



Australian Government

Office of the Registrar of Indigenous Corporations

Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018

Report on further consultations with stakeholders

27 March 2019

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Background

The Australian Government is currently progressing reforms to strengthen and improve the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

The [Corporations \(Aboriginal and Torres Strait Islander\) Amendment \(Strengthening Governance and Transparency\) Bill 2018](#) was introduced into Parliament on 5 December 2018 and referred to Senate Finance and Public Administration Legislation Committee for inquiry and report by 11 February 2019.

The Senate committee's report recommended passage of the legislation however noted dissent by Labor Senators and the Australian Greens.

On Friday, 22 February 2019 during Senate estimates, the Minister for Indigenous Affairs, Senator the Hon. Nigel Scullion, and the Registrar of Indigenous Corporations, Selwyn Button, gave an undertaking to the committee to host further targeted consultations to address objections to the bill raised in submissions to the committee.

Consequently, on 20 March 2019, the Registrar hosted a consultation workshop with targeted stakeholders.

About the workshop

The purpose of the consultation workshop on 20 March 2019 was to discuss the objections raised in submissions, and consider whether any parts of the bill are supported at this time.

The Office of the Registrar of Indigenous Corporations (ORIC) and the Department of the Prime Minister and Cabinet (PMC) invited the following stakeholders to participate in the workshop:

- Aboriginal Peak Organisations Northern Territory
- Cape York Land Council Aboriginal Corporation
- Law Council of Australia
- National Aboriginal Community Controlled Health Organisation (NACCHO)
- National Native Title Council (NNTC)

Attendees:

- Selwyn Button – Registrar of Indigenous Corporations
- Brian Stacey – Policy Consultant, NAACHO
- Tony McAvoy SC – Chair Indigenous Legal Issues Committee, Law Council of Australia
- Jaimie Lowe – Chairman, NNTC
- Austin Sweeney – Director of Legal Policy, NNTC
- Jennifer Collard – First Assistant Secretary, PMC IAG Program Office
- Andrew Huey – Assistant Secretary, PMC IAG Program Office
- Kym Lockley – Principal Legal Officer, PMC IAG Legal
- Angus Hudson – General Counsel, ORIC

- Benjamin Murray – Senior Adviser, ORIC
- Lisa Hugg – Senior Adviser, ORIC

General concerns of stakeholders

Outcome: Agreement to consider progressing this bill with some changes on the basis of a commitment to a comprehensive review of the CATSI Act.

Discussion:

At the outset of discussions about whether any parts of the bill are supported at this time, representatives of the stakeholders indicated that any proposed changes to the bill discussed during the workshop would be communicated to their respective organisations for consideration, and that the decision whether to support any proposed change to the bill would be a matter for the internal processes of their respective organisations.

The representatives of stakeholders reiterated concerns raised in submissions that the review of the CATSI Act and the consultations which supported the bill were too limited in scope. The overarching concern of stakeholders was that there should be a comprehensive review of the CATSI Act as a special measure for the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*.

The representatives of stakeholders indicated that their respective organisations would consider whether to support proposed changes to the bill on the basis of the Registrar committing to a comprehensive review of the CATSI Act which includes a consideration of:

- the grounds for the CATSI Act as a special measure
- the role of the CATSI Act in the broader corporate context
- the role of CATSI Act in the context of government policy
- to consider inclusion of a specific section on PBCs as suggested by the KPMG review.

The Registrar also committed to establishing an ORIC Governance Advisory Council of leaders in the Indigenous corporate sector that would inform the strategic and policy direction of ORIC and the administration of the CATSI Act. The representatives of stakeholders welcomed the Registrar's commitment to this initiative.

Summary of workshop outcomes on specific measures

Support for amendments being considered

The representatives of stakeholders indicated that their respective organisations were open to considering support for the following measures in the bill:

- Requiring rule books to include replaceable rules, albeit with a five-year transition period instead of the two year period currently proposed in the bill.

