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*spirit
of
Change*

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Dear Sir / Madam

**Re: NNTC response to the Corporations (Aboriginal and Torres Strait Islander) Act 2006
Draft Review Report**

1. INTRODUCTION

The National Native Title Council (NNTC) welcomes this opportunity to present the views of the native title sector in relation to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* Draft Review Report to the National Indigenous Australians' Agency (NIAA). The NNTC is the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers (NTRB/SPs) recognised under the *Native Title Act (NTA)* (sections 203AD and 203FE) as well as Registered Native Title Bodies Corporate (RNTBCs) established under section 55 of the NTA and other equivalent Traditional Owner Corporations (TOCs) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*. RNTBCs and TOCs are required to be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, (CATSI), with many of the NTRBs also incorporated under this legislation.

The NNTC has a demonstrated record of 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.

Background, process and legislative context

CATSI was introduced by the Howard Government as part of what was described as a 'modernising project' to update the previous legislative regime around Indigenous

corporations, the *Aboriginal Councils and Associations Act 1976*. CATSI repealed and replaced this earlier legislation and commenced in 2006. This is the first time the CATSI Act has been under significant review.

A Technical Review of CATSI was led by the Office of the Registrar of Indigenous Corporations (ORIC) at the request of the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion in 2017. This Technical Review was limited in the scope of matters it considered. The report arising from the Technical Review was never publicly released, however, in August 2018, ORIC released a Discussion Paper canvassing, in general terms, proposals that were said to originate in the outcomes of the Technical Review. The NNTC responded to the 2017 Technical Review and those submissions are [available here](#) on the NNTC's website.

The technical review was too narrow and the NNTC welcomes the opportunity to provide more substantial feedback on the CATSI Act. In 2019, the Minister for Indigenous Australians, the Hon Ken Wyatt, announced a comprehensive review into the CATSI Act. Phase 1 consultation was completed by NIAA at the end of February 2020 and a subsequent draft report was made available on 31 July 2020.

This submission is part of the Phase 2 consultation and a response to the draft review report. The NNTC provides a detailed response to the CATSI Act Draft Review Report below, to those sections of the report that relate most to RNTBCs. The NNTC has not provided a response to sections that do not relate to RNTBCs example: 4.22-23 two-member corporations.

First, the NNTC would like to highlight some concerns with the review and consultation process.

Timeframe of the current review process

The NNTC would like to note the inadequacy of the consultation time provided by NIAA to RNTBCs and other Indigenous corporations as part of this current review. While Phase 1 of the review finished at the end of February 2020, the draft report was not delivered until five months later, with the consultation period to close on 21 September 2020. This means that Indigenous corporations who are legally required to be incorporated under CATSI, only have seven weeks to provide meaningful written feedback to the report. This is not enough time for most RNTBCs to respond.

The time frame also does not provide allowances for those affected by COVID 19, which has reduced the capacity of the NNTC to consult regularly with their members in person.

Not providing NTRB/SPs and RNTBCs sufficient time to respond to the review is a breach of the principles of Free, Prior and Informed Consent (FPIC) as set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Resourcing of the NNTC and RNTBCs

The NNTC and most RNTBCs are not directly resourced to provide input into policy and legislative submissions, which makes it difficult for the NNTC to adequately consult with and engage with the RNTBC sector for reform processes, such as this one, particularly with such a short time frame.

Resourcing an ongoing RNTBC officer in the NNTC would allow for the NNTC to engage a greater number of RNTBCs into their membership and to have a more targeted communications and engagement process for responding to submissions that better represent the voice of RNTBCs.

As included in the NNTC pre-budget submission available [here on the NNTC website](#), the NNTC recommends:

- That each RNTBC be allocated three-year recurrent funding at a level of \$300,000 pa and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Government.

A separate division of CATSI for RNTBCs

Common law holders of native title are forced to incorporate under CATSI to act as an agent or trustee, even though:

- native title is by definition *sui generis* and it is something that is not given or created but rather recognised by the common law and acknowledged in the NTA
- a native title determination is an *in rem* judgment that recognises a body of people have rights and interest that run with the land and waters forever and those rights and interests are good against the whole world

A body corporate is a poor fit to manage such rights and interests and another model, such as a council or authority is a better model to accommodate a Polity that has in rem rights. At the very least, that Polity is deserving of a separate division that regulates the entity charged with the unique duty to manage those rights and interests on its behalf, technically forever.

To ensure that current and all future CATSI Act revisions are best suited to the legal and cultural complexities of RNTBCs while supporting the self-determination of native title groups, the NNTC proposes that the review should include a separate division of CATSI for RNTBCs. RNTBCs are unique from other Indigenous corporations with a particular set of legal obligations under the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) and CATSI. Having one division that captures the additional information relevant to RNTBCs would assist RNTBCs in navigating such legally difficult terrain. A separate division of CATSI for RNTBCs would also streamline regulation

powers specific to RNTBCs and reduce consultation costs for future reform processes targeted for RNTBCs.

In the [2017 CATSI Act technical review](#), the NNTC noted the need for a separate division to bring together all the relevant provisions together in a coherent and consistent manner and questions why this has not been at least proposed for discussion in the current review.

As noted by the [Phase 1 submission from The Australian Institute of Aboriginal and Torres Strait Islander Studies \(AIATSIS\)](#), a ‘separate division is not a new concept and 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.’ Under this legislation Indigenous organisations could choose to register as a corporation or as an Aboriginal Council with more of a service delivery role. Indeed, as noted above, a council or statutory authority structure may be a more appropriate model to ensure native title holder participation and representation and this in turn could support the development of regional governance models and the building of a regional economies in years to come. Having a separate division of the CATSI Act for RNTBCs would provide a more appropriate pathway for RNTBCs that might want to transition one of these governance models in the future.

2. OBJECTS OF THE CATSI ACT

Special measures and incorporation of the CATSI Act

As detailed in the introduction of the NNTC 2017 submission, the imposition of a racially differentiated regime of compulsory incorporation aimed explicitly at Indigenous peoples, can only be exempted from the *International Convention for the Elimination of All Forms of Racial Discrimination* (and therefore the *Racial Discrimination Act 1975* Cth (the RDA)) if they are characterised as a special measure under the convention, which must facilitate the advancement of the relevant disadvantaged group. Therefore, it is imperative that this review process seeks the best ways forward to do this by considering what significant change to CATSI will most benefit Indigenous corporations at this time.

As outlined in the previous 2017 NNTC submission, there needs to be a comprehensive analysis of where the provisions of CATSI impose obligations that are divergent from those contained in the *Corporations Act 2001* (Cth) (the CA). Firstly, each such divergence then needs to be justified as a ‘special measure’ in accordance with the criteria described below. Secondly, the appropriateness of the fundamental equation between a CATSI corporation and a company limited by guarantee under the CA, particularly in the context of a rapidly expanding Indigenous private sector, needs to be assessed. Thirdly, areas where legitimate additional special measures are desirable should be considered.

