle for CATSI corporations to engage in economic activity.³²

4.28-34 Size Classification

Please see 7.40

AIATSIS also notes the submission from the CLC regarding the addition of a 'Caretaker Corporation' size for those organisations that have zero income and zero employees. AIATSIS, as in previous submissions, sees benefit in exploring an exempt and/or very small size category to provide a less onerous compliance regime for relevant corporations.³³ Reducing or exempting such corporations from certain administrative compliance will be of cost and resource benefit to the corporation and to ORIC.

4.39 Meeting obligations and uncommon events

AIATSIS agrees with this suggestion to allow extensions to hold AGMs and allow updated notice of meetings due to uncommon events.

4.41 Small corporations and delaying AGMs

As already noted in section 4.28 there is benefit in providing flexibility for very small or no employee no income corporations to reduce their administrative compliance and this may include delaying or not holding AGMs. This may not, however, be appropriate for all small RNTBCs.

We refer to our previous submission and note,

When there has been little or no activity, AIATSIS supports small CATSI Corporations being exempted from the requirement to hold an AGM on the basis that it takes only 10% of the membership to call for a general meeting. The membership can poll for a general meeting to discuss urgent business at hand. Small RNTBCs with limited resources and limited activity

32 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 12.

33 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, pp. 7-9.

can also regularly communicate via social media and other means to communicate with their membership. For small regional and remote CATSI Corporations the meeting and notification requirements can be extremely burdensome. AIATSIS does not necessarily support members of medium and large corporations having the power to pass a resolution not to have an AGM for up to three years.³⁴

4.42 Virtual AGMs using technology platforms

AIATSIS welcomes utilising technology for AGMs.

We believe that further flexibility involving virtual AGMs, communication through social media and other uses of technology can support small and other RNTBCs to fully utilise their AGMs, reduce their costs and comply with administrative responsibilities.

There should be further consultation regarding how this works in practice and it should be up to the individual RNTBC to decide on policies and procedures.

4.45 30-day time extension to lodge report(s) in the case of death, natural disaster and certain cultural activities in community

AIATSIS supports this recommendation and notes that, in some circumstances, the extension should be longer than 30 days.

4.53 We are proposing that all replaceable rules be included in rule books

AIATSIS supports that all replaceable rules be included in rule books whether they have been adopted as they are, or are modified or replaced.

AIATSIS strongly supports consistency in the clear identification of replaceable rules across all documents, fact sheets, model and condensed rulebooks.

Ongoing assistance and training from ORIC to support RNTBCs to create and/or streamline their own rulebooks is essential.

AIATSIS supports an increased number of replaceable rules to allow for matters to be dealt with in individual RNTBCs policies and procedures to facilitate flexibility in modification.

4.55 Simplified rule books

AIATSIS is aware that there are varying opinions amongst RNTBCs as to simplified or condensed rule books and suggests this is an area for further enquiry. As outlined in 7.34

³⁴ Strelein et al., *AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, p. 19.

AIATSIS strongly supports a RNTBC specific model rule book and any potential simplified rule books should be RNTBC specific.

It is essential that any RNTBCs' simplified rule book clearly identify what rules are replaceable rules.

A separate RNTBC chapter within the CATSI Act and a tailored simplified rule book together with a replaceable rules regimes would greatly assist RNTBCs to manage their rights and responsibilities under different legal systems and disciplines.

4.58 We are interested in your views on whether three proxies is too many for one member to hold?

It is AIATSIS view that this is an example of a possible replaceable rule and that the number of proxies is a matter for individual RNTBCs.

5. Officers of Corporations

In our answers to all questions under this section, AIATSIS strongly advocates a first principles approach to non-discrimination. Members, directors and corporations that are regulated by ORIC and the CATSI Act should have no greater scrutiny or burden for reporting and disclosure than those shareholders, directors and corporations established under the Corporations Law. If there are relevant differences that require more supportive mechanisms (for example In relation to greater likelihood of remoteness), or if there are relevant differences arising from the involuntary nature of incorporation for RNTBCs (for example, capacity to meet regularly) then these relevant differences should be taken into account.

