SUBMISSION TO THE REVIEW OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT – PHASE 2 CONSULTIONS

ON BEHALF OF:

THE FIRST NATIONS BAILAI, GURANG, GOORENG GOORENG, TARIBELANG BUNDA PEOPLE NATIVE TITLE ABORIGINAL CORPORATION

AND

THE INSTITUTE OF FIRST NATIONS GOVERNANCE PROFESSIONALS LTD

AUTHORS:

KERRIN ANDERSON

Director, Institute for First Nations Governance Professionals Ltd

Email: kanderson@kalawyer.com.au

Phone: 0459 188 858

MATTHEW COOKE

Chair, First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation

Email: Matthew.Cooke8@bigpond.com

Phone: 0487 345 763

Contents

INTRODUCTION

This submission is provided on behalf of the First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation, (PCCC PBC) a Registered Native Title Body Corporate for Traditional Owners located in the Gladstone and Bundaberg region. The PCCC PBC is part of the Port Curtis Coral Coast corporate grouping which includes a separate trust with a corporate trustee incorporated under the Corporations Act, an operating company to undertake nation rebuilding community development being established under the Corporations Act and four Traditional Owner development corporations (one for each nation) all either incorporated under the Corporations Act or in the process of transferring from the CATSI Act to the Corporations Act.

In addition to their work with the PCCC PBC, the authors of the submission have an extensive background in working with and for Indigenous community-controlled organisations in the native title, health and housing sectors, including working with both CATSI corporations and those incorporated under the Corporations Act.

In framing our responses to the questions asked in Phase 2 of the Review of the CATSI Act we have examined them with following essential questions in mind:

1. Is it meetings its objects and justifiable as a **special measure**? (**the special measure test**). As the CATSI Act is racially discriminatory, it is only legally justifiable if it is an act of positive discrimination designed as a special measure. Therefore, every provision in the CATSI Act must meet the test of being a special measure. If any individual provision fails the test of being a special measure then it leaves it open to challenge as racial discrimination. Therefore, in reviewing each suggestion in the Report we have applied the following tests that must be met for it to be justifiable as a special measure:

    (a) Does it have **the sole purpose** of securing adequate advancement or protection of Indigenous Australians[1] (**sole purpose test**). If this is used as the justification for the CATSI Act, it must be shown that it is, in fact, securing adequate advancement or protection of Indigenous Australians, in manner that could not otherwise be achieved without the special measure; and

    (b) Is it **necessary** to ensure Indigenous Australians have **equal enjoyment** or exercise of human rights and fundamental freedoms[2] It must support Indigenous Australians to overcome entrenched discrimination so they can have similar access to opportunities as others in the community[3]. It must enable Indigenous Australians to enjoy **on an equal basis** with other Australians the same legal facilities and attendance socio-economic benefits that incorporation confer[4] (**equality test**); and

    (c) It must not lead to the ongoing maintenance of separate rights for different racial groups [5]– that is, is there **continue to be a need** for the CATSI Act and/or the relevant provision in question?[6] (**continued need test**).

[1] CATSI Act Review Report (Report) p12 para 2.2
[2] Report p12 para 2.2
[3] Report p6 para 1.7
[4] Report p6 para 1.13
[5] Report p12 para 2.2
[6] Report p6 para 1.8

It should be particularly noted that a special measure must satisfy all three of these elements for it to be justifiable as a special measure. If it fails any one of these tests then it is not defensible as a special measure.

2. Does it **advance self-determination** for Indigenous People?[7] Does it achieve the right balance of providing regulatory safeguards without impinging on the autonomy of the corporation?[8] (**self-determination test**). This test is based on the right to self-determination under Article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

3. Does it or can it be used to **negatively discriminate** against Indigenous Australians? (**negative discrimination test**).

4. Are the identified **special incorporation needs** of Indigenous Australians better met by a separate incorporation statute and regulator?[9] Does it provide sufficient flexibility to accommodate specific cultural practices and tailoring to reflect the particular needs or circumstances of individual groups?[10] (**special needs test**)

Further to this, we have also taken into account the following over-arching concerns in relation to the conduct of the Review and the operation of the CATSI Act:

1. **Conflicts of Interest**: The Review is being led by the National Indigenous Australians Agency, which is not an impartial body given that it employs the personnel of the Office of the Registrar of Indigenous Corporations and therefore has a vested interest in ensuring the CATSI Act and ORIC remain in place. Similarly, the Steering Committee includes senior officials from ORIC.

2. **Essential Services Justification**: The Review appears to view CATSI Corporations primarily through the lens of them as community-controlled organisations delivering essential services to the community.[11] This is treated as a justification for regulating them to safeguard the interest of the members and communities that rely on them.[12] However, this fails to recognise that there are many organisations delivering essential services to Indigenous communities, including many that are community-controlled but incorporated under the Corporations Act. In particular, many Aboriginal Community-Controlled Health Organisations are incorporated under the Corporations Act.[13] These organisations successfully deliver services without any special regulatory oversight beyond that of any other corporation in Australia. Therefore the notion that the delivery of essential services to Indigenous communities somehow justifies regulating Indigenous corporations in a manner different to other corporations cannot be sustained.

[7] Report p13 para 2.6
[8] Report p8 para 1.21
[9] Report p6 para 1.12;
[10] Report p7 para 1.15
[11] Report p8 para1.20; p13 para 2.9
[12] Report p8 para 1.21
[13] For example, Nhulundu Health Service, Charleville and Western Areas Aboriginal and Torres Strait Islander Community Health, Institute for Urban Indigenous Health; Goolburri Aboriginal Health Advancement Company, Cherbourg Regional Aboriginal and Islander Community Controlled Health Service.

A further concern arising from the way the Review views CATSI Corporations through the essential services lens is that it repeatedly proposes regulatory standards that are akin to publicly-listed companies that have safeguards to protect shareholders. This extreme approach to regulating CATSI Corporations cannot be justified. There are many charities and private companies that provide essential services to their members and communities and they are not subject to such high regulatory standards. To treat CATSI Corporations in this manner is negative racial discriminatory.

3. **Incentive to transfer**: The more rigid the requirements imposed on CATSI Corporations the more incentive there is for Indigenous organisations to move away from the CATSI Act and over to the Corporations Act. The availability of the transition provisions in the CATSI Act has enabled Indigenous organisations who feel increasingly that the CATSI Act is racist and that they are over-regulated and constrained by it, to transfer across. These same concerns lead RNTBCs to set up complex structures with trusts and operating companies under the Corporations Act in order to move the bulk of their operations outside the scope of the CATSI Act.[14]

4. **Over-regulation**: The Review focusses on regulatory oversight and control as being the means of achieving the stated goals of the special measure without any consideration of how those goals may be achieved by other alternative and more effective means of overcoming disadvantage, for example by providing more applied education and training, increasing organisational capacity development and mentoring and providing legal and governance assistance.

   This focus on regulation is why many consider the CATSI Act to be racist as it suggests that Indigenous people cannot be trusted to govern their own organisations without the added scrutiny of a dedicated regulator who is given extraordinary powers of control over them. Indigenous People often face significant disadvantages when trying to operate corporate entities due to lower levels of education, poor English language skills, lateral violence, remoteness and cultural differences. Special laws and regulations do not in and of themselves address these disadvantages and in fact perpetuate them by requiring Indigenous Australians to understand a different and more complex regulatory regime than faced by non-Indigenous Australians. If the focus truly was on overcoming the disadvantages and challenges that Indigenous people face when dealing with the complex legal and regulatory corporation frameworks, then resources would be better directed to developing their capacity to address these disadvantages and enabling them to overcome these challenges **within the existing corporate frameworks available to all Australians** rather than burdening them with even more legalities and regulation in the form of the CATSI Act and ORIC.

   This is particularly the case with RNTBCs. They are subject to one of the most complex regulatory environments of any corporation in Australia as they must deal with ORIC and the CATSI Act, the ACNC and the ACNC Act and the Native Title Act and Native Title (Prescribed Body Corporate) Regulations. This approach of greater regulation and control (vs special assistance) is directly contrary to the special needs of Indigenous Australians to

[14] For example, the First Nations Bailai, Gurang, Gooreng Gooreng Taribelang Bunda People Aboriginal Corporation and Bigambul Native Title Aboriginal Corporation.

overcome the disadvantages they face as detailed above. It only serves to further increase the disadvantages by creating a regulatory regime that is so complex even highly educated non-Indigenous Australians have difficulty understanding it. This highlights the fact that this approach does not satisfy the equality aspect of the special measures test and is in reality negative racial discrimination.

5. **The right of Indigenous People to determine their own decision-making structures:** The Report makes reference two articles of UNDRIP[15] :

   - Article 18 which provides:
     Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, ***through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions****. (emphasis added)*

   - Article 23 which provides:
     Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, ***to administer such programmes through their own institutions****.(emphasis added)*

   The Report incorrectly draws the conclusion from these Articles that this requires the Indigenous Corporations that provide health, housing and other economic and social programmes affecting them to be community-controlled with a majority of directors being members. This is used as a justification for the controls the CATSI Act imposes on membership and boards of CATSI Corporations. This completely overrides the right of Indigenous people under these Articles to **create their own decision-making institutions** and to **participate in decision-making through representatives chosen by themselves in accordance with their own procedures**. The CATSI Act, by placing restrictions on how CATSI Corporations may be structured, how boards may be composed and how boards must make decisions, is fundamentally at odds with the right of Indigenous People to choose these things for themselves.

Therefore, in providing our response to the Report, we have not only provided our response to the specific questions asked in each section but have also drawn attention to specific sections and comments within the Report that are pertinent to the essential questions identified above or otherwise highlight our over-arching concerns. Where we have not addressed specific questions asked in the Report it is because we have no view on these matters.

[15] Report p 13 paras 2.8 and 2.10

OVERVIEW

It is our submission that the CATSI Act is not justifiable as a special measure. Rather than working to reduce disadvantage for Indigenous Australians in running corporations, it has:

- resulted in over-regulation of the sector;
- entrenched inequality and racially discriminatory practices;
- created a rigid and inflexible corporate structure;
- eroded self-determination; and
- failed to address the special needs of Indigenous Australians.

We are of the view that the CATSI Act should be repealed and replaced with something similar to the Australian Charities and Not-for-Profit Commission Act, where Indigenous Corporations are able to incorporate under the Corporations Act and, if they satisfy certain criteria, they are able to register as Indigenous Corporations in a manner similar to how charities are registered under the ACNC Act and could create an special commission for this purpose (**Indigenous Corporations Commission**). The criteria for registration as an Indigenous Organisation should be as simple as being majority indigenous owned. They would also be able to register as charities if they met the relevant criteria.

In this regard we would disagree with the Review of the ACA Act in that we do not believe that a special statute for incorporation of Indigenous Corporations is required or can be justified as a special measure. However, we agree with that Review in that Indigenous Corporations should have the benefit of a special form of regulatory assistance required to enable Indigenous Australians to use corporations (namely, the same corporations as every other Australian has access to) more effectively (**Special Regulatory Assistance Scheme**).[16] This Special Regulatory Assistance Scheme could be administered by the Indigenous Corporations Commission and could be overseen by a Registrar of Indigenous Corporations.

