



Australian Government
National Indigenous
Australians Agency



NIAA

Final report

CATSI Act Review

30 October 2020

Working with Aboriginal and Torres Strait Islander peoples




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Executive summary


1. The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) came into effect on 1 July 2007 to provide Indigenous corporations with a fit-for-purpose regulatory framework to make it easier for Aboriginal and Torres Strait Islander persons to form and manage corporations. The CATSI Act mirrors many requirements of the *Corporations Act 2001* (Corporations Act)¹, while providing the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander people. The CATSI Act is a special measure for the purposes of the *Racial Discrimination Act 1975*.
2. In December 2019, the Minister for Indigenous Australians announced a comprehensive review of the CATSI Act to build on previous reviews and consider a wide range of issues, including:
 - whether the CATSI Act is meeting its objects and continues to be desirable as a special measure for the advancement and protection of Indigenous people as set out in the Act's preamble;
 - whether the functions and powers of the Registrar of Indigenous Corporations are appropriate, effective and adequate; and
 - possible amendments to the CATSI Act to better support the regulation of CATSI corporations.
3. This review included two phases of consultation in which a broad range of stakeholders were involved, such as directors, members and CEOs of CATSI corporations including Registered Native Title Bodies Corporate (RNTBCs), academics, peak Indigenous and professional bodies, lawyers, accountants, industry and business. Stakeholder engagement was thoughtful, constructive and relevant, and found to be very valuable.
4. As a special measure, the CATSI Act should be periodically reviewed to assess whether it is meeting its objects. Special measures are designed to ensure the full and equal enjoyment of human rights and fundamental freedoms by certain racial or ethnic groups or individuals. By definition, a special measure is to be discontinued once its objects have been achieved.
5. Although consultations revealed general support for the CATSI Act as a special measure, there was some feedback the CATSI Act was not necessary or desirable and corporations would be better positioned under the Corporations Act. Some stakeholders proposed the unique incorporation provisions specifically aimed at Aboriginal and Torres Strait Islander people could be moved to the Corporations Act instead of retaining the CATSI Act, or rather than having targeted assistance, Aboriginal and Torres Strait Islander people could be better supported to incorporate under the Corporations Act. These proposals did not reflect the majority of views received.
6. The unique provisions of the CATSI Act reflect its history and that of its predecessor, the *Aboriginal Councils and Associations Act 1976* (ACA Act). Following the 1967 Referendum, it was considered Aboriginal and Torres Strait Islander people could realise community priorities through government grants to community organisations. The ACA Act was enacted as a vehicle to enable people to incorporate community controlled organisations and was seen to be a measure of self-determination.
7. The nature of corporations registered under the CATSI Act has changed over time and there are now for-profit entities, registered charities, community controlled entities and native title bodies—all at varying degrees of maturity. Some of these entities are required to incorporate under the CATSI Act, such as RNTBCs, while the majority of corporations are voluntarily incorporated under the CATSI Act.
8. Through the consultations, stakeholders shared their experiences such as having their corporations placed under special administration, being the subject of an examination, receiving assistance from the Office of the Registrar of

¹ The *Corporations Act 2001* (Corporations Act) is the primary legislation regulating companies in Australia and defines the laws dealing with business entities at both the federal and state levels. The Corporations Act is administered by the Australian Securities and Investment Commission (ASIC).



Indigenous Corporations (ORIC) to develop their rule books or undertaking training delivered by ORIC. Aspects of the CATSI Act such as special administration and capacity building are unique provisions aimed at providing adequate support for corporations at different stages of their lifecycles.

