



Australian Government

Department of the Prime Minister and Cabinet



Australian Government

Office of the Registrar of Indigenous Corporations

Submission to the Finance and Public Administration Legislation Committee

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

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The Department of the Prime Minister and Cabinet and the Registrar of Aboriginal and
Torres Strait Islander Corporations

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1. Executive Summary

The Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) and the Department of the Prime Minister and Cabinet (the Department) welcome the opportunity to provide a submission to the Senate Finance and Public Administration Legislation Committee inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (the Bill). The Bill was introduced into the Senate on 5 December 2018.

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) is a special measure for the purpose of the Racial Discrimination Act 1975. While the Bill aligns with modern corporate governance standards and corporations law, it takes account of the special risks and requirements of the Indigenous corporate sector.

Many Indigenous communities depend on CATSI corporations to deliver essential services, including landholding, housing, health, education, employment and native title services. The CATSI Act supports these corporations to succeed 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.

Since it commenced in 2007, the CATSI Act has proven to be a highly successful framework for regulating and supporting the economic development of Aboriginal and Torres Strait Islander corporations, however there is room for improvement.

The key purpose of the Bill is to improve the regulatory framework by reducing unnecessary administrative burden for CATSI corporations, increasing transparency of governance arrangements, and maintaining alignment with law and regulation in the broader corporate sector.

The amendments are informed by recommendations from the Technical Review of the CATSI Act ([Attachment A](#)), undertaken by law firm DLA Piper Australia in the latter half of 2017. As part of that review process, widespread consultation was undertaken to inform the development of the recommendations. In 2018 further consultation was undertaken by the Office of the Registrar of Indigenous Corporations (ORIC) on the implementation of the proposed amendments. Overall, approximately 600 people and 70 corporations have been involved in consultations, and 45 written submissions have been received. ORIC continues to raise awareness and discuss the impact of the proposed amendments in regular meetings with individual corporations, and public forums such as native title conferences.

On the whole, stakeholders were positive about the proposed amendments, and in particular welcomed the increased transparency and reduced red tape. In some cases, feedback from stakeholders helped to reframe the policy position, and in others, will contribute to the effective implementation and operation of the amendments.

The amendments in the Bill will result in significant savings for Indigenous corporations through reduced red tape, and simplified operational processes, while maintaining and strengthening governance for the benefit of members.

2. Response to Selection of Bills Committee findings

On 6 December 2018, the Senate referred the Bill to the Finance and Public Administration Legislation Committee for inquiry and report. The referral was made on the recommendation of the Selection of Bills Committee because of concerns that the content of the Bill may raise governance issues for Indigenous organisations, increase costs of compliance, and unnecessarily infringe on service delivery for remote disadvantaged communities.

On the contrary, the Bill specifically addresses governance problems that corporations and stakeholders face under the current CATSI Act. The purpose of the Bill is to reduce red tape and compliance costs for Aboriginal and Torres Strait Islander corporations that will result in savings corporations can redirect to service delivery.

Broadly, each of the proposed amendments supports one or more of the following benefits for corporations and the sector:

- reduction in red tape;
- increased flexibility;
- increased transparency; and
- more appropriate regulation.

The amendments are framed around 11 high level measures.

2.1. Simplify the size classification system for corporations

CATSI corporations are classified according to size, which is relevant to determining certain governance arrangements and their annual reporting obligations. Currently a CATSI corporation's size is determined by a tripartite test of income, assets and number of employees. The test is complicated, where corporations need to meet any two of the criteria, and, because the thresholds for small corporations are lower than some other regulatory frameworks, there is a risk that, comparatively, some corporations may be overregulated.

Further complexity arises through a second test to determine a corporation's annual reporting obligations—a test of size and income. For example, a corporation may be classified as small due to assets and employee numbers, but it may be required to report as a medium or large corporation because its income exceeds the relevant thresholds.