This proposal preserves a function for the Registrar in overseeing Special Regulatory Assistance Scheme without the need or complications of having a whole separate incorporation statute and regulatory regime. The regulator of a registered Indigenous Organisation would be either ASIC or the ACNC, in the same manner as any other Australian corporation, thus reducing the complexity of having multiple regulators, which is currently the case for many CATSI Corporations. Further, rather than having the expense of maintaining a separate regulator, the resources currently used to maintain ORIC and oversee the CATSI Act, could be diverted to providing the Special Regulatory Assistance Scheme to registered Indigenous Organisations that would be specifically aimed at overcoming the disadvantages and challenges they face. For example, once a corporation was registered as an Indigenous Organisation it would be entitled to obtain the benefit of specific corporate capacity development services including:

- applied governance education and training;
- organisational capacity development and mentoring;
- special administrative assistance;
- legal and governance guidance and assistance; and
- dispute resolution services.

This approach would mean that all Indigenous Organisations who are providing essential services to Indigenous Australians could access these services without the artificial discrimination that currently exists between those incorporated under the CATSI Act and those incorporated under the

[16] Report p6 para 1.12

Corporations Act. It could also potentially be extended to those that operate as Incorporated Associations or Co-operatives.

We acknowledge that there are some special needs that would need to be specifically addressed in any such new regime. In the same way the ACNC Act amends particular provisions of the Corporations Act for charities, registered Indigenous Organisations could be subject to special rules that amend the Corporations Act to take into account the particular traditions and cultural requirements of Indigenous Corporations. For example, extensions of timeframes to hold AGMs where there is sorry business or other cultural requirements. Further the particular, special role played by RNTBCs could also be addressed in this manner and/or through the PBC Regulations under the Native Title Act

The benefit of the approach we are proposing is that there would be significant advantages to a corporation that meets the criteria to be a registered Indigenous Organisation with virtually none of the downsides of the highly rigid and over-regulated corporate structure under the CATSI Act. This would encourage all Indigenous Organisations to register and gain the benefits of doing so. The current CATSI Act acts as a disincentive to operate as a CATSI Corporation so many Indigenous community-controlled organisations (**ICC Corporations**) that would otherwise benefit greatly from additional assistance choose to forego that in favour of the more flexible and less discriminatory regulatory regimes of ASIC and the ACNC.

It is our submission that the whole approach of the CATSI Act is therefore wrong. It is an approach that favours giving powers of regulation and control to the government (a negative discriminatory approach) versus an approach that focusses on what benefits and assistance can be provided to Indigenous Corporations to aid them to overcome their disadvantages (a positive discriminatory approach).

In the following sections of the submission, we focus on each of the sections of the Report and address the comments and questions both taking into account the tests outlined in the Introduction and our preferred approach detailed in this Overview. To the extent that we address specific questions about the proposed changes to the CATSI Act or the scope of the powers of ORIC and the Registrar we do so on the basis that either:

- these matters would still be relevant in relation to our proposed approach either in the form of changes to the Corporations Act or the role of the Indigenous Corporations Commission; or
- we have a preferred position should the CATSI Act and ORIC remain in their current form.

OBJECTS OF THE CATSI ACT

This section of the Report deals largely with the CATSI Act being justified as a special measure under the Racial Discrimination Act. It states that "[It] is designed to be a modern incorporation statute that provides flexibility to corporations to operate in ways that reflect cultural practices"[17] In our view the CATSI Act is quite the opposite of this. Its stipulations of the structure and internal governance rules that a CATSI Corporation is required to have makes for a very rigid structure with very little flexibility. Further, forcing Indigenous Corporations into this particular form of corporate and board structure with specific, largely unchangeable internal governance rules erodes their ability to choose how they run themselves and therefore erodes self-determination.

The Report cites the preamble of the CATSI Act where it states that the Act is a special measure under the Racial Discrimination Act 1975 (Cth) and the International Convention on the Elimination of all forms of Racial Discrimination.[18] It them goes on to state:

> *Being a special measure, the CATSI Act is a form of positive discrimination. As such, it is unlikely that removing the CATSI Act would be beneficial for Aboriginal and Torres Strait Islander corporations and alternative models proposed in survey responses substituted one type of special measure for another under the Corporations Act. The Review of the ACA Act in 2002 also found alternative statutes would not provide the same level of support or meet the incorporation needs of Aboriginal and Torres Strait Islander people.* [19]

This is a fundamental flaw in the approach taken by this Review as it does not itself actually question the findings of a Review that was conducted 18 years ago to determine whether this is still the case today. Importantly, in the period since that Review, the ACNC has been established, which provides a successful precedent for establishing special regulatory regimes for corporations incorporated under the Corporations Act.

Further, the Report draws the conclusion that the mere fact that the CATSI Act is stated as being a "special measure" in its preamble it is therefore a form of positive discrimination. What it fails to do is actually **apply** the special measure test to the existing provisions or to any of the proposed reforms. The Report fails therefore at the most basic and fundamental level to be a true review of the CATSI Act as a special measure.

We are concerned that the fundamental issues with this Review identified in the preceding two paragraphs is evidence of a bias towards retention of the CATSI Act and ORIC that is a manifestation of the conflict of interest in having NIAA and ORIC as central parties in the conduct of the Review.

Community Controlled Essential Services Justification

In paragraph 2.9 of the Report it states that the CATSI Act enables Indigenous People to form corporations that enable them to undertake activities deemed to be a priority such as health, housing etc and that the CATSI Act includes provisions to ensure these corporations remain Indigenous-controlled. This completely ignores the fact that they are able to, and in fact do, form ICC Corporations under the Corporations Act that deliver these services. There is no need for the CATSI Act to do this. As previously stated, many Aboriginal Medical Services are incorporated under the Corporations Act and remainIndigenous controlled simply by virtue of including such a provision in their constitution. This is an example of true self-determination. They have chosen this form,

[17] Report p12 para 2.5
[18] Report p 12 para 2.2
[19] Report p 13 para 2.7

rather than it being mandated. Therefore the essential services justification does not meet the special measure test as it:

- **fails the equality test**: it is not *necessary* to enable Indigenous Australians to enjoy *on an equal basis with other Australians* the same benefits of incorporation; and
- **fails the continued need test**: there is no *need* for maintaining separate rights for different racial groups to enable Indigenous Australians to provide community-controlled essential services;

as Indigenous Australians are able to, and do, avail themselves of the Corporations Act to provide community-controlled essential services, with provisions in their constitutions used to ensure they maintain Indigenous community-control.

It therefore **fails the special needs test**. There is no need for a special incorporation statute as the existing use of the Corporations Act by many ICC Corporations shows it can be used to adequately address this need without having a racially-segregated separate incorporation statute. In fact, the essential services justification is a reason to repeal the CATSI Act and replace it with a Special Regulatory Assistance Scheme as it would enable all ICC Corporations that provide essential services to Indigenous communities to gain the benefit of special regulatory assistance.

In paragraph 2.10 the Report cites Article 18 of UNDRIP regarding the right of indigenous people to participate in decision-making, including *the right to maintain and develop their own decision-making structures*. This is fundamental to the right of self-determination. The CATSI Act is inconsistent with this Article as it mandates the type of corporate and decision-making structure that an Indigenous Corporation must have. An example of this is cited in the next paragraph where the Report goes on to point out that the CATSI Act **requires** that a majority of directors are indigenous. This is taking away the right of indigenous people to determine their own decision-making structure.

As an example, an Indigenous owned business may decide that they would like to have equal amounts of Indigenous and skills-based independent directors or even more skills-based directors than Indigenous directors. The benefit of this is that it enables Indigenous Corporations to get access to skilled directors and business people to maximise the success and returns to the Indigenous owners and it enables the Indigenous members of the Board to learn from them. The approach any single Indigenous Corporation takes may depend entirely on the type of business and activities the Indigenous Corporation is undertaking. The requirement in the CATSI Act for majority Indigenous member directors appears to be based on the assumption that all Indigenous Corporations are providing essential services to indigenous communities, which is an entirely invalid assumption. On this basis, the CATSI Act is in fact contrary to Article 18 of UNDRIP, does not advance self-determination and amounts to over-regulation. It fails to fully address the incorporation needs of all Indigenous Australians and focusses on ICC Corporations providing essential services as a justification to impose rigid and inflexible governance rules on all Indigenous Corporations.

Culture and Traditions Justification

One of the main justifications cited for having the separate CATSI Act is that it enables Indigenous Corporations to take into account the particular cultures and traditions of Indigenous People. Paragraph 2.11 and 2.12 of the Report cite examples of how the CATSI Act enables Indigenous Corporations to run in a culturally appropriate manner including:

- Holding meetings and having their books in a language other than English as long as an English language translation is available. This is not a justification for the CATSI Act. The Corporations Act could easily address this and already does so for example in s287, which provides:

  Language requirements
  (1) The financial records may be kept in any language.
  (2) An English translation of financial records not kept in English must be made available within a reasonable time to a person who:
  (a) is entitled to inspect the records; and
  (b) asks for the English translation.

- Allowing for the inclusion of rules in the Rule book that take into account Indigenous traditions and customs. This can also be achieved under the Corporations Act. There is nothing that prevents the constitution of a company incorporated under the Corporations Act from including such provisions and in the case of many ICC Corporations incorporated under the Corporations Act their constitutions do this. This is therefore not a justification for having a separate incorporation statute.

- Allowing the inclusion of advisory committees such as elders councils. Again, this can be, and is regularly, done by ICC Corporations incorporated under the Corporations Act. It therefore cannot be used as a justification for having the separate CATSI Act.

- Requiring the Registrar to take into account Indigenous traditions and circumstances in performing his or her functions. In our suggested approach, this could easily be provided for under the Corporations Act and does not justify a separate incorporation statute.

None of the cited examples requires a separate incorporation statute for Indigenous Corporations. Most can, and often are, addressed within the existing Corporations Act and ACNC Act regime by ICC Corporations incorporated under the Corporations Act. Those that cannot, could be more readily addressed through minor changes to the Corporations Act and the ACNC Act and the Special Regulatory Assistance Scheme we have proposed rather that requiring a separate incorporation statute.

Protection for Members

The Report states that this is one of the key concepts underpinning the CATSI Act[20] and that is achieved by **requiring** a majority of directors are members.[21] This is a flawed concept as it:

- **Conflicts with UNDRIP**: By making this a requirement, it conflicts with Articles 18 and 23 of UNDRIP that state that Indigenous people have the right to maintain and develop their own decision-making structures. Indigenous Corporations should therefore have the right to choose their own decision-making structure and whether the directors are required to be members or not. If they wish it to be the case, they can achieve this by including it in their constitution, and in fact, this is what many ICC Corporations incorporated under the Corporations Act do.

- **There is no special need for CATSI Act to achieve this**: This requirement is based on the assumption that the members of Indigenous Corporations require better "protection" than what is available under the Corporations Act and ACNC Act. The previously cited justification

[20] Report p14 para 2.14
[21] Report p14 para 2.15

for this appears to be the fact that Indigenous Corporations often provide essential services to their communities. However, as pointed out previously not all Indigenous Corporations do this. It also fails to take into account that the protections can be adequately achieved within constitutions and provisions under the Corporations Act and ACNC Act as is the case with the many ICC Corporations incorporated under the Corporations Act that provide essential services to their communities.

