



2 October 2020

CATSI Act Review

National Indigenous Australians Agency
By email: CATSIActReview@niaa.gov.au

Dear Sir/Madam

Submission to CATSI ACT review draft report

The MCA appreciates the opportunity to contribute to the Australian Government's review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

The CATSI Act Review Draft Report represents an important step in the reform process to ensure a modern and future-focused regulatory framework that supports opportunity and prosperity.

Minerals industry intersection with the CATSI Act

The MCA represents Australia's exploration, mining and minerals processing industry with its members accounting for the majority of national minerals production. MCA members share a commitment to operating in a way that supports sustainable development for current and future generations.¹

The minerals industry's interest in the CATSI Act largely arises for two reasons:

- Native title covers much of the land on which minerals industry operates. A Registered Native Title Body Corporate is established to hold or manage native title on behalf of native title holders. Usually known as Prescribed Body Corporates (PBCs), these entities must be incorporated under the CATSI Act. PBCs are a key interface for industry regarding land use
- The minerals industry is also often a close partner of Indigenous organisations that provide community and essential services to Aboriginal and Torres Strait Islander people and communities.

A modern framework and guiding considerations

In making this submission, the MCA aims to contribute to a modern regulatory framework that:

- Better enables local communities and native title holders with which they engage to benefit from native title monies and other benefits associated with land use. Land use agreements associated with minerals development can be a significant source of income for native title holders. Cultural heritage services may be another importance source of income
- Ensure that industry can have confidence in the stability and governance of the native title and other organisations with which it engages and partners
- Is a modern and future orientated framework that supports shared opportunity and prosperity.

¹ See Minerals Council of Australia, [Enduring Value – The Australian Minerals Industry Framework for Sustainable Development](#), MCA, Canberra, 2015, p. 2

From the minerals industry perspective, it is important the following guiding considerations inform the Australian Government's approach:

- Governments have a responsibility to support a practical, stable and equitable native title system by ensuring:
 - Sufficient and consistent baseline funding and support for PBCs to undertake statutory duties. While fee-for-service and economic activities can provide important income streams, sufficient baseline funding is particularly important as PBCs establish foundations. Current arrangements should be urgently reviewed.
 - Guidance materials should be available to PBCs, land users and others covering good practice engagement, benefit management structure options and linkages between the CATSI Act and other regulatory and policy measures.
- Regulation should be proportionate and targeted to the issue being addressed and not applied where guidance or support would be sufficient. For example, guidance and educational material may address some concerns regarding transparency rather than regulation.
- Transparency measures should be meaningful and appropriate, focussed providing timely relevant, timely and non-commercially sensitive information to those with a legitimate interest in this information and avoid duplicative or burdensome requests.
- Parties providing advice to native title holders must uphold a high standard of conduct in accordance with professional requirements. A professional code of conduct could be developed where relevant professional standards are not available
- Any policy changes should be consistent with other policy objectives and outcomes, including measures proposed in the Native Title Legislation Amendment Bill 2019, COVID-19 economic recovery measures and other national objectives.

Comments

This section provides a summary of comments specific to proposals canvassed in the draft report. The MCA recommends NIAA undertake further consultation on each proposal.

Chapter 4 – Governance	
4.30 Aligning the CATSI Act size classification framework	Aligning the CATSI Act size classification framework with the Australian Charities and Not-for-profits Commission size framework would enhance consistency in terms and understanding.
Chapter 5 – Officers of corporations	
5.2-5.13 Greater transparency and accountability	<p>Noting concerns about personal information, a reasonable option to improve transparency and accountability could include making available the aggregated total salaries and benefits of senior officer and director salaries rather than remuneration of individuals.</p> <p>Publishing salary band information in annual sectoral analysis may assist PBCs to set appropriate salaries.</p>