The amendments propose a size classification system based solely on consolidated revenue rather than income. This will:

- make it easier for corporations to know their governance and reporting obligations, alleviating the potential for accidental non-compliance around reporting requirements;
- reduce the risk of overregulation of corporations that receive an unusual income item during a single year such as a one-off grant or through sale of an asset; and
- align the classification system with complementary regulatory regimes, thereby streamlining reporting requirements.

2.2. Make corporation rule books easier to use

The Bill simplifies rule books (constitutions) to make it easier for members and directors to understand and follow their internal governance rules. The key elements of this change:

- require corporations to include all replaceable rules (either replaced or worded as the legislation provides) within their rule book; and
- give the Registrar a power to initially refuse to register a rule book if he or she forms the view that it is not fit for purpose. Despite the Registrar's views, if the members pass a resolution to resubmit the constitution without change then the Registrar must accept the constitution. This measure strikes a balance between the Registrar's interests in ensuring constitutions are fit for purpose, and the interests of members in ultimately determining the most suitable governance arrangements for their corporation.

Corporations with rules in multiple locations and/or a rule book which is not fit for purpose face increased risk of governance difficulties, misunderstandings, potential breaches and even disputes. The proposed changes are designed to mitigate these risks.

Some may regard the requirement for all corporations to revise their rule books as an impost. However, ORIC strongly recommends, as good practice, all corporate entities review their key governing documents on a regular basis to consider emerging risks and opportunities. The Bill acknowledges a transition period by allowing corporations two years from commencement to make the necessary changes and ORIC will support corporations to do so. There are no fees or charges levied by the Registrar to use template rule books or to change or amend a corporation's rule book.

2.3. Make it easier for subsidiary and joint venture organisations to be created under the CATSI Act

Modern corporations use a variety of business structures, including subsidiaries, to help manage economic opportunity and risk, and enter into joint ventures with other entities. Currently, registering a CATSI corporation as a subsidiary or joint venture vehicle is difficult due to the requirement that a majority of the directors must be members of the corporation. This requirement prevents wholly corporate memberships because there must be individual members who can be appointed as directors. Consequently, it is complex for a CATSI corporation to be a wholly-owned subsidiary of another CATSI corporation. It is similarly complex for a CATSI corporation be held by two or more bodies corporate as a joint venture vehicle. As a result, many CATSI corporations currently use companies under the *Corporations Act 2001* (Corporations Act) to form these types of business structures, which subjects those CATSI corporations to separate regulatory frameworks.

This Bill allows for wholly corporate memberships, relaxing the requirement for directors to be members in this situation. These corporations will be able to access the special supports provided by registration under the CATSI Act and allow all corporations in a group to be subject to the same regulatory scheme.

2.4. Streamline general meeting and reporting processes, especially for small corporations

Substantial savings will be realised through amendments which allow small corporations the choice to pass a special resolution to not hold their next one or two annual general meetings (AGMs). The Technical Review found that one of the most significant compliance burdens for corporations was the requirement to hold AGMs. During consultations, participants, particularly from small and/or remotely located corporations with dispersed memberships, highlighted the struggle to notify members, difficulties in achieving a quorum, and the cost of organising and holding AGMs. ORIC estimates that the cost of planning and conducting an AGM for small corporations is, on average, \$7,500. It is anticipated that nearly 2,360 CATSI corporations will be classified as small and each of these corporations will be able to take advantage of this new provision, saving up to \$15,000 over three years, representing a potential saving of nearly \$6 million across the sector over 10 years.

The relaxing of AGM requirements for small corporations will be balanced by other regulatory requirements designed to protect the interests of members, maintain governance standards and prevent power being entrenched in the hands of particular individuals. These safeguards include:

- a special resolution to not hold the next one or two AGMs must be passed by at least 75 per cent of members entitled to vote on the resolution, ensuring the choice remains in members' hands;
- to prevent entrenchment of power, directors will generally not be allowed to vote on the special resolution;
- small corporations that have elected not to hold an AGM will have an ongoing obligation to advise the Registrar if there has been a significant change in the corporation's circumstances; and
- the Registrar will have the power to direct a corporation to hold an AGM if issues arise or circumstances warrant it.

