



Australian Government
National Indigenous
Australians Agency



NIAA

CATSI Act Review

Draft Report

31 July 2020

Working with Aboriginal and Torres Strait Islander peoples



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1. Introduction

Background

- 1.1 Corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) play a crucial role in delivering services and supporting economic development in Indigenous communities, particularly in remote Australia. The CATSI Act came into effect on 1 July 2007 to provide Indigenous corporations with a fit-for-purpose regulatory framework, making it easier for Aboriginal and Torres Strait Islander persons to form and manage corporations. The CATSI Act mirrors many requirements of the *Corporations Act 2001* (Corporations Act)¹, while providing the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander people.
- 1.2 Many Indigenous communities depend on CATSI corporations to deliver essential services, including land holding, housing, health, education, employment and native title services. The CATSI Act supports these corporations by promoting high standards of corporate governance and financial management. The CATSI Act also provides regulatory tools for assisting corporations in distress, such as special administration provisions.
- 1.3 The objects of the CATSI Act, as set out at section 1-25, are to:
 - a) provide for the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar); and
 - b) provide for the Registrar’s functions and powers; and
 - c) provide for the incorporation, operation and regulation of those bodies that it is appropriate for the Act to cover; and
 - d) without limiting paragraph (c)—provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate (RNTBC); and
 - e) provide for the duties of officers of Aboriginal and Torres Strait Islander corporations and regulate those officers in the performance of those duties.²
- 1.4 Since it commenced in 2007 the CATSI Act has proven to be an effective framework for regulating and supporting the economic development of Aboriginal and Torres Strait Islander corporations. Nevertheless, there are aspects of the CATSI Act that have been identified as requiring improvement. After thirteen years of operation, it is also important to update the CATSI Act so that it continues to be relevant to Aboriginal and Torres Strait Islander corporations, particularly as they face new challenges.
- 1.5 On 11 December 2019 the Minister for Indigenous Australians, the Hon. Ken Wyatt MP AM, announced a comprehensive review of the CATSI Act, building on a series of reviews undertaken in recent years. Responding to feedback from stakeholders for comprehensive consideration of the ongoing role of the CATSI Act, Minister Wyatt announced that this review would consider whether the CATSI Act is achieving its objects, particularly as a special measure under the *Racial Discrimination Act 1975*.

¹ The *Corporations Act 2001* (Corporations Act) is the primary legislation regulating companies in Australia and defines the laws dealing with business entities at both the federal and state levels. The Corporations Act is administered by the Australian Securities and Investment Commission (ASIC).

² Australian Government, *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, February 2020, available from <<https://www.legislation.gov.au/Series/C2006A00124>> [accessed 5 July 2020].



1.6 The Preamble to the CATSI Act states:

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

*The law is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders.*³

1.7 The Australian Human Rights Commission explains that special measures aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.⁴ Special measures are sometimes described as acts of ‘positive discrimination’ or ‘affirmative action’. They are allowed under federal anti-discrimination laws.

1.8 Once a special measure has achieved its purpose and substantive equality has been established, the measure should cease. A primary function of this review is to assess whether there continues to be a need for the CATSI Act as a special measure.

Development of the CATSI Act

1.9 In 2007 the CATSI Act replaced the *Aboriginal Councils and Associations Act 1976* (the ACA Act) which had been in place for over 30 years. At the time, the ACA Act was the primary vehicle for the incorporation of close to 3000 Aboriginal and Torres Strait Islander associations which played a central role in the delivery of government services at both the Commonwealth and State and Territory level.

1.10 Over the 30 year period the ACA Act was in operation, it was subject to multiple amendments and several reviews. Following two reviews, amendments were attempted in the 1990s but lapsed without changes to the legislation. The period covered by the ACA Act was one of the most significant times for the development of Indigenous corporations, and its sheer longevity without major amendment rendered it ultimately not fit-for-purpose.

1.11 In 2000 a comprehensive review of the ACA Act was commissioned and in 2002 the report on the review of the ACA Act (Review of the ACA Act) was provided to government.⁵

1.12 The Review of the ACA Act concluded that Indigenous people possess a range of characteristics which may disadvantage them when using statutes of general incorporation such as the Corporations Act. It noted that in order to reduce those disadvantages, the special needs of Indigenous people in the context of incorporation and corporate regulation must be accommodated. It also concluded that the special incorporation needs of Indigenous people were still best met through a general statute of incorporation which is tailored to the specific incorporation needs of Indigenous people.

1.13 The Review of the ACA Act recommended the enactment of a new Indigenous corporations Act to provide Aboriginal and Torres Strait Islander people seeking incorporation with key facilities of a modern incorporation statute such as the Corporations Act and special forms of regulatory assistance that would enable them to use corporations more effectively. Moreover the Review of the ACA Act recommended that the new Act be established as a special measure to enable Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities and attendant socio-economic benefits that incorporation could confer.

³ Australian Government, *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, February 2020, available from <<https://www.legislation.gov.au/Series/C2006A00124>> [accessed 5 July 2020].

⁴ Australian Human Rights Commission, *Special Measures* [Internet], 2020, available from <<https://humanrights.gov.au/quick-guide/12099>> [accessed 3 July 2020].

⁵ Corrs Chambers Westgarth, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976*, 2002.

1.14 In 2005 the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) was first introduced into Parliament, and after a significant amendment process, the CATSI Bill was passed in October 2006.

1.15 The Revised Explanatory Memorandum of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 states:

The Bill implements the key recommendation [of the ACA Act Review] by retaining a special incorporation statute to meet the needs of Indigenous people. The Bill introduces a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.⁶

Previous reviews

1.16 It is important to ensure that legislation remains relevant, contemporary and useful for the people and/or entities it is designed to benefit. This is even more critical for laws that are special measures, which must not remain in place once they have achieved their objectives. In 2016 the CATSI Act had been in operation for ten years, and the exponential growth of the Indigenous corporate sector during this time meant it was pertinent to look at the ongoing relevance of the CATSI Act.

2016 KPMG Review: Regulating Indigenous Corporations

1.17 In late 2016 the Department of the Prime Minister and Cabinet (the Department) commissioned KPMG to conduct a review to identify opportunities to improve the effectiveness of the Office of the Registrar of Indigenous Corporations (ORIC) and to enhance the CATSI Act.⁷ The resulting report, *Regulating Indigenous Corporations*, concluded that overall ORIC was doing a good job in a challenging regulatory environment, but there were significant opportunities to enhance ORIC's contribution to the better governance of Indigenous corporations in the future as it becomes a more modern, intelligence led risk-based regulator.⁸ The report went on to recommend that a technical review of the CATSI Act be undertaken, with a view to streamline, strengthen and better align it with mainstream corporate regulation.

2017 DLA Piper Technical Review

1.18 In July 2017 the then Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, announced an independent review to consider technical amendments to strengthen and improve the CATSI Act and align it with recent changes in corporate law and regulation, particularly changes in the Corporations Act (the Technical Review).⁹ The then Registrar of Aboriginal and Torres Strait Islander Corporations commissioned law firm, DLA Piper Australia, to

⁶ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.15, available from https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403 [accessed 3 July 2020].

⁷ At that time, the Indigenous Affairs Group—which is now the National Indigenous Australians Agency (NIAA)—was a division within the Department of the Prime Minister and Cabinet. On 1 July 2019, the NIAA became an Executive Agency.

⁸ KPMG, *Regulating Indigenous Corporations*, Office of the Registrar of Indigenous Corporations (ORIC), 15 December 2016, available from <https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations> [accessed 13 February 2020].

⁹ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <https://www.oric.gov.au/catsi-review> [accessed 11 February 2020].



undertake the review, which included a series of public consultations with stakeholders and sought submissions on a discussion paper.

1.19 The Technical Review included:

- a literature review of relevant materials including reports, articles and cases that would assist and inform the Review’s considerations;
- a review of changes and proposed changes to the Corporations Act in relation to the CATSI Act;
- consideration of the impact of the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) on companies incorporated under the Corporations Act; and
- preparation and dissemination of a discussion paper, and consultations with relevant stakeholders.

1.20 In late October 2017 the *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* report was provided to the Registrar. The Technical Review made 69 recommendations, across a broad range of issues arising from the terms of the review. It also identified a number of themes that emerged from stakeholder consultation including that:

- Indigenous corporations play a unique role in Indigenous communities and in the provision of services to Indigenous peoples;
- there is no ‘single’ form of CATSI corporation, and ‘one size does not fit all’;
- smaller CATSI corporations require additional support, and it is appropriate to reduce the regulatory burden that is imposed upon small CATSI corporations;
- while CATSI corporations look to the Registrar and ORIC for assistance and support, the autonomy of CATSI corporations requires that regulation is often based upon additional disclosure; and
- the Registrar can play a greater role with respect to certain matters relating to native title regulation.¹⁰

1.21 The themes identified in the Technical Review are important underpinnings to any consideration of changes to the CATSI Act going forward. They highlight the tension between getting the regulatory balance right to safeguard the interests of members and communities that rely on CATSI corporations, and ensuring that regulation does not impinge on the autonomy of CATSI corporations.

2018 Strengthening Governance and Transparency Bill

1.22 In 2018 the Department—which still had policy responsibility for the CATSI Act—undertook an internal assessment of the recommendations in the Technical Review. The Department recommended taking forward amendments to the CATSI Act based on 30 of the recommendations. Recommendations that were not taken forward included:

- A number of recommendations relating to external administration and insolvency as they would create unnecessary inconsistency between the insolvency laws applying to CATSI corporations and companies registered under the Corporations Act. This inconsistency would have led to additional regulatory complexity and would have been directly contrary to the intent to streamline the legislation.
- Twenty recommendations specifically relating to the governance of native title Prescribed Bodies Corporate (PBCs). These recommendations have informed the broader reforms of the *Native Title Act 1993* (NTA) led by the Attorney-General’s Department, which has resulted in the Native Title Legislative Amendment Bill that is currently before the Parliament.

¹⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2020].

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- 1.23 In mid-2018, the Department, in conjunction with ORIC, developed a Discussion Paper¹¹ outlining proposed amendments to the CATSI Act based on the relevant recommendations in the Technical Review. From 6 August 2018, ORIC conducted consultation on the proposed amendments for six weeks consisting of:
- public consultations in 14 locations across Australia attended by over 200 people;
 - one-on-one consultation sessions with 12 corporations;
 - four live radio broadcasts;
 - two presentations to around 100 people; and
 - 13 individual consultations with peak bodies, including native title bodies.
- 1.24 To promote the consultations as widely as possible the Registrar wrote to all CATSI corporations (approximately 3000) inviting them to attend public consultations and/or provide a written submission; and also offered key stakeholders one-on-one meetings.
- 1.25 The Registrar and the Department also met with the Prime Minister’s Indigenous Advisory Council, both at regular meetings and with individual councilors outside of meetings, to provide updates about the review and seek advice and direction.
- 1.26 The Department, in conjunction with ORIC, then developed a bill based on the recommendations of the Technical Review and feedback received through the consultation process. The Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 was introduced into the Senate on 5 December 2018, and was subsequently referred to the Finance and Public Administration Legislation Committee for inquiry.
- 1.27 Although there were only seven submissions to the Senate Inquiry (apart from the joint Department and ORIC submission), the majority called for greater consultation and a broader review of the CATSI Act as a special measure under the *Racial Discrimination Act 1975*. On 11 February 2019 the Committee handed down its report recommending that the Bill be passed. Labor and Australian Greens Senators lodged dissenting reports reflecting similar concerns to those of the submissions that the scope of the review had been too narrow and there had been insufficient consultation in relation to the proposed amendments.¹²
- 1.28 The Bill was not passed before Parliament was prorogued due to the 2019 general election being called and it subsequently lapsed in July 2019.

Comprehensive review of the CATSI Act 2019–20

Purpose

- 1.29 Following the 18 May 2019 election, Minister Wyatt, was sworn in as the first Indigenous Minister for Indigenous Australians on 29 May 2019. On 11 December 2019 Minister Wyatt announced a comprehensive review of the CATSI Act.

¹¹ The 2018 Discussion Paper and a summary of the Discussion Paper is available on ORIC’s website at:

<<https://www.oric.gov.au/catsi-review>>.

¹² Parliament of Australia, *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018*, 2019, available from

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/CATSIAmendmentBill2018/Report> [accessed 3 July 2020].



1.30 To address criticism of the 2018 review, this comprehensive review will consider:

- whether the CATSI Act is meeting its objects and continues to be desirable as a special measure for the advancement and protection of Indigenous people as set out in the Act's preamble;
- whether the functions and powers of the Registrar of Indigenous Corporations are appropriate, effective and adequate; and
- possible amendments to the CATSI Act to better support the regulation of CATSI corporations.

1.31 It will also consider the consistency and interaction of the CATSI Act with other relevant legislation, including the Corporations Act, ACNC Act and NTA.

Governance

1.32 The review is being led by the NIAA, and overseen by a Steering Committee comprised of senior officials from the NIAA, ORIC and other Commonwealth regulatory bodies. A Reference Group of key stakeholders is also providing advice and input to the conduct of the review.

Review structure

1.33 The review is being conducted over three phases: planning and establishment; review and consultation; and report and implementation.

Phase 1: Planning and establishment

1.34 The first phase (planning and establishment) commenced immediately after the review was announced by the Minister in December 2019 and finished at the end of February 2020.

1.35 In the planning and establishment phase, the review was launched by the Minister including the release of the CATSI Act review website and online survey inviting feedback in relation to those aspects of the CATSI Act that should be considered as part of the review. The survey was available on the NIAA's website from 11 December 2019 to 14 February 2020.

1.36 The NIAA received 60 responses to the survey and a further eight submissions were received via email. The NIAA published a Survey Summary Report in June 2020 which provides a snapshot of respondents' commentary according to themes.¹³ Governance was identified as the area that was important to most respondents, closely followed by the purpose of the CATSI Act.

Phase 2: Review and consultation

1.37 Phase 2 encompasses the review and consultation processes, and commenced in February 2020. Central to this phase is the development of this draft report which builds on the findings of the previous reviews.

1.38 To inform this draft report, a review has been undertaken of:

- previous reviews, including the 2002 Review of the ACA Act, 2016 KPMG review and the 2017 Technical Review;
- documents and feedback from the 2018 consultations on the proposed amendments of the CATSI Act including the discussion paper, written submissions received in relation to the discussion paper and written submissions made to the Senate Inquiry;
- the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018; and
- other relevant reports.

¹³ A copy of the Summary Report is available on the [NIAA website](#).

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- 1.39 A review of relevant legislation has also been undertaken, including any amendments or proposed amendments to the Corporations Act, ACNC Act and NTA since the Technical Review.
- 1.40 This draft report further incorporates suggestions and ideas received through the NIAA's:
- online survey as well as the written submissions received via email; and
 - consultation with ORIC staff and contractors who undertake examinations and special administrations.
- 1.41 Feedback is being sought on this draft report through a consultation process that has been developed to reach the widest possible range of stakeholders under the current constraints, including corporations registered under the CATSI Act, their members, and other interested stakeholders.
- 1.42 Stakeholders can provide feedback through a number of different channels, including by:
- completing the chapter surveys and/or the web-based general feedback form on the NIAA's website;
 - drafting a submission and emailing it to the CATSIActReview@niaa.gov.au mailbox;
 - registering for one of the NIAA's virtual pre-registered consultation sessions through the NIAA's website; and/or
 - joining one of the virtual 'drop-in' consultation sessions.¹⁴
- 1.43 If these options are not accessible, you can also email the CATSIActReview@niaa.gov.au mailbox or contact your nearest NIAA or ORIC office to discuss alternative feedback options.
- 1.44 The consultation period will be open from late July 2020 and close on 21 September 2020.
- 1.45 Relevant feedback will be incorporated into a final report to be presented to the Australian Government in October 2020.

Phase 3: Report and Implementation

- 1.46 On submission of the final report to government, phase 3 will commence. Implementation arrangements will be dependent on the final recommendations and the government response to the review.

¹⁴ Schedules for the virtual consultation sessions are available on the NIAA's website.



2. Objects of the CATSI Act

- 2.1 The CATSI Act establishes a framework for the incorporation, regulation and support of Indigenous corporations. The CATSI Act also provides for the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) and the Office of the Registrar of Indigenous Corporations (ORIC).
- 2.2 The CATSI Act's preamble states that it is a special measure for the purpose of the *Racial Discrimination Act 1975* and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(4) of ICERD provides that special measures will be considered not to constitute racial discrimination stating:
- Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.*¹⁵
- 2.3 While the CATSI Act is designed to mirror many provisions of the Corporations Act, it also has unique provisions that characterise it as a special measure. In this chapter, we discuss these provisions which include:
- incorporation provisions for Aboriginal and Torres Strait Islander corporations;
 - protection for members;
 - support for corporations; and
 - capacity building.
- 2.4 The special incorporation needs of Aboriginal and Torres Strait Islander people were identified in the Review of the ACA Act. In addition to socio-economic and cultural characteristics, the Review of the ACA Act identified special incorporation needs under the broad headings of the nature of some Indigenous corporations and the functions that Indigenous corporations may be expected to perform. In this chapter, we also look at whether these special incorporation needs exist today to help assess whether there is an ongoing need for the CATSI Act as a special measure under the *Racial Discrimination Act 1975*.

Unique provisions of the CATSI Act

- 2.5 The CATSI Act is important for Aboriginal and Torres Strait Islander people and communities. It is designed to be a modern incorporation statute that provides flexibility to corporations to operate in ways that reflect cultural practices. The CATSI Act also aims to recognise the unique characteristics of the Indigenous corporate sector, including but not limited to the remote localities of many corporations as well as the critical roles that many corporations play such as in delivering essential services to communities and managing native title rights and interests.
- 2.6 Feedback varies as to whether there should be an incorporation statute unique to the needs of Aboriginal and Torres Strait Islander people. The National Aboriginal Community Controlled Health Organisation (NACCHO) noted in its

¹⁵ United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination* [Internet], 1965, available from <<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>> [accessed 16 June 2020]. Australia ratified the ICERD on 30 September 1975.



submission to the Senate Inquiry into the CATSI Act amendment bill in 2019 that “[f]or Aboriginal and Torres Strait Islander peoples the CATSI Act is first and foremost a vehicle for us to achieve some measure of self-determination in modern Australia.”¹⁶ In contrast, other submissions and responses to the NIAA’s online survey noted the ‘racist’ nature of the CATSI Act, and advocated for its repeal.