Chapter 7 – Registered Native Title Bodies Corporate	
7.7-7.11 Transparency around native title monies	The MCA supports the proposal to enable the creation of trusts under the CATSI Act as a further option for parties.
7.12-14 Benefits management structures	<p>Through engagement with the National Native Title Council and charitable trust experts, the MCA considers that there is still a need for simple, tailored option to enable PBCs to unlock native title monies for economic development.</p> <p>For example, the MCA has been advised that ACNC guidance provides limited clarity on activities a charity may pursue in furtherance of a charitable purpose. Further information about ongoing complexities is outlined in the detailed NNTC PBC Economic Vehicle Status proposal (Appendix 1).</p> <p>The MCA also recommends the Australian Government invest in research to understand the features of leading practice benefits management structures.</p>
7.18-7.20 Proposed requirement that RNTBCs must report separately on native title benefits	<p>It is good practice for parties to benefits management structures to regularly communicate and consult on how these funds are deployed.</p> <p>It is important to note that the CATSI Act does not preclude PBCs from choosing to report on this information. Accordingly tailored guidance and support for PBC governance may assist to resolve native title concerns.</p> <p>Further consultation is required regarding the form of reporting to avoid burdensome requirements.</p>
7.21 Non-monetary benefits reporting	<p>In addition to financial benefits, land use agreements often include a range of non-financial benefits that aim to support native title holder aspirations and priorities in return for land access. These can include significant company investments in tailored employment programs and pathways and preferential Indigenous procurement policies.</p> <p>The MCA would welcome the opportunity to contribute to this important definition.</p>
7.22 Decision-making about the use of native title benefits	<p>The proposal to require PBCs to ‘consult and seek the consent of common law holders before native title benefits could be invested or otherwise applied’ should be carefully considered to understand its practical implications. This appears cumbersome, especially as in accordance with corporate governance practices benefits would usually be used in a way that aligns with the PBC’s corporate strategy and plan.</p>
7.24 Non-monetary benefits reporting	<p>While the MCA supports ongoing communication and engagement about the implementation of land use agreements, it is unclear how these would be incorporated into a definition of ‘non-monetary native title benefit.’</p> <p>The MCA would welcome the opportunity to contribute to reporting proposals, including an appropriate threshold.</p>
7.25 Potential extending of reporting requirements	<p>It is good practice for parties to benefits management structures to regularly report on funds, how they are used and other relevant information to beneficiaries. Tailored guidance and support to articulate expectations for communication and engagement on benefits management structures should be considered as a first step.</p>
7.26 ORIC’s regulatory role	ORIC’s regulatory role should be confined to regulated processes rather than the content of PBC decisions.

Critical opportunities

Supporting good practice with guidance

The MCA recommends that NIAA work with the native title sector, ORIC and participants in the native title system to develop a suite of good practice guidance. This would build on the existing resources available on the native title website administered by the Australian Institute of Aboriginal and Torres Strait Islander Studies.

As a starting point, this guidance could cover:

- Reporting to assist PBCs to meet native title holder expectations and needs
- Engagement to assist proponents, including mining companies, to understand how to best communicate, consult and partner with PBCs and native title holders
- Guidance for directors of boards seeking to recruit senior officers
- An introduction to PBCs, the CATSI Act and relevant regulation for proponents
- Benefits management structure options to raise awareness of options, including for land users
- Good practice for trustees and others with responsibilities for benefits management structures.

PBC-EVS

The MCA supports the NNTC's detailed proposal for a new economic vehicle status specifically for PBCs (see Appendix 1). It may also provide an incentive to modernise arrangements for holding and utilisation of financial benefits associated with land uses.

Next steps

Following phase two of the review, the MCA anticipates a third phase of consultation to discuss and further develop proposals canvassed in the draft report. This is critical due to the relatively short period for comments, importance of the framework and to ensure the final directions align with other policy changes being progressed.

The MCA looks forward to continuing to support a strong, stable and future-focused CATSI Act.

Please contact Jillian D'Urso, Manager – Social Policy, at jillian.durso@minerals.org.au for more information or questions about this submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Tania Constable".

