



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

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Disclaimer

This Review has been undertaken as outlined in the Introduction and Methodology for the Office of the Registrar of Indigenous Corporations, as the Agency under the Legal Services Multi-Use List Deed.

The Review has drawn on the experience and insights of stakeholders in the consultations outlined in the Methodology and in the Consultation Report in Annexure B (Consultations).

No warranty of completeness, accuracy or reliability is given in relation to the statements and representations made by any person taking part in the Consultations. We have not sought to independently verify any statement or representation made by any person to us or to our consultants.

This document is given to ORIC on 31 October 2017 and not intended to be updated by us.

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EXECUTIVE SUMMARY

This technical review of the CATSI Act has considered a wide range of issues that arose from the terms of the Review.

A number of themes emerged from the consultations with stakeholders, including the following:

- that Indigenous corporations play a unique role in Indigenous communities and in the provision of services to Indigenous peoples;
- there is no ‘single’ form of CATSI corporation, and ‘one size does not fit all’;
- smaller CATSI corporations require additional support, and it is appropriate to reduce the regulatory burden that is imposed upon small CATSI corporations;
- while CATSI corporations look to the Registrar and ORIC for assistance and support, the autonomy of CATSI corporations requires that regulation often be based upon additional disclosure; and
- the Registrar can play a greater role with respect to certain matters relating to native title regulation.

This Review

DLA Piper Australia has overall responsibility for the production of this Review. Dr Garry Hamilton of Taylor David Lawyers, a specialist in insolvency of CATSI corporations, had carriage of Chapter 5 "Insolvency and Distressed Corporations". As will be evident, the information gathered from the consultations has been taken into account in this Review and the recommendations that are set out in this Review.

DLA Piper wishes to thank the many participants in the consultations, the face-to-face meetings and those providing written submissions for their time and efforts especially given the constrained timelines for the Review. In particular, DLA Piper also thanks the Registrar and the ORIC management and staff for their assistance in logistics for the consultations and their participation in the Review.

We wish to recognise and thank Natalie Walker, Rivkah Nissim and Myles Bateman of Inside Policy Pty Ltd, Noel Niddrie of Winangali Pty Ltd, Dr Garry Hamilton of Taylor David Lawyers and our staff working on this Review: Gail Boelens, Matthew Roberts, Alastair Macphee, Alex Moores and Tara Alexander.



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1 RECOMMENDATIONS

This Review is a technical review of the CATSI Act. Accordingly, the recommendations below only relate to proposed amendments to the CATSI Act or other legislation.

Topic	Ref.	Recommendation
Classification of CATSI corporations	1	The classification of CATSI corporations be simplified by removing the assets and employees tests. It is recommended that classification be based on annual revenue in line with the classification for companies limited by guarantee and that used by the ACNC.
	2	The CATSI Act should embody a three tiered model based on revenue with small companies below \$250,000 of revenue having significantly lesser obligations. It is recommended that the threshold be aligned with requirements for companies limited by guarantee (i.e. revenue of \$250,000, below \$1m and \$1m and above), that the deductible gift recipient requirement not be replicated and the same reporting requirements apply as for companies limited by guarantee.
Rule books and replaceable rules	3	It is recommended that the replaceable rules be removed from the CATSI Act, but be replaced by one or more plain English model rule books. These model rule books would be default constitutions for a CATSI corporation. Further, it is recommended that there be at least one model rule book for RNTBCs and one for other corporations.
	4	It is recommended that the Registrar be granted the power to refuse to register a rule book if, in the Registrar's opinion, it is deemed "not fit for purpose" for the CATSI corporation. Where such a determination occurs the members must either confirm adoption of the rule book in its current state or provide a re-drafted rule book, which the Registrar must approve (subject to the other requirements for registration being satisfied).
Prohibited names	5	That, other than as expressly required by State or Territory law, the CATSI Act or the CATSI Regulations be amended to prohibit the use of the following terms in the name of an incorporated entity that is not registered under the CATSI Act as a CATSI corporation. <ol style="list-style-type: none"> 1. Aboriginal Corporation; 2. Torres Strait Islander Corporation; 3. Indigenous Corporation; 4. Aboriginal and Torres Strait Islander Corporation; or

		5. Torres Strait Islander and Aboriginal Corporation
Corporate structures	6	<p>It is recommended that in order to promote greater flexibility in the design of corporate structures for CATSI corporations, which would, in turn, promote increased economic activity, that:</p> <ol style="list-style-type: none"> 1. CATSI corporations be permitted to wholly-own other CATSI corporations as the sole corporate member, unless this is expressly prohibited by the CATSI corporation in its rule book; 2. That where a CATSI Act corporation is established with 2 members, one of which is not Aboriginal or Torres Strait Islander person, that the requirement in section 246-5(2) of the CATSI Act that a majority of directors to be Aboriginal or Torres Strait Islander persons be removed where the director that is an Aboriginal or Torres Strait Islander person has a casting (deciding) vote; and 3. an entity or group of entities be permitted to establish a CATSI corporation as a subsidiary, or joint venture entity, if that entity, or each member in the group of entities, at all times, satisfies the Indigeneity requirement in section 29-5 of the CATSI Act (and the requirements prescribed by the CATSI Regulations) when the underlying membership is assessed.
Resolution to not hold an AGM	7	<p>The CATSI Act should be amended to allow for small CATSI corporations to have the power to pass a special resolution not to have an AGM for up to three years, provided that:</p> <ol style="list-style-type: none"> 1. the directors do not vote on that resolution; and 2. the corporation is obliged to advise the Registrar if there is any material change in its circumstances.
	8	<p>The CATSI Act should be amended to give the Registrar the power to call and hold a general meeting of the corporation where the Registrar decides that it is reasonable to do.</p>
Automatic extensions of time	9	<p>It is recommended that an amendment to the CATSI Act be made to allow for an automatic once-only extension of time for a period of 30 days (or such longer period permitted by regulation) to hold a particular AGM, where a CATSI corporation:</p> <ol style="list-style-type: none"> 1. reports that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and 2. the CATSI corporation has not notified an automatic extension of time more than three years in a row.
	10	<p>It is recommended that the CATSI Act be amended to allow for an automatic extension of time for a period of 30 days (or such longer period as permitted by regulation) reporting and lodgement of</p>

		reports under Division 348 of the CATSI Act, in the case of death, natural disaster and certain cultural activities in Indigenous communities.
Reports at AGM	11	It is recommended that an equivalent to section 317(1) of the Corporations Act be included in the CATSI Act, requiring the relevant reports to be presented to an AGM, if the company is required to have one. However, an equivalent to section 317(1A) should be included but, in fact, be broader and exempt small companies from the requirement.
Auditors	12	It is recommended that: <ol style="list-style-type: none"> 1. equivalent provisions to those the Corporations Act be included in the CATSI Act so that auditors are given qualified privilege in their communication, whether written or oral, to the Registrar; and 2. a new Regulation 33(3) be included in the CATSI Act Regulations that the directors can fill a casual vacancy in the auditors of the corporation. Such an auditor will hold that position until the next AGM, where the members can confirm the appointment or appoint new auditors.
Alternative contact details	13	It is recommended that the CATSI Act is amended to oblige the corporation, where an alternative contact method has been nominated by the member, to ensure that the relevant information is recorded in a register separate to the Register of Members and stored with the corporation's other records.
Contact details and cancellation of membership	14	It is recommended that the CATSI Act is amended as follows: <ol style="list-style-type: none"> 1. section 150-25(3) of the CATSI Act be amended to oblige the corporation to attempt to contact the potentially uncontactable member by using any alternative contact details nominated by that member for the purposes of receiving a notice of meeting, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months; 2. section 150-25(3) of the CATSI Act be amended to oblige the corporation, where no alternative contact method has been nominated by the member in accordance with section 201-25(3), to attempt to contact the potentially uncontactable member by any other means that the corporation's rule book (if any) permits, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months; 3. section 150-25(3) be further amended to provide that section 150-25(3)(c) will not be satisfied unless:

		<ul style="list-style-type: none"> a. at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 1 above (but only where the member has nominated such an alternative contact method); or b. where the member has not nominated such an alternative contact method, where at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 2 above (but only where this is provided for in the corporation’s rule book); <p>4. section 150-25(3) be further amended to replace the phrase “a continuous period of 2 years prior to the meeting” in section 150-25(3)(b) with the phrase “a continuous period of 12 months prior to the meeting”;</p> <p>5. section 150-25(3) be further amended to replace the phrase “2 year period” in section 150-25(3)(c) with the phrase “12 month period”; and</p> <p>6. section 150-25(4) of the CATSI Act be amended to oblige the corporation’s directors to send a copy of the resolution:</p> <ul style="list-style-type: none"> a. to the address for the member that is entered on the Register of Members; and b. where the member has nominated a postal address, fax number or email address for the purposes of receiving a notice of meeting, to at least one of those nominated addresses or fax numbers.
<p>Privacy of members</p>	<p>15</p>	<p>It is recommended that the CATSI Act be amended so that where a company officer considers that disclosure of details on the Register of Members would compromise a person's safety the corporation is allowed to redact the relevant information. The relevant information could go beyond the affected member's address and could apply to other members' information where such disclosure could compromise affected member's or another person's safety.</p>
	<p>16</p>	<p>It is recommended that the applicant seeking such information should have a right to request the Registrar order the CATSI corporation to release the information (and the applicant be required to justify the need for the information and that no member's safety will be compromised).</p>

Registering CEOs and senior executives	17	It is recommended that CATSI corporations include their CEOs and senior executives' names, addresses, contact details and employment history over the last ten years in their annual reports.
Remuneration / benefits	18	Other than small CATSI corporations, the CATSI Act should be amended so that CATSI corporations provide their director, CEO and senior management salary and benefits packages to the Registrar. The Registrar should collect remuneration/benefits data and disseminate de-identified information about director, CEO and senior management remuneration, in such categories as the Registrar considers appropriate.
Director training	19	It is recommended that CATSI corporations not be required to mandate director training for current or incoming directors, but that all CATSI corporations be encouraged and supported to ensure that all directors have the necessary skills to manage their responsibilities.
Independent directors	20	It is recommended that the CATSI Act be amended to reverse the prohibition on the appointment of independent directors unless the rule book provides for their appointment to the default position that all CATSI corporations may appoint independent directors unless their rule book expressly provides otherwise.
Related party transactions	21	It is recommended that the provisions relating to restrictions on related party dealings be retained, but that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions, where it would be beneficial to the affected director and in no way detrimental the members of the CATSI Act corporation.
	22	It is recommended that: <ul style="list-style-type: none"> 1. a threshold for transactions that trigger the related party transactions provisions in the CATSI Act be introduced for small CATSI corporations. A de minimis exception of \$5,000 or such other amount as may be prescribed in regulations from time to time should apply. However, we further recommend that all related party benefits be described in appropriate in an annual report that is provided to members and the Registrar. 2. section 290-30 of the CATSI Act be amended to require that the resolution put to members at the meeting be "materially the same" as the resolution in the notice of meeting, and that the regulations made under the CATSI Act may prescribe how the concept of "materiality" is to be determined.
Special Administration	23	It is recommended that: <ul style="list-style-type: none"> 1. section 453-1 of the CATSI Act (examination of books) should include as a matter to be reported on whether:

	<ul style="list-style-type: none"> a. the corporation is insolvent (as statutorily defined); and b. whether the corporation has traded at a loss for at least 6 months in the last 12 months. <p>2. paragraph (a) of section 487-5 of the CATSI Act be repealed and replaced by a new paragraph to read '<i>(a) the authorised officer appointed under section 453-1 has reported to the Registrar that:</i></p> <ul style="list-style-type: none"> <i>i. the corporation is insolvent; or</i> <i>ii. the corporation has traded at a loss for at least 6 months during the period of 12 months prior to reporting to the Registrar.'</i>
24	<p>It is recommended that where all the directors request the appointment of a special administrator, the Registrar need not prepare and serve a '<i>show cause notice</i>'. It is recommended therefore that section 487-10(2) be amended to include as an additional circumstance where the '<i>show cause notice</i>' may be dispensed with, a request by all the corporation's directors for the Registrar to appoint a special administrator.</p>
25	<p>It is recommended that three additional grounds be included in section 487-5 as follows:</p> <ul style="list-style-type: none"> 1. The corporation has no directors. 2. Where in the opinion of the Registrar: <ul style="list-style-type: none"> a. there is doubt as to whether the board of directors is validly constituted; b. that doubt, when it first came to the attention of the Registrar (the date), is not resolved either within 21 days of the date, or such longer period as the Registrar may, in writing to the corporation allow; and c. the expanded paragraph (a) as suggested above. 3. Where all the directors of the corporation request in writing that the Registrar appoints a special administrator.
26	<p>It is further recommend that the following be additional grounds for appointment of a Special Administrator:</p> <ul style="list-style-type: none"> 1. breach of the Native title legislation; and 2. substantial or repeated breaches of the prohibition on related party transactions.
27	<p>It is recommended to abolish the current gazetting and advertising</p>

		requirements in subsections 493-1(4) and (5) and replace them with a requirement of notification, as soon as practicable, on the ORIC webpage, with consequential amendments to section 694-95(2)(b) (failure to gazette and publish in a newspaper being a contravention of the CATSI Act) and Division 700 (Dictionary) in respect of the definitions of ' <i>national newspaper</i> ' and ' <i>daily newspaper</i> '.
Presumptions of insolvency and winding up	28	Section 526-35(3) of CATSI Act imports, among other Parts of the Corporation Act, Part 5.7B (relating to voidable transactions), which contains a presumption of insolvency. It is recommended that the presumption of insolvency applies, for the purpose of section 526-5(i), in either of the following circumstances: <ol style="list-style-type: none"> 1. Where the authorised person reports to the Registrar under section 453-1 that either of the circumstances set out above exist; or 2. Where the special administrator forms that opinion.
	29	It is recommended that, as the presumption is rebuttable, the corporation be afforded an opportunity to rebut if possible the presumption by for example being given 14 days to produce the records.
	30	It is recommended that the six presumptions of insolvency contained in Corporations Act, section 459C be incorporated into the CATSI Act for the purpose of better defining and more easily proving insolvency.
	31	It is recommended that the Registrar or a director may apply to wind up a corporation on the grounds that it is insolvent with the requirement for obtaining the leave of the court be removed.
External Administration	32	Subject to the exceptions referred to in the next sub-paragraphs, the provisions in the CATSI Act which link into the external administration area of the Corporations Act ¹ should refer to the provisions of the Corporations Act and the Corporations Regulations as they stood immediately before the commencement of the Insolvency Law Reform Act 2016 (ILRA) i.e. on 28 February 2017. The exceptions referred to are: <ol style="list-style-type: none"> 1. The ILRA amended a technical defect in the Corporations Act with the definition of 'relation-back day' in section 9. It is recommended that the CATSI Act pick up the new definition of 'relation-back day' through section 526-40 of the CATSI Act. 2. It is recommended that section 100-5 of Division 100 of Part 4 of Schedule 2 Insolvency Practice Schedule (Corporations) of the Corporations Act (assignment of rights of action previously

¹ CATSI Act, sections 516-1, 521-1, 526-35, 526-40, 531-1 and 536-1.

		<p>available only to registered liquidators, such as voidable transactions and insolvent trading) be introduced into CATSI Act.</p> <ol style="list-style-type: none"> 3. It is recommended that the CATSI Act adopts sections 40-5 and 40-10 (but only in respect of documents required to be lodged under the Corporations Act as in force at 28 February 2017) and adopts sections 40-15, 40-20, 40-30 and 40-35 (dealing with general disciplining of insolvency practitioners by ASIC) of Division 40 of Part 2 of Schedule 2 of the Insolvency Practice Schedule (Corporations). 4. It is recommended that as the concept of official liquidator was abolished on 1 March 2017, sections 1291, 1286, 1283, 1291 should not be imported nor the definition of 'official liquidator' in section 9; in addition, the reference in section 472 to the appointment of an 'official liquidator' should be changed to refer simply to the appointment of a 'liquidator' which means a registered liquidator.
Recommendations on 'ipso facto' and 'safe harbour' provisions	33	<p>It is recommended, despite some drafting issues, to incorporate into the CATSI Act the proposals in the recently enacted <i>Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017</i> ("safe harbour" and "ipso facto" provisions).</p> <ol style="list-style-type: none"> 1. The 'safe harbour' legislation: an amendment to the CATSI Act will be required to incorporate a new section 588GA which was not in force as at 28 February 2017. This can be done by an amendment to section 531-1(3)(a). 2. The ipso facto provisions: these provisions are incorporated at the end of Corporations Act Part 5.1 (Amalgamations and Reconstructions) with the new section numbers just running on. The new sections are all incorporated in Part 5.1.
Insolvent trading corporations which are trustees	34	<p>It is recommended there be amendments to the CATSI Act relating to the winding up of an insolvent corporate trustee which has traded in its trustee capacity only and not in any personal capacity (issue one). It is recommended that the CATSI Act be amended to:</p> <ol style="list-style-type: none"> 1. Limit the operation of such amendments to a corporate trustee which traded only as trustee and not in any personal capacity. 2. Define 'property' as including a corporate trustee's right of indemnity. 3. Subject to comments below and to the extent that CATSI Act applies the provisions of Corporations Act, Parts 5.4 to 5.9, apply those provisions to the corporate trustee. 4. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to

	<p>operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person.</p> <ol style="list-style-type: none"> 5. Make any provision in a trust deed or elsewhere which has the effect of removing a corporate trustee as trustee on its winding up void, subject however to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person. 6. Provide the Courts an ability to making an order in circumstances where it appears to the Court 'appropriate or convenient' to do so. 7. Provide that any provision which attempts to limit or exclude a corporate trustee's right of indemnity is void, and that the trustee's right of indemnity is exercisable only by the corporate trustee through its liquidator and not by any creditor or beneficiary. 8. Prohibit the sale of the trustee's right of indemnity. 9. Where the assets of the corporate trustee are insufficient to cover the total costs of the winding up, extend the trustee's right of indemnity to the corporate trustee's personal assets (if any). 10. Give the liquidator a specific power to wind up the trust. 11. Give the liquidator specific power to carry on the business of the trust, but only so far as necessary for the beneficial disposal or winding up its business. 12. Provide that it is not necessary for the liquidator to apply to the Court for approval to exercise the powers referred to in paragraph 10 and 11 above. 13. Provide that the Court order or resolution whereby the liquidator is appointed (as the case may be) is taken to confer these powers on the liquidator, such that it is not necessary for the Court order or resolution to specify such powers. 14. Provide that the liquidator's costs, charges and expenses of winding up the corporate trustee have the same priority as is conferred by Corporations Act, section 556(1)(a). 15. Provide that the liquidator of a corporate trustee may apply to the Court for any matter arising in the winding up of the trust.
35	It is recommended that amendments to the CATSI Act be made relating to a trustee corporation that has traded in any other

	<p>capacity i.e. traded both in a personal capacity and as a trustee or traded as a trustee of more than one insolvent trust or traded as a trustee of multiple trading trusts, some of which were solvent and other of which were insolvent. (issue two). It is recommended that where issue one does not apply to:</p> <ol style="list-style-type: none"> 1. Apply the provisions in the following circumstances where the corporate trustee: <ol style="list-style-type: none"> a. is the trustee of more than one trust; b. traded and incurred debts in both its personal capacity and as a trustee of only one trust; c. traded and incurred debts in both its personal capacity and as a trustee of multiple trusts; d. did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of multiple trusts; e. traded in its personal capacity and also in its capacity as trustee of multiple trusts, all of those being insolvent; f. traded in its personal capacity and also in its capacity as trustee of multiple trusts, some of those being insolvent and some solvent. 2. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person. 3. Make any provision in a trust deed or elsewhere which has the effect of removing a corporate trustee as trustee on its winding up void, subject however to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person. 4. Restrict the Court's ability to making an order to circumstances where it appears to the Court 'appropriate or convenient' to do so. 5. Provide that any provision which attempts to limit or exclude a corporate trustee's right of indemnity is void, and that the trustee's right of indemnity is exercisable only by the corporate trustee through its liquidator and not by any creditor or beneficiary.
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	<ol style="list-style-type: none"> 6. Prohibit the sale of the trustee's right of indemnity. 7. Provide that the liquidator may apply to the Court for directions as to how the winding up is to be conducted. 8. Provide that on any application, the liquidator must set out as reasonably practicable (from the available books and records) the financial position of the corporate trustee in both its personal capacity and as trustee of each trust where the corporate trustee is trustee, and set out a proposal for the Court's consideration as to how the winding is proposed to be conducted. 9. Provide that such proposal is to be based on the following considerations: <ol style="list-style-type: none"> a. that the trustee company's own property and property held by it on one or more trusts each be administered separately in the winding up; b. that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and c. each of the creditors referred to in b. above be entitled to a distribution out of the funds derived from the property that they claim an interest in. 10. Provide that in any such application, the Court may direct the liquidator to implement the proposal or modify it as the Court may consider just, appropriate or convenient and direct the liquidator to implement the proposal as so modified by the Court. 11. Provide that notice of any such application be provided to that the application be formally served on: <ol style="list-style-type: none"> a. the creditors of the corporate trustee; b. the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument; c. the Registrar; and d. any other person as ordered by the Court.
36	<p>It is recommended that to deal with insolvent corporate trustees (issue 3) that the CATSI Act in respect of voluntary administration:</p>

		<ol style="list-style-type: none"> 1. Define the expression used in Part 5.3A Corporations Act, 'business, property and affairs' as including a corporate trustee's business, property and affairs both in its personal capacity and as a trustee. 2. Define 'administrator' and 'deed administrator' and 'deed' respectively as: <ol style="list-style-type: none"> a. the person appointed as such by resolution under Corporations Act section 436A; b. the administrator of a deed of company arrangement constituted under Corporations Act Part 5.3A; and c. a deed of company arrangement constituted under Corporations Act Part 5.3A. 3. Apply the provisions to all corporations to which issue one and issue two applies. 4. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person. 5. Provide that in preparing the report under Corporations Act section 439A (now Insolvency Practice Rule 75-225), the administrator shall so far as is reasonably practicable, report separately as to: <ol style="list-style-type: none"> a. the corporate trustee's business, property, affairs and financial circumstances in its personal circumstances; and b. the corporate trustee's business, property, affairs and financial circumstances in its trustee of any trust. 6. Provide that subject to the foregoing, and in addition to the powers conferred by Corporations Act Part 5.3A on an administrator, the administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the corporate trustee. 7. Provide that subject to paragraph 8 below, a deed administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the corporate trustee. 8. Provide that the power of an administrator or deed administrator to carry on the company's business applies only
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	<p>where, in the external administrator's opinion, the carrying on of the business is in the interests of the creditors of the trust.</p> <p>9. Provide that the power to carry on the business of any trust shall be exercisable by any administrator or deed administrator without any order or direction of the Court.</p> <p>10. Provide that, subject to paragraph 11 below, the power of an administrator to terminate or dispose of all or any of the company's business shall include the power to wind up any trust where the corporate trustee was trustee.</p> <p>11. Provide that the power under paragraph 10 above shall not be exercisable until the creditors have had an opportunity to consider the exercise of such power at a meeting convened under Corporations Act section 439A.</p> <p>12. Provide that where the assets of the corporate trustee are insufficient to cover the total costs of the administration of the corporate trustee, the trustee's right of indemnity shall extend to include any assets of the corporate trustee held in its personal capacity.</p> <p>13. Provide that so far as is reasonably practical, the instrument required to be prepared under section 444A(3) set out a proposal as to how a deed will operate in respect of a corporate trustee:</p> <ul style="list-style-type: none"> a. traded both in a personal capacity and as a trustee; b. that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and c. that each set of creditors relating to the activities of the corporate trustee in its personal capacity and in respect of each trust where it is the trustee be entitled to a distribution out of funds derived from the proceeds of realisation of property in which the creditors claim they have an interest in. <p>14. Provide that the administrator or deed administrator may apply to the Court for directions in respect of any particular matter relating to the administration or operation of the deed.</p> <p>15. Provide that on any such application notice is to be given to and the following persons served with the application:</p> <ul style="list-style-type: none"> a. the creditors of the corporate trustee; b. the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that
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	<p>case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument;</p> <p>c. the Registrar; and</p> <p>d. any other person as ordered by the Court.</p>
37	<p>It is recommended that amendments to address issues arising under sections 433 and 561 (issue four) be made to the CATSI Act to:</p> <ol style="list-style-type: none"> 1. Provide that the reference to 'property in section 433' shall be read as including a reference to property of a company held both in its own right and as trustee also. 2. For the avoidance of doubt, provide that the references to 'the property of the company' and 'any property' shall be read a including a reference to property held by a company both in its own right and as trustee. 3. For the avoidance of doubt, provide that the trustee's right of indemnity available to a corporate trustee is to be taken to be part of the property of that company for the purposes of sections 433 and 561. 4. Provide that where section 433 applies, section 561 shall not apply. 5. Provide that where section 433 does not apply, any secured party in relation to a circulating security interest, shall, as soon as practicable after the appointment of a liquidator, and to the extent that such assets allow, either: <ol style="list-style-type: none"> a. permit the liquidator access to the assets to permit the liquidator to sell such of those assets to enable the liquidator to pay the amounts referred to in Corporations Act section 561(a), (b) and (c); or b. pay the amounts referred to in Corporations Act section 561(a), (b) and (c). 6. Provide that where because section 433 employee entitlements have been paid and the liquidator subsequently makes recoveries under the voidable transactions provisions (Corporations Act, Part 5.7B), resulting in a '<i>surplus</i>', becoming available, then so much of that surplus as represents all or some of the amount of the employee entitlements paid, shall be reimbursed to the secured creditor.
38	<p>It is recommended that the Commonwealth discuss amendments with States and Territories to their trust legislation to deal with any potential Constitutional issue which might arise (issue five). It is</p>

		<p>recommended that such laws:</p> <ol style="list-style-type: none"> 1. Provide uniformly in the various trustee legislation of the States and Territories that the suggested provisions of the CATSI Act as set out above apply to the winding up and administration of corporations, that prior to their, winding up or entry into administration, carried on business and incurred debts in their capacity as trustee of one or more trusts. 2. Provide that, for the avoidance of doubt, the provision in paragraph 1 above operates, so far as may be necessary to confer the relevant provisions of the CATSI Act on the Commonwealth pursuant to indicia 51(xxxvii) of the Commonwealth of Australia Constitution Act.
Deregistering corporations	39	It is recommended that with the exception of the criterion relating to the corporation being a party to legal proceedings, the Registrar be given a power, at the request of the applicant, to waive one or more of the deregistration criteria.
	40	It is recommended that section 546-1 CATSI Act be amended to give the Registrar absolute discretion to relieve a voluntary deregistration applicant of strict compliance with the criteria set out in subsection 546-1(2), (other than that concerning the corporation being a party to legal proceedings).
	41	It is recommended that only a special resolution of members of the Corporation be required for a deregistration.
Miscellaneous	42	It is recommended that section 6-50 of the CATSI Act be redrafted to deal with definitional problems relating to the term "administrator".
Disclaimer of property	43	It is recommended that the CATSI Act be amended so that the Registrar is given a power to disclaim any property vested in the Registrar under section 546-20 of the CATSI Act within 120 days of the Registrar having actual knowledge that the property has so vested. The disclaimer is to be effected by notice published on the ORIC website and is to relieve the Registrar of all rights and liabilities in respect of the property whether any such liabilities are present or future, certain or contingent, ascertained or sounding only in damages.
Oversight of the PBC Regulations	44	It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that RNTBCs are fulfilling their obligations to common law holders to the same extent as members.
Register of Common Law Holders	45	It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain a 'Register of Common Law Holders', in addition to their Register of Members.

	46	It is recommended that inclusion on the Register of Common Law Holders be by application, in a manner similar to membership applications for the corporation, save that the eligibility requirements must be limited to age (15 years) and whether or not that person is a common law holder of the relevant native title.
	47	It is recommended that directors may not refuse to accept an application if the eligibility requirements are met, that the directors be required to give notice where a person is considered not to meet eligibility requirements and that consideration be given to conferring powers upon the National Native Title Tribunal in relation to the resolution of disputes regarding whether or not a person is a common law holder of the relevant native title.
	48	It is recommended that a person not be able to be removed from the Register of Common Law Holders, except where uncontactable.
	49	It is recommended that the Register of Common Law Holders should be available for inspection by the public.
	50	It is recommended that the Registrar should have the same powers in relation to the Register of Common Law Holders, as in relation to the Register of Members (and the Register of Former Members).
	51	It is recommended that native title representative bodies and native title service providers be required to provide RNTBCs with extant information prepared in connection with, or filed in, native title proceedings in order to allow RNTBCs to keep a Register of Common Law Holders, such as connection reports.
	52	It is recommended that persons on the Register of Common Law Holders maintained by a RNTBC who are not members of that RNTBC automatically qualify as observers in respect of that RNTBC.
Membership	53	It is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure both that rule books are complied with in relation to the revocation of membership of individuals.
Rule Books	54	It is recommended that the CATSI Act be amended to provide a power for the Registrar to refuse to amend an RNTBC's rule book in circumstances where the amendment would result in the RNTBC no longer meeting the requirements of regulation 4(2) of the PBC Regulations.
Native Title Decisions and Directions	55	It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain:

		<ol style="list-style-type: none"> 1. a 'Register of Native Title Decisions'; and 2. a 'Register of Trust Money Directions'.
	56	It is recommended that the CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.
	57	<p>It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:</p> <ol style="list-style-type: none"> 1. members; and 2. common law holders.
	58	It is recommended that RNTBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations in the relevant decision).
	59	It is recommended that the Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).
Fees for Native Title Services	60	It is recommended that consideration be given to amending the CATSI Act to require RNTBCs to publish a schedule of fees and charges for the matters specified in regulation 20 of the PBC Regulations, noting that the fees are likely to be variable depending on region, the nature of the relevant service and the nature of the proposed future act.
	61	It is recommended that the CATSI Act be amended to require the Registrar to maintain a register of opinions given under regulation 22 of the PBC Regulations in relation to fees charged by RNTBCs. We do not recommend that the Registrar be given the power to set such fees.
Native Title Benefits	62	It is recommended that the CATSI Act be amended to require RNTBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the <i>Income Tax Assessment Act 1997</i> (Cth)) received by the RNTBC.
	63	It is recommended that the CATSI Act be amended to require RNTBCs to include, in their consolidated financial accounts and reports, details of 'native title benefits' held by third parties (e.g. trustees) derived from native title rights and interests of which that RNTBC is trustee or acts as agent of the relevant common law holders (as applicable). This requirement should be supported by a

		requirement for third parties to provide relevant information to RNTBCs in order to prepare audited consolidated financial accounts taking into account 'native title benefits' held by third parties, in circumstances where a failure to do so will constitute a statutory offence.
Alignment with the Native Title Act	64	It is recommended that consideration be given to extending protections equivalent to those provided to RNTBCs under section 265-20 of the CATSI Act to other CATSI corporations where CATSI corporations are required to hold land on behalf of Indigenous persons under State or Territory legislation in a manner that may give rise to potential conflicts between duties under the CATSI Act and duties under State or Territory legislation.
The Registrar's Powers	65	It is recommended that the Registrar be given the power to impose an appropriate late fee in response to a breach of the CATSI Act.
	66	It is recommended that the CATSI Act is amended so that: <ol style="list-style-type: none"> 1. the Registrar has similar powers to ASIC and is able to require actions in less than 14 days where it is considered reasonable in the circumstances to do so. 2. to the extent the investigatory powers of the Registrar are not equivalent to those of ASIC under the ASIC Act, that the CATSI Act be amended to provide the Registrar with such powers.
	67	It is recommended that the Registrar is given a broader range of powers in this regard, including the power to impose a fine on the CATSI corporation and/or its directors, in circumstances where the Registrar reasonably considers that there has been a failure to comply with a compliance notice issued by the Registrar (where the Registrar does not propose to appoint a Special Administrator to the CATSI corporation).
	68	It is recommended that the Registrar be given equivalent powers to ASIC to accept enforceable undertakings from relevant persons and take action to enforce such undertakings.
FOI	69	It is recommended that: <ol style="list-style-type: none"> 1. the CATSI Act be amended so that all exempt documents under the CATSI Act are treated as exempt documents under the FOI Act. 2. if the <i>Treasury Laws Amendment (Whistleblowers) Bill 2017</i> is passed in Parliament and retains its current form relating to the protection of whistleblowers, the CATSI Act should be amended to reflect the new provisions in the Corporations Act for the protection of whistleblowers, and

		<p>3. if that Bill is not passed or does not contain the current protections, a new provision be inserted into the CATSI Act stating that the FOI Act does not apply to a document which discloses information relating to a whistleblower's identity or is likely to lead to the identification of a whistleblower.</p>
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2 INTRODUCTION

Background

- 2.1 The *Corporation (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) commenced on 1 July 2007, repealing the *Aboriginal Councils and Associations Act 1976* (Cth) (**ACA Act**). As at 30 June 2016, there were 2,781 corporations registered under the CATSI Act, with a combined income of approximately \$1.88 billion, assets under management of approximately \$2.2 billion and 11,095 employees.² One of the strategic priorities of the Office of the Registrar of Indigenous Corporations (**ORIC**) for the period 2017-2020 is to review the CATSI Act to ensure that it remains relevant and meets the needs of Aboriginal and Torres Strait Islander corporations.³
- 2.2 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 CATSI Act. The CATSI Act has not been reviewed since it came into effect.
- 2.3 The CATSI Act establishes a regime for the establishment and operation of corporations for Indigenous people and communities, with such corporations having special Indigeneity requirements. The CATSI Act is largely based upon the *Corporations Act 2001* (Cth) (**Corporations Act**) but with special features considered appropriate for such Indigenous corporations.
- 2.4 Importantly, the CATSI Act establishes the Registrar. The Registrar is an independent statutory office holder that administers the CATSI Act. The Registrar is supported by ORIC, which is established under the CATSI Act. ORIC is an agency situated within the Department of Prime Minister and Cabinet's portfolio (the **Department**).
- 2.5 The functions and aims of the Registrar are set out in sections 658-1 and 658-5 of the CATSI Act. In administering those functions and aims, the Registrar supports and regulates CATSI corporations by:
- 2.5.1 advising on how to incorporate;
 - 2.5.2 training directors, members and key staff in good governance;
 - 2.5.3 ensuring compliance with the law, and
 - 2.5.4 intervening when needed.

Review

- 2.6 This Review is subsequent to the KPMG Report which, among other things, identified an opportunity for amendments to the CATSI Act. Accordingly, the purpose of this 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 changes in the Corporations Act.

² ORIC, *Snapshot of ORIC*, p 1.

³ ORIC, *Strategic Plan 2017-2020*, p 5.

- 2.7 The Review was required to consider the following matters:
- 2.7.1 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;
 - 2.7.2 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;
 - 2.7.3 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;
 - 2.7.4 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;
 - 2.7.5 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;
 - 2.7.6 amendments to improve consistency and interaction with native title legislation; and
 - 2.7.7 the appropriateness of existing penalties in the CATSI Act.
- 2.8 The Review was required to undertake consultation with CATSI corporations and other relevant stakeholders. The Review was required to be overseen by a steering committee made up of representatives of the Department and ORIC and other relevant stakeholders. Further details about the consultations are set out in Chapter 3 of this Review.

3 METHODOLOGY

Introduction

- 3.1 A Project Plan for the Review was developed by DLA Piper Australia and approved by the Registrar. The Project Plan sets out intended methodology for the Review which was adapted to meet the constrained timelines. The methodology adopted consisted of:
- 3.1.1 a literature review;
 - 3.1.2 a review of changes to the Corporations Act and changes to the CATSI Act since the commencement of the CATSI Act;
 - 3.1.3 a review of proposed changes to the Corporations Act;
 - 3.1.4 consideration of the impact of the ACNC Act and regimes created by the ACNC on the Corporations Act and companies operating under the Corporations Act;
 - 3.1.5 preparation and dissemination of a Discussion Paper dealing with the issues the Review was to consider;
 - 3.1.6 developing a Consultation Plan and undertaking consultations with relevant stakeholders; and
 - 3.1.7 consideration of the information gathered from the consultations and preparation of this Review.

Literature review

- 3.2 DLA Piper Australia undertook a literature review to identify relevant materials (including reports, articles and cases) that would assist in the Review's consideration of the matters the Review was to consider, as set out above. The literature review appears in this Review as the "Bibliography and Case List".

Review of Corporations Act

- 3.3 The CATSI Act has been in operation for more than 10 years. Given that the potential for increased alignment with the Corporations Act is a key matter the Review was to consider, DLA Piper Australia prepared a high level overview of changes to the Corporations Act and changes to the CATSI Act since the commencement of the CATSI Act. We also surveyed the forthcoming changes to the Corporations Act. ORIC assisted by providing a list of sections of the CATSI Act where staff had identified problems regarding the operation and administration of the Act.
- 3.4 The changes that were made to the Corporations Act since the passing of the CATSI Act were considered, and whether equivalent changes to the CATSI Act had been made was also considered. Further proposed changes to the insolvency regime under the Corporations Act were also considered. During this Review, the *Treasury Laws Amendment (Whistleblowers) Bill 2017* was announced and that Bill was also considered.

Discussion Paper

- 3.5 From the materials identified in the literature review, and with input from ORIC, DLA Piper Australia developed the Discussion Paper, as set out in Annexure A to this Review. The Discussion Paper was posted on the ORIC website.⁴
- 3.6 Interested parties were invited by the website to respond to the Discussion Paper by a written submission, or to attend a public consultation on the issues raised by the Discussion Paper. Interested parties were also advised that they could apply for participation via one-on-one interviews, but that the opportunities for these interviews would be limited.
- 3.7 ORIC also contacted relevant stakeholders by email, telephone and informal networking to alert them to the Review, the Discussion Paper and the opportunities to participate.

Consultations

- 3.8 A series of consultations were planned to inform the Review. Given the time constraints, consultations were planned for Perth, Alice Springs, Cairns, Melbourne and Canberra.
- 3.9 DLA Piper Australia undertook consultation sessions in Perth in September 2017, Melbourne and Canberra in October 2017. Participants in these sessions were invited by the Registrar.
- 3.10 Consultation in Perth was undertaken as a "roundtable" meeting with participants commenting on the questions raised by the Discussion Paper and contributing other issues as they desired. Sixteen people⁵ attended the Perth consultation, representing ORIC, the Department of Prime Minister and Cabinet, and 10 stakeholder organisations. As the Perth roundtable consultation approach was successful, the same approach was adopted for the consultations in Melbourne and Canberra. Thirteen people attended the Canberra consultation representing ORIC, the Department and 6 stakeholder organisations. 8 people attended the Melbourne consultation representing ORIC, the Department and 6 stakeholder organisations.

Public consultations

- 3.11 Specialist Indigenous consultants, Inside Policy Pty Ltd and Winangali Pty Ltd, were engaged to conduct a series of public consultations with Indigenous representatives, representatives from CATSI corporations and other relevant stakeholders in Alice Springs and Cairns. Inside Policy and Winangali prepared a report (**Consultation Report**) which detailed the findings and analysis of consultations with 150 representatives from CATSI corporations who participated in 4 consultations in Alice Springs and Cairns in September 2017, as well as the additional insights provided by 11 organisations that participated in one-on-one interviews. The Consultation Report is attached as Annexure B to this Review.
- 3.12 Inside Policy worked collaboratively with DLA Piper Australia and ORIC to design and deliver a consultation approach that focussed on drawing out a diverse range of perspectives from CATSI corporations and other relevant stakeholders. The stakeholder

⁴ <http://www.oric.gov.au/sites/default/files/CATSIReviewDiscusionPaper170904.pdf>

⁵ Representatives from DLA Piper have not been included in any counting of participants.

engagement methodology was dialogic, meaning that the engagement was open, transparent and gave stakeholders the opportunity to critique and exercise creativity in their feedback. The key stakeholder groups engaged across consultations were:

- 3.12.1 small, medium and large CATSI corporations, and
 - 3.12.2 native title organisations, including PBC's that are registered under the CATSI Act.
- 3.13 The consultation mechanisms employed by Inside Policy and Winangali for this engagement involved "roundtable" meetings and one-on-one interviews.

Roundtables

- 3.14 Inside Policy and Winangali facilitated four three-hour roundtable consultations in Alice Springs and Cairns, two per day in each location.
- 3.15 The first roundtable in each location was open to all CATSI corporations to discuss general matters relevant to the review of the CATSI Act, including:
- 3.15.1 registration of corporations;
 - 3.15.2 directors and their qualifications;
 - 3.15.3 remuneration and accountability of CEOs;
 - 3.15.4 CATSI corporation meetings;
 - 3.15.5 CATSI corporation reporting;
 - 3.15.6 membership;
 - 3.15.7 external administration and deregistration, and
 - 3.15.8 powers of the Registrar.
- 3.16 The second roundtable in each location was open to CATSI corporations and other stakeholders engaged in native title operations. The Registrar facilitated these discussions as a subject matter expert, being guided by the following topics:
- 3.16.1 regulation of native title corporations;
 - 3.16.2 membership;
 - 3.16.3 decision making and accountability, and
 - 3.16.4 management of native title benefits.
- 3.17 A discussion guide was developed by Inside Policy and Winangali for each session, containing a series of audience-appropriate questions based on the Discussion Paper.
- 3.18 A total of 150 representatives of Aboriginal and Torres Strait Islander corporations and broader CATSI Act stakeholders participated in the roundtable consultations.

One-on-one Interviews

- 3.19 Representatives from key stakeholder groups in Alice Springs and Cairns who were unable to attend the roundtables were each invited to participate in a one-on-one interview. As a result, Inside Policy and Winangali conducted 11 face-to-face interviews with representatives from various CATSI corporations. The purpose of these interviews was to provide key stakeholders with the opportunity to discuss their experience of the matters for consideration in the CATSI Act review in greater detail. The interviews were conducted in a semi-structured format based on the discussion guides, focussing on themes and questions most significant to the interviewees.

4 CATSI CORPORATIONS

Introduction

- 4.1 Establishment of a CATSI corporation under the CATSI Act is the gateway to the benefits offered by incorporation under, and to the obligations imposed by, the CATSI Act. Similarly to members of corporations established under the Corporations Act, the members of a CATSI corporation have the benefit of limited (or no) personal liability⁶ for the debts of the CATSI corporation. Indigenous groups wishing to access grants of \$500,000 or more in a year from the Department generally are required to incorporate under the CATSI Act.⁷ In addition, associations and companies can transfer their registration under other Acts to the CATSI Act.⁸
- 4.2 Similarly to corporations established under the Corporations Act, CATSI corporations enjoy benefits such as:
- 4.2.1 separate personality from their members; and
 - 4.2.2 the ability to continue in existence until lawfully dissolved.
- 4.3 CATSI corporations are also subject to various obligations. The CATSI corporation must report to its members and to its regulator, the Registrar, on various matters including its financial position. Regimes for reporting to regulators exist under almost all forms of regulation in Australia. In particular, under both the Corporations Act and the ACNC Act, entities subject to those Acts must report on their finances to the relevant regulator, ASIC or the ACNC. Reporting by an entity tends to vary depending on the criteria chosen by law or the regulator. Accordingly, the extent of and requirements for reporting usually depends on how the entity is classified.

4(A) CLASSIFICATION OF CATSI CORPORATIONS

Overview of the current situation: CATSI Act

- 4.4 Under the CATSI Act, there are three categories of CATSI corporations: small, medium and large. These categories are determined by three quantitative criteria relating to income, assets, and employees. If the CATSI corporation meets two of the three criteria for each of the following categories, then it will be subject to the requirements that apply to that category:⁹

⁶ CATSI Act, Division 147.

⁷ <http://www.oric.gov.au/start-corporation/transferring-other-legislation-catsi-act>.

⁸ See generally ORIC, *Policy Statement 19: Transferring registration in and out of the CATSI Act*.

⁹ ORIC, *Corporation size and financial reporting*, p 1.

Size Category	Consolidated Gross Operating Income	Consolidated Gross Assets	Number of Employees
Small	Less than \$100,000.00	Less than \$100,000.00	Fewer than 5
Medium	Between \$100,000.00 and \$5 million	Between \$100,000.00 and \$2.5 million	Between 5 and 24
Large	More than \$5 million	More than \$2.5 million	More than 24

- 4.5 The classification of a CATSI corporation will determine the level of reporting required to the Registrar, and whether an audit is required by law.¹⁰
- 4.6 Any uncertainty in relation to the size classification can lead CATSI corporations to be unsure about their reporting requirements, and can potentially lead to breaches of the rule book and director obligations.
- 4.7 However, there is potential in the 3 category system to create confusion when applied to determining reporting requirements across jurisdictions.¹¹ As the categories are triggered by a CATSI corporation satisfying two of the three criteria, there is potential for a CATSI corporation to satisfy only one criterion, but still enliven obligations owed by CATSI corporations in larger size categories.
- 4.8 An example of the overlap between criteria and size category is where a CATSI corporation has less than \$100,000 in consolidated gross assets and fewer than 5 employees, but has a consolidated gross operating income of over \$100,000. Under the current system, this CATSI corporation would be registered as a small corporation, but due to the operating income would have the reporting requirements of medium corporation.¹² This would in turn require financial reports to be prepared and audited, rather than a general report being provided. The different types of reports and requirements are discussed in detail below.
- 4.9 Funding agreements can create another supplementary reporting regime that can overlap with the size category requirements, including where a CATSI corporation is receiving public money through one-off or recurring grants.
- 4.10 Statutory reporting requirements have previously been identified as an ongoing burden to CATSI corporations, with smaller corporations particularly affected.¹³ The size categories as currently defined mean that a small, passive land-holding body that would not be described as 'trading' is subject to the same reporting requirements as a small CATSI corporation with income and employees, and it is likely the reporting requirements would have to be understood and met by the board of directors drawn from the local community, without necessarily having obtained the appropriate training.¹⁴ Regardless of the ability of

¹⁰ We note that funding agreements may impose their own auditing and reporting requirements in addition to those required by law.

¹¹ Deloitte Report, p 11.

¹² KPMG Report, p 34.

¹³ Native Title Report 2007, p 126; KPMG Report, p 4.

¹⁴ Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*, pp 263-264.

the directors to complete the reports, they can be expensive and time consuming for CATSI corporations and feedback from stakeholders suggests it is, and disproportionately so for passive bodies.

- 4.11 While it was beneficial for the CATSI Act to provide for size classifications for CATSI corporations, the current size categories do not address the distinction between types and activities of CATSI corporations within a single category. There is arguably little public interest in a high level of reporting and disclosure for 'non-trading' or relatively passive bodies and there is limited scope for these requirements to be relaxed or waived within categories.¹⁵

Overview of the current situation: Corporations Act

- 4.12 The Review includes consideration of whether it is desirable and appropriate for the CATSI Act to be more aligned with the Corporations Act. ASIC's summary of the Corporations Act reporting framework is as follows:

Although all companies should keep financial records to ensure they understand how their operations are faring, some types of companies need to keep these records for the purposes of preparing and lodging financial reports with us.

Generally, companies must lodge reports where:

- *there are substantial sums of money involved,*
- *the general public has invested funds with the company, or*
- *the company exists for charitable purposes only and is not intended to make a profit...*¹⁶

- 4.13 We note that the determination of a corporation's reporting requirements under the Corporations Act is in fact very complex and depends on the classification of the corporation.¹⁷ There are various features that can determine classification of the corporation, including its annual revenue, whether it is a "disclosing entity", whether it is foreign owned and whether it is a public company limited by shares, a proprietary company limited by shares or a public company limited by guarantee. This complexity stems in part from the various types of corporations that can be registered under the Corporations Act and the functions that they perform, and in part from historical and practical factors.

- 4.14 Within the differing classifications of corporations for reporting obligations, corporations can be analysed by type. For example, a proprietary company limited by shares can be classified as a 'large proprietary company' or a 'small proprietary company'.¹⁸ Broadly speaking:

¹⁵ Deloitte Report, p 30.

¹⁶ <http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/lodgement-of-financial-reports/>.

¹⁷ See generally Chapter 2M of the Corporations Act.

¹⁸ ASIC, *Information Sheet 31: Lodgement of financial reports*.

- 4.14.1 large proprietary companies must prepare and lodge a financial report and a directors' report for each financial year. The accounts must be audited unless ASIC grants relief; and
- 4.14.2 some small proprietary companies may have to lodge financial reports in certain circumstances.
- 4.15 The criteria for classification into 'large' or 'small' proprietary company is set out below. If a company meets 2 or more of the relevant criteria then it falls within the classification:

Size Category	Consolidated Gross Revenue	Consolidated Gross Assets	Number of Employees
Small	Less than \$25 million	Less than \$12.5 million	Fewer than 50
Large	More than \$25 million	More than \$12.5 million	More than 50

- 4.16 This model of classification has the benefit of being relatively simple and easily identifies those companies that are 'large proprietary companies' and, accordingly, their reporting requirements. However, the above table is not sufficient for small proprietary companies and further investigation is needed to determine their level of reporting.
- 4.17 A simple classification system, but with different criteria, also applies to public companies limited by guarantee under the Corporations Act. The table below sets out the 3 forms of classification and the reporting requirements associated with each classification.

Size category	Annual revenue	Reporting obligation
Small company limited by guarantee	Annual (or consolidated) revenue of less than \$250,000 and it is not a deductible gift recipient	Unless directed by a member or ASIC, the company does not have to: <ul style="list-style-type: none"> • prepare a financial report or have it audited; • prepare a directors' report; or • notify members of annual reports.
Company limited by guarantee	Annual (or consolidated) revenue of less than \$1 million	The company: <ul style="list-style-type: none"> • must prepare a financial report; • can elect to have its financial report reviewed, rather than audited unless the company is a Commonwealth company or a subsidiary of a Commonwealth company or Commonwealth authority; • must prepare a directors' report, although with less detail than that required of other companies; and • must give annual reports to any

Size category	Annual revenue	Reporting obligation
		member who elects to receive them.
Company limited by guarantee	Annual (or consolidated) revenue of \$1 million or more	<p>The company must:</p> <ul style="list-style-type: none"> • prepare a financial report; • have the financial report audited; • prepare a directors' report, although with less detail than that required of other companies; and • give annual reports to any member who elects to receive them.

- 4.18 This model of classification has the benefit of being relatively simple and easily identifies companies and their reporting obligations.

Overview of the current situation: ACNC Act

- 4.19 In addition to the disparity between classification systems under the CATSI Act and the Corporations Act, the ACNC regime has an additional classification system. As approximately 900 CATSI corporations (approximately 30%) are also registered charities under the ACNC Act, these classifications are highly relevant to CATSI corporations. Non-compliance with the ACNC governance and reporting regime can result in loss of charitable status and various tax exemptions and concessions that apply due to the charitable registration. Under the ACNC Act, there are three categories of charitable corporation which are all revenue based:

Size Category	Annual Revenue
Small	Less than \$250,000
Medium	Between \$250,000 and \$1 million
Large	More than \$1 million

- 4.20 This system distinguishes revenue from income, revenue being the component of income created from the sale of goods or services, or any other use of capital or assets, associated with the ordinary operations of the charity only. This may include profit from the sale of goods, fees from the provision of services, and incoming grants and donations. Once the charity has assessed its revenue it can identify the appropriate reporting requirements based on the financial size categories. Reporting requirements to the ACNC for registered charities are as follows:¹⁹

¹⁹ ACNC, *Charity size and revenue*.

	Small (Annual Revenue Less than \$250,000)	Medium (Annual Revenue more than \$250,000 but less than \$1m)	Large (Annual Revenue more than \$1m)
Annual Information Statement	Yes	Yes.	Yes
Financial report	Optional	Yes	Yes
Type of financial statement	Small charities can choose to submit a financial statement. The type of financial statement can be the same as a Medium or Large charity.	<ul style="list-style-type: none"> • Special purpose financial statement (if not a “reporting entity”); or • Reduced disclosure regime general purpose financial statement; or • Full general purpose financial statement. 	<ul style="list-style-type: none"> • Special purpose financial statement (if not a “reporting entity”); or • Reduced disclosure regime general purpose financial statement; or • Full general purpose financial statement.
Review or audit	No ACNC obligation for review or audit.	The ACNC requires financial reports to be either reviewed or audited. ²⁰	The ACNC requires financial reports to be audited.

Exemptions from compliance

- 4.21 The Registrar has power to exempt a CATSI corporation from compliance with record keeping and reporting requirements (Part 7-4 CATSI Act). This includes the scenario where the CATSI corporation makes an application for exemption (section 353-3) or the Registrar so determines independently without application (section 353-10).

Discussion Paper questions

- 4.22 The Discussion Paper included the following questions regarding classification of corporations:
- 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 have greater powers to exempt small corporations from compliance with CATSI Act?*

²⁰ The charity constitution/governing document or grant funding agreements may also dictate the type of financial statement the charity must prepare and whether the financial report needs to be reviewed or audited.

2.1.4 *In what circumstances should certain corporations be exempted from compliance with the CATSI Act based on their size?*

Discussion of key issues

Classification

4.23 From the overview above, classification of CATSI corporations is a key driver of reporting obligations, and there are various models of classification that can be adopted. The Review was asked to consider whether the CATSI Act classification could be simplified, and potentially aligned with the Corporations Act.

4.24 The public and private consultations generally agreed that it was unnecessary to divide CATSI corporations into 3 categories, and particularly in a parallel system that does not synchronise with either the Corporations Act or the ACNC Act classifications. The Consultation Report indicates as follows:

Consultations in both Alice Springs and Cairns drew out broad agreement that the classification of corporations under the CATSI Act should be simplified to include only a small and large classification. Despite this consensus, and a range of classification systems being proposed, participants did not reach agreement on an appropriate method of classification.

Participants identified the risks and benefits of various methods of classifying corporations based on revenue, assets or size of membership, particularly for small corporations. One risk identified was the imposition of significant compliance requirements on a non-trading, land holding-only corporation based on its asset base, despite not generating revenue.²¹

4.25 The specific operation of many CATSI corporations as passive or non-trading bodies that hold assets on behalf of a community was a repeated theme. Many shareholders also expressed a preference for removing the asset and employee tests for simplicity and to aid understanding among members and boards of CATSI corporations. This approach would also bring CATSI corporations closer to the ACNC Act approach.

4.26 Some participants indicated that since CATSI corporations were closer in size and operation to charitable corporations, the ACNC Act classifications would be a more appropriate benchmark on which to base an amendment than the Corporations Act regime, except that a preference was expressed for the 2 tier classification as opposed to retaining a 3 tier system.

4.27 The public consultations raised several alternative classification proposals, including: raising the income test for small corporations to capture more medium corporations, creating a class of smaller corporations to recognise sole traders and single grant recipients, aggregating income and assets over multiple financial years to offset concerns about high funding revenue in a single year, and determining a fluid arrangement to take into account a change in membership numbers.²²

²¹ Consultation Report, p 199.

²² Consultation Report, p 199.

- 4.28 In the private consultations, there was a preference for simplification into 2 categories, namely 'small' and 'large', with the distinction to be based on revenue. The \$1 million threshold was considered to be potentially appropriate. The current \$100,000 limit for classification of companies as 'small' was considered to be too low.
- 4.29 Participants in both the public and the private consultations also raised the possibility of classifying CATSI corporations based on the purpose for which they were established.²³ The specifics of a purpose-based classification system were not discussed in detail. Examples of possible categories included those relating to level of activity, whereby passive landholding corporations would have the least compliance obligations, small community service providing organisations would have additional requirements, and large trading corporations with more complex operations would be subject to the highest level of reporting and scrutiny.

Compliance and exemption

- 4.30 As a general principle, regulation should be proportionate to the problem or mischief that it seeks to deter. Compliance with law is a cost that a CATSI corporation will need to bear, and the consultations produced sympathy for costs of compliance for small CATSI corporations.²⁴

Similarly, consultations on [compliance] also revealed a need for ORIC to simplify or reduce compliance provisions under the CATSI Act, particularly for small corporations and/or those that receive no government funding. Participants noted that the CATSI Act and ORIC need to move away from "...treating all corporations as if they are community controlled social enterprises whose main source of income is government funding"...

Many participants spoke about the time and financial burden involved in compliance with the CATSI Act, particularly for smaller CATSI corporations. There was mixed feedback as to how this problem might be addressed. For example, some participants advocated for greater flexibility in the CATSI Act compliance regime to reduce this burden. Other participants thought that the current compliance measures should remain in order to entrench good governance and capacity development within small and developing corporations. Annual compliance measures were also seen to be a useful "health check" for ORIC to identify and mitigate early risks to vulnerable corporations.

- 4.31 The Registrar has power to exempt a CATSI corporation from compliance with record keeping and reporting requirements.²⁵ If there is a change to the classification of CATSI corporations, this may reduce the compliance burden for some CATSI corporations, as they may fall into a category with less onerous compliance requirements.
- 4.32 However, the consultations also highlighted that many CATSI corporations are passive or non-trading bodies that hold assets on behalf of a community, and that CATSI corporations operate in a wide variety of circumstances. This diversity can lead to anomalies from a regulatory perspective. This raises whether the exemption powers of the Registrar should be broadened.

²³ Consultation Report, p 200.

²⁴ Consultation Report, pp 234-5.

²⁵ CATSI Act, Part 7-4.

Recommendations

Classification

- 4.33 Complex classification models can lead to inefficiencies and confusion. It is recommended that the classification of CATSI corporations be simplified by removing the 'assets' and 'employees' tests, and that classification be based on annual revenue in line with the classification for public companies limited by guarantee and that used by the ACNC.
- 4.34 The consultations indicated a preference for a 2 tiered model. However, both the classification of public companies limited by guarantee and by the ACNC involve a 3 tiered model based on revenue, with small companies below \$250,000 of revenue having significantly reduced obligations. It is recommended that the threshold be broadly aligned with requirements for companies limited by guarantee (i.e. revenue of \$250,000, revenue below \$1 million and revenue of \$1 million and above) and that the "Deductible Gift Recipient" requirement of companies limited by guarantee not be replicated. We further recommend that the same reporting requirements apply as for public companies limited by guarantee.
- 4.35 The Registrar has wide powers of exemption in Part 7-4 of the CATSI Act regarding record-keeping and financial reporting. The diversity and the potential for anomalies does raise the potential for wider exemption power being given to the Registrar. We consider this in other sections of the Review when dealing with specific issues.