- 2.7 Being a special measure, the CATSI Act is a form of positive discrimination. As such, it is unlikely that removing the CATSI Act would be beneficial for Aboriginal and Torres Strait Islander corporations and alternative models proposed in survey responses substituted one type of special measure for another under the Corporations Act. The Review of the ACA Act in 2002 also found alternative statutes would not provide the same level of support or meet the incorporation needs of Aboriginal and Torres Strait Islander people.

Incorporation provisions for Aboriginal and Torres Strait Islander corporations

- 2.8 Article 23 of the *United Nations Declaration on the Rights of Indigenous Peoples* states that:

*Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous [sic] peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*¹⁷

- 2.9 To this end, the CATSI Act supports Aboriginal and Torres Strait Islander groups to form corporations that enable them to undertake activities deemed to be a priority such as delivering health, housing and employment services or managing native title rights and interests. To ensure that corporations remain controlled by Aboriginal and Torres Strait Islander people, the CATSI Act includes an Indigeneity requirement that corporations must meet for the entirety of their incorporation. Under the requirement, at least a majority of a corporation’s members must be Aboriginal and Torres Strait Islander people, and at least a majority of a corporation’s directors must be members.
- 2.10 Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* relates to Indigenous people having the right to participate in decision-making regarding matters that affect their rights and in accordance with their procedures, including their right to maintain and develop their own decision-making institutions.¹⁸
- 2.11 To ensure participation in decision-making, subsection 246-5(1) of the CATSI Act requires that the majority of a corporation’s directors are Aboriginal and Torres Strait Islander people. Other incorporation provisions under the CATSI Act that are specific to Aboriginal and Torres Strait Islander people and are aimed at allowing CATSI corporations to be run in a culturally appropriate manner include:
- enabling CATSI corporations to hold meetings and maintain their books in languages other than English as long as there are English language translations available; and
 - providing for CATSI corporations to include rules in their rule books that take account of Aboriginal and Torres Strait Islander tradition and circumstances.
- 2.12 The CATSI Act also allows governance structures to include advisory committees such as elders’ councils that may embed these traditional values within modernised corporate structures.

¹⁶ National Aboriginal Community Controlled Health Organisation (NACCHO), *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 Submission No. 6*, 25 January 2019, available from https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/CATSIAmendmentBill2018/Submissions [accessed 16 June 2020].

¹⁷ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* [Internet], 2007, available from <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [accessed 16 June 2020].

¹⁸ *ibid.*

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- 2.13 Recognising that the role of the Registrar is to support Indigenous corporations, the CATSI Act requires that the Registrar have regard to Aboriginal and Torres Strait Islander tradition and circumstances in performing his or her functions and exercising his or her powers. This provision relates to the Registrar's administration of all aspects of the CATSI Act, and according to the Revised Explanatory Memorandum, it is another provision that confirms the CATSI Act as a special measure.

Protection for members

- 2.14 Protection for members is one of the key concepts underpinning the CATSI Act.
- 2.15 Subsection 246-5(3) of the CATSI Act requires that the majority of directors are members and the Revised Explanatory Memorandum to the CATSI Act states that this is to ensure that members' interests are protected.
- 2.16 Further, several of the Registrar's functions are aimed at protecting members, including:
- Providing factual and procedural advice about the registration, rules and operation of a corporation (subsection 658-1(1)(d)). These provisions aim to help resolve disputes and ensure that correct procedures are followed by establishing the Registrar as a source of independent information.
 - Assisting to resolve disputes, including at the request of members (subsections 658-1(1)(f) and (g)). The Registrar can provide this assistance in many forms including by providing advice, referring parties to independent mediation and arbitration services, and by investigating and responding to complaints made about corporations.

Support for corporations

- 2.17 The Review of the ACA Act noted that a new statute should enable a form of regulation which is more 'responsive' to the particular difficulties faced by members and directors; a system where the regulator provides a more active form of assistance to the corporation in meeting the relevant legislative standards or avoiding insolvency.
- 2.18 Under the CATSI Act, the Registrar is given the unique power to appoint a special administrator when a corporation is experiencing financial or governance difficulties. The aim of special administration is to return control of the corporation back to its members in better health. Without this provision, CATSI corporations experiencing difficulties would be likely to fail; possibly resulting in the cessation of essential services to communities, such as health and housing, or, the loss or mismanagement of native title rights and interests. Special administration is another provision that only benefits CATSI corporations and is not available to corporations incorporated under other statutes.
- 2.19 Special administration provisions are used by the Registrar on a regular basis to ensure the continuity of corporations registered under the CATSI Act. Since the commencement of the CATSI Act in 2007, 110 corporations have been put into special administration, of which, over 70 per cent were receiving some form of government funding to deliver services to the community and the remainder were mostly land holding corporations with a key role in native title administration. Of the 102 completed special administrations, over 90 per cent of corporations have been returned to the control of their members to continue delivering services to Indigenous Australians. All registered native title bodies corporate (RNTBCs) that have been placed under and taken out of special administration have been handed back to the members.
- 2.20 The Registrar's unique powers include safeguards for CATSI corporations that are located in remote or very remote regions and that may provide essential services or hold land. Relevant provisions within the CATSI Act that take account of the remoteness of some corporations, include:
- Conferring jurisdiction to a broad range of courts to hear CATSI Act matters. CATSI corporations and their members located in remote areas benefit by being able to access state courts including lower level courts.
 - Allowing the Registrar to appoint an authorised officer, who may not be a Commonwealth, state or territory employee or official but who may be suitably qualified, to exercise the powers or perform the functions of the

Registrar. This provision recognises that in some remote or very remote locations, there may not be a Commonwealth, state or territory employee or official available for appointment.

- Providing for the election of directors, for a corporation that has concluded special administration, via postal ballot to take account of corporations that may have geographically dispersed membership bases.

2.21 Another unique requirement to the CATSI Act is that CATSI corporations must have constitutions (known as rule books) that form part of the internal governance rules for how they should operate. Rule books are designed to support the successful operations of a corporation by guiding how a corporation should operate. Rule books in effect are a contract between the members and directors of a corporation.

2.22 Section 69-35 of the CATSI Act provides the Registrar with the power to change a corporation’s rule book on his or her own initiative in certain circumstances. Recently, the Registrar was able to effectively exercise this power to assist CATSI corporations to choose to adopt special rules in relation to the holding of meetings and making of decisions. These rules were developed by ORIC to assist CATSI corporations to respond to the impacts of COVID-19. They have enabled corporations to continue their business operations by:

- holding virtual meetings in light of restrictions that have prevented large groups of people from travelling and meeting; and
- enabling resolutions to be passed without holdings meetings if certain conditions have been met.

Capacity building

2.23 Another benefit to CATSI corporations is access to education and training programs provided by the Registrar. Section 658-1 of the CATSI Act outlines the functions of the Registrar which includes conducting public education programs on the operation of the Act and on the governance of Aboriginal and Torres Strait Islander corporations. This provision is specific to supporting CATSI corporations and is not replicated in either the Corporations Act or the *Australian Securities and Investments Commission Act 2001*.

2.24 As illustrated in Table 2.1, ORIC has been providing training to an increasing number of corporations each year with most participants reporting a ‘significant’ or ‘very significant’ increase in corporate governance knowledge following the training.

Table 2.1: Participation in training from 2012–13 to 2018–19

| Data item | 2012–13 | 2013–14 | 2014–15 | 2015–16 | 2016–17 | 2017–18 | 2018–19 |
|---|---------|---------|---------|---------|---------|---------|---------|
| Number of participants | 897 | 1015 | 886 | 865 | 943 | 1058 | 827 |
| Number of corporations | 198 | 194 | 169 | 208 | 260 | 254 | 261 |
| Participants reporting a ‘significant’ or ‘very significant’ increase in corporate governance knowledge | 92.5% | 91.1% | 90.0% | 88.2% | 92.1% | 97.4% | 84.0% |

Source: ORIC data.



Special incorporation needs of Aboriginal and Torres Strait Islander people

- 2.25 The CATSI Act aims to address the special incorporation needs of Aboriginal and Torres Strait Islander people articulated in the Review of the ACA Act. The nature of these needs may have changed since that time, but they nevertheless persist in some form.
- 2.26 The Review of the ACA Act found that in light of the special incorporation needs of Aboriginal and Torres Strait Islander people, the Corporations Act alone would probably not have provided an appropriate alternative to an Indigenous-specific incorporation statute, even if special regulatory assistance were available to Indigenous corporations. The review noted that this was particularly the case for small Indigenous corporations. Further, the review found that the special incorporation needs of the members of Indigenous corporations are not well catered for under other incorporation statutes, including those of the states and territories.

Social disadvantage

- 2.27 The Review of the ACA Act noted factors of social disadvantage that could present as barriers for some Aboriginal and Torres Strait Islander people to establish and manage corporations, including low education rates, low employment rates and English language challenges. A 2017 Australian Bureau of Statistics report noted that *'Aboriginal and Torres Strait Islander people are more likely than other Australians to experience various forms of disadvantage, including higher unemployment, poverty, isolation, trauma, discrimination, exposure to violence, trouble with the law and alcohol and substance abuse.'*¹⁹ Some of these forms of disadvantage could present a barrier to effectively forming a corporation, appointing or becoming directors, holding executives and directors to account for their management of a corporation, and understanding and enacting their rights as members. These barriers and challenges should not prevent Aboriginal and Torres Strait Islander people from developing their own organisations consistent with Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 2.28 The *2020 Closing the Gap Report* indicates that progress against the Closing the Gap targets has been mixed. For example:
- there has been progress made towards halving the gap for Indigenous children in reading, writing and numeracy but further improvement is required; and
 - in 2018 the Indigenous employment rate was around 49 per cent compared to around 75 per cent for non-Indigenous Australians.²⁰
- 2.29 Further, Aboriginal and Torres Strait Islander people who speak Indigenous language(s) proficiently may have less developed English language skills. According to the Australian Bureau of Statistics 2016 Census results: around 13 per cent of people in very remote Australia who spoke an Indigenous language as their main language at home reported that they spoke English 'not well' or 'not at all'; for Indigenous people living in remote and outer regional Australia this was seven per cent; for people in major cities this was four per cent; and three per cent for people

¹⁹ Australian Bureau of Statistics (ABS), *Social and Economic Wellbeing of Aboriginal and Torres Strait Islander People with Disability* [Internet], ABS, 2019, available from [https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20\(Feature%20Article\)~10001#:~:text=Aboriginal%20and%20Torres%20Strait%20Islander%20people%20are%20more,with%20the%20law%20and%20alcohol%20and%20substance%20abuse](https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20people%20with%20disability%20(Feature%20Article)~10001#:~:text=Aboriginal%20and%20Torres%20Strait%20Islander%20people%20are%20more,with%20the%20law%20and%20alcohol%20and%20substance%20abuse) [accessed 6 July 2020].

²⁰ National Indigenous Australians Agency (NIAA), *Closing the Gap Report 2020*, NIAA, 2020, pp 11 and 65, available from <https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf> [accessed 16 March 2020].



living in inner regional Australia.²¹ Not having strong English language skills can make it difficult to establish and manage a corporation as many related interactions may need to be undertaken in English, for example, meeting taxation and broader reporting requirements, interacting with auditors and regulators, and applying for funding and other kinds of support.

Cultural values and practices

- 2.30 In the design of a regulatory framework, it is important to understand the operating environment and for the supporting act and regulations to be fit-for-purpose. The Review of the ACA Act noted the impact that Aboriginal and Torres Strait Islander customs and beliefs can have on corporations' governance arrangements. There was a strong theme among responses to the NIAA's online survey that the CATSI Act could be further enhanced to better accommodate Aboriginal and Torres Strait Islander tradition and circumstances indicating that this is a requirement that prevails today.
- 2.31 Native title is the recognition that Aboriginal and Torres Strait Islander people hold rights and interests to land and waters under their traditional law and customs. These rights and interests are unique to each native title holding group and may extend to living on or accessing land, hunting, gathering or fishing in specific areas and engaging in cultural activities. Native title can include exclusive possession or consist of non-exclusive rights and interests that co-exist with non-Indigenous rights. Many native title holding groups have law and custom based decision-making processes. Native title rights and interests need to be responsibly and transparently managed for the benefit of common law holders. It is compulsory under the Native Title (Prescribed Bodies Corporate) Regulations 1999 that a corporation managing native title rights and interests be registered under the CATSI Act which includes provisions to ensure that corporations remain Indigenous controlled and that Aboriginal and Torres Strait Islander people are involved in decision-making.
- 2.32 'Sorry business' is one example of an Aboriginal and Torres Strait Islander custom that can impact on the operations of a corporation. This term refers to the traditional practices observed by many Aboriginal and Torres Strait Islander people when mourning the loss of a family member, when a family or community member is ill or imprisoned, or when a cultural connection to the land is lost. There is no set time period for sorry business and customs can vary between communities. Where sorry business relates to mourning the loss of a family or community member, the day-to-day business of the community can be suspended and external visitors may be asked to postpone any planned visits. These circumstances can make it difficult for Aboriginal and Torres Strait Islander corporations to meet pressing or time specific requirements or business related matters, including holding meetings, and preparing and submitting reports. To this end, the CATSI Act includes provisions that support CATSI corporations during these times and as part of this review, it is proposed to further extend these provisions. For example, by allowing corporations to access a 30-day time extension to hold an Annual General Meeting (AGM) for reasons including if there has been a death in the community (refer paragraph 4.39).

Nature of corporations

- 2.33 The Review of the ACA Act refers to corporations that have been established as a result of legislative requirements or Government policy. In 2002, examples of corporations in this category included those obligated to form due to requirements of the NTA or in order to receive Government funding. Similar legislative and policy requirements are in place today with some legislation mandating incorporation under the CATSI Act and a policy position requiring entities in receipt of funding through the Indigenous Advancement Strategy to incorporate under relevant

²¹ Australian Bureau of Statistics (ABS), *2076.0—Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2016* [Internet], ABS, 2019, available from <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2076.0Main%20Features1012016?opendocument&tabname=Summary&prodno=2076.0&issue=2016&num=&view=> [accessed 16 March 2020].



Commonwealth legislation; as a general rule, Indigenous corporations are required to incorporate under the CATSI Act.

Legislated

- 2.34 The NTA requires that if the Federal Court hands down a native title determination, it should also determine which corporation is to manage native title on behalf of common law holders. As noted in paragraph 2.31, corporations managing native title rights and interests are required to incorporate under the CATSI Act as it contains special provisions for RNTBCs. Further, RNTBC specific provisions under the CATSI Act have been designed to complement obligations under the NTA.
- 2.35 Subsection 150(2) of the Victorian *Aboriginal Heritage Act 2006* also requires that an applicant for registration as a Registered Aboriginal Party (RAP) must be a corporation registered under the CATSI Act. This requirement exists to ensure that RAPs:
- have in place sound governance frameworks;
 - can access the support provided by the Registrar and ORIC to CATSI corporations such as special administration, and education and training programs; and
 - can be both a RAP under the state legislation and a RNTBC under the Commonwealth legislation.

Policy

- 2.36 The Australian Government introduced its Strengthening Organisational Governance policy on 1 July 2014. The aim of the policy is to ensure that organisations receiving Australian Government funding to deliver Indigenous programs have high standards of governance and accountability. Organisations receiving grant funding of \$500,000 or more in any single financial year under the Indigenous Advancement Strategy administered by the NIAA are required to:
- incorporate under Commonwealth legislation—Indigenous organisations are required to incorporate under the CATSI Act and other organisations are required to incorporate under the Corporations Act; and
 - maintain these arrangements while they continue to receive funding.²²

Corporations' functions

- 2.37 Another special incorporation need identified in the Review of the ACA Act relates to the functions that Indigenous corporations may be expected to fulfil to facilitate social, economic and political objectives. The Review of the ACA Act noted that many of the existing corporations were not-for-profit and/or delivering community services such as housing, health, employment and legal services. Consequently, whole communities may be dependent on services provided by a corporation and when such a corporation fails, there may be no alternative service providers. While demonstrating the ongoing nature of special incorporation requirements, the diversity in corporation types also adds to the complexity in supporting CATSI corporations.
- 2.38 There remains a significant number of CATSI corporations that deliver essential services to communities, often in remote locations. As demonstrated in Table 2.2, as at 30 October 2019 there were hundreds of CATSI corporations delivering education, housing, municipal, and health and community services.

²² Funding received for capital works or through procurement activities are not subject to these requirements. Statutory bodies, government bodies and organisations operating under a specific piece of legislation are also excluded and Indigenous organisations already incorporated under the Corporations Act do not have to change their incorporation status to meet this requirement.

Table 2.2: Number of CATSI corporations delivering essential services as at 30 October 2019

| Nature of service | Number of CATSI corporations delivering service |
|----------------------------------|---|
| Education (including child care) | 277 |
| Employment and training | 452 |
| Health and community services | 661 |
| Housing | 302 |
| Municipal services | 99 |

Source: ORIC data.

Conclusion

- 2.39 The CATSI Act continues to fulfil an important role as a special measure, supporting and building the capacity of Aboriginal and Torres Strait Islander corporations, and we propose that the Act be retained. Areas considered as part of this review confirm the ongoing need for the CATSI Act as a special measure and suggest that further measures—as opposed to the weakening or removal of existing protections—are required to safeguard the unique interests of Aboriginal and Torres Strait Islander peoples. For example, the RNTBC chapter outlines issues associated with ensuring transparency around the holding, investment and use of native title monies for common law holders and suggests that the provisions outlined in the CATSI Act relating to the reporting requirements for entities dealing with native title monies need strengthening.
- 2.40 While we propose that the CATSI Act is retained as a special measure, the Act should be subject to periodic review to monitor progress and determine whether the measure has achieved its purpose. The CATSI Act has not previously been subject to a comprehensive review or assessment of the ongoing need for a special incorporation statute for Aboriginal and Torres Strait Islander corporations. Consequently, consideration should be given to including a requirement for the CATSI Act to be subject to regular review in order to assess this position at appropriate intervals. Other legislation established as special measures under the *Racial Discrimination Act 1975* include mechanisms for their review. For example, section 18 of the *Low Aromatic Fuel Act 2013*, which is a special measure under the *Racial Discrimination Act 1975*, provides for the relevant Minister to undertake a review of the operation of the Act as soon as possible after the introduction of the section and every five years thereafter.

