



TECHNICAL REVIEW OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006

DISCUSSION PAPER: QUESTIONS AND THEMES

1 INTRODUCTION

- 1.1 On 5 July 2017 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs and Anthony Beven, Registrar of Indigenous Corporations announced a technical review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**).
- 1.2 The purpose of the review is to consider technical amendments to strengthen and improve the CATSI Act and align it with recent changes in corporate law and regulation, particularly in the Corporations Act 2001 (Cth) (**Corporations Act**). The review will consider the following matters:
1. *Whether any part of parts of the CATSI Act could be amended to create a more efficient and effective regime of registration, regulation, enforcement, support and administration.*
 2. *The appropriateness of the current size classification of corporations (small, medium and large) and the meeting and reporting requirements for Aboriginal and Torres Strait Islander corporations, and whether these can be simplified and streamlined.*
 3. *The desirability and appropriateness of increased alignment of any provisions of the CATSI Act with provisions of the Corporations Act, including whether the current applied provisions are still effective.*
 4. *Any new or altered powers or functions for the Registrar to strengthen the administration of the CATSI Act and the provision of increased support and assistance to Aboriginal and Torres Strait Islander corporations, including, but not limited to, a greater role in the resolution and mediation of disputes.*
 5. *Amendments that would provide greater flexibility in the design of corporate structures for Aboriginal and Torres Strait Islander corporations, particularly to promote increased economic activity.*
 6. *Amendments to improve consistency and interaction with native title legislation.*
 7. *The appropriateness of existing penalties in the CATSI Act.*
- 1.3 This Discussion Paper sets out various themes and questions for consideration as part of the review.

2 ESTABLISHMENT OF CATSI CORPORATIONS

Classification of CATSI Corporations

- 2.1 Corporations incorporated under the CATSI Act (**CATSI Corporations**) are classified as small, medium and large. The classification dictates the corporation's reporting requirements.
- 2.1.1 Can these classifications be simplified and streamlined? Is 3 too many classifications i.e. should there be only 2 types e.g. small and large?
- 2.1.2 Should small corporations be given a less onerous compliance regime within the CATSI Act?
- 2.1.3 Alternatively, should the Registrar of Indigenous Corporations (**the Registrar**) have greater powers to exempt small corporations from compliance with CATSI Act?
- 2.1.4 In what circumstances should certain corporations be exempted from compliance with the CATSI Act based on their size?
- 2.1.5 Should it continue to be mandatory for all corporations to have a rule book?
- 2.1.6 Are the replaceable rules still a relevant and applicable framework for the rules of a corporation established under the CATSI Act?

Prohibited names under the CATSI Act

- 2.2 To what extent should an entity that is not established under CATSI Act be prohibited from using words required by the CATSI Act to be a part of the name of the corporation such as Aboriginal Corporation, Torres Strait Islander Corporation, Indigenous Corporation or Aboriginal and Torres Strait Islander Corporation?

Corporate structures

- 2.3 CATSI Corporations must have a majority of their directors as members. This limits the ability of CATSI Corporations to create wholly-owned CATSI Corporations as subsidiaries. However, they can create Corporations Act companies as subsidiaries.
- 2.3.1 Should the CATSI Act be amended so that CATSI Corporations can incorporate wholly-owned CATSI Corporations as subsidiaries or so that several CATSI Corporations can incorporate a company to be jointly owned by them e.g. a joint venture?
- 2.3.2 Should provisions such as section 187 of the Corporations Act relating to directors' obligations extending to parent companies (reflected in section 265-35 of the CATSI Act) be adapted for the corporate structure of CATSI Corporations?
- 2.4 Are there any other changes to the CATSI Act that would provide greater flexibility in the design of corporate structures for CATSI Corporations, which would to promote increased economic activity?

3 DIRECTORS OF CATSI CORPORATIONS

Independent directors

3.1 In many corporations, independent directors are appointed to enhance the range of skills, experience and competencies represented at board level.

3.1.1 While CATSI corporations can appoint independent directors if their rule books permit this, should the default be that CATSI corporations may appoint independent directors, unless not appointed?

