Law Council
OF AUSTRALIA

Office of the President

25 January 2019

Senator Jenny McAllister
Chair
Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: fpa.sen@aph.gov.au

Dear Chair

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

1. The Law Council welcomes the opportunity to comment on the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (**the Bill**).

2. The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee in the preparation of this submission.

3. The Law Council acknowledges that the extensive litigation and procedural activity associated with the native title regime established pursuant to the *Native Title Act 1993* (Cth) (**NTA**) gives rise to many operation issues and norms. The Law Council also welcomes the ongoing reform of this regime.

4. In this submission the Law Council:
    a. indicates its support for many aspects of the Bill;
    b. outlines some aspects of the Bill which require further consideration; and
    c. opposes other aspects of the Bill for the reasons outlined below.

5. The Law Council does not address all aspects of the Bill but rather, it addresses issues relating to:
    a. the constitution/rule books of Aboriginal and Torres Strait Corporations (**CATSI corporations**);
    b. the appointment of a special administrator under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**); and
    c. the training of CATSI corporations and directors and members of CATSI corporations.

6. The CATSI Act updated and replaced the previous legislative regime relating to Indigenous corporations (that is, *the Aboriginal Councils and Associations Act 1976* (Cth)) in 2006, but has not been the subject of any substantive review since that

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time. The Bill originated in a Technical Review led by the Office of the Registrar of Indigenous Corporations (**ORIC**). In August 2008, ORIC released a Discussion Paper canvassing, in general terms, proposals that were said to originate in the outcomes of the Bill.

7. When considering the Bill it is important to appreciate that a number of provisions of both the CATSI Act and the Bill are racially discriminatory as they set up a different legal regime for Aboriginal and Torres Strait Islander corporations. The *International Convention for the Elimination of All Forms of Racial Discrimination* (**CERD**) and the *Racial Discrimination Act 1975* (Cth) (**RDA**) allow an exception to the general prohibition on racial discrimination, where a provision is a 'special measure', designed to 'secure the disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.[1]

8. A consequence of this is that such provisions do not offend the CERD or the RDA *only* if they can constitute a legitimate 'special measure' in the manner provided for in the CERD and in the RDA. In this context, the matter must facilitate the advancement of Australia's First Peoples. The concept of 'special measures' has been considered by the High Court of Australia in *Gerhardy v Brown* (1985)[2] and in *Maloney v The Queen* (2013).[3]

9. However, the Law Council is concerned that the treatment of 'special measure' in the Explanatory Memorandum of the Bill at paragraphs 265 to 269 is highly restricted and does not adequately explain or provide justification regarding how it is that many of the measures in the Bill, while discriminatory, do not offend the CERD or the RDA because they are 'special measures'.

10. Further, the Law Council is advised that the Bill was not made available to CATSI corporations or other Aboriginal and Torres Strait Islander bodies prior to its introduction to Parliament. It also notes the short submission period and the differences between the Bill and the ORIC Discussion Paper. It is arguable that the Bill has not been subject to adequate consultation with the affected group, relevant to the 'special measures' criteria in the CERD and RDA.[4] This is generally necessary ensure that the provisions reflect the wishes of the group and are appropriately designed and effective in achieving the objective of advancing Australia's First Peoples.[5] The lack of consultation of the very groups this legislation is directed and will impact reinforces why a Voice to Parliament is required.

<u>Constitutions/Rule Book</u>

11. Part 2 of the Bill is directed at constitutions of CATSI corporations. Part 2 of the Bill includes a requirement that 'Replaceable Rules' as defined in section 60-1 of the CATSI Act, which currently operate by default as part of a CATSI corporations constitution by virtue of the CATSI Act must, within two years, be explicitly incorporated into the constitution of all CATSI corporations.

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[1] *Racial Discrimination Act 1975* (Cth) s 8(1); *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).
[2] 159 CLR 30.
[3] 252 CLR 168
[4] See *Racial Discrimination Act 1975* (Cth) s 8(1); *Gerhardy v Brown* (1985)159 CLR 70, 135 (Brennan J); *Morton v Queensland Police Service* [2010] QCA 160, [31] (McMurdo P).
[5] Ibid.

12. The Law Council is concerned that this requirement could potentially place an unreasonable and unnecessary burden on each and every one of the some 3,300 CATSI corporations that presently exist because such requirement could necessitate all such CATSI corporations throughout Australia to hold Special General Meetings to replicate rules already contained in CATSI corporations into their own Rule Books within two years, and this would be necessary irrespective of whether the present rules of such CATSI corporations have caused any confusion in the past or are in any way ambiguous in their present format. The Law Council considers that such a requirement for the holding of such Special General Meetings in such circumstances should be reconsidered. Perhaps the compromise position might be that any CATSI corporations established in the future should be required to adhere to this requirement, but not that all 3,300 CATSI corporations already in existence must also be required to adhere to this requirement.