Further ideas

- 2.41 As noted in paragraph 2.39, this review is finding that the protections for Aboriginal and Torres Strait Islander people included in the CATSI Act can be strengthened. Respondents to the NIAA's online survey raised a number of questions that they suggested should be considered as part of the review to which we are interested in hearing your thoughts, including:
- whether the CATSI Act is meeting the needs and expectations of Aboriginal and Torres Strait Islander people;
 - whether the CATSI Act is putting CATSI corporations on an even playing field with companies incorporated under the Corporations Act;
 - whether changes can be made to the regulatory and enforcement powers of the Registrar with particular consideration to the traditions and circumstances of Aboriginal and Torres Strait Islander people;
 - whether the CATSI Act is flexible enough to meet the needs of a whole range of different Aboriginal and Torres Strait Islander corporations; and

- how can the Registrar and ORIC better support corporations to pursue economic and community development opportunities?

Support for members

2.42 A few responses to the NIAA’s online survey questioned whether the Registrar should have greater oversight of Prescribed Bodies Corporate (PBCs), including the power to intervene in any disputes. The NTA provides for a Native Title Registrar and the Native Title Tribunal, however, PBCs are required to be incorporated under the CATSI Act. We would appreciate hearing your views on this matter. See also the chapter on RNTBCs and the CATSI Act.

Support for corporations

2.43 CATSI corporations perform a critical role in supporting Indigenous communities, including in regional and remote areas. As at 27 February 2020, there were 1256 CATSI corporations operating in remote or very remote areas, which represents almost 40 per cent of all CATSI corporations. As such, it is crucial that the Act supports corporations in these areas. We are seeking feedback as to whether changes could be made to the CATSI Act to better support corporations operating in remote or very remote areas?

2.44 One respondent to the NIAA’s online survey indicated that more consideration was required on how to better integrate governance structures with cultural practices to promote capacity building and corporation longevity. Another respondent suggested that as part of the review, opportunities for changes to the CATSI Act to better cater to the traditional and cultural customs of Aboriginal and Torres Strait Islander people should be considered. We would be keen to hear your thoughts and suggestions on both of these areas.

Capacity building

2.45 Some responses to the NIAA’s online survey showed that there is not necessarily a consistent and accurate understanding of the CATSI Act and its provisions. We would be interested in hearing your views on how the Registrar and ORIC can further develop the capacity of corporations, including ensuring that directors and members have a sound understanding of their roles and rights as well as those of others?

Table 2.3: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|--|--|
| Preamble | Special measure |
| Part 1-1, section 1-25 | Objects of the CATSI Act |
| Part 1-2, section 6-1 | Overview of the Act |
| Part 2-3, section 29-20 | Internal governance rules |
| Part 3-2, section 69-1, section 69-35 and section 72-5 | Rule book requirement Registrar can change a corporation’s rule book Corporation must provide member with rule book |
| Part 3-7, section 115-1 | Document access addresses for small and medium CATSI corporations |
| Part 5-2, section 201-5 | Request by members for directors to call general meetings |
| Part 5-4, section 220-10 | Members’ access to minutes |
| Part 6-2, section 246-1, section 246-5, section 249-10 and section 252-5 | Eligibility for appointment as a director Majority director requirement Removal by members Members can access information about directors’ remuneration |



| Section of CATSI Act | Discussion Area |
|--|--|
| Part 6-6, section 284-1 | Need for member approval for financial benefit |
| Part 6-6, section 342-5 | Members' access to reporting |
| Part 10-3, section 447-1 | Examinations |
| Part 11-2, section 487-1 | Registrar can put corporations into special administration |
| Part 16-3, section 658-1 and section 658-5 | Functions of Registrar Aims of the Registrar |



3. Powers and functions of the Registrar

- 3.1 The CATSI Act establishes the Registrar’s functions and powers. Amongst other things, the Registrar’s powers allow him or her to intervene when necessary to solve problems within corporations, including assisting with dispute resolution and examining the books of a corporation. The Registrar is also empowered to do all things necessary or convenient to enable the performance of his or her functions.
- 3.2 The Registrar’s powers conferred though the Act include the ability to:
- call Registrar-initiated general meetings and meetings of interested persons (sections 439-10 and 439-15);
 - direct a CATSI corporation to change its name (section 88-5);
 - apply various enforcement powers, including appointing authorised officers, examining a corporation’s books, requiring attendance to answer questions and applying for a warrant to seize books (Part 10-3);
 - appoint a special administrator to a CATSI corporation (section 490-1);
 - fulfil outstanding obligations of a deregistered CATSI corporation (section 546-30); and
 - intervene in court proceedings relating to a matter arising under the CATSI Act (section 581-1).
- 3.3 In this chapter, we discuss whether the powers and functions of the Registrar as outlined in the CATSI Act are sufficient to allow him or her to adequately support Aboriginal and Torres Strait Islander corporations.

Broader suite of regulatory powers

- 3.4 Effective regulatory frameworks include a range of enforcement options that are designed to allow a graduated and proportionate response to different cases of non-compliance. In the Technical Review, DLA Piper noted that the Registrar does not possess all of the regulatory powers of the Australian Securities and Investments Commission (ASIC).²³ For example, currently the only action open to the Registrar where a corporation has failed to lodge reports is to consider commencing a criminal prosecution and refer a matter to the Commonwealth Director of Public Prosecutions for this purpose. Depending on the facts of the case, this may be a heavy-handed response to what might be a minor regulatory breach. Unlike ASIC, the Registrar does not have the power to impose fines by way of infringement notice, which may be more appropriate, particular if the breach is the first offence by a corporation.
- 3.5 DLA Piper further reported in the Technical Review that some stakeholders expressed the view that the Registrar and ORIC require additional powers which are less severe in scope or consequence to supplement existing powers. In other words, there is a perceived gap in the regulatory tools that are currently at the Registrar’s and ORIC’s disposal, and there is a view that a wider range of powers (and resulting regulatory and support options) is needed.²⁴
- 3.6 Changes to the Registrar’s powers were recommended in the Technical Review, and were included as amendments in the proposed Strengthening Governance and Transparency Bill. At that time, feedback received during consultations was generally very positive about introducing lower level powers for the Registrar:

²³ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, p. 177, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2019].

²⁴ *ibid.*, p.173.

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- *“It would be a positive step to see ORIC adopt an intervention methodology that began with constructive support and progressed towards fines whereby legal threats and litigation were only used as a last resort”*
 - *“Bring the investigation and enforcement regulations into line with the ASIC purview of rules and regulation and allow the Registrar to administer and address the lower-level compliance issues within a much tighter time frame accordingly”*
 - *“...generally supports the proposal to introduce lower level powers such as fines and enforceable undertakings to address situations which are less serious, bringing the powers of the Registrar more in line with those of ASIC”*
- 3.7 It is proposed to expand the powers of the Registrar to include a suite of lower level discretionary powers, modelled on those of ASIC, including the power to issue fines. This would enable the Registrar to respond in a proportionate manner, reflecting the nature of the breach.
- 3.8 Finally, while the Registrar does have some dispute resolution powers under the CATSI Act, these are currently relatively limited. The need for early intervention mechanisms, particularly in the native title sphere, were discussed at length during the consultations on the Technical Review and *“many participants saw benefit in developing alternative avenues to resolve disputes outside the judicial system”*.²⁵ This chapter seeks your views on what such alternative avenues might look like.

Enforceable undertakings

- 3.9 An enforceable undertaking is an administrative settlement that can be accepted as an alternative to civil court action or other administrative actions and is legally enforceable. The use of enforceable undertakings allow the regulator flexibility to reach outcomes that can be more comprehensive than that of the court, which is subject to some restrictions.²⁶ An enforceable undertaking can also avoid the Registrar having to take prosecution action for relatively minor breaches of the Act. Both the Australian Competition and Consumer Commission (ACCC) and ASIC use enforceable undertakings. However, the Registrar does not currently have the power to accept enforceable undertakings from corporations.
- 3.10 The Technical Review recommended that the Registrar be given equivalent powers to ASIC to not only accept enforceable undertakings, but also to take action to enforce such undertakings. There was also general support among the written submissions to the Technical Review for the Registrar to be able to accept enforceable undertakings, including one submission which stated that: *“The Registrar should be given the power to accept enforceable undertakings and to take action to enforce such undertakings rather than undertake a prosecution in the first instance for breaches of the CATSI Act.”*
- 3.11 It is proposed that the Registrar’s powers be expanded to accept enforceable undertakings as well as to identify situations where the corporation is failing to fulfil the undertaking it has made. Currently, section 453-1 of the CATSI Act allows the Registrar to appoint an authorised officer to examine the books of a corporation or related body corporate and report to the Registrar on the results of that examination, at any time. Enhancements to this section could provide that a suspected contravention of an enforceable undertaking may also be the subject of a report following an examination of a CATSI corporation. This will equip the Registrar with the necessary powers to identify contraventions and act accordingly.

²⁵ *ibid.*, p. 254.

²⁶ Nehme, Marina, *Enforceable Undertaking: A Restorative Sanction?*, 36(2) Monash University Law Review, 2010, p.129.



Investigation powers

- 3.12 Investigations are a key underpinning of ORIC's regulatory approach and the CATSI Act provides the Registrar with a range of powers that may be used in investigations.
- 3.13 The Registrar may use his or her investigations powers to look at alleged breaches of the CATSI Act or other law. The Registrar may, based on the evidence available and nature of any breach, undertake civil litigation (including on behalf of a corporation), or refer a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) in relation to criminal matters. This action may be taken in relation to corporations or individuals depending on the matters at hand.

Notice period

- 3.14 Another area where there is currently a misalignment between the powers of ASIC and those of the Registrar is in relation to provisions around the production of books. Currently under section 453-5 of the CATSI Act, the Registrar is required to give a person 14 days' notice to produce books. Such a delay can frustrate prompt regulatory action, particularly in cases where it would be appropriate and reasonable for the Registrar to require immediate production of books. By comparison, ASIC is empowered to specify what it considers would be a reasonable time for the person served to respond to the notice. The review undertaken by KPMG in 2016 supported changes to the 14 days' notice period for the production of books, and agreed with ORIC's suggestion that the Registrar's powers should be amended to reflect those of ASIC, allowing the Registrar to specify what is a reasonable time.²⁷

Issuing notices

- 3.15 The Registrar's powers to issue notices to produce books is also limited compared to ASIC's powers. ASIC has extensive powers that enable it to require a person or entity to produce books relevant to a corporation's affairs, and these powers extend to auditors and liquidators. The Registrar may only compel the production of books from someone who the Registrar, on reasonable grounds, believes to have some knowledge of the examinable affairs²⁸ of an Aboriginal and Torres Strait Islander corporation. It would be beneficial for the Registrar to have similar powers to ASIC in regard to issuing notices for the production of books. This would also require the Registrar to have a further power to compel the production of books, if the books are not produced initially. This may be a further notice, or another form of regulatory action.

Accessing and reviewing a corporation's books

- 3.16 There are some inadvertent limitations in the language used in section 456-10 of the CATSI Act which means that while an authorised officer²⁹ is expressly permitted to use the books from a CATSI corporation that have been produced or seized under a warrant for a proceeding (subsection 456-10(4)), there is no express provision for the Registrar for this purpose. Likewise, an authorised officer is expressly permitted to make copies of said books (subsection 456-10(3)), but the Registrar is not.

²⁷ KPMG, *Regulating Indigenous Corporations*, ORIC, 15 December 2016, available from <<https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations>> [accessed 13 February 2020].

²⁸ Section 700 of the CATSI Act defines the examinable affairs of a corporation as meaning: (a) the promotion, formation, management, administration or winding up of the corporation; or (b) any other affairs of the corporation; or (c) the business affairs of a connected entity of the corporation in so far as they are or appear to be, relevant to the corporation; or anything that is included in the corporation's examinable affairs because of (a) and (b).

²⁹ The CATSI Act provides for the Registrar to appoint a suitable person as an 'authorised officer' for the purposes of carrying out enforcement functions. The functions and powers of an authorised officer are outlined in various parts of the CATSI Act and include (but are not limited to): undertaking an examination and reporting to the Registrar on specific matters; applying to a magistrate for a search warrant; and inspecting and making copies of a corporation's books.



3.17 To this end, it is also proposed that 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. This would ensure that an authorised officer could request information, explanations and other assistance from a company officer, as well as from a person who produced books to the authorised officer or who was a party to the compilation of those books.

Subjects of powers

3.18 Lastly, under section 84 of the ASIC Act, any power exercisable over a body corporate is extended to a person who is, or has been, an officer or employee of the body corporate. In other words, ASIC's powers are not confined to the corporation, but apply to anyone who has worked for, or been an officer of, the corporation. The Registrar does not have the same power, which potentially limits relevant avenues of investigation.

Conclusion

3.19 Expanding the Registrar's powers to include a broader suite of regulatory responses will enable a more proportionate intervention when required, and better support Aboriginal and Torres Strait Islander corporations, particularly those who may be at risk of poor governance or financial management. Being able to provide this type of support is generally consistent with the expectations of stakeholders as illustrated by a submission to the Technical Review which stated:

[T]here is a need for ORIC to find a balance between providing support and oversight to CATSI Act Corporations, while preserving their self-determinative rights of governance. The stance that we hold at present is that the present attempt by the legislation to limit ORIC's powers has left it in a situation in which it can only intervene after disaster has struck, and that it does not have the ability to make targeted, minimalist interventions on application of a Corporation to address particular concerns.³⁰

Further ideas

3.20 We are seeking feedback about whether there are powers available to other Commonwealth regulators that are not currently available to the Registrar, and that would assist the Registrar to better support CATSI corporations. In particular, we are seeking feedback on the following:

- Which powers would be most appropriate and why?
- Should these powers be replicated for the Registrar or altered in some way to better support CATSI corporations?

3.21 Under the CATSI Act, the Registrar can help corporations resolve disputes. In particular, the Registrar can provide general advice, a formal advisory opinion, and facilitate conferencing between parties. Further, ORIC staff can attend corporation meetings as observers and present information or provide advice. We are seeking feedback on whether the current dispute resolution powers of the Registrar are adequate and/or appropriate. If not, how could they be enhanced?

³⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* ORIC, 2017, pp.173-4, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2019].



Table 3.1. Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|--|---|
| Chapter 5 | Registrar’s power to call meetings |
| Chapter 10 | Regulation and enforcement |
| Part 10-2, Division 439 | Regulation of CATSI corporations |
| Part 10-3, Division 453 and section 456-10 | Examination of books and persons Powers where books produced or seized |



4. Governance

- 4.1 The CATSI Act outlines governance standards designed to meet the needs of Aboriginal and Torres Strait Islander people. For example, requiring that the majority of a corporations' directors and members are Aboriginal and Torres Strait Islander people to ensure that corporations are Indigenous controlled.
- 4.2 Sections 658-1 and 658-5 of the CATSI Act set out the functions and aims of the Registrar and in carrying out those functions and aims, the Registrar supports and regulates CATSI corporations by:
- providing advice in relation to incorporation requirements;
 - training directors, members and key staff on good governance practices;
 - monitoring corporations' compliance with CATSI Act requirements; and
 - intervening when needed.
- 4.3 In the survey conducted by the NIAA seeking input to this review, governance was the area that was important to most survey respondents.³¹
- 4.4 In this chapter, we consider how the CATSI Act supports corporations to:
- manage their membership bases;
 - establish appropriate corporate structures and consider their corporation size;
 - manage their meeting and reporting obligations; and
 - develop and utilise their rule books.

Membership management

Contact details

- 4.5 Indigenous corporations are ultimately controlled by members and, therefore, corporations need to know who their members are to understand who is entitled to receive notices and other information, and who can participate in member meetings. Consequently, subsection 180-1(1) of the CATSI Act requires that corporations establish and maintain a register of members, and subsection 180-5(1) requires that the register include each member's name, address and date when the member's name was added to the register. This requirement could be updated to explicitly allow the collection of email addresses and phone numbers for members which may make it easier and less costly for corporations to contact members.
- 4.6 Members can provide corporations with alternative contact details to receive notices of meetings but corporations are not required to record these details in their register of members and are not permitted to use these details for other purposes such as determining that the member is non-contactable when deciding to cancel their membership (refer paragraphs 4.15 to 4.17). The Technical Review recommended changing the CATSI Act to oblige corporations to attempt to contact potentially uncontactable members using alternative contact details, where the corporation has not been able to contact members at their registered addresses for a period of not less than 11 months.
- 4.7 Using alternative contact details should make it easier for corporations to contact members and ensure that members are kept informed of the corporation's operations. This could be achieved by requiring corporations to record a member's alternative contact details in the corporation's records and to use them in addition to a member's

³¹ Of 60 survey respondents, 57 identified governance arrangements as important to them.



primary contact details for issuing notices of meetings as well as other communication with members, including when considering cancelling membership (refer paragraphs 4.15 to 4.17).

Contacting members

4.8 Feedback received in response to the NIAA's online survey as well as the Technical Review indicated that enabling corporations to use other methods such as email to notify members may result in more effective and timely communication. In paragraph 4.5, we discussed corporations collecting email addresses and telephone numbers from members to make it easier to contact them. We are seeking feedback in relation to whether corporations should be able to determine the nature of contact that would be acceptable when contacting members. For example, would social media and community noticeboards be acceptable forms of contact? We would also like feedback on how corporations would make this decision, such as through a resolution at a general meeting?

Redaction of member details

4.9 Each CATSI corporation maintains a register of members which is provided to the Registrar each year as part of the corporation's annual general report. The Registrar subsequently publishes CATSI corporations' member lists on the public register available on ORIC's website. In response to feedback received during the CATSI Act amendment consultations in 2018, the Registrar announced in October 2019 that ORIC would no longer publish member addresses by-default on the ORIC website. However, members' addresses are recorded on a corporation's register of members, and under section 180-22 of the CATSI Act, any person is entitled to inspect the register.

4.10 There was general support among the submissions made to the Technical Review to redact personal information from membership registers in the interests of ensuring safety of members. We are seeking your views on whether you support personal information being redacted from a corporation's register of members and if so, how to practically implement such a change. We would like to hear your responses to these questions:

- should the relevant member have to request that their information be redacted from the register, or in some circumstances, should the corporation be able to make such a decision on behalf of the member;
- if members are required to submit a redaction request, should the request be submitted to the corporation or in some circumstances, could it be submitted to the Registrar directly;
- should there be a threshold for requesting the redaction of personal information, such as personal safety;
- how would members be able to organise a meeting without access to the personal information of other members;
- how should such a request be recorded; and
- should some of the points above be matters for corporations to decide?

Membership approval

4.11 One response to the NIAA's online survey raised that there is no requirement for boards to make a decision in relation to membership applications within a specific timeframe. We would like to hear whether you think that the CATSI Act should include a statutory timeframe within which corporations need to consider membership applications and if so, the appropriate length of such a timeframe. For example, would three months be appropriate to align with quarterly directors' meetings?

