

15 September 2018

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of
Change*

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CATSI Review
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Proposed CATSI Amendments 2018

Dear Sir or Madam

Thank you for the opportunity to provide comments on the proposed reforms of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).

The National Native Title Council (NNTC), as always, is committed to working closely with the Government to assist in the development of improved policy and legislative reforms that will better support Indigenous controlled organisations and empower their communities. As we have previously submitted, appropriate improvements to the CATSI Act have the potential to provide meaningful rights as a basis for economic and community development for Aboriginal and Torres Strait Islander Peoples.

The NNTC has been an alliance of Native Title Representative Bodies and Native Title Service Providers (NTRBs/SPs) from across the country since 2005, having been formally incorporated in November 2006. In September 2017 the NNTC adjusted its constitution to allow Prescribed Bodies Corporate (PBCs) and Traditional Owner Corporations (TOCs) to become members of the organisation.

The objects of the NNTC are, amongst other things, to provide a national voice for the Indigenous native title sector on matters of national significance affecting the native title rights and interests of Aboriginal and Torres Strait Islander people. Over the next year or so, the NNTC will be working closely with PBCs and TOCs to develop priorities that will better support the Indigenous Native Title Sector.

The following submission provides some brief comments by way of a response to selected aspects of the proposed reforms.

Process

1. Firstly, we want to express our concerns about the time being given to allow for people and organisations to respond to the proposed reforms. We do not believe that there has been sufficient time to consider the reforms. While we understand the reasoning behind the desire to ensure that legislation can be tabled in the next sitting of the Federal Parliament – we think that given the fundamental role that the CATSI Act has for many community organisations – more time should have been provided for talking to the community about the proposals.
2. Secondly, on top of the lack of time, there is also a substantial lack of detail about many of the reforms. We understand there is to be no exposure draft, and the next iteration of the reforms will be a Bill before parliament.
3. We also should point out that Native Title holders have no choice about the corporate entity they must use for native title, as Prescribed Bodies Corporate are required to be CATSI Act Corporations. A similar observation could be made about organisations who are Registered Aboriginal Parties for cultural heritage purposes in Victoria, and entities seeking funding under the Indigenous Advancement Strategy. What this means is that it is important to consider any reforms carefully, and people ought to have had the time and relevant details to understand their impacts – prior to any legislation being introduced.
4. We remain concerned that CATSI retains much of its racially differential and paternalistic underpinnings. For the purposes of the Racial Discrimination Act, our view is that the legislation is required to demonstrate the characteristics of a special measure, and this would include the proposed reforms.

Size Classifications

5. The proposed reforms are to change the reporting requirements test and base the threshold purely on revenue. The three classifications proposed broadly equate to the classification of companies limited by guarantee under the *Corporations Act*. The proposed amendments raise a number of concerns. First, while it has the potential to reduce the reporting requirements for some small corporations it also has the potential to increase the reporting requirements for a number of current mid-size corporations. Second the proposed new reporting requirements are not described with adequate sufficiency. Third, and more fundamentally, the proposed reforms equate all CATSI corporations with companies limited by guarantee under the *Corporations Act*, which is inappropriate.

6. While all CATSI corporations have a member (as opposed to shareholder) structure as do companies limited by guarantee under the Corporations Act, not all CATSI corporations are established for public or community purposes as is usually the case with companies limited by guarantee. Many CATSI corporations are established for private business purposes. These companies equate more closely with Proprietary Limited corporations under the Corporations Act. In respect of a Proprietary Limited corporation the Corporations Act has only two classifications; small (revenue < \$12.5m) and large (revenue > \$12.5m). The proposed amendment would only operate to continue or increase the regulatory burden on CATSI corporations of this nature. In addition, it continues the false perception that CATSI corporations are necessarily “social enterprises” when this is manifestly not the case.

Rule Books

7. Any proposal to increase clarity of rule books and how they relate to the CATSI Act is notionally progressive. However, we believe the current proposal imposes a significant and unnecessary burden on all existing 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 the CATSI Act into their rule books. This obligation would arise whether or not there is any evidence the existing structure has caused any confusion. Any similar proposal with respect to all corporations under the Corporations Act would raise concerns in the broader community. Indigenous Australians are entitled to express the same views. A preferable approach is to make the proposed amendments prospective. This would allow existing CATSI corporations to make the necessary changes at an appropriate time and only if there was a perceived need. For most CATSI Corporations, resources are limited and a requirement to hold a special general meeting can impose a substantial financial and logistical burden – particularly where membership is dispersed.
8. Just as concerning is the proposal to increase the Registrar’s capacity to refuse to register a rule book. We understand the attractiveness of simplicity, but organisations ought to have some control over how they think their rules are best conceived. We would suggest that far more details be provided on how the ‘fit for purpose’ test is to be conceived.