Appointment of special administrator

13. The grounds on which the Registrar may determine that a CATSI corporation is to be placed under special administration are set out in subsection 487-5(1) of the CATSI Act. The grounds for appointment under the CATSI Act are significantly broader than those for receivership or voluntary administration under the *Corporations Act 2001* (Cth) (**Corporations Act**). The reasoning for this distinction was noted in the Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006:

> *The term 'special' is used to distinguish administration under CATSI from administration under the Corporations Act. It also relates to the application of the CATSI Bill as a special measure for the advancement and protection of Aboriginal people and Torres Strait Islanders. Placing a corporation under special administration, appointing a special administrator and conducting a special administration will be informed by the objects and aims of the CATSI Bill as opposed to an administration under the Corporations Act which is principally driven by the interests of creditors and the certainty of commercial transactions.*
>
> *…*
>
> *Proposed section 487-5 sets out the grounds on which a corporation may be placed under special administration. The grounds are broader than insolvency or inability to repay a debt, which are usually the basis for appointing administrators or liquidators under the Corporations Act. The grounds include circumstances where disputes within the corporation are interfering with the conduct of the corporation affairs.*[6]

14. Similarly, in Policy Statement 20 – Special administrations, ORIC notes that:

> *Special administration is a form of external administration unique to the CATSI Act. It is a special measure that addresses the unique role and circumstances of Aboriginal and Torres Strait Islander corporations. It contributes towards the CATSI Act as a special measure to advance and protect Aboriginal and Torres Strait Islander people and their respective cultures.*

[6] Revised Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) 1.521, 1.523.

> *Special administration enables the Registrar to provide early proactive regulatory assistance when a corporation experiences financial or governance difficulties. It is quite different to a receivership or voluntary administration under the Corporations Act 2001 (the Corporations Act), which are usually driven by the interests of creditors.*
> *Only the Registrar may place an Aboriginal and Torres Strait Islander corporation under special administration. The Registrar does not need to apply to a court. The grounds for placing a corporation under special administration are broad. They are not restricted to insolvency or the inability to pay a debt. They allow early intervention once certain risk factors are present and may avoid later corporate collapse. For example, a common risk factor is when a dispute between members and the board has escalated to the point of interfering with the operations of the corporation. This would be one reason for placing a corporation under special administration and is an important special measure.*[7]

15. The Law Council does not oppose a more proactive approach to appointment of special administration under the CATSI Act. However, it submits that the grounds for such appointment should be as least restrictive and as specific as possible.

16. By way of example, the Exposure Draft of the Native Title Legislation Amendment Bill 2018 includes provision for the appointment of a special administrator in circumstances where, inter alia, 'the corporation is a registered native title body corporate and conducts its affairs contrary to the interests of the common law holders'. The Law Council considers that such a provision is too broad and should be narrowed by being more specific as to what is encompassed by conducting affairs contrary to the interests of the common law holders. Currently, paragraphs 487-5(1)(d)-(e) of the CATSI Act set out in relation to all Aboriginal and Torres Strait Islander corporations that a special administrator may be appointed if:

> (d) the officers of the corporation have acted in the affairs of the corporation:
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> (i) in their own interests rather than in the interests of the members of the corporation as a whole; or
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> (ii) in a way that appears to be unfair or unjust to members of the corporation;
>
> (e) the affairs of the corporation are being conducted in a way that is:
>
> (i) oppressive; or
>
> (ii) unfairly prejudicial to, or unfairly discriminatory against, a member or members of the corporation; or
>
> (iii) contrary to the interests of the members of the corporation as a whole.

[7] Office of the Registrar of Indigenous Corporations, "Special administrations" (Policy Statement 20, 21 February 2017) [2.1]-[2.3].

17. The provision in the Exposure Draft is significantly broader than the above current grounds. While there are many cases in which the appointment of a special administrator on this ground would be justified, such a power might also be enlivened in circumstances where the action that is alleged to be 'contrary to the interests of the common law holders'; are relatively minor – for example, failing to call an annual general meeting within the relevant period. While the Registrar would have a discretion in deciding whether or not the particular facts might justify special administration, the Law Council suggests that there should be a requirement that the appointment of a special administrator can only occur where the relevant acts or omissions are contrary to the interests of the common law holders in a significant (or a substantial) respect.

18. Further, in this context regard must be had to the already extensive provisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**NT(PBC) Regulations**), in particular clauses 6 to 8, which impose significant obligations on a CATSI corporation which is operating as a prescribed body corporate. It must be assumed that ORIC is proposing to enhance its regulatory functions in this regard because there is a perceived deficiency. The proposed amendments should also be linked to the NT(PBC) Regulations.

19. A related point is that due to their significant overlap, the Native Title Legislation Amendment Bill 2018 and the CATSI Bill should ideally be considered in context with each other by Parliament.

Training for the directors and members of Aboriginal and Torres Strait Islander corporations

20. The CATSI Act framework is complex, and for many CATSI corporations, achieving a good understanding of the regime is no easy task.

21. The Law Council submits that there should be included in the Bill provision for the training, support, and/or assistance of CATSI corporations and directors and members. ORIC already provides a range of training programs to 'increase corporate governance knowledge, skills, efficiency and accountability within corporations'. However, the Law Council submits that ORIC's capacity to provide training to corporations and their directors and members should be expanded. Such expanded capacity should include, in particular, capacity to advise CATSI corporations and directors and members of their various roles and responsibilities and ensure that those roles and responsibilities are properly understood. Such expansion should be specifically provided for in the Bill – that is, the Bill should impose on ORIC statutory obligations to provide training, support and other such assistance to corporations and their directors and members.

Conclusion

22. The Law Council considers that this is important legislation and it should not be rushed. Further, the Law Council submits that there should be genuine and comprehensive consultation with relevant stakeholders, including, for example, the National Native Title Council which is the peak body for Australia's Native Title Organisations representing Native Title Representatives Bodies and Service Providers recognised under the NTA (sections 203AD and 203FE) as well as Prescribed Bodies Corporate also established under the NTA (section 55).

23. The Law Council welcomes this opportunity to provide the comments on the Bill outlined above.

Yours sincerely

Arthur Moses SC
President