Another important amendment is the provision for corporations to activate an automatic extension of time to hold their AGM or lodge reports in certain circumstances—where there has been a death in the community, natural disaster, cultural activity or delay in audit—even after the notice of meeting has been given.

Currently under the CATSI Act, if a corporation needs an extension of time, it must lodge an application for consideration by the Registrar. There is also no provision to provide an extension of time for a meeting if notice of that meeting has already been given. Under the amendments, corporations will only need to notify the Registrar that these circumstances exist to activate the extension.

This will reduce uncertainty and support corporations to deal with unexpected events that arise in communities. Currently, extensions are routinely granted in these circumstances—in 2015-16 nearly 10 per cent of corporations applied for an extension, the majority for less than 30 days, which the Registrar granted almost without exception.

The amendments, together with proposed amendments to the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (the Regulations), also aim to reduce the regulatory burden for medium corporations by allowing reviews of financial statements as an alternative to audits. Reviews offer a less expensive alternative to an audit while maintaining a level of independent assurance of financial information. This aligns the reporting requirements under the CATSI Act with the Corporations Act following the reforms of the *Corporations Amendment (Corporate Reporting Reform) Act 2010*, which introduced reviews as an option for medium sized companies limited by guarantee. It also aligns the CATSI Act with the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act).

These changes will be supported by other measures to provide greater transparency to members. For example, CATSI corporations will be required to table at their AGM all the reports required to be lodged with the Registrar rather than simply making them available to members. As the reports are already required to be produced there will be no additional burden on corporations. Many corporations already do this as a matter of good governance.

2.5. Improve management of membership

Having members who are not contactable can cause difficulties for a corporation in terms of its ability to meet quorum requirements for meetings. This, in turn, can affect the governance of the corporation and its ability to conduct its affairs effectively in the interests of all members. Currently, a corporation must attempt to contact a member for two years, before being able to cancel membership on the grounds of the member being uncontactable. This is a protracted period requiring valuable administrative resources which may not always be available, particularly to small corporations. The amendments will address these difficulties by reducing the minimum timeframe to 12 months in order to establish that a member is not contactable for the purposes of cancelling membership. As a protection to members, the amendments also require that a corporation take reasonable steps to attempt to contact the member including using alternative contact details.

Among the most important amendments are provisions that protect someone's personal safety by allowing particular information about a member or former member to be redacted by the corporation in certain circumstances. These provisions were welcomed by all stakeholders.

2.6. Increase the transparency of senior management arrangements

There is a growing trend across the Indigenous and non-Indigenous corporate sectors for greater transparency and accountability of CEOs and senior management. ORIC regularly receives complaints and feedback from CATSI corporation members about the lack of transparency of senior management remuneration. Other regular feedback concerns performance, and the ability of regulators and courts to monitor and remove individuals who are not fulfilling their roles. The Bill responds to these concerns by providing a level of transparency around remuneration and employment history that will help members to evaluate the management of their corporation.

The amendments provide for the Regulations to prescribe that corporations be required to report employment history and remuneration of senior management staff as part of their annual reports. These proposed changes prompted vigorous discussion throughout the

consultations, particularly around the rights of individuals to privacy. Although not part of this Bill, the consequential changes to the Regulations—which are currently being drafted—will set out the exact requirements for reporting including which classes of corporations they apply to. The proposal is that remuneration be reported in bands of \$25,000 increments, reflecting the feedback from stakeholders relating to the protection of individual privacy. The benefits of transparency to members will more than offset the minor increase in regulatory burden.