Paragraph 2.16 of the Report goes on to point out the role of the Registrar in protecting members by:

- **providing advice** on registration, rules and operation of an Indigenous Corporation. In this role the Registrar acts as a source of independent information. We recognise this as an important function. However, it can be achieved under our proposed Special Regulatory Assistance Scheme with all Indigenous Corporations incorporated under the Corporations Act, without the need for the CATSI Act.
- **Assistance with resolving disputes.** We also recognise this as an important function that could be achieved under our proposed new Special Regulatory Assistance Scheme. It does not justify having a completely separate incorporation regime for Indigenous Corporations.

On this basis, the "need" for the CATSI Act to protect members fails to satisfy the tests for a special measure as it:

- **fails the equality test**: it is *not necessary* for equal enjoyment of the benefits of incorporation; and
- **fails the special needs test**: a separate incorporation statute is not justified;

as most member protections can be achieved without needing to have them incorporated other than under the Corporations Act like every other Australian corporation. The special role of the Registrar in providing advice and resolving disputes can be provided for under the Special Regulatory Assistance Scheme proposed.

Support for Corporations

The Report cites the Review of the ACA Act as noting there was a need for a system that was more responsive to the difficulties of the members and directors of Indigenous Corporations and where there was a more active form of assistance to the corporation to meet the relevant legislative standards or avoiding insolvency.[22] We largely agree with this statement. However, we do not believe this is a reasonable justification for a separate incorporation statute.

<u>Special Administration</u>

The availability of the unique special administration provisions under the CATSI Act is cited as one of the reasons justifying a separate incorporation regime. However, there is nothing within these provisions that could not be addressed, and in a manner more consistent with the rights of self-determination, under a new Special Regulatory Assistance Scheme. Further, in our view there are some fundamental issues with the special administration regime that cannot be justified under the special measure tests.

Firstly, the way special administration operates is that when a special administrator is appointed (quite often a non-Indigenous person) he or she takes control of the corporation. The special

[22] Report p 14 para 2.17

administrator then runs the corporation for a period of time before making the decision to either wind it up or hand it back to control of the community, which the Report states happens in 90 percent of the cases. The issues with this are that by giving the special administrator control of the corporation:

- it is fundamentally inconsistent with Articles 18 and 23 of UNDRIP and the rights of self-determination of Indigenous People;
- it fails to act as a learning experience for the corporation, its management and its board thus Indigenous Corporations can end up back in special administration for a second or third time.[23] In ORIC's research paper in 2010 that identified the leading causes of failure of Indigenous Corporations it found that most failed as a result of poor management or poor corporate governance.[24] The process of special administration focusses on taking control to rectify issues and does nothing to build the capacity of Indigenous Peoples to better manage and govern their corporations;
- it acts as a deterrent for Indigenous Corporations to seek assistance early when they are facing difficulties as by bringing their issues to the attention of ORIC, the Registrar can step in and appoint a special administrator resulting in them losing control of their corporations. This can potentially have the adverse effect that by the time a corporation is put into special administration it is in a far worse position than it would otherwise be had it sought assistance when it first began facing difficulties; and
- it is a negative discriminatory measure as no other corporations in Australia can be taken over by a regulator in this manner without the consent of the Board or members.

We do not deny the importance of the special administration process, and it is the one part of the CATSI Act that can be justified as a special measure as it is designed for securing the advancement and protection of Indigenous Australians, it does assist them to overcome entrenched discrimination and disadvantages and there is an ongoing need for it. However, it does not justify having a separate incorporation statute as it could easily be accommodated as a special measure under the Corporations Act.

While there is an identified special need for special administration-like provisions, this need does not require a whole separate incorporation regime to be effective. Rather, it could be built into the Special Regulatory Assistance Scheme and operate as an special assistance measure (a positive discriminatory measure) rather than an assumption of control by the regulator (a negative discriminatory measure). If it functioned so that the Board retained control but were under advice from the special administrator, it would encourage more corporations to seek assistance earlier; it would enable the directors to learn from the experience and it would be consistent with the rights of self-determination of Indigenous Australians.

<u>Registrars powers to safeguard remote and very remote corporations</u>

The Report draws attention to provisions of the CATSI Act that take account of remoteness of Indigenous Corporations including:

[23] For example, Many Rivers Regional Housing Management Services Aboriginal Corporation; Mitakoodi Aboriginal Corporation

[24] ORIC Research Paper "Analysing the Key Characteristics in Indigenous Corporate6 Failure" Australian Government 2010 p6

- conferring jurisdiction to a broad ranges of courts to hear CATSI Act matters enable those in remote locations to access state and local courts;
- enabling appointment of qualified persons who are not government employees as authorised officers in remote areas; and
- allowing elections by postal ballots.

All these requirements could be accommodated within changes to the Corporations Act as applied to registered Indigenous Corporations under the Indigenous Corporations Commission that are located in remote or very remote areas. In fact, it would be preferable to have this as it would allow all ICC Corporations in remote and very remote areas to access these benefits. As it is, there are ICC Corporations registered under the Corporations Act that do not have these special safeguards available to them.

Rule Books

The Report states that it is a unique requirement to the CATSI Act that corporations must have Rule books that operate as a contract between the members and directors of the corporations. This is not unique to CATSI Act at all. All corporations incorporated under the Corporations Act are required to have constitutions that operate as a contract between the members and directors of the corporations. It cannot therefore be considered a reason for requiring the separate CATSI Act.

Section 69-35 – power to change Rule Book

The Report cites the positive benefit of the Registrar being able to change a corporation's Rule book as a means of allowing special rules for meetings during the COVID 19 pandemic. It should be pointed out that ASIC also made special measures in this regard. In general, the fact that the Registrar can change a Rule book, along with the fact that the Rule book must be approved by the Registrar and the Registrar is required to approve changes to the Rule books are negative discrimination provisions of the CATSI Act as corporations incorporated under the Corporations Act do not have any of these requirements and there is no justification for these provisions as a special measure. They do not satisfy the sole purpose test, they are not necessary to overcome entrenched discrimination or provide equal access to benefits and there is not continuing need for them.

Capacity Building

As the Report notes an important benefit to CATSI Corporations is access to education and training programs. This is definitely a positive discriminatory aspect to the regulation of CATSI Corporations that satisfies the special measure test. The real issue here is that not all Indigenous Corporations who would benefit from these programs are able to access them due to the fact that some elect to incorporate under the Corporations Act to escape the inflexible over-regulation of the CATSI Act. It would be far better to enable all Indigenous Corporations to access these capacity building programs and this would be possible under our proposed Indigenous Corporations Commission and Special Regulatory Assistance Scheme.

Special Incorporation Needs of Indigenous People

Social Disadvantage

The Report identifies the special disadvantages that can impact on the ability of Indigenous People to form and run corporations including lower levels of education, low employment rates, English

language challenges, poverty, trauma and violence.[25] These disadvantages unquestionably justify special measures to assist Indigenous People overcoming these when running their corporations. However, we contend this is best achieved through a Special Regulatory Assistance Scheme (a positive discriminatory measure) rather than through imposing a whole different, more rigid set of laws and controls around Indigenous Corporations (negative discrimination).

Cultural Values and Practices

The need to accommodate the special cultural values, traditions and practices of Indigenous People in the way they are able to run corporations is important. However, the whole concept of incorporation is anathema to Indigenous Peoples and is often at odds with their cultural values and practices.[26] To the extent that allowance can be made for cultural values and practices this can be done within either the constitution of the corporation under the Corporations Act or accommodated within variations to the Corporations Act for registered Indigenous Corporations under the Indigenous Corporations Commission without the need for a separate incorporation statute. For the particular circumstances of Native Title PBCs these can, and are already, accommodated within the Native Title Act and the Native Title (Prescribed Body Corporate) Regulations.

Nature of Corporations

The Report refers to the requirements via legislation or government policy for some corporations to be formed as CATSI Corporations. This is, in and of itself, racially discriminatory and facilitates governments making racially discriminatory policies that are not justifiable as special measures. Why, for example, should corporations in receipt of IAS funds of $500,000 or more be required to incorporate under the CATSI Act when non-Indigenous organisations in receipt of the same amount of IAS funds are not? The justification given is that it means that they are subject to regulatory oversight of ORIC, which has far greater powers of intervention and takeover of a corporation than ASIC or the ACNC thus offering greater protection of government funding. This is not an acceptable reason under the special measure test as its purpose is to protect government funding rather than to secure the advancement, protection or disadvantage of Indigenous Australians. Accordingly, this cannot be justified as a special measure in any way and is negative racial discrimination. Why can't ICC Corporation incorporated under the Corporations Act have access to these grants on the same terms as non-Indigenous corporations? Similarly, the NSW government has taken a policy position that Indigenous housing corporations incorporated under the CATSI Act cannot manage more than 500 properties. This is again negative racial discrimination and is not in any way a special measure designed to address the advancement, protection or disadvantage of Indigenous Peoples. These are examples of racial discrimination in its worst form that the CATSI Act indirectly permits governments to perpetuate through policies that single out Indigenous Corporations incorporated under the CATSI Act. Further, this rationale for having the CATSI Act is simply self-fulfilling. If the CATSI Act did not exist then these requirements could not exist and the ability of governments to formulate policies that amount to negative racial discrimination utilising the CATSI Act as a distinguishing feature would be removed.

Corporations Functions

This section of the Report identifies a special incorporation need based on the functions that Indigenous Corporations fulfil. Again it refers to Indigenous Corporations providing essential

[25] Report p 16 para 2.27

[26] For example, the values and practices of kinship vs laws relating to related party benefits and conflicts of interest in corporations.

services. As has been detailed previously in this submission, this is not a special need that justifies the CATSI Act as many ICC Corporations incorporated under the Corporations Act fulfil the function of providing essential services to Indigenous communities.[27]

Conclusion

In summary, the CATSI Act cannot be justified as a special measure as it fails the special measure tests of being necessary to ensure Indigenous Australians enjoy the benefits of incorporation the same as other Australians and there is no continued need for it. None of the reasons identified in this section of the Report justify the need for a separate incorporation statute for Indigenous Peoples. It is not supporting Indigenous Australians to overcome entrenched discrimination and disadvantage. In actual fact, it is entrenching discrimination further in a self-perpetuating cycle. It entrenches a negative discriminatory approach to Indigenous Corporations (in that it is far more rigid, inflexible and over-regulated with extraordinary powers of control given to the Registrar and it facilitates discriminatory government policy) without demonstrating that there is a special or continuing need for it when all the purported rationales for the CATSI Act can be easily achieved under the Corporations Act and a Special Regulatory Assistance Scheme.

Further strengthening of the CATSI Act will only see more Indigenous Corporations move away from the inflexibility and discrimination in favour of incorporation under the Corporations Act. This means they will be unable to access the few true benefits that are given to CATSI Corporations in the form of:

- capacity building, education and training programs;
- special administration measures;
- advice on compliance matters; and
- dispute resolution.

All Indigenous Corporations should be enabled to access these benefits as they all suffer from the same disadvantages and need access to these special measures. Having a separate incorporation statute in the form of the CATSI Act draws an artificial and unnecessary distinction between Indigenous Corporations that can access them and those that cannot.

