



2 October 2020

National Indigenous Australians Agency
PO Box 2191
Canberra ACT 2600

By email to: CATSIActReview@niaa.au

Dear Sir/Madam

Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act)*

The Federation of Victorian Traditional Owner Corporations (the **Federation**) is a state-wide body advocating for the rights and interests of Traditional Owners in Victoria. Our members are Victorian Traditional Owner Corporations recognised as cultural custodians of their Country. Our members are all corporations incorporated under the CATSI Act. We work with our members and other Traditional Owner groups across Victoria.

We welcome the opportunity to contribute to the National Indigenous Australians Agency (**NIAA**) review of the CATSI Act (the **Review**). On this basis we make the following comments. Our comments are not comprehensive in scope. Our comments do not address all issues relevant to Victorian Traditional Owner Corporations, nor do they answer all questions posed by the Review. Rather, our comments focus on the objectives and overarching principles of the CATSI Act, and some areas of particular interest.

We note that the NIAA has undertaken a number of online consultation sessions with Aboriginal and Torres Strait Islander corporations (**CATSI corporations**) including Victorian Traditional Owner Corporations, and other relevant Indigenous peak bodies, on the technical aspects of the Review as outlined in the NIAA draft report. We expect that NIAA will implement the recommendations and feedback received at these consultation sessions in line with the Federal Government's support of the principles of self-determination and free, prior, and informed consent.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Before we address the more technical aspects of the Review, we note that the CATSI Act is a significant piece of legislation for Indigenous people and communities. It creates a specific and differentiated regime for the incorporation, regulation and operation of CATSI corporations. It is therefore vital that the Review seeks to introduce amendments that advance the rights of Aboriginal peoples and Torres Strait Islanders and allows their corporations and representative structures to thrive.

CATSI corporations play an important role in delivering services and enabling development in communities. CATSI corporations have varied objectives and functions. Their broad scope of activities should be considered in the Review and any proposed amendments.

In Victoria many CATSI corporations contribute to and enable the cultural, social, political and economic development, and financial security of their communities. This is achieved through business operations, social enterprises, community organisations, and statutory functions. For example, a number of Victorian Traditional Owner Corporations provide an important function to government and the wider community pursuant to environmental, heritage and land rights legislation and policy processes. To this end, Federal and State governments often rely on these corporations to act as an interface between government, third parties and the Aboriginal community the corporation represents. While some of this work is dictated by functions prescribed by legislation and funded by government, often this work takes up a considerable amount of the corporation's time and resources in addition to what is publicly funded for that purpose.

To this end, the more successful CATSI corporations are, the greater the benefit to society. The advancement of Indigenous rights benefits the whole community and provides beneficial outcomes for members, communities, and government.

As such, the UNDRIP, which was endorsed by Australia in 2009, provides a useful reference point to guide this Review, both in relation to the Review process and any proposed amendments flowing from it. The UNDRIP contains 46 articles recording the rights of Indigenous Peoples and communities. These rights constitute the minimum standards for the survival, dignity, and well-being of Indigenous peoples. Viewed as a minimum standard, any proposed amendments to the CATSI Act ought to exceed the standards contained in the UNDRIP but should not fall short of them.

The UNDRIP rights particularly relevant to the CATSI Act, include but are not limited to:

- Self-determination;¹
- Self-government in matters relating to internal and local affairs;²

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 3–4

² *Ibid* art 4.

- Free prior and informed consent on matters that will affect them;³
- Practicing and revitalising cultural traditions and customs;⁴ and
- Maintaining and strengthening distinct political, legal, economic, social and cultural institutions.⁵

The Review provides a valuable opportunity to advance the rights of Aboriginal peoples and Torres Strait Islanders and progress the aspirations of the UNDRIP in a key piece of legislation affecting Indigenous communities in Australia.

RECOMMENDATION 1:

The CATSI Act should align with, and embed, the rights articulated in the UNDRIP, both in substance and legislative process.

