

Friday 17 September 2021

Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Secretariat,

CATSI Act Amendment Bill 2021

I am writing in relation to the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021 (the Bill)* that seeks to amend the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (the CATSI Act)* that has been referred to the Senate Finance and Public Administration Committee.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 46,000 is drawn from directors and leaders of not-for-profits, large and small businesses, CATSI Act corporations (**corporations** or **CATSI corporations**) and the government sector.

As with our submission on the review of the CATSI Act (available [here](#)) and the Exposure Draft of the Bill (available [here](#)), our recommendations and observations outlined in this submission should be read in light of the AICD's limited internal expertise in relation to the CATSI Act. However, we have undertaken external consultation with directors and senior executives of Indigenous corporations and Indigenous organisations to inform this submission.

The AICD team has presented more than 145 Indigenous Governance Programs to over 1920 participants since 2010, and delivered the Company Directors Course to more than 230 Indigenous business leaders since 2009. All of these programs are facilitated by faculty who are experienced directors on Indigenous boards. We are also looking to appoint an Indigenous sector leader to bolster our expertise and engagement with First Australians. We have also engaged IPS Management Consultants to guide the development of our second Reconciliation Action Plan.

1. Executive summary

The AICD strongly supports the purpose of the CATSI Act. We understand from our consultation on the Bill and CATSI Act review, that it facilitates Aboriginal and Torres Strait Islander persons to create and manage Indigenous entities which play a vital role in Indigenous communities.

Our engagement with stakeholders has highlighted the need for the CATSI Act to empower corporations to focus on the important public function and custodial role these organisations have in Indigenous communities.

The AICD endorses certain elements of the Bill that seek to promote the purpose of the CATSI Act, particularly those that promote a flexible legislative framework that accommodates specific cultural practices and allow for self-determination. In particular, we support the following:

- amendments to allow CATSI corporations to apply for an extension to both hold an AGM and lodge financial reports in the case of 'Sorry business';
- amendments to allow CATSI corporations to incorporate wholly owned subsidiaries and form joint ventures;
- amendments to simplify related party transactions and remove the requirement for member approval of small, related party transactions;
- amendments to modernise the CATSI Act to ensure that corporations can determine how they hold AGMs and contact members, noting that these should be subject to member resolutions; and
- amendments to allow CATSI corporations to appoint independent directors.

However, our stakeholder engagement has highlighted that certain amendments risk adding a level of complexity, compliance and regulation to CATSI corporations that is unnecessary and out of step with the purpose of the legislation.

We are concerned that some of the amendments in the Bill, such as the incorporation of *Corporations Act 2001 (Cth)* (**Corporations Act**) whistleblowing protections and disclosure of executive remuneration, risk conflating legal requirements and better practice, rather than encouraging CATSI corporations to adopt sound governance principles. In our view, the CATSI Act should be focused on promoting governance and responsibility rather than being punitive in nature. This is particularly important for smaller CATSI corporations. The AICD also encourages the Committee to reconsider some of the additional proposed Regulations, such as proposals to lay reports before an Annual General Meeting (**AGM**) (Division 349).

Section 2 below includes comments on governance-related aspects of the Bill and includes Bill item references where applicable. Our comments remain subject to a review of the proposed amendments to the CATSI Regulations.

2. Detailed comments on the Bill

A. Membership applications, contact details and electronic communications

Alternative contact details

The AICD supports amendments in the Bill that empower CATSI corporations to obtain alternative contact details for members and determine how members should be contacted, including via social media and community noticeboards. However, we suggest that contacting members using alternative contact details should require a resolution at a general meeting to ensure that members can still opt-in to receive a written notice, for example.

Membership applications

Decisions regarding membership applications should be subject to due process, and, therefore the AICD supports the inclusion in Item 56 of the Bill of a six-month timeframe within which corporations

need to consider membership applications, as well as the process for allowing the extension or exemption from the period for deciding an application (Item 61 of the Bill).

Redaction of member contact details

We also support items that will allow members to request that their contact details be redacted from a member register. The AICD has long been concerned with the confidentiality and security of information held on existing business registries. In today's digital world, personal identity information is a key exploitation target of cyber and identity criminals.

Expert advice commissioned by the AICD confirms that the public availability of personal information (such as residential address and date of birth) exposes directors and officers to undue privacy, cyber-security and personal safety risks, including identity fraud.

B. Subsidiaries and joint ventures

The AICD supports Items 99-105 and 109 of the Bill that allow CATSI corporations to establish wholly owned subsidiaries and joint ventures. These steps enable CATSI corporations to take advantage of different business structures and design corporate structures that are fit-for-purpose and maximise opportunities for Indigenous communities.

