



National
Native Title
Tribunal

Submissions of the National Native Title Tribunal

To the Senate Standing Committees on Finance and Public Administration

Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

The Hon John Dowsett AM, QC President

24 September 2021

Introduction

1. The National Native Title Tribunal (Tribunal) makes the following submissions in relation to the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (Amendment Bill), which bill has been referred to the Senate Finance and Public Administration Committee.
2. The Tribunal is an independent body established under the *Native Title Act 1993* (Cth) (NTA). It has a wide range of decision-making, mediation and assistance functions, particularly in relation to the NTA's future act regime. The Native Title Registrar also maintains registers under the NTA, including the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements.

Focus of this submission – CATSI Act corporations that are RNTBCs

3. This submission focusses on the implications of the Amendment Bill for corporations which are registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act), and are registered native title bodies corporate (RNTBCs) entered on the Native Title Register following a determination of native title.
4. An RNTBC holds native title in trust or as agent for the common law holders of native title as determined, primarily, by the Federal Court. An RNTBC has specific responsibilities to common law holders, particularly with respect to decisions which affect native title rights and interests (see *Native Title (Prescribed Bodies Corporate) Regulations 1999*).

Common issues for RNTBCs, their members and common law holders

5. An RNTBC's relationship with common law holders is not always straightforward, as common law holders are not necessarily members of the RNTBC. Nor will all common law holders seek to become members. An RNTBC therefore has obligations, not only to the members of the corporation, but also to the common law holders on whose behalf it acts as trustee or agent.

6. Through its work the Tribunal is familiar with the types of disputes and issues that routinely arise between an RNTBC and the common law holders of native title. These include:
 - a. a real or perceived lack of accountability to, and consultation with common law holders;
 - b. issues relating to membership of the RNTBC; and
 - c. dissatisfaction with the distribution of benefits derived from native title agreements or trusts, and an associated lack of transparency.
7. Recent amendments to the CATSI Act and the NTA were aimed at addressing a number of these issues and concerns. In particular:
 - a. the constitution of an RNTBC must include membership eligibility requirements which provide for all common law holders to be represented, directly or indirectly (s 141-25 of the CATSI Act);
 - b. an RNTBC must accept a compliant membership application from a common law holder (s 144-10(3A) of the CATSI Act); and
 - c. the Tribunal now has power to assist in the promotion of agreement between an RNTBC and common law holders, between RNTBCs, or between common law holders (s 60AAA of the NTA).

Corporate membership of RNTBCs

8. Item 102 of the Amendment Bill proposes an amendment to s 77-5(1) to expand the eligibility for corporate membership of a CATSI Act corporation, including an RNTBC.
9. Under the proposal it will be possible for an RNTBC to have:
 - a. one member, if the RNTBC is wholly owned by another body corporate; and
 - b. two members, if the only members are bodies corporate.

10. In either case, the term “body corporate” includes both CATSI Act and non-CATSI Act corporations, although membership remains subject to the Indigeneity requirement in s 29-5 of the CATSI Act.
11. The Tribunal accepts that it may be appropriate for a CATSI Act corporation to have subsidiaries. We understand that native title holders may seek flexibility in their corporate and contracting arrangements, particularly to support economic and business opportunities. However, where native title is held by an RNTBC on trust, there may be room to doubt the appropriateness of having corporate members. It is difficult to generalize. However a basis of such concern may be the possibility of competing interests as between member corporations and common law holders.
12. Increasingly complex corporate arrangements have the potential to further disenfranchise common law holders, who already complain of a lack of transparency and involvement in the operations and decisions of their RNTBCs.
13. A requirement that common law holders be indirectly represented on an RNTBC (possibly through corporate representation), may provide inadequate protection of the rights and concerns of individual common law holders. An RNTBC’s role, as trustee or agent for common law holders, should be its paramount concern and should not be at risk of becoming subordinate to the potentially diverse endeavours of a holding company.
14. If the proposed changes are to apply to RNTBCs the interests of common law holders should be protected. All of the protection and support mechanisms in place at present centre on the RTNBC. For example, a common law holder could be refused membership of a corporation which is the sole member of the RNTBC, and would have limited recourse to assistance under the CATSI Act or NTA. In particular, the Tribunal’s new assistance power in s 60AAA would not apply.
15. The Tribunal therefore recommends that consideration be given to providing measures which protect the statutory role of an RTNBC and the fiduciary obligations to common law holders, in circumstances where the only members of an RNTBC are bodies corporate.