Consistency with the *Racial Discrimination Act 1976 (Cth) (RDA)*

The CATSI Act imposes a differentiated corporate governance regime specifically for Aboriginal and Torres Strait Islander corporations in comparison to those imposed more generally by the *Corporations Act 2001 (Cth) (Corporations Act)*. The justification for the otherwise discriminatory nature of the CATSI Act is that it is a ‘special measure’ aimed at the advancement of Aboriginal peoples and Torres Strait Islanders.

The preamble of the CATSI Act notes that the legislation is intended to be a special measure for the purposes of the *International Convention for the Elimination of All Forms of Racial Discrimination* and the RDA for “the advancement and protection of Aboriginal peoples and Torres Strait Islanders.” To be legitimately characterised as a special measure, each provision of the CATSI Act must satisfy the criteria outlined in *Gerhardy v Brown*.⁶

When assessing whether the provisions in the CATSI Act constitute a special measure, consideration must be given to whether each provision is appropriate and adapted to achieving its purpose.⁷ The sole purpose of departure from the Corporations Act must be that it is necessary for the advancement of Aboriginal peoples and Torres Strait Islanders so that they may have equal enjoyment and exercise of human rights and fundamental freedoms.

There can be no other purpose.

³ Ibid arts 10, 11, 19, 28, 29, 32.

⁴ Ibid arts 11, 12, 26, 27, 33, 34, 40.

⁵ Ibid art 5.

⁶ *Gerhardy v Brown* (1985) 159 CLR 70 [32] (Brennan, J): It must confer a benefit on some or all members of a class; membership of the class must be based on race, colour, descent, or national or ethnic origin; must have the sole purpose of securing the adequate advancement of the beneficiaries so that they may have equal enjoyment and exercise of human rights and fundamental freedoms; and the must be necessary for the equal enjoyment and exercise of human rights and fundamental freedoms to be realized.

⁷ *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*.

Wherever a provision or proposed amendment of the CATSI Act imposes an obligation or limitation for which there is no equivalent in the Corporations Act, it must satisfy the above indicia. Otherwise, the obligation or limitation is contrary to the RDA. Currently, it is unclear if all 'special measures' meet the above indicia. A substantive evaluation of the CATSI Act against the above indicia is required to provide certainty that provisions of the CATSI Act are not contrary to the RDA.

Notwithstanding the special measure intention, Traditional Owners in Victoria do not always have a choice as to whether they incorporate under the CATSI Act; it is not always voluntary.

For example, under the *Native Title Act 1993* (Cth) (**NTA**) a corporation must incorporate under the CATSI Act to be a Prescribed Body Corporate (**PBC**),⁸ and under the *Aboriginal Heritage Act 2006* (Vic), a corporation must incorporate under the CATSI Act to secure Registered Aboriginal Party status.⁹ While the scope of this Review does not extend to proposed amendments to ancillary legislation, we note that the requirement to incorporate under a differentiated regime is highly prescriptive.

Increasingly there is overlap between the legislative and regulatory regimes of the NTA and the CATSI Act. By legislating that representative structures such as PBCs must incorporate under the CATSI Act, PBCs are forced to comply with a particularly technical set of provisions in order to achieve legitimacy in the eyes of government. This is out of step with the principles of self-determination and self-government, and risks undermining the autonomy and cultural governance and cultural obligations of those groups.

The NTA sets out the process for the recognition and management of native title rights and interests of Traditional Owners, whereas the CATSI Act is set up to regulate the corporate activities of Aboriginal and Torres Strait Islander corporations. As such, any proposed amendments flowing from this Review should not seek to go beyond these core principles. For example, while it is appropriate for the CATSI Act to include targeted corporate provisions intended to benefit CATSI corporations undertaking particular activities, such as the inclusion of cultural governance considerations in decision making; it is not appropriate for the corporate regulator to adjudicate over the content or meaning of a Traditional Owner group's Traditional Law and Custom.

