VICTORIAN ABORIGINAL
HERITAGE COUNCIL

Office of the
Victorian Aboriginal
Heritage Council

Level 3, 3 Treasury Place
East Melbourne
Victoria 3002

T: 03 7004 7198
E: vahc@dpc.vic.gov.au

The Officer in Charge
CATSI Act Review
National Indigenous Australians Agency
PO Box 2191
Canberra ACT 2600

Via email only to; CATSIActReview@niaa.gov.au

Victorian Aboriginal Heritage Council
Submission in Response to the CATSI Amendment Exposure Draft

The Victorian Aboriginal Heritage Council (Council) welcomes the opportunity to make this submission in response to the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* Exposure Draft (The Draft Bill). The Bill proposes amendments to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth.) (CATSI).

By way of context, Council is a statutory body corporate established under s 130 of the *Aboriginal Heritage Act 2006* (Vic.) (AHA). It comprises up to 11 Victorian Traditional Owners expert in Aboriginal Cultural Heritage matters who are appointed by the Victorian Minister for Aboriginal Affairs. One of Council's main functions is the appointment, management, oversight and supervision of Registered Aboriginal Parties (RAPs) under the AHA. RAPs are local Traditional Owner corporations that discharge statutory functions *inter alia* in relation to the grant of authorisation of interference with Aboriginal Cultural Heritage within the area for which they are appointed. A Traditional Owner corporation is required to be incorporated under CATSI in order to be appointed as a RAP pursuant to s 150(2) of the AHA.

Council has previously made submissions in response to phase 1 and phase 2 of the CATSI Review. Most recently to The CTASI Review Phase 2 process. Council's submission to this Phase of the Review was dated October 2020.

Council's October 2020 submission noted (again) the essentially racially discriminatory nature of CATSI and the obligation to ensure that any amendment to CATSI and ultimately CATSI itself could be legitimately characterized as aa "special measure" for the purposes of the *International Convention for the Elimination of All Forms of Racial Discrimination* ("the Convention" and therefore the *Racial Discrimination Act 1975 Cth* - the "RDA").

Overall, the process of the CATSI Review inevitably means that the Draft Bill cannot be characterized as advancing a "special measure". This is because a determination as to whether a proposal constitutes a special measure can only be made by reference to the wishes of the group for whom advancement of their enjoyment and exercise equally with others of human rights and fundamental freedoms is sought.[1] More recent international jurisprudence regarding

[1] *Gerhardy v Brown* (1985) 159 CLR 70 per Brennan J at 135.

the special measures provision of the Convention identifies that the express consent of the affected group is a necessary prerequisite. [2]

In the covering letter to Council's October 2020 submission the (then) Council Chair, Rodney Carter, stated in part:

> *Having reviewed the CATSI Act Review Draft Report produced as a result of Phase 1 of the Review it is apparent that overwhelmingly the proposals contained in it are in substance the same proposals that were agitated in Phase 1 of the Review. In turn the proposals contained in Phase 1 of the CATSI Act Review were substantially identical to those proposals that were contained in the now lapsed Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018. Likewise, many of the proposals contained in that Bill originated in the Technical Review" undertaken by DLA Piper. Given this persistent repetition in proposals, despite frequent opposition to many of these that is articulated by Aboriginal and Torres Strait Islander peoples and their organisations it should come as little surprise that Council's responses to those proposals remain identical to that put forward in its submission to Phase 1 of the current CATSI Act Review.*

The Draft Bill continues this process of "consulting" without listening. The same proposals are recycled with regard to the articulated wishes of the affected "group": Australia's Aboriginal and Torres Strait Islander Peoples. What Council finds particularly disturbing is that this meaningless consultation is occurring subsequently to the Commonwealth and other Australian Governments solemnly entering into the July 2020 *National Agreement on Closing the Gap* ("National Agreement") Clause 18 of which states:

> 18. This Agreement is a commitment from all Parties to set out a future where policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership.

The processes of the CATSI Review not only offend Australia's obligations under international law but also undermine any credibility in the Commonwealth's commitment to the principles of partnership contained in the Nationally Agreement.

These deficiencies noted Council makes the following points:

Divergence from the Corporations Act

Council has previously submitted that particularly in light of the effective requirement imposed by legislation and funding program requirements that many Aboriginal and Torres Strait Islander organisations incorporate under CATSI it is simply racially discriminatory for CATSI to impose obligations or create unilateral regulatory powers that are divergent from those contained in the *Corporations Act 2001* (Cth.) ("CA"). In such cases it is difficult to imagine circumstances where such divergence could ever be justified as a "special measure". The exposure draft appears to create or exacerbate of number of such divergences from the arrangements under the CA.