The NIAA CATSI Act draft review report notes the justification for having the special measures of the CATSI Act, rather than just the CA, to better address social and economic disadvantage of First Nations.

Protection for members

The NNTC supports those measures in the CATSI Act aimed at protecting the rights of members including the current powers of the Registrar, but emphasises that any additional proposed powers of the Registrar should not be based on the power to intervene, but rather be made available to corporations when requested. There needs to be further consideration about who can request the intervention of additional powers, such as the board, majority of the board, or members.

De-criminalisation of the CATSI Act

While the NNTC supports the use of civil and criminal penalties in the CATSI Act where necessary to protect the good governance of Indigenous corporations, it does not support the heavy handed use of criminal provisions throughout the CATSI Act and calls for a process of the de-criminalisation of the CATSI Act where possible.

As noted in the current CATSI submission by the Central Land Council (CLC) that calls for a process of de-criminalisation, the CATSI Act creates at least 166 criminal offences that can be committed by corporations or their officers. These are often trivial compliance matters, which can include large fines for corporations that are already poorly resourced with little or no income or employees. Most RNTBCs are not in the same position of larger well-resourced corporations and under the special measures provision of CATSI, this needs to be recognised in de-criminalisation. The threat of criminal liability on RNTBCs is an injustice to Aboriginal and Torres Strait Islander peoples and needs to be reconsidered in the aims of the reducing the incarceration rate for Aboriginal and Torres Strait Islander peoples.

Support for Corporations

The NNTC supports online mechanisms in CATSI to provide corporations with improved efficiencies, particularly those in remote Australia with high meeting costs and encourages ORIC to explore these options with Indigenous corporations. Areas that may be improved with online options, including increased use of social media, include:

- Online communications, such as social media for meeting notices and reporting
- Virtual meetings
- Online voting systems for in and out of session decision-making
- Online reporting forms via the ORIC website

- Capacity development opportunities, such as virtual training sessions

However, these mechanisms require corporations to be adequately resourced to ensure they have access to the necessary technology and have the capacity to use it effectively.

Further ideas

2.41 Whether the CATSI Act is meeting the needs and expectations of Aboriginal and Torres Strait Islander people;

The NNTC questions whether the CATSI Act meets the needs of RNTBCs, which are more legally and culturally complex than most other Indigenous corporations due to the statutory obligations that RNTBCs have under the NTA.

As already noted, the NNTC proposes the development of a separate division of CATSI for RNTBCs as a mechanism to ensure that the additional special needs of RNTBCs are met and can be evaluated and reviewed efficiently. The NNTC suggests that NIAA should employ an independent and qualified review committee to conduct an evidence-based evaluation of whether the CATSI Act is meeting the needs of RNTBCs. This process would employ evaluative research methods and engage with RNTBCs over a sufficient consultation period that adheres to the principles of FPIC.

As mentioned in the introduction to this submission, there needs to be consideration whether corporate structures in general are an appropriate fit for native title communities, including what a transition process might entail for established corporations looking to move into a new structure.

whether the CATSI Act is putting CATSI corporations on an even playing field with companies incorporated under the Corporations Act;

The NNTC would require further time to complete a thorough analysis of the CATSI Act and CA.

whether changes can be made to the regulatory and enforcement powers of the Registrar with particular consideration to the traditions and circumstances of Aboriginal and Torres Strait Islander people;

It is unclear what is being proposed by this general statement and it raises questions from the NNTC, such as:

- What would this look like and how would it work in practice?
- Would this be an optional choice for RNTBCs?
- Does this refer to general changes or specific to each group and their local cultural practices?

In general, the NNTC supports changes that provide all RNTBCs with flexibility to adapt their RNTBC governance practices to environmental, climate, cultural and other issues but requires further detail to provide a specific response.

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

There needs to be substantial research into whether the current corporate structure designated to Indigenous Corporations by incorporation under the CATSI Act is the best option for RNTBCs. The NNTC is currently exploring potential future corporate, regional and other models for RNTBCs in their RNTBC policy reform and nation building work. A separate division of CATSI for RNTBCs, such as the ACA Act mentioned in the introduction, could have additional options for the incorporation of RNTBCs, such as a statutory body or authority or a local council model.

how can the Registrar and ORIC better support corporations to pursue economic and community development opportunities?

For the current CATSI review, the NNTC in conjunction with the Minerals Council of Australia and an independent panel of experts have developed a proposal to improve the management of economic opportunities for RNTBCs – the Prescribed Bodies Corporate (PBC) – Economic Vehicle Status (PBC-EVS). The reasoning for and outline of the model is explained later in the submission and a model for inclusion in CATSI is included as **Appendix 1**.

In addition to this review the NNTC believes there needs to be substantial work on improving economic development opportunities for RNTBCs, particularly smaller RNTBCs and those without access to their land or without Indigenous Land Use Agreements (ILUAs). The NNTC has started to identify ideas for economic development required through responses to the 2019 PBC Survey and their nation building research.¹

2.45 Capacity building

In addition to the model rule book addressed below, ORIC could provide resources to support RNTBCs to build capacity and capability in the following areas:

- Distinction between CATSI compliance and native title functions
- Replaceable rules
- Succession planning and materials for new Directors

¹ The PBC survey is a collaboration between the NNTC, AIATSIS and CSIRO, and includes questions on the kinds of the work being conducted by PBCs, the relationships they have in the sector and the opportunities they are seeking in the next year. The survey report is expected to be available in October 2020.

- Dispute management resources that supports RNTBCs to operate regardless of disputes
- More RNTBC specific training
- Updated online factsheets
- Q&A de-identified FAQs received from corporations are answered for the benefit of other corporations in the future.

3. POWERS AND FUNCTIONS OF THE REGISTRAR

Currently no one has oversight and regulatory power of the tension between maintaining the corporate structure of the RNTBC and compliance to CATSI while ensuring the obligations to the common law holders are met. As we note later in this submission, it may be preferable to address this lack of oversight by building the capacity, capability and resources of RNTBCs, and by providing NTRB/SPs with greater resources to assist and support RNTBCs. Furthermore, if oversight were to be provided, members of the NNTC have differing views on whether this should be by the Registrar, the National Native Title Tribunal (NNTT) or another body, such as the Auditor General.

Broader suite of regulatory powers

3.7 It is proposed to expand the powers of the Registrar to include a suite of lower level discretionary powers, modelled on those of ASIC, including the power to issue fines.

The NNTC requires further information about what the suite of lower level discretionary powers would include to provide informed comment on this proposal. However, the NNTC would be concerned about the imposition of fines for trivial breaches of administrative compliance, particularly where this involves small corporations with no employees or resources. Nonetheless, the NNTC does support and emphasise the need for capacity and capability development in circumstances of non-compliance.