9. Importantly, the CATSI Act sets out a minimum standard to ensure newly established corporations and in particular those formed out of need and whose members may not have experience or knowledge of running a corporation, can put in place proven governance processes.
10. Stakeholders advised changes to the CATSI Act should not be prescriptive and Aboriginal and Torres Strait Islander people need to be able to decide how their corporations are governed—they need to retain self-determination as set out in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). There was positive feedback about the support ORIC provides and stakeholders indicated they would like access to increased capacity building opportunities. This was especially true of RNTBCs.
11. Through the first phase of consultation, we received feedback about considering further ways to incorporate Aboriginal and Torres Strait Islander culture and tradition into the CATSI Act. This issue was then canvassed through the second phase of consultation. There were diverse views on how this could be achieved as well as questions as to whether this was a relevant consideration. For some, the CATSI Act was not the right place to attempt to codify culture and tradition. Stakeholders specifically cautioned against doing so to prevent homogenisation and instead advocated for corporation to put in place processes reflective of their local ways of working. It was suggested a number of times the best way for corporations to incorporate Aboriginal and Torres Strait Islander culture and tradition into their operations is through their rule books.
12. The value of rule books in supporting sound governance was repeatedly emphasised across all feedback channels. CATSI corporations are required to have a rule book whereas only some classes of companies under the Corporations Act have similar provisions. Stakeholders shared how they already use their rule books to put into practice some of the proposals considered as part of this review. For example, rules in relation to eligibility and other requirements for directors as well as managing the personal information of members. We also heard from some stakeholders how their rule books were providing for traditional decision-making in their corporations such as through Elders' Councils. Others shared with us the difficulty they had in trying to incorporate culture and tradition into their internal governance noting interpretation can sometimes be an insurmountable hurdle.
13. During consultation, we heard from members and common law holders who had concerns about the transparency of the operations of their corporations or the receipt and management of their native title benefits. There are a number of recommendations in this report aimed at providing greater transparency to members and common law holders in this respect. There was some feedback these measures are 'paternalistic' or administratively burdensome. Nevertheless, the rights of members and common law holders to relevant and sufficient information about the management of their corporations and entitlements outweighs these criticisms.
14. It was inspiring to hear of corporations with better practice operations and whose executive and directors undertake their roles with care and diligence. Unfortunately we also heard of directors and executives who could only be described as unconscionable in relation to the discharge of their duties. Stakeholders suggested there was opportunity to strengthen aspects of the CATSI Act to address situations where people in trusted positions do the wrong thing.
15. At the moment, the CATSI Act effectively offers an 'all or nothing' regulatory approach with criminal prosecution being one of the only remedies available to the Registrar in many instances. Effective regulatory models provide for a graduated, proportionate approach to dealing with non-compliance. There was support for such an approach under the CATSI Act and for the Registrar to be able to access a suite of powers enabling him or her to take appropriate action to address the specific nature of any non-compliance.
16. Some stakeholders advocated for the CATSI Act to be decriminalised. Analysis shows criminal prosecution has been exercised judiciously in the past by Registrars, including when taking action against people who have demonstrated fraudulent and/or corrupt behaviour adversely impacting CATSI corporations. Maintaining access to this power will enable the Registrar to not only prosecute people or corporations when appropriate but also to use this power as a deterrent, consistent with better practice modern regulatory administration.

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17. Stakeholder feedback included that consideration needs to be given to the privacy of Aboriginal and Torres Strait Islander peoples' personal information; in particular by way of a paywall on ORIC's website for information held on the Register of Aboriginal and Torres Strait Islander Corporations. However, there was an expectation personal and corporate information would remain available to members and directors at no cost. Examination of this issue found it is unlikely to achieve the expected outcome of acting as a deterrent to people wanting to access CATSI corporation information for purposes other than a corporation's business. A paywall would be resource intensive to administer, would deliver limited benefits and could result in the redirection of ORIC resources as information held by the Registrar would still need to be freely available to CATSI corporations and their members. Further, a paywall arrangement could be put in place now if the benefits were to outweigh the expected cost.
 18. Looking at proposed and actual changes to the Corporations Act, *Native Title Act 1993* (NTA) and *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act), there was scope to include measures under the CATSI Act that either replicated or complemented provisions in those Acts. For example, the Corporations Act was updated in 2019 with expanded whistleblower provisions that could also be appropriate for inclusion in the CATSI Act and the NTA may be amended to include new mediation provisions that could be partnered with subsequent arbitration options. There was support for these ideas and stakeholders expressed a general expectation that the CATSI Act keep pace with relevant legislation and standards.
 19. Stakeholders identified other aspects of the CATSI Act that could be updated to better reflect modern ways of operating such as storing, accessing and sharing information. Consistently though, stakeholders thought it was important no particular cohort was disadvantaged through modernisation and in particular older people have continued access to notices and information in a format suitable to their needs.
 20. In line with feedback received that Aboriginal and Torres Strait Islander people need to be able to make decisions about their corporations we have made a number of recommendations to strengthen and streamline the CATSI Act. We agree with the feedback that greater decision-making power is critical to self-determination—which fittingly is also the historical basis of the CATSI Act.