Unsurprisingly, the CATSI Act is not always the first choice for incorporation when Aboriginal organisations are given the option. The Review should seek to understand why this is the case and work to redress the insufficiencies of the CATSI Act so as to support the advancement of Aboriginal peoples and Torres Strait Islanders. For example, in Victoria we have seen the First Peoples Assembly of Victoria, who are the Aboriginal Representative Body declared under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), incorporate under the Corporations Act rather than the CATSI Act. This structure was adopted after considerable community consultation as the best structure to achieve its purpose. The Federation is another

⁸ *Native Title Act 1993* (Cth) ss 56–57.

⁹ *Aboriginal Heritage Act 2006* (Vic) s 150(2).

example. The Federation is an Aboriginal organisation formed by its Victorian Traditional Owner Corporation members. The Federation's members opted to incorporate the Federation under the Corporations Act to enable more flexibility to achieve its objectives, including the ability to adopt a corporate structure that allows for the creation of subsidiaries

The CATSI Act should be modernised to take into account the broad scope of activities that CATSI corporations engage in - commercial, charitable, or otherwise. The outdated notion that Aboriginal and Torres Strait Islander corporations are always intended to be Public Benevolent Institutions needs to be revisited.

Special measures should advance the rights of Indigenous people and communities, not monitor and regulate them in excess of broader society for arbitrary or paternalistic reasons. If the CATSI Act is genuinely designed to achieve its special measure objective, it needs to reflect advancement of rights as self-determined by Aboriginal peoples and Torres Strait Islanders. Indigenous peoples need to be trusted to make decisions about their internal affairs and representative structures, including their corporations. Anything less is contrary to the intention of a special measures and is ultimately out of step with the UNDRIP.

RECOMMENDATION 2:

Each provision of the CATSI Act should satisfy the definition of special measure, in line with the principles of self-determination. Only those provisions that can legitimately be characterised as a special measure should be retained or progressed.

Technical aspects of the Review

The above two recommendation is intended to provide a framework for approaching the Review with clear mechanisms for assessing whether proposed amendments will enable robust CATSI corporations to grow and thrive.

We note that the NIAA draft report sets out a number of questions for consideration and feedback. We have endeavoured to discuss these issues with Victorian Traditional Owner Corporations, however given their limited resources and enormous workload, we recommend that the NIAA provide sufficient time and resources to Victorian Traditional Owner Corporations to enable them to engage directly with the Review beyond online surveys and forums. In the midst of managing their corporations and working with their members and communities through the challenges of the global COVID-19 pandemic and natural disasters, it is imperative that proper consultation is undertaken by NIAA on this important legislation in a respectful and culturally appropriate manner.

With that in mind, we provide the following preliminary comments on some more technical aspects of the Review, noting that this is by no means a comprehensive or conclusive statement on the views of Victorian Traditional Owner Corporations. We strongly recommend NIAA properly resource and consult with Victorian Traditional Owner Corporations as they are directly

affected by the Review and are highly skilled to provide feedback, having considerable experience of navigating the practical operation of the CATSI Act.

A Economic Vehicle Status (EVS)

The National Native Title Council (**NNTC**) has consistently advocated for the creation of an EVS for PBCs. We support this submission and consider the Review should canvass whether it would be beneficial for EVS status to be extended to encompass Traditional Owner Group Entities (**TOGEs**) established pursuant to the *Traditional Owner Settlement Act 2010* (Vic).

RECOMMENDATION 3:

The CATSI Act should be amended to adopt the NNTC's proposal for Economic Vehicle Status for PBCs and other entities as appropriate.

B Power and functions of the Registrar

Bringing the Registrar's power more into line with the regulatory powers of the Australian Securities and Investments Commission (**ASIC**) is generally supported but only to the extent that it would result in a wider range of powers that would allow the Registrar to respond to a breach in a more proportionate manner (for example, issuing a warning or fine rather than commencing legal proceedings). However, the Registrar should not be given powers that extend beyond the powers of (ASIC). Notwithstanding this, we consider dispute resolution is an internal matter to be dealt with as outlined by the corporation's Rule Book.