We also support Items 106-108 of the Bill that allow for establishing two-member corporations where only one member is an Aboriginal or Torres Strait Islander person, provided that the person has the deciding vote.

C. Classification of corporations review of financial reports

Aligning financial reporting thresholds with ACNC standards

Based on our consultation, we support the amendments in the Bill that will ensure financial reporting thresholds be aligned to that of the Australian Charities and Not-for-profits Commission (**ACNC**), and be based solely on revenue, as is the case for other corporate entities. We note that the Government has announced that reporting thresholds for ACNC-registered charities will be increased from 1 July 2022.¹ We assume that the CATSI Act regulations (which we understand will contain the new thresholds) will reflect the new ACNC reporting thresholds. We also understand that the Australian Accounting Standards Board (**AASB**) are also considering thresholds and would suggest that it would be preferable to deal with those thresholds in that process.

Review of financial reports

We also agree with proposed amendments included in Part 19 of the Bill that allow medium-sized corporations to have their financial reports reviewed rather than audited. This will bring CATSI

¹ Financial reporting thresholds for small charities will increase to under \$500,000 annual revenue (from \$250,000) and medium-sized charities will increase to under \$3 million (from \$1 million). The threshold for large charities will increase to \$3 million or more. These changes have the potential to reduce compliance costs for smaller charities (for example on requirements for review or audit).

corporations' requirements into line with registered entities under the *Australian Charities and Not-for-profits Commission Act 2012* and companies limited by guarantee under the *Corporations Act*.

D. Meetings

Meeting formats

The AICD strongly supports amendments included in Items 124 and 125 of the Bill to enable CATSI corporations to hold a general meeting, such as an AGM, without a physical venue, using any technology that gives members a reasonable opportunity to participate.

The disruption caused by COVID-19 has highlighted the need to modernise these provisions to enable organisations to continue to meet their governance requirements where organisations may not be able to facilitate physical meetings or send meeting materials to shareholders in hard-copy (for example, due to snap lockdowns, social distancing requirements and travel restrictions). It is critically important that the legislation is not overly prescriptive. We agree with the Bill's amendments which provide CATSI corporations flexibility to adopt the best meeting format for their circumstances, whether that be physical, hybrid or wholly virtual meetings, on a permanent basis.

However, it is important to protect shareholder democracy and organisations that wish to have the option of conducting virtual meetings on a permanent basis should ensure that shareholders or members have consented via a member resolution. We encourage consistency with the permanent reforms currently consulted on by Treasury for organisations to seek one-off shareholder or member approval to amend constitutions to permit the conduct of wholly virtual meetings on a permanent basis.

Automatic extension for holding an AGM and lodging reports

The AICD also supports Items 126-129 and 137-142 that will allow all corporations to activate an automatic, one-off extension of 30 days to hold an AGM and lodge their reports with the Registrar in the case of death, natural disaster and certain cultural activities in the community. The grounds proposed in the Bill for an extension are appropriate (including that the request can be made orally and must specify when the corporation intends to hold its AGM and lodge its reports).

We note that we have received some feedback from stakeholders that 30 days is a relatively short period to enable a community to respond to a natural disaster or mourn the loss of a family member following traditional ceremonies and practices, and that 45 days may be a more appropriate extension period.

Requirement to lay reports before AGM

The AICD agrees that members of a corporation should be able to request copies of reports. However, we have received feedback that it would be unnecessarily onerous and inappropriate for all corporations (required to hold an AGM) to lay before the AGM any report in respect of the relevant financial year (Item 143 of the Bill), particularly those in remote communities with limited access to resources. The AICD does not support this Item of the Bill and asks that its inclusion be reconsidered.

E. Constitutions

We understand from our consultation that rule books can become very complicated and unwieldy. Although we support incorporating replaceable rules into corporations' rule books and clarifying those that apply to the corporation, in our submission on the review we cautioned against implementing this recommendation if it would increase the complexity of rulebooks.

As such, we support Item 147 of the Bill, which requires rule books to refer to replaceable rules rather than incorporate them in full. This will not only ensure that rule books do not become unwieldy, but also ensure that they remain current if there are amendments to the CATSI Act. We also support Item 150 of the Bill that provides CATSI Act corporations a transitional period to allow these organisations to reference replaceable rules accordingly.

F. Officers of corporations

Senior executive remuneration

While we agree that heightened transparency around remuneration of CEOs and senior executives should be encouraged, it is important that any new requirements around reporting are not unduly complicated. Although items 174-188 of the Bill incorporate the concept of a remuneration report for a financial year, we understand that the detail of what these remuneration reports will include will be dealt with in the CATSI Regulations.