**TANIA CONSTABLE PSM
CHIEF EXECUTIVE OFFICER**

APPENDIX 1: NNTC PBC ECONOMIC VEHICLE STATUS MODEL

Introduction

This document explains the Prescribed Bodies Corporate Economic Vehicle Status (PBC EVS) model, which seeks to address structural impediments which limit the ability of some native title groups to deploy native title funds for long-term economic development activities.

A PBC EVS would provide a targeted, fit-for-purpose option to enable Indigenous communities to 'close the gap' through their own investments in economic development.

Critically, a PBC EVS would represent a clear break from the notion that native title monies represent charitable welfare while applying similar tax concessions as for other entities focused on the self-determination of Indigenous peoples.

Having autonomy and choice – the right to determine one's own economic development and to manage their own internal affairs, including financing – is a principle of the United Declaration of the Rights of Indigenous Peoples (UNDRIP).

The PBC EVS adheres to UNDRIP by providing native title groups and corporations options for managing their own financial affairs that go beyond the charitable trust system.

This document outlines the background and reasoning of the PBC EVS and details the model for inclusion into the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) reform.

This document has been drafted by the following organisations and individuals:

- National Native Title Council
- Minerals Council of Australia
- Associate Professor Ian Murray, University of Western Australia.

History

The objectives of the initial work were identified by the [Taxation of Native Title and Traditional Owner Benefits and Governance Working Group](#), which reported to the Australian Government in July 2013 and made a range of recommendations, including legislation of the Indigenous Community Development Corporation model (ICDC).

The ICDC model was intended to fill the gap not yet addressed by a range of reforms in the lead-up to July 2013, most notably amendments to the Income Tax Assessment Act 1997 (Cth) in 2012 and 2013 that rendered native title benefits as non-assessable non-exempt income.

Following those tax amendments, the key gap was the existence of a sound and efficient governance structure that permitted the pursuit of Indigenous community development purposes not limited to the constraints of a traditional charity and public benevolent institution models, but with access to the same type of tax concessions.

There have been piecemeal attempts to address this gap through legislative and policy decisions. These include recognition in the Charities Act 2013 (Cth) that native title groups can be a sufficient section of the public (for Commonwealth, but not state purposes) and recent Australian Charities and Not-for-profits Commission guidance which accepts the charitable nature of addressing Indigenous economic disadvantage and following cases such as Word Investments that charities can use business as a means to pursuing their charitable purpose.

In 2018 and 2019, the NNTC supported by the MCA and Melbourne Business School convened seminars to understand whether these measures had sufficiently addressed structural impediments identified in 2013. The discussion from seminars show that the various challenges outlined below remained.

Reasons for the PBC EVS

Even with these recent developments, issues with the current regime which the PBC EVS model seeks to overcome include:

- The ACNC guidance provides limited clarity on the precise activities that a charity may legitimately pursue in furtherance of a charitable purpose focused on economic development for an Indigenous community. That may be in part because charity law is inherently uncertain. For example, there will be legitimate overlap between loans or grants to Indigenous businesses made for charitable purposes, and those that are made for the private benefit of the business owners.
- Whilst charities can accumulate funds, the ATO's administrative practice in relation to long duration and general purpose accumulation does not always fit well with the provision of intergenerational benefits within Indigenous communities.²
- Achieving practical resolution of the ambiguity about scope of economic development activities, accumulation and section of the public is difficult without legislative reform as (a) there are material consequences of failure, being invalidity of an entire trust and loss of tax exemptions; (b) individual test cases would be time consuming, expensive and unlikely to resolve all issues; and (c) general administrative guidance is likely to be difficult to formulate, is not binding on the main charity regulator (ACNC) and would also be required from state and territory attorneys-general, who retain oversight of charitable trusts.
- Complexity (with associated administration costs and potential for poorer governance) caused by having to use multiple entities to address the above issues, such as using a charitable trust, a discretionary trust (for direct grants to Indigenous businesses) and a PBC. It can also be caused by having to use multiple entities for different tax concession categories, such as environmental purposes (registered environmental organisation), cultural purposes (registered cultural organisation) and relief of Indigenous disadvantage purposes (public benevolent institution).
- Language: the language of 'charity' as applied to economic and cultural development for Indigenous Australians is seen as offensive by many.
- Trust compliance and regulation has been difficult.³

The timing of pursuing the model has become more urgent with two recent developments in native title: compensation and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) reform.