Rule books

Overview

- 4.36 Incorporated entities are artificial legal persons and require rules about their operation and governance. These rules are supplied either by statute or via governing documents adopted by the members of the entity. A CATSI Act corporation's constitution is known as its "rule book". Similarly to the governance of a corporation under the Corporations Act, a corporation may be governed by the provisions in the CATSI Act, and
- 4.36.1 the replaceable rules set out in the CATSI Act, or
 - 4.36.2 some of the replaceable rules and the provisions in the corporation's constitution, or
 - 4.36.3 the provisions in the rule book alone.
- 4.37 There are provisions in the CATSI Act that, unless exempted by the Registrar on application submitted by the corporation, apply to all CATSI corporations and cannot be altered. They cover governance matters, such as the requirement to hold an annual general meeting each year.²⁶
- 4.38 The rule book for CATSI corporations governs how a corporation should be run, and often includes rules specific to the CATSI corporation and its circumstances. The rule book is adopted when the corporation is established. It must be followed by the

²⁶ CATSI Act, section 201-150.

corporation's directors and officeholders, as well as members (so far as the rule book provisions relate to the behaviour of members), and must be followed to hold valid meetings. Having a rule book that is carefully followed, and works well for a corporation, is essential to maintaining good governance.

- 4.39 Rules in the rule book specific to the corporation include the name of the corporation, its objectives, membership eligibility, and any rules that address corporation specific issues such as those that provide direction on native title issues, sub-committees, advisory or elders' groups, or the corporation's charitable status.²⁷
- 4.40 Some rules in the CATSI Act are 'replaceable', meaning that a CATSI corporation can either accept the rule as it stands or replace it with another rule that better suits its needs and circumstances, similarly to the replaceable rules regime under the Corporations Act. For example, section 144-5(2) of the CATSI Act relates to the way membership applications can be submitted, and states that the application must be in writing.²⁸ However, by virtue of the replaceable rules provisions in the CATSI Act, the constitution of the corporation may specify additional or alternative methods of application if that is preferable to their membership (e.g. membership may be applied for verbally and confirmed at an AGM or by email).²⁹ Any rule changes must be reflected clearly in the rule book of the CATSI corporation.
- 4.41 Some rules have components that are replaceable. Commonly, this is where there is an obligation and a prescribed mechanism for achieving it: the obligation may be a set law but the mechanism may be replaceable so that CATSI corporations can determine how best they will meet the obligation in their circumstances. A demonstration of the types of rules that are either set laws for good governance, replaceable, or able to be exempted are below:³⁰

Chapter 3—Basic features of an Aboriginal and Torres Strait Islander corporation		
Resolution of disputes	section 66-1(3A)	
Chapter 4—Members and observers		
How does a person become a member?	section 144-1	
Application to corporation	section 144-5	<i>subsection (2) can be replaced</i>
Determination of applications for membership	section 144-10	<i>subsection (7) can be replaced</i> <i>subsection (8) can be exempted</i>
Fees for membership and being an observer	section 144-15	

²⁷ ORIC, *A corporation's rule book: what you need to know*.

²⁸ CATSI Act, section 144-5(2).

²⁹ CATSI Act, section 60-1.

³⁰ ORIC, *A corporation's rule book: what you need to know*.

Obligation to contribute on winding up	section 147-1	
Corporation may impose other membership obligations	section 147-5	
Liability of corporation members	section 147-10	
Cessation of membership	section 150-1	
Resignation	section 150-10	<i>subsection (2) can be replaced</i>
Cancellation of membership—general	section 150-15	
Member not eligible for membership etc.	section 150-20	<i>this section can be replaced</i>
Member not contactable	section 150-25	<i>this section can be exempted</i>
Member is not an Aboriginal and Torres Strait Islander person	section 150-30	<i>this section can be exempted</i>
Member misbehaves	section 150-35	<i>this section can be exempted</i>
Different classes of members	section 153-1	
Observers	section 158-5	<i>subsection (2) can be replaced</i>
What protections apply to variations or cancellations of class rights?	Division 172	
Corporation or directors may allow member to inspect books	section 175-15	<i>this section can be replaced</i>
Chapter 5—Meetings		<i>this chapter can be exempted</i>
Director may call meetings	section 201-1	<i>this section can be replaced</i>
Request by members for directors to call general meetings	section 201-5	
When must directors comply with members' request?	section 201-10	
When must a requested meeting be held?	section 201-15	
Amount of notice for general meetings	section 201-20	
Notice of general meeting to members, officers and observers	section 201-5	<i>subsections (2), (5) and (6) can be replaced</i>

Auditor entitled to notice and other communications	section 201-30	
Contents of notice of general meeting	section 201-35	
Members' resolutions	section 201-40	
Notice of members' resolutions	section 201-45	
Members' statements to be distributed	section 201-50	
Purpose	section 201-55	
Time and place for general meeting	section 201-60	
Technology	section 201-65	
Quorum	section 201-70	<i>subsections (1), (2), (5) and (6) can be replaced</i>
Chairing general meetings	section 201-75	<i>this section can be replaced</i>
Auditor's right to be heard at general meetings	section 201-80	
Adjourned meetings	section 201-85	<i>subsection (2) can be replaced</i>
Who may appoint a proxy	section 201-90	<i>this section can be replaced</i>
Rights of proxies	section 201-95	
Appointing a proxy	section 201-100	
Proxy documents	section 201-105	
Body corporate representative	section 201-110	
How many votes a member has	section 201-115	<i>this section can be replaced</i>
Objections to right to vote	section 201-120	<i>this section can be replaced</i>
How voting is carried out	section 201-125	<i>this section can be replaced</i>
Matters on which a poll may be demanded	section 201-130	

When a poll is effectively demanded	section 201-135	
When and how polls must be taken	section 201-140	<i>this section can be replaced</i>
Corporation must hold first general meeting within three months of registration	section 201-145	
Corporation must hold AGM	section 201-150	
Extension of time for holding AGM	section 201-155	
Business of AGM	section 201-160	
Questions and comments by members on corporation management at AGM	section 201-165	
Questions by members of auditors at AGM	section 201-170	
Circulating resolutions	section 204-1	
Resolutions of one member corporations	section 204-5	
Constitution to provide for meetings	section 212-1	
Calling directors' meetings	section 212-5	<i>this section can be replaced</i>
Use of technology	section 212-10	
Chairing directors' meetings	section 212-15	<i>this section can be replaced</i>
Quorum at directors' meetings	section 212-20	
Passing of directors' resolutions	section 212-25	<i>this section can be replaced</i>
Circulating resolutions of corporation with more than one director	section 215-1	<i>this section can be replaced</i>
Resolutions and declarations of one director corporation	section 215-5	
Minutes	section 220-5	
Members' access to minutes	section 220-10	

Chapter 6—Officers		
Minimum number of directors	section 243-1	
Maximum number of directors	section 243-5	<i>this section can be exempted</i>
Eligibility for appointment as a director	section 246-1	
Majority of director requirements	section 246-5	
Consent to act as director	section 246-10	
Corporation may appoint a director	section 246-15	<i>this section can be replaced</i>
Directors may appoint other directors to make up a quorum	section 246-20	<i>this section can be replaced</i>
Term of appointment	section 246-25	<i>subsections (1) and (3) can be replaced</i> <i>subsection (2) can be exempted</i>
Alternate directors	section 246-30	<i>this section can be replaced</i>
How does a person cease to be a director?	section 249-1	
Director may resign	section 249-5	<i>subsection (2) can be replaced</i>
Removal by members	section 249-10	
Removal by other directors	section 249-15	
Remuneration	section 252-1	
How a secretary or contact person is appointed	section 257-20	
Terms and conditions of office for secretaries	section 257-45	<i>this section can be replaced</i>
Terms and conditions of contact person's appointment	section 257-50	<i>this section can be replaced</i>
Duties in relation to disclosure of, and voting on matters involving material personal interests	Division 268	
Powers of directors	section 274-1	<i>this section can be replaced</i>

Negotiable instruments	section 274-5	<i>this section can be replaced</i>
Delegation	section 274-10	
Right of access to corporation books	section 274-15	
Member approval needed for related party benefit	Part 6.6	<i>this Part can be exempted</i>

- 4.42 Both the CATSI Act and the CATSI corporation's, rule book are central to proceedings where the Federal Court has held that directors of CATSI corporations are in breach of their obligations.³¹ As the rule book is a primary source of good governance rules and procedures, where a director is accused of behaving in a manner contrary to the good governance of the CATSI corporation, it is likely there will be breaches of the rule book.
- 4.43 Under the current CATSI Act, CATSI corporations must register their rule books with the Registrar. There are very limited circumstances under which the Registrar may refuse to register a rule book, and the discretion to refuse may not be exercised in situations where the Registrar believes that the rule book is simply not fit for purpose due to its inappropriate complexity or poor drafting. This can result in CATSI corporations with rule books that are essentially defective or uncertain for the purpose of addressing particular governance issues (e.g. there are contradictory dispute resolution or officeholder appointment mechanisms). Nonetheless, the rule book must be registered.

Discussion Paper Questions

- 4.44 The Discussion Paper included the following questions:

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?

Discussion of key issues

Rule Books and replaceable rules

- 4.45 The consultations recognised the unique and varying requirements of Aboriginal and Torres Strait Islander communities and that their rule books need to reflect these requirements. These unique and varying requirements operate to distinguish CATSI corporations that operate in native title matters from other non-native title corporations, and also to distinguish different situations outside of native title.
- 4.46 The replaceable rules operate as a default device i.e. if the issues they deal with are not dealt with in the constitution the replaceable rules apply. They are a fixed approach to the problem of creating appropriate rules for corporations that serve Aboriginal and Torres Strait Islander individuals' and communities' interests. As they are existing rules, replaceable rules can operate as a means of reducing transaction costs.

³¹ *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346.

- 4.47 However, reliance on the replaceable rules seemed to be unheard of or, at least, extremely infrequent. This led to some participants suggesting that there be more education about the replaceable rules.³² Lack of familiarity with the replaceable rules (and their function as a "default" device) led some participants to suggest that there should be additional replaceable rules with different options available for adoption.
- 4.48 Participants in the public consultations generally considered that the rule book was fundamental to the operation of CATSI corporations, and that establishing and maintaining a rule book should be mandatory for all CATSI corporations regardless of their size category.³³ However, compliance with the rule book was identified as one of the major burdens on the directors and participants felt that various changes could be made to the current operation of the adoption of rule books to make them more relevant and effective for the individual CATSI corporations.
- 4.49 The private consultations focused on the need to make the rule book effective and appropriate for the specific circumstances of each individual CATSI corporation at the time of establishment. Currently, some rule books are overly detailed with complex language, which can lead to a disengagement by the membership, and the board, if provisions in the rule book are not correctly understood or applied. Rule books that cover material that is not relevant to certain CATSI corporations, or address matters in a way that does not practically benefit the individual circumstances of the corporation, are also problematic. Members and directors also can find it difficult to apply the rule book when there are issues or allegations of breach or if there are conflicts within the corporation.
- 4.50 In response to the issue of the registration of inadequate rule books, the consultations discussed the proposal to increase the power of the Registrar to allow the Registrar to refuse to register a rule book if it was not deemed 'fit for purpose' (in the Registrar's discretion). Participants in the private consultations emphasised the need to respect the original drafters of the rule book and accept that the rule book is the creation of the CATSI corporation, thereby reflecting an exercise of autonomy on behalf of the CATSI corporation in determining what matters and processes are important to the organisation. To address this, it was proposed that an increase in power to allow the Registrar to refuse to register a rule book should be subject to a process whereby an initial refusal by the Registrar would send the rule book back to the membership with the reasons that it had been refused, and if the members then approve the rule book after the communication from the Registrar, the rule book would have to be registered.
- 4.51 The overall position of the private consultations was that a simple rule book is preferable to enhance member understanding and engagement provided that, through the simplification process, the needs of the CATSI corporation are considered and all relevant provisions are included (which, for large and complex corporations may lead to detailed and lengthy rulebooks).
- 4.52 In the event that the CATSI corporation determines that the rule book must be a more complex document (in order to accurately reflect the will of the organisation at the time of drafting), then it is the responsibility of the CATSI corporation to ensure that members are subsequently engaged with the corporation and its rule book and all new members and directors understand their rights and obligations.

³² Consultation Report, p 217.

³³ Consultation Report, p 201.

Recommendations

Rule books and Replaceable Rules

- 4.53 The operation of the replaceable rules could reduce transaction costs in the establishment of CATSI corporations but there appeared to be a lack of familiarity and understanding about them. Further, they seem not to be used and are displaced by rule books. This is also the case for establishment of companies under the Corporations Act where the replaceable rules are almost invariably displaced by a written constitution.
- 4.54 It is recommended that the replaceable rules be removed from the CATSI Act, but be replaced by one or more plain English model rule books. These model rule books would be default constitutions for a CATSI corporation. Further, it is recommended that there be at least one model rule book for RNTBCs and one for other corporations.
- 4.55 It is recommended that the Registrar be granted the power to refuse to register a rule book if, in the Registrar's opinion, it is deemed "not fit for purpose" for the CATSI corporation. Where such a determination occurs the members must either confirm adoption of the rule book in its current state or provide a re-drafted rule book which the Registrar must approve (subject to the other requirements for registration being satisfied).

Prohibited names under the CATSI Act

Overview

- 4.56 The Corporations Act prohibits the use of various legal entity identifiers (e.g. Pty Ltd or Limited) in the name of an entity which is not of the legal type identified and formally registered in accordance with the Corporations Act. An equivalent prohibition is not contained in the CATSI Act to protect the use of Aboriginal Corporation or Indigenous Corporation as a legal entity identifier. This has the effect that corporations or incorporated associations formed under other legislation can use the words Aboriginal Corporation or Indigenous Corporation in their name without being registered under and, accordingly, not subject to the regulation requirements of the CATSI Act.

Discussion Paper questions

- 4.57 The Discussion Paper included the following question:

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?

Discussion of key issues

- 4.58 The terms Aboriginal Corporation and Indigenous Corporation are widely recognised as relating to corporations under the CATSI Act.
- 4.59 The private consultations took the view that "Aboriginal Corporation" should be a protected identifier under the CATSI Act and unable to be used by organisations that are not registered under the CATSI Act. One participant stressed the need to ensure that only the specific words "Aboriginal Corporation" or "Indigenous Corporation" were prohibited under the CATSI Act as it should be the right of Indigenous people to use words such as

'Aboriginal' or 'Indigenous' in the name of a non-CATSI corporation. Otherwise this would prevent Indigenous people wishing to express their identity from doing so.

- 4.60 However, it was recognised that the words 'Aboriginal' or 'Indigenous' alone were terms that may need to be used as identifiers for entities established under State or Territory legislation (such as incorporated associations).

Recommendation

- 4.61 That, other than as required by State or Territory law, the CATSI Act or the CATSI Regulations be amended to prohibit the use of the following terms in the name of an incorporated entity that is not registered under the CATSI Act as a CATSI corporation:
- 4.61.1 Aboriginal Corporation;
 - 4.61.2 Torres Strait Islander Corporation;
 - 4.61.3 Indigenous Corporation;
 - 4.61.4 Aboriginal and Torres Strait Islander Corporation; or
 - 4.61.5 Torres Strait Islander and Aboriginal Corporation.

Corporate structures

Overview

- 4.62 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. In a membership based entity, for a subsidiary to be wholly-owned there must be one or more corporations as the member(s) and no individuals as members. If a CATSI corporation wishes to establish a subsidiary, for example, in order to isolate operations that entail more risk than the current operations of the corporation, then it must incorporate a Corporations Act company as its subsidiary. Further, other entities such as Aboriginal Land Councils which may wish to create wholly-owned CATSI corporations as subsidiaries cannot do so due to the requirement that a majority of the CATSI corporation's directors must be members.
- 4.63 Risk in the creation and development of enterprises can be spread by the establishment of joint ventures. Nothing prohibits CATSI corporations from entering into a joint venture via contract, in a similar fashion to a partnership. Also, such CATSI corporations could establish an incorporated joint venture using a Corporations Act company owned by them as the vehicle to undertake the venture and to isolate the risks of the venture. However, such CATSI corporations *are* prohibited from establishing a CATSI Act corporation to undertake such a joint venture.
- 4.64 Where a wholly-owned subsidiary is established section 187 of the Corporations Act allows directors' of such subsidiaries to act in the interest of their parent companies. Section 265-35 of the CATSI Act would enable this in the CATSI context.

Discussion questions

- 4.65 The Discussion Paper included the following questions;

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?*³⁴

Discussion of key issues

- 4.66 The Consultation Report indicates that the proposals inherent in the Discussion Questions on subsidiaries and joint ventures were supported.
- 4.67 In the Written Submissions the proposals were also supported.³⁵ However, one submission proposed a higher underlying threshold for corporate membership should be allowed in circumstances where 75% of the underlying ownership of the corporation consists of Indigenous people. We consider that this higher bar is not justifiable given the 51% Indigeneity requirement in the CATSI Regulations.
- 4.68 An additional issue was raised as part of the consultations. CATSI Act section 29-5(b) allows a CATSI Act corporation to be established where there are 2 members one of who members is an Aboriginal or Torres Strait Islander person. However, section 246-5(2) of the CATSI Act requires that a majority of directors to be Aboriginal or Torres Strait Islander persons. One participant in the consultations lamented that where a person and their spouse or domestic partner wish to establish a CATSI corporation and be the members, currently the CATSI Act would prevent those 2 persons alone from being the only 2 directors and another Aboriginal or Torres Strait Islander person would need to be found to act as a director.

Recommendations

- 4.69 It is recommended that in order to promote greater flexibility in the design of corporate structures for CATSI corporations, which would promote increased economic activity, that:
- 4.69.1 CATSI corporations be permitted to wholly-own other CATSI corporations as the sole corporate member, unless this is expressly prohibited by the CATSI corporation in its rule book;
- 4.69.2 that where a CATSI Act corporation is established with 2 members, one of which is not Aboriginal or Torres Strait Islander person, that the requirement in section

³⁴ One submission suggested that CATSI corporations be allowed to incorporate with share capital and another that laws for a special Indigenous Development Corporation be established. These are matters outside the scope of this Review.

³⁵ One submission queried how the proposal might apply to the establishment of trusts. This issue is outside the scope of this Review but we consider that it raises an issues worthy of consideration. In particular, consideration should be given to whether names for such trusts should be restricted in the same fashion as this Review's recommendations for restriction of prohibited names. Further consideration should be given to whether a CATSI corporation should be permitted to be the trustee of a trust where the objects (beneficiaries) of the trust do not meet the Indigeneity requirements in the CATSI Regulations.

246-5(2) of the CATSI Act that a majority of directors to be Aboriginal or Torres Strait Islander persons be removed where the director that is an Aboriginal or Torres Strait Islander person has a casting (deciding) vote; and

- 4.69.3 an entity or group of entities be permitted to establish a CATSI corporation as a subsidiary or joint venture entity if that entity, or each member in the group of entities, satisfies the Indigeneity requirement in section 29-5 of the CATSI Act (and the requirements prescribed by CATSI Regulations) when the underlying membership of the entity or entities is assessed.

4(B) MEETINGS OF CATSI CORPORATIONS

Introduction

- 4.70 Meetings are an essential part of ensuring good corporate governance. Directors hold board meetings where they make decisions regarding the business of the corporation. Members attend general meetings in order to interact with the board, receive information and undertake those (limited) functions reserved to the members (eg election of directors). Annual General Meetings (AGMs) are held once a year to allow the directors to report on what has happened in the past 12 months, present the annual reports of the corporation and for members to ask questions.
- 4.71 AGMs are a long-standing fixture in the corporate landscape as they are designed to keep the board accountable to the corporation's members. Some corporations however struggle to hold their AGMs due to timing, financial, attendance and organisational issues. CATSI corporations can have sometimes have additional difficulties, especially some CATSI corporations in remote areas that have their members located over a large area.³⁶
- 4.72 Upon application by the CATSI corporation, the Registrar can give extensions and exemptions for AGMs. A small but significant number of CATSI corporations seek and receive these exemptions and extensions. Nevertheless, the Review has been requested to consider whether the CATSI Act could be amended to provide more flexibility and less red tape for the Registrar and the CATSI corporations in relation to AGMs. We note that the ACNC does not require AGMs for charities but rather requires accountability to members.³⁷
- 4.73 AGMs are a useful tool in promoting good governance but only if they are properly organised and members and directors meaningfully engage with the process. If the AGM process is to be modified or removed, it is important that alternative methods are used by the Registrar and CATSI corporations to ensure that directors and members still have the right and ability to engage with each other.

Overview: the current situation

- 4.74 The CATSI Act regime is very similar to that operating for Corporations Act corporations. The CATSI Act mandates that a CATSI corporation must hold an AGM within 5 months after the end of its financial year.³⁸ There is a penalty of 10 penalty units if the corporation fails to comply with this requirement. A CATSI corporation that has

³⁶ ORIC, *Corporation Meetings*, available at <http://www.oric.gov.au/run-corporation/corporation-meetings>.

³⁷ See ACNC Governance Standard 2. Discussed at 7.73 - 7.77 of this Review.

only one member is not required to hold an AGM.³⁹ Meetings can be held in person or using any technology that gives members a reasonable opportunity to participate.⁴⁰

- 4.75 The CATSI Act provides guidance on what will happen at an AGM. The CATSI Act stipulates that at an AGM, there may be consideration of the annual reports of the corporation, the election of directors and, where required, the appointment and remuneration of an auditor (even if these activities are not listed in the notice of the meeting).⁴¹ The chair of the AGM must allow a reasonable opportunity for the members during the meeting to ask questions about or make comments on the management of the corporation at the AGM.⁴² Further, if the auditor or the auditor's representative is at the meeting, the members must be given reasonable opportunity to question the auditor or their representative at the AGM.⁴³
- 4.76 In line with the Corporations Act's approach for small proprietary companies, the Registrar may exempt CATSI corporations from the requirement to hold an AGM.⁴⁴ CATSI corporations can also seek extensions of time for holding an AGM under section 201-155 of the CATSI Act. CATSI corporations can apply to the Registrar for an exemption or extension of time by filling in an *Application for exemption in relation to meetings* form (either online or by downloading a form). Applicants are asked to give reasons for the exemption and extension request. An application for an extension of time must be lodged before the end of the period when the corporation was required to hold its AGM.
- 4.77 When deciding whether to grant an exemption or an extension, the Registrar must be satisfied that the AGM requirement would be inappropriate in the circumstances or impose unreasonable burdens on the CATSI corporation.⁴⁵ When determining if the AGM obligation would cause an unreasonable burden, the Registrar must have regard to the expected costs of complying with the obligation in comparison to the expected benefits of compliance, any practical difficulties that the CATSI corporation may have and any other matter that the Registrar considers relevant.
- 4.78 In 2015-2016, there were 236 approved extensions of time for AGMs.⁴⁶ This means that approximately 8.5 per cent of CATSI corporations sought extensions. The Registrar has stated that the majority of the extension requests were for less than 30 days with the reasons being death in the community, natural disaster, cultural activity or a delay in the audit.⁴⁷
- 4.79 The CATSI Act also gives the power to members under section 201-5 to request that the directors hold a general meeting at any time. The required number of members to call a

³⁸ CATSI Act, section 201-150.

³⁹ CATSI Act, section 201-150(4).

⁴⁰ CATSI Act, section 201-65.

⁴¹ CATSI Act, section 201-160.

⁴² CATSI Act, section 201-165.

⁴³ CATSI Act, section 201-170.

⁴⁴ CATSI Act, Part 5-5.

⁴⁵ CATSI Act, section 225-20.

⁴⁶ KPMG Report, p 7.

⁴⁷ KPMG Report, p 7.

general meeting is the greater of five members of the corporation or 10% of the members of the corporation.⁴⁸ Directors can apply to the Registrar for permission to deny the requested meeting, if the directors resolve that the request is frivolous, unreasonable or that complying with the request would be contrary to the interests of the members as a whole.⁴⁹

Discussion Paper questions

4.80 The Discussion Paper included the following questions regarding AGMs:

- 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 if certain adverse issues are identified by the Registrar?*

⁴⁸ CATSI Act, section 201-5(4).

⁴⁹ CATSI Act, section 201-10.

Discussion of key issues

AGM exemption for small CATSI corporations

- 4.81 During the consultations, many participants expressed difficulties in holding AGMs, particularly those representing small and/or remotely-located corporations. The issues relating to AGMs related to the struggle to notify members of AGMs, the lack of engagement from members,⁵⁰ difficulties to achieve quorum and the cost of holding and organising AGMs. The Consultation Report states:

... many participants expressed difficulties in holding AGMs, particularly those representing small and/or remote corporations. The requirement for members to receive individual notification was noted as particularly difficult in remote communities where many people do not have an address but use the same post office box, and often notification letters are returned to the corporation unopened. Some corporations dealt with this by advising of meetings through public notices in communities. A suggestion was made to also allow notification of AGMs via social media as it was seen to be a more effective mode of communication in some areas.

Additionally, participants noted that achieving quorums is key problem for small corporations, particularly in remote areas where it is expensive and challenging to locate and bring members together. The use of proxies was also discussed and noted as problematic as proxy holders are subject to pressure from other members, often don't know what they are signing up for, and sometimes carry conflicting proxies from different members.⁵¹

- 4.82 The consultations recognised that for small corporations or land-holding only corporations, AGMs were often seen as impractical. Some participants also stated that AGMs were often not valued or seen as relevant by members as members were able to gain their information from other sources e.g. reports, emails to members, social media updates etc.
- 4.83 Proposals in the consultation included that the mandatory requirement to hold an AGM be removed for small corporations.⁵² A suggested counter balance to this removal would be the ability of the threshold amount of members ask the directors to call a general meeting under section 201-5 and the power of the Registrar to call a general meeting if members made a complaint.⁵³
- 4.84 Despite the difficulties outlined above regarding organising and holding AGMs, there was little to no support for an 'across the board' AGM exemption for small CATSI corporations. Many participants noted the existing flexibility in regards to AGMs with

⁵⁰ Lack of member engagement in some CATSI corporations was a recurring theme in the consultations. One written submission tackled the issue of a lack of member engagement from a different perspective. That submission indicated that in the life cycle of a company established for community benefit, after the initial establishment and successful operations of company, there may no longer be a need for active community involvement. The submission suggested that such CATSI corporations could be restructured to a model where the directors alone are the members. However, a need was recognised for such director/members to be representative of the relevant community(ies) and that our mechanisms may be needed to keep this representation (e.g. director nominations committees made up of community members).

⁵¹ Consultation Report, p 203.

⁵² A small corporation will be a CATSI corporation that will have at least two of the three requirements in a financial year: a consolidated gross operating income of less than \$100,000, consolidated gross assets valued at less than \$100,000 and/or fewer than five employees. However, note our recommendation in this regard, see Recommendation 2, p 2.

⁵³ The Registrar does not currently have the power under the CATSI Act to call an AGM. This idea arose during the public consultations.

corporations able to hold their meetings using technology⁵⁴ and request extensions⁵⁵ or exemptions⁵⁶ (which were deemed to be sufficient).

- 4.85 The main concerns in the consultation regarding a default AGM exemption related to further member disengagement, reduced director accountability and organisational transparency. While participants have identified a lack of member engagement as a serious issue, it was commented that removing AGMs may actually worsen member engagement. Without a yearly reminder to consider the business of the CATSI corporation, members may become further disconnected. Many suggestions were made on how AGMs could be better run and made more relevant for members (rather than removing them). If AGMs were to be removed, participants noted that there would need to be another method of engagement for members (particularly for ACNC-registered CATSI corporations which are required under the ACNC Act to demonstrate transparency and accountability). While some participants noted that a certain percentage of members can request a meeting, it was also noted that many members are not aware of this right.
- 4.86 Further, the danger of removing entirely the requirement to have an AGM could result in reduced accountability for directors to their members. Members would need to mobilise and be proactive in requesting that directors call meetings. Furthermore, if members bear the initiative to call a general meeting, members may only exercise this right if there is a crucial or at least, very serious, problem or point of disagreement with the management of the corporation. If members are heard earlier in the process, better decisions will be made by the corporation. In ORIC's 2010 '*Analysing key characteristics in Indigenous corporate failure*' report,⁵⁷ it was noted that a symptom of a failing corporation was a corporation which did not hold an AGM or one whose AGM was inappropriately conducted.⁵⁸ The three common symptoms in 75 - 81 per cent of cases of corporate failure were poor financial accounts, not holding annual general meetings and poor record keeping of members' records.⁵⁹
- 4.87 Another issue relating to director accountability is that directors are typically appointed by members at AGMs. A typical rule book states that, "The corporation can appoint a director by the members passing a resolution a general meeting or AGM". This means that without the AGM requirement, director elections can only occur at a general meeting called by the directors or the threshold amount of members. With some remote and regional CATSI corporations having difficulty to bring together the threshold amount of members, there is a risk that the director renewal process may be greatly delayed.
- 4.88 Finally, removing the AGM requirement would be at odds with principles of good corporate governance. The Registrar has stated that meetings are an essential component to running a CATSI corporation and that better decisions are made if a meeting is well planned, runs smoothly and different points of view can be properly heard.⁶⁰ As noted above, the CATSI Act specifies activities that should occur at an AGM e.g. consideration

⁵⁴ CATSI Act, section 201-65.

⁵⁵ CATSI Act, section 201-155.

⁵⁶ CATSI Act, Division 225.

⁵⁷ ORIC, *Analysing key characteristics in Indigenous corporate failure*.

⁵⁸ ORIC, *Analysing key characteristics in Indigenous corporate failure*, p 52.

⁵⁹ ORIC, *Analysing key characteristics in Indigenous corporate failure*, p 52.

⁶⁰ ORIC, *Factsheet: Meeting for members*.

of the annual reports, the election of directors, appointment etc. These provisions are designed to ensure that at an AGM members have an opportunity to participate and hold the directors accountable.

- 4.89 Many participants discussed how AGMs promote transparency and accountability within the organisation. One CATSI corporation manager commented that *'there is a discipline imposed by an AGM, the board has to prepare and the CEO has to report, but the disciplines are good in and of themselves'*. Another participant noted that AGMs are an opportunity for external stakeholders such as the police, government representatives and housing providers to attend and engage with members, which is a very valuable process.

Resolution to not hold an AGM

- 4.90 A proposal was that members of medium and large corporations have the power to pass a resolution not to have an AGM for up to three years. If a CATSI corporation elected to delay an AGM by three years, the Registrar has queried whether CATSI corporations should be required to provide additional forms of reporting to their members.
- 4.91 Participants in the consultations demonstrated more support for the proposition that members ought to have the choice to postpone an AGM for three years as opposed to outright AGM exemption for certain CATSI corporations. There was some support amongst the groups that small corporations and non-trading (land holding only) corporations should be able to exercise flexibility in holding AGMs once every three years. It was suggested that this provision should be included as a replaceable rule in corporations' rule books.
- 4.92 As discussed above, AGMs play a role in ensuring good corporate governance and their removal may lessen participation by the members, transparency in the organisation and board accountability. Members, through their participation in meetings, can involve themselves in the decisions and direction of the corporation. Its arguable, however, that if members are satisfied that it is not necessary to hold an AGM for three years, their decision should be respected. As stated above in paragraph 4.79, members can always request that directors hold a general meeting.⁶²
- 4.93 Two situations can be postulated that call for special comment. The first situation is where the directors of the corporation are seeking to hide from member scrutiny. The second situation is where the directors are the only members of the corporation. In the first situation where directors propose to defer the AGM to avoid scrutiny but indicate a legitimate rationale for deferral (such as cost or lack of engagement by members) then members will be deceived. It is hard to avoid such a situation occurring but it may be potentially ameliorated by requiring that:
- 4.93.1 directors do not vote on the deferral, and
 - 4.93.2 a high bar be placed on the vote for the deferral e.g. a special resolution.

⁶² CATSI Act, section 201-5.

Additional reporting

- 4.94 If CATSI corporations were able to delay their AGMs by three years, the secondary question was whether additional reporting should be provided to keep members informed on the corporation's business. Stakeholders commented that the reporting rules should not be relaxed.
- 4.95 Under the current rules, small, medium and large sized CATSI corporations have different reporting requirements.⁶³ A CATSI corporation that is required to produce a financial report and a directors' report for a financial year must give members copies of the reports on request.⁶⁴ The corporation must also give members, on request, a copy of the auditor's report if the corporation has to obtain one.⁶⁵ These reports are also available to the general public via the Registrar's public register.
- 4.96 Additional forms of reporting could include more information e.g. a comparison report from the previous year, or more regular updates e.g. director and financial reports to be provided every six months or yearly.
- 4.97 Stakeholders put forward a number of ideas on how the Registrar and members could monitor CATSI corporations which resolve to hold their AGMs other than on an annual basis. These proposals included:
- 4.97.1 that annual reporting documents be submitted to an independent and authorised professional auditor, such as a CPA, who must submit an annual third party interim report to members and the Registrar. The auditor would then prepare a full report covering all three years for review by the members at the next AGM. The same stakeholder suggested that there be a cap on the aggregate financial activity (including debts and salaries) and if over the three years, this cap was exceeded then the corporation would be required to return to yearly AGMs.
- 4.97.2 that CATSI corporations be required to provide notice to the Registrar if there is any material change in their circumstances. If any material change occurred (e.g. a significant payment of native title benefits was paid to the CATSI corporation), the corporation would be required to return to holding regular AGMs.
- 4.98 Considering that AGMs allow for a participation by members, new reporting requirements could allow members to submit questions in advance to the board and for the board's responses to be included in the reports. Nevertheless, bearing in mind that both the current Government and Registrar's strategy is to reduce compliance burdens, creating extra reporting requirements may be counterproductive to this approach.⁶⁶ While members would be relieved from the time and monetary cost of attending an AGM, the workload of directors and the management would be increased if they had to comply with extra reporting requirements.

⁶³ See this Review, Chapter 4(C): Reporting by CATSI Corporations.

⁶⁴ CATSI Act, Division 342.

⁶⁵ CATSI Act, Division 342.

⁶⁶ ORIC, *ORIC Strategic Plan 2014–17*.

- 4.99 It should be noted that approximately one third of CATSI corporations are charities regulated by the ACNC.⁶⁷ Non-CATSI charities must meet a set of governance standards to be registered and remain registered with the ACNC.⁶⁸ CATSI corporations that are charities must comply with ACNC reporting requirements. The ACNC's Governance Standard 2 requires that charities take reasonable steps to be accountable to their members and give their members adequate opportunity to raise concerns about the governance of the charity.⁶⁹ The ACNC states that an AGM is one way a registered charity can meet this standard. In a Written Submission a concern was raised as follows:

Should an ACNC-registered CATSI corporation not hold an AGM, it may need to demonstrate to the ACNC that it is meeting Governance Standard 2 in an alternative way. If a charity cannot demonstrate the way in which it is meeting Governance Standard 2, it may no longer be entitled to registration with the ACNC and its registration could be revoked. This is likely to have significant tax consequences.⁷⁰

- 4.100 Considering the participants' views and the overlap between ACNC standards, it seems imperative that if AGMs are deferred, ACNC registered CATSI corporations will still need to find a way to be accountable to their members and to allow their members to participate, in order to uphold its ACNC registration (and accordingly, its charitable status for taxation purposes).⁷¹

Automatic extensions of time

- 4.101 The Review also considered a proposal that the CATSI Act be amended so that if a CATSI corporation cannot comply with the meeting requirements for certain specific events or reasons, that the corporation be able to notify the Registrar and obtain an automatic extension for 30 days (or another set period of time). The suggested events or circumstances which would trigger an automatic extension of time are a death in the community, natural disaster, cultural activity or a delay in the audit.
- 4.102 In Indigenous communities deaths, natural disasters and certain cultural activities can be significant events that should be expressly recognised as being of unusual significance. These events can be justification for relaxation of otherwise rigid rules.
- 4.103 As described above, CATSI corporations can seek extensions of time for holding an AGM under section 201-155 of the CATSI Act. An interviewee in the KPMG Report stated that the incidence of extension requests may indicate that the current meeting requirements are "overly rigid".⁷² This topic did not receive a large amount of attention during the consultations but, of the submissions received, stakeholders were generally supportive of automatic extensions.
- 4.104 The argument in favour of automatic extensions of time is that such a change would remove the administrative burden of submitting and approving applications for

⁶⁷ As of 30 June 2016, there are 2781 corporations registered with the Registrar and the ACNC regulates approximately 900 of these CATSI corporations as charities.

⁶⁸ ACNC Act, section 45-10.

⁶⁹ ACNC, *Governance Standard 2*.

⁷⁰ ACNC Act, section 35-10(1)(c)(ii).

⁷¹ ACNC Act, section 35-10(1)(c)(ii).

⁷² KPMG Report, p 7.

extensions. Currently, CATSI corporations can either submit a form or apply online to request an extension. The application and the determination made by the Registrar are made public on the Register. It is unclear to what extent an automatic extension of time mechanism would significantly reduce the burden on either the Registrar or the CATSI corporations seeking an extension, as the current process does not appear particularly onerous. CATSI corporations are not required to provide detailed reasons or evidence of the circumstances or events requiring an extension.

- 4.105 Nevertheless, we consider an automatic extension process would be beneficial. A way to streamline the extension procedure may be to make simple amendments to the process itself. In the written form or online application, the applicant could have a choice to tick a box to notify an "automatic exemption" or apply for a "special exemption" (if the automatic extension did not apply). If the corporation notifies an "automatic exemption", it would choose between the categories of the automatic exemptions. In order to prevent abuse of this provision, the Registrar could monitor the number automatic extensions granted to CATSI corporations or CATSI corporations could be restricted from receiving automatic extensions more than three years in a row. This amendment would further the Registrar's flexible approach to the special circumstances and needs of CATSI corporations.
- 4.106 Given the significance of deaths, natural disasters and certain cultural activities in Indigenous communities, we see the potential for these events to be relevant beyond the holding of AGMs. In particular, we consider that these events may justify a delay in reporting and lodgement of reports under Division 348 of the CATSI Act.

Calling Meetings

- 4.106.1 The Registrar already effectively has the power to direct a corporation to hold a general meeting if certain adverse issues are identified by the Registrar (under section 439-10(d) if the Registrar "is satisfied that, in the circumstances of the corporation, there is a need to do so"). The section states:

439-10 Registrar may call a general meeting (other than an AGM)

- (1) *The Registrar may call and arrange to hold a general meeting (other than an AGM) of an Aboriginal and Torres Strait Islander corporation if:*
- (a) *the corporation has called the meeting for a particular day but it has not been held for 14 days after that day; or*
 - (b) *the Registrar has been requested to do so in writing by at least the required number of members of the corporation under subsection (9); or*
 - (c) *the corporation has not held a general meeting within 3 months after the corporation is registered; or*
 - (d) *the Registrar is satisfied that, in the circumstances of the corporation, there is a need to do so.*

- 4.106.2 However, in addition to this power, we consider that the CATSI Act should be amended to give the Registrar an express power to require the directors of the CATSI corporation call and hold a general meeting of the corporation, where the Registrar decides that it is reasonable to

do. If the directors do not do so then the Registrar can exercise its powers under section 439-10.

Additional issues raised by stakeholders during consultation

- 4.107 A number of participants made other suggestions to increase flexibility for CATSI corporations in relation to their AGMs.
- 4.108 One CEO, who was interviewed during the consultations, represented a corporation which has a number of "town camps" as members. It was noted that if there was an option not to have annual AGMs that its members would still want them, but that it would be helpful to have more flexibility around the timing as all the town camp meetings have to be held prior to the corporation's AGM as they contribute to the informing of the corporation's board on relevant issues for the AGM.
- 4.109 Participants also felt that it would be of benefit to enable corporations to have AGMs independently facilitated and the suggestion was made that the Registrar be able to assist with, facilitate and participate in AGMs and other corporation meetings as required. Similarly, participants supported the Registrar being given the power to call and facilitate an AGM at the request of its members.
- 4.110 Additionally, some participants discussed the benefit of the CATSI Act enabling more flexible arrangements to conduct corporations' business typically undertaken during AGMs. For example, there was a suggestion that allowing for rolling elections and resignations during the year, provided there were appropriate succession plans in place, may increase the efficiency and overall capability of the board and senior staff. This is in comparison to situations where corporations are continually having to "start again" in terms of training whole new boards with governance and capacity skills. Another participant submitted that the member threshold for the quorum requirement be reduced.

Recommendations

AGM exemption for small CATSI corporations

- 4.111 It is not recommended that the CATSI Act should be amended to exempt small CATSI corporations from holding an AGM as required under section 201-150, because:
- 4.111.1 the existing legislative framework already allows CATSI corporations to seek exemptions from the Registrar;
 - 4.111.2 member engagement, which has already been identified as a problem, is likely to worsen if an opportunity to engage with the corporation is removed;
 - 4.111.3 AGMs enhance director accountability by allowing members to elect, question and receive information directly from the board; and
 - 4.111.4 AGMs can be attended by external stakeholders who can make valuable contributions. This allows for the wider public to have transparency on the CATSI corporation's activities.
- 4.112 We encourage the Registrar to communicate to CATSI corporations the ability to hold the AGMs using technology and to investigate possible technological solutions which would allow members to participate.

Resolution to not hold an AGM

- 4.113 It is recommended that the CATSI Act be amended to allow for small sized CATSI corporations to have the power to pass a special resolution not to have an AGM for up to three years, provided that:
- 4.113.1 the directors do not vote on that resolution, and
 - 4.113.2 the corporation is obliged to advise the Registrar if there is any material change in its circumstances.
- 4.114 Further, consideration should be given to land-holding corporations with little income. These also appear appropriate for a power to defer AGMs.
- 4.115 However, we consider that the CATSI Act should be amended to give the Registrar the power to require the directors call and hold a general meeting of the corporation where the Registrar decides that it is reasonable to do. Examples of this could be:
- 4.115.1 members making numerous complaints;⁷³
 - 4.115.2 failure to provide annual reporting in a timely manner to members two years in a row;
 - 4.115.3 failure to provide give members an opportunity to ask questions of the board and for the board to include their responses in the annual reporting; or
 - 4.115.4 failure to provide notice to the Registrar if there is any material change in its circumstances.
- 4.116 We support the potential for deferral of AGMs for small corporations as a change to the CATSI Act as:
- 4.116.1 members should have the autonomy to make a decision on how the CATSI corporation should hold their AGMs;
 - 4.116.2 the safeguards presented above should ensure that CATSI corporations remain accountable to their members and that members have the opportunity to participate in the running of their corporation during the three year AGM hiatus.

Automatic extensions of time

- 4.117 We support an amendment to the CATSI Act to allow for an automatic extension of time for a period of 30 days (or such other period as is prescribed by regulation) to hold an AGM where a CATSI corporation:
- 4.117.1 reports that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and

⁷³ The Registrar currently does not have the power under the CATSI Act to call a general meeting for a CATSI corporation. If this provision was to be inserted in the CATSI Act, we would recommend that the Registrar use this power sparingly where members complaints are involved and that it make sufficient enquiries of the board and senior management to investigate the legitimacy of such complaints before calling an AGM.

- 4.117.2 the CATSI corporation has not notified an automatic extension of time more than three years in a row.
- 4.118 A CATSI corporation seeking an extension for a longer period or for a different reason than expressed in paragraph 4.117.1 would need to apply for extension under the current procedure.
- 4.119 This amendment is supported because:
- 4.119.1 in practice it is being applied already with a significant proportion of CATSI corporations seeking extensions for these reasons and the Registrar granting the extensions;
 - 4.119.2 its introduction would reduce cost and red-tape on behalf of the Registrar and CATSI corporations;
 - 4.119.3 the potential for abuse is low with the safeguard of paragraph 4.117.2 in place and the consequences of delaying an AGM by 30 days is not serious; and
- 4.120 the reasons stated in 4.117.1 which are eligible for an automatic extension of time are reasonable and appropriate for the communities that the CATSI corporations serve.
- 4.121 Given the significance of deaths, natural disasters and certain cultural activities in Indigenous communities, it is recommended that the CATSI Act be amended to allow for an automatic extension of time for a period of 30 days (or such other period as is prescribed by regulation) for reporting and lodgement of reports under Division 348 of the CATSI Act.

4(C) REPORTING BY CATSI CORPORATIONS

Introduction

- 4.122 Good governance involves scrutiny of the operations of a corporation. Two essential features of such scrutiny are the potential external scrutiny by the public or a regulator and internal scrutiny by the members of the corporation. Information provided in annual reports assists in such scrutiny. However, preparation of reports can be complex and time-consuming depending on the size and scale of operations of the corporation. Accordingly, there are differing requirements for the preparation of reports depending on the size and type of entity. As a general rule, small corporations are not required to prepare and provide as detailed reports as large corporations, unless there is a particular reason for more comprehensive scrutiny (e.g. the corporation has been provided with public money through government funding programs).
- 4.123 Generally companies are required to prepare reports for presentation to the members. These reports provide an opportunity for the members to scrutinise the decisions of the board and to formulate any questions about the operation of the corporation. Companies often provide varying levels of detail in various forms of presentation to best represent the key information to the relevant audience. One of the most common ways that information is presented to members is through reporting at the annual general meeting. Members also have the right to request information in certain circumstances, and the process by which these requests can be made is usually contained in the governing

documents of the entity, such as the constitution or articles of association, or may be enshrined in statute.

Overview: the current situation⁷⁴

- 4.124 Under the Corporations Act, it is usual for the AGM to receive the company's annual financial report, directors' report and auditors' report (as applicable). However, the reporting regime under the Corporations Act is complex. Public company AGMs must receive these same reports, other than in the case of small corporations, and a remuneration report is also given for listed companies.⁷⁵ Large proprietary companies must prepare annual financial reports and a directors report, have the financial report audited and send both reports to shareholders.⁷⁶ They must also lodge the annual financial reports with ASIC unless exempted.
- 4.125 Depending on the type of entity and legislation under which it is registered, there will be reporting obligations to the relevant regulator. Under the Corporations Act, for companies registered with ASIC, annual reports must be filed and corporations have an obligation to ensure all details are current including the register of officeholders and members.
- 4.126 There are exemptions to the financial reporting provisions in the Corporations Act. One of the most common forms of exemption is for wholly-owned subsidiaries, the parent companies of which file consolidated reports on behalf of the group.
- 4.127 If an entity is registered as a charity under the ACNC regime it will be required to provide an information statement and if classified as medium or large, a financial report, and whether or not these accounts need to be audited will depend on the size of the charity.
- 4.128 In our view, structurally CATSI corporations are similar to companies limited by guarantee. Companies limited by guarantee are public companies under the Corporations Act. For public companies the Corporations Act provides as follows:

S317 Consideration of reports at AGM

- (1) *The directors of a public company that is required to hold an AGM must lay before the AGM:*
- (a) *the financial report; and*
 - (b) *the directors' report; and*
 - (c) *the auditor's report;*
- for the last financial year that ended before the AGM.*
- (1A) *Subsection (1) does not apply to a small company limited by guarantee in relation to a report if the company is not required under a member direction made under*

⁷⁴ A good summary is provided by ORIC, *Corporation Reporting Guide*.

⁷⁵ Corporations Act, Part 2M.

⁷⁶ A large proprietary company must satisfy two of the following: (a) gross operating revenue of less than \$10 million for the year, (b) gross assets of less than \$5 million at the end of the year and (c) fewer than 50 employees at the end of the year.

section 294A or an ASIC direction made under section 294B to prepare or obtain the report.

4.129 Similarly, the size of a CATSI corporation currently affects the type of reports that must be prepared and presented at an AGM. CATSI corporations may also have increased reporting requirements if they receive public funding.⁷⁷ The different types of reports that must be tabled, and the requirements for the contents of those reports, are as follows:

<p>A general report contains:</p>	<ul style="list-style-type: none"> • the names and addresses of members and directors; • the name and address of the corporation’s secretary (for large corporations) or contact person (for small or medium corporations); • the corporation’s registered office address (for large corporations) or document access address (for small or medium corporations); • the corporation’s total income for the financial year; • the value of the corporation’s assets at the end of the financial year; • the number of employees of the corporation at the end of the financial year; • the corporation’s ABN (if it has one); • whether the corporation is a deductible gift recipient under the <i>Income Tax Assessment Act 1997 (Cth)</i>; and • whether any directors or the secretary or contact person of the corporation is also an employee.
<p>A financial report contains:</p>	<ul style="list-style-type: none"> • financial statements for the financial year; • notes to the financial statements (as required by the accounting standards). CATSI corporations that prepare general purpose financial reports may adopt tier 2 reduced disclosure requirements where they meet the criteria set out in AASB 1053; and • a directors’ declaration. <p>In addition, the financial report must give a true and fair view of the corporation’s finances and performance. It should also be audited and an audit report obtained.</p>
<p>A directors’ report contains:</p>	<ul style="list-style-type: none"> • a detailed overview of the corporation’s business performance during the financial year; and

⁷⁷ ORIC, *Factsheet: Corporation size and financial reporting*.

	<ul style="list-style-type: none"> the factors underlying the corporation’s results and financial position.
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- 4.130 Medium and large corporations are required to lodge financial reports by 31 December, in addition to the general reports that must be lodged by all CATSI corporations. Delays to lodgement can arise by factors such as a death in the community, natural disaster, cultural activity or a delay in audit.
- 4.131 The ACNC reporting requirements also impose additional obligations on directors of CATSI corporations.
- 4.132 Auditors have qualified privilege under the Corporations Act for statements they make. This is not provided for in the CATSI Act.

Discussion Paper questions

6.1.1 To what extent should the AGM of certain CATSI corporations be required to receive these reports?

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?

...

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

....

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

Discussion of key points

- 4.133 The current CATSI Act regime for disclosure to members is generally based on request by members i.e. the member may request reports the corporation is required to prepare.⁷⁸ This regime differs from the regime that applies to public companies under the Corporations Act, and we assume that a deliberate choice was made to adopt such a difference.
- 4.134 However, we note that the regulations⁷⁹ or the Registrar⁸⁰ can require reports be given to members. Further, the Registrar has the power to increase reporting by a class of CATSI

⁷⁸ CATSI Act, sections 327-1(4) and 342-5.

⁷⁹ CATSI Act, section 333-15(3).

⁸⁰ CATSI Act, section 336-1.

corporation.⁸¹ Presenting reports at an AGM for discussion is good governance and we note that a typical corporation's rule book will provide that AGMs are to receive the general report, financial report and the directors' report.⁸²

- 4.135 The Consultation Report produced a range of views about reporting, but a constant theme was the burden and cost for small corporations and that small sized corporations need to have their compliance costs reduced.

The discussion about current reporting requirements under the CATSI Act revealed diverse opinions across consultations. For example, a CEO of a small corporation interviewed noted that reporting under ORIC is far easier, and more reasonable, than for those under the ACNC and government departments. In particular, the participant noted that provisions inbuilt into the CATSI Act to allow for support and flexibility was extremely helpful.

Conversely, other participants thought that annual reporting under the CATSI Act was particularly time and resource intensive for small corporations with limited staff, assets and income. ...

Similarly, consultations on this theme also revealed a need for ORIC to simplify or reduce compliance provisions under the CATSI Act, particularly for small corporations and/or those that receive no government funding. Participants noted that the CATSI Act and ORIC need to move away from "...treating all corporations as if they are community controlled social enterprises whose main source of income is government funding." ...

Many participants spoke about the time and financial burden involved in compliance with the CATSI Act, particularly for smaller CATSI corporations. There was mixed feedback as to how this problem might be addressed. ...

- 4.136 Following these views there would not be support for a requirement that further reports be provided at AGMs, at least for small sized corporations, as this would increase compliance costs. However, another strand of thought identified is that:

Annual compliance measures were also seen to be a useful "health check" for ORIC to identify and mitigate early risks to vulnerable corporations.

- 4.137 However, the Registrar can exempt both individual and classes of CATSI corporations from the reports required under Parts 7-2 and 7-3 of the CATSI Act. So if additional reporting was required by the CATSI Act the Registrar could give exemptions in appropriate individual or group situations, such as for small sized corporations. The section reads:

S335-10 Registrar's power to make determinations

(1) *The Registrar may determine in writing that:*

(a) *a specified Aboriginal and Torres Strait Islander corporation or a specified class of Aboriginal and Torres Strait Islander corporation; and*

⁸¹ CATSI Act, section 336-5.

⁸² See the sample rule books on ORIC's website.

- (b) *the directors of a specified Aboriginal and Torres Strait Islander corporation or of a specified class of Aboriginal and Torres Strait Islander corporation (as the case may be);*

are exempted from the provisions of Part 7-2 or 7-3, or of regulations made for the purposes of Part 7-2 or 7-3, that are specified in the Registrar's determination.

Note: For the criteria for making determinations under this section, see Part 7-5.

- (2) *The determination may:*
- (a) *be expressed to be subject to conditions; and*
- (b) *be indefinite or limited to a specified period.*
- (3) *The Registrar may, in writing, revoke, vary or suspend the determination.*
- (4) *Notice of the making, revocation, variation or suspension of a determination in relation to a specified class of Aboriginal and Torres Strait Islander corporation, or the directors of a specified class of Aboriginal and Torres Strait Islander corporation, must be published in the Gazette.*

Auditors

- 4.138 A Written Submission from an Accounting Firm supported that as qualified privilege is given to auditor under the Corporations Act it should also be given to auditors under the CATSI Act. There appears to be no policy reason to not provide such a benefit to auditors under the CATSI Act.⁸³
- 4.139 Further, the Registrar identified an issue relating to appointment of auditors. Under the CATSI Regulations, Regulation 33(1) provides that the members of the CATSI corporation appoint the auditor in general meeting. However, if they do not Regulation 33(2) enables the directors to appoint the auditor.
- 4.140 Regulation 36 provides that an auditor can resign but does not indicate how a replacement is appointed. We consider this problem should be addressed.

Recommendations

Reports at AGM

- 4.141 It is recommended that an equivalent to section 317(1) of the Corporations Act be included in the CATSI Act requiring the relevant reports to be presented to an AGM, if the company is required to have one. An equivalent to section 317(1A) should also be included and, in fact, be broader and exempt small sized companies from the requirement. Noting that a CATSI corporation's rule book or the Registrar could require otherwise.

⁸³ While not with the scope of this Review, we note that the Institute of Internal Auditors considers such protections should apply to a corporation's internal auditors.

Deferral of Reporting

- 4.142 The Review does not consider the Registrar's current powers are sufficient and given the significance of deaths, natural disasters and certain cultural activities in Indigenous communities, it is recommended that the CATSI Act be amended to allow for an automatic extension of time for a period of 30 days (or such other period as is prescribed by regulation) for reporting and lodgement of reports under Division 348 of the CATSI Act.

Auditors

- 4.143 It is recommended that equivalent provisions to those in the Corporations Act be included in the CATSI act so that auditors are given qualified privilege in their communications to the Registrar, whether written or oral.
- 4.144 It is recommended that a new Regulation 33(3) be included in the CATSI Regulations that the directors can fill a casual vacancy in the auditors of the corporation. Such an auditor will hold that position until the next AGM, where the members can confirm the appointment or appoint new auditors.

4(D) OBLIGATIONS OF MEMBERS

Introduction

- 4.145 Under Australian law, the usual flow of accountabilities in a corporate structure is that management is accountable to the corporation's board, and the board is accountable to the corporation's members. This applies whether or not the corporation is a for-profit or not-for-profit entity. This flow of accountabilities means that members have the ultimate power within the corporate structure, notwithstanding the usual broad decision-making power that is granted to the board under the corporation's constituent documents, and which the board ordinarily delegates (in part) to the corporation's management team.
- 4.146 For this governance model to work effectively, members must be both informed and engaged.⁸⁴ As members do not meet or exercise their power as a collective on a frequent basis, the process for contacting members (e.g. to convene a general meeting) is particularly critical to ensuring that the governance model works as intended. If members cannot be contacted, this can impede their ability to remain informed about the corporation and its affairs, and ultimately may prevent members from performing their intended functions and exercising their rights.
- 4.147 Also, it is common for the constituent documents of a corporation to include rules regarding how a member's membership will terminate if the member is uncontactable. This is because the ongoing inclusion of uncontactable members on the corporation's Register of Members can have adverse consequence for governance processes and outcomes, such as the ability to form a quorum at a general meeting of members where this is expressed as a percentage of members.⁸⁵ The obligation to send notices to a member who (up to that point in time) has not been contactable may also increase

⁸⁴ ORIC, *Factsheet: Members' rights*.

⁸⁵ See, for example, the replaceable rule set out in section 201-70(1)(b)(i) of the CATSI Act, which refers to "the number of members holding 10% of the voting rights".

administration costs for the corporation, particularly where the notice must be sent by mail to that member.

- 4.148 The system for recording the contact details of each member, and for storing and utilising such information, is therefore an important element in achieving good governance outcomes.

Overview: the current situation

- 4.149 Prescribed details of each member of the corporation are ordinarily required to be recorded in a “Register of Members”.⁸⁶ In the case of CATSI corporations, a “register of former members” must also be maintained.⁸⁷ In the absence of evidence to the contrary, a register is proof of the matters shown in the register under the relevant statute.⁸⁸

- 4.150 In the case of CATSI corporations, the Register of Members must contain the following information about each member who is an individual:

- 4.150.1 the member’s given and family name;
- 4.150.2 the member’s address; and
- 4.150.3 the date on which the entry of the member’s name in the register was made.

The register may also contain any other name by which the member is or was known.⁸⁹

- 4.151 Further, the Register of Members must contain the following information about each member who is a body corporate:

- 4.151.1 the member’s name and address; and
- 4.151.2 the date on which the entry of the member’s name in the register was made.⁹⁰

- 4.152 In addition, the entry for a member in a CATSI corporation’s Register of Members must (where applicable) indicate that the member is not an Aboriginal and Torres Strait Islander person.⁹¹

- 4.153 A member of a CATSI corporation can also provide the CATSI corporation with other address information for specific purposes, although this is not required to be recorded in the Register of Members. In particular, a member can:

- 4.153.1 nominate an alternative address for receiving a notice of meeting;⁹²

⁸⁶ For a CATSI corporation, refer to Division 180 of the CATSI Act. For a Corporations Act corporation, refer to sections 168(1)(a) and 169 of the Corporations Act.

