

Submission to the National Indigenous Australian Agency

Exposure Draft Corporations (Aboriginal and
Torres Strait Islander) Amendment Bill 2021

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1. Background to the making of this submission

Chalk & Behrendt Lawyers & Consultants is a majority Indigenous-owned law and consulting firm with over 25 years of experience in advising and representing Aboriginal communities and organisations in relation to governance, native title, land rights, heritage, commercial agreements, and economic and community development.

We advise a number of clients who are registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (**CATSI Act**), including some that are also registered native title bodies corporate.

In September 2018, Chalk & Behrendt jointly provided a submission to the Office of the Registrar of Indigenous Corporations (**ORIC**) on the then proposed amendments to the CATSI Act (**2018 Submission**).

The Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 (**Draft Bill**) incorporates the outcomes of consultation on the 2018 proposed amendments and as well as the findings of the comprehensive review of the CATSI Act led by the National Indigenous Australians Agency in 2019-2020.

Chalk & Behrendt welcome the opportunity to make this submission on the Draft Bill. Our observations are drawn from extensive experience supporting CATSI Act corporations to develop more robust corporate governance structures and to achieve their goals within the existing statutory framework.

2. Limited Consultation Period

Before commenting on the substantive proposals in the Draft Bill, we note that only a very limited time has been provided for consultation. CATSI Act corporations only have a month to provide feedback on a Draft Bill which is 97 pages in total, containing 329 individual changes to the CATSI Act and other legislation, and implements more than 60 recommendations of the October 2020 CATSI Act Review Final Report (**Final Report**), many of which are taken forward in a way which differs from that described in the Final Report.

This is insufficient time for most CATSI corporations to respond given the number and complexity of the reforms and that many such corporations are already insufficiently resourced to respond to policy and legislative proposals. The time frame also does not account for the disruptions caused by the June-July 2021 COVID-19 outbreak, which has reduced the capacity of our clients to meet and discuss the proposed changes, as well as the ability of NIAA to provide for in person consultation opportunities.

We also note that many of the details of how specific legislative proposals will operate have been left to be implemented in the *Corporations (Aboriginal and Torres Strait Islander) Regulations* (the **CATSI Regulations**). We encourage the NIAA to commit to a proper consultation process and timeframe for the proposed amendments to the CATSI Regulations, in line with the

requirements of the *Legislation Act 2003* (Cth), in light of the potentially significant impact that these amendments will have on CATSI corporations.¹ We outline this potential impact further below.

3. Comments on the Draft Bill

Many of the changes proposed by the Draft Bill, particularly those which provide greater flexibility for CATSI corporations to meet regulatory requirements, are positive ones. We are pleased that the Draft Bill takes on board some of the comments made in the 2018 Submission.

The introduction of a requirement to review the effectiveness of the CATSI Act every seven years is also positive change, given the continuing need for the CATSI Act to respond to the evolving needs of CATSI corporations.

However, we are concerned with certain proposals in the Draft Bill that move towards criminalisation of administrative non-compliance, undermine the principle of self-determination and increase administrative burdens on CATSI corporations without adequate policy justification.

3.1 Infringement notices

One of the recommendations in the Final Report being taken forward by the Draft Bill is Recommendation 4, which proposed that the CATSI Act Registrar's powers be expanded to include the ability to issue penalty notices. Although the Registrar already had the ability to issue penalty notices for prescribed offences under section 566-5 of the CATSI Act, no offences have been prescribed in the CATSI Regulations.

Item 21 of the Draft Bill repeals existing section 566-5 and items 22-23 proposes a new Division 571 in relation to infringement notices that sets out a framework governing the conditions and requirements around infringement notices including when they can be issued and what information they should contain. The fact sheet published by the NIAA accompanying these changes state that "*The CATSI Regulations will be amended in accordance with the changes prescribed in the CATSI Amendment Bill and at that time offences will be included in the Regulations.*"

This is one of the proposals the impact of which on corporations will depend significantly on the detail in the CATSI Regulations, a draft of which is not published alongside the Draft Bill.

While we support the inclusion of a more detailed framework governing the Registrar's power to issue infringement notices if that power were to be used, including for example, the ability of the Registrar to extend the period for payment (which is not available in existing section 566-5), we would be concerned if the proposed amendments were in practical terms to lead to

¹ See Fact sheet 8 "Part 8—Officers of corporations", which states that "*Time permitting, consultation will be undertaken in relation to the proposed amendments to the CATSI Regulations.*"

greater 'criminalisation' of non-compliance. Many CATSI corporations have very limited resources to meet the complex administrative requirements of the CATSI Act, often relying on unpaid directors to do this work, many of whom live in remote areas and may not have access to technology. It is inappropriate in these circumstances that minor non-compliance could result in the issuance of penalties, rather than addressed through ways that support and improve the capacity of the corporation to meet their compliance obligations.

While the CATSI Act also includes quite serious offences, such as those relating to breaches of directors' duties (e.g. s 265-25), those offences are more appropriately dealt with by a court given the high penalties and the implications for the individuals involved.

We agree with the submission made by the Central Land Council to the Comprehensive Review of the CATSI Act 2019-20² that it is critically important that the implementation of the CATSI Act does not result in potentially harmful criminal outcomes for Indigenous people, particularly where other regulatory measures would suffice.

The prescribed offences which can trigger the power to issue infringement notices need to be carefully considered so that the proposed amendments do not lead to greater 'criminalisation' of minor non-compliance.