Related Parties

3.2 The current provisions on dealings with related parties in the CATSI Act are modelled on those applying to public companies under the Corporations Act. These provisions may be unsuitable for CATSI Corporations where there are extensive family relationships and may be poorly understood by some directors.

3.2.1 To what extent should these provisions be modified/removed from applying to CATSI Corporations e.g. small corporations?

3.2.2 Would this have an adverse effect on the requirements for disclosure of interests and voting restrictions of directors? Could this be addressed by regular reporting of related party transactions to members?

4 MANAGEMENT OF CATSI CORPORATIONS

Remuneration and accountability of CEOs and senior management

4.1 The role of the CEOs and senior management is central to any corporation. Recently, there has been increased emphasis on the accountability of CEOs and senior management. Given this increased emphasis, questions arise as to what emphasis should be place on their accountability, and to what extent, in large or medium sized corporations:

4.1.1 Should CEOs and senior executives be required to be registered with the Registrar, similar to the proposed Banking Executive Accountability Regime (BEAR) for banking executives?

4.1.2 Should the Registrar have the power to deregister and disqualify CEOs and senior executives who fail to meet expectations?

4.1.3 Should remuneration of CEOs and senior executives be required to be disclosed to the Registrar and the Registrar have the power to set maximum limits on remuneration for specific types of CATSI corporations or generally?

4.1.4 Should the Registrar have the power to impose civil penalties for corporations/their directors who fail to properly monitor CEOs and senior executives?

4.1.5 Should CEOs and senior executives have statutory duties of care and diligence and are any other express statutory duties required?

4.1.6 Should such disclosure requirements be limited to large or potentially medium-sized corporations?

- 4.1.7 Should members of CATSI corporations have the same powers relating to approval of remuneration reporting as is available to shareholders in listed companies under the Corporations Act?¹

5 MEETINGS OF CATSI CORPORATIONS

General meetings

- 5.1 Many small and medium size corporations, whether under the Corporations Act or the CATSI Act, struggle with coordination and compliance for the timing and management of AGMs. A small but significant percentage of CATSI Corporations seek approval for holding delayed AGMs.
- 5.1.1 To what extent should small corporations be exempt from having an AGM? Noting that 10 per cent of members can always request a general meeting.
- 5.1.2 Should members of medium and large corporations have the power to pass a resolution not to have an AGM for up to three years?
- 5.1.2.1 If this occurred, would any additional forms of reporting to members between AGMs be required?
- 5.2 If a CATSI Corporation cannot comply with the meeting requirements for general meetings or directors' meetings as a result of certain specific events or reasons, either before or after the notice of meeting has been issued, should the directors be able to re-schedule or extend the time for holding the meeting?
- 5.2.1 What are appropriate events or circumstances to obtain an extension of time? e.g. a death in the community, natural disaster, cultural activity.
- 5.3 The Registrar has the power to call, hold and chair meetings and AGMs of CATSI corporations.
- 5.3.1 Should this power be extended so that the Registrar has the power to direct a corporation to hold a general meeting or a directors' meeting if certain adverse issues are identified by the Registrar?

6 REPORTING BY CATSI CORPORATIONS

- 6.1 Under the Corporations Act it is usual for the AGM to receive the company's annual financial report, directors' report and auditors' report (if any). Public company AGMs must receive these (other than small companies) and for listed companies a remuneration report is also given.
- 6.1.1 To what extent should the AGM of certain CATSI Corporations be required to receive these reports?

¹ For example, the CATSI Act could be amended to require the remuneration report to put to members at the annual general meeting for a vote. Consistent with the requirements imposed by the Corporations Act for some corporations, this could be an advisory vote, with the same first strike and second strike requirements with the ultimate sanction being a spill of the board and fresh elections but without any related parties being able to vote.

6.1.2 If such reports are required to be given at an AGM, to what extent should the Registrar be given a power to dispense with the preparation and submission of these reports in certain circumstances?

