



2 October 2020

National Indigenous Australians Agency
PO Box 2191
Canberra ACT 2600
By email: CATSIActReview@niaa.gov.au

Dear National Indigenous Australians Agency

Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) Draft Review Report

Thank you for the opportunity to provide comments in relation to the National Indigenous Australians Agency's *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) Draft Review Report*.

The enclosed submission has been prepared by First Nations Legal and Research Services (**First Nations**). First Nations (formerly Native Title Services Victoria Ltd) is a not for profit company limited by guarantee providing professional services to Victorian Traditional Owners and Traditional Owner Corporations.

First Nations is funded by the Commonwealth government under s203FE of the *Native Title Act 1993 (Cth)* to carry out the functions of a native title representative body as prescribed in that Act. First Nations also receives funding from the Victorian Government to assist Traditional Owners in negotiations and settlements under the *Traditional Owner Settlement Act 2010 (Vic)*.

First Nations welcomes the opportunity to make a submission to the CATSI Act Draft Review Report and is committed to working with government to develop policy, legislative and administrative reforms targeted at achieving community aspirations and increasing levels of self determination.

In preparing our submission, First Nations has also had the opportunity to review the submissions of the Federation of Victorian Traditional Owner Corporations and the National Native Title Council.

I would be pleased to discuss further any of the matters raised in this submission.



Yours sincerely

A handwritten signature in black ink, appearing to read "Tony Kelly", is positioned below the text "Yours sincerely". The signature is fluid and cursive.

Tony Kelly

Chief Executive Officer

First Nations Legal & Research Services

First Nations' response to the CATSI Act Draft Review Report

First Nations Legal and Research Services (**First Nations**) supports the submissions made by the Federation of Victorian Traditional Owner Corporations (the **Federation**) and the National Native Title Council (**NNTC**) to the review.

In particular, First Nations supports the Federation's recommendations that the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) should align with, and embed, the rights articulated in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and be consistent with the *Racial Discrimination Act 1975* (Cth). Further to First Nations' support for the Federation and NNTC submissions, we provide the following additional comments.

Timeframe of the review process

The timeframe provided by the National Indigenous Australians Agency for consultation on the current review of the CATSI Act was insufficient to support meaningful engagement within native title groups or organisations (including Registered Native Title Bodies Corporate (**RNTBCs**)). The timeframe also failed to make allowances for the impacts of COVID-19, which has reduced the ability of organisations to consult in person. First Nations notes that the timeframe for submissions was extended by two weeks, just one day before the original closing date. This extension is unlikely to have facilitated additional dialogues between RNTBCs and Traditional Owner Corporations and their members or to have ensured compliance with the principles of Free, Prior and Informed Consent outlined in the UNDRIP.

2. Objects of the CATSI Act

Meeting the needs of the range of Aboriginal and Torres Strait Islander corporations

Incorporation under the CATSI Act is mandatory for RNTBCs. In First Nations' view, RNTBCs need to be able to select a form of incorporation that best supports their aspirations and needs, whether that be from a range of options under the CATSI Act or between incorporation under that Act or the *Corporations Act 2001* (Cth).

A separate RNTBC chapter of the CATSI Act could include additional options for the incorporation of RNTBCs and First Nations supports the NNTC submission on this topic.

Taking a bigger picture view, consideration should be given to whether corporate structures, in general, are an appropriate fit for native title communities. This may be relevant not only for new corporations but also for existing corporations who may wish to transition away from traditional corporate structure options.

Protection for members and de-criminalisation of the CATSI Act

First Nations agrees with the NNTC in supporting measures in the CATSI Act aimed at protecting the rights of members and noting 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.

First Nations supports the call to de-criminalise the CATSI Act where possible, save for civil and criminal penalties necessary to protect the good governance of Indigenous corporations. First Nations has observed examples of the civil and criminal offences currently included in the CATSI Act creating a culture of fear in corporations which, in our view, results in corporations being less likely to seek

guidance from the Office of the Registrar of Indigenous Corporations (**ORIC**) and feel empowered to realise their full potential.

Support for corporations to pursue economic and community development opportunities

CATSI Act corporations require increased resources in order to resolve the complex issues they face. This could be done in a number of ways, including through ORIC increasing its focus on the provision of consistent advice by phone and email, and an updated suite of guides and factsheets. ORIC could respond to questions in a variety of ways, for example by including de-identified FAQs received from corporations on its website.