⁸⁷ CATSI Act, Division 180.

⁸⁸ For a CATSI corporation, refer to section 180-45 of the CATSI Act. For a Corporations Act corporation, refer to section 176 of the Corporations Act.

⁸⁹ CATSI Act, section 180-5(1).

⁹⁰ CATSI Act, section 180-5(1A).

⁹¹ CATSI Act, section 180-5(2).

⁹² CATSI Act, section 201-25(3)(b).

- 4.153.2 nominate a fax number or electronic address for receiving a notice of meeting;⁹³
- 4.153.3 nominate other electronic means for receiving a notice of meeting;⁹⁴ and
- 4.153.4 nominate an electronic means the member may use to gain access to notices of meeting.⁹⁵
- 4.154 In addition, if a CATSI corporation has a constitution, the constitution may permit the CATSI corporation to give the notice of meeting to a member by other means, in which case the corporation may give the notice of meeting by that means.⁹⁶
- 4.155 A Register of Members must ordinarily be kept in a specified place,⁹⁷ and any person is ordinarily permitted to inspect the Register of Members.⁹⁸ However, use or disclosure of information obtained from a Register of Members is strictly regulated.⁹⁹
- 4.156 It is common for the enabling statute to include provisions regarding how alleged errors in the Register of Members may be corrected. Ordinarily, the corporation or an aggrieved member may apply to the Court to have the Register of Members corrected. The Court may also order the corporation to compensate a party to the application for loss or damage suffered.¹⁰⁰
- 4.157 In addition, a CATSI corporation must:
- 4.157.1 make the Register of Members available for inspection (without charge) by members at the AGM; and
- 4.157.2 ask each member attending the AGM to check the entry for that member in the register and inform the corporation of any corrections that need to be made to that entry.¹⁰¹
- 4.158 These statutory mechanisms aim to allow errors in the Register of Members to be identified promptly and rectified without judicial intervention wherever possible, but with the option for seeking judicial intervention where this is required.
- 4.159 Under the CATSI Act, the status of the Register of Members as the authorised record of each member's contact details is relevant in several important ways, including the following:

⁹³ CATSI Act, section 201-25(3)(c).

⁹⁴ CATSI Act, section 201-25(3)(d).

⁹⁵ CATSI Act, sections 201-25(e) and 201-25(4).

⁹⁶ CATSI Act, section 201-25(f).

⁹⁷ For a CATSI corporation, refer to section 180-20 of the CATSI Act. For a Corporations Act corporation, refer to section 172 of the Corporations Act.

⁹⁸ For a CATSI corporation, refer to section 180-20 of the CATSI Act. For a Corporations Act corporation, refer to section 173 of the Corporations Act.

⁹⁹ For a CATSI corporation, refer to section 183-1 CATSI Act. For a Corporations Act corporation, refer to section 177 of the Corporations Act.

¹⁰⁰ For a CATSI corporation, refer to section 180-40 CATSI Act. For a Corporations Act corporation, refer to section 175 of the Corporations Act.

¹⁰¹ CATSI Act, section 180-30.

- 4.159.1 to enable the member to receive a notice of meeting;¹⁰²
- 4.159.2 to enable the member to receive a proposed circulating resolution;¹⁰³
- 4.159.3 where applicable, to enable the member to receive the corporation's financial report and directors' report for a financial year;¹⁰⁴ and
- 4.159.4 for the purposes of cancelling the member's membership of the CATSI corporation on the grounds that the member is not contactable.¹⁰⁵
- 4.160 A member of a CATSI corporation may have their membership cancelled on several grounds, including where the member is "uncontactable".¹⁰⁶ However, an application can be made to exempt the CATSI corporation or its directors from these requirements.¹⁰⁷
- 4.161 To be valid, a cancellation of membership must be effected in the manner and circumstances specified in the CATSI Act, namely by special resolution in general meeting if the following pre-conditions are also satisfied:
- 4.161.1 the CATSI corporation has not been able to contact the member at the address for the member that is entered on the Register of Members, for a continuous period of 2 years prior to the meeting; and
- 4.161.2 the CATSI corporation has made 2 or more reasonable attempts to otherwise contact the member during that 2 year period but has been unable to.¹⁰⁸
- 4.162 Further, if a CATSI corporation does cancel a member's membership in accordance with the above procedure, the directors must send the member a copy of the resolution at the last known address of the member, as soon as practicable after the resolution has been passed.¹⁰⁹ An offence against this requirement is an offence of strict liability.¹¹⁰

Discussion Paper questions

- 4.163 The Discussion Paper included the following questions regarding obligations of 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).

¹⁰² CATSI Act, section 201-25(3).

¹⁰³ CATSI Act, section 204-1.

¹⁰⁴ CATSI Act, section 342-5.

¹⁰⁵ CATSI Act, section 150-25. Note that an application under section 187-5 of the CATSI Act may be made to exempt a CATSI corporation, or its directors, from the requirements of section 150-25.

¹⁰⁶ CATSI Act, section 150-25.

¹⁰⁷ CATSI Act, section 187-5.

¹⁰⁸ CATSI Act, section 150-25(3).

¹⁰⁹ CATSI Act, section 150-30(4).

¹¹⁰ CATSI Act, section 150-30(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?*

Discussion of key issues

Information to be provided by members

- 4.164 The current CATSI Act regime for recording the details of each member, contacting members for specific purposes and determining when the cancellation of membership regime is triggered, raises a number of issues.
- 4.165 First, although a member of a CATSI corporation is able to nominate an alternative postal address or a fax number or other electronic means for the purposes of receiving notices of meeting from the CATSI corporation, that nominated postal address, fax number or other electronic means:
- 4.165.1 is not required, or expressly permitted, to be included in the Register of Members with respect to that member for broader purposes; and
- 4.165.2 cannot be used for other purposes, such as determining whether a member is “not contactable” and, hence, vulnerable to having the member’s membership terminated.
- 4.166 Secondly, the current CATSI regime is potentially insufficiently sensitive to the varying geographic footprints, domiciliary arrangements and technological resources of CATSI corporations and their members. For example:
- 4.166.1 members of CATSI corporations may move and not provide the CATSI corporation with their updated contact details;¹¹¹
- 4.166.2 some CATSI corporations receive a large amount of unclaimed mail when posting notices of meeting to members. Coupled with the administrative burden of monitoring mail returns (noting that smaller CATSI corporations may have no, or few, paid staff), and the expense of multiple mail outs, this can be a significant financial and administrative burden for a CATSI corporation without advancing the underlying objective of supporting and informed and engaged membership;¹¹²

¹¹¹ Written submission.

¹¹² Written submissions.

- 4.166.3 the recent changes to Australia Post delivery times may have an adverse impact with respect to postal communications from a CATSI corporation to its members;¹¹³
- 4.166.4 some CATSI corporations in remote regions have a membership base extending over vast geography, and several individuals may use the same post office box;¹¹⁴
- 4.166.5 further, in some remote communities that do not have a reliable postal service, or any postal service, members may use a “care of” postal address for the purposes of the CATSI corporation’s Register of Members;¹¹⁵ and
- 4.166.6 some remote communities are not serviced by post, internet or telephone.¹¹⁶
- 4.167 One stakeholder observed:

It is currently a requirement that a member’s address is recorded on the member’s register. In some communities, members do not have a specific residential address that is used to contact them. For example, in some remote communities the area is not serviced by post, internet or phone. In these circumstances it is suggested that a member’s community may be acceptable for the member’s register and the organisation must use reasonable attempts to contact those members (for example, by a physical presence or in a poster on community notice board in English or any applicable language).

Given the varied nature of member communication, the Sector believes that the level of contact details required for the member register should be a replaceable rule such that, for example, the email addresses of member can be used as an alternative means of notification.¹¹⁷

- 4.168 Another stakeholder made the following submission:

The register may reflect alternative contact details of a member (perhaps similar to those in the notice provisions under section 201-25), however, this should not be mandatory. Members should have the ability to nominate their preferred method for service of notice. If the member does not nominate a particular preferred method, the corporation would rely on the member’s registered residential address or a ‘care of’ postal address in the case of remote areas not having reliable (or any) other postal service.¹¹⁸

- 4.169 We note that if a CATSI corporation has a rule book (i.e. a constitution), the legislation already permits the CATSI corporation (through its constitution) to:
- 4.169.1 provide for other obligations that attach to membership of the corporation;¹¹⁹ and
- 4.169.2 specify other means by which a notice of meeting may be given to a member.¹²⁰

¹¹³ Written submission.

¹¹⁴ Consultation Report, p 203.

¹¹⁵ Written submission.

¹¹⁶ Written submission.

¹¹⁷ Written submission.

¹¹⁸ Written submission.

¹¹⁹ CATSI Act, section 147-5.

¹²⁰ CATSI Act, section 201-25(3)(f).

- 4.170 We query whether this flexibility is fully appreciated by all relevant stakeholders.
- 4.171 With respect to whether a CATSI corporation should be obliged to keep and maintain up-to-date records on all members, one stakeholder observed:

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

*Yes. But the onus of providing up to date information must fall to the member. Currently there is a requirement for the corporation to keep its Register of Members and this is then updated with ORIC as part of the general reporting requirements on an annual basis. This system is fair and reasonable. It must be noted however that the corporation's Register of Members will only be as up to date as the information they are receiving from their members and that onus must remain with the members to provide any change in detail.*¹²¹

Recommendations

Information to be provided by members

- 4.172 It is not recommended that members of a CATSI corporation should automatically be required to provide further contact details for inclusion in the Register of Members. This is because the legislation currently:
- 4.172.1 permits members to nominate an alternative postal or electronic address, or fax number, for receiving a notice of meeting, and to nominate an electronic means the member may use to gain access to notices of meeting; and
 - 4.172.2 permits a CATSI corporation to specify in its constitution other means by which a notice of meeting may be given to a member.
- 4.173 We encourage the Registrar to communicate this flexibility to CATSI corporations, with the aim of empowering CATSI corporations to design their own notification arrangements, as considered most suitable in the local context by that corporation and its directors and members.
- 4.174 Similarly, it is not recommended that members of a CATSI corporation should be required to submit email addresses or alternative physical addresses to the corporation, because:
- 4.174.1 the existing legislative framework is sufficiently flexible to permit CATSI corporations and their members to determine the methods of communication that are best suited to local needs and capabilities; and
 - 4.174.2 if a member elects not to provide up-to-date contact information to the CATSI corporation, the member must accept the risk that the member's membership may therefore cease in accordance with the CATSI Act if the member is "uncontactable". Such an outcome is sufficiently detrimental from a member's perspective, and in our view it would not be beneficial for such a failure to also constitute a breach of the CATSI Act on the member's part.

¹²¹ Written submission.

Obligations of CATSI corporations

- 4.175 It is not recommended to amend the CATSI Act to oblige a CATSI corporation to keep and maintain up-to-date records on all members – however, this is subject to our recommendations below. If a member elects not to provide up-to-date contact information to the CATSI corporation, it is not clear what the CATSI corporation could reasonably do to obtain that information.

Alternative contact details

- 4.176 It is not recommended that the CATSI Act be amended to oblige a CATSI corporation to actively seek alternative contact details from members over and above what is currently required to be recorded in the Register of Members. However, as a matter of practice, the Registrar may wish to encourage CATSI corporations to do so as part of their membership admission and general meeting procedures.
- 4.177 Where a member nominates alternative contact methods in accordance with the CATSI Act, the relevant information is not required to be recorded in the CATSI corporation's Register of Members. It is not recommended that the legislation be amended to mandate that such information is recorded in the Register of Members but that the information should be retained and used e.g. in relation to notices of meeting and other communications with or to members. It is recommended that the CATSI Act is amended as follows:
- 4.177.1 the CATSI Act be amended to oblige the corporation, where an alternative contact method has been nominated by the member to ensure that the relevant information is recorded in a register separate to the Register of Members and stored with the corporation's other records.

Cancellation of membership

- 4.178 With respect to the applicable time period for an “uncontactable” member's membership ceasing, stakeholders provided differing views on whether the existing regime requires amendment. Some stakeholders responded that the current time period and number of attempts specified in the CATSI Act are appropriate. One stakeholder commented:

*The sector believes that the two year period is excessive and the member's membership may be cancelled by special resolution of the membership if the member has been uncontactable for a six month period and two attempts have been made to contact them during that period.*¹²²

- 4.179 Another stakeholder identified an alternative model for consideration:

An option could be one year to remove a member at the AGM or other general meeting, with a member automatically reinstated if they recontact within two years of their membership being cancelled. Many of our members move and do not update their address.

- 4.180 In our view, the continuous period of 2 years that must have elapsed before a member's membership of a CATSI corporation can be cancelled by special resolution in general meeting is arguably too long:

¹²² Written submission.

- 4.180.1 on one view, a shorter time period would allow the CATSI corporation to proceed with greater certainty when undertaking any action that involves communication with members, as well as reducing administration costs in communicating with members. It may also assist a CATSI corporation in more readily achieving a quorum at a general meeting of its members, depending upon the quorum rules that apply for that particular CATSI corporation; but
- 4.180.2 conversely, if the requisite time period was too short, there is obviously the potential for substantial injustice to be caused to the member whose membership is cancelled.
- 4.181 On balance, we agree that 2 years may be too long. However, 2 attempts at contacting a member may not be sufficient especially where only the contact address set out in the Register of Members is used.

Recommendation

Cancellation of membership

- 4.182 Alternative contact information should be used as part of the process of contacting members where this can lead to cancellation of membership. It is recommended that the CATSI Act is amended as follows:
- 4.182.1 section 150-25(3) of the CATSI Act be amended to oblige the corporation to attempt to contact the potentially uncontactable member by using any alternative contact details nominated by that member for the purposes of receiving a notice of meeting, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months;
- 4.182.2 section 150-25(3) of the CATSI Act be amended to oblige the corporation, where no alternative contact method has been nominated by the member in accordance with section 201-25(3), to attempt to contact the potentially uncontactable member by any other means that the corporation's constitution (if any) permits, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months;
- 4.182.3 section 150-25(3) is further amended to provide that section 150-25(3)(c) will not be satisfied unless:
- 4.182.3.1 at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 4.182.1 above (but only where the member has nominated such an alternative contact method); or
- 4.182.3.2 where the member has not nominated such an alternative contact method, where at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 4.182.2 above (but only where this is provided for in the corporation's constitution);

- 4.182.4 section 150-25(3) be further amended to replace the phrase “a continuous period of 2 years prior to the meeting” in section 150-25(3)(b) with the phrase “a continuous period of 12 months prior to the meeting”;
- 4.182.5 section 150-25(3) be further amended to replace the phrase “2 year period” in section 150-25(3)(c) with the phrase “12 month period”; and
- 4.182.6 section 150-25(4) of the CATSI Act be amended to oblige the corporation’s directors to send a copy of the resolution:
- 4.182.6.1 to the address for the member that is entered on the Register of Members; and
- 4.182.6.2 where the member has nominated a postal address, fax number or email address for the purposes of receiving a notice of meeting, to at least one of those nominated addresses or fax numbers.

Additional issue raised by stakeholders during consultation: privacy

- 4.183 The issue of whether the address or other contact details of the members of a CATSI corporation should be made public (e.g. on the ORIC website) was also raised by several stakeholders during the consultation phase. Stakeholder feedback on this point was negative, including the following feedback:

*As a matter of privacy, the sector is not comfortable with the addresses of members being public on the ORIC website. The Sector suggests that a redacted version of the member’s register is published on the ORIC website which only reveals the names of the members but no other personal details.*¹²³

*[T]he proposal that members’ details be made public was not supported by those consulted due to privacy concerns. It was felt that CATSI corporations should be given the same privacy protections as corporations governance under the Corporations Act 2001 in this regard. It was suggested that if members’ details were required by ORIC, they should be accessible only to ORIC.*¹²⁴

- 4.184 This issue of privacy for members was also discussed at various consultations, with consistent support for members information (other than their names) being kept private i.e. not available to the public. ORIC currently publishes the names and addresses of members of CATSI corporations on its website. ASIC does not publish registers of members on its website for any type of corporation. However, companies can be searched for a fee and for companies limited by shares (but not companies limited by guarantee) the search will reveal details of the current membership including the shareholders address.
- 4.185 We consider that from a structural perspective CATSI corporations are generally more analogous to companies limited by guarantee. Strict equivalence with the Corporations Act regime for such companies would mean that no details about members of CATSI corporations would be published by ORIC or would otherwise be available except from the corporation itself.

¹²³ Written submission.

¹²⁴ Consultation Report, pp 202.

- 4.186 Currently, the CATSI Act regime is not the same as the Corporations Act regime and there did not seem to be any support among stakeholders for strict equivalence to be introduced. However, there was support among stakeholders for member's addresses and other details, not to be made publicly available. This appeared to be both in relation to ORIC's website and a CATSI corporation's Register of Members.
- 4.187 Some stakeholders also raised concerns raised about accessing this information from inspection of the Register of Members. Indeed, personal safety was raised where members details were sought in the context of family law and other proceedings. As noted above, such information can be accessed in respect of both CATSI corporations and Corporations Act corporations.
- 4.188 While the concerns raised by certain stakeholders are understandable, given the long-standing Corporations Act approach to this issue (on which the CATSI Act is modelled), we consider *other than for safety reasons*, any change would lead to misalignment with Corporations Act which would not be desirable in all the circumstances. In addition the design and operation of an alternative regime, where access to such information would have to be genuinely justified prior to access, would be complex and impractical, as it would most likely require the involvement of third party decision-makers.
- 4.189 Accordingly, the CATSI Act should be amended to allow the corporation to redact the relevant information where a company officer considers that disclosure of details on the Register of Members would compromise a person's safety. The relevant information could go beyond the affected member's address and could apply to other member's information as well where such disclosure could compromise the affected members safety. However, the rights of applicants seeking such information need to be protected and we consider they should have a right to request the Registrar to provide that information. This would enable the person to justify the need for the information and that no member's safety is compromised. The decision of the Registrar not to provide the information would be a reviewable decision.

Recommendation

Privacy of members

- 4.190 It is recommended that the Registrar reviews the rationale for publishing the unredacted Register of Members of each CATSI corporation on its website. If the Registrar decides to continue to publish member information, the Registrar should consider whether any greater emphasis should be placed on privacy or safety considerations of members and the circumstance in which redaction should be adopted.
- 4.191 Subject to safety concerns, we do not recommend any changes to the existing CATSI Act regime regarding inspection of the Register of Members of a CATSI corporations.
- 4.192 It is recommended that the CATSI Act should be amended so that where a company officer considers that disclosure of details on the Register of Members would compromise a person's safety the corporation is allowed to redact the relevant information. The relevant information could go beyond the affected member's address and could apply to other members' information where such disclosure could compromise the affected member's safety.

- 4.193 It is recommended that the applicant seeking such information should have a right to request the Registrar provide the information subject to the person justifying the need for the information and that no member's safety is compromised.

Other feedback from stakeholders during consultation

- 4.194 While stakeholders did not provide specific feedback as to whether members of a CATSI corporation should be required to provide more details for the register, there was support for enabling greater flexibility around methods of contacting members, for example, by using newspaper advertisements, public notices or social media.¹²⁵

4(E) MANAGEMENT OF CATSI CORPORATIONS

Introduction

- 4.195 CEOs and senior executives play an important role in the management of a corporation. These individuals are responsible for executing the strategy approved by the board and ensuring that a corporation is managed properly.¹²⁶
- 4.196 Across the Indigenous and non-Indigenous corporate sector, there has been a push for greater transparency and accountability for CEOs and senior executives. The main concerns regarding key management personnel have centred around performance, remuneration and the ability of the Registrar and the Courts to monitor and remove individuals who are not fulfilling their roles.
- 4.197 While the Registrar, CATSI corporations and the general public want to ensure that CEOs and senior executives perform their roles to a high standard, there is considerable divergence on how best to achieve this outcome. There is a tension between the view that CATSI corporations should have autonomy (i.e. the freedom to manage their own affairs) and the role of the Registrar to intervene and regulate CATSI corporations and their employees. The proposed solutions to these issues range from "softer measures" such as greater disclosure and information requirements to "harder powers" such as an increase in the Registrar's power to limit remuneration, impose civil fines and disqualify individuals.

Overview: the current situation

Statutory duties of CEOs and senior executives

- 4.198 The CATSI Act does not make explicit reference to CEOs and senior executives with the one exception of section 246-5(5) which states that a person who performs a CEO function may be a director but cannot chair the directors' meetings. A person will be deemed to perform a CEO function if they are a person with overall management responsibility for a corporation or a person who is responsible for financial matters.¹²⁷
- 4.199 Despite no clear signposting in the CATSI Act, CEOs and senior executives are also subject to many of the same duties that apply to directors and officers under the CATSI Act. As with the Corporations Act, "director" and "officer" are given a wide definition

¹²⁵ Consultation Report, pp 203; Written submission.

¹²⁶ ORIC, *February 2013: The vital role of your CEO/manager*.

¹²⁷ CATSI Act, section 694-85.

under section 683-1 of the CATSI Act.¹²⁸ Due to the nature of their activities and influence, a CEO will fall under the definition of an officer.¹²⁹

4.200 'Director' and 'officer' are defined as follows in the CATSI Act:

director	<p>s 683-1(1): a person appointed to be a director or alternate director who is acting in that capacity (regardless of the title of that person); or</p> <p>s 683-1(2): a person who is not validly appointed as director but acts in that position or a person to whom the directors of the corporation are accustomed to act in accordance with that person's instructions or wishes.</p>
officer	<p>s 683-1(3): a person is an officer if they are a</p> <ul style="list-style-type: none"> • director of the corporation; • secretary of the corporation; • special administrator of the corporation; • receiver, or receiver and manager, of property of the corporation; • administrator of the corporation; • liquidator of the corporation; • trustee of the corporation; • a person who is involved in making decisions that affect the business of the corporation or has the capacity to affect significantly the corporation's financial standing; or • a person to whom the directors of the corporation are accustomed to act in accordance with that person's instructions or wishes.

4.201 Both in the CATSI Act and the Corporations Act there is an overlap in the definitions as an officer is also defined to include a director. While alignment with the Corporations Act is highly desirable, there may be some merit removing this overlap to avoid confusion.

¹²⁸ Explanatory Memorandum to the CATSI Act, paragraph 5.639.

¹²⁹ ORIC, *Factsheet: Duties of directors and officers*. Note this is supported by authorities on the Corporations Act as the definition of "director" and "officer" is almost exactly the same as the meaning of a "director" and "officer" under the Corporations Act. See generally Australian Institute of Company Directors, *Role of chief executive officer or managing director: Governance relations*.

4.202 There are a number of exceptions to the criteria set out in paragraph 4.200. Even if the directors of the corporation act in accordance with a person’s instructions or wishes, a person will not be considered to be a director or officer if:

4.202.1 the directors act on advice given by the person in the proper performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors or the corporation;¹³⁰

4.202.2 the person is a native title holder and the directors act to ensure that the corporation complies with a Native Title legislation obligation;¹³¹

4.202.3 the person is a common law native title holder and has the capacity to affect significantly the corporation’s financial standing or that person, in complying with a Native Title legislation obligation, makes or contributes to decisions that affect the business of the corporation;¹³² or

4.202.4 the person is the Registrar.¹³³

4.203 Directors' and officers' duties largely cross over with two additional duties applying to directors only:

Directors' duties:	Officers' duties:
1. Duty of care and diligence	1. Duty of care and diligence
2. Duty of good faith	2. Duty of good faith
3. Duty to not improperly use position or information	3. Duty to not improperly use position or information
4. Duty to disclose material personal interests	
5. Duty to not trade while insolvent	

Registering CEOs and senior executives

4.204 The Registrar maintains a register of the details of each CATSI corporation.¹³⁴ Any member of the public can go to the ORIC website to search and access a CATSI corporation's information. The register has every registered and deregistered corporation's corporation extract reports. The register also contains copies of the corporation's documents held on the register about the corporation.

¹³⁰ CATSI Act, section 683-1(4).

¹³¹ CATSI Act, section 683-1(5).

¹³² CATSI Act, section 683-1(6).

¹³³ CATSI Act, section 683-1(7).

¹³⁴ Available at www.oric.gov.au.

- 4.205 While the corporation extract report and the other reports lodged by the corporations list who the directors, members and contact person/secretary are public, these documents do not disclose who their CEO or senior executives are.¹³⁵ This information would normally be found on the corporation's website or annual report and other publications. Not all CATSI corporations, however, have websites and therefore it is not easy to publically identify who their CEO or senior executives are without directly contacting the corporation.

The Registrar deregistering and disqualifying CEOs and senior executives

- 4.206 The Registrar maintains a publically available register of disqualified officers under the CATSI Act.¹³⁶ This register provides information on people who have been disqualified from managing corporations either by a Court or by the Registrar. It is an offence for a disqualified person to manage a CATSI corporation.¹³⁷
- 4.207 A person can be disqualified from managing a CATSI corporation in the following ways:

Automatic disqualification

- 4.207.1 A person will be automatically disqualified where:¹³⁸

4.207.1.1 they are convicted of:

- (a) an Australian or foreign offence that involves the business or financial standing of a CATSI corporation;
- (b) an offence of which contravenes the CATSI Act and which is punishable by imprisonment for a period greater than 12 months;
- (c) an Australian or foreign offence that involves dishonesty and is punishable by imprisonment for at least 3 months; or
- (d) an offence against the law of a foreign country and which is punishable by imprisonment for a period greater than 12 months.

4.207.1.2 they are an undischarged bankrupt;

4.207.1.3 they have executed a personal insolvency agreement under the *Bankruptcy Act 1966* (Cth) (or a similar law) and has not complied with the terms of the agreement; or

4.207.1.4 they are disqualified from managing corporations under the Corporations Act.

¹³⁵ See *Topic 6: Reporting* for more information on the types of reports that CATSI corporations must provide to the Registrar.

¹³⁶ Available at <http://register.oric.gov.au/DisqualifiedPersonRegister.aspx>.

¹³⁷ CATSI Act, section 279-1.

¹³⁸ CATSI Act, section 279-5.

Courts power of disqualification

- 4.207.2 Upon application by the Registrar, the Court may disqualify a person from managing CATSI corporations for a period that the Court considers appropriate. The Court may disqualify a person for the following reasons:
- 4.207.2.1 contravention of a civil penalty provision;¹³⁹
 - 4.207.2.2 the Court may disqualify a person who has breached a civil penalty provision under the CATSI Act or Corporations Act; and
 - 4.207.2.3 poor financial management.¹⁴⁰
 - 4.207.2.4 The Court can disqualify a person if within the last 7 years, a person has been an officer of two or more corporations that have failed.¹⁴¹ The failed corporations can be regulated either by the CATSI Act or the Corporations Act.

Repeated breaches of the CATSI Act¹⁴²

- 4.207.3 The Court has the power to disqualify a person where:
- (a) the person has (or the corporations where the person has been an officer have) breached the CATSI Act or the Corporations Act more than once and has failed to take reasonable steps to prevent this; or
 - (b) the person has been an officer of a body corporate (other than an CATSI corporation) and has done something that was against the duties of care and diligence and good faith under the CATSI Act.

The Registrar's power of disqualification¹⁴³

- 4.207.4 The Registrar can disqualify a person who has been an officer of two or more corporations in the past seven years where the corporations were wound up and the liquidator lodged a report stating the corporation's inability to pay its debts. The wound up corporations can be regulated either by the CATSI Act or the Corporations Act. Before disqualifying a person, the Registrar must give the person a written notice asking them to demonstrate why they should not be disqualified and giving them an opportunity to be heard.
- 4.208 CATSI corporations may be located in remote areas where there is only a small pool of individuals who can manage the corporation.¹⁴⁴ By reason of this unique situation, the Registrar has the power to grant leave to a person to manage a CATSI corporation even

¹³⁹ CATSI Act, section 279-15.

¹⁴⁰ CATSI Act, section 279-20.

¹⁴¹ A "failed corporation" is defined in the section.

¹⁴² CATSI Act, section 279-25.

¹⁴³ CATSI Act, section 279-30.

¹⁴⁴ Explanatory Memorandum to the CATSI Act, paragraph 5.306.

when they have been disqualified from managing Corporations Act or CATSI corporations.¹⁴⁵

The Registrar imposing civil penalties on individuals and CATSI corporations

4.209 The Court can impose civil penalties on individuals and corporations for breaches of the CATSI Act, such as:

- 4.209.1 breaches of officers' duties;
- 4.209.2 breaches of company secretaries' duties;
- 4.209.3 failure to meet requirements for record keeping and reports; and
- 4.209.4 insolvent trading.

4.210 Outcomes and penalties can range from freezing orders to protect the assets of a corporation to heavy fines, compensation and disqualification orders.¹⁴⁶ Between 2010 and 2017, the highest penalty awarded was disqualification for 15 years and compensation orders and fines exceeding \$1.2 million plus legal costs.¹⁴⁷

4.211 The Registrar has standing to apply to the Court for a declaration of contravention of the CATSI Act, a pecuniary penalty order or a compensation order.¹⁴⁸ The Registrar cannot directly impose civil penalties on a CATSI corporation or their directors. A CATSI corporation affected by a contravention of a civil penalty provision may apply for a compensation order or intervene in the proceeding relating to that corporation.¹⁴⁹

Remuneration

4.212 The levels of executive remuneration in the Indigenous and non-Indigenous corporate sector is an issue that generates significant discussion and debate. The issue of CEOs and senior executives receiving allegedly excessively high salaries and employee benefits has resulted in media attention and, in the context of CATSI corporations, a number of prosecutions.¹⁵⁰

4.213 In 2012, the Registrar contacted 372 CATSI corporations with over \$500,000 in income to collect data on the amounts they paid in remuneration, bonuses and other benefits to directors, senior managers and employees.¹⁵¹ Some of the key findings regarding CEOs were:

¹⁴⁵ CATSI Act, section 279-30(7).

¹⁴⁶ Australian National Audit Office, *Supporting good governance in Indigenous corporations*, paragraph 3.37.

¹⁴⁷ Australian National Audit Office, *Supporting good governance in Indigenous corporations*, paragraph 3.37.

¹⁴⁸ CATSI Act, section 386-20(1).

¹⁴⁹ CATSI Act, section 386-20(2)-(3).

¹⁵⁰ ORIC, *Media Release: Court order former CEO to pay over \$1.2 million in fines and compensation* (February 2014); ORIC, *Media Release: Former CEO of Kimberly Corporation Pleads Guilty* (May 2017); ABC News, *'Questionable' circumstances around \$700k pay out by Groote Eylandt's Aboriginal corporation* (September 2015); ABC News, *Mabunji Aboriginal corporation audit reveals 'financial irregularities'*, ORIC says (December 2015).

¹⁵¹ ORIC, *Remuneration - a report benchmarking the salaries of Aboriginal and Torres Strait Islander corporations*, p 4.

- 4.213.1 CEO remuneration level is influenced by the size of the corporation, the number of employees and the sector in which the corporation operates.
- 4.213.2 The total remuneration for CEOs ranged between \$44,084 and \$382,770 in 2012.
- 4.213.3 The total remuneration received by CEOs averaged \$119,387 in 2011 and \$122,448 in 2012.
- 4.213.4 In 98.8 per cent of cases, boards of directors approve and review CEO remuneration. In 87 per cent of cases the board of directors are responsible for approving the payment of bonuses to the CEO and other staff.¹⁵²
- 4.214 The Registrar exercised its statutory authorisation under section 453-5 in the CATSI Act to collect the above data and information from CATSI corporations. The Registrar stated that the aim of the report was to arm the Indigenous corporate sector and other stakeholders with reliable information as a basis to create internal remuneration policy documents. With the exception of the remuneration report, the Registrar does not regularly collect or publish information on current remuneration levels and practices in CATSI corporations.
- 4.215 The CATSI Act does not contain any provisions relating to CEO and senior management remuneration but the CATSI Act does deal with director remuneration. The CATSI Act prescribes that directors of a CATSI corporation are not to be paid remuneration unless the constitution (rule book) of the corporation allows this.¹⁵³ This is reflected in the rule book which contains the replaceable rule that directors are not to be paid. If the constitution (rule book) allows the directors to be paid, the directors' remuneration is to be determined by the CATSI corporation by resolution in a general meeting.¹⁵⁴
- 4.216 The Registrar and the members of a CATSI corporation can obtain information about the directors' remuneration and paid expenses. Members can only exercise this right if the threshold numbers of members (the greater of five members or 10% of the members of the corporation) request the information.¹⁵⁵ The corporation must disclose all remuneration and expenses paid to the director, regardless of whether it is paid to the director as a director or in another capacity e.g. a director who is also an employee.¹⁵⁶ The corporation must send either the Registrar and/or the members an audited statement of remuneration and expenses of each director of the corporation.¹⁵⁷ If the request is made by the Registrar, the audited statement will be sent to the Registrar and the members.¹⁵⁸

Discussion Paper questions

- 4.217 The Discussion Paper contained a number of questions regarding the management of CATSI corporations. For ease of reference, the discussion paper questions will be categorised by issue under the following headings:

¹⁵² ORIC, *Remuneration - a report benchmarking the salaries of Aboriginal and Torres Strait Islander corporations*, p 7.

¹⁵³ CATSI Act, section 252(1).

¹⁵⁴ CATSI Act, section 252(2).

¹⁵⁵ CATSI Act, section 252(7).

¹⁵⁶ CATSI Act, section 252(4).

¹⁵⁷ CATSI Act, section 252(5).

¹⁵⁸ CATSI Act, section 252(5)(ii).

- 4.217.1 Regulation of CEOs and senior executives in the CATSI Act;
 - 4.217.2 Increasing the powers of the Registrar to hold CEOs and senior executives accountable; and
 - 4.217.3 Remuneration.
- 4.218 On the topic of the management of CATSI corporations, the following questions were posed:

Remuneration and accountability of CEOs and senior management

- 4.219 *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:*
- 4.219.1 *Should CEOs and senior executives have statutory duties of care and diligence and are any other express statutory duties required?*
 - 4.219.2 *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?*
 - 4.219.3 *Should the Registrar have the power to deregister and disqualify CEOs and senior executives who fail to meet expectations?*
 - 4.219.4 *Should the Registrar have the power to impose civil penalties for corporations/their directors who fail to properly monitor CEOs and senior executives?*
 - 4.219.5 *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? Should such disclosure requirements be limited to large or potentially medium-sized corporations?*
 - 4.219.6 *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?*¹⁵⁹

¹⁵⁹ 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.

Discussion of key issues

Statutory duties of CEOs and senior executives

- 4.220 The Discussion Paper asked whether CEOs and senior executives should have statutory duties of care and diligence¹⁶⁰ and whether any other express statutory duties are required. As mentioned earlier, CEOs and senior executives will usually have the same statutory duties of care and diligence as officers due to their status as officers under the CATSI Act.
- 4.221 During the consultations, a number of participants expressed the view that CEOs should have the same or a similar level of obligations to the corporation as directors. Currently, the difference between the duties of "officers" and "directors" under the CATSI Act are largely the same, with directors being subject to two extra duties: the duty to disclose material personal interests, and the duty to not trade while insolvent. For comparison purposes, we note that under the Corporations Act, only directors are subject to the duty to disclose material personal interests¹⁶¹ and the duty to not trade while insolvent.¹⁶²
- 4.222 If CEOs and other senior management personnel of CATSI corporations were to be subject to these additional statutory duties, the CATSI Act would need to be amended to reflect this position. To make this legislative change would be problematic, as it is difficult to justify why a CEO of a CATSI corporation should be bound to a higher standard compared to CEOs of corporations under the Corporations Act.
- 4.223 If this change was implemented, it may result in CATSI corporations being less attractive places of employment, which in turn may make it more difficult for CATSI corporations to recruit and retain appropriately skilled and experienced executives. We note that it is also possible to include these duties in the employment contract of a CEO or senior executive, if the employer considers it appropriate and this is acceptable to the CEO or senior executive. Finally, it is arguably appropriate that directors have additional duties in comparison with other officers due to the fact that directors form the board and have ultimate responsibility for governance and oversight of the corporation, in addition to the board's critical role with respect to strategy, risk and retaining and removing the CEO.
- 4.224 The majority of the responses in the public consultations supported the idea that CEOs of CATSI corporations should perform at a higher standard than under the current regime. We consider, however, that this objective can be achieved without resorting to legislative change to bring the duties of "officers" in line with those of "directors" under the CATSI Act. The main ideas coming from the consultation involved the Registrar supporting CEOs to achieve better outcomes, and CATSI corporations and the Registrar being able to remove non-performing CEOs more easily.
- 4.225 There are a number of ways the Registrar could support CEOs to perform their roles in line with their existing statutory duties. Participants put forward the idea that CEOs be required to undergo an annual performance review. This requirement could be included in the CEO's employment contract, and in our view such a requirement would accord with generally-accepted principles of good corporate governance. The review of the CEO would normally be undertaken by a board subcommittee or the board itself. However,

¹⁶⁰ We consider that "statutory duties" meant statutory duties that expressly referred to the role of CEO or managing director.

¹⁶¹ Corporations Act, section 191.

¹⁶² Corporations Act, section 588G.

some participants in the consultation suggested that this could be undertaken by the Registrar or another external party (with the option for directors to also be involved in the process). This suggestion seems excessively complicated to us, particularly as the Registrar will not have close working knowledge of the CEO's actual day-to-day performance and management style, whereas the directors of the CATSI corporation ideally will. Obviously, there are various mechanisms for providing the reviewing body with additional information in this regard, including "360 degree feedback".

- 4.226 Some participants also noted that the Registrar and CATSI corporations should have greater focus on supporting internal staff to progress into senior management and CEO positions, leading to improved capacity and autonomy of CATSI corporations. This includes the idea of coaching or peer mentoring young Indigenous CEOs who could '*take the organisation in the right direction*' with some support.
- 4.227 Another practical solution would be to increase training to CEOs and directors. The Registrar currently offers directors and members "*Introduction to Corporate Governance*" training and other training courses.¹⁶³ The Registrar should consider whether this training should be adapted and promoted to CEOs and key management personnel. CEOs could be given specific training on what their role entails, how it fits into the overarching governance structure, their statutory duties and what resources and support services are available to them. Directors could be better trained with respect to the role and duties of CEOs, how to find the right CEO for their corporation and how to manage, oversight, mentor and remove CEOs.
- 4.228 ORIC's factsheet, titled '*Duties of directors and other officers*', notes that CEOs and senior executives will also bear duties under the CATSI Act.¹⁶⁴ It may be helpful to have more materials like this and, within these materials, emphasise that CEOs and senior executives have statutory duties as "officers" and can therefore face penalties for non-compliance with these duties.
- 4.229 Another concern arising from the consultations was about CEOs who were incompetent or misbehaving in their role, and the Registrar's and the CATSI corporation's ability to remove them. CEOs are ordinarily appointed by the board and can be removed by the board. The consultation participants gave feedback that in some cases, directors may be unwilling to act due to family or other relationships of influence with the CEO. We note that directors who are aware of a CEO's misconduct and do nothing will likely be in breach of their own statutory duties. We recognise that it may be more difficult for a board to recognise and remove a misbehaving senior executive as they may not report directly to the board.
- 4.230 During different consultations, there were concerns raised about "bad" CEOs who '*bounce from organisation to organisation*'. The Registrar already has the power to issue criminal and civil proceedings against CEOs and senior executives. The Registrar has successfully prosecuted CEOs for breaches of their statutory duties of care and diligence.¹⁶⁵ In contrast, the Registrar has not brought many actions against senior managers.¹⁶⁶ As

¹⁶³ KPMG report, *Factsheet: Duties of directors and other officers*, p 25.

¹⁶⁴ <http://www.oric.gov.au/publications/catsi-fact-sheet/duties-directors-and-other-officers>.

¹⁶⁵ *Registrar of Aboriginal and Torres Strait Islander Corporations v Berto* [2014] FCA 100; *Registrar Of Aboriginal And Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412; *Registrar of Aboriginal and Torres Strait Islander Corporations v Ponto* [2012] FCA 1500.

¹⁶⁶ There is only one reported case of the Registrar prosecuting senior executives: *Registrar of Aboriginal and Torres Strait Islander Corporations v Pini* [2014] FCA 1451. In *Pini's case*, the Registrar sought declaratory relief relating to the conduct of the respondents which they alleged was a breach of a director or officer's general duties under ss 265-1 and 265-10 and an order of disqualification pursuant

previously stated, the provisions of the CATSI Act relating to directors' and officers' duties effectively mirror the equivalent provisions of the Corporations Act. Senior managers have been prosecuted under the Corporations Act for breaching their statutory duties.¹⁶⁷ There could be a number of reasons why there have not been many prosecutions of senior executives under the CATSI Act, e.g. low incidences of senior executives breaching their duties, the Registrar preferring to pursue CEOs, or senior managers being dealt with internally or prosecuted under other legislation.

- 4.231 As noted above, the CATSI Act does not expressly state that CEOs, as officers, have statutory duties. One way of making this clearer would be to amend the CATSI Act, but for the reasons set out above we do not consider this to be necessary.

Registering CEOs and senior executives

- 4.232 The Registrar maintains a register of the details of each CATSI corporation but does not include any information on CEOs.¹⁶⁸ In order to increase accountability, the Discussion Paper queried whether CEOs and senior executives be required to register their details with the Registrar, similar to the proposed BEAR for banking executives.
- 4.233 In the 2017-2018 federal budget, the Commonwealth Government announced that it will legislate to introduce BEAR. A key objective of BEAR is to improve the operating culture of authorised deposit-taking institutions (**ADIs**), which includes all banks, and to increase transparency and accountability across the banking industry.¹⁶⁹ The proposed regime will be administered by the Australian Prudential Regulation Authority (**APRA**) and has similar measures to the Senior Manager & Certification Regime that was introduced in the United Kingdom in 2016.
- 4.234 One of the key proposals in the regime is to make senior executives more accountable for the actions and outcomes of their organisation. One of the new measures in the proposed bill is that "accountable persons" (defined as board members or senior executive with responsibility for management or control of significant or substantial parts or aspects of the ADI) will be required to register with APRA. APRA will maintain a register of the "accountable persons" of an ADI.¹⁷⁰ The register will not be public.¹⁷¹

to section 279-15 of the CATSI Act. The first respondent was the general manager and the second respondent was the business manager of the corporation. It was unclear whether the Court agreed that the respondents could be treated as directors or officers of the corporation with Dowssett J expressing doubt whether the conduct of the respondents would constitute a breach of their general duties. The Court stated, however, that as the respondents had consented to the appropriate declarations, it was not necessary that he resolved his doubts. It should be pointed out that the judge did not comment on whether it was appropriate to bring an action under division 265 against the respondents (however, this could be due to the fact that the respondents had consented to the declarations that they had breached this division).

¹⁶⁷ For example, in *Shafron v Australian Securities and Investments Commission* (2012) 286 ALR 612 where a person who held the roles of general counsel and company secretary was deemed to be an "officer" and liable for a breach of his duties under section 180(1) of the Corporations Act.

¹⁶⁸ Available at www.oric.gov.au.

¹⁶⁹ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.43.

¹⁷⁰ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.113.

¹⁷¹ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.113.

- 4.235 Accountable persons must register with APRA before they are appointed.¹⁷² A person cannot be accountable person unless they are registered with APRA and therefore, all existing directors and senior executives will also be required to register with APRA.¹⁷³ The benefit of this is that APRA will have a current list of all accountable persons and visibility on senior appointments before they are made.
- 4.236 Furthermore, ADIs will also be required to provide APRA with an accountability statement and accountability map of the roles and responsibilities of each accountable person.¹⁷⁴ The accountability map will identify the chain of responsibility through the ADI business.¹⁷⁵ The purpose of the accountability map will be to allow APRA to scrutinise the management structure and responsibilities and to have a clear idea of who is accountable if things go wrong. It is the ADI's responsibility to allocate responsibilities appropriately.¹⁷⁶ If an ADI does not or cannot do this, APRA will be able to provide direction to an ADI or its subsidiary on how to allocate the accountable person's responsibilities.¹⁷⁷
- 4.237 Another key feature of BEAR is that accountable persons will be required to meet their accountability obligations under BEAR.¹⁷⁸ The accountability obligations will specify the behaviour and conduct expected of an accountable person and are likely to be strengthened from the existing behaviour and conduct expectations under APRA's standards.¹⁷⁹ Where senior executives fail to meet expectations, they will no longer be able to be registered as an accountable person or be employed in a senior role.¹⁸⁰
- 4.238 The proposal to register CEOs and other senior management through a BEAR-like system or a similar regime did not generate significant discussion during the consultation process. As BEAR was only recently announced, it is possible that many participants were not aware of the proposed regime or familiar with its details. One stakeholder commented that it was too onerous for corporations under the CATSI Act to have their CEOs or similar, registered with the Registrar.
- 4.239 BEAR has come about in a general climate of reduced trust in the banking industry. It is arguable that it is not appropriate to extend this onerous regime to CATSI corporations, either while BEAR is still in its very early stages, or at all. Further, it is easier to justify BEAR for the banking industry which plays an important role in society, handles significant amounts of money and services the vast majority of individuals and businesses

¹⁷² Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.110.

¹⁷³ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.57.

¹⁷⁴ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.116.

¹⁷⁵ Explanatory Memorandum, *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), p 5.

¹⁷⁶ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.53.

¹⁷⁷ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.53.

¹⁷⁸ Explanatory Memorandum to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Exposure Draft), paragraph 1.92.

¹⁷⁹ See APRA, *Prudential Standard CPS 520 Fit and Proper*.

¹⁸⁰ Commonwealth, *Factsheet: Budget 2017; Banking and Financial Services; A more accountable and competitive banking system*.

in Australia. Despite many CATSI corporations being providers of key services to Indigenous communities, CATSI corporations are not comparable in their influence within the Indigenous community to banks and therefore it is questionable whether their CEOs and senior executives should be put under the same level of scrutiny as those in the banking sector.

- 4.240 If there are concerns regarding transparency of CEOs and senior executives, it would not be particularly onerous if CATSI corporations were required to include basic details regarding their CEO or senior executives when complying with their reporting obligations. They could provide the same level of detail that directors provide i.e. full name, date of birth, place of birth and residential address.
- 4.241 We note the concerns raised about "bad" CEOs who "bounce from organisation to organisation" that arose in the consultations. The Consultation Report stated:

Consultation participants considered the proposal of ORIC developing a "good" or "white list" (as opposed to a blacklist) of potential CEOs, as well as keeping track of poor performing CEOs. While one CEO interviewed strongly supported the proposal for a "white list" as "there are too many crooks ripping off communities", most of those consulted expressed concerns about such a list, noting that decision-making regarding inclusion on a list could become politicised and good candidates may be put off in applying for positions. They concluded that "rogue CEOs" are a problem but that regulation is not necessarily the best response. One suggested alternative to resolve this issue was to include ORIC in the CEO recruitment process, thereby enabling assessment candidates on a case-by-case basis in relation to a corporation's needs. Importantly, if this option was considered, it was felt that this should not be mandated under the CATSI Act but offered by ORIC as an "opt in" service. Ultimately, the group could not come to a consensus about how this could be done in a fair and accurate manner.

In discussing CEO accountability, one government representative interviewed questioned how best to deal with those who have a "history of capturing a community for their own interests."¹⁸¹

- 4.242 We consider that requiring the Registrar to maintain a "good" or "bad" list of potential CEOs would be problematic. We expect this would be an "open invitation" for litigation against the Registrar from those that consider they are unjustifiably on the "bad" list, and from those who fail to get on the "good" list. However, a potential ameliorating effect to the problem of hiring CEOs with a history of problems may be to have more information available about the employment history of potential candidates for CEO roles. If the recent employment history of the CEO's and other senior executives was required to be set out in a CATSI corporation's annual report, that history may be able to be tracked through different corporations.
- 4.243 Thus, it may be useful for a CATSI corporation's reports to include information about CEO's and senior management's employment history (i.e. the so called "C-suite"). We note that neither ASIC or the Corporations Act require that Corporations Act corporations report this information. Despite this, the inclusion of such information could be helpful for CATSI corporations and their boards, as it could help to increase transparency and accountability of senior management (and those applying for such roles). Further, such a

¹⁸¹ Consultation Report, pp 238.

requirement could assist the Registrar in having increased visibility of key management personnel within CATSI corporations, so that the Registrar is informed on the senior appointments within CATSI organisations and can provide support where appropriate.

- 4.244 Rather than a "good" or "bad" list we suggest that a voluntary list, or pre-qualification register of potential CEOs and/or senior management could be established. Such a pre-qualification register would set broadly acceptable vocational experience, public service or educational qualifications, seen as desirable pre-requisites for certain C-suite positions within CATSI corporations. It may also be necessary to include a power to add candidates that lack such experience where some other skills, experience, capability or other "merits" warrant the individual's inclusion on the register. The register could include relevant details such as qualifications and employment history, and should be open and available for inspection by all.
- 4.245 CATSI corporations could be encouraged to have their existing CEOs and senior management apply to be on the pre-qualification register. However, application for entry on the register would be open to all, and not just existing C-suite management. Over time CATSI corporations could be encouraged to hire from this register via requirements in funding agreements.
- 4.246 However, maintenance of such a register is important and those who cease to qualify would need to be removed from that register. Even if participation in the register was voluntary, such removal would, we expect, have potentially adverse consequences for the person removed. The power to remove a person from the register could also trigger natural justice requirements. For all these reasons, we consider that the best person to establish and operate the register is the Registrar.

The Registrar deregistering and disqualifying CEOs and senior executives

- 4.247 One of the questions for the Technical Review was whether the Registrar should have the power to deregister and disqualify CEOs and senior executives. Under the CATSI Act, a person can be disqualified from managing CATSI corporations automatically,¹⁸² by the Court (upon application by the Registrar)¹⁸³ and by the Registrar directly.¹⁸⁴
- 4.248 The Registrar's power to disqualify a person is based on ASIC's power of disqualification in section 206F of the Corporations Act. The Registrar can directly disqualify a person who has been an officer of two or more corporations in the past seven years where the corporations were wound up and the liquidator lodged a report stating the corporation's inability to pay its debts.
- 4.249 The question is then whether the Registrar should have further grounds to disqualify people. As mentioned earlier, the Courts have a wider scope to disqualify people for contravention of a civil penalty provision or for repeated breaches of the CATSI Act.
- 4.250 The Registrar does not appear to have used its power under section 279-30 to disqualify a person. The ten individuals listed on the Register of Disqualified Officers were all disqualified by the Courts.¹⁸⁵ If the provision has not been used by the Registrar, then it is

¹⁸² CATSI Act, section 279-5.

¹⁸³ CATSI Act, sections 279-15 - 279-25.

¹⁸⁴ CATSI Act, section 279-30.

¹⁸⁵ Note that the Register only contains individuals' names who are currently disqualified.

reasonable to ask whether the provision is effective or whether the reasons for disqualification are too limited (i.e. forcing the Registrar to apply to the Courts for a disqualification order). This issue did not receive significant attention during the consultation process and warrants further investigation.

- 4.251 Nevertheless, the Registrar's ability to disqualify people, upon application to the Courts or directly by the Registrar, appears to be appropriate for the circumstances of CATSI corporations. The same can be said about the grounds that the Registrar currently has to directly disqualify people. The consequences of disqualification are serious with individuals losing their positions and damaging their future career prospects by having their names contained on a public register. While the Registrar gives the person an opportunity to be heard before they are disqualified, the Courts can provide a neutral forum to resolve disputes and accord due process.

The Registrar imposing civil penalties on individuals and CATSI corporations

- 4.252 The Discussion Paper asked whether the Registrar should impose civil penalties on CATSI corporations or directors who fail to properly monitor their CEOs and senior executives. The Courts can impose civil penalties¹⁸⁶ on directors who fail to properly monitor their CEOs and senior executives, as this could constitute a breach of their duty of care and diligence.¹⁸⁷ In contrast, CATSI corporations may only be fined for failures to meet record keeping and reporting requirements.
- 4.253 Determining the culpability of individuals and corporations where there are alleged breaches of duty, can involve an exercise of both the establishment of the relevant facts and the interpretation, of and application, of relevant laws. The appropriate standards of evidence for the determination of facts and the appropriate interpretation of laws are generally matters for the courts. The courts are a neutral forum for determining the culpability of individuals and corporations. We consider that the courts should be the forum to determine whether the directors have breached their duties, and no new duties or penalties are queried.
- 4.254 Turning now to the corporation itself, as the corporation is an artificial person, it is the failure by the directors properly monitor their CEOs and senior executives that would give rise to the potential civil penalty being imposed on the corporation. Thus, the relevant failure remains that of the directors. We do not consider it appropriate to impose civil penalties on a CATSI corporation, in addition to directors, because directors are ultimately responsible for the oversight of the affairs of the corporation. If a CATSI corporation could be subjected to civil penalties as well, this would diminish the assets of the corporation that may be used for the benefit of the members¹⁸⁸ and would be to the detriment of the members of the CATSI corporation. Of course, there may situations where corporations should be subject to civil penalties especially where the actions of the directors and, hence the corporation, are detrimental to those beyond the corporation and its members, including market misconduct or manipulation.
- 4.255 The second part of the question is whether the Registrar should be able to bypass the court procedure in imposing civil penalties on individuals and corporations. The

¹⁸⁶ CATSI Act, section 386-1.

¹⁸⁷ CATSI Act, section 265-1.

¹⁸⁸ For Corporations Act corporations a topical issue is the potential for class actions by shareholders where there has been misleading or deceptive conduct or breaches of duty. The potential for such class actions against CATSI corporations is outside the scope of this Review.

Registrar currently does not have the power to impose civil penalties directly on individuals or CATSI corporations. Similarly, ASIC does not have these powers.¹⁸⁹

- 4.256 As noted above, in this context the courts are the appropriate forum for determining the culpability of individuals and corporations. Granting the Registrar the power to impose civil penalties potentially may be a useful deterrent to improper conduct by directors and corporations. However, in this circumstance, we consider that such a power would result in the Registrar being seen as "judge, jury and executioner". Accordingly, we do not consider the grant of such additional powers to the Registrar to be necessary or appropriate.

Remuneration

- 4.257 Remuneration was an issue which drew considerable debate during the consultation process. Many participants had mixed views on whether the Registrar should be involved in CEO and senior executives' salaries. ASIC does not set salary limits for key management personnel in Corporations Act corporations. The issue whether a salary is reasonable and proportionate is generally viewed as a subjective question, and participants had different views on whether salary caps, disclosure requirements and member approval would help or hinder this objective.

- 4.258 The Discussion Paper put forward a number of suggestions for addressing excessive remuneration such as the Registrar setting maximum limits on remuneration, CATSI corporations being required to disclose salary levels and members being able to approve the remuneration of CEOs and senior executives.

- 4.259 We note that:

4.259.1 publically listed companies under the Corporations Act are required to disclose the nature and value of remuneration of key management personnel in their annual reporting; and

4.259.2 the Corporations Act provides for a "two strikes and re-election" process for publically listed companies. If the remuneration report is presented and receives a no vote of 25 per cent or more, this will be the "first strike". Where a first strike occurs and comments were made on the remuneration report that was considered at the meeting, a subsequent remuneration report must be prepared that contains an explanation of the proposed action in response or the reasons for the board's inaction. If the subsequent remuneration report receives a no vote of 25 per cent or more, this will be the "second strike". If a second strike occurs, a spill resolution will be put to shareholders. The spill resolution will be passed if 50 per cent or more of eligible votes cast are in favour. All directors (other than the managing director) are required to stand for re-election at the spill meeting.¹⁹⁰

- 4.260 The KPMG Report proposed the two options set out in paragraphs 4.259.1 and 4.259.2 above.¹⁹¹ However, KPMG also commented that these options may be too burdensome and inappropriate for a large proportion of CATSI corporations. While we would generally agree with this conclusion, we note there are some CATSI corporations of

¹⁸⁹ See generally ASIC, *Report 387: Penalties for Corporate Wrongdoing*.

¹⁹⁰ Corporations Act, sections 250U - 250X.

¹⁹¹ KPMG Report, p 63.

significant size which undertake commercial activities and we query whether any of these could be said to be comparable to listed corporations. To that end, we recommend that further investigation is undertaken to ascertain whether certain large CATSI corporations should be required to disclose the nature and value of remuneration of directors and employees in their annual reports and whether the "two strikes and re-election" process should apply to such CATSI corporations, in a similar fashion to listed companies.

- 4.261 The proposal for the Registrar to set maximum limits on remuneration received very little support. One stakeholder commented that "*this would be out of step with normal practice for corporations... and may cause unintended consequences such as driving talented individuals away from the Sector*". Another participant commented that "*[i]t would be difficult for the Registrar to set maximum limits on remuneration for specific types of corporations given the diversity of circumstances; i.e. state and territory, urban, regional or remote; complexity and range of duties*".
- 4.262 Meanwhile, the question of whether CATSI corporations should be required to disclose their remuneration received more support amongst stakeholders. While some suggested that disclosure of remuneration to the community would cause issues as there is lack of understanding as to the roles and responsibilities of key management personnel, participants discussed how this measure would increase accountability and transparency for CATSI corporations. One CATSI corporation CEO who participated in an interview strongly endorsed disclosing his, and other CEOs' salary, as he viewed it as important for CATSI corporations to be as '*open and transparent*' as possible. In the group discussions, however, there were differing opinions on whether CEO salaries should be disclosed publicly, only to members, or only to the Registrar for aggregate reporting to inform its own information and reporting on salary trends across CATSI corporations.
- 4.263 If remuneration was to be disclosed to the Registrar, it may not be too onerous for CATSI corporations to include this information in their annual reports. Large corporations, medium corporations and small corporations with a consolidated gross operating income of more than \$100,000 are currently required to submit financial reports (which disclose the total amount spent on employee costs).
- 4.264 By contrast, we consider that the introduction of a requirement for member approval of remuneration would be unduly burdensome for CATSI corporations. This option would involve an amendment to the CATSI Act to require that a remuneration report be presented to the members at the AGM. As per the process for listed companies, the members would be asked to vote to approve the remuneration report. If the remuneration report failed to be approved by the members twice, then, as per the "two strikes" rule, the board may be dissolved and directors required to stand for re-election.
- 4.265 For publicly listed companies, the purpose of the remuneration report is to arm members with comprehensive information.¹⁹² As previously noted, some participants in the consultations have suggested that the current AGM requirements are already too onerous on the CATSI corporations (as demonstrated by the number of AGM extensions of time that are requested by CATSI corporations).¹⁹³ It is clear that a reform of this kind would complicate the AGM processes that CATSI corporations must comply with. On balance, we consider this to be undesirable.