6.1.2.1 What are the appropriate events or circumstances to obtain such dispensation?

6.2 Medium and large corporations are currently required to lodge financial reports by 31 December. Delays to lodgement can arise by factors such as a death in the community, natural disaster, cultural activity or a delay in audit.

6.2.1 Are the current powers of the Registrar to extend the date for lodgement sufficient?

6.3 Auditors have qualified privilege under the Corporations Act for statements they make. This is not provided for in the CATSI Act.

6.3.1 Should qualified privilege be given to auditors under the CATSI Act?

7 OBLIGATIONS TO MEMBERS

7.1 There are various components of the CATSI Act where the details kept about members is highly relevant. For example, a membership may be cancelled if the member is uncontactable (section 150-25), notice is given as to meetings (section 201-25), circular resolutions are issued (section 204-1), and annual/financial reports are provided (section 342-5).

7.1.1 Should members be required to provide more details for the register, so that there are more alternative methods of contact, that would allow them to be contacted in timely way?

7.2 Membership may be cancelled by special resolution if the member has been uncontactable for two years and two attempts have been made to contact them, following which notice of cancellation must be sent to the member.

7.2.1 Is the time period and the number of attempts appropriate?

7.2.2 Should members be required to submit email addresses or alternative physical addresses?

7.2.3 Should the onus be on the CATSI Corporation to keep and maintain up-to-date records on all members?

8 DIRECTORS

8.1 The directors of a corporation play a vital role in its governance. Directors have general law duties and specific duties under the CATSI Act (which mirror those in the Corporations Act). The Registrar's Research Paper *Analysing Key Characteristics in Indigenous Corporate Failure* (2010) indicated that the failure of CATSI Corporations is primarily related to the poor performance of directors and staff in performing their duties.

8.2 There are a number of training courses for directors and the Registrar delivers some director training, especially regionally, so that directors can be more aware of the duties and

obligations. Further, some funding bodies require the Registrar training as a condition of funding. However, given that corporate failure is often linked to poor director performance:

- 8.2.1 Should the CATSI Act mandate that new directors have training before they become directors² or within a certain period of being in office?
- 8.2.2 Should such training be mandatory for certain types of corporations?
- 8.2.3 Are all the grounds for automatic disqualification of CATSI Corporation directors under section 279-5 of the CATSI Act appropriate to Aboriginal and Torres Strait Islander directors and officers given they are required to balance "conventional expectations of appropriate corporate governance and directors' behaviours and the very real, heartfelt obligations of clan and tribe to a fellow member of a clan or tribe in the Australian Aboriginal and Torres Strait Islander community"?³

9 SPECIAL ADMINISTRATION

- 9.1 The process associated with the appointment of a special administrator can be complex.
 - 9.1.1 What changes can be made to streamline these processes?
 - 9.1.2 Should additional grounds for special administration be included?
- 9.2 In certain circumstances to avoid there being no directors of a CATSI Corporation the existing director terms can be extended for a limited period. However, situations can arise where no valid directors exist.
 - 9.2.1 Should there be no valid directors be an express ground for appointment of a special administrator?⁴

10 VOLUNTARY ADMINISTRATION

- 10.1 The process associated with the appointment of a voluntary administrator can be complex, and in particular is complex when the corporation has acted as a trustee of a trust. The provisions of the Corporations Act are inapplicable if the corporation is a trustee.
 - 10.1.1 What changes can be made to overcome the issues in this area?

² Following suggestions in *Registrar v Monaghan (No 2)* [2016] FCA 1143.

³ See *Registrar v Kerkhoffs (No 2)* [2013] FCA 1446 at [12] and *Registrar v Kerkhoffs* [2013] FCA 1445 at [9] to [11].

⁴ See *Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2]* [2016] WASC 75 (9 March 2016) or is this an example where the power already exists in section 487-5(j)(i)?

