



Law Council
OF AUSTRALIA

Office of the President

1 October 2020

The Hon Ken Wyatt AM, MP
Minister for Indigenous Australians
PO Box 6022
Parliament House
CANBERRA ACT 2600

By email: CATSIActReview@niaa.gov.au

Dear Minister Wyatt

SUBMISSION TO PHASE 2 OF THE REVIEW OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 (CTH)

1. The Law Council of Australia (**the Law Council**) welcomes the opportunity to provide input to the National Indigenous Australians Agency (**the NIAA**) in relation to Phase 2 of the Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**the CATSI Act**).
2. It is grateful to its Indigenous Legal Issues Committee and the Australian Environment and Planning Law Group and the Not-for-Profit Legal Practice and Charities Committee of its Legal Practice Section for assistance in the preparation of this submission.

Background

3. Phase 2 of the Review seeks feedback on the Draft Report published on 31 July 2020.¹ According to the NIAA, the Draft Report is informed by a review of past reports and papers on the CATSI Act, including most recently the 2017 Technical Review conducted by DLA Piper, as well as suggestions received during past consultations regarding proposed amendments to the legislation and during Phase 1 of the Review.² The Law Council previously provided submissions on these proposed amendments in September 2018 and January 2019, and on Phase 1 of the Review in February 2020.³ It was also represented on the Stakeholder Reference Group of the Review by the Co-Chair of its Indigenous Legal Issues Committee.

¹ National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) <https://www.niaa.gov.au/sites/default/files/publications/catsi-act-review-draft-report_0.pdf>.

² Ibid 10-11.

³ Law Council of Australia, Submission to the Office of the Registrar of Indigenous Corporations, *Discussion Paper on Proposed Amendments to the CATSI Act* (17 September 2018) <<https://www.lawcouncil.asn.au/publicassets/585b0376-9a01-e911-93fc-005056be13b5/3507%20-%20Proposed%20Amendments%20to%20the%20CATSI%20Act.pdf>>; Law Council of Australia, Submission No 8 to the Senate Finance and Public Administration Committee, *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* (25 January 2019) <<https://www.lawcouncil.asn.au/publicassets/e531bbec-be29-e911-93fc-005056be13b5/3573%20-%20CATSI%20amendment%20submission.pdf>>; Law Council of Australia, Submission to the National Indigenous Australians Agency, *Phase 1 of the CATSI Act Review* (12 February 2020).

4. The Law Council is now pleased to make a number of observations and recommendations arising from a brief assessment of the Draft Report in response to Phase 2 of the Review. These are set out below. Please note that the Law Council does not purport to provide a comprehensive assessment of the Draft Report.

Discussion

Observations and recommendations relating to Chapter 1, 'Introduction'

5. The Law Council supports the scope of the Review, made evident in numerous statements throughout the Draft Report, as assessing not only the technical aspects of the legislation but also its overriding object.⁴ In particular, the Law Council endorses the emphasis in the Draft Report on the importance of considering whether the legislation remains a legitimate special measure and therefore exempt from the general prohibition on racial discrimination.⁵
6. However, the Law Council submits that another specific aim of the Review should be to reduce the complexity and the sheer size of the legislative regime, which is discussed further at paragraphs 17 and 37 below.⁶ A core function of the Law Council is to maintain and promote the rule of law, a key principle of which is 'the law must be both readily known and available, and certain and clear'.⁷ It follows that in a democratic society, effort should be taken to ensure laws are known, available and comprehensible to all groups, including culturally and linguistically diverse groups, who will be principally affected by them.⁸ The CATSI Act is directed towards First Nations organisations, and should be effectively communicated towards such organisations, including in relevant local languages and less legalistic forms. Where this does not occur, the average person is disempowered in their dealings with the legal profession and system, undermining trust.⁹ The Law Council is supportive of innovative attempts to ensure that complex legislative regimes are accessible to those outside the legal profession, and would urge the Registrar to consider how this may be achieved for the CATSI Act working in close partnership with, and resourcing, First Nations organisations.
7. The Law Council's recent Justice Project, overseen by a Steering Committee chaired by the Hon Robert French AC, highlighted some key features of effective community legal education (**CLE**) for First Nations peoples which may be relevant in this context. These included that CLE delivery must be culturally competent, and informed by the different cultural experiences of communities and individuals. By incorporating the involvement of Aboriginal-Controlled Community Organisations as well as elders and community leaders into its design and delivery, CLE is most likely to overcome distrust of the legal system, engage people more effectively and provide information in the

⁴ See, eg, National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) 5, [1.4]-[1.5].