4.12 Related to the point above, a submission to the previous review of the CATSI Act noted the significant power that boards have in relation to accepting or rejecting membership applications. The submission suggested that where a membership application is rejected despite an applicant meeting all of the membership criteria, the applicant could request a meeting of all of the corporations' members to reconsider the application. The submission further suggested that there should be timeframes within which the applicant can request the meeting and within which the meeting must be called as well as a specified quorum of members to consider the membership request.

- 
- 4.13 The same submission proposed that where a member wishes to challenge the acceptance of a person's membership, the existing rules regarding the requisitioning of a member's meeting should apply. Similarly, the submission proposed that the requisition should be required within a nominated timeframe and a specified quorum of members need to consider the challenge.
- 4.14 Please let us know any thoughts you may have in relation to the two proposals outlined in paragraphs 4.12 and 4.13.

Membership cancellation

- 4.15 In specific circumstances, corporations can cancel memberships including when a member is uncontactable. Subsection 150-25(3) allows corporations to cancel a membership on the grounds that a member is uncontactable, if the corporation has:
- been unable to contact the member at their address recorded on the corporation's register of members for a period of two years; and
 - made two or more reasonable attempts to contact the member during that two year period.
- 4.16 Feedback received during the consultation process for the previously proposed amendments to the CATSI Act included:
- both support for and against the reduction of the non-contactable period for the purposes of cancelling memberships from two years to 12 or fewer months;
 - a variety of ideas about the appropriate form of attempted contact and the number of attempts that should be made before membership is cancelled.
- 4.17 If the non-contactable period for cancelling memberships was to be reduced from two years, we are seeking your ideas on how this might work in practice, including the:
- length of an appropriate non-contactable period, for example, would the 11 months recommended by the Technical Review be appropriate; and
 - number of attempts that should be made to contact an uncontactable member, how long there should be between each attempt and the acceptable form of attempted contact?

Corporate structures

- 4.18 Providing CATSI corporations with greater flexibility in designing their corporate structures can generate more options for social, economic and community development. Making it easier for CATSI corporations to establish subsidiaries or enter into joint ventures will in turn expand business opportunities for Indigenous communities.

Subsidiaries and joint ventures

- 4.19 Establishing wholly-owned subsidiaries is difficult under the CATSI Act as the majority of a corporation's directors must also be members of a corporation under subsection 246-5(3), and while members can be individuals or body corporates, directors must be individuals (i.e. natural persons). Consequently, a CATSI corporation could not be established as a subsidiary with only one corporate member unless a class of members is established for individuals who can be directors. A way around this is for CATSI corporations to establish subsidiaries by ensuring the majority of directors are members of the subsidiary for the term of their directorship, and the sole corporate member is the only member with voting rights. While effective, this solution imposes unnecessary administrative burden on corporations.
- 4.20 Amending the CATSI Act to change the current membership and directorship provisions for corporations with corporate members to make it easier for CATSI corporations to establish subsidiaries and joint ventures would assist



with growing Aboriginal and Torres Strait Islander businesses and ensure that corporation structures are fit-for-purpose. The CATSI Act could be changed to allow a:

- corporation to establish a wholly-owned subsidiary CATSI corporation unless prohibited by its rule book; and
- group of entities to establish a CATSI corporation, similar to a joint venture where the majority Indigenous membership requirement (the ‘Indigeneity requirement’) is met by the parent entity or group of entities.

4.21 This proposed amendment is consistent with the Technical Review which recommended allowing an entity or group of entities to establish a CATSI corporation as a subsidiary or joint venture entity if the entity or group can satisfy the Indigeneity requirement in section 29-5 of the CATSI Act. There was general support among submissions to the Technical Review for this recommendation, including one submission which stated:

“The Act should be amended to allow CATSI corporations to be wholly owned subsidiaries from another CATSI corporation. The existing requirement to have a majority of personal members is complex, confusing, unnecessary and costly.”

Two-member corporations

4.22 Two-member corporations can also be challenging to establish under the CATSI Act. While subsection 29-5(b) allows for the registration of two-member corporations where at least one member is an Aboriginal or Torres Strait Islander person, subsection 246-5(1) requires that the majority of a corporation’s directors be Aboriginal or Torres Strait Islander persons. In the event that two people intend to establish a CATSI corporation, one of whom is an Aboriginal or Torres Strait Islander person and the second of whom is non-Indigenous, a third Aboriginal or Torres Strait Islander person would need to act as a director.

4.23 The Technical Review recommended removing the requirement in subsection 246-5(2) that a majority of directors be Aboriginal and Torres Strait Islander persons in circumstances where a CATSI corporation is established with two members, one of whom is an Aboriginal and Torres Strait Islander person and that person has a casting (deciding) vote. Making it easier for two people to establish a corporation, where only one of whom is an Aboriginal or Torres Strait Islander person, will encourage small business and entrepreneurship, particularly in the case of spouses. We consider there would be merit in adopting this recommendation of the Technical Review.

Complex structures

4.24 In some circumstances, corporations establish very complex corporate structures—usually native title entities. These complex structures may develop for a range of reasons including the establishment of separate entities to manage native title rights and interests, to reduce tax and manage risk, or simply due to poor advice from advisers. Complex corporate structures can be costly to establish and maintain, and can limit transparency to members and common law holders in relation to the receipt and use of native title benefits. While consideration needs to be given to supporting more flexible corporate structures, there is also a need to provide transparency of these structures. The CATSI Act could be amended to provide members with improved visibility of corporation structures by requiring corporations to include in their annual report to the Registrar:

- information about their corporate structure, for example, where the CATSI corporation has associated subsidiaries and/or trusts; and
- the names of the key management personnel such as the Chief Executive Officer (CEO), Chief Operating Officer and Chief Financial Officer within that structure.

4.25 This issue is also explored more in the RNTBCs chapter.

Support for particular types of structures

4.26 One response to the NIAA’s online survey suggested that a question for the review should be whether the CATSI Act could better support profit-driven entities. The response went on to suggest that the CATSI Act does not seem to



align with the policy of Supply Nation certification and specifically identified the Indigeneity requirement, profit distribution and clarity of ownership through shareholdings as areas where there is a lack of alignment. We are keen to hear your views on whether the CATSI Act could better support profit driven entities and if so, what this support would look like?

- 4.27 It has also been noted that ORIC is registering an increasing number of single member corporations and consideration should be given as to how the CATSI Act can be enhanced to help these types of corporations develop and grow. We would like to hear your thoughts on this matter.

Size classification

- 4.28 Under the CATSI Act, a corporation is classified as small, medium or large based on whether it meets thresholds for any two of three criteria relating to income, assets and number of employees. A corporation's size determines aspects of its governance requirements under the CATSI Act such as the nature of contact details they are required to provide to the Registrar, and how information held by the corporation should be stored and made available to members. However, a corporation's reporting requirements is based on its size and income—also a determinant of size. This can result in a situation where a corporation is categorised as small according to asset and staffing criteria thresholds, but then have more reporting obligations due to its income level. Not only is this confusing, but with so many factors to take account of, it can be difficult for corporations to self-assess in preparing for reporting.
- 4.29 The Technical Review noted that the size classification requirements outlined in the CATSI Act do not adequately address the differences between the types of, and activities undertaken by, CATSI corporations. For example, a small, passive land holding body may be subject to the same reporting requirements as a small CATSI corporation with income and employees.
- 4.30 When consulting on proposed amendments to the CATSI Act in 2018, ORIC sought views on aligning the CATSI Act size classification framework with that of the Australian Charities and Not-for-profits Commission (ACNC), under which around 30 per cent of CATSI corporations are registered. This proposal would change the size classification test to be based on revenue only and align the revenue thresholds used to determine size with the ACNC classifications. Table 4.1 outlines the current thresholds noting that a 2018 review of the ACNC legislation³² recommended further increasing the ACNC revenue thresholds.³³

³² Patrick McClure AO, Greg Hammond OAM, Su McCluskey, Dr. Matthew Turner, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission, Legislation Review 2018*, The Treasury, 2018, available from <<https://treasury.gov.au/publication/p2018-t318031>> [accessed 13 February 2020].

³³ A 2018 review of the Australian Charities and Not-for-profits Commission (ACNC) legislation recommended further increasing the ACNC revenue thresholds. Although it supported the recommendation, in its response, the Government outlined a program of broad consultation to ascertain the appropriate thresholds before proceeding with legislative change. Alignment of the two regulatory regimes is expected to benefit those corporations subject to both regimes and as such, it would be proposed to change the thresholds for CATSI corporations in line with the revised thresholds introduced by the ACNC.

Table 4.1: Income and revenue thresholds to determine corporation size

| Current income thresholds ¹ | | Proposed revenue thresholds ² | |
|--|-----------------------------------|--|---|
| Small | Less than \$100,000 | Small | Less than \$250,000 |
| Medium | Between \$100,000 and \$5 million | Medium | \$250,000 or more and less than \$1 million |
| Large | \$5 million or more | Large | \$1 million or more |

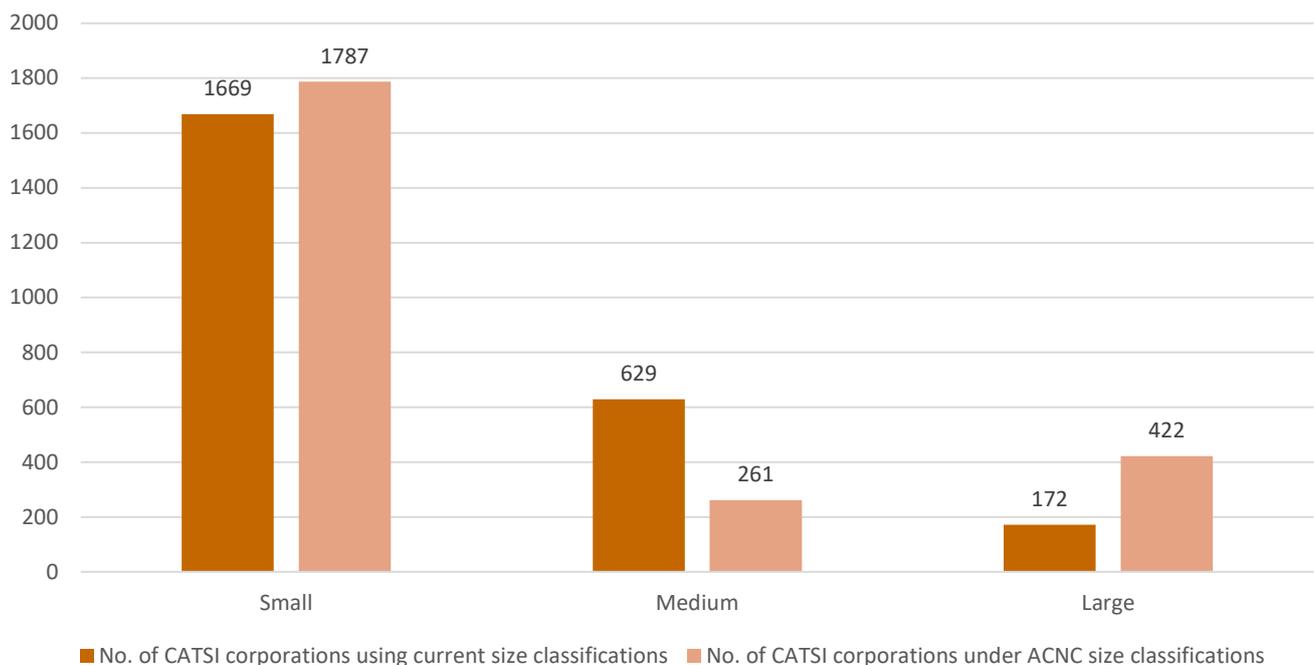
Note 1: Income is one of three criteria used to determine size classification under the CATSI Act; corporations' sizes are determined when they meet the thresholds for two of three criteria. The other criteria are the value of the corporation's assets and the number of its employees.

Note 2: The proposed thresholds as based on the revenue thresholds to determine entity size as specified in the ACNC Act as at 16 June 2020.

Source: CATSI Act Regulation 37-10.01 and ACNC Act section 205-25.

4.31 Implementation of this size classification change in line with the ACNC's current framework would result in another 118 corporations being classified as small, 368 fewer corporations being classified as medium and a further 250 corporations being classified as large as illustrated in Figure 4.1.

Figure 4.1: Changes to the number of CATSI corporations under ACNC size classification based on ORIC corporation data as at 12 March 2020



Note: The corporations included in the figure above are those corporations that have lodged income information for 2018–19 and 2017–18. For corporations that have lodged income information for both financial years, their 2018–19 income figure has been used for this analysis. Corporations not included in the table above are those that have not lodged 2018–19 or 2017–18 reports with ORIC or were not required to report.

Source: ORIC data.

4.32 There has been varying support among submissions made to both the Technical Review and to the Senate Inquiry for changes to size classifications. One submission to the Technical Review outlined a preference to see alignment between regulatory frameworks, for example, in relation to size classifications: *“We support the alignment of duties and responsibilities with the standards developed by the ACNC in relation to Corporations that are registered charities.”*

- 4.33 In contrast, another submission to the Senate Inquiry noted that the ACNC size and reporting classification framework is the same as companies limited by guarantee registered under the Corporations Act. The submission suggested that aligning CATSI corporations with companies limited by guarantee was inappropriate as the latter are usually established for public or community purposes which is not always the case for CATSI corporations.
- 4.34 While aligning the two size classification frameworks would ease the administrative burden on corporations, it has also been suggested that a new CATSI Act framework could be introduced with only two sizes: small and large. We are interested in hearing your views on both proposals and for a two size classification framework, your thoughts in relation to what the criteria and associated threshold(s) could be for determining whether a corporation is small or large?

Meetings

- 4.35 Under the CATSI Act, corporations have meeting obligations and can change some aspects of meeting rules to suit their specific needs. An AGM is held once a year to allow directors to keep members informed of the work of the corporation over the last 12 months. Corporations can also hold general meetings throughout the year for a range of reasons including if directors want to seek the views of members on a major plan or project or if members would like to discuss an issue(s).

Annual General Meetings

- 4.36 All corporations are required to hold an AGM within five months of the end of their financial year unless the Registrar has approved an extension or exemption. Corporations must apply for an extension, by completing and lodging a form with the Registrar. As illustrated in Table 4.2, on average, around nine per cent of corporations apply for an extension each year, most for less than 30 days and all for reasons of a death in the community, natural disaster, cultural activity, a delay in the audit or awaiting another event.³⁴

Table 4.2: Number of CATSI corporations that requested a time extension for holding their Annual General Meeting

| | 2014–15 | 2015–16 | 2016–17 | 2017–18 | 2018–19 |
|--|---------|---------|---------|---------|---------|
| Number of CATSI corporations requesting an extension | 153 | 123 | 181 | 258 | 270 |

Source: ORIC data.

- 4.37 The Technical Review recommended amending the CATSI Act to:
- enable small CATSI corporations to pass a members’ special resolution to not have an AGM for up to three years provided that the directors do not vote on that resolution and the corporation is required to advise the Registrar if there is any material change to its circumstances; and
 - provide the Registrar with the power to require directors to hold a general meeting where it is reasonable to do so. For example, when members have made a significant number of complaints or when members have not been provided with an opportunity to ask questions of the Board and the Board has not been able to include answers to these questions in the corporation’s annual reporting.

³⁴ Recently, a number of corporations have also requested exemptions due to COVID-19 related matters.



4.38 There were varying levels of support for changes to meeting requirements among submissions to the Technical Review as reflected in the comments below:

...“does not necessarily support members of medium and large corporations having the power to pass a resolution not to have an AGM for up to three years.”

“The coordination and compliance requirements for meetings under the Corporations Act 2001 and the CATSI Act may be burdensome particularly for CATSI corporations that are small or lacking resources and capacity (as is the case with many native title corporations) to meet their obligations to members, often across vast geographical areas.”

4.39 We are suggesting amendments to the CATSI Act to provide flexibility to corporations that would struggle to meet their meeting obligations when faced with an uncommon event by:

- allowing corporations to access a 30-day time extension to hold a particular AGM where the corporation:
 - notifies the Registrar before the period to hold the AGM has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit;
 - has not notified the Registrar of an extension of time more than three years in a row; and
- allowing directors to issue an updated notice of meeting—after one has already been issued—within 30 days of the original meeting date in the case of death, natural disaster and certain cultural activities in community, which may change one or all of the following: date, time and place of the meeting.

4.40 A further suggestion is amending the CATSI Act to enable the Registrar to cancel meetings after they have been called. Currently, corporations are unable to do so without a court order once a meeting has been called, unless this provision is specified in a corporation’s rule book.

4.41 We would appreciate your views in relation to the Technical Review recommendation that small corporations be allowed to pass a special resolution to not hold their AGM for up to three years after their most recent AGM; provided that directors do not vote on that resolution unless all members are also directors, and the corporation advises the Registrar if there is any material change in its circumstances (refer paragraph 4.37).

4.42 An alternative to the Technical Review’s recommendation may be to allow virtual AGMs using technology platforms. During the COVID-19 pandemic, the Registrar introduced special rules to allow corporations maximum flexibility to hold meetings using any suitable technology, including social media platforms, online platforms, mobile platforms or other applications. These rules also allow corporations to seek relevant members’ or directors’ endorsement of resolutions so they may continue conducting business when in-person meetings are not feasible. This may include using text, social media or other applications to vote. An electronic record needs to be created and retained as part of the corporation’s records (for example, screenshots of text messages or social media). These rules expire in November 2020 and we are interested in your views about whether these arrangements should be explicitly allowed under the CATSI Act.

General meetings

4.43 It was proposed in one response to the NIAA’s online survey that the CATSI Act requires greater clarification in relation to the conduct and cancellation of general meetings; in particular where it may be reasonable to cancel a general meeting but cancellation would be at short notice, for example, to accommodate sorry business within a community. We are interested in whether other stakeholders consider that clarification is required to the general meeting provisions outlined in the CATSI Act. For example, in what circumstances can a general meeting be cancelled once notice of the meeting has been issued, how close to the scheduled time can a meeting be cancelled and is greater flexibility needed in relation to these provisions?



Audit committees

- 4.44 In response to the NIAA's online survey, a suggestion was also made that large corporations should be required to establish audit committees to advise the board of directors on financial matters. This was considered to be a useful provision so that the board received independent advice and the committee could help identify where internal governance rules are not being followed. We would like to hear your thoughts on this suggestion.

