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2 October 2020

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## **Submission on the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* Review – Draft Report**

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### **Introduction**

1. The Kimberley Land Council (**KLC**) is the representative Aboriginal/Torres Strait Islander body for the Kimberley region and under s 203AD of the *Native Title Act 1993* (Cth) (**NTA**) the KLC has statutory functions in respect of, and provides advice and assistance in relation to governance and compliance of, Registered Native Title Bodies Corporate (**RNTBCs**) in the Kimberley region of Western Australia. The KLC makes this submission with regard to its statutory functions, as well as the interests of native title holders and their representative organisations more broadly.
2. On 11 December 2019 Minister Ken Wyatt announced a comprehensive review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**). The National Indigenous Australians' Agency (**NIAA**) released the CATSI Act Review Draft Report on 31 July 2020 (**CATSI Act Review**). The KLC welcomes the opportunity to make a submission on the CATSI Act Review.

### **Purpose of CATSI Act Review**

3. The KLC understands that the broad purpose of the CATSI Act Review is to ascertain whether the CATSI Act is meeting the needs and expectations of Aboriginal and Torres Strait Islander people. There are a diverse range of CATSI Act Corporations which perform a diverse range of roles.<sup>1</sup> RNTBCs are required to be incorporated under the CATSI Act but organisations such as the KLC are also CATSI Act Corporations.
4. This submission focuses on RNTBCs. While RNTBCs make up only a small percentage of corporations incorporated under the CATSI Act they have a unique and challenging role in managing native title rights and interests.

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<sup>1</sup> CATSI Act Review Draft Report p 9, p 15

5. Under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**). RNTBCs are required to incorporate under the CATSI Act. The functions of RNTBCs include to hold determined native title rights and interests on trust or act as agent for common law holders, and to consult with and obtain the consent of common law native title holders on native title decisions<sup>2</sup> (**Native Title Functions**).
6. The primary functions of RNTBCs are the Native Title Functions. However, having been incorporated under the CATSI Act, RNTBCs must (firstly) ensure that they remain compliant with all corporate governance requirements under that Act in order to be able to (secondly) perform their Native Title Functions. NIAA provides 'basic PBC support' funding to NTRBs/SPs to support RNTBCs to meet these corporate governance obligations. Unfortunately, however this 'basic PBC support' funding does not extend to cover costs of basic compliance (four directors' meetings / one general meeting) for corporations in remote regions such as the Kimberley. The lack of sufficient funding for RNTBCs to remain compliant with their basic governance obligations under the CATSI Act creates obvious risk to the performance of Native Title Functions and may result in the primary function not being met. At present the shortfall is met, whenever possible, by native title grant funding provided to NTRBs or non-grant funding to RNTBCs. However, given Native Title Functions are often triggered by third party commercial activities, it is critical that appropriate mechanisms are put in place to require third parties to meet **all** costs incurred by RNTBCs as a result of their activities. The KLC's submission on the *Native Title Act Amendment Bill 2019* raised the need for reform of s60AB of the *Native Title Act* to address the issue.<sup>3</sup>
7. In this context, and having regard to the potential civil and criminal liabilities for non-compliance with the CATSI Act, the CATSI Act is not currently meeting the needs and expectations that Aboriginal and Torres Strait Islander people have for RNTBCs because of the imbalance between the primary Native Title Functions, which are not funded at all, and the secondary CATSI Act compliance requirements, which are funded in part by NIAA. The current arrangement in many cases essentially requires Native Title Functions to be undertaken on a volunteer basis. There are many ways that RNTBCs could be better supported including through better funding and internalization of costs to proponents of future acts.
8. **Proposed changes to the CATSI Act**
9. In light of the systemic issues highlighted above any proposed changes to the CATSI Act should aim to ease regulatory burden and simplify and streamline what is presently a complicated legislative scheme.

### **The CATSI Act: a form of positive racial discrimination**

10. The CATSI Act is a form of positive discrimination. It enacts a special measure that facilitates the advancement of a disadvantaged group. This is acknowledged in CATSI Act Review and it is important to approach the review of the CATSI Act bearing this in mind given that unless the CATSI Act can legitimately be seen as supported by the affected group and "appropriate and adapted to its beneficial purpose" it is simply a manifestation of racism.<sup>4</sup>

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<sup>2</sup> *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) r 8 and 8A

<sup>3</sup> Section 60AB of the NTA provides that RNTBCs may charge a proponent for the costs the RNTBC incurs when performing certain functions associated with a future act agreement under s 31(1)(b) of the NTA, alternative state or territory provisions, an ILUA, or the limited category of future acts provided for in the regulations. However this capacity to charge is not linked to any obligation on the proponent to pay or a consequence for the future act processes (such as suspension or freezing of time frames) of a failure to pay. While the NTA provides for RNTBC to operate on a cost recovery basis the practical reality is that where a proponent does not pay there is no recourse for the RNTBC. Further difficulties presented by operating on a cost recovery model include that it does not allow for long term planning and organizational sustainability.