C Governance

Member's privacy should be respected. While it may be necessary for the purpose of the member's register, members' names and addresses should not be published on the ORIC website.

The CATSI Act should be amended to allow for CATSI corporations to set up wholly owned subsidiary CATSI corporations. Likewise, the CATSI Act should be amended to allow a group of entities to establish a CATSI corporation (similar to a joint venture). These amendments are an important step in recognising that Indigenous peoples have commercial and economic aspirations and should be allowed to determine their own corporate structures for achieving their objectives.

D Officers of the corporation

The NIAA draft report suggests that because many CATSI corporations are publicly funded through grants, or through native title benefits, they should be required to report remuneration details of their CEOs and other senior managers in their Annual Reports. We disagree. CATSI corporations are not equivalent to publicly listed companies under the Corporations Act. Those

corporations are required to report remunerations to inform shareholders and prospective investors. Drawing any analogy between companies listed on the ASX and CATSI corporations publicly funded through grants is misleading and only serves to highlight the discriminatory nature of such a proposal. If there was an equivalent proposal to require reporting for corporations under the Corporations Act that are not publicly listed there would likely be an outcry. Executive remuneration is a matter for directors. In setting remuneration, directors may benefit from benchmarking information compiled by the Registrar based on voluntary de-identified information provided by CATSI corporations.

We note also that native title benefits are not made up of money gifted by government or third parties: native title benefits are legal entitlements paid pursuant to the exercise of procedural rights or the right to compensation under legislative or contractual requirements. As such, the way in which such entitlements are allocated or invested by the recipient corporation is an internal matter and not a matter for public interest disclosure.

Further, as NIAA would be aware, the financial reporting requirements for organisations in receipt of public funds through State and Federal government agencies are robust and comprehensive. We are not aware of any grants provided to our members that have not been the subject of extensive reporting requirements including the maintenance of proper financial records, acquittal of funds, and in some cases – a statutory declaration. We therefore fail to see any connection between reporting against grant funding and the public disclosure of executive remuneration.

Moreover, where a CATSI corporation is registered as a charity they are subjected to a high level of compliance and accountability reporting requirements to the Australian Charities and Not-for-profit Commission.

We question whether the proposal to disclose executive remuneration would meet the required threshold of special measure if such an amendment is pursued.

We agree that related party benefits and the requirement that most directors must not be employees should be reviewed and amended to make them more appropriate and adapted to the practical operations of CATSI corporations.

E Modernising the CATSI Act

The CATSI Act should be modernised to take into account technological progress including in relation to information storage and providing notices. However, the Registrar should not be allowed to share information (even if de-identified) with researchers, peak bodies, academics, and other stakeholders without the consent of the corporation whose information it belongs to. Historically and to present day, Aboriginal people and communities consistently have their information collected, stored, and transferred to third parties by government when that data belongs to them and should be controlled by them.

F Registered native title bodies corporate

We support the NNTC's submissions in relation to the matters set out in the NIAA draft report on Registered Native Title bodies corporate.

We sincerely hope the NIAA uses this opportunity for positive reform of the CATSI Act and undertakes this Review in line with the aspirations of Aboriginal peoples and Torres Strait Islanders.

It is time to modernise the CATSI Act. To do so the NIAA needs to listen to the experience and expertise of Aboriginal and Torres Strait Islander people. The special measure the CATSI Act sets out to achieve – the advancement of Aboriginal peoples and Torres Strait Islanders – can only be achieved when government recognises and accepts that Aboriginal and Torres Strait Islander people are the experts on how this should happen.

Aboriginal and Torres Strait Islander people are determining their own futures, it is time to listen.

Should you require any further information on the content of this letter please contact Daniel Kelly at daniel.kelly@fvto.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Paton', followed by a period.

Paul Paton
CHIEF EXECUTIVE OFFICER

Federation of Victorian Traditional Owner Corporations