3.21 The Registrar's role in dispute resolution

See section 7.27-7.32 Dispute resolution

4. GOVERNANCE

Contact details

The NNTC supports the proposal for the voluntary use of alternative contact details to make it easier for corporations to contact members and ensure that members are kept informed of the corporation's operations, as long as contact details are stored internally and not publicly available.

Throughout the sections of the report concerning membership details, personal information and contact details, there needs to be a distinction between the members register, which according to ss180.1-180.45 of the CATSI Act must include personal information and can be requested by any persons at all and internal membership/contact lists maintained by the staff or Directors of a corporation and not publicly available.

A member's register should not contain personal information of members as it is accessible by the public and a personal safety issue as detailed below. An internal membership or contacts list may contain personal information to be able to contact members and should remain confidential to the corporation's staff and Directors only.

If members need to contact each other, they can do through social media or other online options, such as email, requested from the corporation's contact list.

4.8 Contacting members through alternative forms of communication, such as social media and community noticeboards

It is important for corporations to be able to use a variety of online and physical communication methods to best suit their members. Each corporation will most likely need to engage with a variety of methods to suit the varying demographics of their members. This is particularly so for RNTBCs who have a very diverse member base. For example, younger members of RNTBCs may prefer social media whereas elder members of RNTBCs may prefer physical notifications, such as post or community notice boards.

A streamlined and simple way to enact a more varied suite of communication methods would be a resolution at a general meeting and amending the Rule Book.

4.10 Redaction of member details

The NNTC understands that corporations need to keep contact details, including personal information of members, but the personal safety and rights of members need to be paramount in considering any amendments in this area.

A member should have the right to redact their information from a register by submitting a request to the corporation directly. The personal information of members should be confidential to the corporation only and not be shared with ORIC, apart from on request for particular and unusual circumstances, such as a corporation being placed under special administration. As stated in the NNTC 2017 submission, personal information should never be made publicly available. Details that are publicly available should be able to be redacted to the minimum required information with the more detailed information kept private to the public. A similar requirement does not exist in relation to the CA and is unjustified by any discernible beneficial purpose. This is a matter of personal safety (domestic and lateral violence) therefore privacy issues should be mandated for all corporations, not left to individual choice.

A corporation may contact a member and suggest removing their personal information for a particular circumstance, such as personal safety, but it is the right of the member to make this choice. It may be appropriate for a corporation to temporarily redact contact details until the member can be contacted.

It needs to be noted here there is a significant administrative burden with the proposal of the redaction process in this report. A more straightforward way would be for all corporate registers to include no personal information other names and for all personal details to be stored within internal contact lists.

Membership approval

4.11 The NNTC does not support introducing a statutory timeframe for members to consider membership applications as it may overburden some corporations with such a regulatory mechanism.

Boards require time and resources to consider membership applications and this needs to be supported. For example, there are situations where the Board does not know the status of the membership application and needs to check this with the NTRB/SP. However, before releasing those details to the Board, the NTRB/SP must obtain consent from the individual whose information is being provided. These processes take time and if compliance restrictions are imposed additional resources need to be provided to the sector to ensure the timeframe can be met.

4.12-13 Board decision-making powers regarding accepting, challenging or rejecting memberships

The NNTC supports having eligibility, acceptance and rejection processes included in a rule book as agreed and determined by the group.

Membership cancellation

The NNTC does not support reducing the timeframe for contacting members to cancel memberships from two years to a shorter period. The type and frequency of the communication attempts is a matter for each corporation to determine and can be included in their rule book.

There are additional issues with using inability to make contact as grounds to cancel membership. A RNTBC sends correspondence to members that often does not require a response – they may not know whether they are currently in active contact with a member or not.

4.20-21 Corporate structures: subsidiaries and joint ventures

The NNTC supports the proposal to make it easier for CATSI corporations to establish subsidiaries and joint ventures as it would assist with growing Aboriginal and Torres Strait

Islander businesses and ensure that corporate structures are fit-for-purpose. However, the NNTC requires more detail on what this might look like before providing a definitive response.

Size classifications

In response to p.4.33-34:

A number of NNTC members support simplifying the size classification for corporations. While some would be prepared to consider an approach that classifies corporations based on revenue thresholds comparable to those adopted by the Australian Charities and Not-for-Profits Commission (ACNC), others consider that a departure from the size classifications available under the CA requires further consideration and justification and needs to carefully take account of the diversity of CATSI corporations including RNTBCs.

The NNTC notes that it would also be useful to consider a fourth corporation size as outlined in the CLC CATSI submission. This would be for a 'caretaker corporation' that would apply to corporations with both zero income and zero employees to reduce the burden on so called 'dormant' corporations. The caretaker classification would be a voluntary application that includes the following:

- Only obliged to hold an AGM if:
 - It has not yet held a general meeting
 - More than half of the directors have passed away or otherwise become ineligible to be directors
 - There has been a material change in the corporation's circumstances
 - There are member requests that an AGM be held in that year.
- not be required to prepare or lodge reports in any year where an AGM is not required to be held
- majority of directors would need to sign a declaration every three years that none of the above circumstances applied to the corporation in the preceding three years.

Meetings

P4.41 Recommendation that that small corporations be allowed to pass a special resolution to not hold their AGM for up to three years after their most recent AGM; provided that directors do not vote on that resolution unless all members are also directors, and the corporation advises the Registrar if there is any material change in its circumstances and 4.42 the use of virtual platforms for AGMs.

The NNTC does not support the recommendation that small corporations can pass a resolution to postpone their AGM up to three years. The current section (201-155), which allows corporations to lodge an application with the Registrar to extend the period within which section 201-150 requires the corporation to hold an AGM is sufficient and a clearer pathway for extending meetings; however, some members of the NNTC have commented that a three year extension is a suitable timeframe.

Virtual meetings, online voting and record keeping and use of social media for communications are options that should always be available for corporations, exceeding the life of COVID 19. They are options that may provide corporations with:

- Improved economic and administrative efficiencies
- Allow for non-mobile or members who live further away to be involved in the corporation
- Assist with avoiding disputes and reducing lateral violence in meeting contexts

4.39 and 4.43 General meetings

A subdivision under Division 201 of the CATSI Act to provide for cancellation or postponement of meetings would be useful to accommodate cultural matters, such as sorry business. The wording should allow for localized flexibility but if a timeframe is to be included then it needs to be for 60 days or longer, as the proposed 30-day extension would be insufficient in many circumstances.

ORIC could provide a factsheet or supporting documentation that provides guidance on what a reasonable unexpected event may include.

4.44 Audit committees

ASIC only requires certain listed entities to have an audit committee however, other companies **may choose** to have an audit committee.² Additionally, the ACNC does not have a requirement for an audit committee, just an audited financial report for large charities.