2.7. Allow some related third party transactions of low financial value, and discretion for the Registrar to allow other transactions

Under the current rules, corporations engaging in a transaction with a related third party are required to hold a general meeting and seek member approval. This results in an administrative burden to prepare and clear notifications, additional costs associated with convening a general meeting and subsequent delays in procuring goods or services. In small communities with extensive kinship ties and limited options for purchasing goods or services, avoiding related party transactions can be difficult, costly, and have negative impacts for the entire community.

It is proposed to exempt small corporations from seeking member approval if the benefit for that related party is less than a threshold specified in the Regulations (proposed to be \$5,000) in either a single transaction or all transactions in one financial year. Corporations will also be able to apply for exemptions from seeking member approval in cases where there would be no disadvantage to members of the corporation. Stakeholders were supportive of this measure during consultations.

2.8. Broaden and clarify the grounds for putting corporations into special administration

To place a corporation into special administration, the Registrar needs to be satisfied that at least one of the grounds set out in the CATSI Act has been met. However there are certain circumstances not presently covered by the CATSI Act that would allow the Registrar to provide support if they were to be included, for example, when a corporation is insolvent. The Bill also clarifies what the examinable affairs of a CATSI corporation are, which will streamline this important function of the CATSI Act.

2.9. Make the criteria for voluntary deregistration more flexible

When CATSI corporations have achieved their purpose and are no longer required, or they are functioning ineffectively, voluntary deregistration is cheaper and less complex than winding up by appointing an administrator or liquidator through the courts. However, meeting all of the current preconditions for deregistration can be difficult, for example, obtaining the agreement of all members to deregister. These changes will make deregistration a more feasible option for CATSI corporations, thus reducing costs and administrative burden. The new provisions will continue to be subject to review by the Registrar and creditor interests will not be put at risk as a result.

2.10. Broaden the Registrar's investigation and compliance powers to include lower level compliance powers

The Bill includes two measures that will enable the Registrar to respond more effectively to breaches of the CATSI Act. Both measures align the Registrar's powers with ASIC's powers.

First, the Bill provides the Registrar with the power to accept enforceable undertakings. The Registrar has a strong record of successful criminal and civil prosecutions in cases involving serious breaches of the CATSI Act. However, there are lower level matters for which court action is disproportionate in terms of expense and regulatory overkill. Instead, enforceable undertakings can be an effective alternative to achieving ongoing compliance in appropriate cases. This new power fits within a range of existing regulatory responses including the power to issue statutory compliance notices, and the appointment of special administrators. Enforceable undertakings are not a substitute for prosecutions, and the Registrar will continue to prosecute serious matters where the approach is in the public interest, particularly in cases involving deliberate and dishonest conduct that harms corporations and undermines the integrity of the sector.

Secondly, the Bill strengthens the Registrar's investigative powers in relation to the production of books of a corporation. Currently, the Registrar is required to give a person 14 days' notice to produce books. Such delay can frustrate prompt regulatory action. The Bill empowers the Registrar to require immediate production of books where it is reasonable in all the circumstances to do so.

2.11. Implement minor technical improvements.

This group of minor but important technical improvements brings the CATSI Act into alignment with the Corporations Act, or addresses small inconsistencies. Some of these items will improve the governance of corporations, such as making it easier to appoint independent directors, and providing qualified privilege for auditors in the same way as under the Corporations Act. Removing the 'show cause' process when directors unanimously request a special administrator be appointed, removes unnecessary red tape which otherwise would delay the availability of expert assistance to corporations in distress.

3. Background

3.1. Drivers for change

Aboriginal and Torres Strait Islander corporations play a critical role in delivering services and supporting economic development in communities across Australia, particularly in regional and remote areas. The Bill cuts unnecessary red tape for CATSI corporations, ensures greater transparency and accountability of boards and senior executives, and maintains alignment with recent changes in broader corporate law and regulation. More than 3,000 CATSI corporations, and the communities they service, will benefit from these reforms.