Further Ideas

Period for Reviews

We would like to express here our concern that the period proposed for reviews of the CATSI Act is 10 years. In order to justify its existence as a special measure the CATSI Act must be the subject of ongoing assessment against whether there is continuing need for its existence. We recognise that it is not practical to require this to be done on ongoing basis, but feel that the period of 10 years is far too long and ignores the continuing need test. We would advocate that the CATSI Act be reviewed against the continuing need test every 5 years with full reviews to be done every 10 years.

Is the CATSI Act meeting the needs of Indigenous People?

We do not believe the CATSI Act is meeting the needs of Indigenous Australians. It is over-regulated rigid, inflexible and focussed on ICC Corporations providing essential services. The fact that many Indigenous Corporations chose to incorporate under the Corporations Act demonstrates the failure of the CATSI Act. The fact that Indigenous Corporations choose to forego the special assistance

[27] See pages 4 and 9

available to them under the CATSI Act regime in favour of incorporating under the Corporations Act means it is failing as a special measure. To truly ensure that Indigenous Australians have access to the special forms of regulatory assistance required to enable them to use corporations more effectively, the approach needs to be rethought so that the benefits that are now restricted to CATSI Corporations can be extended to all Indigenous Corporations. Maintaining the CATSI Act and strengthening it further will only further drive Indigenous Corporations away from the regime.

Does the CATSI Act put CATSI Corporations on an even playing field with companies incorporated under the Corporations Act?

It does not. It subjects them to far greater forms of regulatory control and over-regulation and facilitates Indigenous Corporations being discriminated against in government policies. Further it perpetuates the paternalistic attitude that many governments, policy makers and corporates have towards Indigenous People's ability to govern themselves. Having a separate, more highly controlled form of regulation for CATSI Corporations is viewed as evidence of Indigenous People's inability to properly manage a corporation and encourages discriminatory behaviour. We have particularly seen this play out in the way corporate entities negotiate ILUAs with the PCCC PBC.

Further, the CATSI Act lacks the flexibility that is available under the Corporations Act. If it did in fact put them on an even playing field, Indigenous Corporations would not elect to incorporate under the Corporations Act. Further, as many Indigenous Corporations are also charities, it adds complexity to their regulation as they end up with two regulators rather than just the single regulator other charities have. Given the disadvantages that Indigenous People already suffer from, particularly low levels of education and English language challenges, creating the added complexity of dual regulators that other charities do not have, only serves to accentuate these disadvantages.

Can changes be made to the powers of the Registrar to better take into account the traditions and circumstances of Indigenous People?

We are supportive of special provisions being made to enable any regulator to take into account the traditions and circumstances of Indigenous People, particularly in granting special consideration for meeting compliance requirements and waiving penalties. Given that many Indigenous Corporations are regulated by ASIC or the ACNC we believe that this is a discretion that should be applied within all the regulatory regimes that Indigenous Corporations fall under. The most effective way to achieve this would be to adopt our proposal for a registered Indigenous Corporations scheme under an Indigenous Corporations Commission.

Is the CATSI Act flexible enough to meet the needs of a whole range of different ATSI Corporations?

The CATSI Act provisions and in particular, the internal governance rules requirements, mean CATSI Corporations are far less flexible than other corporations and cannot be tailored to suit the particular needs of the owners. The focus on Indigenous Corporations providing essential services means that other forms of Indigenous Corporations are stuck with an inappropriate structure.

How can the Registrar and ORIC better support corporations to pursue economic and community development opportunities?

There are two aspects to this. The first is removing the barriers that are caused by the CATSI Act such as inflexibility and Regulator over-reach and control that causes concerns for private Indigenous corporations that are run as businesses. Enabling Indigenous Corporations to have access to the usual flexible range of corporate structures available under the Corporations Act in the same manner as any other Australians would go a significant way to addressing this.

The second aspect is capacity building. This is clearly the most important means of overcoming the disadvantages faced by Indigenous People. The current form of capacity building of ORIC is in the form of education and training programs that are all taught in an abstract or theoretical manner. The issue with this approach is the difficulty Indigenous People often find in making the leap from the theory to the practical application within their own organisations. They would therefore benefit from applied training where they are shown how to do use the theory in practice and mentored in this.

Should the Registrar have greater oversight of PBCs, including the power to intervene in disputes – especially given PBCs have to incorporate under the CATSI Act?

We feel that this is an area where the conflicts of interest around the involvement of NIAA and ORIC in the review mentioned above arise as giving greater oversight to the Registrar over PBCs is seeking to increase its scope and powers of ORIC. There is no need for the Registrar to have any greater oversight of PBCs than any other CATSI Corporation.

Should the CATSI Act be changed to better support corporations in remote and very remote areas, especially seeing they often provide essential services and account for 40 per cent of all CATSI Corporations?

It would be better to provide support to corporations in remote and very remote areas in the form of:

- specialised regulatory assistance; and
- tailored applied training and mentoring

that focusses on the specific issues they face that are unique to each of them.

POWERS AND FUNCTIONS OF THE REGISTRAR

Imposing Fines: Do you agree that the Registrar should have the power to issue fines in cases of minor non-compliance? Enforceable Undertakings: Do you agree the Registrar should be able to accept enforceable undertakings

It is our view that the penalties under the CATSI Act for non-compliance should be the same as those imposed under the ACNC Act. Currently the CATSI Act imposes far harsher penalties on Indigenous Corporations and their directors. This cannot be justified under a special measure test and is simply negative discrimination on the basis of race. It is a further example of the "stick approach" of the CATSI Act and does not in any way address the special disadvantages of Indigenous Australians in running corporations. If anything, penalties should be less harsh because of the disadvantages they face. We would therefore favour the issue of fines for minor non-compliance and the use of enforceable undertakings.

In addition, special assistance should be provided to those corporations and directors who find themselves in the position of non-compliance to facilitate them overcoming their issues. This would be a true example of a positive discrimination rather than just issuing punishments.

Notice Period: Should the CATSI Act be amended so that the Registrar also has the power to specify the timeframe within which books must be produced?

Issuing Notices: Do you think that the CATSI Act should be amended to provide the Registrar with similar powers to ASIC to issue notices to produce books?

Powers when Books are produced or Seized: Should the CATSI Act be amended to provide the Registrar with the same powers?

Strengthening CATSI Act: Are there powers available to other Commonwealth Regulators that should also be available to the Registrar?

Extending Power: Do you agree that the CATSI Act should be amended to allow the Registrar to take action against a current or former employee or officer as well as the corporation?

All these inconsistencies between the regulatory powers in relation to ASIC Corporations vs CATSI Corporations are symptomatic of having a separate incorporation statute for CATSI Corporations. Under our proposal where all corporations were incorporated under the Corporations Act this issue would not arise.

Are the current dispute resolution powers of the Registrar adequate – if not how could they be improved?

The current dispute resolution powers given to the Registrar are consistent with a positive discriminatory approach. Any extension that goes beyond providing advice, guidance and assistance to corporations to resolve disputes would amount to regulatory overreach. In particular, any form of binding decision-making powers in relation to disputes would not be a justifiable special measure.

GOVERNANCE

Membership Management

Should members addresses be hidden from view?

Should there be particular circumstances for someone making a request to redact personal information from the members register? Should the relevant member have to request that their information is removed from the register or should the corporation be able to make that decision in some circumstances? If members submit a request should it go to the Corporation or the Registrar?

It is an area of major concern for members that their personal details can be obtained by other members and it does act as a disincentive to become a member. These concerns will only be exacerbated if the Members Register includes email addresses and phone numbers. Requiring that information to be made available without the consent of the member conflicts with most modern notions of the right to privacy. It is our view that personal details of a member should not be made available unless it is requested, a valid reason related to the governance of the corporation is given for the request and the member is made aware of the request and given the opportunity to object to the disclosure. The right to object should be fully at the discretion of the member with no reason needing to be given. Where the member does object the information should not be disclosed. This process should be the responsibility of the corporation to manage.

How would members be able to organise a meeting without access to personal information of other members?

If a member wishes to contact other members to organise a meeting the above process could still be followed. If a member is advised that another member is seeking their personal information for the purpose of organising a meeting they are free to consent to that request so that they can participate in that process. It should however be accompanied by an obligation that the member seeking the information can only use it for the purpose of organising the meeting and cannot disclose it to anyone else.

Provision could also be made that permit a member who wishes to organise a meeting to provide information either to the corporation or to the Registrar detailing the reasons they wish to organise a meeting with a requirement that the corporation or Registrar distribute this information to the rest of the membership with details of how to contact the organising member if they wish to participate in the process of requisitioning such a meeting.

Should there be specific timeframes within which membership applications need to be decided? What would it be?

Each corporation has its own processes for considering membership applications which is outlined in its constitution. Some corporations have processes, for example, that include sending the application for consideration and recommendation of the Elders advisory council before it is sent to the Board for final determination. The Elders advisory council may not meet as frequently as the Board so the process for approval can take longer than other corporations that have membership applications go directly to the Board. Therefore we are against imposing a statutory timeframe. To do so would impinge on the right of Indigenous People to decide on their own decision-making processes. It should be left to each corporation to decide if they wish to include a timeframe in their constitution and, if so, what that timeframe should be.

If the Board rejects an application, even if it meets the criteria, should the applicant be able to ask for it to be reconsidered at general meeting? Should that be within a specific timeframe? With a specified quorum?

This is again something that should be left for the constitution of each corporation. To impose a specific statutory process that applies to every CATSI Corporation would be contrary to the right of Indigenous People to determine their own decision-making processes. For example, some corporations may wish the right to have their application to be reconsidered go to the Elders advisory council rather than a general meeting.

If a member wants to challenge a particular membership, and they call a members meeting, should that meeting occur within a specific timeframe with a specified quorum?

We do not agree with this proposal. As mentioned above, each corporation should be allowed to determine its own processes for how a membership is challenged for inclusion in its constitution.

In relation to all three of the above suggestions regarding membership approval we would reiterate our point that the more statutory requirements you specify for CATSI Corporations, the more rigid and inflexible you make the regime. This only serves to drive Indigenous Corporations to incorporate under the Corporations Act where there is far greater flexibility.

We would also make the following points:

- how do any of these suggestion meet the special measures test? They are simply not necessary to address entrenched discrimination or disadvantage;
- they are inconsistent with the right of Indigenous People under Article 18 of UNDRIP to determine their own decision-making processes; and
- they fail to recognise that there are different types of Indigenous Corporations out there, including privately owned, rather than community-controlled, corporations, where these types of provisions would be inappropriate.

Corporate Structures

What do you think about changing the CATSI Act to allow a:

- Wholly owned subsidiary CATSI Corporation?
- Group of entities (which meet indigeneity requirements) to establish a CATSI Corporation similar to a joint venture?

While these suggestions would go some way to improving the lack of flexibility in the CATSI Act, in our view it would be best to address this issue by removing the requirement for a majority of directors to be members. Our reasons for this are outlined in the discussion of the *Community Controlled Essential Services Justification* under Part 3 of our submission that deals with the Objects of the CATSI Act.[28]

This issue would not exist if our proposal were adopted to have Indigenous Corporations incorporated under the Corporations Act with a registration system under an Indigenous Corporations Commission with the only requirement for registration being that the corporation is majority Indigenous owned (whether by Indigenous People themselves or by other Indigenous Corporations).