⁵ *Ibid* 5, [1.5]; 6, [1.8]; 7, [1.16]. See also *Racial Discrimination Act 1975* (Cth) s 8(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 4(1) (**ICERD**).

⁶ Cf *ibid* 9-10, [1.29]-[1.31].

⁷ Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011) <<https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>>.

⁸ See, eg, the criticism directed at official coronavirus health communications in Victoria, where gaps in communication were widely judged to have undermined trust, compliance, and the effectiveness of the regulatory regime: Alexandra Grey, 'Australia's multilingual communities are missing out on vital coronavirus information', *ABC News* (online, 29 June 2020) <<https://www.abc.net.au/news/2020-06-29/coronavirus-multilingual-australia-missing-out-covid-19-info/12403510>>.

⁹ See Robert French AC, 'Law – Complexity and Moral Clarity' (Speech presented at the North West Law Association and Murray Mallee Community Legal Service, Mildura, 19 May 2013) <<https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf>>.

language of clients. ‘Two-way learning’ approaches are also valuable, as they allow service providers to become familiarised with cultural perspectives, communities’ legal literacy needs and conceptions of the law. The Justice Project highlighted relevant examples of two-way learning such as the North Australia Aboriginal Justice Agency’s CLE programs for remote communities which incorporated principles of adult learning, traditional Aboriginal and Torres Strait Islander learning styles, bilingual education and intercultural communication. A key finding was that ‘how’ the project was delivered was as important as ‘what’ was being developed.¹⁰

Observations and recommendations relating to Chapter 2, ‘Objects of the CATSI Act’

Special Measures

8. Despite the views mentioned in paragraph 6 above, the Law Council suggests that the Final Report could improve upon the Draft Report by engaging more substantially with the concept of a special measure.¹¹
9. In this regard, the Final Report could be more detailed in how those provisions of the CATSI Act that deviate from the *Corporations Act 2001* (Cth) are compatible with the current state of both international and domestic human rights law and practice relating to the concept of a special measure,¹² and what further issues exist that still need to be legitimately remedied through this mechanism.
10. In the Law Council’s opinion, the legislation as a standalone mechanism for participation in legal, political and commercial endeavours of First Nations people, remains as valid an exercise of the special measures exemption from the *Racial Discrimination Act 1975* (Cth) as it was when first enacted as the *Aboriginal Councils and Associations Act 1976* (Cth).
11. The capacity to create and maintain corporate entities exclusive to First Nations people under various subcategories now has an integral role in holding or managing native title rights, operating Indigenous entities capable of economic empowerment activities

¹⁰ Law Council of Australia, ‘People – Building Legal Capability and Awareness’, *Justice Project* (Final Report, August 2018) 21-23.

¹¹ Cf National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) 19, [2.39].

¹² See Law Council of Australia, Submission to Australian Human Rights Commission, *Response to Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 15-16 <<https://www.lawcouncil.asn.au/publicassets/ed1dce97-9048-ea11-9403-005056be13b5/3725%20-%20Priorities%20for%20federal%20discrimination%20law%20reform.pdf>> for further information on the status of domestic and international law and practice relating to special measures.

There is also substantial background available on the level of detail that should be provided. In 2019, in the context of proposed amendments to the CATSI Act, the Law Council raised its concerns that lawmakers had not provided adequate explanation or justification as to why the proposed provisions, while discriminatory, were exempt as special measures: Law Council of Australia, Submission No 8 to the Senate Finance and Public Administration Committee, *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* (25 January 2019) 2. The Parliamentary Joint Committee on Human Rights has previously criticised circumstances where ‘there was little detailed analysis of the applicable criteria for a measure to qualify as a ‘special measure’, and of whether some or all of these measures satisfied the criteria’: Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (Eleventh Report of 2013, June 2013) 25 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2013/2013/112013/index>. It has previously referred to the Indigenous Education (Targeted Assistance) Amendment Bill 2013 as ‘an example of a measure appropriately characterised as a ‘special measure’’: Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (Eleventh Report of 2013, June 2013) 28 fn 60. Its report in relation to this legislation may provide further guidance as to how the CATSI Act might be analysed in this regard: see Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 18-21 March 2013* (Sixth Report of 2013, May 2013) 111-113.

through access to the Indigenous Procurement Policy, and facilitating and operating expressions of First Nations self-determination. It is also noted that the recently refreshed National Agreement on Closing the Gap speaks of community-controlled sector service delivery.¹³ The majority of those community-controlled organisations will be CATSI Act corporations.