- Providing for model rule books that are deemed compliant with the CATSI Act and can be used off the shelf.
- Providing for wholly owned and joint venture CATSI corporation subsidiaries.
- Requiring corporations to use alternative contact details of members for communications including in the context of processes for cancellation of membership.
- Allowing directors to redact personal information of members on the register of members to protect the personal safety of members, subject to considering in a future comprehensive review of the CATSI Act, the merits of extending the power to members themselves to redact their personal information.
- Allowing medium corporations to have financial reports reviewed instead of audited.
- Requiring medium and large corporations to lay annual reports before the AGM.
- Broadening the Registrar's compliance powers to include issuing fines for non-lodgment of annual reports, entering into enforceable undertakings, and shortening timeframes for requiring production of documents.
- Adding a number of grounds for the appointment of a special administrator.
- Exempting small corporations from seeking member approval for related party transactions capped at \$5000 per party per annum.
- Removing the show cause process for appointing a special administrator if all directors request the appointment.
- Adding insolvency as a ground for appointing a special administrator.

Amendments not supported

The representatives of stakeholders indicated their respective organisations would not support the following measures in the bill at this time, but were open to considering these issues further in the context of a comprehensive review of the CATSI Act and regulations in the future:

- Changing the criteria and thresholds for size classifications.
- Empowering the Registrar to refuse to register a rule book that is not fit-for-purpose as it is presently formulated.
- Allowing small corporations the option to reduce the frequency of AGMs.
- Reducing the period that a member is not contactable from two years to 12 months for the purpose of cancelling membership.
- Reporting remuneration and employment history of key management personnel.
- Adding a presumption of insolvency based on reports of examiners or special administrators regarding failures to keep financial records for the purpose of the appointment of a special administrator.

Specific issues concerning the bill

Rule books and replaceable rules

Proposed change

- Require all applicable replaceable rules to be either replaced (in the sense of reproduced) or modified in a corporation's constitution.

Outcome: Stakeholders will consider supporting subject to a five-year transition period for corporations registered prior to the commencement of this amendment, instead of the two-year period currently proposed.

Discussion

Stakeholders agreed there was merit in requiring all applicable replaceable rules to be included in the text of a corporation's rule book.

NNTC suggested the requirement be imposed only on new registrations and, for existing corporations, at the time a corporation wishes to update its rules.

The Law Council noted this requirement would be resource-intensive for both corporations and ORIC, and queried whether ORIC had the resources to provide appropriate support to over 3000 corporations to revise their rule books.

NNTC indicated a longer transition period would allow peak bodies a more realistic timeframe to offer advice to smaller corporations, especially those in remote areas, to ensure they sought informed consent to change the rules.

On balance, the representatives of stakeholders agreed that their respective organisations would consider not opposing this provision in the spirit of cooperation provided there was an extension of the transition timeframe from two to five years.

Model rule books

Proposed change

- Provide for model rule books that are deemed compliant with the CATSI Act and can be used off the shelf.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders did not object to the concept of an 'off-the-shelf' model rule book, including model rule books designed for different sectors, provided it did not prejudice people's right to create rule books tailored to their own needs and circumstances. The representatives of stakeholders made the point that the development of model rule books needs to be led by Indigenous people in each relevant sector.

Refusal to register a rule book

Proposed change

- Extend the Registrar's power to refuse to register a rule book if in the Registrar's opinion it is not fit for purpose.

Outcome: Not supported

Discussion

Stakeholders held the view that this proposed power was not necessary as ORIC already had the capacity to provide guidance on the content of draft rule books. Further, such a power would be detrimental in that it would feed the notion that corporations are controlled by ORIC. They felt the current support offered by ORIC to review rule books was adequate.

Tabling annual reports and financial statements

Proposed change

- Require medium and large corporations to lay before the AGM, any reports they are required to prepare for that financial year instead of just making available to members.

Outcome: Stakeholders will consider supporting

Discussion

Despite there being no current legislative requirement to table reports, many corporations have adopted the good practice of doing so at their AGM. Mandating the tabling of reports promotes transparency and provides members with access to information to allow them to participate effectively in corporation decision-making.

There were some concerns about the potential financial burden to corporations if they must produce multipage reports in hard copy for large numbers of members. The group discussed alternative methods for providing and presenting the information at the AGM.

Review of financial reports

Proposed change

- Allow medium corporations to have financial reports reviewed instead of audited.

Outcome: Stakeholders will consider supporting

Discussion

There was some concern about whether a review would provide an adequate level of assurance and whether it was appropriate for a corporation to make the decision on whether to have a review or an audit.

Stakeholders noted the existing safeguard providing the Registrar with the power to require a corporation to be audited.

There was a desire for the Registrar to clarify when a review of financial reports would suffice as opposed to an audit.