The recent high profile decision regarding compensation for the extinguishment and impairment of native title rights: *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7* (Timber Creek Compensation Case) has resolved some of the uncertainty in relation to native title compensation.

This welcome development will hopefully facilitate the long overdue settlement of native title compensation matters across the country. This development adds urgency to the requirement to overhaul the current charity-based models of native title wealth management to allow native title holders the best opportunity for real economic development.

The current review of the CATSI Act is a rare and ideal opportunity to establish the basis for the model. State charities law would then require amendment to give effect.

² See Australian Taxation Office TR 2015/1 'Income tax: special conditions for various entities whose ordinary and statutory income is exempt' (25 February 2015); TR 2011/4 'Income tax and fringe benefits tax: charities' (12 October 2011).

³ For example, see the Report on the Njamal People's Trust carried out by the Western Australian government, <https://www.parliament.wa.gov.au/council/tp-2278.pdf>

Principles

The PBC EVS model will:

- **Provide a simple and flexible vehicle** tailored for the specific needs of PBCs. The number of PBCs rose from 156 to 221 between 2015 and 2020.
- **Provide an optional and alternative vehicle to charitable trusts** to generate sustainable and long term social and economic benefits for current and future generations of First Nations peoples. It will do so by being required to be not-for-profit with a First Nations community development (economic, social and cultural) purpose. By providing more certainty about economic development activities, the PBC EVS would also materially reduce the need for non-charitable discretionary trusts. It is not, however, intended to carry out all of the current types of non-charitable discretionary trust activities in its own right.⁴
- **Provide more certainty about the range of economic development** activities that can be pursued than presently exists for charities (including public benevolent institutions) by articulating broad principles about how PBCs may carry out the following activities in pursuit of their purposes:
 - a) providing finance to native title holders to establish private businesses – an activity, the precise bounds of which are not presently clear for charities;
 - b) promoting investment in Indigenous economic activities.
- **Deliver benefits: receive tax exemptions at the federal and state level** commensurate with having a community development purpose⁵ with funds able to be rolled in and out of the model without any income tax (capital gains tax included) impediment.
- **Leverage native title rights and interests:** maintain past native title agreements i.e. no ‘re-litigation’ (required in statute).
- **Permit the ability** 1) to transfer funds from legacy trusts to the new PBC EVS and 2) enable existing PBCs to transition to the PBC EVS model.⁶

Status

Building on the original ICDC model, the PBC EVS is a status which could be granted to existing PBCs by fulfilling specific criteria set out in a separate chapter of the CATSI Act. This means that the PBC EVS can use the existing PBC structures and governance, rather than developing a separate corporate entity or trust.

Key criteria

The following criteria below are additional to the legal duties outlined in CATSI, which would remain in place for the PBC EVS.⁷

⁴ Where funds are received by First Nations members in their own right, the PBC EVS could, however, potentially still provide management and administration services to those members so long as this is incidental or ancillary to its purposes. From a tax integrity perspective, these funds would not receive any of the PBC EVS concessions, as the funds would belong to individual members of the First Nations community.

⁵ State payroll tax tests for exempt wages could be used as a relatively simple model for limiting the fringe benefits tax exemption to benefits provided to PBC EVS staff for work performed in connection with the relief of First Nations socio-economic disadvantage. That is, a subset of the PBC EVS’s purposes that align with public benevolent institution purposes. See, eg, *Payroll Tax Act 2007 (NSW)* s48(2). This would still permit use of one, rather than multiple, entities.

⁶ Permitting the transfer of assets to a non-charity will require amendments to state legislation and likely state and federal tax legislation. The necessary amendments to additional legislation under the PBC EVS, including transferring assets and tax reform, are not included in this document and can be provided separately.