[28] Refer to page 9 of this submission.

Could the CATSI Act better support for profit corporations and if so how? How can the CATSI Act be changed to help single member corporations to develop and grow?

We do not believe the CATSI Act in its current form is suitable for these types of entities due to:

- its focus on the *Community Controlled Essential Services Justification* for the CATSI Act;[29]
- the fact that it treats CATSI Corporations akin to publicly funded companies and the public interest justification has been used to put stricter regulations around them;[30]
- lack of flexibility around designing the board and other decision-making structures that are suited to privately owned and for profit corporations;[31]
- there is no means of raising capital eg through issues of shares, that can be used to support growth.

Were our proposal adopted, Indigenous Corporations would all be incorporated under the Corporations Act under a corporate structure that was appropriate for the type of activities the corporation engaged in. It is a much preferable solution that enables each individual Indigenous Corporation to determine the type of corporate structure they wish to have without forcing them all to adopt the same corporate structure that is principally designed for public good entities.

Our proposal would allow Indigenous Corporations that were focussed on profits and/or had growth agendas to establish as proprietary limited companies that could raise capital through share issues or other forms of equity. Conversely, those Indigenous Corporations that were focussed on public good could incorporate as companies limited by guarantee and become registered charities with the attendant increased accountability that comes with being a public company limited by guarantee and a registered charity.

Trying to meet the needs of all these different types of entities within a single corporate framework under the CATSI Act is practically impossible unless the CATSI Act is expanded so that different corporate structures for different entities are included. This would be an unnecessarily complex solution when the proposal we have put forward resolves this issue in a very simple way.

Size Classification

Should the test for size be based on that of the ACNC? Should there be only two sizes small and large and if so what criteria or thresholds could be used?

As a significant proportion of Indigenous Corporations are registered charities, the size tests should be aligned to the ACNC. The current disparity between the two tests creates significant confusion. It can also add to costs where a corporation finds itself with two different reporting requirements. Having only two sizes small and large would only serve to increase the confusion and reporting costs.

It should be noted that our proposition of having Indigenous Corporations registered under the Corporations Act would address this issue and remove all inconsistencies between the regimes.

Meetings

Should corporations be able to hold AGMs online when an in-person meeting is not feasible?

[29] Refer to pages 8-9 of this Submission.
[30] See for example Report p 42 para 5.30
[31] Refer to our

On-line AGMS should be permitted regardless of whether meeting in person is "feasible". This is particularly important for PBCs where their membership base may be scattered across multiple locations.

Should the Registrar be able to call a general meeting if there have been a lot of complaints or if members have not been able to ask questions of the board?

This is simply a case of regulatory overreach and negative discrimination. Neither ASIC or the ACNC are able to call general meetings if there have been complaints and there is no justification for treating Indigenous Corporations differently. This is not justifiable as a special measure as it is not necessary for addressing entrenched discrimination or disadvantage.

Further, it perpetuates the approach of treating all Indigenous Corporations as if they are publicly funded or PBCs and/or providing essential services to the community when this is not the case. A provision such as this would further compel Indigenous Corporations to incorporate under the Corporations Act.

Should corporations be able to have an automatic 30 day extension to hold an AGM due to sorry business or other cultural activities or natural disaster?

We agree with this proposal in relation to sorry business or other cultural activities as this is consistent with this being a special measure. We do not agree with this for natural disasters as any corporation, not just a CATSI Corporation can be faced with this issue. CATSI Corporations should therefore be treated no differently to other corporations.

Does the CATSI Act need to be clearer about holding and cancelling general meetings?

It should be made consistent with the Corporations Act but with allowance for cancellation of a meeting due to sorry business or other cultural activities where traditional practices mean the activities cannot be postponed or changed.

Should large corporations be required to have an audit committee to advise boards on financial matters?

We do not agree with this proposal. Large corporations under the Corporations Act and ACNC Act to not have this requirement and there is no justification for treating CATSI Corporations differently under the special measure test. Further, it diminishes the right of Indigenous People to determine their own decision-making structures.

Reporting

Should corporations be allowed to have an automatic 30 day extension to lodge reports due to sorry business or other cultural activities or natural disaster?

Again, we agree with this proposal in relation to sorry business or other cultural activities as this is consistent with this being a special measure. We do not agree with this for natural disaster as any corporation, not just a CATSI Corporation can be faced with this issue. CATSI Corporations should therefore be treated no differently to other corporations.

Currently corporations only have to give copies of reports to members on request – should they be required to present them at AGMs?

We do not agree with this proposal. This would add a significant administrative burden and cost to AGMs. Without knowing the actual numbers who will attend an AGM, corporations would be required to print a large number of copies of the report that may in the end be simply thrown away.

Further, due to the identified issues of Indigenous disadvantage principally low levels of education and English language challenges, many members simply do not have the capacity to comprehend these reports. The fact that members who actually do have an interest are able to request copies of the report creates sufficient accountability.

Rule Books

Do you agree that all replaceable rules should be included in rule books whether they have been adopted as they are or replaced?

We do not agree with the approach taken to replaceable rules under the CATSI Act. There is no reason to treat replaceable rules under the CATSI Act any differently to replaceable rules under the Corporations Act. That is, a corporation's constitution should be able to simply declare that the replaceable rules do not apply. However, if the requirement is to remain that all Rule books must deal with matters covered by replaceable rules, they should be included in the Rule book.

However, if this is done we believe the replaceable rules should be specifically highlighted in the model Rule book and alternative options to what is in the CATSI Act given. There is a significant issue around the use of the model Rule book by Indigenous Corporations as many adopt the model Rule book thinking that it is their only option without really understanding or exploring whether it is suitable for their purpose. We would therefore strongly advocate that, not only in relation to inclusion of the replaceable rules, but in general, that explanations regarding rules should be provided with alternative choices given.

Another issue we have come across is what the words "cover the matters provided for in the replaceable rules" actually means as the definition in s66-5 is not really helpful to understanding to what extent the matters must be covered. Clarification of this with specific examples would therefore be very useful.

The most significant issue that we see is the fact that the CATSI Act has so many internal governance rules that are not replaceable. The problem this creates is that:

- if you do not include internal governance rules in the Rule book (including replaceable rules) then corporations and directors can overlook the requirements of the internal governance rules because they have a tendency to only reference the Rule book to determine what rules apply;
- however, if you do include the internal governance rules in the Rule book then you have a problem where changes are made to the internal governance rules in the CATSI Act itself. What this does is leave many corporations with outdated Rule books as they have the old internal governance rules in them.

This was highlighted in one of the zoom consultations where there was a discussion around the impact on existing Rule books that have the current internal governance rules in them when the changes to internal governance rules arising from this Review are implemented. There was a suggestion that there would be a period of 2 years grace given to allow CATSI Corporations to enact amendments to their Rule books to bring them into line with the new internal governance rules. What this proposal does not address is what would happen if, despite numerous attempts by the Board, the requisite special resolutions of members to enact these changes failed to pass. Further thought should be given to how better to facilitate the transition.

Due to this dilemma we have been working on establishing a model Rule book that excludes all internal governance rules that cannot be replaced but attaches them as a reference schedule only to the Rule book. That way, if the internal governance rules changes, the schedule can be updated

without the need to amend the constitution but the internal governance rules sit within the Rule book.

Do you agree the CATSI Act should also say the Registrar can reject changes to a rule book that are different from changes made by a special administrator?

We do not agree with this proposal and in fact we do not believe the Registrar should have final approval of changes to Rule books. Other regulators do not have this power. We acknowledge that it is useful for the Registrar to be able to review and recommend changes made to a Rule book to ensure they are consistent with the legal requirements as this is a special measure designed to overcome Indigenous disadvantage.

Granting the Registrar the power to reject changes that are different from changes made by a special administrator is fundamentally inconsistent with the rights of self-determination and the right of Indigenous People to determine their own decision-making processes.

Should Rule books be simplified?

We do not believe it is realistic to simply Rule books given the extent of the requirements of the CATSI Act. In fact, we suggest an approach to them that we have outlined above where there are two sections to the Rule books, one that has the substantive provisions that are adopted by members and only change via special resolution of the members, and a second section or schedule that replicates the internal governance rules that cannot be replaced. This section or schedule would not form part of the Rule book per se but would exist within it as a reference schedule for the purposes of drawing the awareness of members and directors to those internal governance requirements.

Further Ideas and Questions

Are there more changes that can be made to the rules for CATSI Corporations the same as rules for registered charities in particular registered charities that are companies limited by guarantee under the Corporations Act?

The fact that the CATSI Act seeks to cover all types of Indigenous Corporations be they ICC Corporations, private corporations, not-for-profit or for profit, adopting provisions that apply to registered charities and applying them to all these types of corporations would be problematic.

We simply make the point here that were our proposal adopted, Indigenous Corporations would all be incorporated under the Corporations Act and those that were registered charities would be regulated by the ACNC and have access to the applicable rules. Those that were not registered charities would be regulated by ASIC and the relevant rules for those types of corporations would apply. It is a much preferable solution that enables each individual Indigenous Corporation to determine the type of corporate structure they wish to have (public company limited by guarantee or proprietary company limited by shares) without trying to jam them all into a single framework.

Members can be asked to vote on behalf of up to three other members at the moment. Is this too many votes for one person to hold?

We do not believe this is a matter for the CATSI Act. It is up to the members of each corporation to determine their position on this and enact it in their Rule book. To do otherwise is inconsistent with the rights of Indigenous Peoples to determine their own decision-making processes.

OFFICERS OF THE CORPORATION

Should medium and large corporations report remuneration details of their CEOs and other senior managers in their annual reports?

How much detail should be provided? Should all remuneration be itemised for each relevant individual or should information be reported in broader groupings?

Should corporations only have to report on individuals who earn over a certain amount eg $200,000?

Do you think members should approve their remuneration?

Should individual directors fees also be reported in corporations annual financial reports to the Registrar?

Do you agree that the names of CEOs and other senior staff and their qualifications should be published in annual reports?

Do you think medium and large corporations should also include 10 year employment history of their CEOs and senior executives in their annual report?

The Report boldly asserts that there is value in these proposals[32] without explicitly stating what that value is. The *only* value that would legally justify these requirements when they do not exist for other like corporations is that there is a need for them to enable Indigenous People to overcome the disadvantage and entrenched discrimination. That is, it must pass the special measures test. Any other value, such as public interest in ensuring how grant funds are expended, would not satisfy the sole purpose test and would take it outside the realm of a special measure into negative racial discrimination.

To treat all CATSI Corporations as if they are akin to publicly listed corporations is a unjustifiable. The rationales for these suggestions in the Report are that there may be a public interest as they employ staff who are publicly-funded through grants or are resourced through native title benefits. However, most charities employ staff funded through grants or resourced from donations made by the public but they are not required to meet these standards. As is pointed out in the Report, the new accountability regimes under the ACNC only require charities to report remuneration in aggregate and only if they are large charities.[33]

Further, there are many CATSI Corporations who fund and employ staff through their own business operations so why should they have to meet these requirements? It is another example of failing to recognise the diverse array of CATSI Corporations and using a particular segment of them to justify increasing the regulation on them all.