Stakeholders also noted equivalent provisions in the *Corporations Act 2001* and the

Business structures

Proposed changes

- Allow corporations to establish wholly-owned subsidiary CATSI Act corporations.
- Allow an entity or group of entities to establish a CATSI Act corporation as a subsidiary or joint venture where the Indigeneity requirement is met.
- Allow two-member corporations, where one member is not an Aboriginal or Torres Strait Islander person or entity, as long as the Aboriginal or Torres Strait Islander member has a casting vote. For example, this may be a two-person corporation, or a joint venture between a CATSI Act corporation and a Corporations Act corporation.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders agreed there were difficulties within the current framework that discouraged registration of some business structures.

Stakeholder concerns centred on the ability to regulate the Indigeneity requirement for subsidiaries and protect Indigenous people. There was some concern that this proposal may have the adverse effect of encouraging registration of structures for the benefit of unscrupulous non-Indigenous operators. However, everyone acknowledged the same risk already exists under the Act.

On the other hand, promoting registration of subsidiaries under the CATSI Act framework provides access to specialist regulatory support and maintains the Indigenous control of the new entity. Also, there are significant benefits in having a group of entities under one legislative framework, with one regulator, through streamlined compliance and reporting obligations.

Classification structure

Proposed change

- Simplify the classification criteria to make it easier to determine a corporation's size.
- Revise the thresholds for each classification to align the CATSI Act more closely with other legislative frameworks.

Outcome: Not supported

Discussion

NNTC did not support the proposed new classification model. It proposed the model for classification and reporting be considered in the context of a broader review of the CATSI Act.

NACCHO supported simplifying the test for determining size but was opposed to some provisions related to size—see less frequent AGMs for small corporations, below.

Less frequent general meetings for small corporations

Proposed changes

- Allow small corporations to pass a special resolution to not hold an AGM for two or three years, provided that:
 1. the directors do not vote on the resolution, unless all members are directors
 2. the corporation advises the Registrar if there is any material change in its circumstances
 3. members have a residual power to request a general meeting.
- Empower the Registrar to direct a corporation to call and hold a general meeting of the corporation, where the Registrar decides that it is reasonable to do so.

Outcome: Not supported

Discussion

Stakeholders agreed there might be merit in relaxing AGM requirements for some types of small corporations, however, they concluded that the subject ought to be considered further in the context of a broader review of CATSI Act.

Cancellation of membership

Proposed change

- Reduce the period that a member is not contactable from two years to 12 months for the purpose of cancelling membership.
- Require at least two attempts to contact the member within the 12-month timeframe using the address entered in the register of members.
- Additionally, at least one attempt to contact the member using an alternative means of contact for the member or, if the member did not supply an alternative means of contact, at least two attempts using another means (if any) that the corporation's constitution permits.

Outcome: Stakeholders will consider supporting in part. Stakeholders will consider support for mandating that a corporation use alternative contact details. Stakeholders did not support reducing the period that a member is not contactable from two years to 12 months.

Discussion

NNTC expressed concerns that the whole of Part 6 needs more thought, particularly in the context of native title and prescribed bodies corporate.

There was support for the requirement to use alternative contact details for the purpose of cancelling membership, however, there were mixed views about reducing the period that a member is not contactable. NNTC opposed the reduction of the two-year period. NACCHO wanted it reduced to six months.

Using alternative contact details for communications with members

Proposed change

- If members have provided alternative contact information, the corporation should be obliged to record that information in the corporation's records and use it for issuing notices to meetings as well as other communication with members, including for the purpose of attempting contact when considering cancelling membership.

Outcome: Stakeholders will consider supporting, with a cap of two contact methods per member

Discussion

Stakeholders agreed that use of alternative contact details is desirable. NACCHO wanted the number of contact details capped at two e.g. residential address and email address. No other views were expressed on this matter.

Privacy of member information

Commitment from the Registrar

The Registrar took the opportunity to acknowledge serious concerns raised in consultations and the workshop about publishing member information. In particular, stakeholders are concerned about the privacy of members whose names and addresses are included in general reports that are lodged with the Registrar then published on ORIC's website.

The Registrar clarified that access to member lists was a separate matter to the proposed change in the bill, which concerns a proposal to redact personal information from a corporation's register of members.

The Registrar committed to revising the policy on access to the Register of Aboriginal and Torres Strait Islander Corporations, including further consultation with stakeholders about the change.

All stakeholders welcomed this commitment.