The NNTC proposes that audit committees should not be mandated through legislation but form part of ORIC's capacity building resources with information provided to RNTBCs and other corporations about the operations and advantages of an audit committee should they choose to establish one.

² For further information, see on audit committees: <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/auditors/audit-quality-the-role-of-directors-and-audit-committees/#roles>

4.45-48 Reporting

The NNTC believes there is value in proposals that provide mechanisms to reduce the regulatory and reporting burden on (particularly) small CATSI corporations. The NNTC suggests making reduced reporting an option for all small RNTBCs, while increasing education resources available from ORIC for when small RNTBCs transition to medium or large RNTBCs with additional reporting requirements.

Ps4.49-55 Rule books

The NNTC proposes that amendments to rule books need to provide the most flexibility for individual corporations. For example, some RNTBCs prefer a higher level of detail in their rule books, such as the PBC regulations, whereas other RNTBCs prefer a simpler rule book with more detail provided in their accompanying policies and processes. It is the right of the RNTBC to make this choice.

Simplification or streamlining of rule books is best suited for capacity development by ORIC, not in legislation. The NNTC agrees that an example model rule book be made available on ORIC's website and that ORIC should continue to provide training and assistance for RNTBCs in developing their own rule books.

5. OFFICERS OF CORPORATIONS

5.10 Should the details and amounts of CEOs' and other senior managers' remuneration packages, including any other material benefits, be reported in corporations' Annual Reports?

While the NNTC supports increased accountability and transparency it does not support CATSI corporations making remuneration information of senior executives public in Annual Reports, unless this information is provided on a voluntary basis. Disclosures of this nature should normally be a matter between a corporation and its members, rather than for the general public.

The NNTC notes that to require such public disclosure would be a discriminatory double standard. Section 300A of the CA only requires listed companies trading on the stock exchange to provide this kind of information, such as the nature and amount of remuneration. Also, it is not appropriate for RNTBCs to have additional reporting requirements, considering most RNTBCs are small with little or no income.

P5.11 Members should also have visibility over the remuneration paid to key personnel of related entities. Such information could be reported in corporations' Annual Reports and may include the corporate structure including the details of any subsidiaries, key personnel within the extended structure and their remuneration.

Again, the review needs to consider the distinction between the right of members and the right of the public.

They may want to consider whether large corporations are required to provide remuneration bands to their members; however, this does not include for it to be published in publicly available reporting.

If there is an issue with Director and member communication this needs to be addressed by capacity development and supportive measures, such as member engagement plans and family workshops.

P5.13 To assist boards with setting remuneration, we are proposing that CATSI corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar, so that the Registrar can publish de-identified information by salary bands. This annual sectoral analysis will help corporations to benchmark their remuneration packages against current practice in the sector.

As stated in our previous submission: 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, for example by an anonymous voluntary survey. As such there is no need for legislative amendment to achieve these outcomes.

Director remuneration

As stated above regarding executive remuneration, Director remuneration should be provided on a voluntary basis only and in line with the CA, excluding listed companies.

P5.16 There is currently no requirement for member approval of remuneration for directors as employees. We are keen to hear whether you think there should be, and if there are conditions that should be met in setting such remuneration?

See response to 5.10.

If members wish to know and approve director remuneration, they can add a clause to their rule book that includes member approval for remuneration (s252-1(2)).

Executive performance

5.21 We would like to hear your views on:

Whether medium and large corporations have the capacity to publish CEO and other senior executives' work history in Annual Reports?

As stated above, the NNTC does not support the publication of any personal information, including work histories, unless it is voluntarily provided by the individual in question.

A strong recruitment process will provide the Board with the information they need to make decisions on the employment of a potential CEO and this process should include an extensive work history provided by the candidate. The Board can refuse to process the application if this information is not provided.

ORIC can support the autonomy and decision-making powers of Boards by providing capacity building information and training on recruitment processes.

How to handle the situation where there are multiple CEOs throughout the year?

Multiple CEOs throughout the year signifies other more fundamental problems that need to be addressed and overcome by the corporation. It is not clear from the draft report what those problems might be, for example, inadequate recruitment processes or communication issues between Directors and members. More information is required to be able to respond adequately to this question.

How can the work history be confirmed before publishing?

The work history should not be published unless voluntarily provided.

5.22-23 While section 694-85 of the CATSI Act gives the meaning of the CEO function, it has been suggested that this provision could be clarified by specifying that a CEO does not have to be an employee of the corporation, but is anyone who undertakes a CEO function, which may include a contractor. This should deter attempts to try to circumvent the measures in this chapter by putting in place alternative arrangements, such as contracts or consultancies. We would be interested in your views on how effective such a measure would be.

This requires clarification on what the suggested measure is trying to achieve and what the scope of 'key management personnel' is in this paragraph of the report.

5.24-38 Related party provisions

The NNTC generally supports the adoption of an at arm's length approach to third-party transactions by RNTBCs, which already applies to corporations limited by guarantee under the CA. This approach permits such transactions in situations where the transaction is at arm's length or is legitimate remuneration for services provided. Such transactions must be noted in the corporation's accounts under existing Accounting Standards and would be reported to RNTBC members in their annual reports.

However, the arm's length approach may not be suitable for small or remote communities where Directors may also be involved in local Indigenous businesses that the RNTBC would prefer to use over non-Indigenous or non-local businesses. Approval for entering into a commercial agreement with a local Indigenous business that may be involved in the RNTBC, for example a Director who also owns or manages a local

business, is not practical or timely because they would need to be approved at a general meeting first. In this case, an exemption from the Registrar would be a suitable approach to ensure that local Indigenous businesses are not discriminated against by CATSI.

The exemption process needs to be straight forward and efficient and should be subject to defined value limits, and in these circumstances would not require approval from members at a general meeting.

If these related party exceptions were introduced, it would be important for a corporation to maintain a register of related party transactions and report these in its Annual Report.

5.39-5.47 Appointment of directors and other director requirements

At the time of writing, NNTC members have not provided specific feedback on these paragraphs of the draft review report with exception to the following:

5.41-5.44 Board composition and independent Directors

The NNTC does not support any suggestions in the report that there should be further controls on board membership, composition or mandating independent Directors for any corporations, including large ones. The suggestions made at 5.41 and 5.44 do not adhere with principles of self-determination and rights of Indigenous peoples under UNDRIP. Indigenous corporations should retain the right to determine the composition of their board.

6. MODERNISING THE CATSI ACT

6.4-6.5 Providing notices

The NNTC supports the Registrar being able to publish notices on electronic communications platforms including the ORIC website, rather than in the Government Gazette. It also supports the Registrar being able to use electronic means such as email when required to notify people or corporations directly. We would expect that these measures would assist corporations and their members by making the Registrar's communications and notifications more readily accessible.