12. The original intent of the *Aboriginal Councils and Associations Act 1976* (Cth) was also to cater for the need for corporate structures and operating environments that were uncomplicated and relatively easily managed. On the advice of its Indigenous Legal Issues Committee, the Law Council notes that this reflected a recognition that First Nations people have been historically denied access to education. While there has been some improvement in some sectors and locations, it is the position of the Law Council that there is still a need for special provision of an easy operating environment. This issue remains to be legitimately remedied through special measures provisions, and there are likely other areas where special measures provisions can be improved or updated.

13. As the Parliamentary Joint Committee on Human Rights often observes, the United Nations Committee on the Elimination of Racial Discrimination provides important guidance for States parties in relation to special measures, including the following:

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary ... [and]

Appraisals of the need for special measures should be carried out ... [and]

*States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.*¹⁴

14. In some instances, the Draft Report picks up aspects of current law and practice, but does not make clear it is doing so. For example, it is proposed at paragraph 2.40 that the CATSI Act 'should be subject to periodic review to monitor progress', and that ideally this would occur through the introduction of a legislative mechanism for review at appropriate intervals.¹⁵ This proposal is consistent with the legal requirement, noted earlier in the Draft Report but not repeated in this paragraph,¹⁶ that special measures must not remain in place once their objectives have been achieved.¹⁷ It is an attempt to implement in practice this important legal requirement deemed necessary to prevent breaches of the *Racial Discrimination Act 1975* (Cth) and the *International Convention on the Elimination of Racial Discrimination (ICERD)*, and this should be made explicit.

15. There is divergence between international and domestic authoritative interpretations as to the content of art 4(1) of the ICERD, with the High Court finding that, while it might

¹³ *National Agreement on Closing the Gap* (July 2020) 3

<<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>.

¹⁴ Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (Eleventh Report of 2013, June 2013) 22-23, quoting UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 32* (2009) [16]-[18].

¹⁵ National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) 19, [2.40].

¹⁶ *Ibid* 7, [1.16].

¹⁷ *Racial Discrimination Act 1975* (Cth) s 8(1); *International Convention on the Elimination of All Forms of Racial Discrimination* art 4(1); *Gerhardy v Brown* (1985) 159 CLR 30; *Maloney v The Queen* (2013) 252 CLR 168.

be desirable, it is not mandatory for governments to undertake monitoring and consultation of measures deemed special measures.¹⁸

16. However, the Law Council suggests that it makes sense to legislatively mandate such practices. Monitoring and consultation will need to be undertaken in practice in order to ascertain whether the objectives of the special measure have been achieved and therefore ensure compliance with the legal requirement that the special measure does not remain in place beyond such time.¹⁹ Organisations such as the Australian Human Rights Commission and the National Congress of Australia's First Peoples have also previously supported the idea that special measures be actively monitored in Australia.²⁰ For these reasons, the Law Council strongly supports the proposal at paragraph 2.40 for a legislative mechanism for review.²¹

Other Recommendations

17. The Law Council further suggests in relation to Chapter 2 of the Draft Report that:
- subsection 246-5(1) of the CATSI Act, requiring that a majority of a corporation's directors are Aboriginal and Torres Strait Islander people, be retained;²²
 - paragraphs 658-1(1)(d), (f) and (g) of the CATSI Act be amended to require that factual and procedural advice about the registration and operation of a corporation, as well as assistance from the Registrar, be provided not only in English but also in local languages;²³ and
 - more detailed information be provided regarding participation in training, such as whether training was provided on country, how far the average participant needed to travel, and whether training is more or less accessible in certain areas compared to others.²⁴ The provision of training in remote and very remote areas, in local languages and through summarised accessible factsheets or videos, or direct face-to-face learning approaches would increase the understanding of members of their rights and obligations, as the legislative regime is lengthy and

¹⁸ *Maloney v The Queen* (2013) 252 CLR 168. See Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (Eleventh Report of 2013, June 2013) 24, which suggests that the judgments in *Maloney* 'adopt a number of conclusions which are arguably not in conformity with the current state of international law and practice relating to special measures'. See also Patrick Wall, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 1, 19, which notes that the High Court in *Maloney* rejected consultation and consent as a legal requirement of a legitimate special measure, but referenced the desirability of these principles.