¹⁹² Australian Institute of Company Directors, *Directors Remuneration*.

¹⁹³ KPMG Report, p 7.

Other feedback from stakeholders during consultation

- 4.266 Some stakeholders reported that if remuneration reporting or disclosure was introduced, the definition of "remuneration" would need to be expanded. It was observed that some directors and senior management personnel receive a number of valuable benefits in addition to their salaries e.g. free or subsidised housing, vehicles, flights etc. . One participant pointed to the Canadian *First Nations Financial Transparency Act 2013 (Canada)*, which requires that a First Nation disclose financial statements that contain information on salaries, wages, commissions, bonuses, fees, honoraria, dividends and any other monetary or non-monetary benefit that chiefs or councillors are receiving.¹⁹⁴ The expenses of First Nation leadership, such as transportation, accommodation, meals and hospitality and incidental expenses, must also be included.¹⁹⁵
- 4.267 Another option proposed was that the Registrar collect and publish information on current salary practices in CATSI corporations on a regular basis. As discussed earlier, the Registrar has published a detailed report of the remuneration breakdown across CATSI corporations in 2013. The information was presented without comment from the Registrar and did not disclose the identity of the CATSI corporations who had provided the data. This information could be useful for comparison purposes and the Registrar already has the statutory authority to collect this type of data from CATSI corporations.
- 4.268 It was also suggested that the Registrar provide guidance to corporations regarding remuneration of CEOs and senior executives. Some participants saw significant benefit in the Registrar developing a "banded" salary or award schedule for CATSI corporation CEOs on an annual basis. It was suggested that if the CEO's pay was outside the relevant band then the members would be required to approve the remuneration, or else it would be prohibited.
- 4.269 Additional options that were put forward in the KPMG report that could also assist with CATSI corporation remuneration issues were as follows:¹⁹⁶
- 4.269.1 the Registrar should provide additional guidance and training on how boards can apply due care and diligence when setting salaries and benefits; and
 - 4.269.2 the Registrar should give information to boards on how they can use independent remuneration consulting services.
- 4.270 The above additional options suggested by KPMG would not require any legislative amendments. We support these proposals.

Final recommendations

Statutory duties of CEOs and senior executives

- 4.271 We do not consider it necessary to amend the CATSI Act to give CEOs and senior executives additional statutory duties (in line with the duties that apply to directors currently), because:

¹⁹⁴ Government of Canada, *Questions and Answers Related to the First Nations Financial Transparency Act (FNFTA)*.

¹⁹⁵ Government of Canada, *Questions and Answers Related to the First Nations Financial Transparency Act (FNFTA)*.

¹⁹⁶ KPMG Report, p 62.

- 4.271.1 the statutory duties that CEOs and senior executives currently hold as officers of the CATSI corporation reflect the duties imposed on "officers" under Corporations Act; and
 - 4.271.2 if a CATSI corporations wishes to impose additional or more onerous obligations on CEOs and senior executives, they could do this without legislative change, for example by seeking to include such obligations in the employment contracts that the CATSI corporations offers to executives.
- 4.272 We encourage the Registrar to undertake the following actions to support CEO and senior executives in performing their roles (hence ensuring compliance with statutory duties):
- 4.272.1 create training materials and guidance that make clear that CEOs and senior executives have statutory duties under the CATSI Act. These materials could be targeted at CEOs, senior executives and the boards of CATSI corporations.
 - 4.272.2 promote the idea of optional performance reviews for CEOs to be undertaken by the Registrar, the board or an external party.
 - 4.272.3 investigate whether it would be worthwhile to introduce a "CATSI corporation CEO mentoring program". This voluntary program could match up a young CEO who wished to be paired with a more senior CEO from a CATSI or Corporations Act corporation in order to receive guidance and advice on a regular basis. This proposal will need further development and investigation to see whether there is the demand or resources for a mentoring program.

Registering CEOs and senior executives

- 4.273 It is recommended that CATSI corporations include their CEOs and senior executives' names, addresses, contact details and employment history over the last ten years in their annual reports. This information could be integrated into the existing information that CATSI corporations are required to provide regarding the directors and members. We support this legislative change as it will not significantly increase the existing reporting obligations on CATSI corporations, and will provide transparency around CATSI corporation key management personnel. It will also assist the Registrar in monitoring and supporting CATSI corporations.
- 4.274 In contrast, we do not recommend that the CATSI Act is amended to require the Registrar to implement a registration regime for CEOs or senior executives in line with BEAR. Such a regime would require significant effort for the Registrar to implement and CATSI corporations to comply with, and does not appear to be warranted in the circumstances.

The Registrar deregistering and disqualifying CEOs and senior executives

- 4.275 We do not recommend that the Registrar be given further powers to deregister and disqualify CEOs and senior executives. The Registrar can directly disqualify CEOs in their own right, or apply to the Courts for disqualification orders. We recognise that it can be expensive and time consuming to utilise the Court process, but considering the serious implications of deregistration and disqualification, there is value in involving a neutral arbitrator such as the Courts.

The Registrar imposing civil penalties on individuals and CATSI corporations

- 4.276 For similar reasons to those listed above, we do not recommend that the Registrar have the power to directly impose civil penalties on CATSI corporations and directors. It is not appropriate for the Registrar to bypass the Courts to impose these civil penalties.

Remuneration/Benefits

- 4.277 Other than small sized CATSI corporations, CATSI corporations should provide details of their director, CEO and senior management salary and benefits packages to the Registrar. The Registrar should collect remuneration/benefits data and disseminate de-identified information about director, CEO and senior management remuneration, in such categories as the Registrar considers appropriate. This information would be a useful touchpoint for CATSI corporations to benchmark their remuneration levels against current "market" practice. The availability of more information regarding the remuneration practices of CATSI corporations will encourage further transparency and accountability for CEOs and senior executives of CATSI corporations.
- 4.278 We do not recommend that the Registrar set maximum remuneration limits for any employees of a CATSI corporation. This measure was regarded by stakeholders as too heavy-handed as would be out of step with the private sector.
- 4.279 It is recommended that further investigation be undertaken about whether certain large sized CATSI corporations (e.g. those with a gross operating income of \$10 million per annum) be required to disclose the nature and value of remuneration of directors and employees in their annual reports in a similar fashion to listed entities.
- 4.280 We further encourage the Registrar to provide:
- 4.280.1 guidance and training on how boards can apply due care and diligence when setting salaries and benefits; and
 - 4.280.2 information to boards on how they can use independent remuneration consulting services.

4(F) DIRECTORS

Introduction

- 4.281 Under the corporate governance system that is reflected in Australia law, the board of directors of a corporation is responsible for the governance and oversight of the corporation's activities, and is also required to provide information relating to the operation of the corporations to its members. While the board is responsible for overseeing the day-to-day running of the corporation it is not responsible for the management of the corporation's day-to-day activities; as this is the responsibility of management. The usual flow of accountabilities is that management is accountable to the board, and the board is accountable to members. Accordingly, the members have various rights, including the right to call meetings and request information, and remove and replace directors provided a sufficient number of members agree.
- 4.282 As the directors are responsible for the overall governance and oversight of the corporations, and are required to act in the best interests of the corporation as a whole, it

is important that directors fully understand all legal requirements and governance best practice and are sufficiently able to perform their functions. However, there is no statutory requirement that directors of a Corporations Act corporation or a CATSI corporation have a particular level of training or specific qualifications in order to be eligible to hold office. Once a director is elected or appointed, they have a duty to the corporation and its members, and can be personally liable for breaches of these duties, as well as causing the corporation to be in breach of its obligations under the Corporations Act or the CATSI Act (as applicable).

- 4.283 Directors of CATSI corporations perform the broadly the same function as directors of Corporations Act corporations. The directors of a corporation therefore play a vital role in its governance. Directors of CATSI corporations 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.
- 4.284 There are various reasons why a CATSI corporation may be formed: there may be a legislative requirement or it may be required by a government policy, or it may be an exercise of the will of the community group. The CATSI Act presents unique challenges for the statutory regulation of directors due to the issue of 'involuntary incorporation'.¹⁹⁷ Some examples of circumstances where Indigenous groups or communities must incorporate under the CATSI Act are:¹⁹⁸
- 4.284.1 requirement by the Native Title Act to establish a CATSI corporation;
 - 4.284.2 requirement by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), or other State and Territory land rights regimes, to establish a CATSI corporation; and
 - 4.284.3 requirement by government funding bodies to form CATSI corporations before they are eligible to receive the funding for delivery of a wide range of essential services (such as housing, health, or employment) to Indigenous communities themselves under 'self-management' policies.
- 4.285 During the consultation process, stakeholders raised various concerns regarding the obligations of directors, including the following:
- 4.285.1 the level of experience and qualifications of directors, especially in small CATSI corporations, may not be sufficient to allow them to comply with their requirements under the CATSI Act; and
 - 4.285.2 the effect of familial and kinship obligations on directors of CATSI corporations.
- 4.286 In addition to the concerns identified regarding the operation of directors within the CATSI Act framework, other matters relating to restrictions currently in place on the boards of CATSI corporations were raised, including the ability to appoint independent directors and the appropriateness of restrictions on related party transactions.

¹⁹⁷ Australian Human Rights Commission, *Native Title Report 2007*, p 127.

¹⁹⁸ Australian Human Rights Commission, *Native Title Report 2007*, p 127.

Director training and qualifications

Summary

- 4.287 Under the Corporations Act, to be a director of a corporation the individual need only be 18 years of age and not otherwise disqualified from managing corporations.¹⁹⁹ There is no requirement that the directors hold specific management qualifications or have prescribed levels of previous experience. Similarly, the CATSI Act does not currently mandate any additional qualifications or experience requirements for directors of CATSI corporations.
- 4.288 The governing documents of the corporation, in most cases the rule book for CATSI corporations and the constitution for other corporations, can impose additional requirements such as a minimum level of formal qualifications or specific previous experience in particular sectors or positions. In practice, this rarely occurs,²⁰⁰ or where it does the qualifications may be unrelated to those to be a good director. The governing documents also prescribe the process by which directors are appointed, which would ordinarily involve the current directors of the corporation resolving to appoint a new director at a board meeting or by circulating resolution.
- 4.289 Where directors do not have the sufficient skills in business management or corporate governance to comply with all of their duties and ensure that the CATSI corporation complies with all its reporting and filing obligations, the Registrar should intervene and assist the directors or the CATSI corporations to comply with all requirements.²⁰¹ Currently, there are numerous resources offered by ORIC to assist directors or officeholders of CATSI corporations to develop the requisite skills to manage their corporations, including fact sheets, templates and position descriptions.²⁰² None of the modules offered by ORIC or any formal tertiary qualifications are currently obligatory for directors or senior executives of CATSI corporations.
- 4.290 Several problems have been identified with the existing model of training, including a focus on initial education and a lack of ongoing support, over-subscription to formal training programmes and courses leading to under-participation, and a focus on the establishment and introductory elements rather than skills required for medium to large corporations.²⁰³
- 4.291 There are a number of training courses for directors of CATSI corporations and the Registrar delivers some director training, especially regionally, so that directors can be made more aware of their role and duties. Further, some funding bodies require directors of CATSI corporations to participate in the Registrar training as a condition of funding.

¹⁹⁹ Corporations Act, section 201B; see also sections 206F and 206G for circumstances where disqualified directors may still be appointed if permission is given by ASIC or the Court respectively.

²⁰⁰ Although in some membership-based companies references of classes of members may be by virtue of holding some qualification or registration, e.g. being a member of the medical profession.

²⁰¹ Australian Human Rights Commission, *Native Title Report 2007*, p 130.

²⁰² KPMG Report, p 29.

²⁰³ KPMG Report, pp 25 - 32.

Discussion Paper questions

4.292 The Discussion Paper included the following questions:

8.2.1 Should the CATSI Act mandate that new directors have training before they become directors²⁰⁴ or within a certain period of being in office?

8.2.2 Should such training be mandatory for certain types of corporations?

Discussion of key issues

4.293 The private consultation groups were of the view that, while there are examples of directors of CATSI corporations that are underqualified for the role, and that this in turn can lead to problems with governance and mismanagement of the corporations, CATSI corporations should not be required to mandate training for directors. Individuals should not be prevented from being directors of Corporations Act corporation or a CATSI Act corporation or any other legislation due to the fact that they have not received prescribed training in corporate governance.

4.294 However, all groups consulted were broadly of the view that training being offered to directors is very important, and that increasing the resources and availability of training is positive. Accordingly, while the groups consulted did not want mandatory training requirements to be imposed, many stakeholders agreed that it may be a positive step for some CATSI corporations to amend their rule books to require a proportion of the total board members to have a particular level of training (e.g. requiring the chairperson and the treasurer to undergo either training provided by ORIC or more formal tertiary certification such as Certificate IV in Management). Participants indicated that the fundamental policy underlying this opinion is that the autonomy of CATSI corporations be respected, and that CATSI corporations remain in control of setting director qualification requirements.

Recommendations

4.295 Requiring directors of CATSI corporations to complete training that is not required for directors of other corporations would impose an undue compliance burden and unreasonably interfere with the autonomy of the CATSI corporation. It is recommended that CATSI corporations not be required to mandate director training for current or incoming directors, but that all CATSI corporations be encouraged and supported to ensure that all directors have the necessary skills to manage their responsibilities.

Disqualification of directors

Summary

4.296 The Corporations Act provides for a regime whereby directors of corporations can be disqualified, either automatically or by order of the courts or appropriate agency, under numerous circumstances. Disqualification can occur in various circumstances including:

4.296.1 automatic disqualification for situations involving illegal activity, bankruptcy and insolvency, or foreign disqualification orders;²⁰⁵

²⁰⁴ Following suggestions in *Registrar v Monaghan (No 2)* [2016] FCA 1143.

²⁰⁵ Corporations Act, section 206B.

- 4.296.2 court ordered disqualification for contravention of civil penalty provisions, repeated contraventions of the Corporations Act and other matters,²⁰⁶ and
- 4.296.3 disqualification under other legislation, namely the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).²⁰⁷
- 4.297 CATSI corporations are excluded from Part 2D.6 of the Corporations Act, except to the extent that the provisions under the Corporations Act are adopted by the CATSI Act, and to the extent that an individual who is disqualified from managing CATSI corporations is automatically disqualified from managing other corporations.²⁰⁸

Discussion Paper questions

- 4.298 The Discussion Paper included the following questions:

*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"?*²⁰⁹

Discussion of key issues

- 4.299 The Supplementary Explanatory Memorandum to the *Corporations (Aboriginal and Torres Strait Islander) Bill 2006* indicated that:

Proposed section 279-5 is based on the automatic disqualification rules in section 206B of the Corporations Act. Significantly, proposed subsection 279-5(5) ensures that persons disqualified under the Corporations Act are automatically disqualified from managing CATSI corporations. This ensures that the disqualification provisions under the proposed CATSI Bill and the Corporations Act are as closely aligned as possible...

- 4.300 The Discussion Paper question on disqualification was not specifically discussed in the public consultations. However, the Consultation Report notes that concerns were raised about the appropriateness of disqualification of directors based on criminal history.
- 4.301 The Commonwealth Parliament's *Bills Digest no. 82 2005–06 Corporations (Aboriginal and Torres Strait Islander) Bill 2005* also raised disqualification for criminal offences:

The result of including as a disqualifying criterion, conviction of offences punishable by imprisonment for 3 months is that convictions for quite minor offences will give rise to an automatic 5 year disqualification. Whether this is appropriate in light of

²⁰⁶ Corporations Act, sections 206C - 206EAA.

²⁰⁷ Corporations Act, sections 206EA and 206EB; see also section 206F for circumstances where ASIC can disqualify directors.

²⁰⁸ Corporations Act, section 206B(5).

²⁰⁹ See *Registrar v Kerkhoffs (No 2)* [2013] FCA 1446 at [12] and *Registrar v Kerkhoffs* [2013] FCA 1445 at paragraphs 9 - 11.

the fact, frequently noted by the Review team, that Indigenous persons arrest and imprisonment rates are significantly higher than others, is a matter for debate.

The attachment of the disqualification criterion to offences punishable by a given sentence, rather than, for instance, by reference to serving or having served a sentence of a given length, as well as making the criterion harsher, also poses administrative problems. This is because, rather than simply having to determine whether a person has served or been sentenced to a given period of imprisonment, the administrator must make an inquiry as to the applicable maximum sentence in respect of particular offences. This may not be straightforward especially in cases of overseas convictions. Similar problems have influenced the change of criterion for disqualification of prisoners from voting to one based on sentence served, rather than on potential sentences.²¹⁰

- 4.302 In the Written Submissions there was general support for retaining the director's disqualification provisions in their current form. One submission indicated that it was not acceptable to lower the standards of governance of CATSI corporations simply to 'balance conventional expectations'. That respondent considered that governance standards are already low, and to lower them further would be to invite further misuse of member and taxpayer money. Another supporter of maintaining the existing regime noted that where there is likely to be conflict between the obligations of a director of CATSI corporation, and that person's obligations to clan and tribe, this should be taken as an indicator that there may be other corporate models better suited to the purpose under which the conflict has arisen.
- 4.303 However, another respondent acknowledged the tension that can arise between director's duties and a director's cultural obligations. That respondent considered that amendments to section 279-5 may be appropriate if disqualification of directors due to clashes between a director's duties and his/her cultural obligations are becoming a prevalent problem which leads to significant numbers of people being disqualified from serving as directors for a significant number of years.
- 4.304 A respondent noted that amendments to section 279-5 may ensure that sufficient numbers of qualified persons remain available to act as directors of CATSI corporations and as responsible persons of ACNC-registered charities. It was noted that a condition of suitability of a "responsible person" of registered charities is that the person is not disqualified from managing a corporation within the meaning of the Corporations Act. If section 279-5 of the CATSI Act substantially diverges from section 206B of the Corporations Act, this will impact on ACNC-registered CATSI corporations. These entities will then need to ensure that their directors are eligible under the CATSI Act and also meet the suitability conditions under the ACNC Act.

Recommendations

- 4.305 We do not recommend any changes to section 279-5 at this time. However, further research is required into whether significant numbers of directors are being disqualified based on criminal convictions punishable by imprisonment for 3 months.

²¹⁰ Footnotes omitted.

Independent directors

Summary

- 4.306 Under the CATSI Act, CATSI corporations are prohibited from appointing independent directors unless it is expressly provided for in the corporation's rule book, meaning that the option to appoint them has been approved by the members. This has the effect that if a rule book did not contemplate the need for independent directors at the time it was drafted, or the conditions have changed as would warrant the appointment of an independent director but this was seen as ill-advised at the time of the drafting of the rule book, the members must first approve an amendment to the rule book before any independent directors can be appointed.
- 4.307 As the process for amending the rule book may be more onerous than the requirements for appointing a director (for example, regulation on timing or the amount of votes required), the status quo may prevent CATSI corporations from being able to appoint independent directors in a timely way or in response to particular matters that come before the board. If there are difficulties achieving quorum at general meetings, this may simply prevent the CATSI corporation from achieving the required numbers of member votes to amend the rule book.

Discussion Paper questions

- 4.308 The Discussion Paper included the following questions regarding the appointment of independent directors:
- 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?*

Discussion of key issues

- 4.309 The appointment of independent directors was seen by some stakeholders in the public consultations as having the potential for positive effects on the boards of CATSI corporations where there was a lack of the required qualifications or experience in a particular area of governance or management. It was also seen as beneficial to utilise independent directors for the resolution of disputes between current directors.
- 4.310 Both the private and the public consultations were broadly in favour of the concept of independent directors provided that their appointment was not mandatory, and that the CATSI corporation maintained its autonomy on the issue. Such autonomy means that the corporation is able to determine who the independent director should be and the manner of their appointment (in the event that it was deemed appropriate for the CATSI corporation to appoint such a director). It was also emphasised that independent directors may of course be Aboriginal or Torres Strait Islanders, and that concept of "independence" should not be interpreted as meaning "independent from the Indigenous community".
- 4.311 Some participants in the private consultations believed that some communities have a negative perception of independent directors who are not from the relevant community as they can lack familiarity with underlying circumstances of the corporation and the community. The same consultation discussed the possibility of the Registrar keeping a register of approved or vetted independent directors, but there was no overall agreement

that a register was the correct way to proceed, simply that if such a register existed it should be established and maintained regularly by the Registrar.

Recommendations

- 4.312 In a similar vein to mandatory director training and qualifications, it is an undue infringement on the autonomy of CATSI corporations to introduce a requirement to appoint independent directors. However, as the appointment of independent director can be very beneficial to any corporation and also to CATSI corporations, we recommend that they should be encouraged to make such appointments where appropriate.
- 4.313 It is recommended that the CATSI Act be amended to reverse the prohibition on the appointment of independent directors unless the rulebook provides for their appointment to the default position that all CATSI corporations may appoint independent directors unless their rule book expressly provides otherwise.

Related party transactions

Overview of current situation

- 4.314 Due to the ability of the directors of corporations to make decisions on behalf of the entity that affect the assets of the members, the Corporations Act imposes restrictions on the ability of directors of public companies to engage in dealings with related parties where a financial benefit is provided. The Corporations Act provides the process by which a financial benefit may be provided to a related party, and requires member approval to be obtained in the manner prescribed.²¹¹ There are limited exceptions to these requirements in the Corporations Act, most of which were replicated in the CATSI Act.²¹²

- 4.315 The Supplementary Explanatory Memorandum to the *Corporations (Aboriginal and Torres Strait Islander) Bill 2006* indicated that in relation to party transactions:

*Proposed section 284-1 is based on the member approval requirement for related party benefits in section 208 of the Corporations Act. Section 208 of the Corporations Act applies to public companies. This standard is appropriate for CATSI corporations to soundly protect the interests of members and recognises the large degree of public and essential services that are funded via CATSI corporations.*²¹³

- 4.316 This suggests a two-fold reason for the use of the related party provisions:

4.316.1 protection of members, and

4.316.2 protection of finances where public funding has been provided to the CATSI corporation.

- 4.317 The Supplementary Explanatory Memorandum can be contrasted with what was noted in the Commonwealth's *Bills Digest no. 82 2005–06 Corporations (Aboriginal and Torres Strait Islander) Bill 2005*:

²¹¹ Corporations Act, section 208; see also Corporations Act sections 217 - 227 for the procedure for obtaining member approval.

²¹² Corporations Act, sections 210 - 216.

²¹³ Explanatory Memorandum to the *Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, [5.308].

There are a number of complex steps that a corporation is required to comply with in obtaining member approval [to related party transactions]. These provisions are modelled on equivalent provisions in the Corporations Act which apply only to public companies. It can be assumed that the resources of the latter in terms of their ability to engage professionals to assist them in compliance generally would outweigh those available to indigenous corporations. Though recommending the issue of related party transactions be addressed, the Review team noted that the provisions relating to related party transactions in the Corporations Act may be more complex and comprehensive than is required under the ACA Act. The Review team suggested that a simplified statement of the duty might be adopted. This does not appear to have been done, with the provisions in the Bill closely following those in the Corporations Act. The necessity of including such a complex regime in this Bill is open to question. Another option might be to apply this regime only to large corporations, as defined in Chapter 7.²¹⁴

4.318 CATSI corporations are established to operate in a range of situations in Indigenous communities where a small or large proprietary company could be used, and if such a company was used, then the related party transaction prohibitions would not apply. While CATSI corporations effectively resemble public companies under the Corporations Act, there are good policy reasons for applying the restrictions to public companies that may not apply to all CATSI corporations. These related parties provisions may be unsuitable for CATSI corporations:

4.318.1 where there are extensive family and kinship relationships, or

4.318.2 where the corporation is a small sized corporation.

4.319 Also, the related party transaction rules may be poorly understood by some directors, leading to inadvertent contraventions. Further, these provisions may prevent CATSI corporations from contracting with entities related to their directors, where these entities are the best qualified to provide the relevant services to the corporation.

Discussion Paper questions

4.320 The Discussion Paper included the following questions regarding the treatment of related party benefits:

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?

Discussion of key issues

4.321 Participants in the private consultations raised the issue of the distinction between a benefit achieved as a result of the person's position within the CATSI Act corporation but which did not diminish the corporations assets and a benefit that directly affects or diminishes from the assets or benefits of the CATSI Act corporation.

²¹⁴ Footnotes omitted.

- 4.322 No participants were of the view that it is acceptable for a related party to obtain a benefit at the expense of the members of the CATSI Act corporation, but some believed there was less certainty around the restrictions where the benefit did not so affect the members or the asset value of the CATSI corporation.
- 4.323 Division 290 of the CATSI Act sets out the required procedure for obtaining member approval of related party benefits. Under this procedure, the corporation must lodge material that will be put to members with the Registrar, at a minimum this must include: an explanatory statement²¹⁵ and the proposed notice of the meeting setting out the text of the proposed resolution.²¹⁶ The proposed resolution and any documents lodged with the Registrar must be included with the meeting notice and be the same in all material respects as the documents lodged with the Registrar. However, by virtue of section 290-30 the resolution that must be put to the meeting of members is the resolution as in the notice without any variation or amendment. This provision also exists in the Corporations Act.²¹⁷
- 4.324 A Written Submission noted that:

Section 290-30 prevents directors from varying the resolution to provide related parties with benefits of greater value than originally listed in the meeting notice; this is an important protection for family groups in RNTBCs that face risks of unfair treatment.

- 4.325 However, the same Written Submission drew our attention to difficulties with section 290-30 in the CATSI corporation context:

...this [section] assumes that the processes for making decisions on related party benefits within an Aboriginal and Torres Strait Islander corporation will follow the decision making processes that occur in typical companies.

Section 290-30 precludes any form of ad-hoc change to a proposed related party payment on the day of the meeting. This can be at odds with how decisions develop, particularly in RNTBCs. To illustrate, consider the distribution of compensation funds received by an RNTBC for the extinguishment of Native Title. On the day of the meeting Traditional Owners discuss and agree the amounts each related party should receive. In practice, the issue of how much a related party should receive will be subject to debate on the day.

Under the current framework, any change to the amounts listed in the meeting notice must be disclosed to all members by way of a new notice which must be considered at another meeting before the changes can be passed. For RNTBCs with a remote, dispersed membership base, holding another meeting may involve considerable expense. ...

However, the requirement to seek an exemption from the Registrar in order to implement decisions, made in accordance with law and custom, undermines self-determination.

²¹⁵ CATSI Act, section 290-5(1)(b).

²¹⁶ CATSI Act, section 290-5(1)(a).

²¹⁷ Corporations Act, section 223.

While there are compelling reasons to ensure the resolution cannot be changed significantly, the CATSI Act ought to recognise that decisions regarding the distribution of resources to related parties will be contested; proposals are subject to change on the day.

- 4.326 While we note that the CATSI Act provides for a court to declare the conditions in Division 290 to have been satisfied if they have been substantially complied with,²¹⁸ we note that seeking a judicial determination that a resolution varied at a meeting should be treated as substantial compliance with Division 290 would be a costly and time consuming process. Further, such a determination may not be forthcoming given the clear words of section 290-30 of the CATSI Act.

Recommendations

- 4.327 While there is a clear desire to prevent the mismanagement of CATSI Act corporation assets and funds, it is important to recognise the specific characteristics and challenges of CATSI corporation management. It is recommended that the provisions relating to restrictions on related party dealings be retained, but that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions where it would be beneficial to the affected director and in no way detriment the members of the CATSI Act corporation.
- 4.328 As CATSI corporations differ both in size and in terms of the scale of their operations, we recommend that a threshold for transactions that trigger the related party transactions provisions in the CATSI Act should be introduced for small CATSI corporations. A *de minimis* exception of \$5,000 (or such other amount as may be prescribed in regulations) from time to time should apply. However, we further recommend that all related party benefits be appropriately detailed in an annual report that is provided to members and the Registrar.
- 4.329 It is recommended that section 290-30 be amended to require that the resolution put to members at the meeting be "materially the same" as the resolution in the notice of meeting, and that the regulations made under the CATSI Act may prescribe how the concept of "materiality" is to be determined.

²¹⁸As does the Corporations Act, section 227(1).

Chapter 4 Recommendations

Recommendation 1: The classification of CATSI corporations be simplified by removing the assets and employees tests. It is recommended that classification be based on annual revenue in line with the classification for companies limited by guarantee and that used by the ACNC.

Recommendation 2: The CATSI Act should embody a three tiered model based on revenue with small companies below \$250,000 of revenue having significantly lesser obligations. It is recommended that the threshold be aligned with requirements for companies limited by guarantee (i.e. revenue of \$250,000, below \$1m and \$1m and above), that the deductible gift recipient requirement not be replicated and the same reporting requirements apply as for companies limited by guarantee.

Recommendation 3: It is recommended that the replaceable rules be removed from the CATSI Act, but that the CATSI Act be clear that the matters covered by those replaceable rules be covered in a corporations rule book. Further, it is recommended that the Registrar instil a practice that proposed CATSI corporations can adopt a pre-approved model rule book for registration purposes and that there be at least one model rule book for native title corporations and one for other corporations.

Recommendation 4: It is recommended that the Registrar be granted the power to refuse to register a rule book if, in the Registrar's opinion, it is deemed "not fit for purpose" for the CATSI corporation. Where such a determination occurs the members must either confirm adoption of the rule book in its current state or provide a re-drafted rule book, which the Registrar must approve (subject to the other requirements for registration being satisfied).

Recommendation 5: That, other than as expressly required by State or Territory law, the CATSI Act or the CATSI Regulations be amended to prohibit the use of the following terms in the name of an incorporated entity that is not registered under the CATSI Act as a CATSI corporation:

1. Aboriginal Corporation;
2. Torres Strait Islander Corporation;
3. Indigenous Corporation;
4. Aboriginal and Torres Strait Islander Corporation; or
5. Torres Strait Islander and Aboriginal Corporation.

Recommendation 6: It is recommended that in order to promote greater flexibility in the design of corporate structures for CATSI corporations, which would, in turn, promote increased economic activity, that:

1. CATSI corporations be permitted to wholly-own other CATSI corporations as the sole corporate member, unless this is expressly prohibited by the CATSI corporation in its rule book;
2. That where a CATSI Act corporation is established with 2 members, one of which is not Aboriginal or Torres Strait Islander person, that the requirement in section 246-5(2) of the CATSI Act that a majority of directors to be Aboriginal or Torres Strait Islander persons be removed where the director that is an Aboriginal or Torres Strait Islander person has a casting (deciding) vote;
3. an entity or group of entities be permitted to establish a CATSI corporation as a subsidiary, or

joint venture entity, if that entity, or each member in the group of entities, at all times, satisfies the Indigeneity requirement in section 29-5 of the CATSI Act (and the requirements prescribed by the CATSI Regulations) when the underlying membership is assessed.

Recommendation 7: The CATSI Act should be amended to allow for small CATSI corporations to have the power to pass a special resolution not to have an AGM for up to three years, provided that:

1. the directors do not vote on that resolution; and
2. the corporation is obliged to advise the Registrar if there is any material change in its circumstances.

Recommendation 8: The CATSI Act should be amended to give the Registrar the power to call and hold a general meeting of the corporation where the Registrar decides that it is reasonable to do.

Recommendation 9: It is recommended that an amendment to the CATSI Act be made to allow for an automatic once-only extension of time for a period of 30 days (or such longer period permitted by regulation) to hold a particular AGM, where a CATSI corporation:

1. reports that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and
2. the CATSI corporation has not notified an automatic extension of time more than three years in a row.

Recommendation 10: It is recommended that the CATSI Act be amended to allow for an automatic extension of time for a period of 30 days (or such longer period as permitted by regulation) reporting and lodgement of reports under Division 348 of the CATSI Act, in the case of death, natural disaster and certain cultural activities in Indigenous communities.

Recommendation 11: It is recommended that an equivalent to section 317(1) of the Corporations Act be included in the CATSI Act, requiring the relevant reports to be presented to an AGM, if the company is required to have one. However, an equivalent to section 317(1A) should be included but, in fact, be broader and exempt small companies from the requirement.

Recommendation 12: It is recommended that:

1. equivalent provisions to those the Corporations Act be included in the CATSI Act so that auditors are given qualified privilege in their communication, whether written or oral, to the Registrar; and
2. A new Regulation 33(3) be included in the CATSI Regulations that the directors can fill a casual vacancy in the auditors of the corporation. Such an auditor will hold that position until the next AGM, where the members can confirm the appointment or appoint new auditors.

Recommendation 13: It is recommended that the CATSI Act is amended to oblige the corporation, where an alternative contact method has been nominated by the member, to ensure that the relevant information is recorded in a register separate to the Register of Members and stored with the corporation's other records.

Recommendation 14: It is recommended that the CATSI Act is amended as follows:

1. section 150-25(3) of the CATSI Act is amended to oblige the corporation to attempt to contact the

- potentially uncontactable member by using any alternative contact details nominated by that member for the purposes of receiving a notice of meeting, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months;
2. section 150-25(3) of the CATSI Act is amended to oblige the corporation, where no alternative contact method has been nominated by the member in accordance with section 201-25(3), to attempt contact the potentially uncontactable member by any other means that the corporation's rule book (if any) permits, where the corporation has not been able to contact the member at the address for the member that is entered on the Register of Members for a period of not less than 11 months;
 3. section 150-25(3) be further amended to provide that section 150-25(3)(c) will not be satisfied unless:
 - a. at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 1 above (but only where the member has nominated such an alternative contact method); or
 - b. where the member has not nominated such an alternative contact method, where at least one of the attempts made by the corporation to contact the member accords with the proposed requirement set out in paragraph 2 above (but only where this is provided for in the corporation's rule book);
 4. section 150-25(3) be further amended to replace the phrase "a continuous period of 2 years prior to the meeting" in section 150-25(3)(b) with the phrase "a continuous period of 12 months prior to the meeting";
 5. section 150-25(3) be further amended to replace the phrase "2 year period" in section 150-25(3)(c) with the phrase "12 month period"; and
 6. section 150-25(4) of the CATSI Act be amended to oblige the corporation's directors to send a copy of the resolution:
 - a. to the address for the member that is entered on the Register of Members; and
 - b. where the member has nominated a postal address, fax number or email address for the purposes of receiving a notice of meeting, to at least one of those nominated addresses or fax numbers.

Recommendation 15: It is recommended that the CATSI Act should be amended so that where a company officer considers that disclosure of details on the Register of Members would compromise a person's safety the corporation is allowed to redact the relevant information. The relevant information could go beyond the affected member's address and could apply to other members' information where such disclosure could compromise affected member's or another person's safety.

Recommendation 16: It is recommended that the applicant seeking such information should have a right to request that the Registrar order the CATSI corporation to release the information (and the applicant be required to justify the need for the information and that no member's safety will be compromised).

Recommendation 17: It is recommended that CATSI corporations include their CEOs and senior

executives' names, addresses, contact details and employment history over the last ten years in their annual reporting requirements.

Recommendation 18: Other than small CATSI corporations, the CATSI Act should be amended so that CATSI corporations provide their director, CEO and senior management salary and benefits packages to the Registrar. The Registrar should collect remuneration/benefits data and disseminate de-identified information about director, CEO and senior management remuneration, in such categories as the Registrar considers appropriate.

Recommendation 19: It is recommended that CATSI corporations not be required to mandate director training for current or incoming directors, but that all CATSI corporations be encouraged and supported to ensure that all directors have the necessary skills to manage their responsibilities.

Recommendation 20: It is recommended that the CATSI Act be amended to reverse the prohibition on the appointment of independent directors, unless the rule book provides for their appointment, to the default position that all CATSI corporations may appoint independent directors unless their rule book expressly provides otherwise.

Recommendation 21: It is recommended that the provisions relating to restrictions on related party dealings be retained, but that the Registrar be empowered to exempt particular opportunities or transactions from the related party provisions, where it would be beneficial to the affected director and in no way detrimental the members of the CATSI Act corporation.

Recommendation 22: It is recommended that:

1. a threshold for transactions that trigger the related party transactions provisions in the CATSI Act be introduced for small CATSI corporations. A de minimis exception of \$5,000 or such other amount as may be prescribed in regulations from time to time should apply. However, we further recommend that all related party benefits be described in appropriate in an annual report that is provided to members and the Registrar.
2. section 290-30 be amended to require that the resolution put to members at the meeting be "materially the same" as the resolution in the notice of meeting, and that the regulations made under the CATSI Act may prescribe how the concept of "materiality" is to be determined.

5 INSOLVENCY AND DISTRESSED CORPORATIONS

Introduction: problems with External Administration

- 5.1 Sections 516-1, 521-1, 526-35, 526-40, 531-1 and 536-1 of the CATSI Act import into that legislation the relevant provisions of the external administration areas of the Corporations Act. Thus understanding the operation and interpretation of these Corporations Act provisions is essential to understanding how the CATSI Act operates in this area.
- 5.2 Over the past 6-7 years, however, there has been some significant deficiencies uncovered in the operation of the external administration provisions of the Corporations Act which have not been addressed by remedial legislation and in respect of which no remedial legislation is proposed.
- 5.3 While alignment with the Corporations Act is desirable, one purpose of this Review is to address the areas where problems have surfaced and to suggest what needs to be done to remedy those issues by way of amendment to the CATSI Act.
- 5.4 It is not satisfactory to suggest that the Corporations Act might eventually be amended and the CATSI Act can simply pick up those amendments. In that context it is noted that some of the most significant problems currently are those involving insolvent corporations which have acted as a trustee. This problematic area was to be addressed as far back as 1988 when the Harmer Report²¹⁹ was released. However the recommendations never found their way into the legislation²²⁰ as it seems the drafting was all too difficult.
- 5.5 The result of that is that CATSI corporations, and those involved in their insolvent or distressed CATSI corporations, such as administrators and liquidators, are now faced with a myriad of conflicting State and Federal Court decisions, both at single judge and appellate level.
- 5.6 To take just one example of such problems, some of the decisions say that when one is dealing with the winding up or voluntary administration of a company which is/has traded in a trustee capacity, none of the Corporations Act provisions apply. The difficulties in this area are compounded when the company acts both as a trustee and in a personal capacity, as trustee of more than one trust and so on.
- 5.7 In the past, insolvency practitioners have simply ignored the difficulties in this area and treated the winding up of companies which happened to be a trustee as being conducted under the provisions of the Corporations Act. If it can be said that there is some 'trend' with the cases, it seems possibly to be that in fact no provision of the Corporations Act applies to the administration or winding up of companies which acted as a trustee. The various consequences of that is that voluntary administrators and liquidators have for many years misapplied assets, wrongly followed statutory distribution priorities and so on.

²¹⁹ Australian Government, *ALRC Report 45: General Insolvency Inquiry*. This Review is commonly referred to as the Harmer Report in recognition of its principal architect, Ron Harmer.

²²⁰ *Corporate Law Reform Act 1992* (Cth).

- 5.8 It is proposed to address in this Review, among other matters, the following issues that affect CATSI corporations (and Corporations Act corporations):
- 5.8.1 The winding up of a corporation which traded in a trustee capacity but not in any personal capacity.
 - 5.8.2 The winding up of corporations which:
 - 5.8.2.1 traded both in a personal capacity and as a trustee;
 - 5.8.2.2 traded as a trustee of more than one insolvent trust;
 - 5.8.2.3 traded as a trustee of multiple trading trusts, some of which were solvent and other of which were insolvent.
 - 5.8.3 The current unresolved and continuing problems with employee entitlements under section 433 and 561 of the Corporations Act, and in particular, the adverse impact on Government revenue sought to be recouped under the Department of Employment's Fair Entitlement Guarantee (**FEG**) scheme which is a legislative scheme designed as a *'safety net'* for employee entitlements when an employer goes into liquidation.
 - 5.8.4 The six Federal Court decisions which appear to have overturned over a hundred years of what was thought to be well-established law that recoveries from voidable transactions, such as preferential payments, were available only to the general body of unsecured creditors and not to any secured creditor.
 - 5.8.5 The streamlining of certain of the CATSI Act provisions relating to special administration, including a re-examination of the grounds for appointment and addressing various difficult aspects such as where there is real doubt as to whether the board of directors has been/or remains validly appointed.
 - 5.8.6 Suggested amendments to the CATSI Act to assist the Registrar with proof of insolvency by providing expanded presumptions in certain circumstances.
 - 5.8.7 Reforms to consider the newly introduced *'safe harbour'* and *'ipso facto'* provisions.²²¹
 - 5.8.8 Reforms to provide some flexibility and discretion to the Registrar by streamlining the deregistration process, particularly in respect of the voluntary deregistration process.
 - 5.8.9 Reforms to eliminate the expensive and largely ineffective requirements for gazetting and advertising of, for example a special administrator, and the replacement of those with notification on the ORIC website.
 - 5.8.10 Some minor miscellaneous reforms such as rewording of CATSI Act section 6-50 which currently does not reflect the primary purpose of (voluntary) administration under the Corporations Act and arguably does not reflect the varying circumstances under which the Registrar might appoint a special administrator under the CATSI Act.

²²¹ These concepts are explained later.

- 5.8.11 Some reform in relation to vesting of property in the Registrar when a company is deregistered after winding-up.
- 5.8.12 The disapplication of the current external administration provisions of the Corporations Act to the CATSI Act following the recent introduction of the *Insolvency Law Reform Act 2016 (Cth) (ILRA)*. This last issue and the reasons for it are discussed first under the next heading.

The problems with the ILRA and why the most of the recently amended provisions should not apply to the CATSI ACT

- 5.9 The ILRA commenced partly on 1 March 2017, with the balance commencing recently on 1 September 2017. In consultant Garry Hamilton's view, this is a disastrous piece of legislation which contains virtually no law reform whatsoever but imposes extraordinary compliance and reporting obligations and associated costs on insolvency practitioners. We now set out a sample of the comments regarding the recent 'law reform' made by leading insolvency practitioners and insolvency commentators.

- 5.10 Michael Murray, the former legal director of ARITA²²² who is now the principal writer for CCH's Australian Insolvency Management Practice said recently in a circular:

*The Insolvency Law Reform Act 2016 is an ungainly attempt to align personal and corporate processes, while having to allow each regulator to have their own separate laws and approaches. It adopts an old regulatory approach that eschews simplicity in focus and drafting and is based on unwarranted assumptions.*²²³

- 5.11 Mr Murray laments that despite numerous reports and enquiries, over the last 15 years, upwards of 30, governments have largely ignored major insolvency reform legislation.²²⁴

- 5.12 The highly respected and recently retired general editor of the *Insolvency Law Journal*, Professor Colin Anderson, who is usually a very measured commentator, had this to say about the ILRA:

*For all the time it has taken to get to this point, much of the so-called 'law reform' has simply been a rearrangement of the existing legislation such that there is now a spread of rules between the legislation, a schedule to the legislation and legislative instrument ... it seems we are left with just a more twisting path to arrive at the same place ... there is a lamentable attempt to draw various matters together without making any significant improvements for stakeholders. The result is perhaps the worst attempt at 'law reform' that I have seen in almost 30 years of scholarship in respect of insolvency law...*²²⁵

- 5.13 The CEO of ARITA, Mr John Winter, at the 2016 annual NSW/ACT conference in Sydney on 15 June 2017 described the ILRA as 'an absolute dog of a piece of legislation' in terms of compliance burdens. As far as we are aware, no attendee demurred.

²²² ARITA is Australia's peak insolvency body for insolvency practitioners. Almost every insolvency practitioner and insolvency lawyer in Australia is a member of this body.

²²³ Murray, *The Insolvency Law Reform Act 2016 – not a racehorse but a camel*.

²²⁴ Murray, *The Insolvency Law Reform Act 2016 – not a racehorse but a camel*.

²²⁵ Anderson, Editorial by the General Editor.

- 5.14 In an article entitled '*A missed opportunity for some real reform*', Mr Kokkinos, a Partner of Worrells Solvency & Forensic Accountants said recently:

*With 10 years of planning and the ILRA's final version being a voluminous 395 pages you would have been excused for thinking creditors and practitioners were about to enter a Utopian era. A place where unnecessary red-tape is non-existent, where phoenix activity and abuse of process by directors and their advisors is eliminated, and where insolvency practitioners have necessary protections to vigorously pursue and investigate actions. Sadly, it is not to be.*²²⁶

- 5.15 After discussing real-life examples in the murky world of the growing '*pre-insolvency*' industry where phoenix activity²²⁷ reigns apparently unchecked, the author concludes with the following:

*Let's hope we won't have to wait until 2027 before today's problems are finally remedied.*²²⁸

- 5.16 Recently, the Victorian Supreme Court described the ILRA machinery provisions as '*labyrinthine and difficult to decipher*'²²⁹ and this judicial comment was made within weeks of the commencement of the ILRA.

- 5.17 ARITA publishes on its website regular updates on FAQs from insolvency practitioners in respect of queries about what the provisions of the ILRA mean. ARITA does its best to address the queries but often has to guess the answers as so much of the legislation is internally inconsistent, poorly referenced and unworkable in practice. In addition, one well-known insolvency expert, Associate Professor Jason Harris of the University of Technology's faculty of law²³⁰ recently described the ILRA as '*more than 1,000 pages of bureaucratic gumpf*'²³¹. The ILRA is, in consultant Garry Hamilton's view and based on some 34 years of practice as both a registered liquidator and insolvency lawyer, the worst effort at '*law reform*' he has ever seen.²³²

- 5.18 The only bodies who '*welcomed*' the ILRA as some '*great step forward*' were ASIC and AFSA who issued a short joint press release on 1 September 2017, proclaiming the '*benefits*' of the ILRA. Unfortunately there are very few.

- 5.19 The ILRA commenced partly commenced on 1 March 2017 with the balance commencing recently on 1 September 2017.

²²⁶ Kokkinos, *A missed opportunity for some real reform*.

²²⁷ Phoenix activity refers to the practice of setting up a new company after a company is insolvent and carrying on the same business in the new company as in the insolvent company.

²²⁸ Kokkinos, *A missed opportunity for some real reform*.

²²⁹ In the matter of *Allston Homes Pty Ltd (in liq)* [2017] VSC 500 at paragraph 9.

²³⁰ And co-author of *Keay's Insolvency*.

²³¹ Associate Professor Harris was here referring to both the amendments to the Corporations Act and the *Bankruptcy Act 1966* (Cth) brought about by the ILRA.

²³² Dr Hamilton sat on the Commonwealth government committee which was responsible for the drafting of the 2007 insolvency amendments to the Corporations Act. They represented real reform with the introduction into Australia of the UNICITRAL Model Law, the introduction of the concept of '*pooling*' where the affairs and accounting for groups of companies was difficult or impossible, the refinement of the voidable transactions provisions and so on.

- 5.20 Perhaps not surprisingly therefore, the first recommendation made is that, subject to the exceptions referred to in the next paragraph, the provisions in the CATSI Act which link into the external administration area of the Corporations Act²³³ should refer to the provisions of the Corporations Act and the Corporations Regulations as they stood immediately before the commencement of the ILRA i.e. on 28 February 2017. The external administration provisions of the Corporations Act as they stood on that date are well understood by insolvency practitioners, the legal profession and the judiciary. In the recommendations for reform set out below, unless otherwise indicated, the references to the Corporations Act is a reference to that legislation as it stood on 28 February 2017 but with the specific exceptions which are set out in the following paragraph.
- 5.21 The exceptions referred to above are as follows:
- 5.21.1 The ILRA amended a technical defect in the Corporations Act with the definition of 'relation-back day' in section 9. That technical problem which arose from an unusual set of circumstances and which probably will never reoccur, was seen in *Chief Commissioner of State Revenue v Rafferty's Resort Management Pty Ltd (in liq)*.²³⁴ It is recommended that the CATSI Act pick up the new definition of 'relation-back day' through section 526-40 of the CATSI Act.
- 5.21.2 The ILRA inserted a provision which allows for the assignment of rights of action previously available only to an insolvency practitioner personally, such as the voidable transactions or insolvent trading provisions. This concept is useful as in many instances where the insolvency practitioner has available good rights of action but is without funds to run them. The right of assignment was introduced into the UK a few years ago and seems to be working positively. Despite the unfortunate drafting of this provision in the ILRA and almost total lack of guidance as to how it is actually to work in practice, it is recommended that section 100-5 of Division 100 of Part 4 of Schedule 2 - Insolvency Practice Schedule (Corporation) of the Corporations Act be introduced into CATSI Act.
- 5.21.3 The ILRA abolished the CALDB and replaced it with the CADB (i.e. the previous disciplinary body deals now only with auditors and not liquidators). Therefore, it is recommended that the CATSI Act picks up sections 40-5 and 40-10 (but only in respect of documents required to be lodged under the Corporations Act as in force at 28 February 2017) and picks sections 40-15, 40-20, 40-30 and 40-35 (dealing with general disciplining of insolvency practitioners by ASIC) of Division 40 of Part 2 of Schedule 2 of the Insolvency Practice Schedule (Corporations).
- 5.21.4 Finally, as the concept of official liquidator was abolished on 1 March 2017, the Corporations Act as it stood on 28 February 2017 should not import sections 1291, 1286, 1283, 1291 nor the definition of 'official liquidator' in section 9; in addition, the reference in section 472 to the appointment of an 'official liquidator' should be changed to refer simply to the appointment of a 'liquidator' which means a registered liquidator.
- 5.22 In contrast to the ILRA are the proposals in the recently enacted *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017*. It deals with 'safe harbour'

²³³ CATSI Act, sections 516-1, 521-1, 526-35, 526-40, 531-1 and 536-1.

²³⁴ (2008) 26 ACLC 333.

provisions to protect honest and bona fide directors against insolvent trading suits and places a moratorium on 'ipso facto' contract termination/modification clauses in certain circumstances. These are explained further below and, despite some drafting issues, it is recommended that they be incorporated into the CATSI Act.

Insolvent corporate trustees

Discussion Paper Questions

5.23 The Discussion Paper posed the following questions:

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?

Overview of the current problems with insolvent corporations which acted as a trustee

5.24 In 1988, the Harmer Report examined in detail the issues which at that time were evident with the winding up of corporations which traded as a trustee. It received extensive submissions from professional bodies²³⁵ and experts including Justice McPherson,²³⁶ Professor Ford,²³⁷ Professor Baxt and former Attorney General of Australia, Daryl Williams QC.²³⁸

5.25 These issues which have to this day still not been resolved were identified in summary form in the Harmer Report as:

The following matters require resolution: the power of the liquidator of a corporate trustee to administer the trust property; the power of the liquidator of a corporate trustee to administer not only the affairs of the company but also the affairs of the trust; limitations on the right of indemnity²³⁹ and of the exercise of the right of indemnity; the circumstances in which the corporate trustee may be removed as trustee; the extent to which trust property may be applied to meet the claims of creditor of the company especially where the terms of the trust did not provide for the company to engage in the particular transactions that resulted in the liability; and, the order of distribution of trust property among creditors.²⁴⁰

5.26 The Harmer Report made clear recommendations for law reform in this area as follows:

5.26.1 Ensure that '*references to the business or affairs of a company for the purpose of the operation of the insolvency provisions*' include a reference to that company in its capacity as a corporate trustee.²⁴¹

5.26.2 The references to '*the property of the company that is being wound up...*' should be taken to include property held by the company as trustee.²⁴²

5.26.3 Given the ability of a liquidator or administrator to cause the company to resign as trustee, the power allowing removal of a trustee where the trustee becomes insolvent ought to be voided in the trust instrument asserting same, however the court ought to be able to make orders as it sees fit.²⁴³

5.26.4 In the event of an insolvency, the liquidator of the corporate trustee ought to be able, subject to an order of the court, to exercise '*the right of indemnity against*

²³⁵ Including AICM (NSW), Victorian Bar Council, Qld Law Society, Australian Credit Forum, DPP (Cth), Hon P Spyker, Law Council of Australia, IPAA, ICAA, ASA, and Australian Credit Forum.

²³⁶ McPherson, *The Insolvent Trading Trust*.

²³⁷ Ford, *Trading Trusts and Creditors' Rights*.

²³⁸ Williams, *Winding Up Trading Trusts: Rights of Creditors and Beneficiaries*.

²³⁹ Trustees have a right to be indemnified out of the trust assets where they have satisfied a trust liability from the trustee's personal funds. Where a trustee draw directly on trust assets to discharge a liability, as opposed to paying out of their own funds and then seeking reimbursement this is referred to as a right of exoneration. For convenience, we will refer to these rights as the "right of indemnity".

²⁴⁰ Australian Government, *General Insolvency Inquiry*, paragraph 44.

²⁴¹ Australian Government, *General Insolvency Inquiry*, paragraph 45.

²⁴² Australian Government, *General Insolvency Inquiry*, paragraph 46.

²⁴³ Australian Government, *General Insolvency Inquiry*, paragraph 48.

trust property ...' and that ought to be 'a collective right exercisable by the company, through its liquidator, on behalf of all trust creditors'.²⁴⁴

5.26.5 In respect of distribution of trust property, the *'proceeds obtained from the exercise of a right of indemnity should be reserved for creditors who have legitimate claims on those proceeds'.²⁴⁵*

5.26.6 The order of the distribution of trust property is *'first, the costs associated with the exercise of the right of indemnity and of the administration of property obtained as a result of the exercise of that right; secondly, the administration costs of the winding up... to the extent that the assets owned by the company in its own right are sufficient to pay those costs. The statutory priorities must be observed when distributing the proceeds of the exercise of the right of indemnity. Unsatisfied claims by trust creditors are admissible to share in any property of the company available for general distribution'.²⁴⁶*

5.26.7 *'The right of indemnity should include not only the amount of the trust debts and liabilities, but also the total costs associated with the winding up (where the assets of the company available for general distribution are not sufficient to cover those costs).²⁴⁷*

5.27 These recommendations had widespread support, however the Law Council of Australia opined otherwise.²⁴⁸ The Explanatory Memorandum that accompanied the law reform legislation following the Harmer Report made no recommendations in respect of insolvent corporate trustees and such silence was reflected in the absence of any relevant provision within the legislation which followed.²⁴⁹ The Harmer Report had little to say in respect of trustee companies entering into voluntary administration. It simply recommended that *'draft legislation relating to corporate trading trusts should, so far as relevant, also be made applicable to a company in administration'.²⁵⁰* No such legislation was ever drafted.

Some history and the current state of the authorities on insolvent trading trusts

5.28 A discussion in this area will usually commence with the two decisions of Needham J of the New South Wales Supreme Court in *Re Byrne Australia Pty Ltd and the Companies Act*²⁵¹ and *Re Byrne Australia Pty Ltd (No. 2)*²⁵² (collectively, **Re Byrne**). In the first case, it was held that a trustee's right of indemnity or lien could only be used in a winding up for the payment of trading creditors of the trust (trust creditors), and, in the second, that the liquidator was not a trust creditor and could not therefore apply trust assets in

²⁴⁴ Australian Government, *General Insolvency Inquiry*, paragraph 49.

²⁴⁵ Namely *"the creditors whose debts or liabilities have been incurred in the conduct of the trust to which the indemnity relates"*: Australian Government, *General Insolvency Inquiry*, [48].

²⁴⁶ Australian Government, *General Insolvency Inquiry*, paragraph 50.

²⁴⁷ Australian Government, *General Insolvency Inquiry*, paragraph 50.

²⁴⁸ Australian Government, *General Insolvency Inquiry*, paragraphs 244, 246 - 247, 250, 256 and 260.

²⁴⁹ *Corporate Law Reform Act 1992* (Cth).

²⁵⁰ Australian Government, *General Insolvency Inquiry*, paragraph 271.

²⁵¹ [1981] 1 NSWLR 394.

²⁵² [1981] 2 NSWLR 364.

satisfaction of the liquidator's costs and expenses of the winding up, including the liquidator's remuneration.

- 5.29 In 1983, the Full Court of the Victorian Supreme Court decided *Re Enhill Pty Ltd*²⁵³ (**Re Enhill**) which decided that the proceeds of the exercise of the trustee's right of indemnity were available for all the creditors of the trustee, both personal and trust. Lush J said:

*In my opinion it followsthat the trustee's right of indemnity or lien is part of his 'personal property'. It exists to enable him to recoup himself for, or to provide for, the debts which he must bear personally. In argument, two matters were put relevant to this opinion. One was that the trustee in effect held his right of lien on trust for the creditors: the other was that if the proceeds of the exercise of the right were available to the trustee's creditors generally, the trustee would be deriving an unauthorised personal advantage from the trust.*²⁵⁴

- 5.30 His Honour then went on to attempt to discount these arguments by relying principally upon the proposition that a creditor is subrogated to the rights of the trustee to resort to the trust's assets to discharge the liability, and he sought to argue that that it was the very fact that that the trustee's right of indemnity was the trustee's personal property that enabled the creditor to have resort to it.²⁵⁵

- 5.31 In *Re Enhill*, the three Full Court judges seemed to ignore or discount two obiter statements in *Octavo Investments Pty Ltd v Knight*²⁵⁶ where the High Court said:

*... the trustee's interest in that property will pass to the trustee in bankruptcy **for the benefit of the creditors of the trust trading operation** should the trustee become bankrupt.*

*The fact that the trust property cannot be taken in execution by the creditors of the trustee is not to the point. Those creditors are nevertheless subrogated to the rights of the trustee in relation to that property, and in the event of the trustee becoming bankrupt, it is those rights **which are to be realised in their favour.***²⁵⁷ (emphasis added)

- 5.32 Finally, *Re Enhill*, unsurprisingly, did not follow *Re Byrne*.