6.7-6.9 Sharing data for research purposes

The NNTC has reservations whether corporations and their members would support a proposal that 'protected information' collected by the Registrar may be shared more broadly in de-identified form with researchers, academics and peak bodies. The NNTC considers that corporations should be consulted about this proposal in more detail before any changes are considered.

6.10 Contact information

The NNTC notes that any amendments to the CATSI Act to require the provision of electronic contact details such as email addresses and telephone numbers of corporations and individuals would need to ensure that the privacy of the personal information of individual members is protected and kept confidential.

6.12-6.13 Consistent approach – false and/or misleading information

The NNTC would require more information about the meaning of ‘reasonable steps’ before it would be able to comment on the proposal in paragraph 6.12.

The NNTC agrees that it may be appropriate to align the penalties for the offences specified in sections 561-1(4) and 561-5(2) as proposed in paragraph 6.13.

6.14 Whistleblower protection

The NNTC would support whistleblower provisions being expanded in line with those introduced in the CA in 2019 to deter corporate and financial misconduct and wrongdoing. Any amendments should include an appropriate exemption that is comparable to the exemption provided under the CA for companies limited by guarantee that are operated on a not-for-profit basis and have a consolidated revenue of less than \$1 million.

6.15-6.17 ORIC examinations

The NNTC would support amending the CATSI Act to require the issuing of finalisation letters and compliance outcome letters to clarify current and proposed practice by ORIC and the Registrar in relation to examination outcomes under the Act.

6.19-6.20 Auditor provisions

The NNTC supports amending the CATSI Regulations to outline a suitable process for corporations to follow when they need to replace an auditor who has resigned.

The NNTC would also support an appropriate amendment to the CATSI Act to provide auditors with qualified privilege in relation to specific actions they may undertake in the course of their duties.

6.21 Payment controls

The NNTC supports expanding the definition of negotiable instrument to include payments such as electronic funds transfers, so as to reflect the current day reality of corporate financial transactions.

7. REGISTERED NATIVE TITLE BODIES CORPORATE

The draft review report acknowledges that RNTBCs are a special form of CATSI corporation with unique statutory functions and obligations under the *Native Title Act*. Unlike other corporations, RNTBCs are not only accountable to their members, but also to the common law holders of native title determined by the Federal Court. One of the unique features of a RNTBC is that it is required to consult with and obtain the consent of common law holders about 'native title decisions.'

Unlike other corporations, the membership of an RNTBC is defined by the native title determination made by the Federal Court. Some of the other unique features of an RNTBC are addressed in different parts of the CATSI Act by reference to its native title legislation obligations. In specific circumstances these native title legislation obligations prevail over other corporate governance provisions in the CATSI Act.

As noted towards the beginning of this submission, the NNTC and its members are firmly of the view that this review should consider the option of creating a separate division within the CATSI Act for RNTBCs. This would enable all existing provisions relevant to RNTBCs to be brought together in one place in a coherent manner. It would also enable any new provisions that may be required for the more effective governance of RNTBCs and the management of native title monies to be included in the same chapter.

7.7-7.11 Transparency around native title monies

The NNTC would echo the feedback received in the online survey about the importance of improving transparency and accountability for common law holders around the management of native title monies.

It is difficult to provide meaningful comments on the proposal in the draft review report about creating trusts and a register of trust deeds under the CATSI Act without knowing if this would be voluntary or mandatory, and without details about how it would be implemented in legal and practical terms.

Earlier in this submission and in the section on benefits management structures below, the NNTC proposes the option of developing a PBC Economic Vehicle Status for RNTBCs. The objectives of this proposal include improving transparency and accountability for common law holders as well as supporting the more effective use of native title monies for their economic and social development needs.

7.12-7.14 Benefit management structures

The draft report notes that considerable attention has been paid in recent years as to whether there is a need for a specific corporate structure or entity for common law holders to support economic development by RNTBCs.

Several models have been proposed to provide greater transparency and accountability to common law holders about the use of native title monies with additional objectives of reducing the costs of benefits management and simplifying regulatory arrangements.

The NNTC and its members consider that notwithstanding developments introduced by the *Charities Act* and amendments to the *Income Tax Assessment Act* there continues to be a need to provide a better and less complex option for the management of native title monies. The importance of having such an option available will be greater than ever once common law holders and RNTBCs are able to secure native title compensation monies as a result of the High Court's decision in the Griffiths/Timber Creek Compensation case.

For this reason the NNTC has continued to work with the Minerals Council of Australia and independent experts to develop a Prescribed Bodies Corporate Economic Vehicle Status (PBC EVS) model. It is designed as an option that would be available to RNTBCs to enable them to more directly and effectively utilise their native title monies to support economic development for their communities, rather than being limited to having most of their monies in charitable trusts and other entities. Funds in legacy trusts could also be transferred to RNTBCs that satisfy the PBC EVS requirements.

Details of the PBC EVS model are set out in **Appendix 1** to this submission.

7.15-7.21 Recording, reporting and decision-making

The NNTC supports greater transparency and accountability to common law holders regarding the management of native title benefits and has proposed the PBC EVS model as an option that could facilitate this.

The draft report proposes several other measures that would require greater recording and reporting of native title monies to common law holders. Whether these measures are the most appropriate to achieve greater transparency and accountability requires more detailed information and greater consultation and discussion.

The NNTC notes that greater and more detailed regulation will not necessarily achieve transparency and accountability. Increased regulation needs to be assessed against several criteria including how resource and cost intensive it will be, and the extent to which it will achieve the desired outcomes. It is critical that an appropriate balance is reached between prescriptive regulation and the right of common law holders and RNTBCs to self-determine how they wish to manage their native title benefits.

7.22 Define decisions about native title benefits as 'native title decisions'

The NNTC is open to considering whether decisions about native title benefits should come within the definition of a 'native title decision' so as to provide greater clarity about how these benefits should be dealt with.

Whether amendments to the PBC Regulations are necessary requires further consideration, particularly when one considers that the existing PBC Regulations require an RNTBC to invest or otherwise apply money held in trust as directed by the common law holders of native title.

Furthermore, it is important to remember that the consultation requirements of the PBC Regulations are often resource intensive, and it would be beyond the capacity of many RNTBCs to undertake frequent meetings to make decisions about how native title benefits are to be managed.

The NNTC notes that for many RNTBCs, decisions about high level benefit management arrangements are currently made at the same time as the relevant native title decision. Native title holders may also provide standing instructions about how benefits are to be managed at the time they make a native title decision.

In view of the above it is important to consider what is likely to be the most appropriate way of ensuring that common law holders have real decision-making power about the use of native title benefits.