Reporting

- 4.45 Depending on their size, corporations are required to prepare specific reports within six months of the end of their financial year, unless granted an extension or exemption from the Registrar. Small corporations are required to prepare a general report while large corporations are required to prepare a general report, financial report, audit report and directors' report. Similar to the point made in paragraph 4.39, it can be difficult for corporations to meet reporting timeframes when faced with circumstances such as a natural disaster or death in a community. We are testing the idea of allowing corporations to activate a 30-day time extension to lodge report(s) with the Registrar in the case of death, natural disaster and certain cultural activities in community where they have not notified the Registrar of an extension of time more than three years in a row.

- 4.46 There was some support for such an amendment expressed in submissions to the Technical Review, including one that stated:

"The Registrar would benefit from increased powers to extend the date for lodgement of financial reports given that medium and large CATSI corporations face delays in lodgement of financial reports by 31 December for reasons often beyond their control: such as death of members of the community, natural disasters and for cultural activities or delays with auditors."

- 4.47 Corporations are currently not required to present reports at AGMs, however, they are required to provide members with copies of any prepared report upon request. When consulting on proposed amendments to the CATSI Act in 2018, ORIC sought views on requiring corporations to lay before the AGM any reports they are required to prepare for that financial year. Such a proposal would provide greater transparency to members of the operations of their corporation. There was also support for this proposal through the consultation process, including one submission which conveyed that:

"Many members are unaware that some of these reports [annual financial report, directors' report and auditors' report] are available through ORIC's website, or that s.252-2 of the CATSI Act allows members to request remuneration information. The AGM would be the most appropriate means to distribute these reports to increase transparency and accountability."

- 4.48 A response to the NIAA's online survey suggested that 'dormant' corporations should be subject to different audit and reporting requirements under the CATSI Act. Along the same lines of the argument in relation to holding AGMs, the submission noted the costs associated with preparing financial statements as well as having them audited. We are interested in your views in relation whether 'dormant' corporations should be subject to reduced reporting and audit requirements under the CATSI Act and if so, what constitutes a 'dormant corporation'?

Rule books

- 4.49 All corporations under the CATSI Act are required to have a constitution, which is commonly known as a rule book. Rule books include rules for the internal governance of a corporation, for example, rules relating to its objects, member and director eligibility, meetings, and winding up the corporation.

- 
- 4.50 Not all of the rules relating to internal governance of a corporation are located in the rule book. Some rules for internal governance are located in the CATSI Act, in particular:
- set rules that apply to all corporations and cannot be changed (unless, in some instances, exempted by the Registrar); and
 - ‘replaceable rules’ that apply to corporations unless modified or replaced by a corporation in its rule book.
- 4.51 Other rules that affect a corporation’s internal governance may be a product of common law, such as the rule that a meeting cannot be cancelled once it is called unless the rule book allows for this.
- 4.52 It is fundamental to good governance that the members and directors of a corporation are aware of its internal governance rules. A common problem for CATSI corporations is that replaceable rules have not been modified or replaced by the rule book and continue to operate. This can be confusing and frustrating for members and directors who are unaware of the replaceable rules. It can also have unintended consequences when a corporation is changing its rule book.
- 4.53 To address this problem, we are proposing that all replaceable rules be included in rule books whether they have been adopted as they are, or are modified or replaced unless the rules are irrelevant (for example, subsection 158-5(2) if a rule book does not provide for a corporation to have observers, or subsection 201-25(2) if a rule book does not provide for joint members).
- 4.54 Changes made to rule books need to be registered with the Registrar, including changes made by special administrators.³⁵ Under subsection 69-30(1) of the CATSI Act, the Registrar is required to decide whether to register a change to a corporation’s rule book, and the Registrar can reject a change to a rule book that is inconsistent with a Registrar-initiated amendment to a corporation’s rule book. The CATSI Act does not include a similar provision allowing the Registrar to reject changes to a rule book that are inconsistent to those made by a special administrator, which we are proposing should be allowed under the CATSI Act.
- 4.55 The majority of responses to the NIAA’s online survey indicated that the review should consider whether rule books could be simplified and made easier to understand. We are keen to hear your thoughts in relation to simplified rule books and what this may look like in practice.

Conclusion

- 4.56 The CATSI Act provides specifically for the incorporation of Aboriginal and Torres Strait Islander corporations and to that end, suggested amendments outlined in this chapter aim to take account of the unique circumstances and traditions of Indigenous Australians. This was a strong theme in the responses to the NIAA’s online survey. Proposed amendments also aim to assist CATSI corporations meet their governance obligations as well as to improve the transparency of corporations’ operations to members.

Further ideas

- 4.57 One response to the NIAA’s online survey suggested that the review should consider whether there is the opportunity to further streamline the requirements for CATSI corporations that are also registered charities; and the extent to which flexible governance arrangements for charities that are registered companies limited by guarantee

³⁵ The Registrar may appoint a special administrator to a corporation that is experiencing some difficulty with the aim to restore the corporation to good health and return it to the control of members. This process is discussed further in Chapter 9.

under the Corporations Act can be extended to CATSI corporations. We would appreciate ideas and input in relation to these two questions.

- 4.58 Another respondent to the NIAA’s online survey suggested that the number of proxies that one member can hold—which is currently three—should be reduced (CATSI Regulation 14). The respondent indicated that three proxies is burdensome on corporations. We are interested in your views on whether three proxies is too many for one member to hold?

Table 4.3: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|---|---|
| Part 2-3, section 29-5 and Part 6-2 section 246-5 | Two-member corporations where one member is non-Indigenous |
| Part 2-4, section 37-10 of the CATSI Act and Part 2, section 8 of the CATSI Regulations | Size classification of CATSI corporations |
| Part 3-2, section 66-5, section 69-25 and section 69-30 | Reflecting replaceable rules in a corporation’s rule book Lodging and registering changes to rule books |
| Part 4-2, section 150-25 and Part 5-2, section 201-25 | Cancelling memberships and using members’ alternative contact details |
| Part 4-5, section 180-1, section 180-5 and section 180-30 | Redaction of personal information from a corporation’s register of members |
| Part 5-2, section 201-20, section 201-150, section 201-155 and section 201-160 | Amount of notice a corporation is required to provide when calling a general meeting Requirement for corporations to hold an AGM within five months of the end of their financial year Extension of time for holding an AGM Business of an AGM |
| Part 6-2, section 246-5 | Requiring directors to be natural persons |



5. Officers of corporations

- 5.1 Directors, CEOs and other senior executives play a critical role in the management of a corporation. These individuals are also responsible for developing and executing the strategy approved by the directors, and ensuring that a corporation is managed properly and its funds are spent appropriately.
- 5.2 Increasingly, there has been a call for greater transparency and accountability of senior executives and directors across the corporate sector, as well as the not-for-profit and public sectors. Recent reviews have recommended greater transparency around remuneration, better measurement and reward for performance, and greater accountability around financial transactions with closely related parties. Similarly, there is an ongoing concern about exploitive behaviour on the part of a small number of senior executives who may also move from corporation to corporation.
- 5.3 This chapter considers amendments to the CATSI Act to increase the transparency of executive remuneration and performance, related party transactions, and the appointment and conduct of directors.

Executive remuneration

- 5.4 The level of executive remuneration in the Indigenous and non-Indigenous corporate sector is an issue that generates significant discussion and debate in Australia and internationally. The matter of senior executives receiving excessively high salaries and employee benefits, such as bonuses, is one that causes concern and anxiety for members and other stakeholders such as common law holders.
- 5.5 There is no requirement for CATSI corporations to report on the individual remuneration for CEOs and senior executives. The only requirement is under the Australian Accounting Standards³⁶ for key management personnel which requires remuneration reporting at an aggregated level.
- 5.6 On the other hand, publicly listed companies under the Corporations Act are required to disclose the nature and value of remuneration of key management personnel in their annual reporting. The 2016 KPMG review³⁷ explored introducing the requirement for large (and possibly medium) sized corporations to disclose the nature and value of remuneration of their key management personnel in Annual Reports in line with the requirements imposed by the Corporations Act on listed companies.
- 5.7 Many CATSI corporations that employ staff are publicly funded through grants, or are resourced by native title benefits. In light of this, there may be a public interest in reporting senior executive remuneration to members, common law holders and other stakeholders.
- 5.8 A move towards this type of accountability is becoming more widespread. The 2018 *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review* (ACNC Review)³⁸ recommended greater disclosure of remuneration practices and related party transactions to improve public trust and confidence in the sector. The recommendation was limited to disclosing remuneration of senior executives and ‘responsible persons’

³⁶ Australian Accounting Standards Board (AASB) *124 Related Party Disclosures*, May 2019, paragraph 17, available from <https://www.aasb.gov.au/admin/file/content105/c9/AASB124_07-15.pdf> [accessed 13 February 2019].

³⁷ KPMG, *Regulating Indigenous Corporations*, ORIC, 15 December 2016, available from <<https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations>> [accessed 13 February 2019].

³⁸ Patrick McClure AO, Greg Hammond OAM, Su McCluskey, Dr. Matthew Turner, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission, Legislation Review 2018*, The Treasury, 2018, available from <<https://treasury.gov.au/publication/p2018-t318031>> [accessed 13 February 2020].



at an aggregated level for large entities only, being those with a revenue of \$1 million or more based on current thresholds.³⁹

5.9 The majority of feedback from the NIAA's online survey was supportive of members having more information on the remuneration received by CEOs and other senior executives. There was also support for more transparency of board members' remuneration and benefits, including salaries, sitting fees, allowances, loans and contracts. Although not all responses were supportive, including comments that:

- The remuneration of senior employees is not appropriate to be reported to members.
- It would be discriminatory to have a higher standard of reporting in the CATSI Act than that in the Corporations Act.

5.10 There is value in members and other key stakeholders such as funding bodies having greater transparency of remuneration packages for senior executives. It is therefore proposed that medium and large CATSI corporations include the details and amounts of their CEO's and other senior managers' remuneration packages and any other material benefits in their Annual Reports. It is important that there is a balance between the interests of the corporation and the interests of the individual so we are seeking your views on how such an approach could be implemented while maintaining that balance; specifically we are interested in your responses to the following questions:

- Should the details and amounts of CEOs' and other senior managers' remuneration packages, including any other material benefits, be reported in corporations' Annual Reports?
- What level of detail is appropriate? Should information on each relevant individual be provided with all remuneration itemised, or should information be reported in remuneration bands?
- Are there other models that could be considered, for instance, reporting could only be required for individuals who earn over a certain threshold, for example, \$200,000?
- What should the definition of remuneration include?

5.11 Members should also have visibility over the remuneration paid to key personnel of related entities. Such information could be reported in corporations' Annual Reports and may include the corporate structure including the details of any subsidiaries, key personnel within the extended structure and their remuneration.

5.12 A related issue is understanding whether the amount of remuneration paid is consistent with industry expectations and therefore reasonable. There is currently no guidance for boards or members about what a reasonable level of remuneration might be given the corporation's circumstances and the skills, experience and performance of the executive in question.

5.13 To assist boards with setting remuneration, we are proposing that CATSI corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar, so that the Registrar can publish de-identified information by salary bands. This annual sectoral analysis will help corporations to benchmark their remuneration packages against current practice in the sector. This proposal is consistent with the Technical Review which recommended that the CATSI Act should be amended so that large and medium CATSI corporations provide details of benefits packages to the Registrar and the Registrar should disseminate de-identified information about director, CEO and senior management remuneration, in such categories as the Registrar considers appropriate (Recommendation 18).⁴⁰

Director remuneration

5.14 Division 252 of the CATSI Act deals with director remuneration. The CATSI Act prescribes that directors of a CATSI corporation are not to be paid remuneration unless specifically provided for in the rule book. If the rule book allows

³⁹ The report also proposed to increase the revenue threshold for a large entity to more than \$5 million.

⁴⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2019].



the directors to be paid, the directors' remuneration is to be determined by the corporation by resolution of the members in a general meeting. The members of a CATSI corporation can obtain information about the directors' remuneration and paid expenses only if the threshold number of members request the information.⁴¹

- 5.15 While sitting fees paid to directors must be approved by members at a general meeting, there can be a lack of transparency about what each director actually receives. To be consistent with the suggested changes for key management personnel, it is proposed that all corporations report on how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar.
- 5.16 Many of the survey responses raised issues about directors getting paid, either as employees, or through an arrangement with the corporation. There is currently no requirement for member approval of remuneration for directors as employees. We are keen to hear whether you think there should be, and if there are conditions that should be met in setting such remuneration?

Executive performance

- 5.17 There has been concern raised about CEOs with a poor track record of management who move from one corporation to another without any seeming accountability. The Registrar maintains a publicly available register of disqualified officers under the CATSI Act. However, the concern is around people who have not been disqualified but nevertheless have a history of poor performance. Currently neither boards nor members have visibility of an applicant's work history other than that provided by the applicant themselves. While this issue is limited to a small number of individuals, it is important that all members' rights and interests are protected.
- 5.18 The Modernising Business Registers Program⁴² is introducing a Director Identification Number (D.I.N.)—a unique identifier that will apply to all directors that they will keep forever. The aim of the D.I.N. is to provide a clear public record of each director, including those of CATSI corporations, and trace their history and relationships with companies over time. Although initially this will only be applied to directors, the legislation has been drafted in such a way that it may be possible to expand the scope to include CEOs and others involved in the making of decisions that affect the business of the corporation and have the capacity to significantly affect the corporation's financial standing. The legislation governing the introduction of the D.I.N. was passed by Parliament on 12 June 2020, and work to implement the regime is underway. It is not expected that any change of scope will occur until after the legislation is implemented for CATSI corporation directors.
- 5.19 Members should be able to identify who is managing their corporation, and is responsible for the day-to-day operations and decisions. Similarly, clients, service providers and commercial partners will be attracted to corporations with a proven track record of sound management. The Technical Review recommended that CATSI corporations include their CEO's and senior executives' names, addresses, contact details and employment history over the last ten years in their Annual Reports (Recommendation 17).⁴³ It is proposed, that as a minimum requirement, all corporations include the names of key management personnel (CEO, Chief Financial Officer and Chief Operating Officer) and their qualifications in their Annual Reports.

⁴¹ Subsection 252-5(7) of the CATSI Act states that the required number of members is the greater of five members or 10 per cent of the members.

⁴² The Modernising Business Registers Program is administered in partnership by the Australian Taxation Office, Treasury, ASIC, Department of Industry, Innovation and Science and the Digital Transformation Agency. Further information on the Program is available on the [Australian Business Register website](#).

⁴³ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <https://www.oric.gov.au/catsi-review> [accessed 13 February 2019].

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- 5.20 We are also considering whether medium and large corporations should include the 10-year employment history of their CEO and senior executive in their Annual Report. This requirement would include directors who are employees and extend to senior staff of any subsidiary of the corporation.
- 5.21 We would like to hear your views on:
- Whether medium and large corporations have the capacity to publish CEO and other senior executives' work history in Annual Reports?
 - How to handle the situation where there are multiple CEOs throughout the year?
 - How can the work history be confirmed before publishing?
- 5.22 While section 694-85 of the CATSI Act gives the meaning of the CEO function, it has been suggested that this provision could be clarified by specifying that a CEO does not have to be an employee of the corporation, but is anyone who undertakes a CEO function, which may include a contractor. This should deter attempts to try to circumvent the measures in this chapter by putting in place alternative arrangements, such as contracts or consultancies. We would be interested in your views on how effective such a measure would be.
- 5.23 Currently, corporations are required to advise ORIC within 28 days of the details of directors when there has been a change of directors. It is also proposed that this be extended to key management personnel, for the purposes of consistency.

Related party provisions

- 5.24 While there needs to be more regulation and transparency around remuneration, there is a need to reduce some of the burden around related party provisions for CATSI corporations. The current requirements can work against the best interests of some corporations, especially in small communities with extensive kinship ties and limited options for purchasing goods or services.
- 5.25 At some point, corporations may need or wish to provide a financial benefit to a related party. A related party financial benefit is when a corporation gives a financial benefit to a person or organisation with a close relationship. A related party can be an individual or an entity, for example, a body corporate or a partnership. Related parties include directors, their immediate family members or corporations/entities that they control.
- 5.26 The requirements for member approval of related party benefits are set out in Part 6-6 of the CATSI Act. Division 293 of the CATSI Act defines what a related party is, and also what constitutes the giving of a financial benefit. Subsection 293-3(3) sets out some examples of the giving of a financial benefit to a related party including:
- giving or providing the related party with finance or property;
 - buying an asset from or selling an asset to the related party;
 - leasing an asset from or to the related party;
 - supplying services to or receiving services from the related party;
 - issuing securities or granting an option to the related party;
 - taking up or releasing an obligation of the related party.
- 5.27 Apart from some limited exceptions (set out in Division 287 of the CATSI Act), corporations must undertake a rigorous process to get the approval of members before providing a related party financial benefit. The members approve the giving of the benefit by passing a resolution at a general meeting. Before the members vote, the corporation needs to prepare certain documents and allow time for the Registrar to comment on them.
- 5.28 The rigorous approval process for related party transactions is in place because the nature of the relationship between the corporation and the related party creates a risk that the transaction may not be in the best interests of the corporation. For example, the corporation may not have negotiated the best deal or the transaction may create



a conflict of interest. This all takes time and calling a general meeting is not always easy for corporations in remote areas and with large or dispersed memberships. Further, the Technical Review⁴⁴ found that related party provisions may not be well understood resulting in inadvertent breaches.