- 5.33 The next event in the commencement of this saga (which we will see continues until this day) was the decision of McLelland J in *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*²⁵⁸ (**Grime Carter**). Here his Honour was asked the same question as was the Full Court in *Re Enhill*. Put into chronically context, one must bear in mind that by this stage that one had a single judge decision in New South Wales deciding that the proceeds of the right of indemnity had to be distributed to trust creditors to the exclusion of personal creditors and that a liquidator's remuneration and his costs and expenses of

²⁵³ [1983] 1 VR 561.

²⁵⁴ *Re Enhill Pty Ltd* [1983] 1 VR 561, p 569.

²⁵⁵ His Honour did not address what seems to be a consequence of that argument, namely that if the right of indemnity is a trustee's personal property, then there is no reason why his personal creditors cannot have recourse to it by way of subrogation as well- yet they clearly cannot on the authorities.

²⁵⁶ (1979) 144 CLR 360.

²⁵⁷ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, p 360.

²⁵⁸ (1983) 7 ACLR 540.

winding up were not trust liabilities. In Victoria one had a Full Court decision to the effect that Needham J was wrong in the first limb of his decision and, in effect, it did not matter if he were wrong or right in the second limb of his decision.

- 5.34 In *Grime Carter*, McLelland J recognised that a question of 'critical importance' was the one addressed in *Re Enhill*, namely whether the proceeds of the exercise of the right of indemnity were available for the general body of creditors.²⁵⁹ His Honour said that the question must be taken to have been answered by in *Re Enhill*. His Honour said that there were 'powerful reasons why, as a decision of an ultimate State appellate court, it should not be followed in New South Wales notwithstanding the earlier contrary decision of a single judge of this court'.²⁶⁰ His Honour spoke of the operation of the Uniform Companies Code²⁶¹ in a field of 'considerable significance throughout the Commonwealth'²⁶² and concluded that he should follow *Re Enhill* and not *Re Byrne*.²⁶³
- 5.35 The next opportunity to contribute to the debate arose in the State of South Australia where the Full Court considered the issues in *Re Suco Gold Pty Ltd (Suco Gold)*.²⁶⁴ The circumstances were broadly the same, the Court having to decide whether the liquidator of a company which was the trustee of trusts was entitled to his remuneration and the costs and expenses of the winding up out of the proceeds of the exercise of the right of indemnity. In this case, however, there were two distinct trusts and the liabilities of course were different in relation to each trust. The only assets were the rights of indemnity against the property of each trust. There were no significant personal assets.
- 5.36 On this occasion, all three judges agreed that if a corporate trustee has not discharged its trust liabilities, its right of indemnity entitles it to resort to trust property only for the purpose of discharging those liabilities. Accordingly, on this point the Full Court agreed with Needham J in *Re Byrne* and disagreed with the Full Court in Victoria in *Re Enhill*.
- 5.37 All three judges held that a liquidator had to comply with the distribution priority regime set out in section 292 of the Companies (SA) Code²⁶⁵ and to the extent that each debt had been incurred in relation to particular trust, the liquidator should have recourse to the property of that trust for the purpose of paying it.
- 5.38 The Full Court considered that the liquidator's remuneration and costs and expenses of the winding up were properly regarded as debts of the company (because of the expression in section 292 'other unsecured debts').²⁶⁶ Since the company's obligations as trustee to pay the debts as incurred in carrying out the trust cannot be performed unless the winding up proceeded, it was reasonable to regard the liquidator's remuneration and his costs and expenses of the winding up as debts of the company incurred in discharging the duties imposed by the trust and as covered by the liquidator's right of indemnity.

²⁵⁹ *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*, p 543.

²⁶⁰ *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*, p 543.

²⁶¹ A precursor to the Corporations Act.

²⁶² *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*, p 543.

²⁶³ *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd*, p 543.

²⁶⁴ (1983) 1 ACLC 895.

²⁶⁵ Our current section is section 556 of the Corporations Act.

²⁶⁶ That same expression appears in section 556 of the Corporations Act.

- 5.39 Thus *Suco Gold* embraced Needham J's view in *Re Byrne* that only trust liabilities can be paid out of trust assets (and discarded the contrary view expressed in *Re Enhill*) but on the other hand discarded Needham's view in *Re Byrne* that a liquidator is not carrying out trust functions. Following *Suco Gold*, Needham J had to deal with the same point again in *ADM Franchise Pty Ltd*.²⁶⁷ This time, however, Needham J took the opportunity of abandoning his previous reasoning in *Grime Carter* and said that the reason in *Suco Gold* was to be preferred to that in *Re Enhill*.
- 5.40 By this time insolvency practitioners might have been forgiven for believing the law 'was an ass', especially after reading the next case in line: *Re Thomas Dawn Nominees Pty Ltd*²⁶⁸ which followed the tortuous line of case discussed above. In that case, Beach J denied the liquidator any remuneration or reimbursement of his costs and expenses out of the trust estate. That was because his Honour was dealing with the winding up of a solvent trust, the winding up of which came about as a result of disagreements between the representatives of the beneficiaries. His Honour reasoned that as there were no trust debts for which the trustee was personally liable, there was therefore no right of indemnity for the trustee.
- 5.41 For several years after these cases were handed down, not much happened. Liquidators would generally wind up corporate trustees by use of the provisions of the Corporations Act as if the assets of the trust were beneficially owned by the company. In 1987, a liquidator, concerned that he did not have power under the Corporations Act to sell trust assets which were not beneficially owned by the company, applied to the court for directions. That was in the matter of *Re Indopal*.²⁶⁹ There the liquidator applied to the New South Wales Supreme Court for directions. McLelland J made an order appointing the liquidator as receiver of the trust assets so as to empower him to sell the assets.
- 5.42 For around another decade after this this, things just moved on and liquidators did not seem too concerned about making a court application to have themselves appointed as receivers of a trustee company's assets and continued to use the provisions of the Corporations Act to wind up trustee companies. As will be seen shortly, this position has now changed and it is common that where it is known that the company to which the liquidator has been appointed is a trustee, an application will be made to the court for an order appointing the liquidator receiver of the assets.
- 5.43 From 2010 to 2015, there were a series of cases, including *Apostolou v VA Corporation of Australia Pty Ltd*²⁷⁰, *Re Bacchus Distillery Pty Ltd (Administrators Appointed)*²⁷¹ and *Kitay, in the matter of South West Kitchens (WA) Pty Ltd*²⁷² which held that a liquidator of a trustee company did not need to apply to the court to have him/herself appointed receiver to sell the assets of a trustee company. Those decisions held that the power of sale was permitted by section 477(2)(c) of the Corporations Act. That provision empowers a liquidator to '*sell, or otherwise dispose of, in any manner, all or any part of the property of the company*' (emphasis added).

²⁶⁷ (1983) 1 ACLC 987.

²⁶⁸ (1984) 2 ACLC 459.

²⁶⁹ (1987) 12 ACLR 54.

²⁷⁰ (2010) 77 ACSR 84.

²⁷¹ (2014) 98 ACSR 53.

²⁷² [2104] FCA 670.

- 5.44 At this stage, insolvency practitioners were starting to breathe a sigh of relief in not having to make a costly application to court to have themselves appointed receivers of the corporate trustee assets. However that relief was short-lived. In the subsequent decision of the Supreme Court of New South Wales in *Stansfield DIY Wealth Pty Ltd (in liq)*²⁷³ (**Stansfield**), Brereton J refused to follow the line of reasoning in the cases above, holding that where a trustee was removed from that position upon it becoming insolvent, it had no power to administer the trust. His Honour held that it was appropriate to appoint the liquidator as receiver to realise the assets of the trust and that section 477(2)(c) Corporations Act applied only to assets which were beneficially owned by the company. In other words, his Honour considered that the reference to '*the property of the company*' had to be a reference to property which was beneficially owned by the company as distinct from property held by it on trust.
- 5.45 His Honour said that the equitable lien which secures the trustee's right of indemnity does not of itself give the former trustee a right of sale; rather it is a security enforceable only by judicial sale or the appointment of a receiver with a power of sale.²⁷⁴ The decision in *Stansfield* was subsequently followed by the Federal Court in *SMP Consolidated Pty Ltd (in liq)*²⁷⁵ where Yates J appointed the liquidator as receiver over the trust assets.
- 5.46 More recently, the important question of whether the relevant statutory priority provisions in the Corporations Act applied in respect of the winding up of a corporate trustee arose in *Re Independent Contractors Services (Aust) Pty Ltd (in liq) (No. 2)*²⁷⁶ (**Independent Contractors**). Justice Brereton of the New South Wales Supreme Court considered that they did not. In his Honour's view, that regime applied only to property beneficially owned by the company and not to trust property. His Honour said:
- ... as to whether s 556 has any application in this context, the South Australian Full Court held in *Suco Gold Pty Ltd* that in respect of each trust of which the company in liquidation was trustee, liabilities were to be paid from trust property in the order laid down by the (SA) Companies Act 1962, s 292- the predecessor of s 556. However, this is virtually universally accepted to be incorrect, although what is the correct position remains unclear.²⁷⁷
- 5.47 His Honour does not explain why the decision is '*virtually universally accepted as incorrect*' and there has been some academic criticism of his Honour's view.²⁷⁸ There are many other decisions from 1981 onwards, apart from those which are specifically mentioned above which bear upon this area.²⁷⁹ Many of these contain slight variations of the principal themes expressed above. Space and time however does not permit such

²⁷³ (2014) 103 ACSR 401.

²⁷⁴ *Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 103 ACSR 401, p 405, relying on, among other decisions, *Hewitt v Court* (1983) 149 CLR 639, p 663.

²⁷⁵ [2014] FCA 1382.

²⁷⁶ (2016) 305 FLR 222.

²⁷⁷ *Re Independent Contractors Services (Aust) Pty Ltd (in liq) (No. 2)* (2016) 305 FLR 222, 230, [23].

²⁷⁸ See Hamilton, *Winding up Insolvent Corporate Trustees- What happened to the Liquidator?*, p 103.

²⁷⁹ *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* [1999] FCA 144; *Australian Securities and Investments Commission v Idyllic Solutions Ltd* [2009] NSWSC 1306; *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* [2011] FCAFC 79; (2011) 193 FCR 442; *Combis in the matter of Reehal Holdings Pty Ltd (in liq)* [2017] FCA 793; *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344; (2008) 74 NSWLR 550; *Octavo Investments v Knight* [1979] HCA 61; (1979) 144 CLR 360; *Re Exhall Coal Company (Limited)* [1866] Eng R 131; (1866) 35 Beav 449 [55 ER 970]; *Vacuum Oil Pty Ltd v Wiltshire* [1945] HCA 37; (1945) 72 CLR 319; *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583.

decisions to be canvassed and at any rate they do not advance the entirely unsatisfactory state of affairs in this area.

- 5.48 Finally in this area, one has the 2017 single judge decisions of *Re Amerind Pty Ltd (in liq)*²⁸⁰, (**Amerind**) a decision of Robson J of the Victorian Supreme Court and *Kite v Mooney, in the matter of Mooney's Contractors Pty Ltd (in liq) (No 2)*²⁸¹ (**Kite**) a decision of Markovic J of the Federal Court. In both those decisions, the Court held that the priority provisions of the Corporations Act, including importantly the employee entitlement provisions²⁸² have no application in the winding up of an insolvent corporate trustee.

Overview of Current situation: insolvent corporate trustees

- 5.49 Despite the 26 years which have now elapsed since the decision in *Re Bryne*, the law in this area is still in a significant state of uncertainty. Based on the more recent 'trends' with the conflicting decisions, one might possibly guess the following to be the current, wholly unsatisfactory state of the law.
- 5.49.1 First, it would appear that where, as is commonly the case, a trust deed provides for the removal of a corporate trustee upon its insolvency, the liquidator or voluntary administrator will have no power to sell any of the assets, or indeed no power to deal in any way with the trust assets without some additional court orders such as an order appointing the external administrator as a receiver and manager of the trust assets. This, of course, involves costs and expenses which in some cases will actually exceed the available assets.
- 5.49.2 Second, it would appear that in a winding up or in a deed of company arrangement which follows the voluntary administration of a corporate trustee, none of the usual statutory priority provisions will apply. According to cases such as *Independent Contractors* and *Kite*, the statutory priority provisions are replaced by a simple *pari passu* method of distribution.
- 5.49.3 Third, and arising from the previous point, the Commonwealth Government's employee safety net scheme does not achieve its ultimate objective of recouping revenue by way of subrogation of the Commonwealth to the usual employee priority in a receivership or a liquidation.
- 5.49.4 Fourth, according to cases such *Independent Contractors*, creditors cannot approve remuneration, and that would seem to be the position not only in respect of winding up but also voluntary administration and a company subject to a deed of company arrangement. Only a court has the power to review or set remuneration and that would seem to be the case even if the creditors had previously (and unanimously) approved the remuneration sought.
- 5.49.5 Fifth, (and this issue was one in respect of which no agreement could be reached when submissions were being made to the Harmer Report), there remain the complex issues involved in insolvent corporations which acted as trustees of multiple trusts. The current legal position on these issues is simply confused.

²⁸⁰ [2017] VSC 127.

²⁸¹ [2017] FCA 653.

²⁸² Corporations Act, sections 433, 556 and 561.

- 5.50 Of course the points in paragraphs 5.49.1 and 5.49.4 which are seen as 'issues' by many now, are still the subject of a unanimous Full Court decision in *Suco Gold*. Although criticised, it is still the law, despite what single judges and some academic commentators have later said about it.

What can be done to amend the CATSI Act to deal with the issues of insolvent trading corporations which are trustees?

- 5.51 The following are amendments to the CATSI Act which are recommended to overcome the multiplicity of current problems involved with insolvent corporate trustees. For clarity, it may be appropriate to split the issues into five different parts:
- 5.51.1 First, recommended amendments to the CATSI Act relating to the winding up of an insolvent corporate trustee which has traded in its trustee capacity only and not in any personal capacity (**issue one**).²⁸³
- 5.51.2 Second, recommended amendments to the CATSI Act relating to a trustee corporation that has traded in any other capacity i.e.:
- 5.51.2.1 traded both in a personal capacity and as a trustee;
- 5.51.2.2 traded as a trustee of more than one insolvent trust;
- 5.51.2.3 traded as a trustee of multiple trading trusts, some of which were solvent and other of which were insolvent.
- (together, **issue two**).
- 5.51.3 Third, recommended amendments relating to the voluntary administration of insolvent corporate trustees (**issue three**).
- 5.51.4 Fourth, recommended amendments to address issues arising under sections 433 and 561 (**issue four**).²⁸⁴
- 5.51.5 Fifth, recommended amendments to State and Territory trust legislation to deal with any potential Constitutional issue which might arise (**issue five**).
- 5.52 It is recognised that section 521-5 of the CATSI Act provides that '*for the avoidance of doubt*' a (voluntary) administrator may perform any function and exercise any power that the corporation has as a trustee.²⁸⁵ As will be seen, there are two issues with this:
- 5.52.1 First, in most cases the external administration of a company will result in its removal as a trustee; and

²⁸³ These are reasonably common and have been the subject of a number of recent decisions, some of which are mentioned above.

²⁸⁴ They address, for example, the issue first raised in *Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR; 276 ALR 349, regarding a secured creditor's right, in certain circumstances, to a liquidator's preference recoveries. Also addressed is the continuing judicial confusion as to how section 433 and 561 interact and the priority of a liquidator's costs, charges and expenses and remuneration under section 561: see for example, *Re Sakr*; *Great Southern Ltd* [2014] FCA 1355, *Re ExDVD Pty Ltd (in liq)* (2014) 223 FCR 409; [2014] FCA 696 and *Re Great Southern Ltd (in liq)*; *ex parte Thackray* (2102) 260 FLR 362; [2012] WASC 59. In addition, the proposed amendments explicitly recognise the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 but confine its operation under both sections 433 and 561 so as to exclude general receivership and liquidation costs, charges and expenses.

²⁸⁵ Section 599-5 of the CATSI Act provides to a similar effect.

- 5.52.2 Second, and more significantly, the current position appears to be that the Corporations Act administration provisions do not apply to the property, business or affairs of a corporation which is a trading trust.
- 5.53 First then we will consider what type of amendments could be made to address **issue one**. These would include provisions to:
- 5.53.1 Limit the operation of amendments here to a trustee corporation (TC) which traded only as trustee and not in any personal capacity.
 - 5.53.2 Define '*property*' as including a TC's right of indemnity.
 - 5.53.3 Subject to the foregoing, and to the extent that CATSI Act applies the provisions of Corporations Act, Parts 5.4 to 5.9, apply those provisions to the TC.
 - 5.53.4 Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular TC.²⁸⁶ An application for an order under such a section could be made by the TC, a liquidator of the TC, the Registrar or any other interested person.
 - 5.53.5 Make any provision in a trust deed or elsewhere which has the effect of removing a TC as trustee on its winding up void, subject, however, to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person.
 - 5.53.6 Restrict the Court's ability to making the order under paragraph 5.53.5 to circumstances where it appears to the Court '*appropriate or convenient*' to do so.
 - 5.53.7 Provide that any provision which attempts to limit or exclude a TC's right of indemnity is void, and that the right of indemnity is exercisable only by the TC through its liquidator and not by any creditor or beneficiary.
 - 5.53.8 Prohibit the sale of the right of indemnity.²⁸⁷
 - 5.53.9 Where the assets of the TC are insufficient to cover the total costs of the winding up, extend the right of indemnity to the TC's personal assets (if any).
 - 5.53.10 Give the liquidator a specific power to wind up the trust.
 - 5.53.11 Give the liquidator specific power to carry on the business of the trust, but only so far as necessary for the beneficial disposal or winding up its business.
 - 5.53.12 Provide that it is not necessary for the liquidator to apply to the Court for approval to exercise the powers referred to above.
 - 5.53.13 Provide that the Court order or resolution whereby the liquidator is appointed (as the case may be) is taken to confer these powers on the liquidator, such that it is not necessary for the Court order or resolution to specify such powers.

²⁸⁶ This has been an extraordinarily useful and powerful provision available to the Court to remedy all manner of difficulties which have arisen in the voluntary administration area - Part 5.3A of the Corporations Act.

²⁸⁷ According to the High Court, the right of indemnity and the equitable lien which supports it is of a proprietary nature: *Octavo Investments v Knight* [1979] HCA 61; (1979) 144 CLR 360.

5.53.14 Provide that the liquidator's costs, charges and expenses of winding up the TC have the same priority as is conferred by section 556(1)(a) of the Corporations Act.

5.53.15 Provide that the liquidator of a TC may apply to the Court for any matter arising in the winding up of the trust.

5.54 Next, we address **issue two** as follows. These would include provisions to:

5.54.1 Apply the provisions in the following circumstances where the TC:

5.54.1.1 is the trustee of more than one trust;

5.54.1.2 traded and incurred debts in both its personal capacity and as a trustee of only one trust;

5.54.1.3 traded and incurred debts in both its personal capacity and as a trustee of multiple trusts;

5.54.1.4 did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of multiple trusts;

5.54.1.5 traded in its personal capacity and also in its capacity as trustee of multiple trusts, all of those being insolvent; and

5.54.1.6 traded in its personal capacity and also in its capacity as trustee of multiple trusts, some of those being insolvent and some solvent.

5.54.2 Provide that the provisions here do not apply where issue one applies.

5.54.3 Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular TC.²⁸⁸ An application for an order under such a section could be made by the TC, a liquidator of the TC, the Registrar or any other interested person.

5.54.4 Make any provision in a trust deed or elsewhere which has the effect of removing a TC as trustee on its winding up void, subject, however, to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person.

5.54.5 Restrict the Court's ability to making an order of the kind contemplated in paragraph 5.54.4 to circumstances where it appears to the Court *'appropriate or convenient'* to do so.

5.54.6 Provide that any provision which attempts to limit or exclude a TC's right of indemnity is void, and that the right of indemnity is exercisable only by the TC through its liquidator and not by any creditor or beneficiary.

²⁸⁸ This has been an extraordinarily useful and powerful provision available to the Court to remedy all manner of difficulties which have arisen in the voluntary administration area - Part 5.3A of the Corporations Act.

- 5.54.7 Prohibit the sale of the right of indemnity.²⁸⁹
- 5.54.8 Provide that the liquidator may apply to the Court for directions as to how the winding up is to be conducted.
- 5.54.9 Provide that on any application, the liquidator must set out as reasonably practicable from the available books and records the financial position of the TC in both its personal capacity and as trustee of each trust where the TC is trustee; and set out a proposal for the Court's consideration as to how the winding is proposed to be conducted.
- 5.54.10 Provide that such proposal is to be based on the following considerations:
- 5.54.10.1 that the trustee company's own property and property held by it on one or more trusts each be administered separately in the winding up;
 - 5.54.10.2 that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and
 - 5.54.10.3 each of the creditors referred to above be entitled to a distribution out of the funds derived from the property that they claim an interest in.
- 5.54.11 Provide that in any such application, the Court may direct the liquidator to implement the proposal or modify it as the Court may consider just, appropriate or convenient and direct the liquidator to implement the proposal as so modified by the Court. Provide that notice of any such application be provided to that the application be formally served on:
- 5.54.11.1 the creditors of the TC;
 - 5.54.11.2 the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument;
 - 5.54.11.3 the Registrar; and
 - 5.54.11.4 any other person as ordered by the Court.
- 5.55 Next we address **issue three** as follows. These would include provisions to:
- 5.55.1 Define the expression used in Part 5.3A Corporations Act, '*business, property and affairs*' as including a TC's business, property and affairs both in its personal capacity and as a trustee.
 - 5.55.2 Define '*administrator*' and '*deed administrator*' and '*deed*' respectively as:
 - 5.55.2.1 the person appointed as such by resolution under Corporations Act section 436A;

²⁸⁹ According to the High Court, the right of indemnity and the equitable lien which supports it is of a proprietary nature: *Octavo Investments v Knight* [1979] HCA 61; (1979) 144 CLR 360.

- 5.55.2.2 the administrator of a deed of company arrangement constituted under Corporations Act Part 5.3A; and
- 5.55.2.3 a deed of company arrangement constituted under Corporations Act Part 5.3A.
- 5.55.3 Apply the provisions to all corporations to which **issue one** and **issue two** applies.
- 5.55.4 Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular TC.²⁹⁰ An application for an order under such a section could be made by the TC, a liquidator of the TC, the Registrar or any other interested person.
- 5.55.5 Provide that in preparing the report under Insolvency Practice Rule 75-225²⁹¹ the administrator shall so far as is reasonably practicable, report separately as to:
- 5.55.5.1 the TC's business, property, affairs and financial circumstances in its personal circumstances; and
- 5.55.5.2 the TC's business, property, affairs and financial circumstances in its trustee of any trust.
- 5.55.6 Provide that, subject to the foregoing, and in addition to the powers conferred by Corporations Act Part 5.3A on an administrator, the administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the TC.
- 5.55.7 Provide that, subject to the foregoing, a deed administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the TC.
- 5.55.8 Provide that the power of an administrator or deed administrator to carry on the company's business applies only where, in the external administrator's opinion, the carrying on of the business is in the interests of the creditors of the trust.
- 5.55.9 Provide that the power to carry on the business of any trust shall be exercisable by any administrator or deed administrator without any order or direction of the Court.
- 5.55.10 Provide that, subject to the foregoing, the power of an administrator to terminate or dispose of all or any of the company's business shall include the power to wind up any trust where the TC was trustee.
- 5.55.11 Provide that, subject to the foregoing, shall not be exercisable until the creditors have had an opportunity to consider the exercise of such power at a meeting convened under Corporations Act section 439A.

²⁹⁰ This has been an extraordinarily useful and powerful provision available to the Court to remedy all manner of difficulties which have arisen in the voluntary administration area - Part 5.3A of the Corporations Act. It can be used to extend or truncate times, validate invalid appointments, disapply various otherwise mandatory sections of the Corporations Act and so on.

²⁹¹ In force as from 1 September 2017, replacing the former report required under section 439(4)(a) of the Corporations Act.

- 5.55.12 Provide that where the assets of the TC are insufficient to cover the total costs of the administration of the TC, the right of indemnity shall extend to include any assets of the TC held in its personal capacity.
- 5.55.13 Provide that so far as is reasonably practical, the instrument required to be prepared under section 444A(3) set out a proposal as to how a deed will operate in respect of a TC:
- 5.55.13.1 traded both in a personal capacity and as a trustee;
 - 5.55.13.2 that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and
 - 5.55.13.3 that each set of creditors relating to the activities of the TC in its personal capacity and in respect of each trust where it is the trustee be entitled to a distribution out of funds derived from the proceeds of realisation of property that the creditors claim they have an interest in.
- 5.55.14 Provide that the administrator or deed administrator may apply to the Court for directions in respect of any particular matter relating to the administration or operation of the deed.
- 5.55.15 Provide that on any such application notice is to be given to and the following persons served with the application:
- 5.55.15.1 the creditors of the TC;
 - 5.55.15.2 the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument;
 - 5.55.15.3 the Registrar; and
 - 5.55.15.4 any other person as ordered by the Court.
- 5.56 Next, as to **issue four**. These would include provisions to:
- 5.56.1 Provide that the reference to *'property in section 433'* shall be read as including a reference to property of a company held both in its own right and as trustee also.
 - 5.56.2 For the avoidance of doubt, provide that the references to *'the property of the company'* and *'any property'* shall be read as including a reference to property held by a company both in its own right and as trustee.
 - 5.56.3 For the avoidance of doubt, provide that the right of indemnity available to a corporate trustee is to be taken to be part of the property of that company for the purposes of sections 433 and 561.
 - 5.56.4 Provide that where section 433 applies, section 561 shall not apply.

- 5.56.5 Provide that where section 433 does not apply, any secured party in relation to a circulating security interest, shall, as soon as practicable after the appointment of a liquidator, and to the extent that such assets allow, either:
- 5.56.5.1 permit the liquidator access to the assets to permit the liquidator to sell such of those assets to enable the liquidator to pay the amounts referred to in Corporations Act sections 561(a), (b) and (c); or
 - 5.56.5.2 pay the amounts referred to in Corporations Act sections 561(a), (b) and (c).
- 5.56.6 Provide that where because of either section 433 or section 5.6.5 employee entitlements have been paid and the liquidator subsequently makes recoveries under the voidable transactions provisions,²⁹² resulting in a 'surplus', becoming available, then so much of that surplus as represents all or some of the amount of the employee entitlements paid, shall be reimbursed to the secured creditor.²⁹³
- 5.57 Finally, as to **issue five**:
- 5.57.1 Provide uniformly in the various trustee legislation of the States and Territories²⁹⁴ that the suggested provisions of the CATSI Act as set out above apply to the winding up and administration of corporations, that prior to their, prior to their winding up or entry into administration, carried on business and incurred debts in their capacity as trustee of one or more trusts.
 - 5.57.2 Provide that, for the avoidance of doubt, the provision referred to above operates, so far as may be necessary to confer the relevant provisions of the CATSI Act on the Commonwealth pursuant to indicia 51(xxxvii) of the *Commonwealth of Australia Constitution Act*.

Special Administration

Discussion Paper Questions

- 5.58 The Discussion Paper posed the following questions:
- 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.*

²⁹² Corporations Act, Part 5.7B.

²⁹³ See generally, Hamilton, *Equitable Subrogation of Banks and other Secured Creditors for the Recovery of Statutory Employee Entitlements*.

²⁹⁴ Specifically: the *Trusts Act 1973* (Qld); the *Trustee Act 1925* (NSW); the *Trustee Act 1893* (NT); the *Trustee Act 1936* (SA); the *Trustee Act 1958* (Vic); the *Trustee Act 1925* (ACT); the *Trustees Act 1962* (WA); and, the *Trustee Act 1898* (Tas).

9.2.1 *Should there be no valid directors be an express ground for appointment of a special administrator?*²⁹⁵

Discussion of key issues

- 5.59 The special administration power is a special measure that allows the Registrar to address proactively governance and financial issues within a corporation before they become so serious that the corporation become completely unviable. The provisions of Part 11-2 of the CATSI Act dealing with special administration of CATSI corporations appear to be working reasonably well. There are several matters however which might be considered to improve the operation of this Part. These are now considered.
- 5.60 First, it was made clear by Gilmour J in *Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2]*²⁹⁶ that the appointment of a special administrator by the Registrar was the appropriate remedy in a situation where a corporation had no directors. His Honour considered, and with respect correctly, that such a course could '*potentially*' be justified under either paragraphs (f) or (j) of section 487-5(1) of the CATSI Act. That circumstance could usefully be added as an additional ground for special administration under section 487-5(1). While it is arguable that the Registrar has power under paragraph (j) of the section to appoint a special administrator where the corporation has no directors, it is preferable that this be set out expressly.
- 5.61 Perhaps even more compelling, however, are those circumstances where it is unclear whether or not there is a validly appointed board. There can be wide-ranging circumstances where there is doubt as to whether a CATSI corporation has a validly appointed board. These arises where, for example:
- 5.61.1 A person is purportedly appointed a director when he or she does not meet the eligibility requirements under CATSI Act.
- 5.61.2 A person who meets the eligibility requirements is validly appointed but later ceases to meet the requirements.
- 5.61.3 A director's term of appointment expires but that person continues to act as a director, attending meetings, making decisions and so on.
- 5.61.4 A director is purportedly removed as a director but nevertheless continues to act as a director, attending meetings, making decisions and so on.
- 5.61.5 A person is purportedly appointed a director at a general meeting in circumstances where the meeting itself was invalid e.g. it was inquorate, or the meeting was '*called*' and '*held*' by persons with no power to do so.
- 5.62 We consider that disputes quite regularly arise as to the validity of the appointment of one or more board members and because of the uncertain or disputed surrounding circumstances, it is simply not possible to determine the legal position with precision.
- 5.63 Second, the grounds for the appointment of a special administrator might be usefully clarified in respect of corporations which are in financial difficulties or insolvent. The

²⁹⁵ 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)?

²⁹⁶ [2016] WASC 75.

first ground mentioned in section 487-5 (1) (a) is that the corporation trading at a loss '*for at least 6 months during the 12 months before the determination is made*' is, to our knowledge, rarely, if ever used.²⁹⁷ Determination of this issue can be seen as subjective and, in the absence of reliable accounting records based on the Australian Accounting Standards, almost impossible to definitively prove. It is one of those grounds which leads easily to disputation.

5.64 If this ground is to be retained, it should be given some force and redesigned. In that regard, it is suggested that:

5.64.1 Section 453-1 (examination of books) should include as a matter to be reported on whether:

5.64.1.1 the corporation is insolvent (as statutorily defined); and

5.64.1.2 whether the corporation has traded at a loss for at least 6 months in the last 12 months.

5.64.2 Paragraph (a) of section 487-5 be repealed and replaced by a new paragraph to read '*(a) the authorised officer appointed under section 453-1 has reported to the Registrar that:*

5.64.2.1 *the corporation is insolvent; or*

5.64.2.2 *the corporation has traded at a loss for at least 6 months during the period of 12 months prior to reporting to the Registrar.'*

5.65 There have been situations where all directors have invited the Registrar to appoint an administrator/special administrator. In these cases, it seems unnecessary for the Registrar to have to go through the motions of preparing a '*show cause notice*'. It is therefore recommended that where all the directors so request the appointment of a special administrator, the Registrar be not need to prepare and serve a '*show cause notice*'. It is recommended that section 487-10 (2) be amended to include as an additional circumstance where the '*show cause notice*' may be dispensed with, a request by all the corporation's directors for the Registrar to appoint a special administrator.

5.66 It is therefore recommended that three additional grounds be included in section 487-5 as follows:

5.66.1 The corporation has no directors.

5.66.2 Where in the opinion of the Registrar:

5.66.2.1 there is doubt as to whether the board of directors is validly constituted;

5.66.2.2 that doubt, when it first came to the attention of the Registrar (**the date**), is not resolved either within 21 days of the date, or such longer period as the Registrar may, in writing to the corporation allow; and

²⁹⁷ It was the first ground for the appointment of an administrator, listed under section 71(2) of the former *Aboriginal Councils and Associations Act 1976* (Cth). Consultant Garry Hamilton prepared or settled more than 100 '*show cause notices*' under that legislation but cannot recall ever seeing that ground being specified.

- 5.66.2.3 the expanded paragraph (a) as suggested above in paragraph 5.64.2.
- 5.66.3 Where all the directors of the corporation request in writing that the Registrar appoints a special administrator.
- 5.67 The previous requirement of the Corporations Act that external administrations (such as winding up and receivership appointments) be gazetted and published in a national newspaper or one in each State or Territory in which the company carried on business has gradually been removed. The time costs and outlays involved here were very high and it was doubtful if these notices ever came to the attention of any relevant party. The gazetting and newspaper notifications for such appointments has become unnecessary and unnecessarily expensive.
- 5.68 We recommend that a more appropriate method of communication in this regard would be via the ORIC website. Possibly, the ORIC webpage could be slightly reconfigured to assist in this regard. It is therefore recommended to abolish the current gazetting and advertising requirements in subsections 493-1 (4) and (5) and replace them with a requirement of notification, as soon as practicable, on the ORIC webpage,²⁹⁸ with consequential amendments to section 694-95(2)(b) (failure to gazette and publish in a newspaper being a contravention of the CATSI Act) and Division 700 (**Dictionary**) in respect of the definitions of '*national newspaper*' and '*daily newspaper*'.
- 5.69 Section 499-10 of CATSI Act imports various provisions of the Corporations Act Part 5.3A (Administration) into the CATSI Act. Naturally, where the CATSI corporation is a trading trust, those provisions will be inapplicable and one will need to rely upon the form of the amendments as set out above.
- 5.70 The Registrar also queried whether other grounds might be the basis for appointment of a special administrator. Given the recommendations in Chapter 6 about changes in relation to administration of PBCs and also the proposed changes relating to related party transactions in Chapter 4, it is recommended that the following be additional grounds for appointment of a special administrator be included in the CATSI Act:
- 5.70.1 breach of the Native title legislation; and
- 5.70.2 substantial or repeated breaches of the prohibition on related party transactions.

Presumptions of insolvency and winding up

Discussion Paper Questions

- 5.71 The Discussion Paper posed the following questions:

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?

²⁹⁸ If thought appropriate, the content of the ORIC webpage posting could reflect the current requirements of section 493-1(5) of the CATSI Act and that is recommended.

11.2.2 *What change is needed to enable the Registrar to form that view without protracted and contested litigation?*

Discussion of key issues

- 5.72 Section 526-35(3) of CATSI Act imports, among other Parts of the Corporations Act, Part 5.7B (relating to voidable transactions), which contains a presumption of insolvency. That presumption applies where:
- 5.72.1 The company fails to keep written financial records which '*correctly record and explain its transactions and financial position and performance*' and which '*would enable true and fair financial statements to be audited*'; or
 - 5.72.2 The company has failed to retain such financial records for a period of seven years.
- 5.73 The presumption does not apply if the non-compliance with matters set out in paragraph 5.72.1 is '*only minor or technical*' and the presumption is rebuttable by proof to the contrary. The presumption was inserted into the Corporations Act to assist liquidators in voidable transaction recoveries. Prior to having the benefit of the presumption, a liquidator had difficulty establishing the insolvency element in the absence of adequate and reliable books and records.
- 5.74 A ground for winding up under CATSI Act, section 526-5(i), is that '*the corporation is insolvent*'. However, there is no presumption similar to that contained in Part 5.7B to assist the Registrar or a special administrator. It is recommended that the presumption applies, for the purpose of section 526-5(i), in either of the following circumstances:
- 5.74.1 Where the authorised person reports to the Registrar under section 453-1 that either of the circumstances set out in paragraph 5.72 above exist; or
 - 5.74.2 Where the special administrator forms that opinion.
- 5.75 As the presumption is rebuttable, the corporation will need to be afforded an opportunity to rebut if possible the presumption by for example being given 14 days to produce the records as described in paragraph 5.72.
- 5.76 In addition to the Part 5.7B Corporations Act presumption, there are six presumptions of insolvency contained in Corporations Act, in section 459C. These are fairly obvious examples of where the insolvency presumption should apply e.g. when a receiver is appointed by a secured creditor, where a person enters into possession of the company's property for the purpose of enforcing a charge, where execution or other process issued on a judgment, decree or order of an Australian court is returned unsatisfied, and so on. It is recommended that these presumptions be incorporated into the CATSI Act for the purpose of better defining and more easily proving insolvency.
- 5.77 For some reason which is not readily apparent, the Registrar or a director (among others) may apply to wind up a corporation on the grounds that it is insolvent only '*with the leave of the Court*': see section 526-15(4).
- 5.78 It makes sense that that section requires a contingent or prospective creditor, or '*contributory*' (a defined term - essentially a member) to obtain leave but there seems no

reason why the Registrar or a director should be obliged to obtain leave. It is therefore recommended that section 526-15 be amended accordingly.

Some current reforms under the Corporations Act

Discussion Paper Questions

5.79 The Discussion Paper posed the following questions:

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?

'Ipso facto clauses' and 'safe harbour' amendments to the CA: what are these and should they be adopted by the CATSI Act?

Background to the legislation and the safe harbour provisions

- 5.80 On 12 September 2017 the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth) was passed by both Houses of Parliament and became the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth) (**new Act**) when it received Royal Assent on 19 September 2017.
- 5.81 The ipso facto provisions (described below) will come into effect on the later of (a) 1 July 2018, or (b) the day after six months after Royal Assent. However the Governor-General may make a proclamation that it is to commence earlier. That is not expected, however, and the likely start date will be 1 July 2018.
- 5.82 On the other hand, the '*safe harbour*' provisions came into effect on 17 September 2017.
- 5.83 The new Act introduces two main reforms in insolvency by amendment to the Corporations Act. First, it introduces a '*safe harbour*' for company directors from personal liability for insolvent trading. Secondly, it imposes a stay on the enforcement of ipso facto clauses in certain circumstances.
- 5.84 The '*safe harbour*' provisions are designed to provide protection for company directors against Australia's rigorous insolvent trading laws under section 588G of the Corporations Act when the directors seek, in a bona fide way, to restructure their company.
- 5.85 Australia has some of the harshest insolvent trading laws in the world. A director can become personally liable for allowing a company to incur a debt if at the time the debt is incurred, there are reasonable grounds to suspect that the company is insolvent or will become insolvent by the incurring of the debt.

- 5.86 In England, the test is much more lenient. There the Court has a discretion under section 214 of the *Insolvency Act 1986* (UK) to order that a director may be liable to 'make such contribution (if any) to the company's assets as the Court thinks proper' if:
- 5.86.1 The Court is satisfied that at the time the debt was incurred the director knew or should have known that the company had no reasonable prospects of avoiding insolvency; and
 - 5.86.2 In that case, the director did not take all possible steps to minimise the loss to creditors.
- 5.87 The 'safe harbour' protection is drafted as a defence to an insolvent trading claim under section 588G Corporations Act and is contained in section 588GA of Corporations Act.
- 5.88 The purpose of the 'safe harbour' provisions is to encourage directors of companies to attempt to restructure and keep alive companies which previously would be placed (often prematurely) into administration because of fear by the directors that they would be pursued for insolvent trading.
- 5.89 Section 588GA of the new Act essentially contains three elements which a director will need to establish in order to gain 'safe harbour' protection:
- 5.89.1 First, the director must show that at the time the director starts to suspect that the company is insolvent or may become insolvent, the director 'starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company'.
 - 5.89.2 There is a list of factors which are set out, as a guide only, in determining this 'better outcome' test. These include whether the director:
 - 5.89.2.1 is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company;
 - 5.89.2.2 is obtaining appropriate advice from an appropriately qualified entity who was given sufficient information to give appropriate advice;
 - 5.89.2.3 is developing or implementing a plan for restructuring the company to improve its financial position; or
 - 5.89.2.4 is properly informing himself or herself of the company's financial position.
 - 5.89.3 Secondly, the director will need to establish that the debts which were incurred were debts incurred in connection with the 'better outcome' course. It would seem that any new financing which is a typical part of restructuring would fall within the 'debt incurred' towards a 'better outcome' test.

- 5.89.4 The expression *'better outcome'* is defined to mean an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company.²⁹⁹
- 5.89.5 Thirdly, the safe harbour provisions do not apply if when the debt is incurred:
- 5.89.5.1 the company is failing *'to pay the entitlements of its employees by the time they fall due'*; or
- 5.89.5.2 the company is not giving returns, notices, statements, applications or other documents as required by taxation laws;³⁰⁰ or
- 5.89.5.3 the company fails substantially to comply with their obligations to assist an administrator, liquidator or controller in a formal insolvency under sections 475(1), 497(4) or 530A(1) of the Corporations Act.³⁰¹
- 5.90 Interpretation issues, as has been noted,³⁰² are readily apparent when considering:
- 5.90.1 The concept that the director seeking protection *'starts developing one or more courses of action'*: is some positive act required rather than merely thinking about the possible course or courses of action?
- 5.90.2 The expression *'reasonably likely'* does not connote a better than 50% probability of a *'better outcome'* than the appointment of a liquidator or an administrator but rather a chance of achieving a better outcome that is not fanciful or remote, but is *'fair'*, *'sufficient'* or *'worth noting'*.³⁰³
- 5.90.3 The *'better outcome'* is in respect of *'the company'*. Why is it not in respect of *'the creditors of the company'*? Intuitively, that would seem to make more sense as the whole concept of the safe harbour is to rescue companies in financial distress.
- 5.90.4 Certainly, the provisions will result in a better return to the employee creditors as the defence is not available if the company fails to *'pay the entitlements of its employees by the time they fall due'*. But what exactly does this mean? Assume that a long-standing employee who has just become eligible for long service leave elects to defer the taking of the leave for one reason or another for six months. Is the company compelled nevertheless to pay the leave immediately it became due?
- 5.90.5 Some of the language of the new legislation is vague. For example, when exactly does a *'person [cease] to take... a course of action'*? And when exactly does a course of action cease to be *'reasonably likely to lead to a better outcome for the company'*?³⁰⁴

²⁹⁹ Corporations Act, section 588GA(7).

³⁰⁰ Corporations Act, section 588GA(4).

³⁰¹ Corporations Act, section 588GA(5). The failure to pay employee entitlements of keep taxation returns up-to date requires *'substantial compliance'* and no more than *'2 or more failures ...during the 12 month period ending when the debt is incurred'*.

³⁰² Maiden and Papaelo, *Safe Harbour laws commence operation and ipso facto laws pass into law*.

³⁰³ Explanatory Memorandum to the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth), paragraph .52.

³⁰⁴ Corporations Act, section 588GA(1)(b).

***Ipso facto* provisions**

- 5.91 An *ipso facto*³⁰⁵ clause in insolvency is typically regarded as a clause in a contract or agreement which permits a party to terminate or modify a contract upon the happening of some event, usually an event concerning the insolvency of the other party. The clause can operate automatically or at the election of the non-defaulting party.
- 5.92 There is little doubt that such clauses can quickly destroy the value of a business or prevent it being restructured or sold as a going concern.
- 5.93 The new Act places a moratorium upon the enforcement of such clauses when (and during the period that) the company:
- 5.93.1 enters into administration under Corporations Act Part 5.3A; or
 - 5.93.2 enters into a Corporations Act Part 5.1 scheme of arrangement for the purpose of it avoiding being wound up in insolvency; or
 - 5.93.3 appoints a managing controller over the whole or substantially the whole of the property of the company.
- 5.94 It is important to note that parties to a contract will retain the right to terminate a contract for circumstances not involving the '*company's financial position*', such as non-payment of amounts due under the contract. In addition, the new provisions relate only to contracts entered into after the commencement and will not apply to contracts made after the commencement of a formal restructure.

Recommendations on '*ipso facto*' and '*safe harbour*' provisions

- 5.95 These proposals represent a sensible approach to modern law reform. They are likely to encourage a more workable restructuring culture than that which currently exists and would be welcomed in Australia. Currently, there is very little incentive for directors of companies facing financial stress to do anything other than place the company into administration or liquidation, rather than risk being pursued for insolvent trading. Despite the somewhat unclear meaning of some of the provisions, as noted above, it is recommended that the provisions be incorporated into the CATSI Act in their entirety.
- 5.96 Finally, we note that none of these new provisions are affected by the ILRA.

Deregistering corporations

Discussion Paper Questions

- 5.97 The Discussion Paper posed the following questions:

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

³⁰⁵ This Latin expression means '*by that fact alone*'.

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?

Discussion of key issues

- 5.98 Division 546 of Part 12-2 of CATSI Act, dealing with the deregistration of CATSI corporations mirror closely the deregistration provisions of the Corporations Act.
- 5.99 It is doubtful if the 'voluntary' deregistration procedures in section 546-1 are often (if ever) used in the CATSI corporation context. The Corporations Act counterpart provisions are not used frequently because the criteria which must exist before voluntary deregistration can occur are extremely narrow and technical (all members to agree, the corporation not carrying on business, not having assets worth more than \$1,000, all fees and penalties paid, no liabilities and not a party to any legal proceedings).
- 5.100 With the exception of the criterion relating to the corporation being a party to legal proceedings,³⁰⁶ it may be useful in the CATSI corporation context to provide that the Registrar may, at the request of the applicant, waive one or more of the other criteria. For example, if not all members can be located to provide their consent to the application, or where the assets might slightly exceed the \$1,000 amount, or where a small lodgement fee has not been paid, it may be appropriate to let the Registrar, in his absolute discretion decide whether it may be appropriate to waive the currently strict criteria.
- 5.101 It is therefore recommended that CATSI Act, section 546-1 be amended to give the Registrar absolute discretion to relieve a voluntary deregistration applicant of strict compliance with the criteria set out in subsection 546-1(2), (other than that concerning the corporation being a party to legal proceedings).³⁰⁷
- 5.102 The Registrar-initiated deregistration provisions contained in CATSI Act section 546-5 are narrow and do not allow the Registrar any discretion outside the strict confines of the section. Outside of a liquidation scenario, the only three criteria for such deregistration are (a) non-lodgement of a general report for six months after it is due, (b) non-lodgement of any documents for 18 months, and (c) the Registrar having 'no reason to believe that the corporation is carrying on business'.
- 5.103 There may well be circumstances other than the three just mentioned where it would be useful for the Registrar to be authorised to initiate a deregistration. The power would need to be broadly expressed, such as 'where the Registrar considers that the deregistration is in the public interest'. Such an approach however may well invite litigation via section 6 of the ADJR Act and for that reason is probably best avoided.

³⁰⁶ It is thought that it would not be appropriate to interfere with the out-working of legal proceedings, as that is a matter for the Court and the relevant Court Rules.

³⁰⁷ See comments in previous footnote.

5.104 It is therefore recommended that no amendment be made to the Registrar-initiated deregistration provisions of CATSI Act.

Should voidable transaction recoveries be available to secured creditors?

Discussion Paper Questions

5.105 The Discussion Paper posed the following question:

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?

Discussion of key issues

5.106 For over 100 years, it has been the law in England that a liquidator's recoveries of monetary preferences are available only to unsecured creditors.³⁰⁸ That appeared to be the law in Australia until the last few years, during which there have been a number of Federal Court decisions that appear to alter that position.³⁰⁹

5.107 Since 2010 there have been six single Federal Court judgments which have decided that, in certain circumstances, a secured creditor should be entitled to the fruits of a liquidator's monetary preference recoveries.³¹⁰

5.108 *Cook v Italiano Family Fruit Co Pty Ltd* (2010) 109 FCR 474 (**Cook**) was the first and most comprehensively analysed case of the six Federal Court decisions. Briefly the facts of Cook were as follows:

5.108.1 prior to being placed into liquidation, a company had granted a bank a security over all its assets for money borrowed;

5.108.2 the liquidators realised the charged assets and paid the proceeds to the employees pursuant to Corporations Act section 561;

5.108.3 subsequently, the liquidators successfully recovered some voidable preferences and ended up with a 'surplus' of some \$50,000;

5.108.4 at that point the bank was still owed around \$1.2M and the ordinary unsecured creditors some \$3.8M; and

5.108.5 the liquidators applied for directions as to whether the 'surplus' should be paid to the bank or to the unsecured creditors.

³⁰⁸ See for example *Willmot v London Celluloid Co* (1886) 31 Ch D 425.

³⁰⁹ See abstract to Hamilton, *Equitable Subrogation of banks and other secured creditors for the recovery of employee entitlements: A 'new class of case' or simply a different perspective?*. Much of the content of the paper following the headnote above has been used under the heading above.

³¹⁰ *Cook v Italiano Family Fruit Co Pty Ltd* (2010) 109 FCR 474 (**Cook**); *Re Damilock Pty Ltd (in liq)* [2012] FCA 1445; *Re ExDVD Pty Ltd (in liq)* (2014) FCA 696; *Currie v Auto Electrical Distributors (Aust) Pty Ltd* [2014] FCA 885; *Re Weston* [2015] FCA 742.

- 5.109 In these circumstances, Finkelstein J concluded that 'the bank has a claim against the liquidators for breach of trust'³¹¹ and that the appropriate 'remedy' for such breach was for the bank to be 'subrogated to the extent of its loss to the rights of employees against the free assets of the company'. In the result, his Honour directed that the bank as the secured creditor was entitled to receive the 'surplus' preference recoveries.
- 5.110 The other five Federal Court decisions which referred to above followed the reasoning in *Cook* and so it would appear that we have, as two of the Federal Court judges described the situation, 'a new class of case'.
- 5.111 The issue which of course is readily apparent, is a timing problem. According to Finkelstein J in *Cook*, liquidators should wait until sufficient is known about the company's free assets before determining whether the employee entitlements should be paid from the charged assets or out of the free assets. His Honour stated that a liquidator must take into account 'potential realisations' as well as 'possible future realisations'. Unfortunately, in the real world, the success or otherwise of preference proceedings is not known until many years after the commencement of the liquidation and rarely will the liquidator commence preference recovery proceedings until the liquidation is well advanced, investigations undertaken and so on.
- 5.112 By way of practical illustration of the timing problem which *Cook* and other decisions have caused, consultant Garry Hamilton acted for the liquidator in *Williams v Peters*.³¹² There, the liquidator, at the date of her appointment, was without funds, and the prospects of recovering funds from any source seemed hopeless. Nevertheless, after almost four years, the liquidator managed to complete her investigations and to encourage a handful of creditors to contribute funds towards an insolvent trading claim and preference actions, all of which were all ultimately successful. These proceedings eventually generated sufficient funds to return a dividend of 100 cents in the dollar to the preferential creditors and 95 cents in the dollar to the unsecured creditors, a total of some \$4 million.
- 5.113 It is submitted that it would be preferable to avoid these almost practically impossible timing issues as raised in *Cook* by some simple amendments to the two relevant employee entitlement sections; section 433 and 561, Corporations Act.³¹³ The CATSI Act has introduced an extraordinary number of complex and still unresolved issues by picking up sections 433 and 561 Corporations Act.
- 5.114 We also recommend consideration of amendments to Corporations Act as in force at 28 February 2017 to overcome issues concerning employee entitlements.³¹⁴

³¹¹ *Cook v Italiano Family Fruit Co Pty Ltd (in liq)* [2010] FCA 1355, [81].

³¹² [2010] 1 Qd R 475; [2009] QCA 180.

³¹³ Section 433 of the Corporations Act applies when a receiver is appointed but the company has not then commenced to be wound up; section 561 is in the liquidation area of the Corporations Act and allows a liquidator access to certain charged assets to pay employee entitlements; it remains unresolved whether section 561 can have a concurrent operation with section 433 when liquidation occurs before receivership, and if so, how the sections operate together.

³¹⁴ To address, for example, the subtle issue first raised in *Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR ; 276 ALR 349, regarding a secured creditor's right, in certain circumstances, to a liquidator's preference recoveries. See generally, Hamilton, *Equitable Subrogation of Banks and other Secured Creditors for the Recovery of Statutory Employee Entitlements*. Also to be addressed is the continuing judicial confusion as to how sections 433 and 561 interact and the priority of a liquidator's costs, charges and expenses and remuneration under section 561 of the Corporations Act: see for example, *Re Sakr; Great Southern Ltd* [2014] FCA 1355, *Re ExDVD Pty Ltd (in liq)* (2014) 223 FCR 409; [2014] FCA 696 and *Re Great Southern Ltd (in liq); ex parte Thackray* (2102) 260 FLR 362; [2012] WASC 59. See generally, Hamilton, *Employee entitlements in corporate insolvency: some unresolved issues*. In addition, the amendments should explicitly recognise the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 but confine its operation under both

Miscellaneous

- 5.115 Section 6.50 of the CATSI Act is an apparent attempt to differentiate between (voluntary) administration under the Corporations Act (as incorporated into CATSI Act by section 521-1) on the one hand and special administration which is peculiar to the CATSI Act, on the other. It is not effective to achieve this purpose.
- 5.116 Subsection 1 states that chapter 11 deals with 'the administration' of a CATSI corporation 'by persons outside the corporation (for example, in a winding up)'. When read with subsection 2, it is clear that subsection 1 is intended to refer generally to the external administration provisions of the Corporations Act so as to distinguish them from special administration under the CATSI Act.
- 5.117 The word 'administration' is not a defined term and, clearly, the statement in subsection 1, concerning 'persons outside the corporation' is not correct as a special administrator is also a 'person outside the corporation' just as is a liquidator or, indeed, a (voluntary) administrator appointed under Corporations Act Part 5.3A (as incorporated into CATSI Act by section 521-1).
- 5.118 Subsection 2 of section 6-50 then goes on to state:
- Importantly, the Registrar may appoint a special administrator for [sic] an Aboriginal and Torres Strait Islander corporation in circumstances that are vital to the continued viability of the corporation. The special administrator differs from an ordinary administrator.*
- 5.119 As mentioned above there is no definition of administrator in the CATSI Act; nor is there any creature known to law as 'an ordinary administrator'. The manner in which subsection 2 is worded suggests that may be some overriding statutory prohibition against the Registrar not using his powers to appoint a special administrator unless he is satisfied that the appointment is 'vital to the continued viability of the corporation'. That, however, is not the case.
- 5.120 The principal object of Part 5.3A Corporations Act is expressed in Corporations Act section 435A as being first, to maximise the chances of the company or so much as possible of its business, continuing in existence, or, secondly, if that is not possible, results in a better return to creditors and members than an immediate liquidation. Part 5.3A is imported into the CATSI Act by section 521-1.
- 5.121 Special administration has a much broader ambit and the reasons for the Registrar appointing a special administrator are reflected in the statutory grounds for appointment set out in the CATSI Act section 487-5. The grounds are many and varied and are not restricted by the Part 5.3A Corporations Act object as described above. Generally speaking, the Registrar can appoint a special administration where there has been non-compliance with the requirements of the legislation, internal disputes between members or officers, oppressive conduct in the manner in which the corporation's affairs are being conducted and so on. Potential insolvency of the corporation is just one of a number of considerations, unlike the Part 5.3A Corporations Act administration.

sections 433 and 561 so as to exclude general receivership and liquidation costs, charges and expenses. Those costs were never intended to intrude into the employee entitlements however in practice liquidators ignore that intention to the detriment of employees.

- 5.122 It is recommended that section 6.50 of the CATSI Act be redrafted to reflect the comments made above.

Vesting of property on a deregistration of the corporation

- 5.123 When a corporation is deregistered, or after a winding up of the corporation, the Registrar is vested with any left-over assets. Section 546-20(2) provides that upon deregistration of a CATSI corporation, all the company's property vests in the Registrar and section 546-20(3) provides that the Registrar takes the property subject to any interest or claim that attaches to that property. In addition, section 546-25(3) provides that the property remains subject to "all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the Registrar."
- 5.124 The Registrar becomes the owner of assets which must be maintained or remediated. The costs of such remediation may be significant and, indeed, may exceed the value of the asset (e.g. a petrol station which has contaminated land). Further, the nature of the asset may be that there are no readily available funds for any upkeep or remediation of the asset. However, we note that section 546-25(4) appears to be an attempt to ameliorate the effect of section 546-25(3) by providing that the Registrar's obligation for the liabilities is limited to satisfying the liabilities "out of the corporation's property to the extent that that property is properly available to satisfy those liabilities."
- 5.125 It is unclear what this section means. There is nothing under the counterpart legislation, Corporations Act, sections 601AE(3) and (4) where this has ever been considered. We expect that the gist of what the drafter meant is that the liabilities attaching to the properties are limited and may not attach to the Registrar beyond an obligation to sell the asset. However, the wording is unclear and therefore uncertain and troublesome.
- 5.126 One solution may be that where assets are vested in the Registrar, there could an immunity for liabilities associated with the asset and that any such liabilities be a charged to the asset only and that relevant authority asserting the liability be given the power can exercise the charge (i.e. to sell the asset to satisfy the liability). However, this may be complex to draft and may involve constitutional law difficulties in implementation.
- 5.127 An alternative is that the CATSI Act be amended to invest the Registrar with the power currently available to a liquidator under the Corporations Act to disclaim onerous property. The effect of such a disclaimer is "to have terminated [as from the date of the disclaimer] the company's [read here: Registrar's] rights, interests, liabilities and property in or in respect of the disclaimed property, but does not affect any other person's rights or liabilities except so far as necessary to release the company [again here read: Registrar] and its property from liability." Corporations Act, section 568D.
- 5.128 A liquidator does not have liability other than after the date of the liquidator's appointment until date of disclaimer and, for some disclaimers, such as leases the liquidator has seven days to exercise the disclaimer. Whereas if a property is vested in the Registrar, the liability is from date of vesting for all liabilities ever incurred relating to that property, not just those incurred since vesting.
- 5.129 Further, unlike a liquidator the Registrar may not have any express notice of the vesting of the property and, accordingly, a period to exercise the right of disclaimer is needed and

should be based upon the Registrar having actual knowledge of the vesting (i.e. the period would commence when the Registrar is ware of the vesting).

- 5.130 Accordingly, it is recommended that the CATSI Act be amended so that the Registrar is given a power to disclaim any property vested in the Registrar under section 546-20 of the CATSI Act within 120 days (or such period as is prescribed by regulation) of the Registrar having actual knowledge that the property has so vested. The disclaimer is to be effected by notice published on the ORIC website and is to relieve the Registrar of all rights and liabilities in respect of the property, whether any such liabilities are present or future, certain or contingent, ascertained or sounding only in damages.