5.10 Medium and large CATSI corporations and CEO's and other senior managers' remuneration packages

AIATSIS does not support the disclosure of CEO and other senior managers' remuneration or other benefits in a CATSI corporation's annual report. There is no evidence that this change is of benefit for the advancement of Aboriginal and Torres Strait Islander corporations. RNTBCs could include reporting of remuneration packages into their rule book if they see fit.

5.13 CATSI corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar

As with our previous submission AIATSIS does not support this proposal.³⁵ If RNTBCs believe this data to be of benefit when setting their remuneration bands they may choose to voluntarily share this information with the Registrar.

5.15 Reporting director sitting fees in their annual financial reports that are lodged with the Registrar.

AIATSIS does not support the proposal to legislate that sitting fees are to be included in annual reports and lodged with the Registrar. Again this should be provided on a voluntary basis at the discretion of the RNTBC.

5.19 CEO's and senior executives' names, addresses, contact details and employment history over the last ten years in Annual Reports

It is proposed, that as a minimum requirement, all corporations include the names of key management personnel (CEO, Chief Financial Officer and Chief Operating Officer) and their qualifications in their Annual Reports.

AIATSIS does not agree to legislating the inclusion of key management personnel contact details and employment history in RNTBCs annual reports to the extent that this is inconsistent with the Corporations Law. In addition to adding another layer of administration, there are privacy issues with this proposal. Individuals may choose to provide such information for publication but should not be compelled to do so.

5.24-38 Related Parties

AIATSIS' previous submission noted the misfit of related party provisions with Aboriginal and Torres Strait Islander family and kinship systems.³⁶ AIATSIS is still of the view that further detailed consideration of these provisions is required before any changes are made. Any changes should ensure that at least no additional requirements are placed on CATSI Corporations than other corporate entities, for example in the requirement to demonstrate arms-length transactions.

5.40 We are interested in receiving feedback on whether there should be controls around board membership and composition

AIATSIS is strongly opposed to any controls around board membership and sees it as an intervention preventing Aboriginal and Torres Strait Islander self-governing and self-determination. Board membership is a matter for individual RNTBCs, their members and

³⁵ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 17.

³⁶ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 16.

the wider native title community. Rather providing proper resources to RNTBCs (and native representative bodies and service providers) in the corporation establishment phase will help alleviate governance or representation disputes of the future.

5.42 CATSI Act to allow corporations to appoint independent directors without an explicit rule in their rule book

AIATSIS agrees with this proposal and refers to our previous suggestion that RNTBCs should,

provide further information about the election processes or the terms of office for independent directors. Constitutions should set out what if any voting rights exist for independent directors and rules and or accompanying policies about the eligibility requirements of independent directors should also be provided.³⁷

RNTBCs should not be compelled to appoint independent directors but should be given the flexibility to appoint them if they see fit.

6. Modernising the CATSI Act

6.4 We are suggesting that the Registrar should be able to publish such notices on modern electronic communication platforms

AIATSIS agrees in principle to the Registrar publishing notices on electronic communication platforms but stress that these platforms should be those commonly and routinely used by RNTBCs.

6.5 Electronic communication

AIATSIS supports the Registrar being able to use electronic communication and suggest it will facilitate contact with RNTBCs. However individual RNTBCs should have the choice as to how the Registrar communicates with them.

6.9 Registrar be able to share de-identified data and information with stakeholders such as researchers, academics and peak bodies among others.

To support digital sovereignty AIATSIS is of the view that RNTBCs should have the choice to decide what, if any, information is provided to any other stakeholders.

³⁷ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 14.

6.10 CATSI Act to require the provision of electronic contact details for people and corporations as well as physical address information

AIATSIS does not agree with amending the CATSI Act to compel the provision of electronic contact details for people. RNTBCs, their members and the wider native title holding group should decide what information they wish to provide.

6.11 CATSI Act be amended to enable the Registrar to update the personal details of a director when he or she is aware that they are incorrect or out-of-date

AIATSIS does not agree with amending the CATSI Act to enable the Registrar to update contact details of a director. This is the responsibility of individual RNTBCs.

6.16 Finalisation letters

AIATSIS agrees with these proposals.