- 5.29 The related party benefit provisions are based on similar provisions in the Corporations Act for public companies although there are some significant and practical differences which are discussed below. The Revised Explanatory Memorandum to the CATSI Bill 2006 which became the CATSI Act indicates that in relation to related party transactions:

...“section 284-1 is based on the member approval requirement for related party benefits in section 208 of the Corporations Act. Section 208 of the Corporations Act applies to public companies. This standard is appropriate for CATSI corporations to soundly protect the interests of members and recognises the large degree of public and essential services that are funded via CATSI corporations.”⁴⁵

- 5.30 A number of exceptions to the requirements under the Corporations Act were deliberately excluded from the CATSI Act, including for benefits given on ‘arm’s length terms’, for payments which are for indemnities, insurance or legal costs and for payments under \$2000 to directors or their spouses. Again, the Revised Explanatory Memorandum explains that “[n]ot replicating these provisions is important for the sound protection of members and will act as a strong deterrent to nepotistic behaviour.”⁴⁶

- 5.31 On the other hand, the CATSI Act does provide the Registrar with a discretion to exempt corporations from the rigorous process for approving related party benefits. The intention of this discretion was explained in the Revised Explanatory Memorandum as follows:

These exemption provisions give the Registrar the flexibility to exempt a corporation when a provision could cause an excessive administrative burden on corporations. They also allow the Registrar to take into account the diversity and special circumstances of a corporation or a class of corporations.⁴⁷

- 5.32 However, the practicalities of seeking an exemption from the Registrar creates its own administrative burden which may be disproportionate to amount of financial benefit in question.
- 5.33 Although there is a need to prevent misuse of corporation assets and funds, holding CATSI corporations to the same standard as publicly listed companies creates an unnecessary administrative burden, particularly for small corporations and those in regional and remote areas. The inclusion of the exceptions into the related party provisions could provide greater benefit to CATSI corporations than the previously recommended changes, as they would be better adapted to the way corporations operate, particularly in small, regional and remote communities. One of the responses to the NIAA’s online survey also specifically recommended adopting these provisions.
- 5.34 The Corporations (Aboriginal and Torres Strait Islander) Act (Strengthening Governance and Transparency) Amendment Bill 2018 proposed some changes around related party provisions to reduce some of this red tape. This included allowing small corporations to make some related party transactions without having to pass a resolution at a general meeting, up to a limit set out in the CATSI Regulations, as well as allowing the Registrar to exempt particular transactions or classes of transactions from the related party provisions where it was in no way detrimental to the members of the corporation.

⁴⁴ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2020].

⁴⁵ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.342, available from <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403> [accessed 3 July 2020].

⁴⁶ *ibid.*, paragraph 1.345.

⁴⁷ *ibid.*, paragraph 1.211.

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- 5.35 These proposed changes were consistent with the Technical Review which recommended that the provisions relating to restrictions on related party dealings be retained, but that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions, where it would be beneficial to the affected director and in no way detrimental to the members of the CATSI Act corporation (Recommendation 21). It also recommended that a threshold of \$5000 or such amount be used as a trigger for the related party transaction provisions in the CATSI Act for small corporations but that all related party benefits be included in an annual report that is provided to members and the Registrar (Recommendation 22).⁴⁸
- 5.36 Further review of Part 6-6 of the CATSI Act indicates there may be value in a more comprehensive overhaul of these provisions. Feedback received through the NIAA's online survey was that there needs to be reporting and transparency, but there should be an easier, more cost-effective and less time consuming approach to related party issues. Additionally, redrafting Part 6-6 would provide an opportunity to address drafting issues with some sections which make it difficult to understand, and even at times appears contradictory to earlier provisions. For example, there is an ambiguity in section 287-1(2) as it relates to Division 252, although it is likely that the issue is drafting rather than substance.
- 5.37 Subsection 252-1(2) requires that, where a rule book permits it, members must approve remuneration, such as sitting fees, for directors. Subsection 287-1(2) states that the giving of remuneration to directors and officers is not subject to member approval if the remuneration is reasonable. While subsection 252-1(2) refers to members approving the quantum of the remuneration, and subsection 287-1(2) refers to the giving of the remuneration being exempt from the member approval process as set out at Division 290, there is potential for confusion as to how the two sections operate together. We would appreciate your feedback on how you apply these provisions in the day-to-day operations of the corporation, and whether clarification would be useful.
- 5.38 Finally, whatever changes to related party provisions may be ultimately proposed, we also suggest a requirement that all related party benefits be described in appropriate detail in a corporation's Annual Reports. This would be consistent with a recommendation in the ACNC Review that all registered entities be required to disclose related party transactions in their Annual Reports to increase transparency around such transactions.

Appointment of directors and other director requirements

- 5.39 The Revised Explanatory Memorandum to the CATSI Act outlines that the Review of the ACA Act concluded '*that the provisions relating to directors and directors' duties in the ACA Act should be modernised and brought into line with the Corporations Act, with some modification for the circumstances of CATSI corporations. ...Chapter 6 of the CATSI [Act] implements these review findings*'.⁴⁹
- 5.40 In operation, some provisions have been found to require clarification or be unnecessarily restrictive. As an example, subsection 246-5(4) provides that a majority of the directors of a CATSI corporation must not be employees. However, in some cases such as art centres where artists may be employed to provide, maintain or promote art work, or native title corporations where members may be employed to do cultural heritage work, it may be appropriate for the majority of directors to also be employees. Allowing the Registrar to grant exemptions to the requirement that the majority of the directors of a CATSI corporation must not be employees would provide a direct

⁴⁸ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2019].

⁴⁹ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.20, available from <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403> [accessed 3 July 2020].



benefit to many corporations and their members. Granting such an exemption could be subject to certain conditions such as the presence of an independent director on the Board. We are seeking your suggestions on what conditions would be appropriate to support an exemption to the requirement that the majority of the directors of a corporation must not be employees?

- 5.41 Many of the responses to the NIAA’s online survey indicated that there should be restrictions in relation to board membership, particularly around the number of family members on boards, and increasing the number of skill-based independent directors. We are interested in receiving feedback on whether there should be controls around board membership and composition, and if so, what sort of controls should be considered and how would this be managed in remote communities, where for instance restrictions on numbers of family members could cause major difficulties?
- 5.42 Appointing an independent director with specialist skills and knowledge is widely recognised as promoting good corporate governance, and adding value to a board. Currently, CATSI corporations are prohibited from appointing non-member directors unless the corporation’s rule book provides for this.
- 5.43 In acknowledging the value of having an independent voice on a board, we suggest amending the CATSI Act to allow corporations to appoint independent directors without an explicit rule in their rule book. This does not mean corporations must have independent directors, but it means the option will be available and encouraged.
- 5.44 It was also suggested that independent directors should be mandated for large corporations. We would like to know if this would be seen as a positive move for large corporations and what, if any, issues might it present?
- 5.45 One survey response put forward a range of suggestions for how culture and tradition could be incorporated into the operation of corporations through changes to directors’ duties and rule books such as providing:
- A defence for directors or officers who are complying with traditional Aboriginal customs or practices of their tribal group.
 - That a corporation may specify in its rules a range of traditional customs and practices, which the directors and officers may follow and that would form the basis of a safe harbour.⁵⁰ This would mean that if the directors acted within the scope of the rules, they would be absolved from any breaches of duty that would otherwise occur.
- 5.46 We would like to hear your views on how the suggestions in paragraph 5.45 would work in practice. We are also seeking further suggestions as to other ways that corporations can operate in a more culturally appropriate way.
- 5.47 As a final area of consideration, section 683-1 provides a definition of ‘director’ and ‘officer’ of the corporation. The definition of director is also subsumed in the definition of officer. Although not specifically referenced in this section, a CEO is also an officer of a corporation. Another question that we would like to receive responses to is whether the current CATSI Act definitions of ‘CEOs (CEO functions)’ and ‘officers’ provide sufficient flexibility when considering who ‘senior executives’ are?

Conclusion

- 5.48 Suggested changes outlined in this chapter aim to improve the transparency of corporations’ operations for members and further suggest ways to hold those in decision-making positions accountable. They are intended to strike the right balance between administrative effort and accountability. Changes regarding related party provisions target processes that we have heard are administratively burdensome and not fit-for-purpose for corporations operating in remote and very-remote areas. In contrast, we believe the increased reporting effort associated with

⁵⁰ A safe harbour provision in a statute specifies that particular conduct will not be deemed a violation of a given rule. An example of a safe harbour provision can be found under section 588GA of the Corporations Act, which protects directors from being personally liable for debts if they have taken courses of action likely to lead to a better outcome for the corporation.



the proposed remuneration and performance changes is justified as the changes are expected to benefit members and reflect modern expectations.

Table 5.1: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|--|---|
| Part 6-2, subsection 246-1(3), subsection 246-5(4), section 246-20 and Part 6-8, section 310-5 | Clarifying directors’ requirements and appointments |
| Part 6-6, section 287-1 and Part 7-3, section 330-5 | Increasing practical application of related party provisions for small CATSI corporations |
| Part 7-3, section 327-1, section 330-5(1) and section 333 | Supporting the transparency of executive remuneration and performance |
| Part 17-1, section 683-1 | Clarifying the distinction between directors and officers |



6. Modernising the CATSI Act

- 6.1 The CATSI Act has been in place for approximately 13 years. Over this period, there have been changes to both the Indigenous and non-Indigenous corporate sectors, including how information is managed, stored and accessed. There have also been changes to how governments interact with the public such as moving to more modern communication platforms, such as social media, email and phone-based messaging. Similarly, the way corporations interact with their stakeholders has changed consistent with general expectations of fast and effective interactions. There is an opportunity to modernise the CATSI Act to take account of these advancements.

Disclosure, storage and publishing of information

- 6.2 The CATSI Act includes specific information management provisions that apply to the Registrar as well as separate requirements for corporations. The CATSI Act outlines how the Registrar should manage, disclose and communicate information. Similarly, it imposes certain obligations on corporations in relation to the collection, storage, availability and communication of information.

Protected information

- 6.3 Under the CATSI Act, the Registrar is able to disclose protected information in various circumstances.⁵¹ Currently, the CATSI Act describes the situations where disclosure is authorised as broad principles (subsection 604-25(1)), as well as providing a list of circumstances in which a disclosure is deemed to be authorised. For example, the CATSI Act allows information to be provided to ASIC for the purposes of it carrying out its functions or exercising its powers. However, there are some circumstances where a disclosure that should be regarded as authorised is not specifically identified. Consequently, it is proposed to amend the CATSI Regulations to prescribe who is permitted to receive protected information in more detail.

Providing notices

- 6.4 The Registrar is required to publish various notices in the *Australian Government Gazette* and/or in newspaper(s) under the CATSI Act. For example, the CATSI Act requires the Registrar to give public notice of changes to reporting requirements for particular types of CATSI corporations in the *Australian Government Gazette*. Given modern technology, this practice is outdated and results in unnecessary costs and delays in information being provided to CATSI corporations. We are suggesting that the Registrar should be able to publish such notices on modern electronic communication platforms, including ORIC's website, rather than in the *Australian Government Gazette* and/or in newspapers. This suggestion is consistent with recommendation 27 of the Technical Review to allow the Registrar to publish information on ORIC's website rather than have to publish information in the *Australian Government Gazette* and newspaper(s).⁵²
- 6.5 We are also suggesting that the Registrar be able to use electronic means, such as email, when required to notify people or corporations directly. Currently, sections of the CATSI Act require the Registrar to provide notices personally or by post which does not enable the Registrar or ORIC to take advantage of faster, less costly communication methods such as email. For example, the Registrar is required under the CATSI Act to give notice to

⁵¹ Protected information includes information given to the Registrar or another person in confidence, in connection with the Registrar conducting his or her role.

⁵² DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2019].



a person to produce relevant information about a corporation or to appear to answer questions about a corporation, either personally or by post. Similarly, the Registrar is required to issue a penalty notice either in person or by post.

Information storage

6.6 Corporations registered under the CATSI Act are required to make information, such as the corporation's Rule Book, available for inspection by members and officers at a nominated physical address. While some sections of the CATSI Act refer to maintaining information on computer, they do not explicitly provide for a corporation's information to be stored on cloud servers, which is technology now commonly used by corporations, individuals and organisations to store information.⁵³ It would be useful if CATSI corporations could store their information on cloud servers and to complement such a change, they would need to take reasonable steps to ensure that the information was secure and met any relevant privacy requirements.

Sharing data for research purposes

6.7 Information collected by the Registrar in the course of performing a function or exercising a power is 'protected information' according to the CATSI Act. Information is not protected if it has lawfully been made public from other sources.

6.8 In similar fashion, the Registrar is able to use or disclose protected information in performing a function or exercising a power. The Registrar is also able to provide information to various people such as officers of state, territory and Commonwealth agencies, among others. However, the Registrar is prevented from sharing protected information more broadly and is required to 'take all reasonable measures' to ensure protected information is not subject to unauthorised use or disclosure.

6.9 Researchers, peak bodies, academics and other stakeholders are interested in the information held by the Registrar and ORIC. For example, information about the operation of CATSI corporations, including those that have been placed into special administration. As the Registrar and ORIC often receive requests to access information, it is suggested that the Registrar be able to share de-identified data and information with stakeholders such as researchers, academics and peak bodies among others.

Contact information

6.10 Where the CATSI Act requires the provision of contact information, it is currently limited to physical addresses. For example, when applying for the registration of a CATSI corporation, the applicant is required to provide their name and address. As noted elsewhere, it can be less costly and more effective to contact people and corporations through electronic means such as email or phone-based messaging rather than by post or in-person. A range of suggestions have been made as part of this review to enable communication through modern, electronic channels and to complement these proposed provisions, the Registrar and ORIC need to hold relevant contact information such as email addresses and telephone numbers. Consequently, we are suggesting amendments to the CATSI Act to require the provision of electronic contact details for people and corporations as well as physical address information.

6.11 CATSI corporations are required to lodge a notice with the Registrar which includes the contact details for a director within 28 days after he or she is appointed, and to subsequently notify the Registrar of any change in the director's personal details. There may be instances where a person is acting as a director for more than one CATSI corporation

⁵³ Corporations may independently maintain or access cloud servers. ORIC is also currently investigating the opportunity to provide corporations with access to cloud servers to store information such as their register of members, records of member applications and approvals, and board papers and meetings minutes.

and in the event that one corporation notifies the Registrar of a change to that person’s personal details, it would be useful if the Registrar could also update the change for the other corporations. Therefore, we are suggesting the CATSI Act be amended to enable the Registrar to update the personal details of a director when he or she is aware that they are incorrect or out-of-date.

Consistent approach in relation to false and/or misleading information

- 6.12 The CATSI Act makes it an offence for false and/or misleading information about a corporation’s affairs to be made available to members and other key stakeholders, or to be included in documents required by or for the purpose of the Act, or lodged with or submitted to the Registrar, without having taken reasonable steps to avoid this situation. These provisions are similar to those contained in the Corporations Act which were amended in 2014 to outline what ‘reasonable steps’ means in this context. There would be merit in including a similar explanation of ‘reasonable steps’ in the CATSI Act in order to maintain alignment with the Corporations Act.
- 6.13 As outlined in Table 6.1, the CATSI Act creates offences for the making of false and/or misleading statements. While the nature of the offence outlined in each subsection is substantially the same, the penalties imposed differ. We consider that there would be value in aligning the penalties for these offences.

Table 6.1: Provisions relating to the making of false and/or misleading statements

| Subsection | Offence | Penalty |
|------------|---|---|
| 561-1(4) | <p>A person commits an offence if the person, in a document required by the CATSI Act or lodged with the Registrar:</p> <ul style="list-style-type: none"> ▪ makes or authorises statements that are materially false or misleading, or ▪ omits or authorises the omission of information from statements, without which the document is materially misleading, <p>without taking reasonable steps to ensure that the statement was not false or misleading, or the omission would not cause the document to be misleading.</p> | 200 penalty units or imprisonment for five years, or both |
| 561-5(2) | <p>An officer or employee of a CATSI corporation commits an offence if he or she provides or authorises the provision of materially false or misleading information to a director, auditor or member of the corporation without taking reasonable steps to ensure that the material was not materially false or misleading, or the omission would not render the information materially misleading.</p> | 100 penalty units or imprisonment for two years, or both |

Source: CATSI Act.

Whistleblower protection

- 6.14 Similar to other legislation such as the Corporations Act, the CATSI Act provides protection to whistleblowers who make disclosures to certain people when they have reasonable grounds to suspect that a corporation, or an officer or employee of a corporation has breached a provision of the CATSI Act. As a result of amendments to the



Corporations Act to expand the whistleblower provisions in 2019, the CATSI Act provisions now seem comparatively narrow. Consequently, it was a recommendation of the Technical Review that the CATSI Act adopt the whistleblower amendments then in the pipeline for the Corporations Act (Recommendation 69).⁵⁴ We are suggesting expanding the protection provisions for whistleblowers under the CATSI Act in line with the 2019 amendments to the Corporations Act. This would promote greater consistency in the regulatory frameworks for both CATSI and non-CATSI corporations.

ORIC examinations of CATSI corporations

- 6.15 ORIC conducts examinations to assess the corporate governance and financial health of corporations. Possible outcomes of an examination include the Registrar issuing a:
- compliance notice, requiring rectification of a less serious compliance matter; or
 - "show cause" notice, where there are more serious concerns, requiring the corporation to explain why it should not be placed into special administration; or
 - a "management letter" advising the corporation of the conclusion of an examination, and highlighting minor concerns and opportunities for better practice.
- 6.16 As things stand, the Registrar does not actually have to issue anything to confirm the completion of the examination. Currently there is no legislative basis for this "management letter", and confusion around the term "management letter" due to its use in the Audit process. We are proposing that the CATSI Act require ORIC to issue a finalisation letter if either a compliance notice or "show cause" notice is not issued at the conclusion of an examination. This is expected to provide certainty to CATSI corporations that an examination has been formally concluded, as well as guidance about actions that may be required to fix any issues identified.
- 6.17 In respect of a compliance notice, the Registrar does not have to issue anything to show that he or she is satisfied that problems set out in the compliance notice have been fixed. A letter from the Registrar confirming that issues have been addressed may help a corporation when responding to queries from members and other stakeholders. Therefore, we are also suggesting that the Registrar be required under the CATSI Act to issue Compliance Outcome Letters to confirm that matters raised in compliance notices have been adequately addressed by corporations.

Accounting standards

- 6.18 CATSI Regulation 23 provides that financial reports required to be prepared by corporations under the CATSI Act must be prepared in compliance with the accounting standards even if the corporation is not a reporting entity as defined under the accounting standards. The accounting standards are required to be applied to the extent they can be applied to a CATSI corporation. Anecdotal evidence indicates that the intent of the Regulation is unclear from its current wording and many corporations are not preparing their financial reports in accordance with the accounting standards. We believe that CATSI Regulation 23 should be amended to make it clear that reporting entities under the CATSI Act need to prepare general purpose financial statements in accordance with the accounting standards—as opposed to special purpose financial statements.⁵⁵

⁵⁴ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2019].

⁵⁵ General purpose financial reports are prepared in accordance with the Australian Accounting Standards. Special purpose financial reports are prepared according to requirements usually established by directors or members. Special purpose financial reports are prepared for a limited group of users or for a specific purpose. [ORIC's website](#) contains more information about the specific reporting requirements for corporations.