¹⁹ See, eg, Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (Eleventh Report of 2013, June 2013) 22-26.

²⁰ *Ibid* 23 fn 45, 25-26. For clarity, it should be noted that these suggestions were made in the context of different legislation, and there is a distinction that can be drawn between legislation understood as granting a benefit to members of a disadvantaged group and legislation understood as limiting a right of members of a disadvantaged group (and whose categorisation as a 'special measure' is therefore more controversial). However, the Law Council is not aware of any suggestion in international or domestic law and practice that guidance that applies to the second type of legislation should not also be applied to the first type of legislation. See *ibid* 21-22, 24, 26, quoting Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4, para 21 (2010).

²¹ See Law Council of Australia, Submission to Australian Human Rights Commission, *Response to Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 15-16 for further information on the Law Council's position in relation to the interpretation of special measures in Australia.

²² See National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) 13, [2.11].

²³ *Ibid* 14, [2.16].

²⁴ *Ibid* 14, Table 2.1 and [2.45].

complex and the detail confusing to those without extensive experience in this area, even those with formal legal education. Legal assistance service providers, particularly Aboriginal-community-controlled legal services, who support members and directors, particularly in remote and very remote areas, must also be funded appropriately to compensate for the time it takes to properly engage with and deliver CLEI about the CATSI Act.

Observations and recommendations relating to Chapter 3, 'Powers and Functions of the Registrar'

18. Subject to the detail of any legislative proposal, the Law Council keenly supports expanding the regulatory powers that are open to the Registrar, to enable a more positive intervention methodology that begins with constructive intervention such as the provision of supports, such as alerts, and then warnings, and then progressing through the tiers of fines, enforceable undertakings and finally litigation, as suggested at paragraph 3.6. While the rights of members must be appropriately safeguarded, this should be achieved through other means than litigation as a first resort.
19. The Law Council supports proposals to introduce lower level powers to address situations which are less serious, noting that this would bring the powers of the Registrar more in line with those the Australian Securities and Investments Commission (ASIC) has for enforcing the *Corporations Act 2001* (Cth).²⁵
20. The Law Council supports lower level powers being discretionary and allowing the Registrar to contact and support a corporation before any penalty is applied, as even fines and enforceable undertakings can be 'blunt instruments' and can disproportionately affect small-to-medium corporations.²⁶ In its 2018 submission on proposed amendments to the CATSI Act, the Law Council recommended that the size and financial capability of the corporation be included as factors that the Registrar must have regard to in imposing a penalty – keeping in mind that such power should only be used where absolutely necessary.²⁷
21. Wherever possible, the Registrar should take a 'knock before you enter' approach in relation to contact, requests for information and the provision of support and training that respects the principle of self-determination.
22. If the Registrar is given broader powers including to issue fines, then it should also develop and publish broader guidelines setting out the criteria upon which a decision to pursue a financial penalty would be made. This would provide certainty and transparency to the scheme and prevent corporations incurring significant costs associated with determining what obligations exist. As the Law Council recommended in 2018, clear and well communicated policy needs to be developed around the circumstances in which discretionary powers will and will not be exercised.²⁸ This is especially important if there is concern that the Registrar will not have the capacity to undertake regulatory functions in relation to lower level breaches in a uniform manner across the whole sector – the manner in which breaches are detected and penalised must be transparent to ensure community confidence in the new powers.²⁹
23. The Law Council is supportive of alternative dispute resolution mechanisms, as discussed in paragraph 3.8. First Nations directors, members, organisations and

²⁵ See, eg, Law Council of Australia, Submission to the Office of the Registrar of Indigenous Corporations, *Discussion Paper on Proposed Amendments to the CATSI Act* (17 September 2018) 4.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

communities should lead the development of such mechanisms, so that these are appropriately suited to their needs.