⁷ Duty of care and diligence - (CATSI Act: section 265-1); Duty of good faith - (CATSI Act: section 265-5); Duty to NOT improperly use position or information - (CATSI Act: sections 265-10 and 265-15); Duty to disclose material personal interests - (CATSI Act: section 268-1); Duty to NOT trade while insolvent - (CATSI Act: section 531-1).

1. For purpose and not-for-profit nature of a PBC EVS

A PBC EVS must: (a) be able to demonstrate, by reference to the governing rules of the PBC EVS or by other means, its purposes and its character as a not-for-profit entity as defined in the PBC EVS criteria ; and (b) make information about its purposes available to the public, including members, donors, employees, volunteers and potential beneficiaries; and (c) comply with its purposes and its character as a not-for-profit PBC EVS.

2. Accountability of the PBC EVS to purpose, members, common law holders and potential beneficiaries

A PBC EVS must take reasonable steps to ensure that it is accountable to its community development purpose, which includes members, common law holders and potential beneficiaries as deemed fit by the corporation. The PBC's members, common law holders and potential beneficiaries should have opportunities to raise concerns with the PBC.

3. Suitability of responsible persons of a PBC EVS

A PBC EVS must: (a) take reasonable steps to ensure that each of its responsible persons meet the conditions mentioned in subsection X; and (b) after taking those steps: (i) be, and remain, satisfied that each responsible person meets the conditions; or (ii) if it is unable to be, or remain, satisfied that a responsible person meets the conditions, take reasonable steps to remove that person.

Structure and governance

The PBC EVS model was envisaged with a streamlined approach to existing PBC structures and governance, which means the registration, governance structure and membership criteria for the PBC would not change. The PBC Board would make high level decisions about any income or funding held through the EVS.

If the PBC chose, they could include the possibility of a separate PBC linked structure for large funds, or a separate board within the same PBC for the management of smaller funds. The concept of a separate board with a set number of prescribed Traditional Owner Directors and expert/Independent Directors in an advisory capacity was to minimise conflicts of interest, in a cultural/financial divide.

However, business and finance are cultural matters and strong cultural governance under a self-determination framework includes the ability to govern and manage all community matters, including business. This may be best achieved with one Board of Directors and additional sub-committees such as an audit and risk committee to ensure conflict of interest and any other issues are monitored independently from the Board.

Accountability to members and common law holders

As the PBC EVS is a for-purpose entity, the CATSI Act could include a stated fiduciary obligation (of directors and others involved in PBC EVS management) to the community development purpose of the corporation.

The purpose then encompasses all common law holders and potential beneficiaries, which may include: common law holders who are not old enough to join the corporation, future common law holders, other non-common law holder Indigenous members of the community and anyone else that the corporation deems to be part of the community for the purpose of the PBC EVS.

Mechanisms for the PBC EVS to ensure compliance to the fiduciary obligations and accountability to the purpose via the members, common law holders and any potential beneficiaries of the PBC EVS might include:

- Consultation with and consent by the members and common law holders for the purposes and holdings of the PBC EVS
- Periodic review by members and common law holders of the outcomes of the PBC EVS

- An agreed and culturally appropriate dispute resolution process to be used in the event of disputes between decision-makers, members and potential beneficiaries
- Recourse to an analogous body of law (charity law) for existing principles to help flesh out the content and application of the fiduciary obligations
- A high level of transparency by ensuring that all documents concerning the management of the funds are publicly available online (excluding any personal details of PBC members).

Trustees tend to report back to members annually. It may be useful to increase the frequency of financial reporting back to members to quarterly to ensure transparency to native title holders without over burdening PBCs.

Additional supporting documents that could be used by PBCs with EVS and provided to their members and potential beneficiaries:

- Strategic plan, which should include:
 - Not just inputs (e.g. money to be spent) and activities/outputs (e.g. 20 co-equity investments in homes) but also outcomes and impacts (i.e. what change is being pursued for recipients/the Indigenous community); and
 - Measurement and reporting about achievement of those outcomes and impacts.
 - Accumulation and distribution plan
- Investment strategy
- Annual audit plan for income over a set amount
- Local and culturally appropriate dispute management support.