Recommendations

21. The Review has made 72 recommendations for consideration by the Australian Government. Table 1 outlines the recommendations made in this report.
22. During consultation, a number of matters were raised which are outside the scope the CATSI Act Review but which are being given further consideration by the National Indigenous Australians Agency (NIAA) and/or ORIC. These matters are outlined in Appendices 1 and 2.

Table 1: CATSI Act Review Final Report Recommendations

No.	Recommendation
Chapter 2 Objects of the CATSI Act	
1	It is recommended the objects of the CATSI Act be amended to better reflect its role by referring to capacity building, promoting modern governance and accommodating Aboriginal and Torres Strait Islander tradition and circumstance.
2	It is recommended the CATSI Act be retained as a special measure.
3	It is recommended the CATSI Act be amended to include a provision requiring review of the CATSI Act every seven years.
Chapter 3 Powers and functions of the Registrar	
4	It is recommended the Registrar's powers be expanded to include the ability to issue penalty notices.
5	It is recommended the Registrar's powers be expanded to be able to accept enforceable undertakings.
6	It is recommended section 453-1 be amended to provide that a suspected contravention of an enforceable undertaking may be the subject of a report following an examination of a CATSI corporation.



No.	Recommendation
7	It is recommended section 453-5 be amended to provide the Registrar with the power to specify a reasonable time within which to produce books.
8	It is recommended the Registrar's powers to issue notices to produce books be aligned with that of the Australian Securities and Investments Commission to require a person or entity to produce books relevant to a corporation's affairs.
9	It is recommended the CATSI Act be amended to: <ul style="list-style-type: none">• provide the Registrar with the same powers as authorised officers; and• expand the sections of the CATSI Act that enable an authorised officer to inspect a corporation's books and request a person to explain the material in those books, to model the rights currently granted to an auditor of a corporation under the CATSI Act.
10	It is recommended the CATSI Act be amended to mirror section 84 of the <i>Australian Securities and Investments Commission Act 2001</i> , allowing the Registrar to extend any powers exercisable over a body corporate to a person who is, or has been, an officer or employee of the body corporate.
Chapter 4 Governance	
11	It is recommended corporations be required to collect phone numbers and email addresses of members where available.
12	It is recommended corporations be required to record alternative contact details, and be able to use those contact details when contacting members where available.
13	<p>It is recommended members be able to make a request to corporations to have their contact details redacted from a member register and that if a member is dissatisfied with a corporation's response to such a request, they can have the decision reviewed by the Registrar.</p> <p>It is <u>not</u> recommended there be a threshold question about safety, privacy or any other issue to support such a request.</p> <p>It is <u>not</u> recommended corporations be given the power to redact information from a member register on behalf of members.</p>
14	It is recommended the CATSI Act be amended to include a proper purpose requirement in relation to section 180-25, inspecting a CATSI corporation's member register.
15	It is recommended the CATSI Act be amended to require corporations to make a determination of membership applications within six months, and that the Registrar can extend or exempt this consideration period for a corporation or class of corporations.
16	It is recommended the CATSI Act require corporations to outline a dispute resolution process to deal with membership applications in their rule books.
17	It is recommended the provision in the CATSI Act in relation to cancelling memberships based on contact with members and number of contact attempts be a replaceable rule.
18	It is recommended the membership and directorship provisions in the CATSI Act be changed to make it easier for corporations to establish subsidiaries and joint ventures.
19	It is recommended the CATSI Act be changed to allow for the incorporation of two-member corporations where only one member is Indigenous as long as that member has the deciding vote.
20	It is recommended CATSI corporations be required to include in their annual reports to the Registrar details of their: <ul style="list-style-type: none">• corporate structure, including any subsidiaries or trusts; and• key management personnel within that structure.
21	It is recommended a subsequent targeted review be undertaken to consider establishing a special class of CATSI corporation in relation to for-profit entities.
22	It is recommended the CATSI size classification framework be aligned with that of the <i>Australian Charities and Not-for-profits Commission Act 2012</i> size classification framework.