11 WINDING UP AND DEREGISTERING CORPORATIONS

Non-alignment with insolvency regime under the Corporations Act and other matters

- 11.1 The CATSI Act is not aligned with Corporations Act on insolvency provisions where a CATSI Act corporation is or was a trustee of a trust:
- 11.1.1 For example, under the Corporations Act, section 556 requires certain debts to be paid ahead of other unsecured creditors and claims such as liquidator's costs, injury compensation, wages, leave and retrenchment payments. How might this be rectified?
 - 11.1.2 In addition, with the current state of the Corporations Act and legal decisions, an external administrator of a CATSI Corporation which is a trustee, whether that person is a voluntary administrator or a liquidator has no power to deal with/sell assets or make any distributions to any creditor without making applications to the court. How might this problem be addressed?
 - 11.1.3 The latter issue has various complicating factors where:
 - 11.1.3.1 The corporation has traded only in a trustee capacity but not in any personal capacity;
 - 11.1.3.2 The corporation has traded in both a personal and trustee capacity;
 - 11.1.3.3 The corporation has acted as trustee of more than one trust;
 - 11.1.3.4 The corporation has been acting as trustee for several trusts, some of which are solvent and some of which are not.
 - 11.1.4 Also, the employee entitlement provisions arising under sections 433 and 561 have no application in this context. This has implications for Commonwealth revenue when the employee entitlement safety net is considered.
 - 11.1.4.1 How might this be rectified?
 - 11.1.5 Further, the relevant insolvency provisions of the Corporations Act do not link into the CATSI Act.
 - 11.1.5.1 How might this be rectified?

Presumption of insolvency where records have not been kept

- 11.2 To what extent should the CATSI Act be amended so that where a corporation has not kept records, it will be presumed to be insolvent and the Registrar be entitled to place that corporation into special administration/voluntary administration/liquidation?
- 11.2.1 How can the element of insolvency be more easily proved?
 - 11.2.2 What change is needed to enable the Registrar to form that view without protracted and contested litigation?

Some current reforms under the Corporations Act

- 11.3 Should the CATSI Act be amended to adopt recent proposals for reform of Australia's insolvency laws in the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth):
- 11.3.1 e.g. a new safe harbour from civil liability for insolvent trading for directors seeking to restructure financially distressed or insolvent companies?
 - 11.3.2 e.g. restrictions on the enforcement of *ipso facto* clauses to facilitate restructurings through voluntary administrations and schemes of arrangement, as well as the conduct of receiverships?

Deregistering corporations

- 11.4 The CATSI Act provisions on deregistering companies mirror those in the Corporations Act. These provisions often are difficult to use in practice because technical compliance with the requirements for a deregistration are often hard to achieve (e.g. it requires all members to be agree and all fines and penalties to be paid). However, deregistration is less expensive and often a better approach to dealing with companies that no longer operate than a formal liquidation (winding up).
- 11.4.1 Other than for registered native title bodies corporate, should the Registrar be given an additional power to deregister companies that are no longer operating where it is just and equitable to do so (even though there is technical non-compliance with the deregistration requirements)?
 - 11.4.2 Is any clarification of the Registrar's powers with respect to deregistered CATSI Corporations or their property required?
- 11.5 In several decisions over the past 7-8 years, the Federal Court has held that recoveries of voidable transactions go to a secured creditor rather than the general body of unsecured creditors.
- 11.5.1 Is the preferred position for CATSI Corporations the “traditional” position that such recoveries go to the unsecured creditors, rather than banks or other secured creditors?

12 REGISTERED NATIVE TITLE BODIES CORPORATE

Oversight

- 12.1 Registered native title bodies corporate (**RNTBCs**) are required to perform a range of functions under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**).
- 12.1.1 Should the Registrar oversight the PBC Regulations and be given power to ensure compliance with those regulations?

Membership

- 12.2 Membership of RNTBCs is required to be open to all common law holders for which that RNTBC acts as agent or trustee. However, it is not required that all common law holders become members of the RNTBC. This can become problematic where an RNTBC is required

to perform a function in consultation with, and with the consent of, the common law holders, not just its membership.