Chapter 5 Recommendations

Recommendation 23: It is recommended that:

1. Section 453-1 (examination of books) should include as a matter to be reported on whether:
 - a. the corporation is insolvent (as statutorily defined); and
 - b. whether the corporation has traded at a loss for at least 6 months in the last 12 months.
2. Paragraph (a) of section 487-5 be repealed and replaced by a new paragraph to read '*(a) the authorised officer appointed under section 453-1 has reported to the Registrar that:*
 - iii. the corporation is insolvent; or*

the corporation has traded at a loss for at least 6 months during the period of 12 months prior to reporting to the Registrar.'

Recommendation 24: It is recommended that where all the directors request the appointment of a special administrator, the Registrar need not prepare and serve a '*show cause notice*'. It is recommended therefore that section 487-10 (2) be amended to include as an additional circumstance where the '*show cause notice*' may be dispensed with, a request by all the corporation's directors for the Registrar to appoint a special administrator.

Recommendation 25: It is recommended that three additional grounds be included in section 487-5 as follows:

1. The corporation has no directors.
2. Where in the opinion of the Registrar:
 - a. there is doubt as to whether the board of directors is validly constituted;
 - b. that doubt, when it first came to the attention of the Registrar (the date), is not resolved either within 21 days of the date, or such longer period as the Registrar may, in writing to the corporation allow; and
 - c. the expanded paragraph (a) as suggested above.
3. Where all the directors of the corporation request in writing that the Registrar appoints a special administrator.

Recommendation 26: It is recommend that the following be additional grounds for appointment of a special administrator:

1. breach of the Native title legislation; and
2. substantial or repeated breaches of the prohibition on related party transactions.

Recommendation 27: It is recommended to abolish the current gazetting and advertising requirements in subsections 493-1 (4) and (5) and replace them with a requirement of notification, as soon as practicable, on the ORIC webpage, with consequential amendments to section 694-95(2)(b) (failure to gazette and publish in a newspaper being a contravention of the CATSI Act) and Division 700 (**Dictionary**) in respect of the definitions of '*national newspaper*' and '*daily newspaper*'.

Recommendation 28: Section 526-35(3) of CATSI Act imports, among other Parts of the CA, Part 5.7B (relating to voidable transactions), which contains a presumption of insolvency. It is recommended that the presumption of insolvency applies, for the purpose of section 526-5(i), in either

of the following circumstances:

1. Where the authorised person reports to the Registrar under section 453-1 that either of the circumstances set out above exist; or
2. Where the special administrator forms that opinion.

Recommendation 29: It is recommended that, as the presumption is rebuttable, the corporation be afforded an opportunity to rebut if possible the presumption by for example being given 14 days to produce the records.

Recommendation 30: It is recommended that the six presumptions of insolvency contained in Corporations Act, section 459C be incorporated into the CATSI Act for the purpose of better defining and more easily proving insolvency.

Recommendation 31: It is recommended that the Registrar or a director may apply to wind up a corporation on the grounds that it is insolvent with the requirement for obtaining the leave of the court be removed.

Recommendation 32: Subject to the exceptions referred to in the next sub-paragraphs, the provisions in the CATSI Act which link into the external administration area of the Corporations Act³¹⁵ should refer to the provisions of the Corporations Act and the Corporations Regulations as they stood immediately before the commencement of the Insolvency Law Reform Act 2016 (**ILRA**) i.e. on 28 February 2017. The exceptions referred to are:

1. The ILRA amended a technical defect in the Corporations Act with the definition of 'relation-back day' in section 9. It is recommended that the CATSI Act pick up the new definition of 'relation-back day' through section 526-40 of the CATSI Act.
2. It is recommended that section 100-5 of Division 100 of Part 4 of Schedule 2 Insolvency Practice Schedule (Corporations) of the Corporations Act (assignment of rights of action previously available only to registered liquidators, such as voidable transactions and insolvent trading) be introduced into CATSI Act.
3. It is recommended that the CATSI Act adopts sections 40-5 and 40-10 (but only in respect of documents required to be lodged under the Corporations Act as in force at 28 February 2017) and adopts sections 40-15, 40-20, 40-30 and 40-35 (dealing with general disciplining of insolvency practitioners by ASIC) of Division 40 of Part 2 of Schedule 2 of the Insolvency Practice Schedule (Corporations).
4. It is recommended that as the concept of official liquidator was abolished on 1 March 2017, sections 1291, 1286, 1283, 1291 should not be imported nor the definition of 'official liquidator' in section 9; in addition, the reference in section 472 to the appointment of an 'official liquidator' should be changed to refer simply to the appointment of a 'liquidator' which means a registered liquidator.

Recommendation 33: It is recommended, despite some drafting issues, to incorporate into the CATSI Act the proposals in the recently enacted *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* ("safe harbour" and "ipso facto" provisions).

³¹⁵ CATSI Act, sections 516-1, 521-1, 526-35, 526-40, 531-1 and 536-1.

3. The 'safe harbour' legislation: an amendment to the CATSI Act will be required to incorporate a new section 588GA which was not in force as at 28 February 2017. This can be done by an amendment to section 531-1(3)(a).

4. The ipso facto provisions: these provisions are incorporated at the end of Corporations Act Part 5.1 (Amalgamations and Reconstructions) with the new section numbers just running on. The new sections are all incorporated in Part 5.1.

Recommendation 34: It is recommended there be amendments to the CATSI Act relating to the winding up of an insolvent corporate trustee which has traded in its trustee capacity only and not in any personal capacity (**issue one**). It is recommended that the CATSI Act be amended to:

1. Limit the operation of such amendments to a corporate trustee which traded only as trustee and not in any personal capacity.
2. Define 'property' as including a corporate trustee's right of indemnity.
3. Subject to comments below and to the extent that CATSI Act applies the provisions of Corporations Act, Parts 5.4 to 5.9, apply those provisions to the corporate trustee.
4. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person.
5. Make any provision in a trust deed or elsewhere which has the effect of removing a corporate trustee as trustee on its winding up void, subject however to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person.
6. Provide the Courts an ability to making an order in circumstances where it appears to the Court 'appropriate or convenient' to do so.
7. Provide that any provision which attempts to limit or exclude a corporate trustee's right of indemnity is void, and that the trustee's right of indemnity is exercisable only by the corporate trustee through its liquidator and not by any creditor or beneficiary.
8. Prohibit the sale of the trustee's right of indemnity.
9. Where the assets of the corporate trustee are insufficient to cover the total costs of the winding up, extend the trustee's right of indemnity to the corporate trustee's personal assets (if any).
10. Give the liquidator a specific power to wind up the trust.
11. Give the liquidator specific power to carry on the business of the trust, but only so far as necessary for the beneficial disposal or winding up its business.
12. Provide that it is not necessary for the liquidator to apply to the Court for approval to exercise the powers referred to in paragraphs 10 and 11 above.
13. Provide that the Court order or resolution whereby the liquidator is appointed (as the case may be) is taken to confer these powers on the liquidator, such that it is not necessary for the Court order or resolution to specify such powers.

14. Provide that the liquidator's costs, charges and expenses of winding up the corporate trustee have the same priority as is conferred by Corporations Act, section 556(1)(a).

15. Provide that the liquidator of a corporate trustee may apply to the Court for any matter arising in the winding up of the trust.

Recommendation 35: It is recommended that amendments to the CATSI Act be made relating to a trustee corporation that has traded in any other capacity i.e.: traded both in a personal capacity and as a trustee or traded as a trustee of more than one insolvent trust or traded as a trustee of multiple trading trusts, some of which were solvent and other of which were insolvent. (**issue two**). It is recommended that where issue one does not apply to:

1. Apply the provisions in the following circumstances where the corporate trustee:
 - a. is the trustee of more than one trust;
 - b. traded and incurred debts in both its personal capacity and as a trustee of only one trust;
 - c. traded and incurred debts in both its personal capacity and as a trustee of multiple trusts;
 - d. did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of multiple trusts;
 - e. traded in its personal capacity and also in its capacity as trustee of multiple trusts, all of those being insolvent;
 - f. traded in its personal capacity and also in its capacity as trustee of multiple trusts, some of those being insolvent and some solvent.
2. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person.
3. Make any provision in a trust deed or elsewhere which has the effect of removing a corporate trustee as trustee on its winding up void, subject however to the possibility of a Court order to the contrary made on the application of the liquidator, the Registrar or any other interested person.
4. Restrict the Court's ability to making an order to circumstances where it appears to the Court 'appropriate or convenient' to do so.
5. Provide that any provision which attempts to limit or exclude a corporate trustee's right of indemnity is void, and that the trustee's right of indemnity is exercisable only by the corporate trustee through its liquidator and not by any creditor or beneficiary.
6. Prohibit the sale of the trustee's right of indemnity.
7. Provide that the liquidator may apply to the Court for directions as to how the winding up is to be conducted.
8. Provide that on any application, the liquidator must set out as reasonably practicable (from the available books and records) the financial position of the corporate trustee in both its personal capacity and as trustee of each trust where the corporate trustee is trustee, and set out a proposal for the Court's consideration as to how the winding is proposed to be conducted.
9. Provide that such proposal is to be based on the following considerations:
 - a. that the trustee company's own property and property held by it on one or more trusts

- each be administered separately in the winding up;
 - b. that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and
 - c. each of the creditors referred to in b. above be entitled to a distribution out of the funds derived from the property that they claim an interest in.
10. Provide that in any such application, the Court may direct the liquidator to implement the proposal or modify it as the Court may consider just, appropriate or convenient and direct the liquidator to implement the proposal as so modified by the Court.
11. Provide that notice of any such application be provided to that the application be formally served on:
- a. the creditors of the corporate trustee ;
 - b. the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument;
 - c. the Registrar; and
 - d. any other person as ordered by the Court.

Recommendation 36: It is recommended that to deal with insolvent corporate trustees (**issue 3**) that the CATSI Act in respect of voluntary administration:

1. Define the expression used in Part 5.3A Corporations Act, 'business, property and affairs' as including a corporate trustee's business, property and affairs both in its personal capacity and as a trustee.
2. Define 'administrator' and 'deed administrator' and 'deed' respectively as:
 - a. the person appointed as such by resolution under Corporations Act section 436A;
 - b. the administrator of a deed of company arrangement constituted under Corporations Act Part 5.3A; and
 - c. a deed of company arrangement constituted under Corporations Act Part 5.3A.
3. Apply the provisions to all corporations to which issue one and issue two applies.
4. Give the Court a similar power as that given by Corporations Act, section 477A as to how the winding up provisions are to operate in respect of any particular corporate trustee. An application for an order under such a section could be made by the corporate trustee, a liquidator of the corporate trustee, the Registrar or any other interested person.
5. Provide that in preparing the report under Corporations Act section 439A (now Insolvency Practice Rule 75-225), the administrator shall so far as is reasonably practicable, report separately as to:
 - a. the corporate trustee's business, property, affairs and financial circumstances in its personal circumstances; and
 - b. the corporate trustee's business, property, affairs and financial circumstances in its trustee of any trust.
6. Provide that subject to the foregoing, and in addition to the powers conferred by Corporations Act Part 5.3A on an administrator, the administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the corporate trustee.

7. Provide that subject to 8 below, a deed administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the corporate trustee.
8. Provide that the power of an administrator or deed administrator to carry on the company's business applies only where, in the external administrator's opinion, the carrying on of the business is in the interests of the creditors of the trust.
9. Provide that the power to carry on the business of any trust shall be exercisable by any administrator or deed administrator without any order or direction of the Court.
10. Provide that, subject to 11, the power of an administrator to terminate or dispose of all or any of the company's business shall include the power to wind up any trust where the corporate trustee was trustee.
11. Provide that the power under 10 shall not be exercisable until the creditors have had an opportunity to consider the exercise of such power at a meeting convened under Corporations Act section 439A.
12. Provide that where the assets of the corporate trustee are insufficient to cover the total costs of the administration of the corporate trustee, the trustee's right of indemnity shall extend to include any assets of the corporate trustee held in its personal capacity.
13. Provide that so far as is reasonably practical, the instrument required to be prepared under section 444A(3) set out a proposal as to how a deed will operate in respect of a corporate trustee :
 - a. traded both in a personal capacity and as a trustee;
 - b. that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and
 - c. that each set of creditors relating to the activities of the corporate trustee in its personal capacity and in respect of each trust where it is the trustee be entitled to a distribution out of funds derived from the proceeds of realisation of property in which the creditors claim they have an interest in.
14. Provide that the administrator or deed administrator may apply to the Court for directions in respect of any particular matter relating to the administration or operation of the deed.
15. Provide that on any such application notice is to be given to and the following persons served with the application:
 - a. the creditors of the corporate trustee;
 - b. the beneficiaries if it appears to the liquidator or the Court that the trust is or may be solvent; and in that case to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument;
 - c. the Registrar; and
 - d. any other person as ordered by the Court.

Recommendation 37: It is recommended that amendments to address issues arising under sections 433 and 561 (**issue four**) be made to the CATSI Act to:

1. Provide that the reference to 'property in section 433' shall be read as including a reference to property of a company held both in its own right and as trustee also.
2. For the avoidance of doubt, provide that the references to 'the property of the company' and 'any

property' shall be read including a reference to property held by a company both in its own right and as trustee.

3. For the avoidance of doubt, provide that the trustee's right of indemnity available to a corporate trustee is to be taken to be part of the property of that company for the purposes of sections 433 and 561.
4. Provide that where section 433 applies, section 561 shall not apply.
5. Provide that where section 433 does not apply, any secured party in relation to a circulating security interest, shall, as soon as practicable after the appointment of a liquidator, and to the extent that such assets allow, either:
 - a. permit the liquidator access to the assets to permit the liquidator to sell such of those assets to enable the liquidator to pay the amounts referred to in Corporations Act section 561(a), (b) and (c); or
 - b. pay the amounts referred to in Corporations Act section 561(a), (b) and (c).
6. Provide that where because section 433 employee entitlements have been paid and the liquidator subsequently makes recoveries under the voidable transactions provisions (Corporations Act, Part 5.7B), resulting in a '*surplus*', becoming available, then so much of that surplus as represents all or some of the amount of the employee entitlements paid, shall be reimbursed to the secured creditor.

Recommendation 38: It is recommended that the Commonwealth discuss amendments with States and Territories to their trust legislation to deal with any potential Constitutional issue which might arise (**issue five**). It is recommended that such laws:

1. Provide uniformly in the various trustee legislation of the States and Territories that the suggested provisions of the CATSI Act as set out above apply to the winding up and administration of corporations, that prior to their, winding up or entry into administration, carried on business and incurred debts in their capacity as trustee of one or more trusts.
2. Provide that, for the avoidance of doubt, the provision in paragraph 1 above operates, so far as may be necessary to confer the relevant provisions of the CATSI Act on the Commonwealth pursuant to indicia 51(xxxvii) of the Commonwealth of Australia Constitution Act.

Recommendation 39: It is recommended that with the exception of the criterion relating to the corporation being a party to legal proceedings, the Registrar be given a power, at the request of the applicant, to waive one or more of the deregistration criteria.

Recommendation 40: It is recommended that section 546-1 CATSI Act be amended to give the Registrar absolute discretion to relieve a voluntary deregistration applicant of strict compliance with the criteria set out in subsection 546-1(2), (other than that concerning the corporation being a party to legal proceedings).

Recommendation 41: It is recommended that only a special resolution of members of the Corporation be required for a deregistration.

Recommendation 42: It is recommended that section 6-50 of the CATSI Act be redrafted to deal with definitional problems relating to the term "administrator".

Recommendation 43: It is recommended that the CATSI Act be amended so that the Registrar is

given a power to disclaim any property vested in the Registrar under section 546-20 of the CATSI Act within 120 days of the Registrar having actual knowledge that the property has so vested. The disclaimer is to be effected by notice published on the ORIC website and is to relieve the Registrar of all rights and liabilities in respect of the property whether any such liabilities are present or future, certain or contingent, ascertained or sounding only in damages.

6 NATIVE TITLE AND REGISTERED NATIVE TITLE BODIES CORPORATE

Introduction

- 6.1 Common law holders of native title must identify a corporation to hold or manage their native title rights and interests on their behalf, known as a prescribed body corporate.³¹⁶ The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**) prescribe that, in order to be eligible to hold or manage native title rights and interests, a corporation must be an Aboriginal and Torres Strait Islander Corporation registered under the CATSI Act.³¹⁷
- 6.2 Following a determination of native title, PBCs are recorded on the Register of Native Title as either trustee of, or agent of the common law holders in respect of, the relevant native title rights and interests, following which they are subsequently known as 'Registered Native Title Bodies Corporate' (**RNTBCs**). A RNTBC is required to notify the Registrar within 28 days of registration on the National Native Title Register.³¹⁸
- 6.3 CATSI corporations that are RNTBCs are required to include the words 'registered native title body corporate' or the abbreviation 'RNTBC' within their name to signal that they hold or manage native title rights and interests.³¹⁹
- 6.4 RNTBCs are required to perform a variety of functions under the PBC Regulations including:³²⁰
- 6.4.1 to hold money (including payments received as compensation or otherwise related to native title) in trust, and invest or apply money in accordance with directions of the common law holders;
 - 6.4.2 manage the native title rights and interests of the common law holders and consult with, and obtain the consent of, common law holders of native title regarding decisions relating to native title, Indigenous land use agreements (**ILUAs**), membership and consultation processes;
 - 6.4.3 otherwise perform functions relating to native title rights and interests at the directions of the common law holders; and
 - 6.4.4 observe their regulatory and compliance obligations.
- 6.5 The CATSI Act makes a number of special provisions for corporations which hold or manage native title rights and interests, which results in number of statutory differences between RNTBCs and CATSI corporations generally, such as protections provided to directors, officers and employees against liability for breach of statutory duties provided they have acted in good faith in fulfilling their obligations under native title legislation.

³¹⁶ Native Title Act, sections 55 - 57.

³¹⁷ Refer to PBC Regulations, regulation 4(2)(d).

³¹⁸ CATSI Act, section 88-10(1). Note that an agreement is in place between ORIC and the NNTT by which the NNTT will notify the Registrar of any changes in native title status of RNTBCs.

³¹⁹ CATSI Act, sections 85-1(1) and 85-10.

³²⁰ Refer to PBC Regulations, regulations 6 and 7.

- 6.6 As at 29 June 2017 there were 173 RNTBCs registered with the NNTT across Australia.³²¹ Most RNTBCs are small, with limited personnel and financial capacity to adequately discharge their obligations to members and common law holders, over and above basic regulatory compliance.

6(A) OVERSIGHT OF THE PBC REGULATIONS

Discussion Paper questions

- 6.7 The Discussion Paper included the following question regarding oversight of the PBC Regulations:

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).

- 6.8 Should the Registrar oversight the PBC Regulations and be given power to ensure compliance with those regulations?

Discussion of key issues

- 6.9 One of the key proposals of KPMG Report in relation to native title was that ORIC should give consideration to including reference to the PBC Regulations within the CATSI Act:

Option 43: Investigate the option to include reference to relevant PBC Regulations clauses in the CATSI Act so that regulation of these are explicitly within ORIC's jurisdiction.

- 6.10 It was suggested that amending the CATSI Act by including explicit reference to the PBC Regulations would allow the Registrar to provide oversight of and ensure compliance with the PBC Regulations, streamlining compliance regimes and reducing administrative issues resulting from multiple regulatory bodies reviewing the conduct of RNTBCs. The KPMG Report noted that ORIC, the Department of Prime Minister and Cabinet and the Attorney-General's Department were supportive of the Registrar taking an increased role in regulating and supporting PBCs.³²²

- 6.11 At present, the PBC Regulations are effectively overseen only by courts of competent jurisdiction. The Federal Court, with its body of specialist expertise in dealing with native title, is often best placed to adjudicate on issues arising under the PBC Regulations. However, the requirement that such matters need to be ventilated before a court or not at all, combined with the lack of transparency regarding matters arising under the PBC Regulations, presents significant barriers to the common law holders who wish to satisfy themselves that their native title is being appropriately managed and, more generally, to the further development of good governance practices in this space.

- 6.12 Accordingly, a question arises as to whether additional regulation should be introduced to fill this space and, if so, which agency, is best placed to do so with a view to improving

³²¹ Refer to AIATSIS, *Registered Native Title Bodies Corporate (RNTBC) Prescribed Bodies Corporate (PBC) Summary*.

³²² KPMG Report, pp 64 - 66.

both the flow of information and the ability to ensure compliance with the PBC Regulations.

- 6.13 Against that background, we consider that there is a role for ORIC in the administration of the PBC Regulations.
- 6.14 Further, as set out below, it is recommended that the Registrar should have the same powers in relation to the proposed Register of Common Law Holders, Register of Native Title Decisions and Register of Trust Money Directions as in relation to the register of members (and Register of Former Members) under the CATSI Act.

6(B) FLEXIBILITY

Overview: the current situation

- 6.15 RNTBCs find themselves in a challenging regulatory environment. In addition to their regulatory and compliance obligations prescribed by the CATSI Act, obligations arise under the Native Title Act and PBC Regulations, as well as other applicable Commonwealth, State and Territory native title legislation. The compliance regime prescribed by the CATSI Act is discussed earlier in this Review.
- 6.16 The Registrar currently has power to exempt CATSI corporations from compliance with a range of exemptible provisions under the CATSI Act, including with respect to:
- 6.16.1 Chapter 4 - Members and observers;³²³
 - 6.16.2 Chapter 5 - Meetings;³²⁴
 - 6.16.3 Chapter 6 - Officers;³²⁵ and
 - 6.16.4 Chapter 7 - Record keeping, reporting requirements and books.³²⁶
- 6.17 Importantly, each of the provisions listed above allows for an exemption to be made in respect of a specified CATSI corporation, specified class of CATSI corporation, or the directors of a specified CATSI corporation or specified class of CATSI corporation. The Registrar considers that the power to exempt specified classes of CATSI corporation extends to exemptions to RNTBCs as a specified class.³²⁷

Discussion Paper questions

- 6.18 The Discussion Paper included the following question regarding 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.

³²³ CATSI Act, section 187-15(1).

³²⁴ CATSI Act, section 225-15(1).

³²⁵ CATSI Act, section 310-15(1).

³²⁶ CATSI Act, section 353-10(5).

³²⁷ Refer to ORIC, *Policy Statement PS-07 Exemptions*.

12.3.1 To what extent should the Registrar have the power to dispense with any of these requirements?

Discussion of key issues

- 6.19 Most RNTBCs struggle to realise their ambitions and aspirations due to a lack of capacity to meet their regulatory responsibilities.³²⁸ Problems with capacity constraints are compounded by the breadth of administrative and regulatory bodies that RNTBCs are required to interface with as they fulfil their role as point of contact between common law holders and Government agencies, such as ORIC and the NNTT, as well as with private parties such as mining companies and private landholders.
- 6.20 The Review considered whether the Registrar should be provided with additional powers to dispense with compliance by RNTBCs with obligations under the CATSI Act, rule books and the PBC Regulations, with the ambition that reducing administrative would free up capacity within RNTBCs to achieve positive outcomes for their members and native title holders.
- 6.21 Consistent with feedback in relation to compliance issues generally, consultation participants were generally supportive of extending exemptions from compliance to RNTBCs based on the size and capacity of the corporations.
- 6.22 However, as one stakeholder observed:
- If changes are being proposed to the level of compliance that is expected of CATSI corporations, of upmost importance is the need for accountability and transparency to members. Without accountability and transparency, CATSI corporations possess little legitimacy within the local and wider community.*
- 6.23 Given the capacity constraints suffered by newly-formed RNTBCs in terms of funds, employees and resources, it was identified that there is a need to grant exemptions during the early phase of an RNTBC's life until the corporation is able to build sufficient capacity to comply.
- 6.24 Furthermore, given the importance of corporate governance in ensuring corporations remain healthy and able to adequately perform their functions, the Review does not consider that the CATSI Act should be amended to allow for additional exemptions from regulatory compliance. Further, the importance of the PBC Regulations in ensuring the proper management of native title rights and issues overrides any suggestion of exemption from compliance with the PBC Regulations.
- 6.25 The Review does not consider that it is necessary for the Registrar to have powers to exempt RNTBCs from the operation of specified provisions of the CATSI Act to a greater or lesser degree than other CATSI corporations. The Registrar's existing powers to exempt classes of CATSI corporations, including RNTBCs, from compliance with obligations under the CATSI Act provides the necessary flexibility for exemptions to be granted to, for example, small RNTBCs during their initial phase of operations, until they have built sufficient capacity to meet standard regulatory requirements.

³²⁸ Deloitte Report, p 2.

6(C) MEMBERSHIP

Overview: the current situation

- 6.26 Due to their dual role as a corporation representing their membership and as agent or trustee for the common law holders whose native title they manage, RNTBCs face additional challenges over and above that of CATSI Corporations generally. The exercise of these dual responsibilities is often frustrated by a lack of understanding on the part of directors and membership as to the varying responsibilities owed to different stakeholders.
- 6.27 Under the existing legislative regime, RNTBCs are required to open membership to common law holders of the native title for which that RNTBC acts as trustee or agent. However, common law holders are not required to become members nor automatically conferred with membership.
- 6.28 This can be problematic and leads to a number of challenges for RNTBCs as they are required to act in a different capacities and discharge differing obligations to their members and to the common law holders whose interests they represent. In particular, where an RNTBC is required to perform a function in consultation with, and with the consent of, the affected common law holders, not just its membership, this can lead to disputes regarding matters including the proper manner of notification of meetings and as to the proper individuals entitled to be consulted.
- 6.29 The CATSI Act requires CATSI corporations to set up and maintain a Register of Members, as well as a register of former members, containing personal details of each member and former member. Registers must be made available to all members for inspection however there is no obligation on RNTBCs to maintain a Register of Common Law Holders.³²⁹

Discussion Paper questions

- 6.30 The Discussion Paper included the following questions regarding membership of RNTBCs and the possible extension of the Registrar's powers to intervene in and resolve disputes as to membership of RNTBCs and CATSI corporations generally:

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?

³²⁹ CATSI Act, Division 180. ORIC's *Policy Statements PS-12 Registers and use and disclosure of information held by the Registrar and PS-15 Privacy* detail the Registrar's policies for use and disclosure of information provided to ORIC, including information contained in registers of members.

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?*

Discussion of key issues

6.31 The complexity of issues in relation to membership of RNTBCs and CATSI corporations generally resulted in a considerable number of contributions from stakeholders. Submissions and consultation feedback demonstrated frustration in relation to membership approval and administration of CATSI corporations. Given much confusion surrounding entitlement to membership of CATSI corporations and RNTBCs in particular, it is not surprising that entitlement to membership of CATSI corporations was also seen as a major cause of disputes.

6.32 ORIC has a key role to play in educating and articulating the separate roles and responsibilities of common law holders and members:

ORIC has an important role to play in clearly articulating the separate rights and responsibilities of these parties. It was thought that greater knowledge about this distinction might assist in resolving membership disputes, particularly in instances where traditional owners do not have an interest in the dealings of the RNTBC but want to maintain their authority of the land.³³⁰

6.33 Consultation participants suggested that amendment of the CATSI Act was necessary in order to remind directors that they represented the interests of the corporation's members as well as, in the case of RNTBCs, the common law holders whose rights and interests they manage.

6.34 Various proposals for amendment of the CATSI Act to increase clarity around rights and responsibilities of members and common law holders were discussed, including a variety of dispute resolution mechanisms, such as a dispute as to entitlement to membership being taken to a Corporation's membership:

When directors refuse an application for membership of the PBC, they must be required to provide reasons for their decision which must be consistent, justified and reasonable. When the decision is disputed, the application must be taken to the members at a properly constituted General Meeting for the members to consider the application. If disputed again, the aggrieved individual may take the matter to ORIC if the matter is procedural and to the federal court if the matter is substantive.³³¹

6.35 There was a high degree of concern among consultation participants that common law holders were not properly being consulted in relation to matters affecting their native title rights and interests as required by the PBC Regulations, and a sense of frustration at the lack of transparency and accountability of RNTBCs to common law holders.

³³⁰ Consultation Report, pp 214.

³³¹ Written submission.

- 6.36 One way of seeking to address this issue is by conferring membership upon common law holders automatically, either on incorporation of the PBC or registration as a RNTBC with the NNTT:

*This automatic membership provision idea also addresses a serious problem with the PBC regulations where the PBC is required to consult with the native title holders. How do they do that if they do not know who they are. Its probably not the case that all holders would be listed as members of the PBC.*³³²

- 6.37 However, there was a divergence of views from among stakeholders as to whether common law holders should automatically be conferred with membership of the CATSI corporation to remedy these issues.

- 6.38 One stakeholder submitted:

*Upon determination the NTRB must hand over the list of Community members on the data base (not with the excuse of Privacy Act) as the PBC is holding the lands in trust of the People. How can the PBC holds the land in trust if they do not know WHO they are holding in trust for or have no idea how to contact them for consultations relating to their interests. From then onwards the PBC should be responsible for any updates/additions to the list similar to the determination decision as to who the People are – eg families, adoption.*³³³

- 6.39 Another submission observed that automatic conferral of membership on common law holders may remove the ability for factionalism with the group to develop:

One of the most common causes of disputes stem from the refusal of membership by Directors of people who satisfy all the membership criteria including status as a native title holders. These disputes are often deep seated and can have a number of different sources including:

- *Dislike and/or distrust of the applicant*
- *Refusal to recognise the legitimacy of the applicant as a native title holder (despite the determination).*

*To overcome this situation a third party with access to relevant anthropological, historical and genealogical information (such as an NTRB) could be called upon to rule on whether the applicant is a native title holder. Once this ruling is made membership of the PBC is granted automatically.*³³⁴

- 6.40 However, some stakeholders suggested that:

*Automatic membership for native title holders [should] not preclude PBCs exercising their right to remove members in accordance with their rule books for behaviour that is not in the best interests of the corporation.*³³⁵

³³² Written submission.

³³³ Written submission.

³³⁴ Written submission.

³³⁵ Written submission.

6.41 The opposition to automatically conferring membership on native title holders was primarily based on the question as to who the appropriate entity would be to determine whether an individual was a common law holder and, as noted above, how RNTBCs would be able to manage a register of common law holders on an ongoing basis.

6.42 Other stakeholders contended that automatic conferral of membership may not be appropriate in some regions of Australia:

*The native title determination area may include many estate groups with different regions, some of which may have much less area in the determination area. It could be inequitable if those groups automatically had membership of the RNTBC based on the number of people in their group. Decisions about membership of RNTBCs is better left to the common law native title holders to work out amongst themselves, rather than imposing requirements regarding membership.*³³⁶

6.43 The myriad of issues and disputes in relation to determination of common law holder status and entitlement to membership underline the need for legislative reform in this area, as well as emphasising that adequate provision for arbitration of disputes is required.

Register of Common Law Holders

6.44 Incomplete or outdated lists of common law holders held over from native title proceedings in the Federal Court, or indeed a lack of a register of common law holders, is one of the main drivers of disputes within RNTBCs. It is accepted by stakeholders that it was the responsibility of RNTBCs to maintain proper registers of members. The position was sometimes less clear in relation to a requirement to keep registers of common law holders in order that they may properly discharge their obligation to consult. In large corporations across Australia, maintenance of a separate register of common law holders was considered best practice that should be adopted where CATSI corporations have the capacity to do so. However, in some cases, RNTBCs complained that they did not always have access to the necessary information (including connection reports and other materials prepared in connection with, or filed in, native title proceedings) in order to maintain such a register.

6.45 Whilst participants supported the inclusion of an express requirement on the part of RNTBCs to maintain a Register of Common Law Holders, many noted that this would further increase the burden of compliance falling upon RNTBCs. Further, given the dynamic nature of native title in the some areas of Australia, it was recognised that the requirement to continuously update such a register would not be practical for all RNTBCs.

6.46 Others participants suggested that the obligation to consult prescribed by the PBC Regulations is sufficient protection for rights of common law holders and that the status quo should be maintained. Further resistance was met on the grounds that common law holders may not wish have their details kept on a public register.

6.47 The Review acknowledges the practical difficulties associated with maintaining an exhaustive register of common law holders, given the manner in which common law holders are typically described in native title determinations (i.e. with reference to apical ancestors or *ngurraritja*). The Review also acknowledges the criticality of ensuring that

³³⁶ Written submission.

any regulatory measures do not have the effect of, or be seen to have the effect of, curtailing or prescribing the rights of native title holders at common law.

Review of applications for membership

6.48 Disputes in relation to entitlement to membership of CATSI corporations generally concern two different circumstances, application for membership and revocation of membership, scenarios which require different approaches to legislative reform in order to remedy the underlying causes of the disputes. These disputes are not limited to RNTBCs, although can often be most acute in RNTBCs.

6.49 One submission to the review identified what is considered to be the key driver of disputes in relation to application for membership, being the power of the board of a CATSI corporation to refuse an application for membership:

.... As the CATSI Act currently stands, the Board of a CATSI Act corporation is the sole decision maker of a person's eligibility for membership including holding the power to reject a membership application despite the prescribed requirements being met. In line with appropriate oversight and governance principles, the Sector believes that the rejection or acceptance of a membership application should be able to be reviewed by the membership.³³⁷

6.50 The current dispute mechanism in relation to application for membership is limited; applicants who are denied membership of CATSI corporation are only able to seek relief in a court of competent jurisdiction, which is a forum largely out of reach for many individuals.

6.51 One submission suggested a possible model for determination of an application for membership by the members, in circumstances where an application was rejected.

As a practical matter, it is suggested that an individual or corporation that has had its membership rejected despite having met all of the membership criteria (Rejected Member) shall be entitled to request a meeting of the members to discuss that issue. Rejected Members must make this request within 14 days of being notified that their membership has been rejected and the Board must subsequently call a meeting of the membership within 21 days. A resolution to accept the Rejected Member's membership must be accepted by 75% of the membership, present and voting.

In the event a member wishes to challenge the acceptance of a person or corporation's membership, it is suggested that the existing rules regarding requisitioning a member's meeting should be followed. This requisition should occur within 14 days of the member's membership being accepted. A resolution to reverse a decision of the Board to accept a person or corporation's membership must be accepted by 75% of the membership, present and voting, excluding the member in question.³³⁸

6.52 Whether the Registrar should have the power to intervene in disputes as to membership, primarily by way of amending a Corporation's register of members to add a person whose membership was improperly revoked, was another topic which generated mixed responses from consultation participants. Many participants saw benefit in developing

³³⁷ Written submission.

³³⁸ Written submission.

alternative flexible avenues to resolve disputes in relation to membership, outside the judicial system. The extent of feedback received during consultations in this area demonstrates a need for the Registrar to provide alternative dispute resolution that caters to the needs of CATSI corporations and RNTBCs.³³⁹

- 6.53 The amendment of the CATSI Act to provide the Registrar with power to amend a register of members was generally supported but only to the extent that the Registrar determine whether the proper method of revoking membership had been followed in accordance with the provisions of the CATSI Act and Corporation's rule books:

*We support the power of the Registrar to amend Membership Registers in appropriate cases, provided that consultation with the Corporation has occurred, and it has been determined that such action is reasonably necessary.*³⁴⁰

- 6.54 If the Registrar was to be provided with a power to amend CATSI corporation's register of members it was clear that stakeholders considered that the exercise of such power be reviewable by the Australian Administrative Tribunal.

- 6.55 Such power should only extend to ensuring that the proper process for cancellation of membership has been followed, and in some respects could be considered a corollary of the Registrar's power to exempt a CATSI corporation from compliance with requirements when seeking to cancel membership under sections 150-25, 150-30 and 150-35. Any exercise of the power to amend a register of members must not have any adverse effect on the Corporation's members.

- 6.56 Resistance to providing a power for the Registrar to amend a register of members was largely based on a perception that ORIC should not be empowered to determine entitlement to membership:

*... It is [our] view that the Registrar should not have the power to amend the register. Determining whether a person is a native title holder as described in a native title determination is not necessarily a simple administrative function. ...*³⁴¹

Rule books

- 6.57 Feedback from submissions and consultations is that many of the problems faced by CATSI corporations may be addressed by ensuring that RNTBC's rule books align with their respective determination of native title.

- 6.58 To that end, there was general support for the proposition that the Registrar should have the power to ensure that RNTBC's rule books reflect native title determinations and to refuse to register or amend rule books which fail to do so. This support was expressed subject to a concern that the Registrar's power should not extend beyond its current ambit, the predominant view being that amendments to CATSI corporations' rule books was largely a matter for determination by the members. One participant raised a concern that providing the Registrar with a blanket power to refuse to register a rule book is suggesting that ORIC knows what is better for corporations than the members themselves.

³³⁹ See also ORIC, *Complaints involving Aboriginal and Torres Strait Islander corporations - 1 January to 30 June 2017*.

³⁴⁰ Written submission.

³⁴¹ Written submission.

- 6.59 One suggestion was that the CATSI Act be amended to provide for a regime whereby any amendments to rule books can be 'pre-approved' by the Registrar, to ensure that members can be confident that any amendments will be approved before undertaking the expensive process of convening members meetings to pass variations:

The Sector understands and supports the present requirement that a Rule Book be registered with ORIC before it comes into effect. The difficulty with this, however, is that where a change to process or Board composition is made, it cannot be implemented until registration has occurred. This increases the cost to Corporations in that they must hold a Special General Meeting sufficiently in advance to the conduct of their Annual General Meeting to allow time for registration with the Registrar.

Our suggestion is that the Act be amended to allow for proposed changes to Rule Books to be 'pre-approved' such that if the amendments are adopted in the form approved by the Registrar, they will be considered to come into effect immediately upon being passed by an appropriate resolution of the Members. Obviously if substantive changes are made to the amendments prior to their adoption the pre-approval would not apply and the ordinary registration process would need to be followed.

Additionally, even when pre-approved, the Corporation should be required to notify the Registrar that the amendments have either been passed or rejected.³⁴²

6(D) NATIVE TITLE DECISIONS AND DIRECTIONS

Discussion Paper questions

- 6.60 The Discussion Paper included the following questions regarding native title decisions and directions:

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?

³⁴² Written submission.

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?*

Discussion of key issues

- 6.61 Consultation participants overwhelmingly supported recommendations that RNTBCs be required to keep and maintain registers of decisions and determinations of matters affecting native title rights and interests to improve accountability and transparency to common law holders. Similarly, there was broad consensus that it was appropriate for reports to be provided in relation to native title benefits paid to charitable and discretionary trusts.
- 6.62 Concerns were raised as to whether such records should be subject to commercial in confidence requirements or should be made available to the members and to the general public.

6(E) FEES FOR NATIVE TITLE SERVICES

Overview: the current situation

- 6.63 RNTBCs are entitled to charge fees for performing certain native title services and functions pursuant to the Native Title Act following the passing of the *Native Title Technical Amendments Act 2007* (Cth). Section 60AB of the Native Title Act was introduced to provide RNTBCs the power to charge a fee for costs they incur in performing certain functions, which include:
- 6.63.1 negotiating a ‘right to negotiate’ agreement under section 31(1)(b) of the Native Title Act;
 - 6.63.2 negotiating an agreement under alternative State or Territory provisions which replace the right to negotiate; and
 - 6.63.3 negotiating Indigenous Land Use Agreements.³⁴³
- 6.64 Regulation 20 of the PBC Regulations provides further clarification as to the functions for which RNTBCs may also charge fees for cost incurred:
- 6.64.1 activities related to providing comments on proposed future acts under sections 24GB(9)(d), 24GD(6)(b), 24GE(1)(f)(ii), 24HA(7)(b), 24ID(3)(b), 24JB(6)(b) and 24JB(7)(b) of the Native Title Act;
 - 6.64.2 activities related to the exercise of procedural rights under subsections 24KA(7), 24MD(6A), and 24NA(8) of the Native Title Act;
 - 6.64.3 activities related to consultations under sections 24JAA and 24MD(6B)(e) of the Native Title Act;

³⁴³ CATSI Act, sections 60AB(1)(a) - 60AB(1)(c).

- 6.64.4 activities related to the exercise of procedural rights for acts or provisions mentioned in a determination under sections 26A, 26B and 43A of the Native Title Act; and
- 6.64.5 activities related to making submissions under section 26C(5)(b) of the Native Title Act.³⁴⁴
- 6.65 Whilst RNTBCs have comprehensive financial and record keeping obligations under Parts 7-2 and 7-3 of the CATSI (discussed elsewhere in this Review), RNTBCs are not required to publish a schedule of fees for native title services performed to their members or the public.
- 6.66 It is open to any person who is charged a fee by an RNTBC to seek an advisory opinion of the Registrar as to whether the fee is properly chargeable under section 60AB.³⁴⁵ The Registrar generally publishes its advisory opinions on the ORIC website, however there is no uniform guidance published in the form of register of fees.³⁴⁶

Discussion Paper questions

- 6.67 The Discussion Paper included the following questions regarding 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?

Discussion of key issues

Feedback in relation to discussion of fees charged for the provision of native title services and functions was consistent with the general theme that regulation should be strengthened in order to increase transparency. In particular, it was noted that the need for a schedule of fees is to educate CATSI corporations, rather than regulate, and the Review and notes the comment that: "*Autonomy means each group can determine their own fees or charges.*"³⁴⁷

- 6.68 It was also observed by the Review that this was one topic where positions of stakeholders varied distinctly across jurisdictions, with participants from some regions identifying that there are recognised market rates for the provision of such services, whilst in others, RNTBCs were not charging fees for the provision of such services despite having little or no other income generating activities.

³⁴⁴ Refer to PBC Regulations, regulations 20(a) - 20(e).

³⁴⁵ Native Title Act, section 60AC. Refer also to regulations 19 - 26 of the PBC Regulations in relation to the procedure for obtaining an advisory opinion and determination of disputes in relation to the correctness of advisory opinions.

³⁴⁶ See also ORIC, *PS -23 Review of fees charged by RNTBCs for certain native title functions.*

³⁴⁷ Melbourne consultation.

- 6.69 However, clear feedback from stakeholders was that ORIC should not play an interventionist role in setting or determining schedules of fees. It was widely agreed that the role of ORIC was to work and consult with RNTBCs to set fees and to provide advisory opinions when required, but the setting of fees was a power and responsibility that should appropriately rest with RNTBCs. It was noted that the Queensland Representative Body Alliance is currently negotiating with the State of Queensland for a schedule of fees payable in respect to native title services provided in Queensland.
- 6.70 Dr Martin Parkinson AC PSM's recent speech at the Wentworth Lecture highlighted the need for transparency and provision of data to as a means for supporting self-determination and education of Aboriginal and Torres Strait Island people:

There's also scope to move past the idea that Aboriginal and Torres Strait Islander people are 'stakeholders' to be 'consulted' in development of data strategy—if our approach is going to be genuinely place-based, we need to build data capability into Indigenous leadership.

...

*Without devolving analysis of that data to the people who need to make decisions on the ground, and moving away from our reliance on technical solutions, we will simply not make progress in Indigenous Affairs at the rate our community expects.*³⁴⁸

6(F) NATIVE TITLE BENEFITS

Overview: the current situation

- 6.71 One of the recommendations in relation to native title matters to come from the KPMG Report was a proposed amendment to the CATSI Act provide for accounting by RNTBCs in relation to native title benefits:
- Option 47: Consider introducing public reporting of native title monies, including the use of register of third party consultations or agents, or explore other measures to further increase transparency and accountability*
- 6.72 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.
- 6.73 As discussed above, CATSI corporations are subject to the reporting and record keeping requirements provided by Parts 7-2 and 7-3 of the CATSI Act. However, there are no express requirements to separately account for native title benefits held in trust, other than in accordance with applicable accounting standards.
- 6.74 The Registrar's view is that proper reporting and record keeping by CATSI corporations serves important functions, in that:
- 6.74.1 accurate and up to date records allow the Registrar to under their regulatory requirements required by the CATSI Act; and

³⁴⁸ Parkinson, *Wentworth Lecture Full Transcript - The promise of 1967: Commonwealth Public Administration of Indigenous Affairs 50 years on*.

- 6.74.2 record keeping is an important part of corporate governance that ensures transparency and accountability within the Corporation.³⁴⁹

Discussion Paper questions

- 6.75 The Discussion Paper included the following questions regarding native title benefits:

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?

Discussion of key issues

- 6.76 A number of submissions expressed strong support for the proposal that the CATSI Act be amended to increase transparency and accountability in relation to the flow of native title benefits to assist members of RNTBCs and the common law holders.

- 6.77 One written submission from a community elder expressed her frustration with the transparency in her RNTBC:

I support the RNTBC and AC providing independence and transparency in its decision making and financial management and investment. At present in my community this is not happening - members do not know anything about the trust, trust funds, investment decisions, investment performance etc.³⁵⁰

- 6.78 Much of the discussion in relation to management and administration of native title benefits revolved around the need for increased transparency on the part of discretionary and charitable trusts holding native title benefits on trust. Private trusts were criticised given their limited obligations to disclose information to RNTBCs, who were not privy to information in relation to trust performance and investment decisions.

³⁴⁹ Refer to ORIC, *PS-07 - Exemptions*, paragraph 5.11 - 5.17.

³⁵⁰ Written submission.

6.79 Many stakeholders agreed that RNTBCs should be required to keep, in addition to their financial accounts, separate consolidated financial records in relation to native title benefits for disclosure to members, as greater clarity in relation to the management and use of native benefits would assist to resolve many of the conflicts within RNTBCs.

6.80 One stakeholder observed:

Some PBCs and associated Trusts are in receipt of significant payments from resource projects occurring on native title lands. In Australia, there is little publically available information about the payments these Trusts receive. ...

In many cases, the beneficiaries of these Trusts are not aware of the terms of the Trust Deeds and Sub-Fund Agreements. Furthermore, where beneficiaries are not shareholders in the Trust company, they may receive no information about the financial affairs of the Trust company and the investment of their native title funds. They also receive no reports from the Trust company's auditors as the beneficiaries are normally not present at the AGMs held by the Trust company. ...³⁵¹

6.81 It was identified that in particular regions of Australia, external trusts hold significant sums of money, often with opaque levels of supervision or oversight.

6.82 There was broad agreement that RNTBCs' disclosure obligations should extend to providing some degree of information regarding private trusts managing native title benefits, including the preparation of consolidated financial accounts by RNTBCs that incorporated some detail of native title benefits held in private trusts.

In our experience, there is a significant lack of transparency in relation to fees charged (running the trust – investing and distributing) and investment returns generated by them on behalf of trust. The trust is also not compelled to report or submit their accounts to the PBC.

The CATSI Act needs to be amended to compel trusts holding funds on behalf of PBCs/recipients of native title agreements to report to ORIC in a similar way to Aboriginal Corporations. Furthermore, that they be compelled to report to the beneficiaries and the relevant PBC/Claim group where applicable. ORIC needs to have the power to review such trusts and where sufficient evidence suggests misuse of funds, change the trustee.³⁵²

6.83 The need for an interim measure short of approaching State Supreme Courts (in the case of discretionary trusts) or State Attorneys General (in the case of charitable trusts) was acknowledged.

6.84 However, participants were wary of not allowing the Registrar to intervene in the realm of benefits management and felt that any power provided to the Registrar to report on the management of native title benefits to the public would require adequate explanation to the Australian public and interested stakeholders to quell any concerns that the Registrar was assuming an interventionist role in the management of native title benefits.

³⁵¹ Written submission.

³⁵² Written submission.

6(G) ALIGNMENT WITH THE NATIVE TITLE ACT

Overview: the current situation

- 6.85 The Terms of Reference for the technical review of the CATSI Act ask whether the Act should be amended to improve consistency and interaction with native title legislation.

Discussion Paper questions

- 6.86 The Discussion Paper included the following questions regarding alignment with the Native Title Act:

12.9 Are there any other amendments to that CATSI Act that would improve consistency and interaction with native title legislation?

Discussion of key issues

- 6.87 We do not consider, other than as set out above, that any further changes to the CATSI Act are required in order to achieve a greater degree of alignment with the Native Title Act.
- 6.88 ORIC's 2010 paper, *Interaction between the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Native Title Act 1993*³⁵³ continues to provide useful guidance for stakeholders in discharging their obligations under both legislative regimes, to ensure that RNTBCs and their directors and officers are able to navigate both pieces of legislation.

'Native Title legislation' exceptions

- 6.89 When the CATSI Bill was originally drafted in response to the 2002 review of the ACA Act, much of the Bill was drafted to ensure that there was appropriate interaction between the CATSI Act and the Native Title Act and PBC Regulations, to remedy the uncertainty in relation to functions and duties conferred on corporations by the Native Title Act and the ACA Act, to minimise "incompatibility with requirements for corporations established pursuant to the Native Title Act", an aim that was realised by, for example, ensuring that "a duty conferred upon a corporation or individual by native title legislation does not put the corporation or individual at risk of breaching provisions in the Bill."³⁵⁴
- 6.90 In that regard, section 265-20 provides that directors, officers and employees do not contravene statutory duties merely because of the doing of an act if the act is done in good faith and with the belief that the act is necessary to ensure that the Corporation complies with an obligation under Native Title legislation.
- 6.91 Native Title legislation is defined by the CATSI Act to mean:
- 6.91.1 the Native Title Act and any regulations made under that Act; and

³⁵³ ORIC, *Interaction between the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Native Title Act 1993*.

³⁵⁴ Revised Explanatory Memorandum to the CATSI Act, see paragraphs 1.25, 1.30 ff. and 1.309 ff.

- 6.91.2 a prescribed law, or a prescribed provision of a law, of the Commonwealth or of a State or Territory.³⁵⁵
- 6.92 Currently, the CATSI Regulations do not prescribe any law or provisions of laws of the Commonwealth or of a State or Territory as Native Title legislation.
- 6.93 Additional 'Native Title legislation exceptions' are included throughout the CATSI Act where it was considered that conflict may arise between the CATSI Act and other State and Territory legislation, for example:
- 6.93.1 section 265-1(2a) which provides that for the purposes of the business judgment rule, a director of a RNTBC does not have a material personal interest simply because they are a common law holder with native title rights held or managed by the Corporation; and
- 6.93.2 section 633-5 which provides that the Governor-General may make regulations that deal specifically with RNTBCs, including in adapting the application of provisions of the Corporations Act to the RNTBCS context, however any such regulation must be supportive of the operation of and not inconsistent with the Native Title Act.³⁵⁶
- 6.94 Throughout the consultations, participants generally supported the amendment of the CATSI Act to improve consistency with the Native Title Act and PBC Regulations, but were concerned that any amendment should not allow the jurisdiction of the Registrar to creep into other areas of law.
- 6.95 Submissions were also made suggesting a greater need for consistency between the CATSI Act and State and Territory legislative regimes:
- [We believe] that the CATSI Act must provide a basis to support economic and community development for Aboriginal and Torres Strait Islander Peoples. In this respect native title has played an important role in achieving improved socio-economic circumstances and economic independence for native title groups, as well as individuals, families and communities. The native title system provides significant employment and training opportunities and should be considered as a key factor and driver of indigenous policy development and implementation.*³⁵⁷
- 6.96 It was suggested that statutory protections available to RNTBCs also be extended to non-RNTBC CATSI corporations which hold or manage native title rights and interests under other legislative regimes, such as the *Aboriginal Land Act 1991 (Qld)*:

*Directors, officers and employees of Queensland Aboriginal land-owning corporations that are not RNTBCs have the same potential conflicts as RNTBCs when fulfilling their role and function as a land holding entity under the Aboriginal Land Act 1991 (Qld) the Aboriginal Land Regulation 2011 (Qld), and they need to be afforded the same protections.*³⁵⁸

³⁵⁵ CATSI Act, section 633-5(9).

³⁵⁶ Native Title Act, section 633-5(9).

³⁵⁷ Written submission.

³⁵⁸ Written submission.

- 6.97 Specifically, it was suggested that Aboriginal land-owning bodies that are not RNTBCs should benefit from some of the protections and exemptions afforded to RNTBCs under the CATSI Act, such as:
- 6.97.1 the need for directors, officers and employees of Aboriginal land-owning bodies that are not RNTBCs to be afforded the same protections against liability in circumstances where they are acting in good faith to fulfil their obligations under State and Territory legislative regimes, consistent with protections provided to RNTBCs under section 265-20 of the CATSI Act; and
 - 6.97.2 protection of Aboriginal land-holding corporations from losing title to Aboriginal freehold land through deregistration, consistent with protections afforded to RNTBCs pursuant to section 546-15 of the CATSI Act.

Chapter 6 Recommendations

Recommendation 44: It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that RNTBCs are fulfilling their obligations to common law holders to the same extent as members.

Recommendation 45: It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain a 'Register of Common Law Holders', in addition to their Register of Members.

Recommendation 46: It is recommended that inclusion on the Register of Common Law Holders be by application, in a manner similar to membership applications for the corporation, save that the eligibility requirements must be limited to age (15 years) and whether or not that person is a common law holder of the relevant native title.

Recommendation 47: It is recommended that directors may not refuse to accept an application if the eligibility requirements are met, that the directors be required to give notice where a person is considered not to meet eligibility requirements and that consideration be given to conferring powers upon the National Native Title Tribunal in relation to the resolution of disputes regarding whether or not a person is a common law holder of the relevant native title.

Recommendation 48: It is recommended that a person not be able to be removed from the Register of Common Law Holders, except where uncontactable.

Recommendation 49: It is recommended that the Register of Common Law Holders should be available for inspection by the public.

Recommendation 50: It is recommended that the Registrar should have the same powers in relation to the Register of Common Law Holders, as in relation to the Register of Members (and the Register of Former Members).

Recommendation 51: It is recommended that native title representative bodies and native title service providers be required to provide RNTBCs with extant information prepared in connection with, or filed in, native title proceedings in order to allow RNTBCs to keep a Register of Common Law Holders, such as connection reports.

Recommendation 52: It is recommended that persons on the Register of Common Law Holders maintained by a RNTBC who are not members of that RNTBC automatically qualify as observers in respect of that RNTBC.

Recommendation 53: It is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure both that rule books are complied with in relation to the revocation of membership of individuals.

Recommendation 54: It is recommended that the CATSI Act be amended to provide a power for the Registrar to refuse to amend a RNTBC's rule book in circumstances where the amendment would result in the RNTBC no longer meeting the requirements of regulation 4(2) of the PBC Regulations.

Recommendation 55: It is recommended that the CATSI Act be amended to require RNTBCs to set up and maintain:

1. a 'Register of Native Title Decisions'; and
2. a 'Register of Trust Money Directions'.

Recommendation 56: It is recommended that the CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.

Recommendation 57: It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:

1. members; and
2. common law holders.

Recommendation 58: It is recommended that RNTBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations) in the relevant decision.

Recommendation 59: It is recommended that the Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).

Recommendation 60: It is recommended that consideration be given to amending the CATSI Act to require RNTBCs to publish a schedule of fees and charges for the matters specified in regulation 20 of the PBC Regulations, noting that the fees are likely to be variable depending on region, the nature of the relevant service and the nature of the proposed future act.

Recommendation 61: It is recommended that the CATSI Act be amended to require the Registrar to maintain a register of opinions given under regulation 22 of the PBC Regulations in relation to fees charged by RNTBCs. We do not recommend that the Registrar be given the power to set such fees.

Recommendation 62: It is recommended that the CATSI Act be amended to require RNTBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the *Income Tax Assessment Act 1997* (Cth)) received by the RNTBC.

Recommendation 63: It is recommended that the CATSI Act be amended to require RNTBCs to include, in their consolidated financial accounts and reports, details of 'native title benefits' held by third parties (e.g. trustees) derived from native title rights and interests of which that RNTBC is trustee or acts as agent of the relevant common law holders (as applicable). This requirement should be supported by a requirement for third parties to provide relevant information to RNTBCs in order to prepare audited consolidated financial accounts taking into account 'native title benefits' held by third parties, in circumstances where a failure to do so will constitute a statutory offence.

Recommendation 64: It is recommended that consideration be given to extending protections equivalent to those provided to RNTBCs under section 265-20 of the CATSI Act to other CATSI corporations where CATSI corporations are required to hold land on behalf of Indigenous persons under State or Territory legislation in a manner that may give rise to potential conflicts between duties under the CATSI Act and duties under State or Territory legislation.

7 THE REGISTRAR AND ITS POWERS

Introduction

- 7.1 The Registrar of Indigenous Corporations is an independent statutory office holder appointed by the Minister for Indigenous Affairs under the CATSI Act. The CATSI Act specifies the Registrar's functions and aims.³⁵⁹ In addition, the Registrar is granted power to do all things necessary or convenient to be done for, or in connection with, the performance of his or her functions.³⁶⁰
- 7.2 The Registrar is also granted various specific powers under the CATSI Act, including:
- 7.2.1 the power to direct a CATSI corporation to change its name;³⁶¹
 - 7.2.2 the power to determine in writing that a specified CATSI corporation, class of CATSI corporation or directors of a specified CATSI corporation or class of CATSI corporation are exempted from relevant "exemptible provisions" set out in the CATSI Act;³⁶²
 - 7.2.3 the power to make specific declarations and class orders regarding directors having a "material personal interest" in a matter before a CATSI corporation's board;³⁶³
 - 7.2.4 the power to ask for information regarding specified matters;³⁶⁴
 - 7.2.5 the power to refuse to receive or register documents, require additional information, accept notice by electronic means and destroy or dispose of lodged documents;³⁶⁵
 - 7.2.6 various enforcement powers, including powers to appoint authorised officers, examine books, require attendance to answer questions and apply for a warrant to seize books;³⁶⁶
 - 7.2.7 the power to appoint a special administrator for a CATSI corporation that is under special administration;³⁶⁷
 - 7.2.8 the power to fulfil outstanding obligations of a deregistered CATSI corporation;³⁶⁸ and

³⁵⁹ CATSI Act, sections 658-1 and 658-5.

³⁶⁰ CATSI Act, section 658-10.

³⁶¹ CATSI Act, section 88-5.

³⁶² For example, sections 187-15, 225-15, 310-15 and 353-10 of the CATSI Act.

³⁶³ CATSI Act, section 268-25.

³⁶⁴ CATSI Act, section 307-1.

³⁶⁵ CATSI Act, division 407.

³⁶⁶ CATSI Act, Part 10-3.