Proposed change

- Empower directors to redact certain member information from the corporation's register of members, if the directors reasonably believe that disclosure of that information would compromise a person's safety.
- The corporation will still need to keep the information for communication purposes with members.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders strongly supported a more extensive right of members to have their personal information redacted on the corporation's register of members, including a default requirement that personal information is redacted unless a member chooses to disclose the information. Stakeholders were willing to support the more limited proposal in the bill, but emphasised this was on the basis that a broader right of redaction would be considered in a comprehensive review of the CATSI Act.

Stakeholders also expressed concern about the current policy of publishing personal information of members on ORIC's website and welcomed the Registrar's commitment to

changing this policy.

Alternatives to minor regulatory prosecutions

Proposed change

- Empower the Registrar to accept enforceable undertakings, being a voluntary agreement between ORIC and a CATSI Act corporation that can be enforced by a court.
- Empower the Registrar to issue penalty notices against corporations for failing to lodge annual reports.
- Empower the Registrar to require production of documents sooner than current 14 day notice period, including requiring production of documents forthwith if necessary.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders agreed with the desirability of penalty notices as an alternative to prosecutions. Broadening of powers seemed reasonable enough in principle.

However, there was a question whether the proposed prescribed fine of three penalty units (\$630 at today's value) would provide a sufficient deterrent effect for the offences. On the other hand, the stigma of receiving a penalty notice would, in itself, provide a sufficient deterrent in some instances. Stakeholders agreed that the regulatory effectiveness of penalty notices would depend on how the Registrar exercises his discretion to issue them.

Stakeholders thought it was important that people know what's going on and understand their responsibilities. To this end, stakeholders expressed expectations that the Registrar would provide information to corporations about the circumstances when fines may be issued.

NACCHO supported shortening the timeframe for producing information to support investigations. They noted that measures to reduce destruction of evidence in cases of misconduct was necessary.

Consistent with their written submission to the inquiry, NNTC raised concerns generally about the inclusion of new strict liability offences and queried the justification for them. The Registrar clarified that the relevant offence provisions that will be subject of penalty notices already exist in the CATSI Act. Penalty notices will provide an alternative to prosecuting these offence, while still remain an option in more serious cases. Regarding the general concern about new strict liability offences, which will not be prescribed for the purpose of penalty notices, the justification in the explanatory memorandum to the bill was noted. That justification includes the regulatory nature of the offences, the low maximum penalties, and the difficulty of proof if they were full-fault offence provisions and, therefore, the diminished deterrent value due to the unlikelihood of full-fault offence provisions of this nature being prosecuted.

Transparency of key management personnel

Proposed changes

- Require medium and large corporations to report annually on the 10 year employment history of the CEOs and senior executives.

- Require medium and large corporations to include in their annual reports a remuneration report in relation to CEOs and senior executives, and that this report be tabled at the corporation's AGM and lodged with the Registrar.

Outcome: Not supported

Discussion

Stakeholders strongly opposed compulsory disclosure or remuneration for key management personnel. Disclosure should be on a voluntary basis only. There is no equivalent requirement for non-CATSI Act corporations other than publicly listed companies, which are not reasonably comparable to CATSI Act corporations. Even with the revised format of banded salary ranges, the proposal was strongly opposed.

Stakeholders expressed concern that the proposed change were discriminatory and unfair to CATSI Act corporations. Workshop participants discussed the potential discriminatory aspects of the proposal—concluding the most adversely affected party was the employees. PMC and ORIC indicated that the intent of the change was to provide greater transparency to members so they may make better-informed decisions and, in this way, represented a special measure intended to benefit the members of the corporation.

There was agreement that something needed to be done to protect vulnerable corporations but disagreement that the proposed changes would achieve this outcome.

Stakeholders supported the Registrar producing guidance for the sector and discussed alternatives for collecting the required information to produce such guidance e.g. voluntary surveys or using existing powers to require the provision of information.

Thresholds for related party financial benefits

Proposed change

- Exempt small corporations from the requirement to seek member approval of related party benefits less than \$5000 per transaction and where the total value of all benefits paid to that party in a financial year doesn't exceed \$5000 per annum.
- Allow corporations to seek exemptions from obtaining member approval in cases where there would be no detriment (harm or disadvantage) to members of the corporation.
- Require all corporations to include a list of all related party benefits as part of their annual reports.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders could see merit in the intent of the proposed provisions but felt the topic would benefit from further consideration in a comprehensive review. The Law Council was concerned about the potential for abuse. NNTC saw no justification for the adoption of any other standard to that which applies to companies limited by guarantee under the *Corporations Act*.