As well as a model rule book for RNTBCs, First Nations is supportive of ORIC providing additional resources to support RNTBCs to strengthen their capacity and capability, including in the following areas:

- The distinction between CATSI Act compliance and native title functions
- Replaceable rules
- Succession planning
- Materials for new Directors
- Dispute management resources that support RNTBCs to operate regardless of disputes
- More RNTBC specific training.

First Nations supports the use of online communications and reporting and virtual meetings and training sessions, where preferred by corporations and their members.

3. Powers and functions of the Registrar

There is currently no oversight that ensures that RNTBCs are meeting their obligations to common law native title holders. As an alternative proposal to a role for the Registrar in this context, First Nations sees a potential role for the Auditor General in conducting audits in response to complaints from common law holders.

Lower level discretionary powers

First Nations supports a broader range of lower level discretionary powers for the Registrar that enable a more proportionate and graduated response to non-compliance. As outlined in the NNTC submission, First Nations agrees that an emphasis should be placed on capacity development initiatives for corporations or its officers who have been non-compliant in carrying out their functions in accordance with the CATSI Act.

First Nations generally supports the proposal that the Registrar has powers to implement fines as opposed to commencing criminal proceedings against a corporation or its officers for minor compliance contraventions. First Nations notes that issuing fines should be considered as a last resort in the event that there have been minor or inadvertent breaches of the CATSI Act and that the ability to extend enforceable undertakings should be used as an option to deal with such breaches.

Fines should be proportionate to the size and income of the corporation. The Registrar should be able to consider the factors that a court would consider when deciding whether to impose an order against

the corporation or its officers. In the event that a corporation or its officers cannot immediately meet the cost of the fine, it should be clarified whether there are delayed payment options available for corporations or its officers.

4. Governance

Contact details

First Nations supports the proposal to allow corporations to use alternative contact details to facilitate stronger communications with their members, but only where those additional contact details are not included in the members register, to ensure that these details are not made publicly available.

Redaction of membership details

First Nations considers that member contact details should be confidential. In addition to there being no benefit or justification for making these details publicly available, there are serious personal safety consequences of doing so, including the risk of domestic violence.

ORIC should establish a process by which all personal information is removed from membership registers and corporations transition to also holding a separate members' contact list which is not provided to ORIC or to members on request. Noting that this would place a further administrative burden on corporations and any potential delays would heighten the risks to members' safety and privacy, adequate support should be provided to corporations to undertake this process.

Membership processes

First Nations considers that a statutory timeframe for considering membership applications is not necessary, as this can be considered and dealt with by corporations in their rule books. For RNTBCs, additional information may be required to assess membership eligibility and corporations should have the flexibility to delay approving a membership application if further information is required. Rule books should be flexible to allow RNTBCs to request further information either from the individual or the relevant NTRB/SP and consider the application at a future board meeting once the requested information is received.

First Nations supports the NNTC submission in relation to eligibility, acceptance and rejection processes and timeframes for membership cancellation.

Audit committees

Audit committees are an effective governance measure and First Nations supports mandating them above a threshold, such as where the annual income of a corporation and its subsidiaries exceeds \$10 million.

Reporting

First Nations sees value in the proposals to reduce the regulatory and reporting burden on CATSI corporations, particularly small corporations. First Nations suggests that any amendments in this space are accompanied by information and guidance, particularly for corporations when they transition from being classified as a small corporation to a medium corporation.

5. Officers of corporations

Executive performance

It is unclear to First Nations what the proposal outlined in paragraph 5.23 of the Draft Report is seeking to achieve and which roles would fall within the scope of 'key management personnel'. Without further information, this proposal is not supported.

7. Registered Native Title Bodies Corporate

Benefit management structures

RNTBCs should be afforded the flexibility to create their own corporate and benefits management structures in accordance with the instructions of the native title group. First Nations supports amending the CATSI Act to provide the option for native title benefits to be regulated by the Registrar, by RNTBC request. It is noted that the CATSI Act has been criticised for not supporting the economic aspirations of Traditional Owner groups.

First Nations supports the NNTC's Economic Vehicle Status proposal.

Dispute resolution

First Nations refers to its submission dated 5 October 2017 (then as its predecessor, Native Title Services Victoria) in which it made proposals for dispute resolution alternatives. The current regime for dispute resolution means disputes are often escalated to ORIC without consideration of mediation or other alternative dispute resolution processes. As set out in its earlier submission, First Nations supports a staged alternative dispute resolution process, and looks forward to an opportunity to consult on such proposals, whether incorporated into the CATSI Act or otherwise.