No.	Recommendation
23	It is recommended a CATSI corporation be able to access an automatic 30-day time extension to hold an Annual General Meeting where it notifies the Registrar before the period to hold the Annual General Meeting has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and it has not notified the Registrar of an extension of time more than three years in a row.
24	It is recommended the CATSI Act allow small corporations that generate little or no income from their operations to pass a resolution to not hold an Annual General Meeting for up to two years.
25	It is recommended the CATSI Act be amended to allow directors to issue an updated notice of meeting—after one has already been issued—that would defer the meeting for up to 30 days of the original meeting date in the case of death, natural disaster and certain cultural activities in community, which may change one or all of the following: date; time; and place of the meeting.
26	It is recommended the CATSI Act be amended to: <ul style="list-style-type: none">• include a replaceable rule in relation to the cancellation of general meetings; and• allow the Registrar to cancel a general meeting.
27	It is recommended provisions be incorporated into the CATSI Act that reflect the special rules introduced by the Registrar in response to COVID-19 that have enabled corporations to hold their meetings virtually, particularly voting.
28	It is recommended a CATSI corporation be able to access an automatic 30-day time extension to lodge reports where it has notified the Registrar before the period to lodge reports has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and it has not notified the Registrar of an extension of time more than three years in a row.
29	It is recommended CATSI corporations be required to lay before their Annual General Meeting any reports they have prepared to submit to the Registrar.
30	It is recommended the CATSI Act require all replaceable rules, whether replaced or not, to be included in rule books.
31	It is recommended an explicit provision be included in the CATSI Act to allow the Registrar to reject changes to a rule book that are inconsistent with ones made by a special administrator.
32	It is recommended a subsequent targeted review be undertaken to consider further streamlining arrangements for CATSI corporations that are also registered charities.
Chapter 5 Officers of corporations	
33	It is recommended senior executive remuneration information be included in annual reporting to the Registrar and that the same information is laid before Annual General Meetings in accordance with Recommendation 29 in Chapter 4.
34	It is recommended the remuneration information of key personnel of associated entities also be reported in annual reports to the Registrar.
35	It is recommended the information provided at Recommendation 33 be used by the Registrar to develop a de-identified sectoral analysis on remuneration benchmarking.
36	It is recommended the CATSI Act be amended to require corporations to report how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar.
37	It is recommended the CATSI Act be amended to require CATSI corporations to notify ORIC within 28 days of a change in Chief Executive Officer, Chief Financial Officer and Chief Operating Officer.
38	It is recommended: <ul style="list-style-type: none">• Part 6-6 be revised to simplify and align more closely with the needs of Aboriginal and Torres Strait Islander communities; and• CATSI corporations be required to report any related party provisions in their annual reports to the Registrar.
39	It is recommended the CATSI Act be amended to allow the Registrar to exempt a corporation or class of corporations from the requirement that a majority of directors must not be employees.



No.	Recommendation
40	It is recommended the CATSI Act be amended to allow corporations to appoint independent directors without an explicit rule in their rule book.
Chapter 6 Modernising the CATSI Act	
41	It is recommended the CATSI Regulations be updated to prescribe who can receive protected information.
42	It is recommended the CATSI Act be amended to allow the Registrar to publish notices on electronic communication platforms as well as in the <i>Australian Government Gazette</i> and/or in newspapers.
43	It is recommended the CATSI Act be amended to allow the Registrar to contact individuals and corporations using electronic means in addition to in-person or by post.
44	It is recommended the CATSI Act be amended to explicitly enable corporations to store information on modern information storage solutions.
45	It is recommended the CATSI Act be amended to allow the Registrar to release de-identified information.
46	It is recommended the CATSI Act be amended to provide for the collection of other contact details, such as email address and phone number, in addition to physical address details.
47	It is recommended the CATSI Act be amended to allow the Registrar to correct information on directors' records if he or she is aware that they are incorrect.
48	It is recommended the CATSI Act be amended to: <ul style="list-style-type: none">• include an explanation of what reasonable steps means in the context of providing false and/or misleading information in relation to a corporation's affairs; and• align the penalties for providing false or misleading information in relation to a corporation's affairs to the lower penalty of 100 penalty units or imprisonment for two years or both.
49	It is recommended the CATSI Act be amended to incorporate the 2019 whistleblower provisions that were incorporated into the Corporations Act.
50	It is recommended the CATSI Act be amended to require ORIC to issue a: <ul style="list-style-type: none">• finalisation letter at the conclusion of an examination in the absence of issuing a compliance notice or 'show cause' notice; and• compliance outcome letter confirming that issues raised in a compliance notice have been addressed by the relevant corporation.
51	It is recommended CATSI Regulation 23 be amended following consultation with Australian Accounting Standards Board.
52	It is recommended CATSI Regulations be amended to outline a process for the appointment of a replacement auditor when the incumbent has resigned outside of an Annual General Meeting.
53	It is recommended the CATSI Act be amended to provide auditors with qualified privilege consistent with the Corporations Act.
54	It is recommended the CATSI Act be amended to allow the title of the Registrar and that of his or her office to be changed following a public consultation process and with endorsement by the relevant Minister.
Chapter 7 Registered Native Title Bodies Corporate (RNTBCs)	
55	<p>It is recommended current benefit management structures be reviewed to identify and address the impediments to supporting economic development for common law holders, including the extent to which charities can:</p> <ul style="list-style-type: none">• engage in economic development activities; and• act as future funds given the conflicting obligations of paying out benefits and accumulating them for future generations. <p>It is recommended the National Indigenous Australians Agency consult on the viability of the Prescribed Bodies Corporate Economic Vehicle Status model with the Department of Finance, the Treasury, the Australian Taxation Office and the Australian Charities and Not-for-profits Commission.</p>