[2] See, Patrick Wall, The High Court of Australia's Approach to International Law and its Use of International Legal Materials in *Maloney v The Queen Melbourne Journal of International Law* (2014) [15](1) at 17-18.

In this respect creating *obligations* on: the collection of member information; determination of membership applications; documents required at Annual General meetings; mandatory remuneration reports; presumptions of insolvency; and, the insertion of reference to replaceable rules would not appear to be reflected in the CA and are therefore offensive.

Size Classification of Corporations

Items 97 -99 relates to the size classifications of corporations and their consequent reporting requirements. The provisions repeat proposals that were contained in The Draft Report at 4.28 – 4.34. Given this repetition Council will repeat what it submitted in regard to this proposal in its October 2020 submission.

> *CATSI classifies corporations as small, medium or large based on an assessment of gross operating income, consolidated gross assets and number of employees. The relevant amounts are prescribed in the regulations.*
>
> *Reforms proposed in the 2018 Bill altered the basis of classification to be based purely on revenue. The specific revenue thresholds were said to be prescribed in the Regulations. ORIC had suggested that it is intended the prescribed amounts will equate with the levels prescribed in relation to the CA for companies limited by guarantee. These are: small – less than $250,000; medium – between $250,000 and $1 million; and, large – above $1 million.*
>
> *These classification levels are also those utilised by the Australian Charities and Not for Profit Commission (ACNC). The Explanatory Memorandum to the 2018 Bill noted that 30% of CATSI Corporations are also registered with the ACNC. Of course, this fact also means that **70%** of CATSI Corporations are **not** ACNC registered.*
>
> *The principle that the reporting requirements of CATSI corporations should equate to those of CA corporations is generally supported by Council. However, the proposed amendments raise some concerns. First, while it has the potential to reduce the reporting requirements for some small corporations it also has the potential to increase the reporting requirements for a number of current mid-size corporations. Often Victorian RAPs fall within this mid-size classification.*
>
> *Second, and more fundamentally, the equation of all CATSI corporations with companies limited by guarantee under the CA is inappropriate. While all CATSI corporations have a member (as opposed to shareholder) structure as do companies limited by guarantee under the CA not all CATSI corporations are established for public or community purposes as is usually the case with companies limited by guarantee.*
>
> *Many CATSI corporations are established for private business purposes. These companies equate more closely with Proprietary Limited corporations under the CA. In respect of a Proprietary Limited corporation the CA has only two classifications; small (revenue < $12.5m) and large (revenue > $12.5m). The proposed amendment would only operate to continue or increase the regulatory burden on CATSI corporations of this nature. In addition, it continues the false perception that CATSI corporations are*

*necessarily "social enterprises" when this is manifestly not the case as indicated by the fact that 70% of CATSI corporations are **not** ACNC registered.*

Proposals that are not discriminatory

As with previous proposal arising from the review process there are a number of proposals contained in the Exposure Draft operate to eliminate racially discriminatory provisions that are contained in the current CATSI. Elimination of these existing discriminatory provisions is supported. These proposals include: provisions relating to joint ventures; two person corporation; non-Indigenous directors (these are inappropriately termed, ,"Independent Directors"); and, related party transactions.

Native Title Provisions

Council fully accepts that CATSI corporations established to hold or manage native title rights and interests (Prescribed Bodies Corporate – PBCs) are in a unique position arising from the fact that due to the subject matter of the rights and interests in question they can only be held by Aboriginal and Torres Strait Islander Peoples and that these rights and interests are held collectively. This fact warrants particular rules being put in place for PBCs. In Council's view this fact also supports the recommendation contained in the Final Review Report that provisions relating to PBCs should be in a distinct chapter. Council is disappointed this recommendation has not be included in the Exposure Draft and would urge that it is in the final Bill.

Finally. Council notes the Final Report recommendation regarding benefit management structures and the advice that this matter that the National Indigenous Australians Agency is looking to implement this recommendation. Council looks forward to the implementation of this important initiative.

If you have any further queries in relation to the content of this submission please do not hesitate to contact the Director of the Office of the Victorian Aboriginal Heritage Council, Dr Matthew Storey, at matthew.storey@dpc.vic.gov.au or on 0419 578 504.

Yours faithfully

Michael Harding
Chairperson
Victorian Aboriginal Heritage Council

6 August 2021