7.23 Regulatory oversight of compliance with PBC Regulations

The draft review report notes that there is no regulatory oversight of RNTBC compliance with the PBC Regulations. Compliance with the PBC Regulations is generally the responsibility of each individual RNTBC, and in order to achieve this they are often advised and assisted by their regional NTRB/SP.

In circumstances where RNTBCs are not able to access the advice and assistance they require it may be appropriate to have an independent regulator that could provide advice and oversight. However, the NNTC is not aware of data that demonstrates conclusively that non-compliance with the requirements of the PBC Regulations is a significant issue that requires regulatory oversight.

Indeed, compliance with the PBC Regulations may be achieved most effectively through continuing to build the capacity, capability and resources of RNTBCs while also resourcing NTRB/SPs to provide a greater level of assistance and support.

In circumstances where it can be demonstrated that it would be necessary and appropriate to have an independent regulator to oversee compliance with the PBC Regulations, the NNTC notes that it is not apparent that any existing agency would necessarily have the resources or expertise to successfully undertake this role and there are a range of views about this among the NNTC's NTRB/SP and RNTBC members.

The possibility of ORIC assuming this role is one option that some of the NNTC's members think could be considered, particularly in view of ORIC's capacity to provide advice and

training as well as regulatory oversight. Other members consider that the NNTT may be better positioned to undertake this role because of its native title expertise.

Other NNTC members have reservations about either ORIC or the NNTT successfully undertaking this role and reiterate the importance of building RNTBC capacity to ensure compliance.

7.27-7.32 Dispute resolution

Dispute management

In the NNTC's experience it is important not only to have an appropriate dispute resolution process, but also an effective dispute management process. Not all disputes are capable of resolution within particular timeframes, and it is important to have a dispute management process and overall regulatory approach that ensures that an RNTBC can continue to operate and carry out its functions regardless of disputes.

As noted in its 2017 CATSI submission, the NNTC has previously proposed a dispute management process that involves a suite of options that could be available to RNTBCs. The NNTC recommends that these options and those proposed in the draft review report are given further consideration and that variations of these as well as other options should be considered. For example, the NNTC is aware of successful dispute resolution and dispute management processes that utilise the skills of independent Aboriginal and Torres Strait Islander alternative dispute resolution experts. An example of this is the Right People for Country program in Victoria that is resourced by the Victorian Government and supports and promotes agreement making between and within Traditional Owner groups.

Arbitration

The NNTC notes the proposal in the draft review report for the introduction of an arbitration mechanism to resolve disputes. While the NNTC would acknowledge that arbitration may be particularly effective when parties are concerned to resolve a one-off transactional matter, the NNTC is not as certain that arbitration is as appropriate or effective when dealing with matters of identity, and family history and relationships that may have to be resolved or managed by an RNTBC. Indeed, recognising the inherent right of native title holders to make their own decisions about native title matters suggests that continuing to build the capacity of RNTBCs and providing them with an appropriate level of resources might be the most effective way to prevent, manage and resolve post-determination disputes.

Nonetheless, the NNTC recognises there may be situations where recourse to an arbitration mechanism would be a more appropriate option than leaving the parties to have their dispute resolved through court proceedings.

From the NNTC's perspective, arbitration in the RNTBC context should be voluntary and only entered into with the free, prior and informed consent of all the parties involved. It would also need to be conducted in a manner that is culturally appropriate and ensures the safety of the parties.

NNTC members have different views on an arbitration mechanism and it is a proposal that needs to be explored and discussed in greater detail. Some NNTC members would see merit in the NNTT utilising its native title expertise in an arbitral role, particularly if it were to perform this function in concert with the RNTBC and the relevant elders to ensure that any determination has cultural legitimacy and authority.

Some NNTC members have indicated that if there were to be an arbitral mechanism they would prefer that ORIC exercised this function, while others consider that it may be appropriate for another body to be constituted to perform this function.

The NNTC notes that in circumstances where the parties consider that a determination by a court is the only appropriate way to resolve a dispute, there may be merit in exploring the development of a streamlined process for the Federal Court to hear matters that concern RNTBCs, where other dispute resolution and management processes have not been successful.

7.33-7.35 RNTBC model rule book

NNTC members have generally been supportive of the proposal that an RNTBC specific model rule book could be developed that would offer sample rules to assist groups develop their own rules, promote good practices, and enable a 'default' set of rules for new RNTBCs.

The NNTC recommends that this model rule book should be developed in consultation with Native Title Representative Bodies and Service Providers and RNTBCs, and that it should be reviewed periodically so that it can be continuously improved and simplified wherever possible.

9. SPECIAL ADMINISTRATION, INSOLVENCY AND WINDING UP

9.4-9.7 Title of special administration

The NNTC considers that there would be benefit in changing the name of 'special administration', because as the draft review report explains, its purpose is very different to the purpose of 'administration' under the Corporations Act.

Organisations and individuals dealing with a CATSI corporation have misunderstood the implications of special administration in the past. As the draft report notes, this has resulted in funding bodies indicating that they may rescind funding agreements with these corporations as they interpret 'special administration' as having the same meaning

as 'administration' under the Corporations Act, and consider this entitles them to rescind funding under the terms of their funding agreement.

Provisions in other legislation that refer to the consequences that flow from 'administration' may also be interpreted as covering 'special administration' with serious consequences for corporations, particularly RNTBCs.

The NNTC is aware that the Aboriginal Heritage Act in Victoria has been interpreted in this way. On at least one occasion this resulted in the very serious consequence of the registration of an RNTBC in its capacity as a Registered Aboriginal Party (formally responsible for cultural heritage management over its determination area) being automatically revoked when a special administrator was appointed - as administration under this legislation was interpreted as including special administration under the CATSI Act. This had major funding implications for the corporation while also seriously undermining its capacity to exercise its statutory cultural heritage and native title functions.

9.7-9.12 'Show cause' process

NNTC members have confirmed that they consider the 'show cause' requirement for the Registrar should be removed if all the directors of a corporation request the appointment of a special administrator.

Some members also consider that the 'show cause' requirement could be removed if a majority of directors request the appointment of a special administrator, as in some circumstances it will not be possible to obtain the agreement of all directors even where special administration would be in the best interests of the corporation, the members, and in the case of an RNTBC, the common law holders.

9.13-9.15 Grounds for appointment and notification of appointment

NNTC members were not able to express a view on the proposal to amend the grounds for the appointment of a special administrator to include an irregularity in the management of a corporation's affairs. They considered that more information was required, particularly on how 'irregularity' would be defined.

The NNTC supports the proposal that the appointment of a special administrator could be published on electronic communication platforms including the ORIC website.

9.16 Keeping contracts going during special administration

The NNTC supports the proposal that the CATSI Act should be amended in a manner similar to the 2018 amendment to the Corporations Act that provides that contracts should not be brought to an end because a company has entered receivership or voluntary administration.