The Report fails to address just how exactly publishing qualifications and work history addresses poor executive performance given that it would not actually include any assessment of their past performances at previous places of employment. Further, qualifications are not necessarily the best indicator of executive performance as having a piece of paper does not guarantee success and fails to take into account the value of actual life experience.

In addition to these issues, it raises serious privacy concerns for CEOs and senior managers and can often lead to antagonism towards them. Individuals within communities can use this information to

[32] Report p 39 para 5.10
[33] Report p 38-39 para 5.8

target these people, often because it is simply a case of them being seen to getting more from the corporation than the members without any real understanding of the work these managers perform and appropriate commercial remuneration rates. It is therefore likely to highlight and increase tensions.

We are therefore strongly opposed to the imposition of these requirements on Indigenous Corporations.

Do you agree that corporations should give remuneration information to the Registrar for the purposes of providing benchmarking information?

This should be not be mandatory. The provision of this information to the Registrar should be voluntary at the discretion of each individual corporation. Imposing such a requirement does not meet the special measures test.

Do you agree that the provisions around related party benefits should be reviewed to make them more workable for CATSI Corporations?

The related party provisions that apply should be the same as other corporations, and in particular should include the same exceptions available to other corporations that are currently not available to CATSI Corporations. The Report quotes the Revised Explanatory Memorandum's reasoning for not allowing the same exceptions as being that it was: *important for sound member protection and will act as a strong deterrent to nepotistic behaviour*.[34] This immediately puts it into conflict with the sole purpose test of a special measure. Neither of these reasons for excluding the same exceptions that are available to non-Indigenous corporations are for the purpose or necessary of addressing Indigenous disadvantage. Further, it smacks of racial profiling by alluding to the assumption that Indigenous People are more prone to nepotistic behaviour than non-Indigenous People.

Giving greater powers to the Registrar to exempt transactions does not address these fundamental flaws in the related party benefits provisions of the CATSI Act. We would therefore strongly advocate for making these provisions consistent with those that apply to all other non-publicly listed corporations in Australia. This would include rectifying the lack of clarity between the application of s252-1(2) and s287-1(2) as this does create confusion.

Do you agree that sometimes the Registrar should be able to exempt corporations from the rule that most directors must not be employees of the corporation?

We do not agree with this rule in the first place as it is not justifiable as a special measure and fails to recognise that there are diverse types of Indigenous Corporations so therefore allowing exemptions would be supported.

Do you think there should be restrictions in relation to board membership, for example, around the number of family members on the Board?

If so, how would this be managed in remote communities where restrictions on the number of family members could cause major difficulties?

This should be up to each individual corporation to decide whether they wish these kind of restrictions in their constitution. We advocate for Indigenous community-controlled corporations to include these types of provisions in their constitutions where it is practical. However, we do not usually recommend them for PBCs where family relationships often make this impractical. It is a

[34] Report p 42 para 5.30

fundamental part of Indigenous People's rights under Articles 18 and 23 of UNDRIP to choose their own decision-making structure and therefore they should be able to choose whether to include such restrictions or not. Further, it fails to recognise that some Indigenous Corporations could be small family owned enterprises. For these reasons and the fact that there is no justification for these types of restrictions under the special measures test, we oppose these restrictions.

Do you think the CATSI Act should allow corporations to appoint independent directors without an explicit rule in their rule book? Do you think independent directors should be mandated for large corporations?

Article 18 of UNDRIP states that Indigenous People should be free to determine their own decision-making structures. In line with this, if members of an Indigenous Corporation choose to have only member directors, an equal mix of member directors and independent directors, a majority of independent directors or all independent directors they should be entitled to do so. Accordingly, any restrictions on their ability to choose the decision-making structure for themselves should be removed, including the requirements around appointment of independent directors and the requirement for a majority of member directors.

Do you think culture and tradition could be incorporated into the operation of corporations by changing directors duties and rule books such as: providing a defence for directors or officers who are complying with traditional Aboriginal customs or practices of their tribal group? Allowing directors and officers to follow their traditional customs and practices without breaching the rules?

Given that the need to take into account culture and traditions of Indigenous People is one of the primary justifications used for having the CATSI Act there is odd that there is actually nothing in the CATSI Act that specifically provides for this. However, this does not prevent Indigenous Corporations from addressing this in their constitutions. The only time they cannot do this is where it conflicts with the CATSI Act. The very real conflict between western concepts of corporate governance and models of Indigenous governance is a tangible issue that Indigenous Peoples have to deal with when forming corporations. While as a basic principle, it sounds positive to include the types of provisions suggested, the question has to be asked exactly how far would they go? For example, would it allow non-compliance with the related party benefits provisions where traditional rules of kinship require a benefit to be passed to family members of directors?

In our view, this demonstrates one of the flaws in the reasoning behind the CATSI Act. Western concepts of incorporation simply cannot be adequately massaged to enable them to fit with the cultures and traditions of Indigenous People. Therefore the focus should not be on trying to provide a separate incorporation regime that can never achieve this unrealistic goal but instead the focus should be on enabling Indigenous People to use the same corporate mechanisms available to all other Australians by removing the barriers they face to doings so. This is one of the major underlying reasons for our proposal to shift away from a separate incorporation and regulatory regime to a Special Regulatory Assistance Scheme.

MODERNISING THE CATSI ACT

Do you think that the Registrar should be able to share de-identified information with interested stakeholders?

This should be up to each corporation, regardless of whether it is de-identified or not. This is particularly the case as there are no limits around who "interested stakeholders" may be or what they may do with the information. Further, it would go against the ethical principles that apply to the conduct of research with Indigenous People where prior informed consent is an absolute requirement.

Should the CATSI Act be changed to enable the Registrar to publish notices on modern communication platforms and contact people using electronic channels?

We agree with these changes. However, they should not be at the expense of traditional forms of communication. The reality is that many Indigenous People, particularly elders and those in remote locations, do not have access to modern technology and still rely on print media such as newspapers.

Information Storage: Do you agree that the CATSI Act should make it clear that corporations can store their information on cloud servers?

Do corporations need minimum security standards for the information they hold?

This is a clear case of regulatory over-reach. No other corporations are subject to this type of interference in their day to day operations and there is no justification for this type of regulation under the special measure test.

Contact Information: Do you agree that the CATSI Act should be updated to require telephone numbers and email addresses as part of contact information?

We disagree with this proposal as not all Indigenous People have emails or even telephones. The inclusion of this information should be optional for each corporation and each individual, particularly since this information becomes publicly available.

False and Misleading Information: Should the CATSI Act also include an explanation of reasonable steps? Should the penalties for making false and misleading statements be consistent?

Whistleblower Protection: Do you agree that these provisions should be expanded in line with recent amendments to the Corporations Act?

The only point we wish to make in relation to the above two questions is that under our proposal these types of ongoing inconsistencies between the CATSI Act, the Corporations Act and ACNC Act would disappear.

RNTBCS

The regulatory and compliance regime imposed on PBCs is one of the most complex and difficult to understand of any corporations in Australia. This complexity is at odds with the pretext of the CATSI Act of overcoming the disadvantages Indigenous People face in using corporations effectively particularly regarding low levels of education and English language challenges. The complexity of the regime is hard to come to terms with even for the most educated, English speaking individuals, let alone those who are suffering from one or more of the disadvantages Indigenous People face.

Even where PBCs have relatively sophisticated Boards, the challenges of dealing with the interplay of the legal and regulatory requirements ORIC and the CATSI Act, the ACNC and the ACNC Act and the Native Title Act and Native Title (Prescribed Body Corporate) Regulations (PBC Regs) requires specialised and expensive legal advice. This is particularly draining on the budgets of small PBCs where a lot of the resources they obtain from their Native Title rights are chewed up in meeting their compliance requirements guaranteeing that the already small amount of income available to them to use for the benefit of the common law holders is even further diminished. The small grants made available for governance of PBCs by the Commonwealth Government does not go close to meeting the actual costs of running these organisations and any attempt by PBCs to maximise the benefits to common law holders by avoiding expenditure on compliance puts them at significant risk of default.

Transparency around Native Title monies

The Report uses the statistic that PBCs generate 22 per cent of complaints to ORIC as a justification for further strengthening the regulatory framework applying to PBCs. This is a false justification without any analysis of the cause of those complaints. It has been our experience that often the source of complaints are wholly unjustified as:

- they often arise as a result of an expectation that Native Title monies should be distributed directly to individual common law holders when the evidence shows this is not either the preferred, or a successful, means of improving the lives of Indigenous People;[35]
- the perception that one or more families, clans or traditional owner groups have more control than another; and
- lateral violence.

This is not to say that all complaints are unjustified. It is to simply make the point that the statistics such as the ones quoted cannot be used to justify further regulation of PBCs unless a more sophisticated analysis of the sources, biases and justifications for the complaints is undertaken.

Increasing accountability of PBCs through greater regulation fails the equality test and therefore is not justifiable as a special measure. Requiring greater regulatory compliance of CATSI Corporations than regular corporations used by other Australians simply further entrenches discriminatory

[35] The Nation Rebuilding Approach to Indigenous governance that is advocated by both ORIC, the Australian Indigenous Governance Institute, the Institute for First Nations Governance Professionals and Reconciliation Australia is based on over 20 years of research conducted by Harvard University and the University of Arizona. This research has shown that direct payments to individuals not only does not benefit Indigenous Peoples but actually causes harm. see *Rebuilding Native Nations: Strategies for Governance and Development* Jorgensen, Miriam, ed. 2007. Rebuilding Native Nations: Strategies for Governance and Development. Tucson: University of Arizona Press.

practices. Increasing regulation in and of itself does not protect Indigenous People or address entrenched disadvantage. This is particularly the case where the disadvantages suffered make it harder for Indigenous Australians to understand and comply with the increased regulatory obligations thus setting them up for failure.

Further, the main justification for increasing accountability of PBCs is to increase transparency of the management of Native Title benefits for common law holders. However, if this is done it is an absolute imperative that the Commonwealth adequately compensate PBCs to enable them to meet the expenses associated with the increased regulation.. **It is absolutely not in the best interests of the common law holders to have their Native Title benefits used up meeting regulatory compliance requirements.** Were common law holders given the option on the one hand to have better reports from PBCs or on the other to have receive more benefits to their People it is fair to assume they would opt for the latter. If the intention is to increase compliance requirements without adequate compensation, it would be appropriate to allow common law holders the choice of what they wished their Native Title benefits spent on, increased reporting and accountability or activities that benefit their People.

Benefit Management Structures

The Report makes note of the fact that many PBCs have complex benefit management structures in the form of separate trusts, subsidiaries and ASIC corporations. It makes the point that this is often done as a way to manage risk and reduce tax. What the Report fails to recognise is that quite often a significant motivating factor is to take the management of Native Title benefits and the day to day operations of Native Title entities outside the scope of the CATSI Act. Along with risk management, this has certainly been a primary motivating factor for the two Native Title entities that work with the authors of the submission. The reasons for this are:

- the CATSI Act is too rigid and inflexible to facilitate social, cultural and economic development activities;
- to take the management of Native Title assets, monies and other benefits outside the scope of the regulatory overreach of ORIC and the Registrar; and
- the research on best practice in Indigenous governance advocates for the nation rebuilding approach[36] and it is difficult to accommodate this within the CATSI Act framework.