³⁶⁷ CATSI Act, section 490-1.

³⁶⁸ CATSI Act, section 546-30.

- 7.2.9 the power to intervene in proceedings relating to a matter arising under the CATSI Act.³⁶⁹
- 7.3 ORIC was established to assist the Registrar in administering the CATSI Act and supporting and regulating CATSI corporations. Under direction of the Registrar, ORIC provides CATSI corporations with support services, information and advice, assistance with legal compliance and has a policy of intervening only when necessary or if invited.³⁷⁰
- 7.4 As a general observation, the Review notes that the Registrar does not possess all of the regulatory powers that ASIC currently possesses. Some of these powers are discussed further below. Also the Registrar raised an issue about its powers to compel the production of certain records under section 453-1 of the CATSI Act and a potential for certain lack of clarity concerning its information gathering powers in so far as third parties are involved.
- 7.5 ASIC's powers in this regard are set out in Part 3 of the ASIC Act. As a general principle, would seem appropriate that the investigatory powers of the Registrar should be at least equivalent to those of ASIC.

Discussion paper questions

- 7.6 The discussion paper included the following questions regarding the Registrar and its powers (understood to include the powers of the Registrar):

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?

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

³⁶⁹ CATSI Act, section 581-1.

³⁷⁰ ORIC, *Who are we: What we do*.

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?

- 7.7 The second and third questions will not be addressed in this Chapter, as they have been canvassed elsewhere in this Review.

Overview: feedback from stakeholders

- 7.8 Stakeholders expressed a range of views in response to the proposed expansion of the Registrar's powers. This feedback is provided against the broader backdrop of the related topic of whether CATSI corporations and their directors and other officers should be subject to the same requirements as apply under the Corporations Act, or alternatively to a higher or a lower standard. These two topics have frequently been merged in the verbal and written submissions provided by stakeholders, and it is prudent not to consider either topic wholly in isolation of the other.
- 7.9 Some stakeholders expressed the view that the Registrar and ORIC require additional powers to supplement existing powers, with those new powers being less drastic in scope or consequence than the existing powers. In other words, there is a perceived gap in the regulatory tools that are currently at the Registrar and ORIC's disposal and a view that a wider range of powers (and resulting regulatory and support options) is needed. One stakeholder submitted:

[T]here is a need for ORIC to find a balance between providing support and oversight to CATSI Act Corporations, while preserving their self-determinative rights of governance.

The stance that we hold at present is that the present attempt by the legislation to limit ORIC's powers has left it in a situation in which it can only intervene after disaster has struck, and that it does not have the ability to make targeted, minimalist interventions on application of a Corporation to address particular concerns. ...

Accordingly, we would support additional powers to be afforded to the Registrar short of Special Administration which would allow for precise, targeted relief for Corporations, to be exercised only in circumstances in which either the Board or Membership has requested them to be exercised, or where ORIC holds a reasonable belief that doing so is in the best interest of the Membership.

In addition to this, though possibly outside the scope of this review, we believe that ORIC should empower (and ideally fund) sector based organisations (such as State and Territory peak bodies) to provide mentoring, facilitation, mediation and support in circumstances of conflict or concern as an alternative to Special Administration at least as an initial option to be considered before more severe action is taken.³⁷¹

7.10 The Consultation Report indicated as follows:

Participants across consultations broadly agreed that the Registrar's powers are either inadequate, or extreme. It was identified that ORIC is able to notify a corporation of an alleged breach of the CATSI Act, but only able to take action through imposing special administration. Some participants expressed that it would be desirable for ORIC to have greater capacity to intervene and there would be some utility in ORIC having the power to make more "targeted strikes" where necessary. However, it was felt there should be controls and limitations on where this could occur. ...

Additionally, many participants expressed a level of confusion over ORIC's role in acting as both a regulator and support provider for CATSI corporations and noted the need for better separation between regulation and support powers.

Despite this, participants broadly seemed comfortable with some specific, practical amendments to the Act that would enable greater intervention of the Registrar, such as the insertion of a clause enabling ORIC to mediate membership disputes prior to a matter going to court. Importantly, participants felt that, if this provision was to be included in the CATSI Act, it should not be the role of the Registrar to determine whether or not a person should be a member of a corporation, but only whether the proper process was followed.³⁷²

...

Participants explained a range of situations where greater intervention by the Registrar would be beneficial, for example:

- *to mediate non-binding decisions and resolve disputes while they are in their early stages,*

³⁷¹ Written submission.

³⁷² Consultation Report, p 208.

- where a director is acting in breach of a corporation's rule book or against its interests but there is no ability for the corporation to rapidly deal with this (pending the members' process taking its course), and
- where CEOs are felt by members to be not acting in the best interests of the organisation but directors will not do anything about them due to fear or for cultural reasons.³⁷³

7.11 Some stakeholders were concerned about any increase in such regulatory powers, particularly where this would go beyond the powers granted to ASIC:

Other participants felt that non-Indigenous corporations cannot be "interfered with" in this way, with one participant asking whether ORIC was coming in to "babysit" CATSI corporations rather than letting them operate commercially and stating that "there is a rule book, let it run its course." The need to respect the "autonomy and self-determination" of Aboriginal corporations was raised as a key principle in relation to this issue.³⁷⁴

Opposing views on this point included concern that action by ORIC against a CEO or director prior to a court process would create the presumption in the community that the person was guilty although this was not proven in court, and could have implication for their livelihoods. Another participant felt that community members should have greater recourse when rules and processes are not followed by a corporation through better internal mediation or dispute resolution process that could be engaged by members. Supporting this view, one participant was concerned that ORIC was more likely to intervene in cases in which there is possible misappropriation of government, rather than members', funds.³⁷⁵

7.12 The Consultation Report states that one of the key implications of the consultation findings is:

The principles of autonomy and self-determination of CATSI corporations should guide any amendments to the CATSI Act.

While consultations indicated a need for more support for CATSI corporations to manage issues raised in relation to the review of the Act, the autonomy and self-determination of CATSI corporations was expressed as a fundamental principle which should guide the outcomes of the review, rather than increased intervention. The duality of the Registrar's role as regulator and provider of support was problematic for some, and participants expressed caution in many instances about the desirability of providing additional powers to the Regulator. Rather, there was a general preference for amendments to the Act which would deliver greater flexibility to CATSI corporations to make changes to their own rule books.³⁷⁶

7.13 Other stakeholders were of the view that the current CATSI Act regime is not protecting the interests of members, regulators or the Australian public more generally, and hence

³⁷³ Consultation Report, p 209.

³⁷⁴ Consultation Report, p 208.

³⁷⁵ Consultation Report, p 209.

³⁷⁶ Consultation Report, p 233.

reforms were required to provide enhanced transparency and accountability to such stakeholders. One stakeholder submitted:

*The accountability and transparency provisions in the CATSI Act are of a lower standard than the Corporations Act 2001 (CA), and the CATSI Act has not kept up with community expectations of director obligations and transparency requirements that have been reflected in the CA since the CATSI Act received assent. This leads to lower expectations of CATSI corporations which has led to lower confidence in dealing with CATSI corporations for commercial matters.*³⁷⁷

- 7.14 Other stakeholders expressed the view that the focus should be on assisting CATSI corporations and their directors in achieving compliance, rather than granting ORIC and the Registrar greater powers or, conversely, reducing the compliance standards that are imposed on CATSI corporations and their officers. The theme of ORIC providing greater guidance and assistance was raised by several stakeholder, particularly with respect to enhancing compliance by CATSI corporations with their statutory reporting obligations. One stakeholder noted:

*Many of the points raised in the Discussion Paper appear to assume that the current requirements in the CATSI Act are too stringent for CATSI Act corporations. [...] Such assumptions ignore the importance of protecting members' interests. The assumptions also enshrine a 'culture of low expectations' pervasive throughout the general community. Rather than reduce the level of compliance placed on CATSI Act corporations, more should be invested in training directors to effectively carry out their responsibilities and work in the members' best interests. [...] At present, ORIC's governance training is rudimentary and not to the level of Indigenous governance training courses provided by organisations such as the Australian Institute of Company Directors.*³⁷⁸

- 7.15 Finally, some stakeholders noted in consultation sessions that the question of changes to the Registrar's powers cannot be considered in isolation of budgetary considerations:

*[C]oncern was expressed by those consulted that ORIC was not sufficiently resourced for a dispute resolution or mediation role and therefore not in a position to provide this type of intervention effectively, even if given the legislative authority.*³⁷⁹

Our headline comments

- 7.16 We have two headline comments in light of the above analysis, prior to considering the specific questions raised in the Discussion Paper and our specific recommendations in response to those questions.
- 7.17 First, where both the Registrar and stakeholders perceive a need for the Registrar to be granted additional powers in order to protect the interests of members of CATSI corporations and other stakeholders, promote legal compliance and good governance outcomes and practice early intervention, and particularly where such powers are less drastic in scope or consequence than the Registrar's current powers, those powers should be granted to the Registrar.

³⁷⁷ Written submission.

³⁷⁸ Written submission.

³⁷⁹ Consultation Report, p 210.

- 7.17.1 In our view, such an approach will satisfy the greatest possible number of stakeholders, particularly as it is more likely to cohere with the Registrar's and ORIC's equally important function of supporting CATSI corporations and their directors and other officers.
- 7.18 Secondly, it is generally desirable to equip the Registrar with regulatory tools possessed by other Commonwealth-funded regulators (such as ASIC) if this may assist in:
- 7.18.1 protecting the interests of members of CATSI corporations and other stakeholders;
 - 7.18.2 promoting legal compliance by CATSI corporations and their officers, and good governance outcomes; and
 - 7.18.3 avoiding, addressing or mitigating issues that would otherwise arise if the Registrar and ORIC were unable or unwilling to act until an issue had become more serious or an actual or potential breach of the law had occurred.
- 7.19 Again, we consider the above approach to achieve the closest alignment between the Registrar's regulatory oversight and sector support functions.
- 7.20 Thirdly, the Registrar and ORIC should be provided with sufficient funding to utilise existing and any new powers in the most effective manner so as to achieve the above objectives.

Should the CATSI Act be amended so that references to the Registrar and their office are more flexible?

- 7.21 The Registrar has previously raised concerns regarding existing references to the Registrar and ORIC.³⁸⁰ Specifically, we understand that the Registrar has proposed that:
- 7.21.1 several provisions of the CATSI Act should be amended to replace expressions such as “the Registrar of Aboriginal and Torres Strait Islander Corporations” (and similar expressions) with “the Registrar” in light of the defined term “Registrar” in the CATSI Act;³⁸¹ and
 - 7.21.2 the CATSI Act is amended to enable ORIC to change its name without requiring legislative change to enable this.³⁸²
- 7.22 It is recommended that that references to the “Registrar” and “the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations” in the CATSI Act be amended in the manner proposed by the Registrar.

³⁸⁰ KPMG Report, p 9.

³⁸¹ Refer to CATSI Act, section 700-1. Provisions identified by the Registrar include sections 1-25, 1-30, 6-1, 648-1, 653-1, 653-5, 668-1 and 700-1 of the CATSI Act. This includes amending section 653-1 of the CATSI Act to read: “There is to be a Registrar. The Registrar is to be appointed by the Minister. The Registrar may be referred to by a title specified by the Minister in a notice.”

³⁸² CATSI Act, Section 1-30.

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

7.23 ASIC imposes late fees for non-lodgement of various reports. The Registrar could be granted the power to impose late fees of this kind in response to a breach of reporting requirements under the CATSI Act.³⁸³

7.24 This topic was not discussed by stakeholders during consultation sessions. One stakeholder made the following written submission:

*While [stakeholder] appreciates that this proposal may encourage timely lodgement of the reports, we fail to see how this would reduce criminal prosecution for non-lodgement. Many small Indigenous corporations have limited funding and would be unable to pay any such fees. Furthermore, a proposal smacks of revenue raising.*³⁸⁴

7.25 Respectfully, our understanding is that the Registrar might seek such a power as an alternative to the current regulatory mechanism of commencing proceedings. In other words, the power may be sought to enable the Registrar to implement a less drastic regulatory response to non-compliance. Further, the cost of paying any such late fee would presumably be less than the cost of defending legal proceedings from a CATSI corporation's perspective.

7.26 It is recommended that the Registrar be given the power to impose an appropriate late fee in response to a breach of the CATSI Act

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

7.27 ASIC has various compulsory information gathering powers.³⁸⁵ ASIC is empowered to specify what it considers to be a reasonable time for the person served to respond to the notice.

7.28 In contrast, the Registrar has the power to require a person to provide information, produce documents or appear to answer questions in certain circumstances.³⁸⁶ However, the person must not be required to provide the information, produce the documents or appear to answer questions within a period of less than 14 days after the notice is given.³⁸⁷

7.29 We understand that the Registrar has previously raised concerns that the mandated 14 day period '*creates a situation where evidence can be destroyed before it can be secured for investigative purposes*', and that the Registrar recommends that the CATSI Act be amended '*to provide equivalent and more practical notice periods*'.³⁸⁸

7.30 This topic was not discussed by stakeholders during consultation sessions. However, several stakeholders made written submissions on this point, as follows:

³⁸³ For example, a breach of an obligation imposed under CATSI Act, Part 7-3. See also CATSI Act, Part 9-2.

³⁸⁴ Written submission.

³⁸⁵ Such powers are granted under *Australian Securities and Investments Commission Act 2001* (Cth) and *National Consumer Credit Protection Act 2009* (Cth). See also ASIC, *INFO 145: ASIC's compulsory information gathering powers*.

³⁸⁶ CATSI Act, section 453-5.

³⁸⁷ CATSI Act, section 453-5(3).

³⁸⁸ KPMG Report, p 6.

From experience, 14 days' notice can be too short a time frame. This organisation had to pay overtime to staff to work on a public holiday to comply with the Registrar's notice.³⁸⁹

We strongly disagree with the shortening of notice periods surrounding the exercise of powers of inspection. We further believe that investigations should be conducted in a consultative manner, with the terms of reference of an investigation provided to the Corporation together with their notice. We do not believe that interim reports should be published publicly, and that only final reports after appeal rights have been exercised should be placed on the public register.³⁹⁰

We consider 14 days to provide procedural fairness, however if action is required earlier, there are certain other avenues the Registrar could use, including the police and/or the Courts.³⁹¹

- 7.31 Respectfully, while we appreciate the concerns raised by stakeholders set out above, if the Registrar has valid concerns regarding document destruction or other actions designed to impede a legitimate investigation under the CATSI Act, it would be appropriate to amend the CATSI Act to permit greater flexibility in stipulating a timeframe for responding to such a notice. A “reasonableness” requirement should assist in addressing the concerns noted above. It is recommended that the CATSI Act is so amended, having reference to the relevant ASIC powers.
- 7.32 Further, it is recommended that to the extent the investigatory powers of the Registrar are not equivalent to those of ASIC under the ASIC Act, that the CATSI Act be amended to provide the Registrar with such powers.

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

- 7.33 Where the Registrar suspects on reasonable grounds that there has been non-compliance by a CATSI corporation with the CATSI Act or its constitution, or there has been an irregularity in the affairs of the CATSI corporation, the Registrar may give written notice to the CATSI corporation or to each of its directors requiring the directors to take the action specified in the notice, within the period specified in the notice, for the purpose of complying with the Act or the constitution or remedying the irregularity, as the case may be.³⁹²
- 7.34 Currently, if a compliance notice is not responded to appropriately, the primary remedy for the Registrar is the appointment of a Special Administrator to the CATSI corporation. In circumstances where this regulatory response was not considered warranted for some reason, there may be no real consequence for the CATSI corporation or its directors for the failure to comply with the compliance notice.
- 7.35 This topic was not responded to by stakeholders.
- 7.36 It is recommended that the Registrar is given a broader range of powers in this regard, including the power to impose a fine on the CATSI corporation and/or its directors, in circumstances where the Registrar reasonably considers that there has been a failure to

³⁸⁹ Written submission.

³⁹⁰ Written submission.

³⁹¹ Written submission.

³⁹² CATSI Act, section 439-20(1).

comply with a compliance notice issued by the Registrar but the Registrar does not propose to appoint a Special Administrator to the CATSI corporation.

Should the Registrar be given the power to accept enforceable undertakings and to take action to enforce such undertakings?

- 7.37 The acceptance and (where necessary) enforcement of enforceable undertakings is a well-established Australian regulatory mechanism. For example:
- 7.37.1 ASIC has the power to accept enforceable undertakings from third parties, which are enforceable in court.³⁹³
 - 7.37.2 Similarly, the Australian Competition and Consumer Commission has the ability to accept written undertakings in the exercise of certain of its powers, which again are enforceable in court.³⁹⁴
- 7.38 Currently, the Registrar does not have a power of this kind. This topic was discussed by stakeholders during consultation sessions, but no agreement was reached by those stakeholders present as to whether such a power should be granted to the Registrar.
- 7.39 One written submission actively supported the proposal.³⁹⁵ Some participants in consultation sessions also noted that there would be some benefit for the Registrar to have the power to '*take a more active role as mediator prior to considering enforceable undertakings*'.³⁹⁶
- 7.40 In our view, there is no good reason why the Registrar should not have the same powers as ASIC in this regard. Further, the availability of such a regulatory enforcement mechanism is likely to be advantageous in avoiding the need to issue proceedings in all relevant matters, and should give CATSI corporations and their directors and other officers greater comfort that instances of alleged non-compliance can be addressed in a less adversarial manner.

Recommendation

- 7.41 It is recommended that the Registrar be given equivalent powers to ASIC to accept enforceable undertakings from relevant persons and take action to enforce such undertakings.

Exempt Documents, whistleblowers and FOI

Introduction

- 7.42 While not included as a topic in the Discussion Paper, the Review noted the issue of documents which are exempt documents under the CATSI Act could be released under

³⁹³ *Australian Securities and Investments Commission Act 2001* (Cth), sections 93AA and 93A; *National Consumer Credit Protection Act 2009* (Cth), section 322; ASIC, *Information Sheet: About the enforceable undertakings register*; ASIC, *Regulatory Guide 100: Enforceable Undertakings*.

³⁹⁴ *Competition and Consumer Act 2010* (Cth), section 87B. See also Australian Competition and Consumer Commission, *Section 87B of the Competition and Consumer Act: Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission*, p 3.

³⁹⁵ Written submission.

³⁹⁶ Consultation Report, p 208.

the Freedom of Information Act (**FOI Act**), and in particular, documents identifying whistleblowers. Under the FOI Act, under certain conditions, anyone can apply to a government body to access or receive a copy of information that the government body holds. The one exception to this, is information which is contained in a document which the FOI Act treats as an exempt document.

- 7.43 The CATSI Act has a class of documents known as "exempt documents".³⁹⁷ Exempt documents are not subject to inspection under the CATSI Act.³⁹⁸ It does not necessarily follow that these exempt documents will be protected from a request under the FOI Act. Also while whistleblowers are protected against victimisation under the CATSI Act, there are concerns that the purpose of the whistleblower protections may be circumvented by FOI requests.

Overview: the current situation - FOI and exempt documents

- 7.44 The FOI Act gives any person the right to:
- 7.44.1 access copies of documents (except documents exempt under the FOI Act) that the Registrar holds,³⁹⁹
 - 7.44.2 ask for information that the Registrar holds about that person (and which is being used for an administrative purpose) to be changed or annotated if it is incomplete, incorrect, out of date, incorrect or misleading; and⁴⁰⁰
 - 7.44.3 seek a review of the Registrar's decision not to allow access to a document or an amendment to a personal record.⁴⁰¹
- 7.45 The Registrar can refuse access to documents or parts of documents that fall within the categories of exemptions under the FOI Act. There are two types of exemptions:
- 7.45.1 documents that are exempt under the FOI Act; and
 - 7.45.2 documents that are conditionally exempt under the FOI Act and will not be released if their disclosure would be contrary to the public interest.

A broad summary is as follows in this table:

FOI Exemptions	Conditional FOI Exemptions
<ul style="list-style-type: none"> • Documents affecting national security, defence or international relations • Cabinet documents 	Documents relating to: <ul style="list-style-type: none"> • Commonwealth-State relations
<ul style="list-style-type: none"> • Documents affecting enforcement of 	<ul style="list-style-type: none"> • deliberative processes relating to

³⁹⁷ CATSI Act, s421-1(4).

³⁹⁸ CATSI Act, s421-1(1).

³⁹⁹ FOI Act, s 11.

⁴⁰⁰ FOI, Part V.

⁴⁰¹ FOI Act, Part VI.

<p>law and protection of public safety</p> <ul style="list-style-type: none"> • Documents to which secrecy provisions in other legislation apply • Documents subject to legal professional privilege • Documents containing material obtained in confidence • Documents whose disclosure would be in contempt of Parliament or in contempt of court • Documents disclosing trade secrets or commercially valuable information • Electoral rolls and related documents 	<p>agencies' or ministers' functions</p> <ul style="list-style-type: none"> • the Commonwealth's financial and property interests • certain operations of agencies (such as audits, examinations and personnel management) • personal privacy • business affairs • research (by CSIRO or the Australian National University) • Australia's economy
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7.46 If a document falls under the conditional exemptions category, there is a further step in deciding whether to release the document or not. The decision maker must consider whether in the circumstances giving access to the document would be contrary to the public interest. Access cannot be refused simply because the document falls within one of the conditional exemption categories, the release must also be contrary to the public interest.

7.47 If an agency or minister decides that a document is not to be released because it is exempt or conditionally exempt, the decision maker must provide their reasons in the notice of decision given to the applicant. If exempt information can be deleted from part of a document, an edited copy of the document can be provided.

7.48 The CATSI Act has a class of documents known as "exempt documents".⁴⁰² Exempt documents are not subject to inspection under the CATSI Act.⁴⁰³ Such exempt documents include reports by special administrators, examiners, reports by receivers and managers, administrators and liquidators, about potential offences, misapplication of money or property or breach of duties. Exempt documents also include a notice of a person's usual residential address where an alternative address is being used for safety reasons.

Discussion of key issues

7.49 There is doubt about whether these CATSI exempt documents are prohibited from access under the FOI Act. For other documents which are not exempt documents, section 421-1(1A) of the CATSI Act allows the Registrar to arrange for a person to inspect a document or register, or be given a copy of, or extract from, a document but so that the person does not have access to personal information contained in the document or register.

⁴⁰² CATSI Act, s421-1(4).

⁴⁰³ CATSI Act, s421-1(1).

- 7.50 There has been no court decision on this area but there has been an AAT decision in *Re Buck* [2012] AATA 354 (**Buck**). In that case, which was part of wider litigation, the Applicants applied to the Tribunal for review of a decision of the Registrar to release a redacted copy of an Examiner's Report by Mr Lindsay Roberts, dated October 2008 (the Examiner's Report), into the examination of the books and records of the Dunghutti Elders Council (Aboriginal Corporation) RNTBC. The AAT noted that the Examiners Report was an exempt document under the CATSI Act:

*There is no specific reference to the reasons for an examiner's report being an exempt document in the Explanatory Memorandum and the Supplementary Explanatory Memorandum for the [Corporations \(Aboriginal and Torres Strait Islander\) Bill 2005](#) or in the Second Reading Speech. There is, however, reference to the need to protect certain personal information from disclosure where that information has been provided to the Registrar pursuant to reporting obligations. This does not explain why an examiner's report is an exempt document but does suggest that the need to protect personal information was recognised as a legitimate concern. In our view, it is reasonable to assume that one of the reasons for exempting an examiner's report from inspection and production is that at this stage of the process, persons affected by the examiner's findings may not have had an opportunity to make submissions. Such procedural fairness is afforded at a later stage by s 487-10 of the CATSI Act as the Federal Court recognised in *Dunghutti*.*

- 7.51 We pause here to note that while these comments relate to an Examiners Report under the CATSI Act, we consider they are apposite for other exempt documents such a special administrators, receivers and managers, administrators and liquidators, about potential offences, misapplication of money or property or breach of duties.
- 7.52 The parties had referred to *Marshall and Department of Defence and Heath (Joined Party)* [2011] AATA 566 (**Marshall**) at [33], where the Tribunal stated its view that '*... the disclosure of personal information that has not been properly tested ... and that is likely to be prejudicial, may well be unreasonable.*'
- 7.53 Ultimately, the AAT held that the Report was an exempt document as follows:

33. *In this matter, the Tribunal is satisfied that the Examiner's Report is an exempt document pursuant to s 41 and s 43 of the FOI Act. We have reached this conclusion for the reasons that now follow. The Examiner's Report is an exempt document under the CATSI Act. As stated above, we think it reasonable to assume that one of the reasons for exempting an examiner's report from inspection and production under that Act is that at the examination stage, persons affected by the examiner's findings may not have had an opportunity to make submissions. In our view, this is a relevant consideration in determining whether a document is exempt under the FOI Act given that an examiner's report may include untested findings that reflect on a person's personal or business affairs.*

34. *As the review officers recognised in making redactions in the present case, the Examiner's Report does disclose personal and business information about the Applicants. ... In our view, this is not a matter where deletions can be made to the Examiner's Report so that the redacted copy would not be an exempt document (s 22(1)(b) of the FOI Act).*

35. *The fact that a small portion of the Examiner's Report was included in the Federal Court's decision in Dunghutti or that the affairs of the Corporation have been the subject of extensive litigation, does not change our view. The Report contains findings that are untested and for the reasons discussed in Marshall, we are satisfied that the disclosure of the Report would be 'unreasonable', according to the ordinary meaning of that word, in terms of the likely adverse effect of the disclosure on the Applicants' reputations and standings in the community. We do not consider that there is any significant public interest in the disclosure of the Report given that the preparation of such a report at the request of the Registrar is a step in the investigation of a corporation's affairs. Given the untested nature of the findings contained in the Examiner's Report, those findings should be treated with caution. The appropriate course is that set out in the CATSI Act involving the Registrar issuing a show cause notice before, ultimately, determining that the corporation is to be placed under special administration.*

- 7.54 In *Buck* the untested nature of the findings in the report were sufficient to justify that it should be exempt from release. We consider that this approach could be applied to equivalent reports by special administrators, receivers and managers, administrators and liquidators. However, it not certain that such an approach would be applied to such reports in future cases.

Recommendation

- 7.55 To save unnecessary litigation on this point, and to clarify this position, we recommend that the CATSI Act be amended so that all exempt documents under the CATSI Act are treated as exempt documents under the FOI Act.

Overview: the current situation- Whistle blowers

- 7.56 The CATSI Act contains provisions which detail how disclosures made by whistleblowers should be treated and the protections that whistleblowers should receive. The CATSI Act does not, however, protect a whistleblower's name, occupation or any other identifying details from being disclosed through a FOI request. This means that where an individual reports a CATSI corporation to ORIC, if the CATSI corporation wishes to find out the identity of a whistleblower, they can do so by making a FOI request to ORIC.
- 7.57 While whistleblowers are protected against victimisation under the CATSI Act, there are concerns that the purpose of the whistleblower protections may be circumvented by FOI requests. If whistleblowers are aware that their identities may be disclosed to the very people or organisations that they are making disclosures about, they may be more hesitant to come forward and subject to unfavourable treatment if their whistleblower status is publically known.
- 7.58 The identity of a whistleblower who makes a disclosure to ORIC is unlikely to fall under the exempt categories but could fall under the conditionally exempt category. In any event the position has not been subject to judicial determination and can be considered to be unclear.

7.59 Finally, Part 10–5 of the CATSI Act deals with whistleblowers. The explanatory memorandum to the CATSI Act gives the purpose to Part 10–5.⁴⁰⁴

[Part 10–5] establishes a framework which is designed to encourage employees, officers, contact persons and subcontractors engaged by a CATSI corporation to report suspected breaches of the Act to either the Registrar or internally within the corporation. The provisions will prohibit employers from victimising employees, officers, contact persons or subcontractors when they report a suspected breach in good faith and on reasonable grounds. Further, the provisions provide the relevant employee, officer, contact person or subcontractor with qualified privilege in relation to a protected disclosure of information. These provisions are based on the equivalent whistle blower provisions in the Corporations Act.

7.60 The key components of Part 10–5 are:

Sections	Summary
466-1	Disclosures qualifying for protection This section provides for the circumstances in which a disclosure of information regarding a suspected breach of the CATSI Act will be protected by this part.
469-1	Effects of Disclosure This section provides for the protections which will be afforded to a person reporting a suspected breach of the CATSI Act including protection against criminal and civil liability, the enforcement of contractual remedies, liability for defamation, and termination of contract.
469-5 & 469-10	Victimisation prohibited & compensation This section prohibits any actual or threatened detriment being directed against a person because of their disclosure. If actual or threatened detriment occurs, then the victim may receive compensation.
472-1	Confidentiality requirement This section provides that persons who make certain disclosures of information, including information that qualifies for protection under Part 10-5 may be guilty of an offence.

Discussion of key issues

7.61 The idea that the identity of whistleblowers should be protected from FOI requests can find support in a number of authorities. For example, the Special Rapporteur on Freedom

⁴⁰⁴ Explanatory Memorandum to the CATSI Act, paragraph 4.46.

of Opinion and Expression has included as a principle in their FOI principles that individuals who release information on wrongdoing must be protected.⁴⁰⁵

- 7.62 The objects of the FOI Act themselves support the idea that whistleblowers' identities should be protected. One of the objects of the FOI Act is to promote Australia's representative democracy by increasing public participation in Government processes.⁴⁰⁶ It is arguable that public participation in government processes encompasses both individuals seeking information from government agencies and government agencies receiving information from individuals. If the aim is to increase public engagement with the government, the two sides must have a reciprocal relationship.
- 7.63 The Parliamentary Joint Committee on Corporations and Financial Services has said that effective whistleblower protections are necessary to foster '*a culture of transparency, accountability and integrity*'.⁴⁰⁷ Individuals who are disclosing information that would afford whistleblower protection under the CATSI Act should have their identities protected in order to uphold the purpose of the section. If whistleblowers' identities are able to be disclosed through FOI requests, there is risk that people will be less willing to become whistleblowers as they may fear retribution from the individuals or organisations of whom they are making the disclosures about. Some CATSI corporations operate in remote communities where there may be damaging social implications if a person is known as a whistleblower on the local CATSI corporation.
- 7.64 On the other hand, it can be argued that even though the identities of whistleblowers can be disclosed through FOI requests, the CATSI Act already protects whistleblowers by prohibiting any actual or threatened detriment being directed against a person because of their disclosure.⁴⁰⁸ Any whistleblower who has been victimised because of their disclosure is eligible to receive compensation under the Act.⁴⁰⁹ While these provisions are helpful in protecting whistleblowers, in reality, detrimental treatment is not always clear cut, hence making it difficult to meet the high standard of proof required by the courts. Also, in these circumstances, we expect that many individuals would find it emotionally and financially taxing to go through the court process.

⁴⁰⁵ Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Document E/CN.4/2000/63, 18 January 2000, 43 – 44. The principles were noted by the United Nations Commission on Human Rights in Resolution E/CN.4/RES/2000/38, 20 April 2000, [2].

⁴⁰⁶ FOI Act, section 3(2)(a).

⁴⁰⁷ Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower Protections, September 2017, p 5.

⁴⁰⁸ CATSI Act, s 469–5.

⁴⁰⁹ CATSI Act, 469–10. Victimisation has occurred in at least one reported case: [Walsh v Umoona Tjutagku Health Service Aboriginal Corporation \(ICN 7460\) \(No 2\) \[2017\] FCA 852 \(28 July 2017\)](#).

7.65 A simple means of addressing this problem would be amend the CATSI Act to state that the FOI Act does not apply to a document which discloses information on the identity of a person who made a protected disclosure or is likely to lead to the identification of a person who made a protected disclosure. A similar provision exists in the Victorian PDA Act:

78 *Exemption from Freedom of Information Act 1982*

(1) *The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body, to the extent that the document discloses information that—*

(a) *relates to a protected disclosure; or*

(b) *relates to an assessable disclosure; or*

(c) *is likely to lead to the identification of a person who made a protected disclosure.*

(2) *In this section, "document" has the same meaning as it has in the Freedom of Information Act 1982.*

7.66 A protected disclosure is a disclosure which is made under the PDA Act or a complaint a complaint made in accordance with section 86L(2A) of the *Police Regulation Act 1958* (Vic). The purpose of the PDA Act is to encourage and facilitate disclosures of improper conduct by public officers, public bodies and other persons. The PDA Act also provides protections for those individuals who make these disclosures.

7.67 Furthermore, at the date of writing this Review, the Commonwealth Government released the exposure draft of the *Treasury Laws Amendment (Whistleblowers) Bill 2017 (Whistleblowers Bill)* and supporting explanatory material. This bill introduces a single whistleblower protection regime in the Corporations Act for the corporate, financial and credit sectors, and creates a new whistleblower protection regime in the taxation law, to protect those who expose tax misconduct. The Bill, while still in draft format, is consistent with this Reviews' recommendations to protect the identity of whistleblowers. The bill proposes to amend the Corporations Act to include the prohibition against a person disclosing the identifying information on the whistleblower,⁴¹⁰ a court publishing the name of a whistleblower,⁴¹¹ and the whistleblower's identity being disclosed to a court.⁴¹²

Recommendation

7.68 If the Whistleblowers Bill is passed in Parliament and retains its current form relating to the protection of whistleblowers, the CATSI Act should be amended to reflect the new provisions in the Corporations Act for the protection of whistleblowers.

7.69 If the Whistleblowers Bill is not enacted into law or does not retain its current protections relating to the protection of whistleblowers, it is recommended that a new provision be

⁴¹⁰ *Treasury Laws Amendment (Whistleblowers) Bill 2017* (exposure draft), section 1317AE.

⁴¹¹ *Treasury Laws Amendment (Whistleblowers) Bill 2017* (exposure draft), section 1317AD.

⁴¹² *Treasury Laws Amendment (Whistleblowers) Bill 2017* (exposure draft), section 1317ADB.

inserted into the CATSI Act stating that the FOI Act does not apply to a document which discloses information relating to a whistleblower's identity or is likely to lead to the identification of a whistleblower. This new provision would be draft in a similar manner to that in the PDA Act.

Alternatives: the ACNC regime

Introduction

- 7.70 Charities play a vital role in the well-being of Australian society. Many charities are established as incorporated associations regulated under the applicable State or Territory legislative regimes, or as public companies limited by guarantee registered under the Corporations Act. Other charities take the form of charitable trusts, or are not legal entities.
- 7.71 This breadth in the form that charities can take, coupled with a desire to support charities and their officers in undertaking their charitable work, led to calls for a simpler, Australia-wide method of regulation for the third sector. This ultimately resulted in the introduction of the ACNC Act and related “ACNC governance standards” in 2012.
- 7.72 There were several perceived challenges in drafting such a statutory regime at Commonwealth level, including the following:
 - 7.72.1 many existing charities were primarily regulated under State or Territory laws;
 - 7.72.2 the diverse forms that charities can take suggested that a “one size fits all” approach would be inappropriate; and
 - 7.72.3 charities and their directors and other officers are subject to general law obligations in addition to any applicable statutory obligations.
- 7.73 One novel feature of the ACNC regime is that certain existing obligations imposed on a registered charity and its directors and other officers are restated, or replaced (in the case of charitable corporations that are registered under the Corporations Act) by five “governance standards”, as follows:⁴¹³

Governance Standard 1	Purposes and not-for-profit nature of a registered entity. Registered charities (‘registered entities’) must be not-for-profit and work towards their charitable purpose. A charity must be able to demonstrate this to the ACNC and provide information about its purpose to the public (for example, by having a copy of its rules on the ACNC Register).
Governance Standard 2	Accountability to members. Charities must take reasonable steps to be accountable to their members and provide their members adequate opportunity to raise concerns about how the charity is governed. This standard only applies to charities that have members (so not to trusts).

⁴¹³ Refer ACNC, *Governance for good: The ACNC’s guide for charity board members*.

Governance Standard 3	Compliance with Australian laws. A charity must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a civil penalty of at least 60 penalty units (as at June 2013, this is \$10,200).
Governance Standard 4	Suitability of board members ('responsible persons'). Charities must take reasonable steps to ensure that their board members are not disqualified from managing a corporation (under the Corporations Act) or currently disqualified from being a board member for a registered charity by the ACNC Commissioner. Charities must take reasonable steps to remove board members who do not meet these requirements.
Governance Standard 5	Duties of board members ('responsible persons'). Charities must take reasonable steps to make sure that their board understand and carry out the duties set out in this standard.

- 7.74 The governance standards are not fixed rules, but instead were introduced as '*a set of core, minimum standards that deal with how charities are run (including their processes, activities and relationships)*'.⁴¹⁴ A registered charity must be able to demonstrate that its method of complying with these high level principles are appropriate, in the light of the charity's size, purpose and activities).⁴¹⁵
- 7.75 For charitable corporations that are registered under the Corporations Act, several Corporations Act provisions are "switched off" for so long as the corporation remains a registered charity.⁴¹⁶
- 7.76 For present purposes, two key aspects of the "governance standards" regime for a company registered under the Corporations Act that is also a registered charity are as follows.
- 7.77 First, subject to the terms of the company's constitution (if it has one), under Governance Standard 2 the company may not need to hold an annual general meeting. Whether or not this is required will depend upon how the company meets the requirements to take reasonable steps to be accountable to its members and allow its members adequate opportunities to raise concerns about how the charity is run.
- 7.77.1 In the ACNC's view, this would include letting members know what the charity is doing and the results of those activities, giving members the opportunity to ask questions and raise concerns on how the charity is run.⁴¹⁷
- 7.77.2 The ACNC further notes that the most common steps taken by charities in order to meet this standard are to:
- 7.77.2.1 organise a meeting at least annually with members (such as an annual general meeting) with opportunities to ask questions and vote on resolutions;

⁴¹⁴ Refer ACNC, *Meet governance standards*.

⁴¹⁵ ACNC, *Meet governance standards*.

⁴¹⁶ Corporations Act, section 111L.

⁴¹⁷ Refer ACNC, *Governance standard 2: Accountability to members*.

- 7.77.2.2 give information to members on the charity’s activities and finances; and
- 7.77.2.3 have clear processes for appointing directors.⁴¹⁸
- 7.78 Secondly, under Governance Standard 5 the ACNC regime “switches off” certain of the Corporations Act duties that are imposed on a charitable company’s directors, and instead obliges the company itself to take reasonable steps to make sure that its directors understand and carry out the duties set out in Governance Standard 5.
- 7.79 The specified duties are as follows:
- 7.79.1 to act with reasonable care and diligence;
 - 7.79.2 to act honestly and fairly in the best interests of the charity and for its charitable purposes;
 - 7.79.3 not to misuse their position or information they gain as a director;
 - 7.79.4 to disclose conflicts of interest;
 - 7.79.5 to ensure that the financial affairs of the charity are managed responsibly; and
 - 7.79.6 not to allow the charity to operate while it is insolvent.⁴¹⁹
- 7.80 The ACNC identifies the following steps that a charity can take to meet Governance Standard 5:
- 7.80.1 bring these duties to the attention of directors (including by providing directors with a copy of ACNC guidance material, or outlining the duties in each director’s letter of appointment or a board or committee charter);
 - 7.80.2 regularly provide information or training to directors on their duties to refresh their knowledge;
 - 7.80.3 encourage directors to attend, prepare for, and participate at meetings;
 - 7.80.4 have processes for the responsible management of money;
 - 7.80.5 have processes in place to manage conflicts of interests; and
 - 7.80.6 take action if directors are failing to meet their duties.⁴²⁰

Overview: CATSI corporations as registered charities

- 7.81 One stakeholder submitted that the ACNC currently regulates just over 55,000 charities, including over 900 CATSI corporations.⁴²¹

⁴¹⁸ ACNC, *Governance standard 2: Accountability to members*.

⁴¹⁹ Refer ACNC, *Governance Standard 5: Duties of Responsible Persons*.

⁴²⁰ ACNC, *Governance Standard 5: Duties of Responsible Persons*.

⁴²¹ Written submission.

- 7.82 Currently, a CATSI corporation that is a registered charity must comply with the applicable CATSI Act requirements, as well as the ACNC Act requirements (including the 5 governance standards). By operation of a Memorandum of Understanding between the Registrar and the ACNC, the Registrar and the ACNC have agreed to work together to reduce red tape for CATSI corporations that are registered charities, exchange information relating to specified provisions in each statute and refer matters between them as necessary.⁴²²
- 7.83 A key advantage of becoming a registered charity is that the CATSI corporation may be eligible for a range of tax concessions, including income tax exemption and fringe benefits tax rebate or exemption. These and other concessions are generally considered vital to the ongoing success and sustainability of the third sector in Australia. Accordingly, as one stakeholder submitted, it is important to ensure that any amendments to the CATSI Act do not inadvertently disrupt the ongoing tax concession eligibility of a CATSI corporation that is a registered charity.⁴²³

Discussion Paper questions

- 7.84 The Discussion Paper included the following questions regarding obligations to members:

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. 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.

⁴²² *Memorandum of Understanding between Australian Charities and Not-for-profits Commission and Registrar of Indigenous Corporations at <https://www.acnc.gov.au/ACNC/Pblctns/Pol/MOU/ACNC/Publications/MOU.aspx?hkey=6dc20099-799a-4d17-b3bd-0921d6f10c50>.*

⁴²³ Written submission.

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?

Should the Registrar be given power to create a regime similar to the ACNC's governance regime for CATSI corporations that are charities?

- 7.85 One option would be to amend the CATSI Act to introduce a more flexible, principles-based system of regulation with respect to CATSI corporation governance, much as the ACNC Act and related amendments to the Corporations Act has achieved for registered charities that are corporations registered under the Corporations Act.
- 7.86 Arguably, such a model may:
- 7.86.1 assist in creating a more efficient and effective regime of regulation, enforcement, support and administration; and
 - 7.86.2 align the CATSI Act more closely with the Corporations Act, with respect to CATSI corporations that are registered charities.
- 7.87 While such a model may appear attractive at first blush, we have identified several potential issues with that approach.
- 7.88 First, we have made a number of recommendations in this Review with the aim of adapting and improving the governance rules and related requirements set out in the CATSI Act. We consider that this specific, targeted approach is the best means of creating a more efficient and effective regime for regulating and supporting CATSI corporations, in contrast with the wholesale replacement of the current rules and regulatory model.
- 7.89 Secondly, and related to the above issue, the level of consultation and communication required to develop, implement and oversee any principles-based governance regime for CATSI corporations is likely to involve significant expense and administrative effort for both the Registrar and CATSI corporations themselves, and this does not appear to be warranted in all of the circumstances.
- 7.90 Thirdly, there is a clear risk that any such model may cause significant confusion within the sector, which again is a highly undesirable outcome when alternative means of achieving the Review's objectives are considered viable and which should not give rise to that risk.
- 7.91 Finally, it is imperative that the ongoing charitable status of CATSI corporations that are also registered charities is not inadvertently disrupted as a consequence of amendments to the CATSI Act. As one stakeholder noted in its submission, this risk could eventuate in several ways if the CATSI Act is amended to create a principles-based governance regime (among other possible changes).⁴²⁴

⁴²⁴ Written submission.

- 7.91.1 For example, if a CATSI corporation was no longer obliged to have a constitution, it may be difficult for a charitable CATSI corporation to demonstrate its ongoing entitlement to registration with the ACNC.
- 7.91.2 Similarly, any changes to the regime for calling and holding general meetings that applies to a charitable CATSI corporation could potentially result in the CATSI corporation no longer satisfying the ACNC's Governance Standard 2 if its governance practices are modified in response to amendments to the CATSI Act. We are sensitive to this risk and have made recommendations accordingly elsewhere in this Review.
- 7.91.3 In our view, it is less likely that any change to the directors' and officers' duties regime under the CATSI Act might result in a charitable CATSI corporation breaching the ACNC's Governance Standard 5, but this risk should also be borne in mind.
- 7.92 For the above reasons, we do not recommend that the Registrar be given power to create a regime similar to the ACNC's governance regime for CATSI corporations that are charities.

Should the Registrar be given power to create a regime similar to the ACNC's governance regime for CATSI corporations that are small corporations?

- 7.93 We do not recommend that the Registrar be given power to create a regime similar to the ACNC's governance regime for CATSI corporations that are small corporations, for the following reasons:
- 7.93.1 We consider that the specific, targeted approach to reforming the CATSI Act advocated in this Review is the best means of creating a more efficient and effective regime for regulating and supporting CATSI corporations.
- 7.93.2 Secondly, and related to the above issue, the level of consultation and communication required to develop, implement and oversee any principles-based governance regime for small CATSI corporations is likely to involve significant expense and administrative effort for both the Registrar and the relevant CATSI corporations themselves, and this does not appear to be warranted in all of the circumstances.
- 7.93.3 Thirdly, there is a clear risk that any such model may cause significant confusion among small CATSI corporations, which may be least-resourced to respond to any such reforms (even where those reforms aim to reduce the red tape and compliance burden imposed on such corporations).
- 7.93.4 Fourthly, and related to the above concern, if such a change was implemented it would be likely to result in a significant compliance and administrative burden for a small CATSI corporation that (for whatever reason) ceases to be a small CATSI corporation and is therefore required to comply with more onerous governance and reporting standards. In contrast, if the current model is retained in modified form, such a change in classification would result in a less drastic change to the corporation's governance and reporting obligations.

- 7.93.5 Finally, to the extent that a small CATSI corporation is also a registered charity, the issues noted in paragraph 7.91 above could arise equally if this model was implemented.

Chapter 7 Recommendations

Recommendation 65: It is recommended that the Registrar be given the power to impose an appropriate late fee in response to a breach of the CATSI Act.

Recommendation 66: It is recommended that the CATSI Act is amended so that:

1. the Registrar has similar powers to ASIC and is able to require actions in less than 14 days where it is considered reasonable in the circumstances to do so.
2. to the extent the investigatory powers of the Registrar are not equivalent to those of ASIC under the ASIC Act, that the CATSI Act be amended to provide the Registrar with such powers.

Recommendation 67: It is recommended that the Registrar is given a broader range of powers in this regard, including the power to impose a fine on the CATSI corporation and/or its directors, in circumstances where the Registrar reasonably considers that there has been a failure to comply with a compliance notice issued by the Registrar (where the Registrar does not propose to appoint a Special Administrator to the CATSI corporation).

Recommendation 68: It is recommended that the Registrar be given equivalent powers to ASIC to accept enforceable undertakings from relevant persons and take action to enforce such undertakings.

Recommendation 69: It is recommended that:

1. the CATSI Act be amended so that all exempt documents under the CATSI Act are treated as exempt documents under the FOI Act.
2. If the *Treasury Laws Amendment (Whistleblowers) Bill 2017* is passed in Parliament and retains its current form relating to the protection of whistleblowers, the CATSI Act should be amended to reflect the new provisions in the Corporations Act for the protection of whistleblowers, and
3. If that Bill is not passed or does not contain the current protections, a new provision be inserted into the CATSI Act stating that the FOI Act does not apply to a document which discloses information relating to a whistleblower's identity or is likely to lead to the identification of a whistleblower.

8 GENERAL ISSUES

Introduction

- 8.1 The Discussion Paper raised some more general questions and also raised the topic of dispute resolution.

Discussion paper questions

- 8.2 The discussion paper included the following questions:

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?

- 8.3 The above questions have been addressed above in this Review in association with topics where the consultation brought forth additional issues.

Alternative dispute resolution

- 8.4 However, there was an additional question posed:

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?

Discussion of key issues

Consultations

- 8.5 The public consultations disclosed a number of views and suggestions about the potential for a role for the Registrar in disputes.

... [P]articipants broadly seemed comfortable with some specific, practical amendments to the Act that would enable greater intervention of the Registrar, such as the insertion of a clause enabling ORIC to mediate membership disputes prior to a matter going to court. Importantly, participants felt that, if this provision was to be included in the CATSI Act, it should not be the role of the Registrar to determine

*whether or not a person should be a member of a corporation, but only whether the proper process was followed.*⁴²⁵

...

Some participants saw significant benefit in the Registrar being empowered to take a more active role in dispute resolution. However, as with the earlier question of changes to the Registrar's powers, there was division across consultations between those who felt corporations should manage disputes involving members or directors independently and those who felt ORIC should be more involved.

Participants explained a range of situations where greater intervention by the Registrar would be beneficial, for example:

- *to mediate non-binding decisions and resolve disputes while they are in their early stages,*
- *where a director is acting in breach of a corporation's rule book or against its interests but there is no ability for the corporation to rapidly deal with this (pending the members' process taking its course), and*
- *where CEOs are felt by members to be not acting in the best interests of the organisation but directors will not do anything about them due to fear or for cultural reasons.*⁴²⁶

8.6 Some another strand of thought was as follows:

*Another participant felt that community members should have greater recourse when rules and processes are not followed by a corporation through better internal mediation or dispute resolution process that could be engaged by members. Supporting this view, one participant was concerned that ORIC was more likely to intervene in cases in which there is possible misappropriation of government, rather than members', funds. Other participants felt that corporations need to "grow up" and take more control over their affairs.*⁴²⁷

8.7 Thus there was some support for the Registrar having a role in mediation of disputes. However, we note that this does not require any legislative change and that a CATSI corporation's rule book could contain a mediation clause that provided for mediation by the Registrar (should the Registrar be willing to be so involved).

8.8 However, as a matter of practicality it should be noted that:

*Finally, concern was expressed by those consulted that ORIC was not sufficiently resourced for a dispute resolution or mediation role and therefore not in a position to provide this type of intervention effectively, even if given the legislative authority.*⁴²⁸

⁴²⁵ Consultation Report, p 208.

⁴²⁶ Consultation Report, p 209.

⁴²⁷ Consultation Report, p 209.

⁴²⁸ Consultation Report, p 210.

8.9 In a private consultation, the role of an elders council as a body in intra-member or intra-group dispute resolution was discussed. However, it was noted that in some circumstances the elders would not be appropriate persons for dispute resolution (such as where they had a conflict of interest). In that consultation it was also stressed that finality of dispute resolution may not be achieved by mediation alone and that an arbitration maybe needed. However, the consultation did not approve of the Registrar as an arbitrator and some queried whether this may infringe the judicial power under the Commonwealth Constitution.

8.10 However, we note the comment from the Consultation Report that:

... many participants expressed a level of confusion over ORIC's role in acting as both a regulator and support provider for CATSI corporations and noted the need for better separation between regulation and support powers...

8.11 We understand that desire of some participants for a role for the registrar in resolutions of disputes but we query whether a formal role is advisable given the role existing roles of the Registrar as regulator and also a provider of educational support.

Recommendation

8.12 We do not recommend any legislative change to give the Registrar a formal role in dispute resolution. However, we consider that it is open for the rule book of a CATSI corporation to include role for the Registrar of its delegate, provided the clause is appropriately drafted and allows the Registrar the option of declining such a role. Further, it is recommended that the Registrar develops some arbitration clauses for inclusion in rule books where members seek finality of dispute resolution, but that the Registrar not be an arbitrator of such disputes.

GLOSSARY

GLOSSARY OF TERMS	
administrator	A person appointed in voluntary administration under the Corporations Act or the CATSI Act to determine whether a body corporate should enter into a deed of company or corporation arrangement, be wound up or revert back to the control of the directors.
annual general meeting or AGM	The annual general meeting of a CATSI corporation.
annual reports	The reports required to be lodged by CATSI corporations with the Registrar each year.
CATSI corporation	CATSI corporation has the same meaning as "Aboriginal and Torres Strait Islander corporation" as set out in section 16-5 of the CATSI Act.
conflict of interest	A situation where a person has a personal interest in a matter that is also the subject of a decision or duty of the person.
constitution	Constitution refers to the constitution of a CATSI corporation as set out in section 69-1(2).
corporate failure	A CATSI corporation that has been subject to external administration.
corporate governance	The term that broadly refers to the 'framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'. ⁴²⁹ Specifically for CATSI corporations, corporate governance refers to structures that govern them, including the CATSI Act, a corporation's constitution, policies, procedures, funding/grant agreements and staffing controls.
deregistration	Deregistration has the meaning as set out in chapter 12 of the CATSI Act.
determination	A decision by the Federal or High Court of Australia that members of a native title claimant group hold native title rights and interests in relation to a particular area of land or waters.
director	Director has the meaning as set out in section 683-1 of the CATSI Act.
examination	When the Registrar appoints an authorised officer under section 453-1 of the CATSI Act to examine the books of a CATSI corporation or related body corporate.

⁴²⁹ Governance Institute of Australia, *Governance foundations*

GLOSSARY OF TERMS	
external administration	<p>When the management of some or all of the affairs of a corporation is assumed by someone other than the directors. External administration includes:</p> <ul style="list-style-type: none"> • the appointment of a special administrator; • the appointment of a receiver or other controller; • the appointment of an administrator; or • the winding up of a corporation.
Indigenous Corporation Number or ICN	The number given by ORIC to a CATSI corporation on registration under subsection 26-1(2) of the CATSI Act.
Indigenous person	Indigenous person has the same meaning as "Aboriginal and Torres Strait Islander person " as set out in section 700-1 of the CATSI Act.
insolvency	When an individual or corporation cannot pay all their debts when they fall due and payable.
Native Title Claim	An application made to the Federal Court of Australia under the Native Title Act for the legal recognition of native title rights and interests held by Indigenous persons.
Native Title Claimant Group	The community or group that purports to hold native title rights and interests over a particular area of land or waters.
Native Title Holder	A person who has native title rights and interests over a particular area of land or waters or, where there has been a determination of native title, and a prescribed body corporate is registered on the National Native Title Register as holding native title rights and interests on trust.
Objectives	The aims that a corporation is established to pursue.
officer	Officer has the meaning as set out in section 683-1 of the CATSI Act
receiver	A person appointed by a creditor or court under the Corporations Act, CATSI Act or a contractual right to investigate the affairs of a corporation or to secure its assets.
Registrar	Registrar of Indigenous Corporations.
rule book	The rule book is a document that governs how a CATSI corporation should be run. A rule book is the corporation's constitution.
special administrator	A person appointed under subsection 490-1(1) of the CATSI Act.

GLOSSARY OF TERMS

winding up	The process by which a liquidator assumes control of a corporation’s affairs in order to discharge its liabilities and prepare for deregistration. The liquidator ascertains the liabilities of the corporation, converts its assets into money, terminates its contracts, disposes of its business, distributes the net assets to creditors and any surplus in accordance with its constitution and extinguishes the company as a legal entity by formal deregistration.
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ABBREVIATIONS

ACA Act	<i>Aboriginal Councils and Associations Act 1976 (Cth)</i>
ACNC	Australian Charities and Not-for-profits Commission
ACNC Act	<i>Australian Charities and Not-for-profits Commission Act 2012 (Cth)</i>
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
ARITA	Australian Restructuring Insolvency & Turnaround Association
ASIC	Australian Securities and Investments Commission
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2007 (Cth)</i>
CATSI corporation	A corporation registered under the CATSI Act
CATSI Regulations	<i>Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (Cth)</i>
CEO	Chief Executive Officer
Consultation Report	Consultation Report dated 6 October 2017 found in Annexure B
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Corporations Regulations	<i>Corporations Regulations 2001 (Cth)</i>
Department	Department of Prime Minister and Cabinet
Discussion Paper	The Discussion Paper made available on ORIC’s website on 4 September 2017
Deloitte Report	Deloitte Access Economics, <i>Review of the roles and functions of native title organisations</i> , Deloitte Access Economics, 2014
FOI	Freedom of information
FOI Act	<i>Freedom of Information Act 1982 (Cth)</i>

ABBREVIATIONS	
ILRA	Insolvency Law Reform Act 2016 (Cth)
KPMG Report	KPMG, <i>Regulating Indigenous corporations: final report</i> , KPMG
Native Title Act	<i>Native Title Act 1993</i> (Cth)
Native Title Report	Aboriginal & Torres Strait Islander Social Justice Commissioner, <i>Native Title Report 2007</i> , Sydney, 2007.
NNTT	National Native Title Tribunal
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
ORIC	Office of the Registrar of Indigenous Corporations
PDA Act	<i>Protected Disclosure Act 2012</i> (Vic)
PBC	Prescribed Body Corporate
Review	This technical review of the CATSI Act
RNTBC	Registered Native Title Body Corporate

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ANNEXURE A: THE DISCUSSION PAPER

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 at 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

- 2.1 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.
- 2.1.1 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?
- 2.1.2 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?
- 2.2 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 placed 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?⁴³⁰

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.

⁴³⁰ 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.

- 6.1.1 To what extent should the AGM of certain CATSI corporations be required to receive these reports?
- 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 an 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 directors⁴³¹ 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"⁴³²

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?⁴³³

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?

⁴³¹ Following suggestions in *Registrar v Monaghan (No 2)* [2016] FCA 1143.

⁴³² See *Registrar v Kerkhoffs (No 2)* [2013] FCA 1446 at [12] and *Registrar v Kerkhoffs* [2013] FCA 1445 at paragraphs 9 - 11.

⁴³³ 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 noncompliance with CATSI Act, rule book or other irregularity. In practice, noncompliance 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.⁴³⁴ 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.

⁴³⁴ See http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx.

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?

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?



ANNEXURE B: THE CONSULTATION REPORT



The Corporations (Aboriginal and Torres Strait Islander) Act Review

Consultation report

6 October 2017

Prepared by Inside Policy for the Office of the Registrar of Indigenous Corporations

DISCLAIMER

This document has been prepared by Inside Policy Pty Ltd for the Office of the Registrar of Indigenous Corporations (ORIC) to assist it in conducting consultations to support the review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

The material contained in this document is confidential and has been prepared for the sole use of ORIC for the purpose outlined above.

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EXECUTIVE SUMMARY

In July 2017, DLA Piper engaged Inside Policy and Winangali to conduct a series of consultations in Alice Springs and Cairns with Aboriginal and Torres Strait Islander corporations to inform the technical review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

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*. The purpose of the consultations was to engage with Aboriginal and Torres Strait Islander corporations incorporated under the CATSI Act (CATSI corporations) in open, transparent discussion about their experience with the CATSI Act to inform the review. A total of 161 stakeholders representing CATSI corporations and other relevant bodies were engaged by Inside Policy and Winangali via roundtable discussions and one-on-one interviews.