7. Registered Native Title Bodies Corporate

7.11 One option is to support greater transparency of trusts by providing for the creation of trusts under the CATSI Act. In turn, the Registrar could hold a Register of Trust Deeds ensuring accessibility and transparency for members and common law holders and could require regular reporting on trust activity.

In principle AIATSIS does not oppose this proposal, noting that a large number of RNTBCs are established and appointed by the Federal Court as trustee RNTBCs under the NTA. Given the complexity of the trust environment in which native title benefits are held and paid AIATSIS is of the opinion that for the purpose of this review there is insufficient information, detail or time to determine if the creation of trusts under the CATSI Act will be of benefit to native title holders and RNTBCs.

7.20 We propose to introduce a requirement that RNTBCs must separately report on monies derived from native title, as well as non-monetary native title benefits held on trust, in addition to their existing reporting requirements.

While AIATSIS appreciates the call for transparency in the reporting of native title monies, in accordance with the principles of non-discrimination, we are hesitant to agree to further reporting requirements for already overburdened and under resourced RNTBCs that are not required by other corporations or trusts. We suggest further consultation with RNTBCs and more details of this suggested reporting requirement is needed.

7.22-25 ORIC and Native title decisions

Amend the PBC Regulations to define decisions about native title benefits as 'native title decisions' which would require RNTBCs to consult and seek the consent of the common law holders before native title benefits could be invested or otherwise applied.

AIATSIS does not agree with amending the *Native Title Prescribed Body Corporate Regulations 1999 (Cth)* regulations. Individual RNTBCs, their members and the native title holders should make decisions about their native title benefits in the way they wish. ORIC can support these decisions through training and resourcing for the development of appropriate RNTBC policies around investment and consultation.

7.26 Given ORIC's corporate regulatory role, are there any issues with extending this to significant aspects of the PBC Regulations such as the making of native title decisions on native title monies and proposed obligations to separately report on native title benefits? Should there be a limit to this regulatory oversight?

AIATSIS is still of the view, as with our previous submission, that the Registrar should not have oversight of the *Native Title Prescribed Body Corporate Regulations 1999 (Cth)*. Under the current arrangements the ORIC is not equipped with the requisite expert knowledge of native title to ensure appropriate stewardship of native title laws.³⁸

7.27-7.32 Dispute resolution and arbitration

In addition to our detailed comments at 3.21, AIATSIS stresses that arbitration or dispute management should be offered as an optional service and that ORIC should not have enforceable powers to arbitrate.

7.34 RNTBC specific model rule book

As with previous submissions, AIATSIS strongly supports the creation of a RNTBC specific model rule book and advocate that this be created in consultation with NTRB/SPs and RNTBCs.

Providing resources and assistance to RNTBCs in their establishment phase is essential and may mitigate problems that may arise when a RNTBC adopts a model (or condensed) rule book without adapting it to their particular community.

The model (or condensed) RNTBC rule book should clearly indicate what rules are replaceable.

³⁸ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 30.

7.39 whether ORIC is the most suitable regulator for native title functions and the need for more calibrated regulatory options before the blunt tool of special administration.

Are there any other regulatory reforms required to ensure transparent and accountable RNTBC decision-making?

AIATSIS is unconvinced that ORIC is the most suitable regulator for a RNTBs native title functions.

Please refer to comments at 9: Special Administration regarding regulatory options before special administration.

RNTBCs make many different types of decisions about their corporate and community functions, including those related to native title. These decisions are varied, complex and depend on the individual groups situation and Indigenous decision making processes. Therefore AIATSIS does not support regulatory reforms on RNTBC decision making.

7.40 Size classification for CATSI corporations

AIATSIS welcomes RNTBC specific reporting thresholds that take into consideration criteria aside from size classification for example, turnover, assets, and number of employees. As previously stated, AIATSIS supports less onerous reporting requirements for smaller RNTBCs particularly in their establishment phase.³⁹

9. Special Administration

9.6 Changing the name of special administration

AIATSIS is of the opinion that simply changing the name of special administration will do little to address the difficulties faced by Aboriginal and Torres Strait Islander peoples, and in particular RNTBCs, in the management of their corporations.