Observations and recommendations relating to Chapter 4, 'Governance'

24. Writing in the Australian Journal of Corporate Law, Marina Nehme has noted the irony in asking Aboriginal communities to accept non-Aboriginal corporate structures in order to have greater control over their own affairs, concluding in relation to this tension:³⁰

*It seems to be common ground that any legislation providing specifically for the incorporation of Indigenous organisations must necessarily be a compromise of some kind between Western and Indigenous concepts. Such legislation has to be flexible enough to permit Indigenous Australians to run their organisations according to Indigenous cultural practices and traditions, while providing the necessary checks and balances to hold those organisations accountable for their conduct. One way to achieve this is by allowing Indigenous corporations to adopt their own internal governance rules ... These rules may for example impose practices in Indigenous communities which may be inconsistent with Indigenous cultural practices and traditions. Consequently, it is important to allow Indigenous corporations to adopt internal governance rules that are tailored to their situation as this would permit such corporations to operate within a Western legal framework, while allowing for practices within the organisation to reflect Indigenous culture. It is, therefore, crucial that legislation allowing for the incorporation of Indigenous organisations does not go too far in embedding Western concepts into the internal management of Indigenous corporations at the expense of Indigenous values and traditions. ... Further, the embedding of Western concepts within the internal management of Indigenous corporations may be contrary to the Declaration on the Rights of Indigenous Peoples, which supports the rights of Indigenous peoples to take control of their economic future through managing their own businesses based on their culture and traditions.*³¹

25. The Law Council understands from its Indigenous Legal Issues Committee that this precise dilemma is likely to be a source of many of the complaints the Office of the Registrar of Indigenous Corporations (**ORIC**) may receive regarding breach of the CATSI Act. More precisely, the related party benefit rules, while necessary to the operation of any corporate entity, isolate the issue of kinship obligation within First Nations communities. The observation can be made that for many First Nations people, the kinship obligations operate at a significantly higher and more important level than the statutory rules under the CATSI Act.

³⁰ Marina Nehme, 'A Comparison of the Internal Governance Rules of Indigenous Corporations: Before and After the Introduction of the Corporations (Aboriginal and Torres Strait Islander) Act 2006' (2014) 29 *Australian Journal of Corporate Law* 71, 72-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024549>.

³¹ Ibid 73-4, citing *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex, art 20 (**UNDRIP**). In relation to the status of UNDRIP, see also Law Council of Australia, Submission to Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) <<https://www.lawcouncil.asn.au/publicassets/01171551-eb0b-ea11-9400-005056be13b5/3712%20-%20Free%20and%20equal%20An%20Australian%20conversation%20on%20human%20rights.pdf>>; Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) <<https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>>.

26. Further, to the extent that CATSI Act entities are intended to be able to reflect traditional decision making structures, as many groups prefer in relation to native title corporations or in self-governance bodies, the move towards greater consistency with the *Corporations Act 2001* (Cth) is not likely to be consistent with that outcome. This dilemma begs the question as to whether in order to truly meet the special measure characteristics, further work needs to be done on accommodating the specifically Indigenous needs for hybrids of the type referred to by Marina Nehme above.

Contact Details

27. Overly prescriptive obligations relating to contacting members are likely to cause real problems for corporations that are not well-resourced or that have large numbers of members based in remote or very remote areas. The Law Council recommends close consultation before increasing obligations in the way contemplated at paragraphs 4.5-4.7, with special effort taken to ensure that representatives from remote and small corporations are heard. Consideration should also be given to whether small corporations will have the resources for the collection and utilisation of data of an increasingly personal or sensitive nature, noting the increased security and privacy demands and liabilities that come with this.

28. In many instances, allowing contact via means other than post (eg phone, email, social media) may be welcome, such as for members who are often away from their primary residence (eg travelling for work, health care or other reasons). However, in other instances, an increasing expectation toward swift connection and communication could be a disadvantage to the maintenance of membership. For example, the Law Council heard during consultations for its Justice Project, the challenges in remote areas from both slow, infrequent or non-existent mail delivery and unreliable or non-existent internet and phone reception.³² Accordingly, in many contexts, allowing for both paper and electronic methods of contact might be the fairest solution, but this should be at the discretion of corporations given the increased resourcing demands engaged and their knowledge of particular circumstances.

Meetings, financial reporting and audit requirements

29. The Law Council supports amendments to the CATSI Act which would provide the Registrar with power to allow the full range of flexible options for conducting meetings, cancellation of meetings, delay of annual general meetings, conduct of meetings virtually using technology, extending the date for lodgement of financial reports and waiving the requirement for audit reports, taking into account the cultural and financial circumstances of a particular corporation which have been referred to in the Draft Review report at paragraphs 4.39-4.41, 4.43, 4.46 and 4.58.