We caution that detailed or lengthy remuneration disclosures can be extremely burdensome for organisations to comply with, and are often difficult for members and users of this information to understand, ultimately undermining the objective of transparency and accountability to members. Disclosures at a level similar to that required under the Corporations Act for publicly listed companies would be inappropriate and disproportionate.

With this in mind and consistent with the 2018 Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review (**ACNC Review**), we suggest that any requirements on remuneration reporting are limited to the senior executives and responsible persons of **large** CATSI corporations, disclosed on an aggregated basis, in bands.

As noted in the Government's response to the ACNC Review, this disclosure should only be required from large entities with two or more key management personnel to accommodate privacy concerns. This disclosure could also include a high-level description of the nature of the remuneration paid, for example whether it is a fixed salary, sitting fee or variable pay that is tied to performance or service.

We support using the accounting standards definition of "key management personnel" on the basis that our above points are addressed.

G. Related party transactions

Related party transactions

The AICD agrees that the related party provisions in the CATSI Act are overly burdensome, and the provisions can work against the best interests of some corporations, especially in small communities or where it is not easy for corporations with a dispersed membership to call a general meeting. The

provisions are more restrictive than the Corporations Act, which is inappropriate without a clear justification.

The AICD supports, in principle, Items 196-203 of the Bill. However, it is difficult to comment on the operability of these provisions without knowing what the monetary threshold trigger for a related party transaction will be, which we understand will be prescribed in the CATSI Regulations.

We also support requirements in the Bill that require corporations to report related party transactions in their annual reporting to members to ensure transparency, and removing the Registrar from participating in the process to make it less administratively burdensome.

H. Power to exempt corporation from employee director requirement

We support Items 204 and 205 of the Bill that allow the Registrar to exempt corporations from the requirement that the majority of directors must not be employees of the corporation in certain circumstances. We support this proposal on the basis that section 310 of the CATSI Act sets out an appropriate application process and criteria for the Registrar to consider for an organisation to follow to benefit from the exemption.

I. Independent directors

The AICD generally supports a majority of independent non-executive directors (independent directors) on boards. However, we recognise that independent directors may not always be appropriate or necessary for CATSI corporations given the nature of the organisations and the stakeholders whom they seek to serve.

We support the inclusion of Items 206 to 212 of the Bill that incorporate a new replaceable rule that allow directors to appoint independent directors for a period not exceeding one year (with the ability to seek reappointment at the next AGM). In our view this is balanced by proposed new section 246-17 which enables corporations to amend the replaceable rule to prevent the appointment of independent directors if it is not appropriate in the context of their organisation. We recommend that the term of appointment of independent directors be extended to three years to reduce red tape around such appointments and enable the independent director to develop an ongoing relationship with the corporation.

The AICD also suggests that independent directors should be encouraged, but not mandated, for large CATSI corporations.

Again, we note that it may be useful for the Office of the Registrar of Indigenous Corporations (**ORIC**) to produce guidance regarding board composition and the benefits of having a diverse board that includes some independent directors. The AICD highlights the benefits of board diversity in its [NFP Principles](#), including that diversity on the board can contribute to improved performance.

J. Improving consistency with Corporations Act

Whistleblowing

The AICD strongly supports robust whistleblower protections and believes that they support high standards of governance. As a matter of good governance, organisations should have strong internal whistleblowing frameworks in place which aim to detect, address and ultimately prevent corporate wrongdoing.

We welcomed the reforms that were introduced to strengthen Australia's whistleblowing laws in the corporate sector and were actively engaged in the relevant consultations leading up to the passage of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Whistleblower Act)*.

However, we have concerns about transposing the same legal framework into the CATSI Act as per Part 10-5 of the Bill, given the nature of the protections and the penalties that apply (100 penalty units or imprisonment for two years, or both, as per Item 260 of the Bill). There were concerns expressed during our initial consultation on the Whistleblower Act that the prescriptive nature of certain aspects of the new legislative regime (including the requirement to have a whistleblower policy in place) may be too onerous for certain types of corporations in light of their size and resources, and restrict boards' abilities to set fit-for-purpose governance arrangements. We understand that stakeholders have similar concerns about the appropriateness of the protections in the context of CATSI corporations.

Finally, we note that the whistleblower protection regime in the corporate sector context is due to be reviewed as soon as practicable after the end of five years from coming into effect. It may be prudent to hold off extending the regime to the CATSI Act until after this review has concluded, even if it were considered appropriate for CATSI corporations.

Auditors – qualified privilege

We support amendments in Items 262-263 of the Bill that provide auditors with qualified privilege consistent with the Corporations Act.

3. Next steps

We hope our comments on the Bill and other matters will be of assistance.

Yours sincerely,

Louise Petschler GAICD

General Manager, Advocacy