Auditor provisions

- 6.19 CATSI corporations may be required to have their financial reports audited. To this end, the CATSI Act includes a range of provisions in relation to the appointment and conduct of auditors. While the CATSI Regulations provide for the resignation of an auditor, there is no provision for appointing a replacement auditor in these circumstances. We suggest that the CATSI Regulations be amended to outline the process for corporations needing to replace an auditor who has resigned. This is in line with a recommendation of the Technical Review that the CATSI Regulations be amended to enable the directors of a corporation to appoint a replacement auditor when the incumbent resigns. We are keen to hear your thoughts on how a replacement auditor should be appointed, including who should make the appointment?
- 6.20 A further proposed change relating to auditors is to align the CATSI Act with the Corporations Act under which auditors are provided with qualified privilege in relation to specific actions they may undertake as part of their work. Qualified privilege operates as a defence in defamation law. Qualified privilege covers statements made in the situation where there is a legal obligation to give the information and the person to whom it is given has a corresponding duty or interest to receive it, such as an auditor's obligation to bring matters to the attention of the Registrar. It allows free communication in certain relationships without the risk of an action for defamation. The defence of qualified privilege cannot be used if it can be proved that the defamation was motivated by malice.

Payment controls

- 6.21 Section 274-5 of CATSI Act is a replaceable rule that outlines the minimum number of directors who are required to enter into or execute a negotiable instrument. The definition of negotiable instrument under the CATSI Act includes a bill of exchange, promissory note, cheque and letter of credit, among others. While the intent of the section is to provide a control in relation to the expenditure of corporation funds, the CATSI Act's definition of a negotiable instrument is outdated and does not adequately address modern payment methods such as electronic fund transfers. Therefore, we are suggesting that the definition of negotiable instruments be expanded to include payments such as electronic funds transfers.

Conclusion

- 6.22 Proposed changes have been outlined in this chapter with the aim of bringing the CATSI Act in line with modern expectations. They also reflect areas where the CATSI Act has not been operating as intended. These proposed changes aim to ensure the CATSI Act operates as a modern incorporation statute for the benefit of Aboriginal and Torres Strait Islander corporations and their members.

Further ideas

- 6.23 As previously noted, the CATSI Act establishes the position of the Registrar, whose title is set out in the CATSI Act as the "Registrar of Aboriginal and Torres Strait Islander Corporations" and the Office of the Registrar, which is entitled in the CATSI Act as the "Office of the Registrar of Aboriginal and Torres Strait Islander Corporations." Nevertheless, the Registrar is often referred to as the Registrar of Indigenous Corporations as is the Registrar's Office.
- 6.24 These titles cannot be formally changed without a change to the CATSI Act itself. There would be benefit in being able to change these titles more simply to reflect developments in the Indigenous Affairs portfolio, such as a shift in

preferred language. We are keen to hear your thoughts on whether the CATSI Act could be amended to allow changes to the title of the Registrar and Registrar's Office?

Table 6.2: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|---|--|
| Part 2-2, section 21-1 | Application for registration |
| Part 3-2, section 72-5 | Corporation must provide governance material to members |
| Part 6-4, section 274-5 | Negotiable instruments |
| Part 6-7, section 304-5 | Notice of name and address of directors and secretaries to the Registrar |
| Part 7-3, section 336-5 | Registrar may require additional reports, or increase reporting requirements, for class of corporation |
| Part 10-2, section 439-20 | Registrar may require compliance with the CATSI Act |
| Part 10-3, section 453-5 | Production of books or attendance to answer questions |
| Part 10-5 | Protection for whistleblowers |
| Part 11-2, section 487-10 | Show cause notice procedure |
| Part 13-1, section 561-1 and section 561-5 | False or misleading statements False information |
| Part 13-2, section 566-5 | Penalty notices |
| Part 15-2, section 604-5, section 604-10 and section 604-25 | Protected information and the Registrar's obligations Authorised use or disclosure |
| CATSI Regulation 23 | Requirement for financial reports to be prepared in compliance with accounting standards |
| CATSI Regulation 33 | Appointment of auditor |
| CATSI Regulation 36 | Resignation of auditor |
| CATSI Regulation 54 | Authorised use or disclosure of protected information |



7. Registered Native Title Bodies Corporate

- 7.1 RNTBCs, commonly known as Prescribed Bodies Corporate (PBCs)⁵⁶ are a special form of CATSI corporation established under the CATSI Act, pursuant to the NTA.
- 7.2 RNTBCs have legal responsibilities under the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations), the CATSI Act and its Regulations, and other Commonwealth and state and territory legislation.
- 7.3 Like other CATSI corporations, RNTBCs must meet their obligations under the CATSI Act and are accountable to their members.
- 7.4 Unlike other CATSI corporations, RNTBCs are also accountable to common law holders who may not be members of the corporation. RNTBCs have an obligation to consult and obtain the consent of common law holders about native title decisions⁵⁷ in accordance with the PBC Regulations and their rule books.
- 7.5 Understanding the obligations of RNTBCs and decision-making processes may be a challenge for RNTBC directors and members, as well as common law holders. This can be even more challenging where a RNTBC is comprised of diverse common law holder groups across a large determination area. A lack of understanding, in particular in relation to native title decisions and monies, can result in disputes, which may impact the RNTBC's ability to operate.
- 7.6 Native Title Legislation Amendment Bill 2019 (2019 Amendment Bill), which is currently before Parliament, proposes some amendments to the CATSI Act and the NTA which create new pathways of dispute resolution for RNTBCs. The proposed changes also increase accountability and transparency of RNTBCs to their common law holders.⁵⁸ Following the passage of the 2019 Amendment Bill, complementary amendments will be made to the PBC Regulations with the same objective of improving accountability and transparency.⁵⁹

Transparency around native title monies

- 7.7 The most common feedback received from the NIAA's online survey about RNTBCs was the need for greater transparency in decision-making and recording of, and reporting about, receipt and expenditure of native title monies, including in external trusts.
- 7.8 While RNTBCs represent 6.5 per cent of CATSI corporations, they generate 22 per cent of complaints to ORIC. Many of these complaints concern governance shortcomings, including the use of native title benefits. This highlights the need for improved regulatory infrastructure that supports the transparent and accountable management of monies derived from native title.

⁵⁶ PBCs are established to be appointed as the body that manages and/or holds the native title rights and interest (as trustee or agent) for the common law holders (also known as native title holders) recognised in a determination by the Federal Court of Australia.

⁵⁷ AS defined in PBC Regulations 3(1): native title decision means a decision to:

- (a) surrender native title rights and interests in relation to land or waters; or
- (b) do, or agree to, any other act that would affect the native title rights or interests of the common law holders.

⁵⁸ The 2019 Amendment Bill and supporting documents can be found on the [Parliament of Australia website](#).

⁵⁹ An exposure draft of the proposed Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 was released on the [Attorney-General's Department website](#) together with 2019 Amendment Bill in 2018.

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- 7.9 Currently common law holders, particularly those receiving large native title related payments such as mining royalties, often rely on complex benefits management structures (also discussed in Chapter 4). These may, in addition to a RNTBC, include trusts, subsidiaries and corporations established under the Corporations Act. This is a common way to manage risk and reduce tax.
- 7.10 Regulatory oversight of these benefits management structures is fragmented. They may be regulated by ASIC, the ACNC, state and territory jurisdictions (for charitable trusts) or have no external regulator, such as for private discretionary trusts.⁶⁰ These arrangements can be costly to establish and maintain. They also limit the transparency and accountability to RNTBC members and common law holders about the receipt and use of native title monies.
- 7.11 One option is to support greater transparency of trusts by providing for the creation of trusts under the CATSI Act. In turn, the Registrar could hold a Register of Trust Deeds ensuring accessibility and transparency for members and common law holders and could require regular reporting on trust activity. We would like feedback on whether this would be a useful provision and whether it would increase transparency for stakeholders.

Benefits management structures

- 7.12 There has been considerable attention over the last decade as to whether there is a need for a specific corporate structure or entity for common law holders to support economic development through leveraging native title rights and interests.⁶¹ Proposed models for such a structure focused on enhanced recording and reporting requirements and aimed to provide greater transparency and accountability to common law holders about the use of native title monies, reduce costs of benefits management, and simplify regulatory arrangements.
- 7.13 The driver for the proposals was the perceived limitations of charitable trusts in funding economic opportunities. Amendments in 2013 to the *Income Tax Assessment Act 1997* (ITAA) and the then-new *Charities Act 2013* (Cth) have addressed some issues, such as related Indigenous individuals can still comprise a charitable class, that funds can be accumulated for use over time, and that a range of activities intended to support economic opportunities can have a charitable purpose.
- 7.14 In light of the amendments, is there still a need for specific corporate structures for native title benefits management, or have these been overtaken by reforms to charitable status and better practice in benefits management structures?

Recording, reporting and decision-making

- 7.15 While the CATSI Act and trust law typically impose a requirement for RNTBCs to keep separate records and accounts for monies held on trust, the CATSI Act only sets out reporting obligations of RNTBCs in relation to their corporate monies.⁶² This means there is no obligation on RNTBCs to report on native title monies except where monies are allocated for corporate use, such as for the RNTBC's operating costs.
- 7.16 The PBC Regulations state that RNTBCs have to invest or otherwise apply native title monies held in trust as directed by the common law holders, but do not outline how these directions need to be given. The PBC Regulations also do not apply to decisions about native title monies held outside of the RNTBC structure, so do not apply to many benefits management structures.
- 7.17 Reporting to common law holders by non-RNTBC entities (whether or not controlled by the RNTBC) depends on any legal obligations that apply to the specific benefit management structure. There may be no or limited requirement

⁶⁰ ORIC and the ACNC have a Memorandum of Understanding that enables a report that satisfies one regulator as also being acceptable to the other regulator which prevents the need for two reports..

⁶¹ This has been considered by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (2013) led by Treasury.

⁶² See Chapter 7, Part 7-3 of the CATSI Act.



to report to common law holders or beneficiaries about monies held on trust.⁶³ There also may be no or limited requirement for non-RNTBC entities or commercial ventures using monies derived from native title to report to common law holders or beneficiaries about monies held on trust or profit and loss from commercial activity.

- 7.18 Additionally, non-monetary benefits derived from native title (such as parcels of freehold land) are often transferred to the beneficial ownership of common law holders under native title agreements. Neither the CATSI Act nor the PBC Regulations address how non-monetary benefits must be reported and there is no express statutory requirement to keep separate records or to report to common law holder beneficiaries about these holdings.
- 7.19 Without regular reporting—by the RNTBC or the non-RNTBC entity that holds the benefits on behalf of and for the benefit of the common law holders—common law holders may lose knowledge about native title benefits derived from agreements such as Indigenous land use agreements (ILUAs), right to negotiate section 31 agreements⁶⁴ or ancillary agreements. This lack of information may mean common law holders, over time, do not know what native title benefits exist, where monies are held, or how and to whom distributions are paid.
- 7.20 We propose to introduce a requirement that RNTBCs must separately report on monies derived from native title, as well as non-monetary native title benefits held on trust, in addition to their existing reporting requirements. All RNTBCs would be required to provide a certain base amount of information in their annual general report that is submitted to the Registrar about the native title monies they have received, invested or used; while some RNTBCs (with income above a certain level) will be required to provide a greater level of detail in their annual financial report.
- 7.21 To support this reporting, a definition of both ‘native title money’ and ‘non-monetary native title benefit’ would need to be developed. The ITAA includes a definition of ‘native title benefit,’ which includes ‘non-cash benefit’. This may be a useful starting point for the development of a definition.
- 7.22 It is desirable that common law holders have real decision-making power about the use of native title benefits. There are different ways that this could be achieved. One way is to amend the PBC Regulations to define decisions about native title benefits as ‘native title decisions’ which would require RNTBCs to consult and seek the consent of the common law holders before native title benefits could be invested or otherwise applied.
- 7.23 There is no regulatory oversight of RNTBCs’ compliance with their obligations under the PBC Regulations. The CATSI Act could be amended so that ORIC would have a clear regulatory role in relation to decision-making and reporting about benefits derived from native title.
- 7.24 The aim is to achieve increased clarity and transparency about native title benefits including non-monetary benefits for common law holders, so that common law holders can participate in the management of their benefits and receive adequate reporting to enable this. We are seeking your views on whether these proposals are likely to achieve this. We are also interested in your views about whether there should be a financial threshold where reporting requirements are triggered to avoid undue regulatory burden.
- 7.25 Noting that the PBC Regulations only apply to RNTBCs, should a reporting obligation be extended to any entity that is related to a RNTBC that is holding monies (above a certain threshold) derived from native title? What would a relevant threshold look like?
- 7.26 Given ORIC’s corporate regulatory role, are there any issues with extending this to significant aspects of the PBC Regulations such as the making of native title decisions on native title monies and proposed obligations to separately report on native title benefits? Should there be a limit to this regulatory oversight?

⁶³ Older trust structures (particularly pre-determination trusts) may not be required to report about trust performance, fees, investment or dispositions to common law holders and beneficiaries. They may be governed by trust deeds that do not have modern checks and balances that allow for good governance, oversight and review and may be subject to complex trustee fee arrangements that significantly reduce the balance of money over time.

⁶⁴ Part 2, Division 3 of the NTA details future act agreements which include ILUAs, section 31 agreements made pursuant to the right to negotiate provisions and ancillary agreements which are often confidential and may be entered into in conjunction to these agreements.



Dispute resolution

- 7.27 The NTLAB proposes new and strengthened pathways for dispute resolution including a requirement for RNTBCs to add a dispute resolution process to their rule book that covers people who are, or assert to be, common law holders and who are not captured by the existing internal dispute process. The NTLAB also proposes a new dispute resolution function for the National Native Title Tribunal (NNTT) to assist RNTBCs and common law holders through mediation. These pathways have not yet been introduced to the system, so their effectiveness is yet to be determined.
- 7.28 While the current dispute resolution options for RNTBCs, and the expanded options offered in the NTLAB, can assist in resolving RNTBC disputes, not all disputes will be resolved..
- 7.29 This leaves affected parties to resolve their disputes in court. While court based mediation processes have been effective in advancing and resolving native title claims, and in some instances have extended to supporting the establishment of governance arrangements post-determination, dispute resolution through a court process can be prohibitively time consuming and costly.
- 7.30 The proposed new mediation function in the 2019 Amendment Bill for the NNTT for post-determination disputes could be complemented by an arbitration mechanism to aid in the resolution of disputes outside of court. Arbitration by a suitable body may provide a forum to parties that have been unable to finalise their dispute by other means; for example, where one or both parties refuse mediation or mediation does not resolve the dispute.
- 7.31 If a detailed arbitration proposal were to be developed, regulatory oversight by ORIC to ensure RNTBC compliance with the arbitrated outcome could also be explored. The development and progression of arbitration options and regulatory oversight of arbitral decisions would be subject to addressing legal and design issues.
- 7.32 We are keen to hear your views on whether, in addition to the existing and proposed dispute resolution options, a new arbitration function would assist in resolving RNTBC disputes noting complex design issues may limit the scope of any arbitration function. If an arbitration option is developed, which agency should hold the arbitration function? Would additional enforcement powers for ORIC to arbitrate decisions be needed?

RNTBC model rule book

- 7.33 As noted above, RNTBCs have dual responsibilities: corporate and native title related. Better guidance on rule development for current and future RNTBCs may assist with distinguishing between the two.
- 7.34 We are keen to hear your views on the desirability of a RNTBC specific model rule book that offers sample rules to assist groups to develop their own rules, promote good practices, and enable a 'default' set of rules for newly established RNTBCs.⁶⁵ For example, a model rule book could include dispute resolution pathways for corporate and native title disputes. These could allow for inclusion of common law holder group specific decision-making processes.
- 7.35 A model rule book would reflect changes required by the 2019 Amendment Bill and any other changes that might arise from this review of the CATSI Act. It could also assist the 100 additional RNTBCs expected to be registered over the next decade to develop rule books that suit their circumstances and avoid known problems.

⁶⁵ The [ORIC website](#) has a useful *Guide to writing good governance rules for PBCs and RNTBCs* (2011) which provides guidance on rule book development.



RNTBC name change registration on the National Native Title Register (NNTR)

- 7.36 Once a RNTBC is up and running a change of name may be sought by the RNTBC. Presently, it is not clear if a name change made to the CATSI register can be carried over to the NNTR maintained NNTR. It is proposed to amend the NTA to enable an amendment of the NNTR by the Registrar of the NNTR.

Conclusion

- 7.37 This chapter includes a range of proposed amendments to support the good governance of RNTBCs, as well improve the transparency of corporations' operations to members and common law holders. RNTBCs are a critical part of the native title system and perform important functions for and on behalf of common law holders. Common law holder groups are diverse in size and capacity, and require transparency to exercise and protect their rights and interests. Tailored regulation can ensure that common law holders receive regular reporting about their native title benefits and are well placed to manage them into the future. This can also prevent disputes between RNTBCs, their members, and their common law holders.

Further ideas

- 7.38 As well as the changes proposed in this paper, we are seeking your views on exploring some further ideas.
- 7.39 Appropriate regulatory oversight for RNTBCs' native title functions was also raised in the NIAA's online survey, including whether ORIC is the most suitable regulator and the need for more calibrated regulatory options before the blunt tool of special administration. Are there any other regulatory reforms required to ensure transparent and accountable RNTBC decision-making?
- 7.40 Are there any other regulatory or legislative reforms that should be considered to improve transparency and accountability around native title benefits? Given the diversity of RNTBCs (size, assets, locations, capacity, stand-alone or part of corporate structure etc.) how might any additional regulation be tailored to ensure implementation is cost neutral? Is the size classification for CATSI corporations relevant in the context of the PBC Regulations or do other reporting thresholds need to be developed?