Special administration

Proposed change

- Add new grounds for the appointment of a special administrator, in particular if the corporation is insolvent, or is likely to become insolvent at some future time.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders expressed concerns about the breadth of some of the existing grounds for appointing special administrators. However, they were supportive of the current proposal, subject to there being a review of all the grounds for special administration in a comprehensive review of the CATSI Act. NNTC emphasised that inclusion within the scope of the comprehensive review of the overall grounds for the appointment of special administrators is a matter of the utmost significance.

Streamlining the appointment process

Proposed change

- Remove the requirement for a show cause process as a precondition for appointing a special administrator if all the directors of the corporation request the appointment.
- Remove the outdated publishing requirements as these are no longer frequently accessed sources and the information already exists in the public domain.

Outcome: Stakeholders will consider supporting

Discussion

Stakeholders agreed this change would remove unnecessary red tape, and streamline access to specialist help for corporations that want it.

Insolvency

Proposed change

- Create a presumption of insolvency for corporations where records are not kept or information not readily available.

Outcome: Not supported

Discussion

Stakeholders considered removing the presumption of insolvency but retaining the proposal to include insolvency as a ground for appointment of a special administrator.

Workshop participants discussed the difficulties of determining when a corporation is insolvent.

NNTC remained opposed to the proposed amendment for the time being on the grounds that it was discriminatory as there is no equivalent in the Corporations Act.

Non-contentious items

The following table lists items in the bill that were not considered contentious in submissions and were not discussed during the workshop.

Table 1: Non-contentious items

Part	Items	Sections	Subject	Description
5	143, 153, 162 – 168	Add: 201-153 348-3 348-10 Amend: 57-5 330-10 348-1	Meeting and reporting obligations	<ul style="list-style-type: none"> allow automatic 30 day extensions of time for holding AGMs and lodging annual reports if the corporation is unable to comply due to a death in the community, a cultural activity, a natural disaster, or unavoidable delay in obtaining an audit or review.
9	203	Amend: 453-1(1)	Examinations	<ul style="list-style-type: none"> Add a new subject of examination, being 'any irregularity in the management of the corporation's financial affairs'.
10	205 – 210	Amend: 546-1	Voluntary deregistration	<ul style="list-style-type: none"> Relax the conditions for granting applications for voluntary deregistration.
12	232 – 237	Various	Publication of notices	<ul style="list-style-type: none"> Change various provisions in the Act to allow the Registrar to publish notices on ORIC's website instead of the Gazette.
14	245 – 249	Add: 610-1 694-120 Amend: 700-1	Qualified privilege for auditors	<ul style="list-style-type: none"> Give auditor qualified privilege in alignment with the Corporations Act.
17	257 – 259 260 - 262	Add: 526-17	Technical insolvency amendments	<ul style="list-style-type: none"> On application under s166-10, allow the Court to order a winding up of a corporation on the grounds of insolvency.

		Amend: 166-10 526-1 526-15		<ul style="list-style-type: none"> Remove the requirement for the Registrar to seek leave of the Court to apply for a winding up order.
18	264 - 269	Add: 265-23 Amend: 265-1(1) 265-5(1) 265-10(1) 265-15(1) 265-30(2)	Conflicting duties under State or Territory legislation	<ul style="list-style-type: none"> Extend the protection in s265-20 to directors of corporations that hold land under State or Territory legislation.
19	270 - 277	Amend: 85-15(3) 150-15(2) 201-15(2) 279-25(1) 304-15(1) 407-15 Repeal: 249-10	Minor technical amendments	<ul style="list-style-type: none"> Clarify meaning in 85-15(3). Make language in 150-15(2)(a) consistent. Remove internal inconsistency in operation of Act by allowing applications for reviews of particular decisions within 28 days, rather than 21 days. 201-15(2) Repeal a redundant and confusing provision. 249-10(2). Align grounds for disqualifying a person from managing a corporation with the Corporations Act. 279-25(1) Apply a requirement in relation to applications under 21-1 consistently to applications under 22-1 and 23-1. Allow the Registrar to accept personal notice of minor changes to a corporation's details, in addition to email and telephone notice. 407-15