9.17-9.23 Examinable affairs and financial matters

The NNTC and its members consider that more information is required about the meaning of an ‘irregularity in the management of a corporation’s affairs’ before they can provide their views on this proposal. It should be noted that the NNTC would not support the reporting of trivial irregularities by an examiner as providing a basis on which the Registrar could intervene in the affairs of a corporation or appoint a special administrator.

9.28-9.34 Rebuttable presumptions of insolvency

The NNTC reiterates the concerns it expressed in its submission in January 2019 about the introduction of a rebuttable presumption of insolvency. There is no equivalent provision in the Corporations Act.

Introducing a presumption of insolvency for a failure to keep adequate records is unwarranted if it could be applied in circumstances where a corporation such as an RNTBC has failed to meet this standard because of minor breaches due to its lack of resources and capacity. More information is required about the details of this proposal and the standard that would be applied before our members would be in a position to consider if this proposal could operate fairly and be justified as a special measure.

9.37-9.40 Voluntary deregistration

The NNTC supports the proposal that a corporation may voluntarily deregister where it passes a special resolution to this effect and the other criteria in section 542-1(2) are satisfied. The NNTC would also be prepared to consider a proposal to provide the Registrar with the power to exempt corporations from satisfying particular criteria to deregister if more details were provided about the parameters of this power of exemption.

APPENDIX 1: PRESCRIBED BODIES CORPORATE ECONOMIC VEHICLE STATUS (PBC EVS) MODEL

INTRODUCTION

This document explains the Prescribed Bodies Corporate Economic Vehicle Status (PBC EVS) model, which seeks to address structural impediments identified as limiting the ability of some native title groups to deploy native title funds for long-term economic development activities.

A PBC EVS would provide a targeted, fit-for-purpose option to enable Indigenous communities to 'close the gap' through their own investments in economic development. Critically, a PBC EVS would represent a clear break from the notion that native title monies represent charitable welfare while applying similar tax concessions as for other entities focused on the self-determination of Indigenous peoples. Having autonomy and choice – the right to determine one's own economic development and to manage their own internal affairs, including financing, is a principle of the United Declaration of the Rights of Indigenous Peoples (UNDRIP).

The PBC EVS adheres to UNDRIP by providing native title groups and corporations options for managing their own financial affairs that go beyond the charitable trust system.

This document outlines the background and reasoning of the PBC EVS and details the model for inclusion into the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) reform.

This document has been authored by the following organisations and individuals:

- National Native Title Council
- Minerals Council of Australia
- Associate Professor Ian Murray, University of Western Australia

HISTORY

The aims for the initial work were identified by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, which reported to the Australian Government in July 2013. That working group made a range of recommendations, including legislation of the Indigenous Community Development Corporation model (ICDC).

The ICDC model was intended to fill the gap not yet addressed by a range of reforms in the lead-up to July 2013; most notably, amendments to the *Income Tax Assessment Act 1997* (Cth) in 2012 and 2013 that rendered native title benefits as non-assessable non-

exempt income. Following those tax amendments, the key gap was the existence of a sound and efficient governance structure that permitted the pursuit of Indigenous community development purposes not limited to the constraints of a traditional charity and public benevolent institution models, but with access to the same type of tax concessions. There have been piecemeal attempts to address this gap through legislative and policy decisions. These include recognition in the *Charities Act 2013* (Cth) that native title groups can be a sufficient section of the public (for Commonwealth, but not state purposes) and recent Australian Charities and Not-for-profits Commission guidance which accepts the charitable nature of addressing Indigenous economic disadvantage and, following cases such as *Word Investments*, that charities can use business as a means to pursuing their charitable purpose.

In 2018 and 2019, the NNTC, supported by the MCA and Melbourne Business School, convened seminars to understand whether these measures had sufficiently addressed structural impediments identified in 2013. The discussion from seminars demonstrates the various challenges outlined below remained.

REASONS FOR THE PBC EVS

Even with these recent developments, there are still the following issues with the current regime that the PBC EVS model seeks to overcome:

- The ACNC guidance provides limited clarity on the precise activities that a charity may legitimately pursue in furtherance of a charitable purpose focused on economic development for an Indigenous community. That may be in part because charity law is inherently uncertain. For example, there will be legitimate overlap between loans or grants to Indigenous businesses made for charitable purposes, and those that are made for the private benefit of the business owners.
- Whilst charities can accumulate funds, the ATO's administrative practice in relation to long duration and general purpose accumulation does not always fit well with the provision of intergenerational benefits within Indigenous communities.³
- Achieving practical resolution of the ambiguity about scope of economic development activities, accumulation and section of the public is difficult without legislative reform as (a) there are material consequences of failure, being invalidity of an entire trust and loss of tax exemptions; (b) individual test cases would be time consuming, expensive and unlikely to resolve all issues; and (c) general administrative guidance is likely to be difficult to formulate, is not binding on the

³ See Australian Taxation Office TR 2015/1 'Income tax: special conditions for various entities whose ordinary and statutory income is exempt' (25 February 2015); TR 2011/4 'Income tax and fringe benefits tax: charities' (12 October 2011).

main charity regulator (ACNC) and would also be required from state and territory attorneys-general, who retain oversight of charitable trusts.

- Complexity, with associated administration costs and potential for poorer governance.

This is caused by having to use multiple entities to address the above issues, such as using a charitable trust, a discretionary trust (for direct grants to Indigenous businesses) and a PBC. It can also be caused by having to use multiple entities for different tax concession categories, such as environmental purposes (registered environmental organisation), cultural purposes (registered cultural organisation) and relief of Indigenous disadvantage purposes (public benevolent institution).

- Language: the language of ‘charity’ as applied to economic and cultural development for Indigenous Australians is seen as offensive by many.
- Trust compliance and regulation has been difficult.⁴

The timing of pursuing the model has become more urgent with two recent developments in native title: compensation and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) reform.

The recent high profile decision regarding compensation for the extinguishment and impairment of native title rights: *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (Timber Creek Compensation Case) has resolved some of the uncertainty in relation to native title compensation. This welcome development will hopefully facilitate the long overdue settlement of native title compensation matters across the country. This development makes it urgent that the current charity-based models of native title wealth management are overhauled to allow native title holders the best opportunity for real economic development.

The current review of the CATSI Act is a rare and ideal opportunity to establish the basis for the model. State charities law would then require amendment to give effect.