<sup>4</sup> Australian Parliament Senate Finance and Public Administration Legislation Committee inquiry into the *Corporations*



11. Generally, it is difficult to see how the CATSI Act or the proposed changes meets the needs and expectations of Aboriginal people. The exclusive focus on regulation and compliance negates the significant barriers faced by native title holders to the creation and maintenance of vibrant and sustainable representative native title bodies for common law holders.
12. The remainder of this submission addresses specific proposals in the CATSI Act Review.

Issue / Proposal	KLC Submission
<b>Membership Management</b>	<p>The membership register should not be required to be published as a matter of course given that a similar requirement does not exist under <i>Corporations Act 2001</i> (Cth). Publishing membership lists also creates potential risks for personal safety and may not be consistent with the Privacy Principles.</p> <p>Members should not need to request to redact their contact details from the register, rather their details should not be published in the public domain and membership lists should be kept confidential to the corporation and ORIC but may be made available to members on request and for a specific legitimate purpose.</p>
<b>Modern communication methods</b>	<p>Corporations should record email and utilize email, social media and electronic means of communication to provide notices to members.</p>
<b>Membership approval</b>	<p>Implementing a time frame for directors to make decisions about membership approvals would be inappropriate given the limited resources available to many corporations to undertake relevant research in regard to the applicant for membership.</p> <p>The issue of membership approval could be contentious, particularly if the board genuinely lack knowledge of facts relevant to eligibility and needed to seek external assistance to determine applications.</p> <p>However, a mechanism to ensure that the corporation deals with membership applications, even if this process takes time, is desirable to balance the interests of the corporation and native title holders entitled to membership of their RNTBC. One such mechanism could be to require membership applications that have not yet been decided to be tabled at the AGM.</p>
<b>Membership cancellation</b>	<p>In regard to cancelling membership based on unsuccessful contact attempts, often the corporation does not know if the members details have changed because members are not required to respond to notices or provide updated contact details. Electronic communication may prove more reliable as people's address or phone number may change however their email or social media generally remain constant.</p> <p>It is important that membership cancellation provisions do not operate in a way that denies native title holders an expression of their determined native title rights and interests.</p>

Issue / Proposal	KLC Submission
<b>Size classification</b>	<p>The current system classifies a corporation's size based on whether it meets the thresholds for any two of three criteria relating to income, assets and number of employees.<sup>5</sup> The size classifications do not address the different types of activities undertaken by corporations and makes it difficult for corporations to self-assess what category they are likely to fall into. For these reasons it makes sense for revenue to be the only factor in determining size classification.</p> <p>Having only small and large categories for corporations and reducing reporting requirements for small corporations is also supported.</p>
<b>AGM</b>	<p>Measures to allow for an extension of time to hold an AGM when there is a death in community, natural disaster or cultural activity is appropriate however 30 days is not a sufficient length of time. A 60-day extension would be more appropriate.</p> <p>A 60-day extension should also be available under the circumstances outlined above for the submission of reports.</p> <p>Rules which allow meetings to take place via technology such as those that have been introduced to address the COVID-19 Pandemic are a useful option. These options should be made available and it should be a decision of individual corporation whether they wish to utilize them.</p>
<b>Chapter 5 – Officers of Corporations Executive remuneration</b>	<p>Reporting of executive remuneration should only be done if remuneration is above a specified level. The proposal for reform should take into account the difficulty in recruiting appropriate candidates to the sector particularly for CEO positions, and the consequent need to ensure that remuneration is sufficient to attract skilled and experienced candidates who may otherwise be able to gain more lucrative employment in the private sector.</p> <p>As a general principal, reporting requirements should not be more onerous or stringent than those imposed under <i>Corporations Act 2001</i> (Cth).</p>
<b>Model Rule Book</b>	<p>A well-designed, optional, model Rule Book for RNTBCs could be of practical assistance for new RNTBCs.</p> <p>Many RNTBCs do not have funding and a streamlined model rule book may assist those corporations however it is important to ensure the model rulebook is tailored to the particular situation including details of the native title determination and the how membership is consistent with the determination.</p>
<b>Related Party Benefit Provisions</b>	<p>As recognized in the CATSI Act Review, the related party benefit provisions are not well understood and are difficult if not sometimes impossible to implement in regional and remote communities with small populations and people with close family connections.</p>

<sup>5</sup> CATSI Act Review Draft Report p 31

Issue / Proposal	KLC Submission
<b>Dispute Resolution</b>	<p>The native title claim process can be complex and disputes may continue post-determination and detrimentally impact on RNTBCs' performance of its Native Title Functions as well as basic corporate compliance.</p> <p>It is important to recognize that resolution of disputes may not be possible and rather it is management of a dispute that will continue to exist that must be the goal. There should be increased support and assistance for RNTBCs to manage their own disputes and continue to effectively function notwithstanding the fact that some disputes may not be resolved.</p>