Table 7.1: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|--------------------------|--|
| Part 3-2 | Rules dealing with the internal governance of corporations |
| Part 3-4, section 88-1 | Registration changing its name |
| Part 7-2, section 322-10 | Obligation to keep financial records |
| Part 7-3 | Reporting requirements |



8. Special Account: Unclaimed Money Account and Protection of Assets

- 8.1 The Unclaimed Money Account is established as a special account under section 551-20 of the CATSI Act—as provided for under Section 80 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The account is used to hold money including proceeds from the sale of unclaimed property of deregistered CATSI corporations. Money in old bank accounts is transferred into the Registrar’s Unclaimed Money Account, as are the proceeds of the sale of land or other assets if sold by the Registrar. At the time of writing this draft report, the account holds just under \$1 million and the Registrar has released around \$570,000 from the account since 2010. Currently six properties are vested in the Registrar following the deregistration of corporations.
- 8.2 Under the CATSI Act, the Registrar is required to transfer unclaimed money to a person who is legally entitled to the property. The Registrar and his office provide guidance to anyone wishing to apply for the transfer of these funds, however, it is resource intensive to proactively identify and pursue potential applicants, and often there are no parties with a legal claim to the asset. If there is no such person, after six years, funds in the Unclaimed Money Account are moved to the Commonwealth’s Consolidated Revenue Fund.⁶⁶
- 8.3 Ordinarily, a CATSI corporation will not be deregistered if it has more than \$1000 in assets. While the Registrar strives to ensure that a corporation has divested itself of all property, there are occasions when a corporation still holds, or is entitled to hold significant assets at the time of deregistration. In some instances the Registrar may not be aware of this property until action is taken by a creditor or other impacted party that brings it to the Registrar’s attention.
- 8.4 Under subsection 546-20(2) of the CATSI Act, remaining assets of a deregistered corporation vests in the Registrar. If the property was held by the corporation on trust, the Registrar may continue to hold the property as Trustee, or apply to the court to appoint a new Trustee. If the property was not held on trust, the Registrar may dispose of, or deal with, the property as the Registrar sees fit. Any money received as a consequence may be applied to defray the Registrar’s expenses of dealing with the property, and the balance will be held in the Unclaimed Money Account.
- 8.5 The property remains subject to all liabilities imposed on it under law, such as a charge or claim on the property, or land rates and taxes. If the Registrar sells the property, the proceeds can be used to meet those liabilities. If the property of the deregistered corporation is insufficient to meet those liabilities, the Registrar is not liable.
- 8.6 The Registrar maintains a record of unclaimed property and provides guidance to anyone claiming entitlement to the property.⁶⁷
- 8.7 While property is vested in the Registrar, there may be issues that affect the value of the asset or pose a potential risk to the public or community, for example, pest threats, illegal tenancies, fire or flood. At present, the Registrar’s financial resources for taking preventive or remedial action for the protection of these assets is limited to the assets

⁶⁶ The Consolidated Revenue Fund is established by section 81 of the Constitution and consists of all revenue and monies raised or received by the executive government of Australia. Source: Department of Finance, Consolidated Revenue Fund [Internet], Department of Finance, 2019, available from <<https://www.finance.gov.au/about-us/glossary/pgpa/term-consolidated-revenue-fund-crf>> [accessed 13 January 2020].

⁶⁷ ORIC, *PS-18: Property of deregistered corporations*, ORIC, 2015, available from <<https://www.oric.gov.au/publications/policy-statement/ps-18-property-deregistered-corporations>> [accessed 12 June 2020].

of the deregistered corporation. Consequently, there is a risk of inadvertent deterioration and/or devaluation of the asset(s) while in the custody of the Registrar.

- 8.8 There are currently a number of properties vested with the Registrar, some of which are accruing liabilities in addition to usual charges such as rates. For example, a property in New South Wales recently incurred a \$5000 charge for the costs of cleaning up excessive vegetation. Such debts accrue along with the regular liabilities, and are paid on sale of the property. This can make the property difficult to sell or even result in the liability value exceeding the value of the property itself.
- 8.9 Natural disasters and other events, such as bushfires, can also impact properties vested with the Registrar, requiring remedial action. Contamination of water supply, damage to infrastructure, and risk to human and livestock safety are just a few examples of risks that need to be managed, and can result in substantial costs if intervention is required. While the Registrar may be immune from liabilities accruing against the asset, as a statutory office holder, he or she has a responsibility to practice ethical and responsible land management.
- 8.10 It is proposed that rather than becoming part of the Consolidated Revenue Fund, the CATSI Act be amended to allow the Registrar to use funds in the Unclaimed Money Account after six years to maintain and protect assets that are vested in the Registrar under subsection 546-20(2) of the Act. This may include using those funds to engage an asset manager to manage the property until the Registrar can take appropriate action to divest the property. It is not proposed that funds will be used to pay liabilities such as rates, but rather for threat mitigation and rectification, and insurance costs.
- 8.11 Appointment of an asset manager has the potential not just to protect the asset, but to see it being used and potentially generating income. The Registrar has recently had approaches from a local council, about a block of land currently vested in the Registrar. The council has had enquiries from someone wanting to rent the property. As a corporate regulator, the Registrar has neither the capacity nor in-house expertise to establish and manage such arrangements.

Conclusion

- 8.12 Enabling the Registrar to utilise funds held in the Unclaimed Money Account after six years will ensure the protection of assets vested in the Registrar. It will also ensure more of the Registrar's own funding will be directed towards supporting Aboriginal and Torres Strait Islander corporations rather than managing property of deregistered corporations.

Table 8.1: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|------------------------------------|----------------------------|
| Part 12-2, section 546-20 | Effect of deregistration |
| Part 12-3, sections 551-1 – 551-25 | Unclaimed property |
| Part 16-3, section 658-1 | Functions of the Registrar |



9. Special administration, insolvency and winding up of CATSI corporations

- 9.1 From time to time corporations may outlive their purpose, struggle to operate effectively, have financial challenges or otherwise come to a different point in their lifecycle. Some may be able to be assisted through a special administration, some may voluntarily choose to deregister, and some may need to be wound up by other means.
- 9.2 Where a corporation's challenges are financial, it can be a difficult and costly to determine if the corporation is insolvent, particularly where there is poor or limited record keeping.
- 9.3 Changes to the special administration, insolvency and winding up provisions of the CATSI Act are being considered with the aim of giving more help to CATSI corporations facing financial difficulty.

Special administration

Title of special administration

- 9.4 Special administration allows the Registrar to provide early proactive assistance when a CATSI corporation faces financial or governance difficulties. When a corporation is experiencing financial stress, special administration may provide a better outcome than formal insolvency options that might otherwise apply.
- 9.5 The aim of special administration is to restore a corporation to financial and organisational health and, once this is achieved, to give control back to directors and members. The appointment of a special administrator should be seen as a positive intervention. However, anecdotal evidence indicates that people often perceive special administration in a negative light as they assume that it is similar to external or voluntary administration. Sometimes this assumption has resulted in funding bodies indicating that they intend to rescind funding to corporations placed under special administration.
- 9.6 Changing the name of special administration may help prevent people assuming that it is the same as external or voluntary administration. We are interested in hearing what you think may be an appropriate alternative name for the special administration process?

Appointing special administrators

'Show cause' process

- 9.7 To put a CATSI corporation under special administration, the Registrar must be satisfied that one or more of the grounds set out in section 487-5 of the CATSI Act exist. Except in limited circumstances involving urgency, if the Registrar is considering putting a corporation under special consideration, the corporation must be given a reasonable opportunity to say why this should not be done. This is known as a 'show cause' notice.
- 9.8 Even if the directors of a CATSI corporation unanimously ask the Registrar to appoint a special administrator, the Registrar must still follow the 'show cause' procedure in the CATSI Act and ask the corporation if it believes there are reasons it should not be placed under special administration.

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- 9.9 It has been suggested that if all of a corporation's directors request the appointment of a special administrator, then the Registrar should not have to undertake the 'show cause' notice process. Submissions to the Technical Review were almost unanimously supportive of removing the 'show cause' notice where all members of the board requested the appointment of a special administrator, as well as the publishing requirements.
- 9.10 One of the grounds for appointing a special administrator is if a majority of directors request the Registrar to appoint one. As such, it has also been suggested that in this case the 'show cause' process could also be dispensed with, since the request in and of itself satisfies one of the grounds for special administration.
- 9.11 We are keen to hear your views on whether the 'show cause' process should be removed if all or only the majority of a corporation's directors request the appointment of a special administrator?
- 9.12 Related to the point raised above, it has also been suggested that the 'show cause' process can provide administrators with the opportunity to destroy corporation records and consideration should be given to removing the requirement altogether. While we would not support the removal of the requirement in its entirety, we are interested in your thoughts on whether the 'show cause' notice process could be streamlined or shortened?

Grounds for appointment

- 9.13 Currently, one of the grounds for the appointment of a special administrator is if the Registrar thinks that the CATSI corporation has traded at a loss for at least six of the last twelve months. It can sometimes be difficult for the Registrar to determine if a corporation has been in that situation, if the corporation is lacking adequate records. A different issue is that financially sound corporations that receive grant funding in intervals (such as annually, biannually or quarterly), or that trade seasonally such as tourism corporations, could be captured by this ground.
- 9.14 Changing this ground to instead cover an irregularity in the management of a corporation's financial affairs could be more practical and improve the effectiveness of this provision. Under this proposal, if the Registrar identifies an irregularity or irregularities in the management of a corporation's financial affairs, he or she can appoint a special administrator.
- 9.15 When appointing a special administrator, the Registrar must give public notice. Currently, the CATSI Act requires the Registrar to give notice in the *Australian Government Gazette* and newspapers. We are proposing that it would be faster and less costly if the Registrar could publish notices of the appointment of a special administrator on modern electronic communication platforms, including ORIC's website.

Keeping contracts going during special administration

- 9.16 In 2018 the Corporations Act was changed to make it law that contracts of insolvent companies could not be brought to an end just because the company went into receivership or voluntary administration. We see benefit in applying a similar provision to corporations that are placed under special administration noting that the aim of special administration is to restore the corporation to good health to return it to the control of members. The cessation of contracts, including funding agreements, during a period of special administration is more likely to harm than help a corporation.

Examinable affairs and financial matters

- 9.17 Section 453-1 of the CATSI Act provides the Registrar with the power to cause an 'authorised officer'⁶⁸ to examine the books of a CATSI corporation and report back to the Registrar on various aspects of a corporation's affairs, including:

⁶⁸ The CATSI Act provides for the Registrar to appoint a suitable person as an 'authorised officer' for the purposes of carrying out enforcement functions. The functions and powers of an authorised officer are outlined in various parts of the CATSI Act

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- non-compliance with the CATSI Act or the corporation’s rule book;
 - alleged or suspected contraventions of law;
 - irregularities in the operations or examinable affairs of the corporation;
 - where grounds for appointing a special administrator exist; or
 - where grounds for appointing a special administrator may exist in the future.
- 9.18 Increased information access powers for the Registrar would improve his or her capacity to provide timely and effective support to corporations that may be experiencing financial difficulties. Expressly including an irregularity or irregularities in the management of a corporation’s financial affairs as a subject for examination will ensure that the Registrar can be made aware of, and take appropriate action, in relation to CATSI corporations that are in financial distress.
- 9.19 This proposal aligns with the intent of the CATSI Act as outlined in the Revised Explanatory Memorandum to the CATSI Bill which states that examinations are *“often used by the Registrar, with the consent of corporations, to undertake diagnostic examination of corporations in difficulty. This ‘special regulatory assistance’ is also important in the context of ‘capacity building’ for these corporations.”*⁶⁹
- 9.20 Currently it is not explicit that an authorised officer may report on the financial affairs of a corporation, even though this is an area that can be indicative of problems within the corporation. Therefore, it is also proposed that an authorised officer be able to report on whether there is an irregularity in the management of a corporation’s financial affairs. This additional reporting ground will give the Registrar more information about a corporation facing financial difficulty, which would then allow the Registrar to provide specialist assistance in the form of special administration, or determine whether other forms of intervention or assistance may be required.
- 9.21 The proposal to allow an authorised officer to report on whether there is an irregularity in the management of a corporation’s financial affairs is predicated on the proposed change that a special administrator can be appointed if an authorised officer issues such a report (paragraph 9.14).
- 9.22 Together, these could be useful changes as they will provide for a process where a corporation in financial distress can be examined and reported on, and where necessary, the corporation can be provided with support and rehabilitation. The opportunity for early identification and intervention through such a process has the potential to reduce the number of corporations that become insolvent.
- 9.23 We are seeking feedback in relation to whether authorised officers should be entitled to report on other matters after examining a CATSI corporation’s books, and if so, what should those matters be?

Insolvency and winding up

- 9.24 A CATSI corporation may be insolvent if it is unable to pay its debts when they must be paid. Insolvency can affect the management and operation of a corporation, and can have serious consequences for the corporation’s officers, employees and members.

and include (but are not limited to): undertaking an examination and reporting to the Registrar on specific matters; applying to a magistrate for a search warrant; and inspecting and making copies of a corporation’s books.

⁶⁹ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.492, available from https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403 [accessed 3 July 2020].

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- 9.25 Running an insolvent corporation can put directors at risk of being found personally liable⁷⁰ for certain debts of the corporation and/or having to pay penalties under the CATSI Act. Provisions relating to insolvency and the winding up of CATSI corporations need to support the Registrar to intervene early and effectively to protect corporations and individuals.
- 9.26 The CATSI Act deals with insolvent corporations in a number of ways. For example, by stating that a corporation should not trade when it cannot pay its debts when they are due, and by providing a means for winding up a corporation. Winding up involves taking control of the corporation from its directors, finalising the corporation's affairs, selling any assets and dissolving the corporation so it ceases to exist.
- 9.27 It is important to recognise that the risk of insolvency does not necessarily mean that a CATSI corporation must be wound up. With support from the Registrar in the form of special administration, a corporation with financial or governance difficulties may be helped to get back on track and to continue operating.

Rebuttable presumptions of insolvency

- 9.28 Having financial trouble does not necessarily mean a CATSI corporation is insolvent. However, if a corporation is insolvent and no steps are taken, the court may need to get involved. For example, the court can wind up a CATSI corporation if it is insolvent under section 526-1 of the CATSI Act.
- 9.29 It can be a long and difficult process for a court to decide that a corporation is insolvent. This is problematic particularly when there are circumstances which mean it should be wound up as quickly as possible.
- 9.30 One way to make it easier for a court to wind up a corporation is to introduce practical tests for insolvency, based on evidence and advice from a specialist. If a CATSI corporation meets these tests, the court would then be able to assume that the corporation is insolvent. This is called a presumption of insolvency. A corporation would still have the chance to show to a Court that it can pay its debts even if one of these presumptions of insolvency exist. A court would then make a decision as to whether the corporation should be wound up based on all the evidence before it.
- 9.31 The Technical Review recommended introducing rebuttable presumptions of insolvency into the CATSI Act but as these presumptions do not apply at the time of winding up companies under the Corporations Act, some submissions made in response to the Technical Review expressed concerns that adopting these presumptions would make it too easy to wind up a CATSI corporation.⁷¹ In addition, it was noted that as they only applied to CATSI corporations, they could be deemed discriminatory and would be heavy handed where the failure to keep adequate records was minor in nature.
- 9.32 We note that this is a rebuttable presumption. So, even if a party applying to wind up a CATSI corporation proves to the court that these criteria are satisfied, the corporation can still seek to prove it is not insolvent. If the corporation can do that, it will not be wound up on the ground of insolvency.
- 9.33 It is therefore proposed that a CATSI corporation should be presumed to be insolvent where an authorised officer appointed under the CATSI Act has reported to the Registrar, or a special administrator forms the opinion, that:
- the corporation has failed to keep adequate written financial records (with no time period specified); or
 - the corporation has failed to keep adequate financial records for a period of seven years.
- 9.34 We are interested in your views about introducing a presumption of insolvency where a corporation has failed to keep adequate financial records, and what standard should be set to ensure this is applied fairly?

⁷⁰ This means that the directors may have to pay the debts of the corporation themselves, and risk personal bankruptcy if they do not or cannot.

⁷¹ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2019].



Registrar to seek leave of the court

- 9.35 Currently the Registrar may apply to the court to wind up a corporation on the grounds that it is insolvent only with the leave (permission) of the court.⁷² In any application for winding up, the Registrar has to prove that the corporation is insolvent. However, needing leave of the court means that, before the Registrar even gets to the stage of having to prove insolvency of the corporation, the Registrar must first prove that it is appropriate to bring the application.
- 9.36 It is proposed to remove the need for the Registrar to seek leave of the court to wind up the corporation. The Registrar would still need to show the court why the corporation needs to be wound up i.e. prove insolvency. This change is consistent with Recommendation 31 of the Technical Review.

Voluntary deregistration

- 9.37 When CATSI corporations have achieved their purpose and are no longer required, or they are functioning ineffectively, voluntary deregistration is less costly and complex than winding up by appointing an administrator or liquidator through the courts.
- 9.38 Currently, under section 546-1(2) of the CATSI Act, in order to voluntarily deregister a corporation, all of the members must agree to the deregistration.
- 9.39 In many cases where a corporation is no longer active, the membership may have lost interest and contact, and it can be difficult to convene a meeting or circulate a resolution to gain 100 per cent member agreement.
- 9.40 It is proposed to address this by providing for a lower threshold such as allowing a special resolution to be passed agreeing to the winding up, or alternatively, providing the Registrar with the power to exempt corporations from a particular criteria for deregistration such as the requirement for 100 per cent of the membership to agree.

Insolvent trustee corporations

- 9.41 A trustee corporation is a corporation which acts as a trustee of property under a trust deed. This section is not referring to a corporation's trustee responsibilities under the native title legislation.
- 9.42 A corporation which acts as a trustee may act just in that trustee capacity (where that is its only purpose for existing). Alternatively, a trustee corporation may act in more than one capacity—it may be a trustee but also manage its own property.
- 9.43 The CATSI Act incorporates the Corporations Act insolvency provisions. Many of these are general provisions only, but must be applied to insolvent trustee corporations even though the provisions are not particularly suited to these types of corporations. This causes problems for companies under the Corporations Act as well as CATSI corporations.
- 9.44 Recently, the courts have made some decisions which help explain how insolvency laws can apply to insolvent trustee corporations.
- 9.45 Previous reviews have considered whether the CATSI Act should be amended to better explain how insolvency laws should apply to insolvent trustee corporations.
- 9.46 At this point, we are not considering any changes to the CATSI Act but would welcome feedback in relation to dealing with insolvent trustee corporations.

⁷² The CATSI Act confers jurisdiction on the same courts as those under the Corporations Act, including the Federal Court, Supreme Courts in each state and territory, Family Court and State Family Courts, and the lower courts of each state and territory.



Conclusion

9.47 Changes proposed in this chapter are expected to better support CATSI corporations requiring intervention to improve their financial and/or governance health. In turn, these changes will benefit members who will see the return of healthier corporations to their control. Some changes also aim to address those corporations for which intervention may be too late or inappropriate, perhaps because members are disengaged or there is no longer a need for the corporation. In any case, streamlining processes to intervene is expected to result in more timely and effective outcomes for CATSI corporations.

Table 9.1: Sections of the CATSI Act explored in this chapter

| Section of CATSI Act | Discussion Area |
|--------------------------|------------------------|
| Part 10-3, section 453-1 | Examination of books |
| Part 11-2 | Special administration |
| Part 11-5, Division 526 | Winding up |