Prohibited Names

9. A view commonly expressed to the NNTC is that the proposal to restrict use of terms such as “Aboriginal Corporation” or “Torres Strait Islander Corporation” to CATSI registered corporations operates as an effective acquisition of cultural identity by the Commonwealth Government and serves only to create another level of coercion to force Indigenous Australians to operate within a fundamentally discriminatory corporate regulatory regime.

Business Structures

10. The NNTC believes there is value in these proposals that are intended to facilitate the creation of subsidiary corporations and joint ventures. However, the NNTC would need to see the detail of the proposed legislation in order to provide an informed response.

Meetings and Reporting

11. The NNTC believes there is value in these proposals that are intended to provide mechanisms to reduce the regulatory and reporting burden on small CATSI corporations. However, the NNTC would need to see the detail of the proposed legislation in order to provide an informed response.

Membership

12. We support any initiative that will contribute to community safety and the protection of people and their private information. We note however that there are no proposals in this reform project to address the specific issues of membership of organisations that are RNTBCs. This is important because the membership of a native title holding group is established by a determination in the Federal Court. There ought to be a simple process of transference of that status into RNTBC membership.
13. In addition, the NNTC would strongly argue that private and personal information of members should not be made publicly available, either on the ORIC website or otherwise. This will not only bring the relevant provisions in line with other legislation but will also alleviate the privacy and safety concerns for members. It would also alleviate the burden on organisations in having the responsibility of alerting ORIC when contact details need to be redacted, particularly for safety reasons. The NNTC believes that whilst ORIC should maintain member registers, the information should not be publicly available.

Transparency of Senior Executives

14. The NNTC acknowledges there is value to the CATSI corporation sector in having comparative information regarding the remuneration of senior executives. However, the NNTC believes that, as with other sectors of the community, the collection of such information should be undertaken on a voluntary basis and publication should occur only in an aggregated form. As such there is no need for legislative amendment to achieve these outcomes.
15. The suggested approach of compelling collection and publication of both remuneration and work history details of all senior executives is a clear example of a double (and racially discriminatory) standard applying to CATSI Corporations. To justify this attempted double standard by reference to the requirements of Australian Stock Exchange listed public companies under Corporations Act serves merely to highlight this duplicity of standards.

Related Third Parties

16. The NNTC submits that a more appropriate mechanism for facilitating legitimate related third-party transactions by CATSI corporations while still ensuring transparency and accountability would be to adopt the approach applying to corporations limited by guarantee under the Corporations Act. This approach permits such transactions in situations where the transaction is arm's length or legitimate remuneration for services provided. Such transactions must be noted in the corporations accounts under existing Accounting Standards. The discussion paper makes no case for departing from this broader community standard in achieving its stated objective.

Special Administrations

17. The NNTC would welcome any move to clarify the Special Administration process under CATSI. Widening the scope of the powers to appoint in some instances could be useful. (Restricting the broad power in some existing circumstances would also be desirable). Similarly, the proposals regarding appointment in circumstances with unanimous board support are valuable.

18. However, we believe that there should be far greater detail provided in relation to the proposal to allow appointment of a special administrator in circumstances where the RNTBC "conducts its affairs contrary to the interests of the common law holders". This is particularly important given the proposed new power is targeted *directly* at RNTBCs. The proposal as it stands would allow intervention in the native title decision making process of an RNTBC where such process is not otherwise contrary to the Act, Regulations (CATSI and PBC) or the PBC Rule Book.

19. Assessment as to the 'interests of the common law holders' is wholly subjective against which a consistent test cannot be designed nor applied. The only objective measure is whether or not the RNTBC conducted its decision making processes is not contrary to the Act, Regulations (CATSI and PBC) and the PBC Rule Book. The NNTC would urge the removal of the proposed amendment.

Voluntary Deregistration

20. The NNTC believes there is value in these proposals that are intended to simplify the mechanisms for voluntary deregistration. However, the NNTC would need to see the detail of the proposed legislation in order to provide an informed response.

Compliance Powers

21. The NNTC believes there is value in these proposals that are intended to allow the imposition of fines and enforceable undertakings rather than compelling court action

in all cases when compliance action is undertaken. However, the NNTC would need to see the detail of the proposed legislation in order to provide an informed response

Conclusion

We do see merit in some of what is proposed. However, there should be sufficient time and details provided for organisations and communities to properly respond. The NNTC seeks further opportunity to comment on the Draft Bill as it is developed, as much of what is proposed is best dealt with once the details are set out. Given the nature of some of the proposals and their direct impact on native title organisations – this is considered by us to be essential.

I trust you find these comments useful and constructive however, if you have any queries or require any further information please do not hesitate to contact me at your convenience.

Yours faithfully

A handwritten signature in black ink, appearing to read 'J. Lowe', is positioned above the printed name.

Mr Jamie Lowe
Chairperson