In the 11 years since it was enacted, the CATSI Act has improved the efficiency, sustainability and accountability of its corporations. In 2015-16, the top 500 CATSI corporations had a collective income of \$1.92 billion, more than double the overall income of CATSI corporations since the Act commenced.

It is important to ensure that the law remains relevant and useful for CATSI corporations, particularly as they face new economic challenges. In late 2016, the Department commissioned KPMG to conduct a review to identify opportunities to improve the effectiveness of ORIC and to enhance the CATSI Act.

The resulting report, *Regulating Indigenous Corporations* ([Attachment B](#)), recommended that a Technical Review of the CATSI Act be undertaken, with a view to streamline, strengthen and better align it with mainstream corporate regulation.

3.2. Technical Review of the CATSI Act

On 5 July 2017, the Minister for Indigenous Affairs, Senator, the Hon Nigel Scullion, announced the first review of the CATSI Act since it came into effect on 1 July 2007. As an independent review, it was 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 then Registrar of Aboriginal and Torres Strait Islander Corporations commissioned an independent Technical Review of the CATSI Act in the latter half of 2017. The review was led by law firm DLA Piper Australia and included a series of public consultations with stakeholders.

The Review included a literature review, a review of changes and proposed changes to the Corporations Act, consideration of the impact of the ACNC Act on companies operating under the Corporations Act, preparation and dissemination of a discussion paper, and consultations with relevant stakeholders.

In 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, of which 30 informed amendments in this Bill. A number of recommendations relating to external administration and insolvency were not accepted by the Department and ORIC because 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.

The Technical Review also contained 20 recommendations specifically relating to the governance of native title prescribed bodies corporate. These recommendations have informed the broader reforms of the *Native Title Act 1993* being led by the Attorney-General's Department.

Attachment C provides a list of all recommendations and indicates the status of the recommendation after assessment by ORIC and the Department. Acceptance indicates in-principle agreement with the intent or spirit of the recommendation. In some cases, as analysis and drafting progressed, the final policy position moved from the initial premise due to legal and operational considerations as well as feedback from stakeholders. For example, recommendation 3 is that the replaceable rules be removed from the CATSI Act. ORIC and the Department agreed that the recommendation was addressing a valid issue, but the final amendment did not remove all the replaceable rules from the CATSI Act. Instead it requires they be included in all rule books, executing the intent of the recommendation to have all governance rules in one place.

3.3. Consultation activities

3.3.1. Technical Review

A series of consultations supported the Technical Review.

After a literature review and, with input from ORIC, DLA Piper Australia developed a discussion paper which identified key areas for consideration including questions about the potential application for CATSI corporations. The discussion paper was posted on the ORIC website. DLA Piper Australia undertook consultation sessions in Perth in September 2017, and Melbourne and Canberra in October 2017, to which participants were invited by the Registrar. These roundtable meetings were attended by 22 stakeholder organisations, and responded to the questions raised in the discussion paper as well as issues initiated by the participants.

Specialist Indigenous consultants, Inside Policy Pty Ltd and Winangali Pty Ltd were engaged to conduct a series of public consultations with Indigenous representatives, representatives from CATSI corporations and other relevant stakeholders in Alice Springs and Cairns. Four three-hour roundtable consultations were conducted, two in each location. Inside Policy and Winangali prepared a consultation report that detailed the findings and analysis of consultations with 150 representatives from CATSI corporations and native title representative bodies who attended. Additional insights were provided by 11 organisations that participated in one-on-one interviews.

The discussion paper and consultation reports are included as annexures A and B to the Report on the Technical Review. The list of submissions to the Technical Review is at Attachment D.

3.3.2. Consultation on proposed amendments

Informed by the recommendations of the Technical Review, the Department and ORIC put forward a set of proposed amendments that received policy authority on 18 June 2018. In preparation for commencing consultations, the Registrar sent an invitation to all CATSI corporations (approx. 3,000) to attend public consultations and/or provide a written submission ([Attachment E](#)). In addition, the Registrar wrote to key stakeholders ([Attachment F](#)) offering a one-on-one meeting and briefing.