The grounds for the appointment of a special administrator under the CATSI Act are significantly broader than those for receivership or voluntary administration under the *Corporations Act 2001 (Cth)*. In this regard, the CATSI Act is potentially racially discriminatory as it establishes up a different legal regime for Aboriginal and Torres Strait Islander corporations. However AIATSIS, as with previous submissions, acknowledges that,

³⁹ Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 5.

Special administration intervention can be an important regulatory intervention that prevents the seriousness of corporate failure and the resulting losses to the native title group as beneficiaries.⁴⁰

Special administration is a symptom of poorly defined governance structures and processes. AIATSIS continues to assert that ORIC should provide extra assistance to RNTBCs and other CATSI corporations who are experiencing difficulties before the drastic step of special administration. It is particularly important that this assistance continue to be provided in the setting up of RNTBCs and other CATSI corporations. The Registrar could also assist corporations to analyse the source of any problems and then facilitate appropriate action.

AIATSIS is aware that intra group disputes, often apparent during the native title process, can be a common area of difficulty and this can continue to play out in the running of RNTBCs. While disputes are a perfectly normal feature of any group or societies dynamics, the circumstances of progressing a native title claim can produce complex and particular conflicts that will impact on the running of a RNTBC and be a reason for complaints to ORIC.⁴¹ AIATSIS is mindful of the interplay of intra group disputes, complaints to ORIC and the possible result of triggering of special administration.

AIATSIS believes that special administration should be a measure of last resort carried out in genuine consultation with RNTBCs and other CATSI corporations and should not come as a surprise to directors, members or native title holders. Anecdotal evidence shows that where RNTBCs go under special administration, confidence in the corporation and therefore capacity to operate can significantly regress.

The need for special administration should be significantly diminished by providing RNTBCs with,

- appropriate resourcing and support to create constitutions, rulebooks, governing and dispute management policies and processes
- informal, formal or performance management style mentoring
- avenues for culturally appropriate and native title cognisant dispute management.

9.12 Streamlined show cause notice

Before special administration occurs, an RNTBC is provided with a show cause notice and given an opportunity to respond and say why it should not be placed under special administration.

40 Strelein et al., AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, p. 25.

41 See for example *Drury on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69.

AIATSIS agrees that the Registrar should not have to undertake the show cause notice process where all members of the board requested the appointment of a special administrator.

9.14 Special administration and irregularities

The show cause notice specifies the grounds for placing the corporation under special administration.⁴² We note that RNTBCs manage a number of functions which are not always designed to generate a profit.

AIATSIS agrees that changing this ground to instead cover an irregularity in the management of a corporation's financial affairs could be more practical and improve the effectiveness of this provision. However AIATSIS notes that there is no definition of 'irregularity' and suggest further clarification and discussions are required.

AIATSIS is also concerned that an irregularity will automatically trigger special administration and stress that this should be a last resort. Ideally there will be interventions and support offered before special administration.

Further, informal notification of upcoming issues (like the failure to lodge financial reports) can assist in the need for the more severe intervention of special administration.

9.15 Notification of appointment of a special administrator

While AIATSIS welcomes the use of electronic communication RNTBCs should be able to nominate their preferred communication channels. This nomination should then also apply for correspondence including notices of special administration. AIATSIS notes that the ORIC website is not likely to be routinely accessed by RNTBCs.

AIATSIS believes written materials including, fact sheets and guidance, should be provided in languages relevant to the membership of a specific RNTBC.

9.16 Contracts and special administration

AIATSIS agrees with this proposal but note that instructions given by special administrators in the conduct of native title proceedings are considered to be valid.

9.20 Authorised officer and irregularities

See above response to 9:14.

In the past this function had been informally done by some ORIC staff. AIATSIS notes the constructive impact of positive and personal relationship management and encourages this as a step before special administration. In some cases a simple phone call or face to face reminder of a late lodgement, for example, or offer of support is enough to avoid the

42 Policy: PS-20: Special administrations Last updated: 21 February 2017 10.

resource consuming and negative impact of special administration on RNTBCs and the Registrar.

This scope of special administration is significant and, considering the impact on the decision making ability of native title holders, requires an equivalent scale of consideration by the Registrar before placing an RNTBC into special administration.