

**CATSI Amendment Bill exposure draft**

*Submission by the Central Land Council*

9 August 2021

# Abbreviations and acronyms used in this submission

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| ALRA | *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) |
| CATSI Act | *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) |
| CATSI Act Review | Comprehensive Review of the CATSI Act 2019-20 |
| CLC | Central Land Council (ABN: 71 679 619 393) |
| Corporations Act | *Corporations Act 2001* (Cth) |
| Draft Bill | CATSI Act Amendment Bill exposure draft |
| NIAA | National Indigenous Australians Agency |
| NTA | *Native Title Act 1993* (Cth) |
| ORIC | Office of the Registrar of Indigenous Corporations |
| RNTBC | Registered Native Title Body Corporate (also called a prescribed body corporate) that holds native title in trust or as agent for the common law holders once a native title determination has been made under the NTA |
| Registrar | Registrar of Indigenous Corporations |

# Introduction

The Central Land Council appreciates the opportunity to comment on the CATSI Amendment Bill exposure draft.

The CLC represents Aboriginal people in Central Australia and supports them to manage their land, make the most of the opportunities it offers and promote their rights. The CLC is a statutory corporation established by the ALRA and also is a native title representative body under the NTA. The CLC is responsible for an area of almost 777, 000 square kilometres.

Since its establishment at a meeting of Central Australian Aboriginal communities in 1975, and through its elected representative Council of 90 Aboriginal community delegates, the CLC has represented the aspirations and interests of approximately 17,500 traditional Aboriginal landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

In carrying out its functions under the ALRA and the NTA, the CLC provides assistance to over one hundred corporations registered under the CATSI Act. The majority of these corporations are largely dependent on the CLC’s assistance for their continuing operation, due to a lack of financial resources.

# Previous submission

In October 2020, the CLC provided an extensive submission in response to the CATSI Act Review. It is disappointing that the majority of CLC’s recommendations were not supported in the subsequent NIAA CATSI Act Review Final Report. Thus, many of CLC’s suggestions are absent from the draft Bill.

The CLC’s position on the Act remains unchanged from the recommendations made in the previous submission. Nonetheless, the CLC has sought to continue to engage constructively with this process, and has provided comments and feedback on some aspects of the draft Bill.

# Feedback on the draft Bill

**Infringement notices (draft Bill clause 22)**

The draft Bill establishes a legislative framework for the Registrar to issue infringement notices. The CLC understands that NIAA intends that initially only a small number of offences, with relatively modest financial penalties, will be prescribed for the purposes of the issuing of infringement notices. However, this is a substantial legislative reform with complex policy implications. It is inevitable that further offences will be prescribed over time. Lessons learned from the general corporate and criminal law contexts should be applied to the draft Bill, and the framework established should be sound and well-tailored.

The infringement notices arrangements established in the draft Bill appear to be modelled on those in the Corporations Act. An important difference between that Act and the CATSI Act is that the latter is a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. It is important to note that, unlike other interventions such as special administration, infringement notices cannot operate to advance the interests of corporations or members. An infringement notice penalises directors, members and the corporation alike.

Many landholding corporations, including RNTBCs, hold substantial inalienable land assets but have no administrative capacity or income. Most do not even have a bank account from which to pay an infringement notice. Even a small penalty would have a disproportionate administrative and financial impact on these corporations, with the risk of flow-on effects for directors, the ultimate beneficial owners of the relevant land, and the Aboriginal estate as a whole.

Similarly, the directors of most Aboriginal and Torres Strait Islander corporations in central Australia receive no remuneration for their service. Many live in deeply impoverished circumstances and have significantly diminished access to basic public services including telecommunications.

The draft Bill’s infringement notices arrangements give very substantial discretion to the Registrar in issuing notices, modifying payment arrangements, and withdrawing notices. Given the above context, the Registrar’s discretion should be guided by the specification of a non-exhaustive list of considerations which the Registrar must take into account when making decisions in relation to infringement notices.

Appropriate considerations would include, at least:

* 1. The gravity of the contravention of the Act;
	2. The person or corporation’s administrative and financial capacity to pay or challenge the infringement notice;
	3. Health, educational, cultural, financial and geographical constraints which are relevant to the contravention of the Act;
	4. The likely impact of the issuing of a notice on a person or corporation’s solvency and a corporation’s ability to continue to carry out its functions; and
	5. Whether other interventions are more likely to promote the relevant corporation’s compliance with the CATSI Act.
1. These requirements would entrench basic discretionary protections which are applied widely in Commonwealth, State and Territory criminal justice systems.
2. In addition, the Registrar should be required to address his or her policy towards the issuing of infringement notices in a published policy (akin to current ORIC Policy Statement 26).
3. The prescribed penalty amounts should be maximum penalties only, and the Registrar required to take the above considerations into account in fixing a given penalty in the notice.
4. As a further protective measure, the legislation should provide flexibility in reducing the amount of an infringement notice after it has been issued. The Registrar should have a discretion (again, subject to the above mandatory considerations) to reduce the amount required to be paid, including solely on compassionate grounds.