No.	Recommendation
	It is recommended the National Indigenous Australians Agency work in consultation with the Office of the Registrar of Indigenous Corporations and the native title sector to develop guidance material on best practice benefit management structures to support good governance of native title benefits for Registered Native Title Bodies Corporate and common law holders.
56	It is recommended a separate, targeted consultation process be considered to determine the need and appetite to amend the CATSI Act to allow for the creation of registered trusts. Such an option to become a registered CATSI Act trust would be open to anyone and not be restricted to Registered Native Title Bodies Corporate or common law holders.
57	<p>It is recommended to amend the Prescribed Bodies Corporate Regulations to require reporting to common law holders on the management and use of native title monies and non-monetary benefits negotiated on behalf of common law holders held on trust under external trust arrangements.</p> <p>It is recommended the Registrar give consideration to introducing reporting requirements under section 336-5 of the CATSI Act, consistent with the reporting requirements to be implemented through changes to the Prescribed Bodies Corporate Regulations.</p> <p>It is recommended that should the Registrar decide against additional reporting under the CATSI Act, changes to the Prescribed Bodies Corporate Regulations outlined above be extended to include reporting on all native title benefits held by Registered Native Title Bodies Corporate.</p>
58	It is recommended the National Indigenous Australians Agency work with relevant stakeholders, including the Office of the Registrar of Indigenous Corporations, to develop and deliver education and information resources on changes to Registered Native Title Bodies Corporate reporting and compliance obligations arising from this Review, and other reforms currently in train, for use by Registered Native Title Bodies Corporate directors, members and common law holders.
59	It is recommended the National Indigenous Australians Agency lead a targeted design process with key bodies in the native title sector to develop an option for voluntary arbitration to assist in resolving disputes about Registered Native Title Bodies Corporate membership after other internal dispute pathways have been exhausted.
60	It is recommended Office of the Registrar of Indigenous Corporations develop a Registered Native Title Bodies Corporate model rule book in consultation with the native title sector.
61	It is recommended the Native Title Act be amended to enable the Registrar of the National Native Title Tribunal to update the National Native Title Register when the Register of Aboriginal and Torres Strait Islander Corporations is updated.
62	It is recommended a separate division of the CATSI Act be created that is dedicated to those provisions specific to Registered Native Title Bodies Corporate.
Chapter 8 Special Account: Unclaimed Money Account and Protection of Assets	
63	It is recommended a special account be established under the CATSI Act and any funds in the Unclaimed Money Account which are due to be returned to Consolidated Revenue Fund, be instead directed to this new special account. The purpose of the special account is that the funds be used only for the protection of assets vested with the Registrar.
Chapter 9 Special administration, insolvency and winding up of CATSI corporations	
64	<p>It is recommended the name of special administration be changed to one of the following options:</p> <ol style="list-style-type: none">1. Special Regulatory Assistance2. CATSI Special Management3. Statutory Management
65	It is recommended the 'show cause' notice procedure not be required under the CATSI Act when a majority of directors have requested that a special administrator be appointed.
66	It is recommended the current ground for appointing a special administrator that the CATSI corporation has traded at a loss for at least six of the last 12 months be changed to identification of an irregularity in the management of a corporation's financial affairs.