- 12.2.1 Should RNTBCs be required to keep a register of common law holders, in addition to a register of members?
- 12.2.2 Should the Registrar have the power to amend the register of members of a RNTBC to reflect the description of native title holders in the relevant native title determination?
- 12.2.3 Should the Registrar have the power to refuse to register or amend a rule book if its terms are not consistent with a native title determination?
- 12.2.4 Should all common law holders automatically qualify as members of an RNTBC acting as trustee or agent in respect of their native title?
- 12.2.5 In what circumstances, if at all, should a common law holder cease to be a member?

Flexibility

- 12.3 Many RNTBCs are small, with no income, assets or staff. However, they must still comply with the obligations under the CATSI Act, their rule books and the PBC Regulations.
 - 12.3.1 To what extent should the Registrar have the power to dispense with any of these requirements?

Decision-making and transparency

- 12.4 The functions of RNTBCs under the PBC Regulations include:
 - 12.4.1 to hold in trust, and invest or apply in accordance with directions of the common law holders of native title, money received as compensation or otherwise related to native title; and
 - 12.4.2 to consult with, and obtain the consent of, the common law holders of native title regarding decisions relating to native title, indigenous land use agreements (ILUAs), membership and consultation processes.
- 12.5 While some of the processes are documented (for example, by registration of ILUAs, membership and consultation processes), others are not (particularly, native title decisions and directions in relation to trust money).
 - 12.5.1 Should the CATSI Act require RNTBCs to keep registers of:
 - 12.5.1.1 native title decisions; and
 - 12.5.1.2 common law holder directions as to trust moneys?
 - 12.5.2 Should the CATSI Act require such registers be available for inspection by members?
 - 12.5.3 Should the registers be available for inspection by the public?

Fees

- 12.6 RNTBCs are entitled to charge fees for performing certain functions. the Registrar's opinion may be sought in relation to whether or not those fees can be charged.
- 12.6.1 Should RNTBCs be required to publish a schedule of fees?
- 12.6.2 Should the Registrar be required to maintain a register of opinions given in relation to RNTBC fees?
- 12.6.3 Should the Registrar be given the power to set such fees?

Native title benefits and trusts

- 12.7 Native title benefits (as defined in section 59.50 of the *Income Tax Assessment Act 1997* (Cth)) are often received by RNTBCs. Where those benefits are received by RNTBCs, they are held in trust in accordance with the PBC Regulations. However, there are no express requirements for RNTBCs to separately account for those payments, other than in accordance with applicable accounting standards.
- 12.7.1 Should RNTBCs be required to keep separate financial records in relation to native title benefits for presentation to members and lodgement with the Registrar?
- 12.7.2 Should RNTBCs be required to prepare a separate financial report in relation to native title benefits for presentation to members and lodgement with the Registrar?
- 12.8 Where native title benefits are not received by RNTBCs, they are typically received into charitable or discretionary trusts that may not be connected to the RNTBC and are, in effect, overseen by State legislation and State courts.
- 12.8.1 Would it be more efficient for the Registrar have power to enforce compliance with relevant laws and obligations in relation to charitable and discretionary trusts that receive native title benefits?
- 12.9 Are there any other amendments to that CATSI Act that would improve consistency and interaction with native title legislation?

13 THE REGISTRAR AND THEIR POWERS

The Registrar and the Office of the Registrar of Indigenous Corporations

- 13.1 The legal title of Registrar and their office is currently mandated in the CATSI Act and is not always consistent with the title of the Minister and the relevant department.
- 13.1.1 Should the CATSI Act be amended so that references to the Registrar and their office are more flexible?

Power to amend the register of members

- 13.2 In practice, especially for CATSI Corporations with many individual members or membership that can change from year to year, often the register of members becomes

inaccurate over time. This can lead to disputes between members of corporations as to who are the actual/correct members.

- 13.2.1 Could such disputes be avoided, or managed more effectively, if the Registrar has a power to amend the register of members to either include or remove members if it is just and equitable to do so?

Exempting compliance with provisions in the rule book

13.3 After a rule book is written, circumstances may change or circumstances may often arise that are not envisaged at the time the rule book is approved by a CATSI corporation's members. Amendment of the rule book requires at least 21 days' notice and a special meeting.