Overall, the review of the CATSI Act was well received by most stakeholders, particularly those representing smaller corporations who identified challenges they face in complying with some of its current provisions. Much of the input received directly related to current compliance obligations in areas such as reporting, conducting meetings and consulting with members, as well as maintaining membership records and managing disputes. There was broad agreement amongst stakeholders that the CATSI Act should be amended to provide greater flexibility for particularly small corporations to satisfy such obligations. There was also general support for some strengthening of the powers of the Registrar to assist with dispute resolution and address administrative anomalies where deemed necessary by a corporation.

However, many of the priority issues to those consulted are not regulatory matters but rather concern the need for greater capacity-building for CATSI corporations regarding matters such as governance and internal dispute resolution. Further, some amendments suggested by consultation participants may already be covered within the current regulatory framework. This suggests the need for greater education about the CATSI Act and about the matters that can be addressed by CATSI corporations by amending their rule books.

The autonomy and self-determination of CATSI corporations was expressed as a fundamental principle which should guide the outcomes of the review, rather than increased intervention. While cautious support was expressed for providing additional powers to the Regulator in relation to specific matters, there was a general preference for amendments to the Act which would deliver greater flexibility to CATSI corporations to address issues through changes to their rule books.

Lastly, while consultations indicated support for greater alignment between the CATSI Act and native title legislation, participants expressed caution about potential over-reach into the native title domain and emphasised the importance of preserving the distinction between the CATSI Act and native title legislation.

1 INTRODUCTION

In July 2017, the Office of the Registrar of Indigenous Corporations (ORIC) and the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion announced a review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). This is the first time that a comprehensive review of the Act has been undertaken since it came into effect. The purpose of this review is to identify areas of the current CATSI Act that should be amended or strengthened in order to improve its overall effectiveness, and where appropriate, align the CATSI Act with recent changes in corporate law and regulation, particularly in the *Corporations Act 2001*. Law firm DLA Piper was commissioned to undertake the technical review of the CATSI Act.

To inform the review, Inside Policy and Winangali were engaged to conduct a series of consultations with representatives from CATSI corporations and other relevant stakeholders. This report details the findings and analysis of consultations with 150 representatives from Aboriginal and Torres Strait Islander (ATSI) corporations who participated in four consultations in Alice Springs and Cairns in September 2017, as well as the additional insights provided by 11 organisations that participated in one-on-one interviews.

In addition to the consultations facilitated in Alice Springs and Cairns by Inside Policy and Winangali, DLA Piper held consultations sessions in Perth, Melbourne and Canberra. The findings of those consultations are not included in this report.

1.1 Structure of this report

The remainder of this report is structured accordingly:

Background	This section will provide background on the CATSI Act review and consultation process.
Methodology	This describes the approach taken to conduct consultations including any limitations on the data collection methods.
Findings	This section discusses the findings from the consultations against the key themes of the CATSI Act review.
Implications	This discusses the implications of the findings for the CATSI Act review.
Appendices	Appendix A: Discussion Guides

2 BACKGROUND

The Registrar regulates and supports Aboriginal and Torres Strait Islander corporations incorporated under the CATSI Act (CATSI corporations). ORIC supports the Registrar to regulate and deliver services to CATSI corporations. As well as monitoring compliance and intervening as needed, the Registrar and ORIC provide advice, training in good governance, and support to corporations throughout their life cycle (as they set up, operate, grow, respond to complaints, resolve disputes, and so on). Corporations registered under the CATSI Act gain access to free services from ORIC, such as job advertising, full-service recruitment assistance, a directory of independent prospective board-members and pro bono legal aid.

There are approximately 2,900 CATSI corporations registered under the CATSI Act. All corporations must be owned and controlled by Aboriginal or Torres Strait Islander people—the majority of directors and members must be Aboriginal or Torres Strait Islander people. Approximately 60 per cent of corporations are located in remote or very remote parts of Australia. Thus, consultation with representatives from CATSI corporations is a core element of the review of the CATSI Act. Specifically, the aims of the CATSI Act review consultations is to draw out stakeholder views on:

- 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.
- The appropriateness of the current size classification of corporations (small, medium and large) and the meeting and reporting requirements for CATSI corporations, and whether these can be simplified and streamlined.
- 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.
- 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 CATSI corporations, including, but not limited to, a greater role in the resolution and mediation of disputes.
- Amendments that would provide greater flexibility in the design of corporate structures for CATSI corporations, particularly to promote increased economic activity.
- Amendments to improve consistency and interaction with native title legislation.
- The appropriateness of existing penalties in the CATSI Act.

3 METHODOLOGY

Inside Policy worked collaboratively with DLA Piper and ORIC to design and deliver a consultation approach that focussed on drawing out a diverse range of perspectives from CATSI corporations and other relevant stakeholders. The stakeholder engagement methodology was dialogic, meaning that the engagement was open, transparent and gave stakeholders the opportunity to critique and exercise creativity in their feedback. The key stakeholder groups engaged across consultations were:

- Small-to-medium and large CATSI corporations, and
- Native title organisations including Prescribed Bodies Corporate that are registered under the CATSI Act.

The consultation mechanisms employed by Inside Policy and Winangali for this engagement involved:

3.1 Roundtables

Inside Policy and Winangali facilitated four three-hour roundtable consultations in Alice Springs and Cairns, two per day in each location.

The first roundtable in each location was open to all CATSI corporations to discuss general matters relevant to the review of the CATSI Act, including:

- registration of corporations
- directors and their qualifications
- remuneration and accountability of CEOs
- corporation meetings
- corporation reporting
- membership
- external administration and deregistration
- powers of the Registrar.

The second roundtable in each location was open to CATSI corporations and other stakeholders engaged in the native title ecosystem. The Registrar facilitated these discussions as subject matter expert, being guided by the following matters:

- regulation of native title corporations
- membership
- decision making and accountability
- management of native title benefits.

A discussion guide was developed by Inside Policy and Winangali for each session, containing a series of audience-appropriate questions based on the discussion paper developed by DLA Piper which was publicly available on the ORIC website.

A total of 150 representatives of Aboriginal and Torres Strait Islander corporations and broader CATSI Act ecosystem stakeholders participated in the roundtable consultations.

3.2 One-on-One Interviews

Representatives from key stakeholder groups in Alice Springs and Cairns who were unable to attend the roundtables were invited to participate in a one-on-one interview. As a result, Inside Policy and Winangali conducted 11 face-to-face interviews with representatives from CATSI corporations. The purpose of these interviews was to provide key stakeholders with the opportunity to discuss their experience of the matters for consideration in the CATSI Act review in greater detail. The interviews were conducted in a semi-structured format based on the discussion guides, focussing on themes and questions most significant to the interviewees.

The findings of these consultations are presented in the following section.

4 FINDINGS

This section presents the findings of roundtable discussions and one-on-one interviews undertaken in Alice Springs and Cairns between 26 and 28 September 2017. Reflecting the structure of the focus group discussions, the findings are presented under the sub-headings 'General Matters' and 'Native Title' and analysed by the thematic areas of the consultation discussion guides (see Appendix A).

It is important to note that participants had generally not read the discussion paper and did not receive the discussion guides prior to the consultations. Perhaps due in part due these factors, discussion largely focused on operational matters relevant to CATSI corporations rather than the specific legislative questions posed by the review. To assist with analysis of the consultation findings in relation to the review questions, a separate section is presented (at page 30) which maps the consultation findings against the questions posed in the discussion paper.

Further, some suggestions made by participants regarding changes to the CATSI Act or the role of ORIC may already be in effect under the current legislative framework. Inside Policy have included these in order to maintain an accurate record of the discussions and to highlight areas where ORIC may wish to focus future engagement and education initiatives.

5 GENERAL MATTERS

5.1 Registration and compliance requirements

Key issues discussed in relation to this theme were:

- Simplification of corporation classifications
- Alternate methods for classifying corporations
- Reducing the compliance burden on small corporations.

Discussions related to the registration and compliance requirements of CATSI corporations largely focused on the need for more a streamlined classification system. Consultations in both Alice Springs and Cairns drew out broad agreement that the classification of corporations under the CATSI Act should be simplified to include only a small and large classification. Despite this consensus, and a range of classification systems being proposed, participants did not reach agreement on an appropriate method of classification.

Participants identified the risks and benefits of various methods of classifying corporations based on revenue, assets or size of membership, particularly for small corporations. One risk identified was the imposition of significant compliance requirements on a non-trading, land holding-only corporation based on its asset base, despite not generating revenue.

It was noted that the definition of a small corporation under the CATSI Act does not align with definitions in corporations or charities legislation and that it should be consistent with these other laws under which some CATSI corporations are also covered. For example, the Australian Charities and Not-for-profits Commission (ACNC) classification of small corporations is those with income up to \$250,000, compared to those with annual income under \$100,000 under the CATSI Act. Other proposals included:

- determining the threshold for a small corporation to be \$500,000 annual income;
- sub-classifications of small corporations to recognise sole trader businesses, those with income under \$50,000 or \$80,000 and those who only receive one small grant;
- determining size by measuring of revenue and assets over a period of three years to account for large government contracts or one-off funding agreements;
- developing a classification system based on the CATSI corporation's purpose – for example, charitable, commercial or landholding,
- implementing a 'sliding scale' along which corporations could be placed depending on a combination of factors including size, turnover, membership and purpose. It was felt that such a 'nuanced' approach which enabled an organisation to move up the scale as its composition and functions changed would be positive as it would provide time for directors to become familiar with changing obligations on the corporation.

Similarly, consultations on this theme also revealed a need for ORIC to simplify or reduce compliance provisions under the CATSI Act, particularly for small corporations and/or those that receive no government funding. Participants noted that the CATSI Act and ORIC need to move away from *"...treating all corporations as if they are community controlled social enterprises whose main source of income is government funding."*

It was suggested that the CATSI Act should recognise CATSI corporations who are maturing and diversifying into well-functioning private entities. For these types of CATSI corporations,

it was felt that reporting and compliance requirements under the CATSI Act should be lesser than for CATSI corporations receiving public funds. Further, there was broad agreement that CATSI corporations should be able to own/be owned by other CATSI corporations under the CATSI Act.

Many participants spoke about the time and financial burden involved in compliance with the CATSI Act, particularly for smaller CATSI corporations. There was mixed feedback as to how this problem might be addressed. For example, some participants advocated for greater flexibility in the CATSI Act compliance regime to reduce this burden. Other participants thought that the current compliance measures should remain in order to entrench good governance and capacity development within small and developing corporations. Annual compliance measures were also seen to be a useful “health check” for ORIC to identify and mitigate early risks to vulnerable corporations.

The rule book required under the CATSI Act was seen to be a fundamental reference point for individual corporations’ operations which participants felt should continue to be mandatory. Despite this, participants suggested a number of improvements to the rule book which would improve its relevance and effectiveness. As one participant noted, “*Compliance with the rule book is massive – we could spend days just on [discussing] that.*” These suggestions include providing more replaceable rules for CATSI corporations to consider, particularly in relation to:

- notifying members of AGMs,
- cancellation of membership if no contact within a period of time determined by the corporation, and
- rescheduling of AGMs if no quorum achieved, for example to the next date on which there is a significant event in the community.

These suggestions are discussed in greater detail under the relevant themes of this section.

Finally, some participants thought that the CATSI Act should have provisions to enable more stringent approval processes for corporation registrations. This would reduce the duplication of business names and purposes.

5.2 Management of membership

Key issues discussed in relation to this theme were:

- The need to improve the flexibility of membership approval, cancellation and appeals processes
- Privacy concerns regarding public disclosure of member details.

Issues experienced by CATSI corporations in relation to membership were most intently discussed in relation to native title bodies. However, there was general agreement across consultations that management of memberships by CATSI corporations is an ongoing issue. Participants explained that the process of identifying and contacting members can be complex, as well as time and resource consuming – particularly for remote corporations, corporations with memberships extending over vast geography or smaller corporations with no, or few, paid staff.

Despite these difficulties, it was agreed that CATSI corporations should focus more on recruitment of, and engagement with, their members. In Alice Springs, participants noted the need to engage more young people as members.

Participants strongly expressed the importance of keeping an up to date list of engaged members. Many participants identified examples, particularly in remote areas, where people unknown to the community are members and “*show up*” to meetings and vote for decisions about a corporation’s business that do not affect them. One proposal put forward during consultation to address this issue was to make membership fees tied to voting rights or having a tiered/classed membership system with certain rights tied to a person’s participation or suitability to be a member. This model is discussed in further detail in the Native Title section.

During one-on-one interviews, a corporation explained the process they undertook to re-assess their membership list to remove over 300 disengaged members. Under the current CATSI Act provisions this corporation was able to efficiently reduce its membership size and retain active membership through an opt-in postal exchange. It was noted that this process worked well because the corporation was within its rights to cancel members through a special resolution to cancel the membership of members who have not engaged with the corporation for more than two years and after multiple attempts of reaching them.

In an alternative view, some participants felt that the current provisions regarding the corporations right to cancel memberships if the member could not be contacted after two attempts over two years should be changed as this was an overly long period for a person to remain as a member without engaging with the corporation. It was suggested 6 – 12 months would be preferable, but that this might not work for all communities. There was consensus that there should be flexibility on the time period within the CATSI Act to reflect the operating environments of different corporations.

Many participants felt strongly about the question of how membership of a CATSI corporation is determined and by whom, including who has the power to deny or cancel membership. When asked if the Registrar should be enabled to cancel memberships, those consulted generally felt that the Registrar should be given recourse to assist CATSI corporations to make amendments to membership lists where proper process has not been followed. Beyond this, participants felt that the removal of members is the business of the corporation and can be provided for through their rule book.

It was suggested that good practice process for approving and cancelling membership should involve a CATSI corporations’ directors and existing members. Importantly, many people thought that existing members should have the opportunity to approve new members. Similarly, if a new member application is rejected, that person should have the right to a robust and fair appeals process. A further issue raised in Alice Springs in relation to membership was the absence of a provision in the CATSI Act regarding incapacity – specifically, that a corporation is currently unable to act on direct instructions from family members to remove a member when they lack capacity to make decisions.

Lastly, the proposal that members’ details be made public was not supported by those consulted due to privacy concerns. It was felt that that CATSI corporations should be given the same privacy protections as corporations governed under the *Corporations Act 2001* in this regard. It was suggested that, if members’ details were required by ORIC, they should be accessible only to ORIC.

5.3 Management of AGMs

Key issues discussed in relation to this theme were:

- The need for flexibility in meeting requirements, particularly for small corporations.
- The need for flexibility in conducting AGM business out of session.
- Enabling the Registrar to assist with meetings as required.

Similar to the discussions with respect to membership, many participants expressed difficulties in holding AGMs, particularly those representing small and/or remote corporations. The requirement for members to receive individual notification was noted as particularly difficult in remote communities where many people do not have an address but use the same post office box, and often notification letters are returned to the corporation unopened. Some corporations dealt with this by advising of meetings through public notices in communities. A suggestion was made to also allow notification of AGMs via social media as it was seen to be a more effective mode of communication in some areas.

Additionally, participants noted that achieving quorums is key problem for small corporations, particularly in remote areas where it is expensive and challenging to locate and bring members together. The use of proxies was also discussed and noted as problematic as proxy holders are subject to pressure from other members, often don't know what they are signing up for, and sometimes carry conflicting proxies from different members.

To address some of these issues, there was broad agreement amongst the group that small corporations and non-trading (land holding-only) corporations should be able to exercise flexibility in holding AGMs, for example, once every three years. This provision should be included as a replaceable rule in corporations' rule books. However, it was emphasised that other reporting requirements, such as auditing and performance should remain annually. This is to mitigate the risk of under-performing corporations "*flying under the radar*" and not receiving the necessary support from ORIC in a timely manner.

One CEO interviewed represented a corporation which has a number of town camps as members. It was noted that if there was an option not to have annual AGMs that its members would still want them, but that it would be helpful to have more flexibility around the timing as all the town camp AGMs have to be held prior to the corporation's as they contribute to the corporation's board. The participant also noted that AGMs are an opportunity for external stakeholders such as the police, government representatives and housing providers to attend and engage with members, which is a very valuable process.

Participants also felt that it would be of benefit to enable corporations to have AGMs independently facilitated and the suggestion made that the Registrar be able to assist with, facilitate and participate in AGMs and other corporation meetings as required. Similarly, participants supported the Registrar being given the power to call and facilitate an AGM at the request of its members.

Additionally, some participants discussed the benefit of the CATSI Act enabling more flexible arrangements to conduct corporations' business typically undertaken during AGMs. For example, allowing for rolling elections and resignations during the year, provided there were appropriate succession plans in place, may increase the efficiency and overall capability of the board and senior staff. This is in comparison to situations where corporations are

continually having to “start again” in terms of training whole new boards with governance and capacity skills.

5.4 Reporting requirements

Key issues discussed in relation to this theme were:

- The need for more resources to assist corporations with reporting obligations.
- Accessibility of trusted professional services to assist with reporting.
- More flexibility around reporting requirements for small or low-income earning corporations.

The discussion about current reporting requirements under the CATSI Act revealed diverse opinions across consultations. For example, a CEO of a small corporation interviewed noted that reporting under ORIC is far easier, and more reasonable, than for those under the ACNC and government departments. In particular, the participant noted that provisions inbuilt into the CATSI Act to allow for support and flexibility was extremely helpful.

Conversely, other participants thought that annual reporting under the CATSI Act was particularly time and resource intensive for small corporations with limited staff, assets and income. As such, the discussion about reporting in Cairns largely focused on the need for more support. It was proposed that ORIC should provide a pre-approved panel of auditors, solicitors, book-keepers and accountants.

This was seen to be particularly useful for small corporations and to address instances where corporations have engaged poor quality professional services to assist with reporting. It was also suggested that ORIC develop more templates and other tools to help corporations undertake reports, in turn developing organisational capacity around reporting.

Participants identified the need for more flexible reporting provisions to allow for unexpected events such as natural weather events, deaths and ceremonies. Interestingly, one ORIC representative present during consultations pointed out that there is already a clear process built into the CATSI Act to allow for these circumstances. This indicates a need for more education of CATSI corporations about options available to them to assist in fulfilling their reporting obligations.

Additionally, it was suggested that the extent of reporting requirements for small corporations should reflect their purpose and financial turnover. It was suggested that reporting requirements for certain CATSI corporations be appropriately modified. For example, small corporations might only need to report every second year, and that it would be beneficial for non-trading (land holding-only) bodies to only have to report every three to five years. Alternatively, to assist corporations' compliance with statutory reporting timeframes, some participants suggested that general reports and financial reports could be lodged separately. Other participants suggested that the CATSI Act should reflect the exemption criteria in ACNC legislation.

Finally, some participants suggested that only CATSI corporations receiving public funding should be required to publish their annual reports publicly, and that private CATSI corporations be afforded the same reporting and disclosure rights as corporations governed under the *Corporations Act 2001*. Despite this point, many participants saw merit in placing

additional reporting requirements on large corporations, particularly regarding remuneration of CEOs. This will be discussed further in the following section.

5.5 Remuneration and accountability of CEOs

Key issues discussed in relation to this theme were:

- Greater clarity around benefits prescribed under the CATSI Act.
- Development of indicative CEO salary guidelines and assistance with locating and recruiting senior management.
- Performance reviews of CEOs and the need for internal capacity building.

Particularly in Alice Springs, participants agreed that the CATSI Act should be clearer in relation to corporations' obligations regarding accountability. Specific points raised included greater clarity on the meaning of "related party benefits", as it was felt that not all corporations understand what this means; clarification regarding non-monetary benefits, and more information about the circumstances in which expenses should be covered and for whom.

Consultations also drew out broad agreement that ORIC should be able to provide guidance to corporations regarding remuneration of CEOs and senior management. Many participants saw significant benefit in ORIC developing a standardised salary or award schedule for CATSI corporation CEOs on an annual basis. Decision-making regarding CEO and senior management salaries was seen to be the role of CATSI corporations. A suggestion was made that there should be an approval process of proposed CEO salary if outside the bandwidth recommended by ORIC, however it was unclear whether it was suggested that this should be an internal or external process.

Additionally, participants did not reach agreement on whether remuneration of CEOs should be disclosed. For example, one CATSI corporation CEO who participated in an interview strongly endorsed disclosing his, and other CEOs pay, feeling that it is important for CATSI corporations to be as "open and transparent" as possible. In the group discussions, however, there were differing opinions on whether CEO salaries should be disclosed publicly, only to members, or only to ORIC for aggregate reporting to inform its own information and reporting on salary trends across CATSI corporations.

Consultation participants considered the proposal of ORIC developing a "good" or "white list" (as opposed to a blacklist) of potential CEOs, as well as keeping track of poor performing CEOs. While one CEO interviewed strongly supported the proposal for a "white list" as "there are too many crooks ripping off communities", most of those consulted expressed concerns about such a list, noting that decision-making regarding inclusion on a list could become politicised and good candidates may be put off in applying for positions. They concluded that "rogue CEOs" are a problem but that regulation is not necessarily the best response. One suggested alternative to resolve this issue was to include ORIC in the CEO recruitment process, thereby enabling assessment candidates on a case-by-case basis in relation to a corporation's needs. Importantly, if this option was considered, it was felt that this should not be mandated under the CATSI Act but offered by ORIC as an "opt in" service. Ultimately, the group could not come to a consensus about how this could be done in a fair and accurate manner.

In discussing CEO accountability, one government representative interviewed questioned how best to deal with those who have a "history of capturing a community for their own

interests.” They noted that it would be positive to have capacity to bring concerns about a CEO to the Registrar, identifying a number of occasions in which they have had to ask directors about a CEO’s capability and one occasion where a coordinator was asked about his role and he could not explain what he did. They queried how ORIC might intervene to address issues of CEO behaviour where this has been approved by directors, in a way which supports the capacity of the board.

There was broad consensus across consultations that CEOs should have the same level of obligations to the corporation as directors under the CATSI Act. Further, participants agreed that it would be valuable to require CEOs to undergo an annual performance review as is required of CEOs of non-Indigenous corporations, and that this should be undertaken by an external party, but that directors may also be involved in the process.

Finally, some participants noted that ORIC and CATSI corporations should have greater focus on supporting internal staff to progress into senior management and CEO positions, leading to improved capacity and autonomy of CATSI corporations. This includes the need for more coaching or peer mentoring of young Indigenous CEOs who could “take the organisation in the right direction” with some support.

5.6 Training and qualification of directors

Key issues discussed in relation to this theme were:

- Training requirements of directors.
- Enabling the appointment of independent directors.
- Flexibility around the disqualification criteria for directors.

Training for directors of CATSI corporations was seen to be “absolutely necessary” and “one of the most critical issues, especially for small remote corporations”, where basic numeracy and literacy are lowest. To address this, participants identified an ongoing need for standardised governance and financial literacy training to develop the skills and capability of directors. The training requirements identified as most useful for directors were a combination of general governance training provided by ORIC, and training specific to the governance requirements of individual corporations. It was felt that ORIC’s governance training is very good and its delivery should be expanded, particularly for remote corporations, and that training should be undertaken repeatedly in order to embed knowledge.

In Alice Springs, it was suggested governance training should be “Aboriginalised” and delivered by training providers who understand the needs of remote communities as the training has to be “relevant to our people, more hands on, not just sitting and learning.” One participant gave an example where their corporation had negotiated the design and delivery of training packages for their community patrols with TAFE. This model was so successful the training provider has since been nominated for an award in acknowledgement.

Further, some participants noted that their organisation had developed internal requirements for new directors to receive training within a certain period of being in office, however, it was not agreed that this should be mandatory under the CATSI Act. This difference of opinion was largely due to concerns about the funding of training and the time required for directors to participate, given they are acting in a voluntary capacity.

Considerations related to training led into a discussion of knowledge transfer and succession planning for directors to avoid peaks and troughs in board capability. One participant noted that if a director's tenure is two years and it takes 6 – 12 months for them to understand the role and undergo training, they then only have a year in the role, representing lost investment. It was suggested that there could be an option of extending directors' tenure if they are being asked to invest in capacity building.

In discussing director capability, some participants raised the need to introduce a *"fit and proper person test"* or an expression of interest process to guide consideration and appointment of directors. It was felt that more stringent appointment practices would enable more effective and motivated board members, particularly for larger corporations, resulting in greater uptake of training and better performance of the board as a whole. Some participants noted that this could also be done by implementing robust internal review and appraisal processes for corporations' directors/boards. It was suggested that the process of appointing independent directors should be applied to all director appointments.

While not a requirement under the CATSI Act, many participants also saw value in appointing independent directors as members of their board to "keep things on the straight and narrow" and provide a resource for directors dealing with, for example, problems with a CEO. One participant noted that "in kin-based communities it can be hard for people to say no... a trusted independent adviser could be healthy." Another participant, however, felt that independent directors without voting rights would lack accountability and could potentially undermine the capacity of other directors. As such, "they [independent directors]" should be used in the capacity of an "independent adviser" not director. It was also noted that independent directors are not always necessary or conducive to effective governance. This is particularly the case for corporations owned by and servicing remote communities, where cultural governance plays a particularly important part of a corporation's operations and decisions.

The issue of covering an independent director's costs was also raised. One participant noted that for one corporation servicing a particular remote community that this amounts to \$5,000-\$6,000 per meeting, which is unaffordable for smaller corporations. Despite this difference of opinion, there was agreement that there should be a change to the Act to provide CATSI corporations with the default option of engaging independent directors, noting that corporations have the right to change this via special resolution.

With respect to the disqualification of directors, Alice Springs participants in particular felt the issue of was complicated by the extent of Indigenous peoples' engagement with the justice system. This issue was noted in relation to particular regions where many Indigenous people had been convicted of a criminal offence. There was concern that "good people" might be lost due to past criminal convictions that were irrelevant to their current role. It was felt that corporations should have the flexibility to deal with this issue on a case by case basis.

Further to this discussion, one government representative consulted asked whether there might be a "trigger" for ORIC to intervene after a minimum period of time where a board is underperforming, or functioning "at a bare minimum." They also felt that state and federal funding bodies should be notified by ORIC when breach of compliance notices are issued.

Lastly, one CEO gave an example of the difficulties they face in managing director accountability.

“Every year we have a fight with (the chair), he wants to buy a Toyota, wants to buy a bus for football... there’s nothing we can do. Two weeks later (directors) ring me and there’s problems and I say there’s nothing we can do, you as a council need to make decisions... what happened this year will be an example for next year as to what not to do again. (The chair) has been corrupted by whitefellas... but now we’ve started to record profits, what we turn back into communities, like if there’s a funeral and people need to dig a grave its expensive... it’s important we run as a business and make a profit so we can support those kinds of things... The advantage of living on community is knowing the tricks and being able to work around them.”

5.7 Changes to the Registrar’s powers

Key issues discussed in relation to this theme were:

- Potential changes to the Registrar’s powers in particular circumstances.
- Separation of the power of the Registrar and the corporation through the rule book.

Participants across consultations broadly agreed that the Registrar’s powers are either inadequate, or extreme. It was identified that ORIC is able to notify a corporation of an alleged breach of the CATSI Act, but only able to take action through imposing special administration. Some participants expressed that it would be desirable for ORIC to have greater capacity to intervene and there would be some utility in ORIC having the power to make more “*targeted strikes*” where necessary. However, it was felt there should be controls and limitations on where this could occur. Other participants felt that non-Indigenous corporations cannot be “interfered with” in this way, with one participant asking whether ORIC was coming in to “babysit” CATSI corporations rather than letting them operate commercially and stating that “there is a rule book, let it run its course.” The need to respect the “autonomy and self-determination” of Aboriginal corporations was raised as a key principle in relation to this issue.

Additionally, many participants expressed a level of confusion over ORIC’s role in acting as both a regulator and support provider for CATSI corporations and noted the need for better separation between regulation and support powers.

Despite this, participants broadly seemed comfortable with some specific, practical amendments to the Act that would enable greater intervention of the Registrar, such as the insertion of a clause enabling ORIC to mediate membership disputes prior to a matter going to court. Importantly, participants felt that, if this provision was to be included in the CATSI Act, it should not be the role of the Registrar to determine whether or not a person should be a member of a corporation, but only whether the proper process was followed.

Participants also suggested that there would be some benefit for the Registrar to hold the following additional powers:

- amend rule books where they do not accurately reflect respective native title determinations (this point is discussed further in the next section),
- call for, facilitate and/or attend corporation meetings as required,
- take a more active role as mediator prior to considering enforceable undertakings.

However, participants were clear that the Registrar’s powers to amend corporations’ rule books should not extend beyond addressing administrative errors or better aligning rule books to their respective native title determination. As a general principle, amendment of,

and compliance with, general business provisions contained in CATSI corporations rule books were considered to be the responsibility of individual corporations and best dealt with internally.

5.8 Improving the efficiency and effectiveness of the CATSI Act

Key issues discussed in relation to this theme were:

- Enabling greater understanding of the CATSI Act.
- Enabling the CATSI Act provide better protections for other Aboriginal land-owning entities.

In addition to issues covered in other sections, consultations also indicated that despite the volume of explanatory memoranda available, the CATSI Act is hard to read and interpret at a practical level. It was suggested that ORIC should consider the literacy level of its audience when developing information and resources to inform CATSI corporations about their rights and responsibilities under the Act.

It was also felt that land-owning entities outside of the native title regime, e.g. those covered by the *Aboriginal Land Act 1991* (QLD) are not adequately considered by the CATSI Act. It was requested that the protections for CATSI corporations and Registered Native Title Bodies Corporate (RNTBC) under the CATSI Act be extended to other land-owning entities.

5.9 Registrar assistance with disputes involving members or directors

Key issues discussed in relation to this theme were:

- Intervention of the Registrar in disputes involving members or directors.
- Resourcing of ORIC to exercise dispute resolution functions.

Some participants saw significant benefit in the Registrar being empowered to take a more active role in dispute resolution. However, as with the earlier question of changes to the Registrar's powers, there was division across consultations between those who felt corporations should manage disputes involving members or directors independently and those who felt ORIC should be more involved.

Participants explained a range of situations where greater intervention by the Registrar would be beneficial, for example:

- to mediate non-binding decisions and resolve disputes while they are in their early stages,
- where a director is acting in breach of a corporation's rule book or against its interests but there is no ability for the corporation to rapidly deal with this (pending the members' process taking its course), and
- where CEOs are felt by members to be not acting in the best interests of the organisation but directors will not do anything about them due to fear or for cultural reasons.

Opposing views on this point included concern that action by ORIC against a CEO or director prior to a court process would create the presumption in the community that the person was guilty although this was not proven in court, and could have implication for their livelihoods. Another participant felt that community members should have greater recourse when rules and processes are not followed by a corporation through better internal mediation or dispute resolution process that could be engaged by members. Supporting this

view, one participant was concerned that ORIC was more likely to intervene in cases in which there is possible misappropriation of government, rather than members', funds. Other participants felt that corporations need to "grow up" and take more control over their affairs.

Finally, concern was expressed by those consulted that ORIC was not sufficiently resourced for a dispute resolution or mediation role and therefore not in a position to provide this type of intervention effectively, even if given the legislative authority.

6 NATIVE TITLE

6.1 Management of membership by native title corporations

Key issues discussed in relation to this theme were:

- Membership record-keeping and cultural governance.
- Management of membership lists.
- The role of the Registrar in relation to native title functions.

Discussion of this issue across consultations revealed strongly divergent views, particularly in relation to matters including entitlement to membership of RNTBCs, access to benefits and voting rights, denial of native title holders' membership and rights to decision making about membership. Many participants provided examples to demonstrate their frustration and confusion with the current membership approval and record-keeping processes.

One participant identified as a traditional owner with native title rights over land in the Torres Strait whose application for membership in the respective RNTBC has been rejected because "they do not live on country." This person was concerned that the corporation was able to make decisions about what is happening on that country without adequately consulting with all the relevant traditional owners.

Another participant spoke of the challenges of membership for people who did not grow up on country: "Mum and Dad's kids were taken from them – what happens when they come back? They have a right to connection to their country but they won't have the knowledge. They need to come home and connect in some way... there's different ways to connect... Who's going to have the authority to say (to them) you have the right to be a part of that land?"

Another participant described their experience which illustrated a number of issues in relation to determining membership:

"Where I am we're getting an influx of 'tick-a-boxes'... 'Tick-a-boxes' means anybody can fill a form out and tick the box to say they're Aboriginal. Proof of Aboriginality is a pretty big thing in our area because of tick-a-boxes claiming things... at our Land Council, we have all these tick-a-boxes who can decide whether or not I can be a member.

I haven't been to a Land Council meeting in three years (and) I got put on a non-voting list. I filled out a form to be a voting member and I was shocked, I said 'Who are all you tick-a-boxes... I've never seen one of you at a meeting before.'... Where does that leave the Elders who were the first mob to take out a land claim? If tick-a-boxes are claiming to be (from that clan) does that mean they're entitled to our benefits?

...The oldest person in our town, he'll say 'I know so and so' but lately his memory's going and he's the one who's okaying all the tick-a-boxes and I said 'You need to question who these people are.' But he's one of the elders, he's on the board of directors of the Land Council... but he's in his 80s and dementia's setting in and no-

one's questioning him except me.... The damage is already done, they've got their foot in the door and you can't get them out."

There were also examples where respective RNTBCs have encountered difficulties in managing and determining correctly membership lists. As one participant explained, their RNTBC "inherited a list of 300 members as a result of a native title determination" and they thought that RNTBCs should have the opportunity to start its members list autonomously. Additionally, some participants noted instances where native title determination applicant lists were either inaccurate or outdated, which has led to the wrong group(s) of people being listed as members while excluding other rightful native title holders.

To address these difficulties, participants articulated two distinct proposals for management of membership. Some participants considered that traditional owners should be automatic members of the respective RNTBC. This suggests that the onus for identifying and keeping records of members should be on the RNTBC. Conversely, some participants felt there should be access to a robust appeals process to enable rejected applicants a right to appeal. This would effectively put the onus on applicants to seek out and apply for membership of their respective RNTBC. There was also some discussion about different types of membership models, particularly utilised in Western Australia, which employ a tiered system of membership with varying voting and other rights based on an individual's cultural connection to the land and claimants identified in the native title determination. It was suggested that this model is particularly useful where an individual has a right to be a member to more than one RNTBC, to varying degrees of family connection and cultural appropriateness.

Despite the difficulties that RNTBCs face in determining and managing membership lists, there was general agreement within the group that RNTBCs are responsible for the maintenance of membership lists. As some participants explained, this can be difficult if RNTBCs do not have access to the information required to develop appropriate lists. For example, due to privacy provisions, some participants identified difficulties in accessing their respective native title determination and applicant lists being held by Native Title Representative Bodies (NTRB) and trusts. To resolve this issue, RNTBCs identified the need for ORIC to be able to compel NTRBs and native title trusts to comply with requests for information, particularly for membership lists and other matters in the interests of RNTBCs. Another suggestion was to utilise consultative committees or council of elders to resolve membership dispute, as outlined below.

An alternate view was put forward by one Native Title Representative Body (NTRB) who identified that for RNTBCs in Central Australia the traditional decision-making process is still "alive and well", with a core group of owners whose seniority entitles them to make decisions, but with dreaming and songline connections also relevant. They described big meetings where it is agreed by participants that three or four senior people can make a decision and when those people nod, the decision is made. It felt that this method of cultural governance was preferred in their region and expressed concern about "codifying" this process through a formal list or register of native title holders. They questioned who would create or maintain such a list and felt that to make such a list public would create disputes in their region. They stated that: "A consistent approach assumes there's a consistency of problem. By fixing a problem that exists for some people you may be creating a problem for others."

Importantly, participants noted that the concept of having two relevant "lists" further complicates considerations of this issue (a list of all common law holders against which a RNTBC can assess its membership; and a list of those who have to be involved in native title

decision-making, which is a sub-group of common law holders but who do not have to be members). An example provided was of a RNTBC where an initial list was determined of the active membership of the three groups involved in native title decisions. Membership applications would be received at each AGM and there would be consideration of who each person was and their connection. There was a rule that if a person was not active in decision-making or cultural obligations they would be put on a general “community list” but this list grew significantly as everybody who applied was included. Consultants had to be engaged to determine which is the decision-making group and which is the community group.

6.2 Compliance obligations for CATSI corporations

Key issues discussed in relation to this theme were:

- Exemptions from compliance under the CATSI Act.
- CATSI corporation rule books and native title determinations.
- Powers of the Registrar and RNTBCs.

Similar to the views expressed in the General Matters consultation, participants broadly agreed with the proposal to allow exemptions for RNTBCs to comply with requirements under the CATSI Act based on the capacity and size of the corporation. Some participants, particularly in interviews, identified that capacity in newly-formed RNTBCs is limited and exemptions should be put in place until the organisation has capacity to comply. For example, new RNTBCs typically lack staff, income or assets, and it was felt that the Registrar should be able to exempt such an RNTBC from its obligations under the CATSI Act. It is worth noting that this view was different to that expressed by participants in the General Matters session in relation to the obligations of small organisations, who advocated for reporting obligations to remain in place with a degree of flexibility.

In an alternative view to allowing for exemptions small and new RNTBCs, one participant spoke about their experience in overseeing a process where larger, more capable RNTBCs provided auspicing services to smaller RNTBCs. This approach had enabled capacity-building between amongst RNTBCs while ensuring compliance obligations are met by the smaller corporations.

Additionally, participants strongly expressed the need for RNTBC rule books to align with their respective native title determinations. There was broad agreement, particularly in Cairns, that this would better address many of the problems currently experienced by corporations regarding forming membership lists and identifying corporation purposes and objects. Noting that native title determinations are Federal Court rulings, it was also suggested that this alignment go some way to resolving some disputes. Interestingly, many participants thought this was an existing requirement of the CATSI Act and a function of ORIC when pre-approving a corporation’s rule books.

Finally, there were mixed views on the proposal to extend the Registrar’s powers to amend corporations’ rule books beyond aligning them to reflect the respective native title determination. While some thought that this might result in more effective and timely dispute resolution, others expressed concern about the risk of over-extending the Registrar’s powers resulting in possible contravention of decisions determined outside of the CATSI Act’s jurisdiction, such as native title determinations made by the Federal Court. Overall, the predominant view amongst participants was that amendments to a corporation’s rule books are largely the responsibility of the corporation and its members.

6.3 Accountability to members and native title holders

Key issues discussed in relation to this theme were:

- Issues relating to consultation by native title bodies.
- Registration of native title decisions.

Many participants were concerned that RNTBCs do not conduct proper consultations with common law holders as required under the CATSI Act. This was attributed to under-resourcing, particularly of smaller corporations in remote areas where it is expensive and logistically challenging to bring all affected members and common law holders together. Another factor inhibiting proper consultation is that RNTBCs often hold incomplete membership lists.

Despite this, participants agreed that common law holders and members equally have the right to be consulted about matters related to native title and dealings of the RNTBC. As discussed previously, there was some confusion around the rights of members compared to the rights of traditional owners of a respective native title determination. It was suggested that ORIC has an important role to play in clearly articulating the separate rights and responsibilities of these parties. It was thought that greater knowledge about this distinction might assist in resolving membership disputes, particularly in instances where traditional owners do not have an interest in the dealings of the RNTBC but want to maintain their authority of the land.

Finally, participants agreed in principle with the proposal that RNTBCs should keep a register of native title decisions. However, there was contention as to whether such record-keeping should be mandatory, and whether records should be made publicly available. These questions were left largely unresolved across consultations.

6.4 Management of native title benefits

Key issues discussed in relation to this theme were:

- Transparency regarding distribution of native title benefits.
- Reporting requirements regarding native title benefits.

There was general agreement amongst participants about the need to improve accountability regarding distribution of native title benefits. One CATSI corporation CEO said that this was a big issue for their corporation because “we don’t even know what’s going on... we have the supermarket coming to us all the time asking what’s going on.” It was generally felt that traditional owners have no visibility over the flow of native title benefits. This is particularly the case when royalties and benefits are being held in external trusts. Further, participants noted that external trusts have limited obligations to disclose this information to their RNTBC and broader RNTBC membership group.

To address this, the participants agreed that RNTBCs should be required to keep and consolidated financial records about native title benefits separate to other income generated, and disclose these to their members. There were, however, differing opinions expressed across consultations in relation to how this should be achieved. One participant felt that while RNTBCs should keep separate financial records about money received on behalf of traditional owners, it would be a concern if this were to be public: “Would that group of traditional owners want all other traditional owners that have nothing to do with that issue to

know how much money is coming in, how it gets distributed and to who, and having that made public?” One suggestion put forward to resolve this issue was that funds could be represented as aggregates, or percentages rather than dollar figures, or as dollar figures without naming the individuals who had received the money.

Importantly, consultations drew out broad agreement that the introduction of any disclosure requirements should extend beyond RNTBCs to private trusts. This would address the currently limited reporting obligations for private trusts set up to hold RNTBC benefits. To this end, it was agreed in principle that the CATSI Act should impose obligations on private trusts regarding transparency and accountability, despite acknowledging that this may require complex legislative amendments. Another suggestion to facilitate this change would be to introduce consistent accounting standards and requirements for all parties dealing with native title benefits.

6.5 Fees and charges for native title services

Key issues discussed in relation to this theme were:

- Support for the development of indicative fees and charges for services to be used as a reference by RNTBCs but not mandated.

Discussions about the setting of fees and charges largely surrounded the need for greater certainty around rates of charges for the processing of future act notices. It is important to note that there are some activities already underway to determine this issue. For example, a representative body explained they have been negotiating with a state government for the past 12 months to determine a suitable standard rate of fees for future act notices. The delay in settling this standard is due to differing opinions about fee structures.

Despite this, participants broadly agreed that RNTBCs should be responsible for setting their own fees for future act notices and other service provisions. Additionally, publishing the rates of these fees should be at the discretion of the RNTBC. While the group agreed that the Registrar should be able to publish opinions about fees, they did not agree that the Registrar should play a larger role in setting the rate of fees charged by RNTBCs.

6.6 Dispute resolution processes

Key issues discussed in relation to this theme were:

- The need for dispute resolution provisions prior to court proceedings.
- Scope of the Registrar’s powers.

The limited options available under the CATSI Act to resolve disputes and need for early intervention mechanisms were discussed at length during consultations. Participants articulated a number of examples where active disputes continue to impact on their RNTBCs success. For example, one participant said that their community had been trying to resolve native title problems with their land council without success, so that at every native title meeting there is conflict as the core problems hadn’t been resolved. They also noted a need for an improved process to help native title holders understand how to resolve issues within meetings rather than resorting to negative behaviour: “People are trying to resolve conflict by going outside and hurting one another and we need to stop the violence... we need to bring it in (to meetings). If you’re a director, behave like a director. If you’re a CEO, behave like a CEO”. This point was reinforced by another participant, who noted that members are being

disempowered when an AGM does not go ahead because somebody is making trouble, and supported the need for early intervention.

Critically, as a first step many participants see considerable benefit for RNTBCs to review their original native title determination in an attempt to resolve disputes around memberships, purpose and objects of the corporation. As the determination is a federal court ruling, participants emphasised that it should provide for the basis of all decision making by the RNTBC. In addition to this, participants saw benefit in RNTBCs developing their own dispute resolution clauses, and the addition of final arbitration clauses within CATSI corporations' rule books.

However, where disputes could not be resolved through this process, many participants saw benefit in developing alternative avenues to resolve disputes outside the judicial system. It was felt that the process of resolving disputes through the court system, particularly to do with native title determinations, is far too time and resource consuming. Notably, ORIC was not expressly considered to be the most appropriate body to fulfil this role, but rather one option amongst others including independent mediators and elders' committees. One participant provided an example where community members were being trained as mediators with the aim of solving community disputes before they end up in court. This was cited as an example of a good model because it enables communities to manage issues sustainably.

It is important to point out that participants did not think the Registrar should not have powers that would in any way intervene with native title determinations as decided by the Federal Court.

6.7 Interaction between CATSI Act and native title legislation

Key issues discussed in relation to this theme were:

- Alignment between native title legislation and the CATSI Act.
- Scope of the Registrar's powers.

Consultations drew out support for greater alignment between the CATSI Act and native title legislation, particularly regarding matters related to native title determinations and individual corporations' rule books. It was noted that all RNTBCs are covered by the CATSI Act but must also comply with native title legislation, and some participants questioned why these corporations must comply with two sets of rules.

More broadly, discussions on this topic focused on the need for "someone on the ground that people can turn to when there's a problem." It was felt that there was a gap between the functions of ORIC and the National Native Title Tribunal (NNTT) and that this was problematic for PBCs. It was noted that the NNTT was intended to provide a pre-court, mediation role but that its functions have gradually been stripped away. Participants saw merit in ORIC being a "one stop shop" for CATSI corporations as they have greater dealings with ORIC than with the NNTT, but noted that native title decisions would still need to be registered with the NNTT. It was felt, however, that whichever body held a mediation role – ORIC or the NNTT – should only become active on the basis of a complaint and not become involved in every native title decision.

As such, participants identified a need for ORIC to be able to exercise greater powers to intervene in corporation business where consistent with specific native title determinations,

for example, enabling the Registrar to provide assistance with amending membership lists and dispute resolution processes. However, and as previously discussed, participants urged caution in consideration of extending the powers of the Registrar beyond the CATSI Act into areas in which there is the risk of intervening in, or overriding, other legislation.

7 FINDINGS RELEVANT TO DISCUSSION PAPER QUESTIONS

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?

The proposal of having only small and large classifications was broadly supported. However, there was no agreement on how to classify small and large corporations, and alternate proposals made as to methods of classification according to purpose (eg commercial, land holding-only).

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?

Consultations supported simplification, reduction or flexibility of compliance provisions for small and/or non-trading CATSI corporations, particularly around reporting and holding AGMs. However, there was not agreement on the proposal to exempt small corporations from compliance.

2.1.5 Should it continue to be mandatory for all corporations to have a rule book?

This proposal was supported.

2.1.6 Are the replaceable rules still a relevant and applicable framework for the rules of a corporation established under the CATSI Act?

This was supported. Further, it was suggested that ORIC provide more education of CATSI corporations about replaceable rules, including what rules are available for consideration within their rule books.

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?

This question was not discussed in detail, however it was suggested ORIC employ greater diligence in approving CATSI corporation registrations to minimise duplication of names and provide more certainty on objects and purpose of corporations.

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?

This proposal was supported.

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?

This proposal was not discussed.

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 promote increased economic activity?

This proposal was not discussed.

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?

This proposal was supported. It was noted that CATSI corporations may amend this default provision in their rule book if required.

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?

As outlined in 3.2.2.

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?

Consultations revealed confusion around the meaning of related party benefits. Greater clarification was requested specifically in relation to monetary benefits and coverage of expenses.

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 placed 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?

Accountability of CEOs and senior executives was discussed and considered a priority, however there was no agreement about the best way to ensure accountability. The suggestion of a “whitelist” or “blacklist” was not universally supported.

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

This proposal was not supported.

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?

This proposal was not supported. It was felt there would be benefit for the Registrar to publish an indicative schedule of salaries to guide remuneration decisions made by CATSI corporations. Aggregated remuneration reports submitted to the Registrar should be used for information and data collection purposes only.

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?

This proposal was not discussed.

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

As outlined in 4.1.1.

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

Disclosing aggregated remuneration reports for large corporations was considered to be beneficial but should not be mandated.

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?

This proposal was not discussed.

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.

Greater flexibility for small and/or non-trading corporations in holding AGMs was supported provided this is agreed by members via a special resolution. It was suggested that AGMs might be delayed for up to 3 years.

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?

The proposal to delay AGMs for up to three years was only discussed and supported in relation to small and/or non-trading corporations.

5.1.2.1 If this occurred, would any additional forms of reporting to members between AGMs be required?

This proposal was not specifically discussed. Reporting of CATSI corporations is discussed at question 6.

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.

This proposal was supported in relation to the circumstances noted above. The option to reschedule was also supported where quorum is not achieved.

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?

This proposal was supported.

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?

This question is discussed at 4.1.3.

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?

There was no specific discussion about the reporting requirements and powers of the Registrar to dispense of these obligations for AGMs, however suggestions around more flexibility in the reporting requirements are discussed at 2.1.4.

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?

It appears from consultation that the powers of the Registrar in this regard are not widely known amongst CATSI corporations.

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?

This proposal was not discussed. However, it was suggested that ORIC develop lists of pre-approved specialist legal and financial service providers in order to assist CATSI corporations with reporting.

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?

This proposal was not specifically discussed. However, there was support for enabling greater flexibility around methods of contacting members, for example, by using social media.

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?

It was felt that this time period and number of attempts are excessive. It was proposed that 6-12 months may be a sufficient timeframe but it was agreed that CATSI corporations should be able to determine the process and timeframes beyond which membership can be cancelled by special resolution in rule books

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

This proposal was not specifically discussed.

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

There was no agreement on this proposal and strongly divergent views held by those consulted. Note: there was significant overlap in discussion of these questions with discussion of membership record keeping by RNTBCs which is covered at 12.2.

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 directors or within a certain period of being in office?

Agreement was not reached on mandating training for incoming directors despite universal agreement on the importance of training for directors, particularly regarding governance and financial literacy.

8.2.2 Should such training be mandatory for certain types of corporations?

In Cairns, it was suggested that directors of larger corporations should have higher prior experience, knowledge and be subject to higher standards of training. This proposal was not discussed in Alice Springs.

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"?

This proposal was not specifically discussed. However concerns were raised about the appropriateness of disqualification of directors based on criminal history.

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?

This proposal was not discussed.

9.1.2 Should additional grounds for special administration be included?

This proposal was not discussed. However, there was considerable support for additional powers for the Registrar to intervene to mediate or resolve disputes prior to appointment of special administration.

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?

This proposal was not discussed.

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?

This proposal was not discussed.

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?

There was no discussion of questions in section 11 'Winding up and deregistering of corporations' during consultations.

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?

This proposal was not specifically discussed. Consultations broadly supported the limiting of powers of the Registrar to matters specifically related to the CATSI Act.

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?

This proposal was not supported and strongly divergent views held by those consulted.

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?

Cairns consultation participants supported this proposal. This proposal was not specifically discussed in Alice Springs.

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?

Cairns consultation participants supported this proposal. This proposal was not specifically discussed in Alice Springs.

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?

There was some support expressed for this proposal however no universal agreement was reached.

12.2.5 In what circumstances, if at all, should a common law holder cease to be a member?

Consultations supported that this should be determined by RNTBCs in their rule book. Participants expressed confusion over the differences in rights and responsibilities as common law holders and members of RNTBC and felt this should be better clarified by ORIC. For example, common law holders who are not members of RNTBCs expressed concern that their rights over the land no longer exist.

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?

It was agreed the Registrar should dispense, or postpone, these obligations where it is appropriate to do so based on the assessment of the RNTBCs size, capacity, and/or income/asset base.

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?

In Cairns participants agreed that CATSI corporation should keep registers of native title decisions and directions of native title benefits, however this requirement should not be mandated under the CATSI Act nor mandated to be made public. This issue was not discussed in Alice Springs.

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?

This proposal was not supported.

12.6.2 Should the Registrar be required to maintain a register of opinions given in relation to RNTBC fees?

In Cairns it was agreed the Registrar may maintain a register of opinions at the Registrar's discretion. This proposal was not discussed in Alice Springs.

12.6.3 Should the Registrar be given the power to set such fees?

This proposal was not supported. Participants felt there is some benefit for the Registrar to publish an indicative schedule of fees to inform RNTBCs determination about rates of 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?

Cairns consultations supported this proposal. This proposal was not specifically discussed in Alice Springs.

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?

There was no agreement reached on whether these reports should be made public.

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?

This proposal was supported in Cairns. The proposal was not discussed in Alice Springs.

12.9 Are there any other amendments to that CATSI Act that would improve consistency and interaction with native title legislation?

There was broad agreement around the need for greater alignment of CATSI Act and native title legislation, however participants felt that the powers given to the Registrar should remain strictly limited to matters directly related to the CATSI Act. It was considered inappropriate for the Registrar to intervene in matters outside the jurisdiction of the CATSI Act.

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?

This proposal was not specifically discussed.

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?

Cairns consultations supported this proposal only in instances where the proper process has not been followed, or if the registers member(s) are inconsistent with the relevant native title determination. This proposal was not specifically discussed in Alice Springs.

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?

Cairns consultations supported this proposal in circumstances where a RNTBC's rule book is inconsistent with the relevant native title legislation. It was emphasised that the power of the Registrar should be strictly limited to amending the rule book to reflect the native title determination.

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?

This proposal was not specifically discussed, however, there was broad agreement that all proposed amendments to a RNTBCs rule book should be passed by special resolution of its members.

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)?

This question was not discussed.

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?

This question was not discussed.

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?

This question was not discussed.

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?

This issue was discussed but no agreement reached. It was broadly agreed that ORIC was not resourced adequately in order to enforce compliance. It is proposed that the Registrar be given addition powers to actively participate in mediation prior to 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?

This proposal was discussed in reference to 13.6 with no agreement reached.

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. 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?

While the suggestion regarding charities was not specifically discussed, as indicated at 2.1.4, there was support for the introduction of more flexible compliance arrangements for small and non-trading CATSI corporations.

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?

While not concerning amendments to the Act, consultations indicated the need for ORIC to play a greater role in supporting CATSI corporations to understand their rights and obligations under the Act.

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?

Consultations indicated agreement that CATSI corporations should not be subject to more stringent compliance obligations than those applicable to other corporations under the Corporations Act. unless receiving public funds.

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?

There was strong support for the introduction of early mediation and dispute resolution mechanisms. While it was not agreed that these should necessarily, or solely, be powers held by the Registrar, it was suggested that the Registrar should be enabled to act as mediator when invited by members of a CATSI corporation.

8 IMPLICATIONS

The implications of the consultation findings for the review of the CATSI Act are considered below.

There is a need for more education, training and capacity-building for CATSI corporations, particularly small corporations and those in regional and remote areas.

Many of the issues raised by participants as of high importance do not require legislative amendment, particularly concerning the need for capacity-building of CATSI corporations regarding governance and internal dispute resolution. Further, some amendments were suggested by consultation participants that may already be covered within the current regulatory framework, either under the CATSI Act or replaceable rules within corporation rule books. This suggests the need for more education about matters covered respectively by the CATSI Act and corporations' rule books, and changes that can be implemented by corporations themselves by amending their own rule books.

The principles of autonomy and self-determination of CATSI corporations should guide any amendments to the CATSI Act.

While consultations indicated a need for more support for CATSI corporations to manage issues raised in relation to the review of the Act, the autonomy and self-determination of CATSI corporations was expressed as a fundamental principle which should guide the outcomes of the review, rather than increased intervention. The duality of the Registrar's role as regulator and provider of support was problematic for some, and participants expressed caution in many instances about the desirability of providing additional powers to the Regulator. Rather, there was a general preference for amendments to the Act which would deliver greater flexibility to CATSI corporations to make changes to their own rule books.

8.1 Any amendments to the CATSI Act should preserve the distinction between that Act and native title legislation.

Consultations indicated support for greater alignment between the CATSI Act and native title legislation, and for some additional functions to be provided to ORIC and the Registrar in this regard. However, participants expressed caution about potential over-reach into the native title domain and the risk of intervention by the Registrar in native title determinations. This suggests that stakeholder support for amendments in this area would depend on careful consideration of the intersection between the purpose and functions of the CATSI Act and *Native Title Act 1993* and ensuring that these are preserved separately.

9 APPENDIX A: DISCUSSION GUIDES

Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006

Discussion Guide: General Matters

1. What changes would you suggest to improve registration and compliance requirements for CATSI corporations, specifically regarding:
 - a. Classification of corporations
 - b. Compliance with the Act, particularly for small corporations
 - c. Compliance with rule books

2. What changes would you suggest to improve how membership is managed by CATSI corporations, specifically regarding:
 - a. Identifying and contacting members
 - b. Record-keeping
 - c. Cancellation of membership

3. What changes would you suggest to improve management of AGMs by CATSI corporations, particularly small corporations?

4. What changes would you suggest to improve reporting requirements for CATSI corporations, specifically regarding:
 - a. The level of detail required in reports
 - b. The timeframe for lodgement of reports

5. What changes would you suggest to improve the accountability of CATSI corporations, specifically regarding:
 - a. Contracting with family members or related parties
 - b. Remuneration of CEOs and senior management
 - c. Statutory duties of CEOs and senior executives

6. What changes would you suggest to improve training and qualification of directors of CATSI corporations, specifically regarding:
 - a. Training for new directors
 - b. Disqualification of directors
 - c. Independence of directors

7. What changes would you suggest to the Registrar's powers regarding breaches of the Act, specifically regarding:
 - a. How breaches of the Act are managed
 - b. Use of enforceable undertakings

Other matters

8. What changes would you suggest to improve the efficiency and effectiveness of the CATSI Act?
9. How would you suggest the Registrar could help corporations resolve disputes involving members or directors?

Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006

Discussion Guide: Native Title

1. What changes would you suggest to improve how membership is managed by native title corporations, specifically regarding:
 - a. Membership of native title (“common law”) holders
 - b. Ceasing membership
 - c. Keeping records of members

2. What changes would you suggest to improve compliance obligations for CATSI corporations, specifically regarding:
 - a. The appropriateness of obligations
 - b. Seeking assistance with compliance

3. What changes would you suggest to improve corporations’ accountability to members and native title holders, specifically regarding:
 - a. The corporations’ understanding of their responsibilities to its members and native title holders
 - b. Consulting and gaining appropriate consent
 - c. Keeping records of native title decisions

4. What changes would you suggest to improve the management of native title benefits, specifically regarding:
 - a. Keeping records of directions from native title holders
 - b. Keeping financial records of native title benefits
 - c. Dealing with native title benefits held outside of the corporation (eg. in a trust)

Other matters:

5. What changes would you suggest to improve certainty over fees and charges for native title services - specifically:
 - a. Understanding what services corporations can charge for
 - b. Determining what fees can be charged for services

6. What changes would you suggest to improve dispute resolution processes, specifically regarding:
 - a. Disputes between native title holders and the corporation
 - b. Membership
 - c. Management of native title benefits
 - d. Governance

7. What other changes would you suggest to the CATSI Act to improve its interaction with native title legislation?