Corporations that are also registered charities

30. A number of provisions of the *Corporations Act 2001* (Cth) have been effectively 'switched off' for registered charities by operation of section 111L of the *Corporations Act 2001* (Cth). This facilitates the flexible regulation of charities that are companies limited by guarantee through conduct standards rather than inflexible procedural requirements.

31. This same streamlining has not been achieved for charities regulated under the CATSI Act.

32. In its Technical Review of the CATSI Act in 2017, DLA Piper rejected the idea of creating a similar streamlined approach to governance for CATSI Act Corporations. The Law

³² See, eg, Law Council of Australia, 'Aboriginal and Torres Strait Islander Peoples', *Justice Project* (Final Report, August 2018) 42 <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

Council believes further consideration should be given to this with the focus being whether maintaining a less flexible set of requirements for CATSI Act corporations that are registered as charities, than those imposed on companies limited by guarantee that are registered as charities, is justified. Flexible governance to facilitate Indigenous cultural practices and traditions is clearly desirable for CATSI Act corporations. The Australian Charities and Not-for-profits Commission (**ACNC**) system of regulation has much to offer here as an alternative to prescriptive rules with a system for permitted exemptions.

Other observations

33. The Law Council supports the proposal in paragraph 4.53 that all replaceable rules be included in rule books, and the proposal in paragraph 4.54 that the Registrar be allowed to reject changes to a rule book that are inconsistent with those made by a special administrator, on the basis that these changes would reduce confusion.³³

Observations and recommendations relating to Chapter 5, 'Officers of Corporations'

34. The Law Council supports greater transparency in relation to the remuneration paid to senior executives, and supports the specific proposal at paragraph 5.13 that the Registrar publish de-identified information by salary bands – or other proposals that similarly balance transparency considerations with privacy concerns. The Law Council supports requirements that directors' remuneration and sitting fees be determined by members and reported in the annual financial reports lodged with the Registrar for publication, as provided at paragraphs 5.14-5.16 of the Draft Report. For these same reasons of transparency and accountability, the Law Council supports the names and qualifications of key management personnel being included in annual reports as proposed at paragraph 5.19.
35. The Law Council supports reducing the burden around related party provisions for CATSI Act corporations, and supports the proposal at paragraph 5.33 of the Draft Report, because it strikes a balance between the stringent provisions contained in Chapter 2E of the *Corporations Act 2001* (Cth) and the need for transparency and reporting of related party transactions.
36. The Law Council also supports the proposed threshold of \$5,000 as a trigger for the related party transaction provisions in the CATSI Act for small corporates outlined in paragraph 5.35 of the Draft Report.
37. In relation to a defence for directors or officers who are complying with traditional laws or customs, suggested at paragraph 5.45 of the Draft Report, the Law Council submits on the advice of its Indigenous Legal Issues Committee that this would need some parameters. For example, there might be a requirement that Directors must have acknowledged the existence of the relevant traditional law or custom at or before the time of the act or resolution, and perhaps an obligation to report on the application of traditional laws or customs in conflict with the CATSI Act requirements in the annual report.

Observations and recommendations relating to Chapter 6, 'Modernising the CATSI Act'

38. As mentioned under the observations relating to Chapter 1 above, the Law Council supports making the legislative regime simpler and more user-friendly being a priority and a specific aim of the Review. It is disappointed that no mention of simplifying the

³³ See National Indigenous Australians Agency, *CATSI Act Review* (Draft Report, 31 July 2020) 36.

CATSI Act is made in Chapter 6, given its length and complexity and the current focus of government on reducing red tape – a focus the Law Council strongly supports.

39. The Law Council generally supports reforms directed toward harnessing modern electronic technology, provided appropriate security and privacy protocols are in place and such reforms are developed and evaluated carefully for accessibility. For the reasons mooted above at paragraphs 26 to 27 of this submission regarding resourcing, infrastructure and remoteness, it submits that:

- the proposal at paragraph 6.4 should be to allow the Registrar to publish notices on electronic platforms **in addition to** – not ‘rather than’ – in the gazette or newspapers;
- the same mix of paper and electronic platforms be incorporated into the proposal at paragraph 6.5;
- the modern information storage proposed at paragraph 6.6 be at the discretion of corporations, determined by general resolution; and
- any changes to requirements around the collection of contact details be developed through close consultation particularly with remote and small corporations, as discussed above at paragraph 26 of this submission.