- 13.3.1 Should the Registrar have the power, in appropriate circumstances, to exempt a corporation, its members and/or directors from complying with provisions in the rule book either in a specific instance or generally?
- 13.3.2 Should the Registrar have the power to impose conditions on such an exemption such as requiring the relevant provisions to be considered by members at the next AGM?
- 13.3.3 What publication or reporting should the Registrar make about such exemptions (e.g. class order, policy statement or specific case-by-case reporting)?

Late fees

13.4 ASIC charges late fees for non-lodgement of reports. Giving the Registrar such a power could reduce criminal prosecutions for non-lodgement of reports.

- 13.4.1 To what extent should the Registrar have the ability to impose late fees for non-lodgement of reports in a similar fashion to ASIC?

The Registrar's investigatory powers

13.5 The CATSI Act provides the Registrar with a range of powers that may be used in investigations. The Registrar is required to give 14 days' notice to people who are formally required to provide information, produce documents or appear to answer questions. ASIC can specify what it considers to be a reasonable time taking into account the documents required and the type of enquiry (which may be less than 14 days where there is a risk that evidence may be lost or destroyed).

- 13.5.1 To what extent should the Registrar have similar powers to ASIC and be able to require actions in less than 14 days?

Compliance Notices

13.6 The Registrar may issue a compliance notice to a CATSI Corporation to rectify a non-compliance with CATSI Act, rule book or other irregularity. In practice, non-compliance with such a notice has limited consequences and, if non-compliance is sufficiently serious, a Special Administration is appointed.

- 13.6.1 What additional remedies could be used to secure compliance with compliance notices and avoid the appointment of a Special Administrator?

Enforceable undertakings

- 13.7 Where a CATSI Corporation has contravened the CATSI Act, rather than undertake a prosecution, the Registrar could be given the power to accept an undertaking from the corporation and its directors about how the CATSI Corporation will rectify the breach and the future conduct of the CATSI Corporation. This may avoid costly litigation.
- 13.7.1 Should the Registrar be given the power to accept enforceable undertakings and to take action to enforce such undertakings?

14 ALTERNATIVES: THE ACNC REGIME

Amendment of the Corporations Act

- 14.1 The Corporations Act was amended so that certain provisions of it would not apply to charities registered by Australian Charities and Not-for-profits Commission (ACNC). Instead, a governance regime consisting of "governance standards" developed and overseen by the ACNC, coupled with a replacement reporting framework and other relevant provisions in the Australian Charities and Not-for-profits Commission Act 2012 (Cth), would apply.⁵ CATSI Corporations are not subject to the ACNC governance regime and remain regulated by the Registrar, which has an MOU with the ACNC to create an effective working relationship.
- 14.2 Corporations Act provisions which have been replaced by the ACNC governance regime include:
- 14.2.1 Duties of directors.
- 14.2.2 Responsibilities and directors and secretaries for certain contraventions.
- 14.2.3 Public information about directors.
- 14.2.4 Meetings of members.
- 14.2.5 Financial reports and audit.
- 14.3 CATSI Corporations are diverse and may be charities, not-for-profits or for profit corporations.
- 14.3.1 Should the Registrar be given power to create a regime similar to the ACNC governance regime for:
- 14.3.1.1 CATSI Corporations that are charities?
- 14.3.1.2 small corporations?

⁵ See http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx.

15 GENERAL ISSUES

- 15.1 Are there any other parts of the CATSI Act could be amended to create a more efficient and effective regime of registration, regulation, enforcement, support and administration?

Alignment with the Corporations Act

- 15.2 Are there any other areas where increased alignment with the Corporations Act is desirable or appropriate?
- 15.3 Are there any other areas where the current applied provisions of the Corporations Act are not effective?

Dispute resolution

- 15.4 Several of the matters raised above touch on situations where there may be disputes between members or purported members of CATSI Corporations and also the potential for disputes about directors' actions or inaction.

- 15.4.1 What other powers could the Registrar be given to help resolve disputes involving members or directors of CATSI Corporations?

End of discussion paper.