For six weeks from 6 August 2018 ORIC conducted widespread public consultations in 14 locations across Australia. Over 200 people attended these sessions. In addition, ORIC carried out consultations with 12 corporations, four live broadcasts, 2 presentations to around 100 people, and 13 individual consultations with native title and other peak bodies. ORIC also published a discussion paper on its website, receiving 24 written submissions. The Discussion Paper, and a summary of the Discussion Paper can be found on the ORIC website at oric.gov.au/catsi-review

[Attachment G](#) outlines the details of these consultations including dates, locations and attendance, as well as providing a summary of feedback about each measure. [Attachment H](#) provides the list of organisations that made submissions in response to the discussion paper.

3.3.3. The Prime Minister's Indigenous Advisory Council

The Registrar and Department also met with the Prime Minister's Indigenous Advisory Council to keep the council informed about the amendments, seek advice about the consultations and provide feedback on stakeholder responses and concerns. This included meetings with the council in March and June 2018, and individual councilors on 8 June and 20 August 2018. Additionally, an out-of-session paper was submitted for council consideration in November 2018.

3.3.4. Outcomes from the consultations

Generally, stakeholder response was positive in regard to the proposed changes. Transparency of senior executive remuneration as it was initially proposed, generated the most discussion although reaction was mixed. Some stakeholders welcomed the increased transparency, while others expressed concern regarding the privacy of individuals, or the risks involved in publishing this information in the absence of other context. ORIC and the Department took these views into account as drafting of the legislation progressed, and developed an approach to implementation that addressed stakeholders' issues, while still achieving a useful level of transparency. This approach will be set out in the Regulations, which are currently being drafted in anticipation of passage of the Bill.

Valuable suggestions have also been provided through the consultation and submission process, which will be used in the implementation of some amendments.

4. Conclusion

When enacted, these amendments will prove beneficial to the CATSI corporations operating around Australia to provide essential services and economic development to communities and

individuals. The amendments will not increase the costs of compliance, raise negative governance issues or infringe on service delivery. On the contrary, they are specifically designed to reduce regulatory burden, taking into account the special circumstances of Indigenous corporations and the communities they serve. Many amendments have been identified through administering the current legislation over the past 11 years, and noting where requirements could be streamlined, and regulation reduced without risking governance standards or transparency.

The CATSI Act offers a level of support to Aboriginal and Torres Strait Islander corporations that is not available under other regulatory frameworks. Its effective operation is pivotal to supporting good governance to around 3,000 CATSI corporations providing services to Indigenous communities across Australia. The Technical Review of the CATSI Act was undertaken to safeguard the relevance of the legislation, assessing the regulatory burden against the mainstream corporate sector, and operational considerations.

These amendments to the CATSI Act strike a balance between acknowledging the circumstances and the environment that CATSI corporations operate in, while still providing an appropriate degree of regulation so that corporations and their members can be assured of proper governance and oversight. Stakeholders have been consulted at numerous points, and feedback has been incorporated into the changes. ORIC will continue to work with corporations and stakeholders to assist with the transition and implementation so that CATSI corporations are able to realise the maximum benefit from these amendments.

5. Attachments

Attachment A	Technical Review of the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> , DLA Piper October 2017
Attachment B	<i>Regulating Indigenous Corporations</i> , KPMG, July 2017
Attachment C	Summary of Technical Review Recommendations
Attachment D	Index of Submissions to the Technical Review
Attachment E	Invite to Consultations (sample)
Attachment F	Tier 1 Stakeholder – Invitation to Comment (sample)
Attachment G	Summary of Consultations on Proposed CATSI Act Amendments
Attachment H	Index of Submissions to Discussion Paper