No.	Recommendation
67	It is recommended the CATSI Act be made explicit in relation to the ability of an authorised officer to report on an irregularity in the management of a corporation's financial affairs.
68	It is recommended the Registrar be allowed to give notice of the appointment of a special administrator on a modern electronic communication platform as well as in newspapers, but the requirement to give notice in the <i>Australian Government Gazette</i> be discontinued.
69	It is recommended the CATSI Act be amended to provide that contracts of corporations under special administration cannot be cancelled, unless they are detrimental to the corporation in the opinion of the special administrator.
70	<p>It is recommended the CATSI Act be amended to provide that a CATSI corporation be presumed to be insolvent where an authorised officer appointed under the CATSI Act has reported to the Registrar, or a special administrator forms the opinion:</p> <ul style="list-style-type: none">• the corporation has failed to keep adequate financial records (with no time period specified); or• the corporation has failed to retain adequate financial records for a period of seven years.
71	It is recommended the CATSI Act be amended to remove the requirement for the Registrar to apply for leave of the court, before making an application for winding up a corporation on the grounds of insolvency.
72	It is recommended the CATSI Act be amended to provide that the Registrar may exempt corporations from satisfying specific criteria required to be met for voluntary deregistration.



1. Introduction

Background

- 1.1 Corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) play a crucial role in delivering services and supporting economic development in Indigenous communities, particularly in remote Australia. The CATSI Act came into effect on 1 July 2007 to provide Indigenous corporations with a fit-for-purpose regulatory framework, making it easier for Aboriginal and Torres Strait Islander persons to form and manage corporations. The CATSI Act mirrors many requirements of the *Corporations Act 2001* (Corporations Act)², while providing the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander people.
- 1.2 Many Indigenous communities depend on CATSI corporations to deliver essential services, including land holding, housing, health, education, employment and native title services. The CATSI Act supports these corporations by promoting high standards of corporate governance and financial management. The CATSI Act also provides regulatory tools for assisting corporations in distress, such as special administration provisions.
- 1.3 Section 1-25 sets out the objects of the CATSI Act, describing what the CATSI Act aims to achieve.

Objects of the CATSI Act are to:

- a) provide for the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar); and
 - b) provide for the Registrar's functions and powers; and
 - c) provide for the incorporation, operation and regulation of those bodies that it is appropriate for the Act to cover; and
 - d) without limiting paragraph (c)—provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate (RNTBC); and
 - e) provide for the duties of officers of Aboriginal and Torres Strait Islander corporations and regulate those officers in the performance of those duties.³
- 1.4 Since it commenced in 2007 the CATSI Act has proven to be an effective framework for regulating and supporting the economic development of Aboriginal and Torres Strait Islander corporations. Nevertheless, this Review and previous reviews have identified aspects of the CATSI Act that require improvement. After 13 years of operation, it is also important to update the CATSI Act so it continues to be relevant to Aboriginal and Torres Strait Islander corporations, specifically as they face new challenges.
 - 1.5 On 11 December 2019 the Minister for Indigenous Australians, the Hon. Ken Wyatt AM MP, announced a comprehensive review of the CATSI Act, building on a series of reviews undertaken in recent years. Responding to feedback from stakeholders for comprehensive consideration of the ongoing role of the CATSI Act, Minister Wyatt announced this Review would consider whether the CATSI Act is achieving its objects, particularly as a special measure under the *Racial Discrimination Act 1975*.

² The *Corporations Act 2001* (Corporations Act) is the primary legislation regulating companies in Australia and defines the laws dealing with business entities at both the federal and state levels. The Corporations Act is administered by the Australian Securities and Investment Commission (ASIC).

³ Australian Government, *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, February 2020, available from <<https://www.legislation.gov.au/Series/C2006A00124>> [accessed 5 July 2020].

1.6 The Preamble to the CATSI Act states:

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders.⁴

1.7 The Australian Human Rights Commission explains that special measures aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.⁵ Special measures are sometimes described as acts of ‘positive discrimination’ or ‘affirmative action’. They are allowed under federal anti-discrimination laws.

