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CATSI Act Review

Part 2—Powers and functions of Registrar

The changes in Part 2 are based on recommendations 4 to 9 of the final report which propose providing the Registrar with a broad range of lower level powers, and aligning the Registrar’s powers with those of the Australian Securities and Investments Commission (ASIC). Most recommendations are being taken forward as proposed although some have been slightly modified.

## Items 2 and 3—Enforceable undertakings

Recommendation 5 states:

*It is recommended the Registrar’s powers be expanded to be able to accept enforceable undertakings.*

This recommendation is being taken forward in the same way as was proposed in the 2018 Bill. Enforceable undertakings are an important tool for regulators that allow an increased scope to deal with non-compliance without recourse to the courts.

Item 2 adds a section that allows the Registrar to be able to accept an enforceable undertaking, and for that undertaking to be modified if both parties agree. It also provides that where a party breaches an enforceable undertaking the Registrar may apply to the court to have the undertaking enforced, or some other order issued.

Recommendation 6 states:

*It is recommended section 453-1 be amended to provide that a suspected contravention of an enforceable undertaking may be the subject of a report following an examination of a CATSI corporation*.

Item 3 gives effect to this by providing that following an examination, an authorised officer can report to the Registrar where they believe there may be a suspected breach of an enforceable undertaking.

## Items 4 to 12 and 20—Notice to produce books

Recommendations 7 and 8 are being taken forward as proposed and are aimed at expanding the Registrar’s powers to be more consistent with those of ASIC. Recommendation 7 states:

*It is recommended section 453-5 be amended to provide the Registrar with the power to specify a reasonable time within which to produce books.*

Recommendation 8 states:

*It is recommended the Registrar’s powers to issue notices to produce books be aligned with that of the Australian Securities and Investments Commission to require a person or entity to produce books relevant to a corporation’s affairs.*

Item 4 gives effect to these recommendations by inserting section 453-2 which replaces the Registrar’s existing power to require the production of books with broader powers based on ASIC’s powers to require the production of books. Both provisions impose legal duties to comply with the notices to produce. Subsection (3) reproduces much of the existing requirements with regard to notices to produce under subsection 453-5(2).

Subsection 453-2(4) empowers the Registrar to require the production of books immediately if it is reasonable in all the circumstances. This differs from the existing requirement under subsection 453-5(3) that a person must not be required to produce documents within a period less than 14 days after the notice is given. Allowing the Registrar to require the immediate production of books enables the Registrar to act expeditiously, for example, where there are concerns about the destruction, concealment or falsification of books.

Subsections 453-2(5) and (6), 453-3(2) and (3) and 453-4(2) and (3) all create a pair of offence and defence provisions based on the ASIC Act. The proposed offence provisions require proof of the fault elements, unlike the existing strict liability offence in existing subsection 453-5(5). This higher level of criminal responsibility justifies the larger penalty of 100 penalty units or imprisonment for 2 years, or both, compared to the existing penalty in subsection 453-5(5) of 30 penalty units or imprisonment for 6 months, or both. The defence provisions are justified because the legal burden of proving all elements of the offence is on the prosecution. In these circumstances, what might constitute a reasonable excuse is a fact that is uniquely within the knowledge of the defendant.

Subsection 453-3(1) is based on section 38 of the ASIC Act and 453-4(1) is based on section 39 of the ASIC Act. They both complement proposed section 453-2 by empowering the Registrar to require a person to state where books may be found, or who last had possession or control of the books and where they may be found; or to identify the property of a corporation and to explain how the corporation has kept account of that property. Both subsections impose a legal duty to comply with the requirement.

Because new section 453-2 now deals solely with production of books, 453-5 has been reframed to deal solely with requesting a person to provide information or answer questions. Items 5 to 10 create this change, and item 10 introduces a ‘reasonable timeframe’ to provide information or appear or answer questions, which may be immediately.

Items 11 and 12 make small amendments to the wording in sections 456-1, 456-5 and 456-10 to reflect the changes outlined in items 4 to 10 above.

## Items 12 to 19—Provide Registrar with same powers as authorised officers

Recommendation 9 is also being taken forward as recommended and states:

*It is recommended the CATSI Act be amended to:*

*• provide the Registrar with the same powers as authorised officers; and*

*• expand the sections of the CATSI Act that enable an authorised officer to inspect a corporation’s books and request a person to explain the material in those books, to model the rights currently granted to an auditor of a corporation under the CATSI Act.*

Items 12 to 19 in the CATSI Amendment Bill give effect to this recommendation by conferring the same powers as an authorised officer upon the Registrar, and enabling the Registrar or an authorised officer to request a person to explain the material in a corporation’s books The change of language from the specific reference of an ‘authorised officer’, to the more general term ‘person’, allows the provisions to apply more generally.

## Items 21 to 23—Penalty Notices

Recommendation 4 states:

*It is recommended the Registrar’s powers be expanded to include the ability to issue penalty notices.*

This recommendation is being taken forward in a different way but with the same principle intent. The Registrar already had the ability to issue penalty notices under section 566-5, but the offences had not been prescribed in the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations). Item 21 repeals existing section 566-5 and item 22 proposes a new Division 571 in relation to infringement notices that sets out the conditions and requirements governing infringement notices including when they can be issued and what information they should contain. Item 22 also provides for the payment period, extensions of the payment period, payment by instalments and withdrawal of the infringement notice. Item 23 includes the relevant definitions for these changes. The CATSI Regulations will be amended in accordance with the changes prescribed in the CATSI Amendment Bill and at that time offences will be included in the Regulations.