Therefore, while changing the CATSI Act to better facilitate the establishment of subsidiaries would better enable these benefit management structures to be put in place, it may not have the intended effect of having benefit management structures being established under CATSI Act if a primary motivating factor remains removing assets and activities outside the over-regulated environment of the CATSI Act and ORIC.

Further, adding additional complexity to the CATSI Act in the form of regulating trusts and other benefit management structures will only increase the drive to establish structures outside the CATSI Act. It will also increase the complexity of regulation in an already over-regulated sector. Therefore if the goal is genuinely to increase accountability and transparency, a better means of doing this would be to remove the artificial division of CATSI Corporations vs ASIC Corporations and have them all regulated under the one regulator with the same accountability and transparency provisions of all Australian corporations and trusts.

[36] Ibid

Recording, Reporting and decision-making

One of the fundamental issues with the way PBCs are regulated is approached is the attempt to use a western construct in the form of a corporation and make it work with indigenous notions of collective rights. To focus on the common law holders as individuals and what their rights are eg to participate in decision-making, to be protected, to share in the benefits of Native Title rights is a very western, individualistic approach to governance and regulation. This fails to recognise the role of PBCs as the mechanism for realising the collective aspirations of their people. By giving individuals more rights and more opportunities to intercede in the operation of an Indigenous Corporation it allows individuals to hamper realisation of the collective's aspirations. This is fundamentally at odds with the traditional forms of governance in Indigenous communities. While we recognise that there does need to be some level of accountability to the common law holders as a collective, granting common law holders more extensive rights under the CATSI Act, rights they would not have under traditional forms of Indigenous governance, will result in more and more individual challenges and complaints around the governance of PBCs and will divert already precious time and resources to dealing with these individuals when the focus should be on realising collective benefit.

Reporting on Native Title benefits

We do not oppose the introduction of the requirement that a PBC report on monetary and non-monetary Native Title benefits. However, some consideration would need to be given as to the point at which the requirement ceased. For example, the PCCC PBC would have no issue in reporting on how Native Title benefits were being used within its related trust and development corporations. However, if the PCCC PBC used those benefits to support for example, an Aboriginal medical service in its region to extend its programs, it could not then be expected to track the expenditure of the native title benefits by the Aboriginal medical service. The PBC should simply report that the program extension was funded and delivered.

Decision making regarding use of Native Title benefits

The proposal to require PBCs to obtain the authorisation and consent of common law holders in relation to any use of Native Title benefits further highlights this problem. This is fundamentally at odds with the duties imposed on directors of CATSI Corporations (or any corporation). The directors are subject to statutory duties to ensuring the proper running of the corporation and are legally responsible for ensuring they make appropriate decisions in relation to the activities and financial management of the corporation. If you take away their capacity to make those decisions by requiring them to obtain the consent of the common law holders but leave them with the legal responsibility for whatever the common law holders decide, any appropriately advised person would refuse to become a director.

If this proposal went ahead it would be reducing the directors' role to merely ensuring compliance and remove their ability to make strategic decisions on how best to utilise the resources of the corporation to achieve its objectives. This is fundamentally at odds with all corporate governance principles under Australian law and will not result in better strategic decision-making. In fact, the opposite is highly likely where tough but important ideas and approaches that are in the long term best interest of the People are avoided in favour of things that are likely to appeal to the lowest common denominator, such as immediate and direct benefits paid to individual common law holders. As has been mentioned previously, the research shows that this results in far worse outcomes for Indigenous People.

A final and very strong objection to this proposal is the additional, very significant time and costs associated with organising and paying for authorisation meetings. For many PBCs it is not the case of a single meeting being held due to the dispersed location of the traditional owner populations. For example, for PCCC PBC when it holds authorisation meetings they are held in Gladstone, Bundaberg, Brisbane and Eidsvold. Each meeting is held on a separate day and involves directors, management, lawyers and other advisors travelling to each location. Similarly, when Bigambul Native Title Aboriginal Corporation holds authorisation meetings they are held in Brisbane, Goondoowindi, Cherboug and Toowoomba. The logistics of organising these meetings requires a significant investment of time as well as money.

It is unreasonable to impose this type of burden on PBCs as:

- the significant costs that are incurred by the PBC to hold the meetings are monies that must necessarily be diverted from achieving its goals of ensuring the benefits of Native Title are passed on to its People. It would chew up even more of the Native Title benefits than the considerable amount already spent on compliance;
- in the case of small PBCs such as Bigambul PBC, they simply cannot afford to hold many of these meetings as it would render them insolvent. They would only be able to hold a very small number a year, which would mean all decisions would be put in abeyance until a meeting was scheduled. This would be extremely inefficient and result in them losing many important opportunities;
- PBCs have limited employees and diverting their time away from the day to day operations in order to organise these meetings is a poor use of valuable and limited resource of the PBC; and
- it merely serves to transfer the Native Title benefits from the PBCs into the pockets of lawyers and advisors whose advice and presence is required at these meetings.

This approach would simply further encourage PBCs to set up benefit management structures outside the purview of the CATSI Act and ORIC and get a blanket approval from the common law holders to transfer all Native Title benefits to that entity. An alternative more practical approach would be to simply require PBCs to obtain the approval of the common law holders to their strategic plan. This would give the common law holders the opportunity to have input into how their Native Title benefits were being used without burdening the PBCs with the completely impractical, costly and resource draining approach of requiring authorisation meetings to be held for all decisions on the use of Native Title benefits. It would also be an approach that is more consistent with corporate governance obligations of directors as it still enables them to make strategic decisions on behalf of the corporation albeit within the scope of the approved strategic plan.

Further Ideas and Questions

Is there a need for a native title specific benefit management structure to help common law holders engage in economic development opportunities using their native title benefits?

We do not believe there is a need for this under the CATSI Act as it is too rigid and inflexible to realistically facilitate better engagement in economic development opportunities. These activities are better pursued in ASIC/ACNC corporations.

Some RNTBCs are small and don't have much money to report. Any extra reporting can be hard for these RNTBCs. Do you think we should limit these changes to bigger RNTBCs with more money and resources?

We do object to the idea that different PBCs should have different reporting standards based on size. The justification for increasing the reporting is common to all common law holders and there is no set of common law holders that deserve a lower standard of reporting. It would be better to resource all PBCs to meet the new reporting standards to ensure that more and more Native Title benefits are not siphoned off into meeting compliance requirements. It is absolutely not in the best interests of the common law holders to have their Native Title benefits used up meeting regulatory compliance requirements.

Do you think we should also limit these changes to Corporations or Trusts that hold a certain amount of native title monies and native title benefits?

As above.

Should the Registrar also have a role as a regulator for RNTBCs about native title decisions and reporting about native title money and benefits? This means that a RNTBC member or common law holder could ask the Registrar for help.

We feel that this would be regulatory overreach. Corporations have many laws they need to comply with but that does not mean that the Registrar should have regulatory oversight and a role in determining whether the corporation has complied with their obligations. For example, the Registrar would not be expected to have oversight regarding the corporation meeting workplace health and safety standards or hear complaints from members if the corporation were not.

Further, the Registrar should only have capacity to deal with complaints and disputes involving members (including common law holders) of the Corporation *in their capacity as members*. Common law holders are not necessarily members of the Corporation and, even if they are, they have a whole different set of rights that arise as a result of them having status as common law holders under the Native Title Act. This is a completely different set of rights than those that arise as a result of membership of the corporation. The ACNC is not given regulatory oversight to deal with the rights of the beneficiaries of charitable trusts or compliance with trust deeds as they are not members of the corporation. There is no special need for this expanded power to be given to the Registrar. Given that the Native Title regime is a very specific complex area, any regulatory oversight of this space should rest with an organisation that has the expertise in this field such as the National Native Title Tribunal. This is a case where we believe that conflict of interest arises with ORIC/NIAA seeking to expand on its own role and scope.

Dispute Resolution: If arbitration is possible, which organisation should hold the function? For example would the NNTT be suitable given its mediation role in, and experience with native title?

For the same reasons cited above the NNTT would be the preferred body.

Would the Registrar be suitable for the role of regulator, enforcing outcomes of arbitration?

We again see this as a case of regulatory overreach. Neither ASIC nor the ACNC are given the powers to enforce the outcomes of arbitration and there is no special need for the Registrar to be given this extended power.

Model Rule Book: Is the development of a RNTBC specific model rule book a good idea?

As previously mentioned, the issue we have seen with the model Rule book is that it is often adopted by Indigenous Corporations thinking that it is their only or the best option without really understanding or exploring whether it is suitable for their purpose. We would therefore only endorse the development of a model Rule book if rather than just providing a single option, it

provided multiple choices within it around the provisions with explanations about each choice and when it is suitable for use.

Where problems arise in a RNTBC that needs outside help, should ORIC be able to assist in both corporate and native title decision making?

For the same reasons cited above we believe that ORIC's role should be limited to advice on corporate matters. Advice on native title decision-making should be with an organisation that has the required expertise and experience to offer the advice.

Given how different RNTBCs are how can we make sure that any additional requirements proposed in the RNTBC chapter do not cost RNTBCs more to implement? Are there ways we could manage the impact of any change on small RNTBCs?

The additional requirements proposed will, without doubt, involve an increased compliance costs, which could be very significant if the proposal to require common law holder consent to use of native title benefits proceeds. The only way that these requirements do not come at an additional cost to PBCs and divert Native Title benefits into meeting compliance obligations is if the Commonwealth adequately compensates them for meeting these requirements. If it does not, a large proportion of Native Title benefits (and for small PBCs, most if not all the Native Title benefits) will not go to the common law holders but to lawyers, accountants, consultants and other service providers.

SPECIAL ACCOUNT – UNCLAIMED MONEY ACCOUNT AND PROTECTION OF ASSETS

Should the CATSI Act be changed to allow the Registrar to used unclaimed monies to maintain assets and property?

We are of the view that the Registrar should be able to use unclaimed monies to maintain assets and property as a matter of course without the need to wait 6 years.

SPECIAL ADMINISTRATION

We have detailed our objections to the special administration process in its current form elsewhere in our submission.[37] We simply reiterate here that we support the concept of special administration and recognise its importance as a special measure. However, we do not support it in its current format where control of the Indigenous Corporation is handed over to the special administrator on the direction of the Registrar as:

- it is inconsistent with the right to self-determination;
- it is inconsistent with the rights Under Article 18 and 23 of UNDRIP;
- it does not build the capacity of corporations and their directors and managers to govern and operate corporations within the Australian legal framework Rather, it pushes them out completely so that what could be an important applied learning process is the exact opposite; and
- what little justification there could be for this is based on public interest and arises out of the focus of the CATSI Act on ICC Corporations providing essential services. It is completely inappropriate for the Registrar to have this type of regulatory over-reach into the operations of a privately owned for-profit company.