3.2 Constitutional changes made by special administrator

Regulatory approaches that emphasise self-determination and support internal decision-making processes (rather than external, top-down regulation) ought, as a matter of policy and principle, be encouraged.

One reform proposed to be implemented in the Draft Bill in our view undermines this principle. Item 127 of the Draft Bill prohibits the Registrar from accepting any constitutional changes after a special administrator has changed the constitution under s 499-5 of the CATSI Act unless he or she is satisfied that the:

- (a) change is consistent with the change made by the special administrator when considering the purpose or need for that change; or
- (b) circumstances of the corporation have changed such that the change made by the special administrator is no longer relevant.

Under s 499-5(3) and (4) of the CATSI Act, a special administrator has the power to change the corporation's constitution without any oversight by the members of the corporation and without any limitation as to the grounds on

² Central Land Council, Submission to the Comprehensive Review of the CATSI Act 2019-20, 1 October 2020, available here: <https://www.clc.org.au/wp-content/uploads/2021/03/20201001-Central-Land-Council-Submission-to-the-CATSI-Act-Review-SIGNED-oct-2020.pdf>

which the change can be made. However, one of the principal objectives of the special administrator is, where possible, to return the corporation to the control of members.³ To prevent members from subsequently changing the constitution in an inconsistent manner is incompatible with the purpose of special administration as a *temporary* measure and undermines members' ability to determine their own governance arrangements.

The Final Report justifies this recommendation on the basis that, under subsection 69-30(1) of the CATSI Act, the Registrar can reject a rule book change by members that is inconsistent with a prior, Registrar-initiated, amendment to a corporation's rule book. However, the Registrar's power to change the corporation's constitution in section 69-35 can only be exercised if he or she is satisfied that the conduct of the corporation's affairs; or an actual or proposed act or omission by or on behalf of the corporation; or a resolution, or a proposed resolution, of members or a class of members of the corporation, is contrary to the interests of the members as a whole or oppressive to a member or group of members. The CATSI Act currently imposes no such limitation on the power of a special administrator to change the corporation's constitution.

We understand that in certain circumstances, it may be detrimental to a corporation's interests for it to reverse a constitutional change which enabled the proper functioning of the corporation to be restored. However, we do not believe that there should be a rebuttable presumption, as the proposal in the Draft Bill introduces, that changes inconsistent with amendments made by the special administrator should not be registered.

The Registrar already has the power to make changes to a CATSI corporation's constitution if the Registrar is satisfied of certain matters referable to the interests of the members. If the Registrar considers that a constitutional amendment made by a special administrator should not be reversed by a member resolution to change the constitution, he or she can overturn that change by satisfying the test under section 69-35, which imposes a positive obligation to consider the interests of the members.

A prohibition on the Registrar accepting any constitutional changes after a special administrator has changed the constitution under section 499-5 of the CATSI Act unless satisfied that the change is consistent with the special administrator's change or circumstances of the corporation have changed is inappropriate given the nature of special administration as a temporary measure and the very broad scope of the special administrator's power to amend the rule book.

³ Office of the Registrar of Indigenous Corporations, Policy Statement 20: Special administrations, Last updated: 21 February 2017: https://www.oric.gov.au/sites/default/files/documents/02_2017/PS-20_Special-administrations_v7-0.pdf

3.3 Requirement to refer to replaceable rules in constitution

Item 125 of the Draft Bill proposes that the constitution of CATSI corporations must identify the replaceable rules (if any) that apply to the corporation.

We understand that the intention of such a requirement is to make people aware that the replaceable rules exist while ensuring that rule books remain current if there are any amendments to the CATSI Act.

However, as stated in the 2018 Submission, we are concerned about the cost and administrative burden placed on CATSI corporations to amend their rulebooks to implement this requirement. No transitional provisions are included in the Draft Bill, so it is unclear the timeframe allowed for CATSI corporations to comply.

Many CATSI corporations have adopted rule books which replace or modify replaceable rules and, in some cases, the rule books adopted have been the product of considerable discussion, debate and political compromise among members. In some cases, members may want to take the opportunity to re-open discussions and debates about the substance of particular rules, and there is in our view a risk that many corporations' members may be unable to reach agreement about revised rule books within a reasonable timeframe. In many cases, corporations will need to obtain legal and other advice about the new rule book to be adopted, which will require funding that many corporations lack. Moreover, the requirement will be triggered each time a new replaceable rule is introduced into the CATSI Act.

For these reasons, we submit that a requirement for existing CATSI corporations to revise their rules books to include a reference to any applicable replaceable rules is impracticable and ought not be implemented.

3.4 Laying reports before AGM

Item 121 in the Draft Bill introduces a requirement for directors of a corporation to lay any reports prescribed by the CATSI Regulations and prepared for the financial year, before the Annual General Meeting.

As per the 2018 Submission, we submit that such a requirement would impose an unnecessary additional financial and administrative burden on CATSI corporations given that an existing requirement that copies of reports be provided to members on request.

A requirement to send copies of reports with the notice of the annual general meeting would, in our submission, impose an additional financial and administrative burden on CATSI corporations which is not justified given that members are already entitled to be given those reports on request.

4. Conclusion

As noted above, many of the proposed amendments in the Draft Bill have the potential to significantly affect CATSI corporations and their members – including amendments which require further elaboration in the CATSI Regulations. It is crucial that all amendments to the CATSI Act are made in a way which supports Aboriginal and Torres Strait Islander peoples in achieving their objectives, and we would therefore welcome the opportunity to comment on the CATSI Regulations as they are drafted.

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