40. The Law Council generally supports the other proposals contained in Chapter 6. However, in relation to taking ‘reasonable steps’ to try to avoid the situation of providing false or misleading information, which would otherwise be an offence under subsection 561-1(4), the definition of ‘reasonable steps’ needs to suit a First Nations context and should be ‘reasonable steps’ taking into account the circumstances of the corporation and the directors.

Observations and recommendations relating to Chapter 7, ‘Registered Native Title Bodies Corporate’

41. As noted in its submissions to the Senate Legal and Constitutional Affairs Legislation Committee on the Native Title Legislation Amendment Bill 2019,³⁴ the Law Council recognises and supports the need for greater scrutiny and accountability in relation to native title agreement-making, including that this extend to recording and reporting on receipt and expenditure of native title monies.³⁵

42. The Law Council considers that the considerations at paragraph 7.12 of the Draft Report are of great importance. Increased legislative support for economic development through leveraging native title rights and interests should be a priority. This goes well beyond issues of charities in paragraph 7.13, although those issues must also find resolution. The need for specific corporate structures for native title benefits management have not been overtaken by reforms to charitable status and more legislative support in this area is required. In particular, uncertainty remains about the precise scope of activities that a charity may pursue in furtherance of a charitable purpose focussed on economic development for a First Nations community. Further, the *Charities Act 2013* (Cth) reforms regarding whether related Indigenous individuals form

³⁴ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Legislation Amendment Bill 2019* (5 December 2019) <<https://www.lawcouncil.asn.au/publicassets/2c7e19d4-5137-ea11-9403-005056be13b5/3721%20-%20Native%20Title%20Legislation%20Amendment%20Bill%202019.pdf>>; Law Council of Australia, Supplementary Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Legislation Amendment Bill 2019* (11 June 2020) <https://www.lawcouncil.asn.au/publicassets/2d44a9d9-4cb4-ea11-9434-005056be13b5/3827%20-%20SS_Native%20Title%20Questions%20on%20Notice.pdf>.

³⁵ See, eg, Law Council of Australia, Supplementary Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Legislation Amendment Bill 2019* (11 June 2020) 2-3.

a sufficient section of the community apply only at the federal level and not for the state law that regulates the existence of charitable trusts.

43. A legislative resolution of these issues is required. In the context of First Nations benefits management structures, consideration of this resolution should go beyond charity law to the social enterprise nature of such structures, which frequently use multiple entities to achieve a social enterprise approach, but with attendant complexity. Further, to the fact that there may be benefit in permitting a move away from the language of ‘charity’, with its connotations of almsgiving, to ‘development’.

Observations and recommendations relating to Chapter 8, ‘Special Account: Unclaimed Money Account and Protection of Assets’

44. The Law Council supports the proposal at paragraph 8.10, but would like to see discretion given to the Registrar, before engaging an asset manager to manage the property, to support First Nations traditional owners and communities to reconnect and care for the property. This would appropriately balance between asset protection and self-determination.

Observations and recommendations relating to Chapter 9, ‘Special Administration, Insolvency and Winding Up of CATSI Corporations’

45. The Law Council has previously expressed important reservations as to further expanding the appointment of special administration under the CATSI Act, given the grounds for appointment under this legislation are already significantly broader than those for receivership or voluntary administration under the *Corporations Act 2001* (Cth).³⁶ While it notes and generally supports the policy justification behind the more proactive approach under the CATSI Act, as articulated in publications of the Registrar,³⁷ it submits that the proposed new ground for appointment in paragraph 9.14 relating to ‘an irregularity in the management of a corporation’s affairs’ is expressed too broadly and should be revisited to address this important issue.

Contact

46. Please contact Ms Alex Kershaw, Policy Lawyer, on 02 6246 3708 or at alex.kershaw@lawcouncil.asn.au in the first instance for further information or clarification.

Yours sincerely



Pauline Wright
President

³⁶ See, eg, Law Council of Australia, Submission to the Office of the Registrar of Indigenous Corporations, *Discussion Paper on Proposed Amendments to the CATSI Act* (17 September 2018) 1-3.

³⁷ See, eg, Office of the Registrar of Indigenous Corporations, ‘Special Administrations’ (Policy Statement 20, 21 February 2017) [2.1]-[2.3].