Rather, we would advocate for something such as our proposed Special Regulatory Assistance Scheme where a special administrator was appointed to guide and mentor the Board and management. This would encourage more corporations to seek assistance earlier; it would enable the directors to learn from the experience and it would be consistent with the rights of self-determination of Indigenous Australians. The additional resources this would require would be off-set by less corporations ending up in intractable positions requiring lengthy special administration.

Our proposal is consistent with the expressed intent of the CATSI Act referred to in the Report from the Revised Explanatory Memorandum to the CATSI Bill which states in relation to examinations that they are:

> *often used by the Registrar, **with the consent of corporations**, to undertake diagnostic examination of corporations in difficulty. This 'special regulatory assistance' is also important in the context of 'capacity building' for these corporations.*[38]

Our proposal is also more accommodating of the different types of Indigenous Corporations that exist and is amenable to both public good ICC Corporations and for-profit privately owned corporations.

Do you agree with changing the ground of appointment to one that applies if the Registrar or an authorised officer identifies irregularities in a corporations financial affairs?

We do not agree with this proposal. The term "irregularities" is too vague and open to abuse. Many corporations, including charities, end up with qualified audit reports for varying reasons – would that constitute an irregularity justifying the appointment of a special administrator? The Report in places equates the term with "financial distress" but this is a very different concept.

[37] Refer to *Special Administration* under the "Support for Corporations" in Section 3 of our submission -Objects of the CATSI Act p12

[38] Report p 61 para 9.19

The appointment of a special administrator is an extreme measure that wrenches control of a corporation away from Indigenous People and so should only apply where there is an absolute need demonstrated by objectively determinable criteria. However, we would be less opposed to this change if the result was not a takeover but rather the provision of special regulatory assistance.

We propose changing the CATSI Act to include a provision to prevent contracts from stopping during special administration. Do you agree?

This would not be an issue if our proposal were to be adopted and the corporation not put into administration but simply offered regulatory assistance.

Do you think authorised officers should be able to examine and report on a corporation's financial irregularities?

We do not agree with this or the powers in general given to authorised officers. It is extraordinary regulatory over-reach and simply amounts to a corporate witch hunt. It is not justifiable as a special measure as it is not necessary means of addressing entrenched discrimination under the equality test.

Would you agree that a CATSI Corporation should be presumed insolvent if an authorised officer or a special administrator has reported to the Registrar that: the corporation has failed to keep adequate written financial records (no time period specified) or the corporation has failed to keep adequate financial records for seven years?

Should the process be simplified so that the Registrar doesn't need to seek leave of the court to wind up a corporation?

We do not agree with these propositions. As was noted in the Report itself,[39] since these provisions would only apply to CATSI Corporations they could be considered, and in our view are, discriminatory. Further, the justification that these are "rebuttable" presumptions and a corporation could make submissions to the court that it is not insolvent is completely impractical. If a corporation is in any form of financial distress (even if not insolvent) making it pay for legal representation to make submissions to the court would likely push it into insolvency and it is unrealistic to assume they would be able to make these submissions themselves without legal representation as that completely ignores the identified disadvantages that Indigenous People have in trying to work within the legal system.

Do you agree that the CATSI Act should be amended to allow a special resolution agreeing to the voluntary deregistration? Or do you agree with providing the Registrar with the power to exempt corporation from meeting some of the requirements set out under the CATSI Act?

We agree with this proposal to reduce it to a special resolution as this is consistent with the Corporations Act.

[39] Report p 62 para 9.31

CONCLUSION

The primary focus of the CATSI Act is regulating Indigenous Corporations differently to other corporations. As such the focus is not specifically on positive discriminatory actions that address disadvantages and equal access to use of corporations (the carrot approach) but rather the negative discrimination approach of laws and regulations that treat them differently and punish for non-compliance (the stick approach). The difficulty with the stick approach is that no matter how big you make the stick, if the inherent disadvantages suffered by Indigenous Australians impede their understanding of what the rules are relating to how and when the stick will be used, the approach fails. In this way the concept of the CATSI Act fails Indigenous Australians. It provides for a more stringent, inflexible regulatory regime that gives far greater powers of control and intervention to the Registrar as the regulator than any other Australian corporations and the focus of this review is on increasing these. The only rationale that justifies taking this approach (vs a special regulatory assistance approach) is the assumption that due to the disadvantages Indigenous Australians face, greater governmental control, regulation and powers of intervention are required for their corporations. However, greater governmental control, regulation and intervention does not address the disadvantages suffered, it simply allows the government to step in and punish or override them when they see fit.

Capacity building as a means of addressing the disadvantages faced by Indigenous Australians making effective use of corporations is quite definitely a secondary focus of the Review of the CATSI Act, which is understandable given it is not actually contained in the CATSI Act itself. The use of positive discriminatory actions such as education, training, mentoring and other capacity building measures to address the disadvantages of Indigenous Australians should be the **primary focus** of any regime that treats Indigenous Corporations different to other corporations. Setting up an Indigenous Corporations Commission with a focus on Special Regulatory Assistance Scheme would achieve this in a similar way that the ACNC provides special regulatory assistance to charities.

The establishment of the ACNC was in recognition that charities are often run by volunteers and have limited resources which they prefer to direct to satisfying their objects than on compliance costs and therefore have a need for special assistance. Treating charities in this manner establishes a precedent for how special needs corporations are dealt with. It offers a viable and preferred means of dealing with Indigenous Corporations as it ensures they are treated equally to other corporations by being incorporated under the Corporations Act with variations and special regulatory assistance to address their special needs. It is therefore not justifiable, and demonstrates *there is no need*, to maintain a wholly separate incorporation regime, particularly when a precedent exists for addressing special needs corporations within the existing corporations framework. **The fact that the Review simply takes the position specified in the Review of the ACA Act in 2002 that no alternatives to a separate incorporation regime would be suitable is fundamentally flawed given that the ACNC regime was not introduced until 2012.**

The CATSI Act cannot be justified as a special measure as:

- **it fails the sole purpose test** as it is also used by governments to maintain greater oversight and control of the funding, monies and assets of Indigenous Corporations than what is imposed on non-Indigenous corporations as is shown by the rules relating to the Indigenous Advancement Strategy grants and the rules around PBCs. Further, the lack of flexibility and the rigid rules around how an Indigenous Corporation is established and operated actually impede its ability to participate in economic development activities and therefore impedes the advancement of Indigenous People;

- **it fails the equality test** as it is not *necessary* to ensure Indigenous Australian have equal access to the benefits of incorporation. This can readily be done within the existing framework of the Corporations Act with special provisions for Indigenous Corporations in the same way charities are dealt with in the ACNC Act. It does not enable Indigenous Australians to enjoy on an equal basis with other Australians the same legal facilities of incorporation. Rather it creates a *wholly separate legal regime* to other Australians that is far more stringent and inflexible and that grants far greater powers of intervention and control of corporations than the standard provisions of the Corporations Act;
- **it fails the continued need test** as there is no *need* to maintain a wholly separate legal regime for Indigenous People. The special needs of Indigenous corporations can all be addressed within the existing regulatory framework of the Corporations Act in a manner similar to the ACNC Act;
- **it does not advance self-determination** due to the regulatory overreach of the government in the form of ORIC and the Registrar where even things as fundamental as the right of Indigenous Australians under Article 18 of UNDRIP to be able to determine their own decision-making structures is fundamentally undermined by the limits imposed on what goes in the constitution of a CATSI Corporation in the form of the internal governance rules and the fact that the constitution must be approved by the Registrar;
- **it does negatively discriminate** against Indigenous Australians by giving the regulator far greater powers of intervention and control over CATSI Corporations and it also enables governments to pass policies that negatively discriminate against Indigenous Australians by targeting CATSI Corporations; and
- **there are no identified special needs** of Indigenous Australians that are better satisfied by having a separate incorporation statute. Special regulatory assistance can be used to address the disadvantages suffered by Indigenous Australians and the Corporations Act can be amended in the same way the ACNC Act amends it for charities to accommodate cultural practices and traditions and particular needs of Indigenous People.

If the result of the review is, as the Report suggests, a further strengthening of the CATSI Act, it will only serve to drive more Indigenous Corporations to either incorporate under the Corporations Act or, particularly in the case of PBCs where that is not possible, to establish separate entities outside of the CATSI Act, to avoid the strictures and regulatory overreach of the CATSI Act and ORIC. This has the opposite effect of addressing the special needs and disadvantages Indigenous Australians face in utilising corporations as it takes them outside the beneficial aspects offered by ORIC in the form of capacity building, special regulatory assistance and dispute resolution. This is a major failure that directly results from having the wholly separate incorporation regime for Indigenous Corporations under the CATSI Act.

Finally, the CATSI Act suffers from focussing on a specific type of Indigenous Corporation – a community-controlled Indigenous Corporation that provides essential services to Indigenous communities or manages benefits on their behalf. The internal governance rules in the CATSI Act are specifically tailored to this type of Indigenous Corporation and therefore lack the flexibility required for other types of Indigenous Corporations. In particular, Indigenous businesses operated for the purpose of social, cultural or economic development or other for-profit activities are severely hampered by the constraints imposed under the CATSI Act. It is also a reason for these type of community development activities of Native Title PBCs to be set up in corporations incorporated under the Corporations Act. The research on best practice in Indigenous governance advocates a

nation rebuilding approach with a focus on social, cultural and economic development activities. As mentioned previously, this approach is advocated by ORIC itself. However, the CATSI Act regime remains fundamentally incompatible with this approach due its inflexibility and over-regulation.[40] Our proposal to allow Indigenous Corporations to incorporate under the Corporations Act overcomes the issue of there being only one type of corporate structure, best suit to a public good ICC Corporation, available under the CATSI Act. If Indigenous Corporations are able to incorporate under the Corporations Act they can choose the most appropriate corporate structure based on their activities and purpose including proprietary companies limited by shares that are suited to private for-profit Indigenous businesses and companies limited by guarantee, best suited to public good ICC Corporations.

For the reasons outlined above, we believe that there is no longer a need for the CATSI Act as a separate incorporation regime for Indigenous Corporations and is no longer justifiable as a special measure. Using regulation and control that is far more stringent and inflexible than other corporations face is a negative discriminatory practice. It should therefore be replaced with a regime that allows Indigenous Corporations to incorporate under the Corporations Act in the same manner as other corporations but to register as Indigenous Corporations to enable them access to special regulatory assistance designed to assist them with overcoming the disadvantages they face. While this is fundamental shift in approach, we believe it is necessary to stop the racially discriminatory practices under the CATSI Act and to prevent the need for Indigenous Corporations to trade off flexibility and equal regulatory treatment under the Corporations Act against access to the benefits and assistance provided by ORIC. It is also necessary to introduce the flexibility needed to accommodate all different types of Indigenous Corporations, not just public good ICC Corporations.

The authors of the submission are available to be contacted if questions arise in relation to this submission.

[40] When one of the authors attended the Native Nations Institute course on the Nation Rebuilding approach to Indigenous Governance at the University of Arizona, in discussing the comparative positions of indigenous governance in Australia, New Zealand, USA and Canada they depicted a linear graph with USA, Canada and New Zealand at one end of the scale at the forefront in their approach to best practice in indigenous governance and Australia at the opposite end of the scale lagging a significant way behind these other countries. The CATSI Act is a significant contributor to this.