Item 381 - proposed amendment to s 193 of the NTA

16. This proposed amendment, will expressly enable the Native Title Registrar to record a change to an RNTBC's details on the Native Title Register. The Tribunal supports the proposal.

Arbitration of RNTBC disputes

17. Recommendation 59 of the CATSI Act Review final report recommends the development of an option for voluntary arbitration to assist in resolving disputes about RNTBC membership. The Tribunal refers to its supplementary submissions to the *Native Title Legislation Amendment Bill 2019*, dated 29 November 2019, setting out the case for an arbitration function to complement its mediation function. The Tribunal continues to support an arbitral role for the Tribunal, suggesting that the parties' agreement to arbitration might be a pre-condition to mediation of post determination disputes.

Resourcing the regulatory authority

18. The Office of the Registrar of Indigenous Corporations (ORIC) plays a significant role in supporting CATSI Act corporations and promoting good governance.

19. The modernisation of the CATSI Act, as proposed by the Amendment Bill, will inevitably create new and additional governance, regulatory and administrative choices and burdens for Aboriginal and Torres Strait Islander corporations. ORIC's role in providing certainty for members, officers and employees of corporations, as well as advice and public education will be critical to achieving the objectives of the amendments. Without adequate resources, the Registrar's statutory function, to facilitate and improve the effectiveness, efficiency, sustainability and accountability of Aboriginal and Torres Strait Islander corporations, cannot be delivered. Failure to provide appropriate funding will compromise the faith and regard in which the regulatory authority is held.

Further measures in support of legislative objectives

20. RNTBCs bear unique responsibilities and, without key expert support and guidance from a respected authority, are vulnerable to exploitation. They may, for example, adopt

structures that further isolate common law holders from the benefits derived from their native title rights and interests.

21. The unique nature of RNTBCs as corporations holding native title rights and interests *in rem*, or acting as agent for the holders of those rights, should attract an appropriate level of interest and investment from Government and other stakeholders, to ensure that the opportunities which flow from native title rights and interests are maximised for the benefit of common law holders.
22. Investment in the education of common law holders, RNTBC directors and other officeholders, can provide communities with enhanced economic and social outcomes, particularly for small to medium sized RNTBCs. Education investment need not be limited to directors' duties, governance and administration, but could expand to include commercial, business, communication and IT skills.
23. The President was involved in the establishment of the National Judicial College of Australia which was designed and established by Commonwealth and State Judges in consultation with representatives from the Commonwealth and States' Attorneys-General. It was designed to operate on a limited budget and with the support of a University host. A similar type of organisation might be of substantial direct benefit to RNTBCs and consequentially, those who partner or do business with them, and the community generally, particularly traditional owners. The Commonwealth Attorney-General would have the records and minutes of meetings which led to such establishment. The Attorney-General was represented in the process by Mr Robert Cornall and Ms Kathy Leigh.
24. A National Native Title College would provide a point of central focus for education, training and resources currently provided by various organizations and agencies. The College would foster multi-disciplinary expertise and promote the development of networks of specialised professionals through conferences and training events. Such a College could attract investment from both government and non-government stakeholders, offering a range of courses and resources that could be tailored to suit the needs of a wide range of RNTBCs.

A wider question

25. Finally, we wonder whether many of the existing problems arise out of the lack of clarity in the *Native Title Act* concerning the status of a trustee appointed pursuant to s 56, and the terms of such a trust. It may be difficult to reconcile the duties of an RNTBC as trustee with the duties of directors in subsidiary or shareholder corporations.