**Requirement to keep up to date records of all contact details including mobile phones (draft Bill clauses 76 & 78)**

The CLC’s concerns about the disproportionate administrative burden of mandatory recording of alternative contact details have been confirmed by the draft Bill. While most of the proposed amendments in Part 3 are benign, the effect of draft Bill clauses 76 and 78, combined with CATSI Act ss 304-5 and 304-10 are to criminalise failure to keep mobile phone contact information up to date. This is not a fair expectation to impose on remote Aboriginal Australians. As explained in the CLC’s previous submission, there is a high rate of turnover of mobile phones, which are often shared between family members. A single user can accrue up to 25 mobile numbers.

With these amendments, every time a director changes their mobile number, they commit an offence if they do not promptly advise every corporation they are a director of. The corporation similarly commits an offence if it does not update the same to ORIC. This is simply not a reasonable requirement.

The draft Bill should be amended to ensure that the corporation and its officers are not responsible for maintaining up to date mobile phone contact details. It should be optional for a corporation to keep mobile phone details, and should not be required that they are kept up to date. If a corporation does opt to keep those records, it is reasonable for the corporation to be required to use the records to try to contact members.

**Requirement to make a membership decision within 6 months (draft Bill clause 56)**

The CLC has concerns that this requirement will not be practical for many corporations that are not being actively managed. This will include a large number of land-holding corporations and RNTBCs in Central Australia.

Many such corporations only have a board meeting in conjunction with their annual general meetings. This means that there are often periods longer than 6 months when the directors do not meet at all. They will therefore also not be in a position to seek an extension/exemption under draft Billclause 58 either.

The intent of this amendment is not met by requiring membership decisions to be made during a period when the corporation is not making any other decisions or holding any other meetings. It would create an unnecessary, and significant, administrative burden to require directors to meet to either consider membership applications, or to seek an extension/exemption.

To address this problem, draft Billclause 56 should be modified to require a membership decision to be made by the later day in the following two periods:

* 1. The period of 6 months beginning on the day the application is made; or
	2. The final day of the first directors meeting held after the day the application is made.

**Requirement to include replaceable rules in the rulebook (draft Bill clause 125)**

The proposed clause requires a constitution to “identify” the applicable replaceable rules. This choice of words is unclear. It could mean “state/reproduce in full” or could simply mean “refer to”, for example by way of a list of relevant section numbers in the CATSI Act. This lack of clarity undermines the intent of this amendment and should be addressed. In our view it would be preferable for the applicable replaceable rules to be required to be reproduced in the constitution.

The draft Bill does not address transitional arrangements, which the CLC submission identified as a significant issue. Particularly given that the draft Bill involves amendments to some of the replaceable rules, even corporations that have already chosen to include relevant replaceable rules in their constitution will likely have to amend their constitution in response to this legislative change.

To be clear, this small amendment is likely to require every single Aboriginal and Torres Strait Islander corporation in the country to amend its rulebook. This is an enormous administrative impost for a modest gain in the accessibility of a corporation’s internal governance rules.

In our submission, transitional provisions should specify that the requirement to reproduce replaceable rules applies only to new incorporated corporations, or to a corporation that amends its rulebook after the commencement of the amendment.

An alternative transitional arrangement could be to provide a significant period – say 2 years – for corporations to amend their rulebooks, after which time the Registrar be required by the transitional provisions to carry out a Registrar-initiated amendment to any rulebooks that remain uncompliant, by amending the rulebook only to the extent necessary to reproduce all replaceable rules that apply to that corporation.

**Resolution not to hold upcoming AGMs (draft Bill clause 110)**

In proposed s 201-175(3), if there is a corporation which has director and non-director members, but the only members of the corporation who choose to attend an AGM are directors, then the members present will not be able to pass the resolution not to hold upcoming AGMs. This does not seem an appropriate outcome, given all members will have had ample notice of the AGM. We suggest that s 201-175(3) instead read: “if there are members of the corporation **present at the AGM** who are not directors”.

Proposed s 201-185 requires the Registrar to be notified of a material change in the corporation’s affairs. The purpose of the notice appears to be to allow the Registrar to consider directing the corporation to hold an AGM. Corporations may wish to simply hold an AGM in order to immediately engage with members about the material change in affairs. We therefore suggest that s 2018-185(1) be amended as follows: “the corporation must **hold an AGM within 2 months, or** lodge written notice of the change with the Registrar no later than 28 days after the change occurs.” This would allow a short timeframe for an urgent AGM to be organised and notified, if the corporation considers it appropriate.

Finally, a special resolution pursuant to s 201-175 does not appear to operate to prevent the requirement to lodge annual reports for the corporation in the years where no AGM is required to be held. In our view would be preferable not to have to file reports, given the incredibly low income of eligible corporations, and the standing requirement to notify a material change in affairs.

The CLC notes our expectation that these changes will not disturb long-standing exemptions granted by the Registrar in relation to land-holding corporations in central Australia.

**Other issues**

Draft Bill clause 53 seems to be an error, given ss 120-1(2) and (3) are not repealed.

Draft Bill clause 102 (new s 201-38) gives directors a power to cancel a general meeting. In our view this power should be conditioned by a specific obligation to exercise it on reasonable grounds, in addition to the directors’ general duties.

The CLC continues to support the National Native Title Council’s proposal that there should be a separate division of the CATSI Act dealing specifically with RNTBCs. It is disappointing that this relatively simple improvement to the Act has not been taken up.