PRINCIPLES

The PBC EVS model will:

- **Provide a simple and flexible vehicle** tailored for the specific needs of PBCs. The number of PBCs rose from 156 to 221 between 2015 and 2020.
- **Provide an optional and alternative vehicle** to charitable trusts to generate sustainable and long term social and economic benefits for current and future

⁴ For example, see the Report on the Njamal People’s Trust carried out by the Western Australian government, <https://www.parliament.wa.gov.au/council/tp-2278.pdf>

generations of First Nations. It will do so by being required to be not-for-profit with a First Nations community development (economic, social and cultural) purpose. By providing more certainty about economic development activities, the PBC EVS would also materially reduce the need for non-charitable discretionary trusts. It is not, however, intended to carry out all of the current types of non-charitable discretionary trust activities in its own right;⁵

- **Provide more certainty** about the range of economic development activities that can be pursued than presently exists for charities (including public benevolent institutions) by articulating broad principles about how PBCs may carry out the following activities in pursuit of their purposes:
 - a) providing finance to native title holders to establish private businesses – an activity, the precise bounds of which are not presently clear for charities;
 - b) promoting investment in Indigenous economic activities.
- **Deliver benefits:** Receive tax exemptions at the federal and state level commensurate with having a community development purpose⁶ and funds are able to be rolled in and out of the model without any income tax (capital gains tax included) impediment;
- **Leverage native title rights and interests**, maintain past native title agreements, that is, no ‘re-litigation’ (required in statute).
- **Permit the ability** 1) to transfer funds from legacy trusts to the new PBC EVS and 2) existing PBCs will be able to transition into the PBC EVS model.⁷

STATUS

Building on the original ICDC model, the PBC EVS is a status that existing PBCs could choose to be granted by fulfilling specific criteria set out in a separate chapter of the CATSI Act. This means that the PBC EVS can use the existing PBC structures and governance, rather than developing a separate corporate entity or trust.

⁵ Where funds are received by First Nations members in their own right, the PBC EVS could, however, potentially still provide management and administration services to those members so long as this is incidental or ancillary to its purposes. From a tax integrity perspective, these funds would not receive any of the PBC EVS concessions, as the funds would belong to individual members of the First Nations community.

⁶ State payroll tax tests for exempt wages could be used as a relatively simple model for limiting the fringe benefits tax exemption to benefits provided to PBC EVS staff for work performed in connection with the relief of First Nations socio-economic disadvantage. That is, a subset of the PBC EVS’s purposes that align with public benevolent institution purposes. See, eg, *Payroll Tax Act 2007* (NSW) s48(2). This would still permit use of one, rather than multiple, entities.

⁷ Permitting the transfer of assets to a non-charity will require amendments to state legislation and likely state and federal tax legislation. The necessary amendments to additional legislation under the PBC EVS, including transferring assets and tax reform, are not included in this document and can be provided separately.

KEY CRITERIA FOR PBC EVS

The following criteria below are additional to the legal duties outlined in CATSI, which would remain in place for the PBC EVS.⁸

1. For purpose and not-for-profit nature of a [PBC EVS]

A PBC EVS must: (a) be able to demonstrate, by reference to the governing rules of the PBC EVS or by other means, its purposes and its character as a not-for-profit entity as defined in the PBC EVS criteria ; and (b) make information about its purposes available to the public, including members, donors, employees, volunteers and potential beneficiaries; and (c) comply with its purposes and its character as a not-for-profit PBC EVS.

2. Accountability of the PBC EVS to purpose, members, common law holders and potential beneficiaries

A PBC EVS must take reasonable steps to ensure that it is accountable to its community development purpose, which includes members, common law holders and potential beneficiaries as deemed fit by the corporation.

That the PBCs members, common law holders and potential beneficiaries have opportunity to raise concerns with the PBC.

3. Suitability of responsible persons of a [PBC EVS]

A PBC EVS must: (a) take reasonable steps to ensure that each of its responsible persons meet the conditions mentioned in subsection X; and (b) after taking those steps: (i) be, and remain, satisfied that each responsible person meets the conditions; or (ii) if it is unable to be, or remain, satisfied that a responsible person meets the conditions, take reasonable steps to remove that person.

STRUCTURE AND GOVERNANCE

The PBC EVS model was envisaged with a streamlined approach to existing PBC structures and governance, which means the registration and membership criteria for the PBC would not change. Nor would the governing structure of the PBC: the PBC Board would make high level decisions about any income or funding held through the EVS.

If the PBC chose, they could include the possibility of a separate PBC linked structure for large funds, or a separate board within the same PBC for the management of smaller funds. The idea of a separate board with a set number of prescribed Traditional Owner

⁸ Duty of care and diligence - (CATSI Act: section 265-1); Duty of good faith - (CATSI Act: section 265-5); Duty to NOT improperly use position or information - (CATSI Act: sections 265-10 and 265-15); Duty to disclose material personal interests - (CATSI Act: section 268-1); Duty to NOT trade while insolvent - (CATSI Act: section 531-1).

Directors and expert/Independent Directors in an advisory capacity was to minimise conflicts of interest, in a cultural/financial divide.

However, business and finance are cultural matters and strong cultural governance under a self-determination framework includes the ability to govern and manage all community matters, including business. This may be best achieved with one Board of Directors, and additional sub-committees, such as an audit and risk committee to ensure conflict of interest and any other issues are monitored independently from the Board.

ACCOUNTABILITY TO MEMBERS, COMMON LAW HOLDERS AND POTENTIAL BENEFICIARIES

As the PBC EVS is a for-purpose entity, the CATSI Act could include a stated fiduciary obligation (of directors and others involved in PBC EVS management) to the community development purpose of the corporation. The purpose then encompasses all common law holders and potential beneficiaries, which may include: common law holders who are not old enough to join the corporation, future common law holders, other non-common law holder Indigenous members of the community and anyone else that the corporation deems to be part of the community for the purpose of the PBC EVS.

Mechanisms for the PBC EVS to ensure compliance to the fiduciary obligations and accountability to the purpose via the members, common law holders and any potential beneficiaries of the PBC EVS may include:

- Consultation with and consent by the members and common law holders for the purposes and holdings of the PBC EVS.
- Periodic review by members and common law holders of the outcomes of the PBC EVS.
- An agreed and culturally appropriate dispute resolution process to be used in the event of disputes between decision-makers, members and potential beneficiaries.
- Recourse to an analogous body of law (charity law) for existing principles to help flesh out the content and application of the fiduciary obligations.

A high level of transparency by ensuring that all documents concerning the management of the funds are publicly available online (excluding any personal details of PBC members).

Trustees tend to report back to members annually. It may be useful to increase the frequency of financial reporting back to members without over burdening PBCs to quarterly to ensure transparency to native title holders.

Additional supporting documents that could be used by PBCs with EVS and provided to their members and potential beneficiaries:

- Strategic plan, which should include:
 - Not just inputs (eg money to be spent) and activities/outputs (eg 20 co-equity investments in homes) but also outcomes and impacts (ie what change is being pursued for recipients/the Indigenous community); and
 - Measurement and reporting about achievement of those outcomes and impacts.
- Accumulation and distribution plan
- Investment strategy
- Annual audit plan for income over a set amount
- Local and culturally appropriate dispute management support