1.8 Once a special measure has achieved its purpose and substantive equality has been established, the measure should cease. A primary function of this Review was to assess whether there continues to be a need for the CATSI Act as a special measure.


Development of the CATSI Act

- 1.9 In 2007 the CATSI Act replaced the *Aboriginal Councils and Associations Act 1976* (the ACA Act) which had been in place for over 30 years. At the time, the ACA Act was the primary vehicle for the incorporation of close to 3000 Aboriginal and Torres Strait Islander associations which played a central role in the delivery of government services at both the Commonwealth and state and territory level.
- 1.10 Over the 30 year period the ACA Act was in operation, it was subject to multiple amendments and several reviews. Following two reviews, amendments were attempted in the 1990s but lapsed without changes to the legislation. The period covered by the ACA Act was one of the most significant times for the development of Indigenous corporations, and its sheer longevity without major amendment rendered it ultimately not fit-for-purpose.
- 1.11 In 2000 a comprehensive review of the ACA Act was commissioned and in 2002 the report on the review of the ACA Act (Review of the ACA Act) was provided to the Australian Government.⁶
- 1.12 The Review of the ACA Act concluded that Indigenous people possess a range of characteristics which may disadvantage them when using statutes of general incorporation such as the Corporations Act. It noted that in order to reduce those disadvantages, the special needs of Indigenous people in the context of incorporation and corporate regulation must be accommodated. It also concluded that the special incorporation needs of Indigenous people were still best met through a general statute of incorporation which is tailored to the specific incorporation needs of Indigenous people.
- 1.13 The Review of the ACA Act recommended a new Indigenous corporations Act be enacted. The purpose of the new Act was to provide Aboriginal and Torres Strait Islander corporations with key aspects of a modern incorporation statute, such as the Corporations Act, and special forms of regulatory assistance that would enable Aboriginal and Torres Strait Islander people to use corporations more effectively. Moreover, the Review of the ACA Act recommended the new Act be established as a special measure to enable Indigenous people to enjoy, on an equal basis with other Australians, the same legal facilities and attendant socio-economic benefits that incorporation could confer.

⁴ Australian Government, *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, February 2020, available from <<https://www.legislation.gov.au/Series/C2006A00124>> [accessed 5 July 2020].

⁵ Australian Human Rights Commission, *Special Measures*, 2020, available from <<https://humanrights.gov.au/quick-guide/12099>> [accessed 3 July 2020].

⁶ Corrs Chambers Westgarth, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976*, 2002.

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- 1.14 In 2005 the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill) was first introduced into Parliament, and after a significant amendment process, the CATSI Bill was passed in October 2006.
- 1.15 The Revised Explanatory Memorandum of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 states:
- The Bill implements the key recommendation [of the ACA Act Review] by retaining a special incorporation statute to meet the needs of Indigenous people. The Bill introduces a strong but flexible legislative framework that maximises alignment with the Corporations Act where practicable, but provides sufficient flexibility for corporations to accommodate specific cultural practices and tailoring to reflect the particular needs and circumstances of individual groups. In acknowledgement of the fact that most corporations are located in remote or very remote areas, and may provide essential services or hold land, the Bill also offers safeguards through the Registrar's unique regulatory powers.⁷*

Previous reviews

- 1.16 It is important to ensure that legislation remains relevant, contemporary and useful for the people and/or entities it is designed to benefit. This is even more critical for laws that are special measures, which must not remain in place once they have achieved their objectives. In 2016 the CATSI Act had been in operation for 10 years, and the exponential growth of the Indigenous corporate sector during this time meant it was pertinent to look at the ongoing relevance of the CATSI Act.

2016 KPMG Review: Regulating Indigenous Corporations

- 1.17 In late 2016 the Department of the Prime Minister and Cabinet (the Department) commissioned KPMG to conduct a review to identify opportunities to improve the effectiveness of the Office of the Registrar of Indigenous Corporations (ORIC) and to enhance the CATSI Act.⁸ The resulting report, *Regulating Indigenous Corporations*, concluded that overall ORIC was doing a good job in a challenging regulatory environment, but there were significant opportunities to enhance ORIC's contribution to the better governance of Indigenous corporations in the future as it becomes a more modern, intelligence led risk-based regulator.⁹ The report went on to recommend a technical review of the CATSI Act be undertaken, with a view to streamline, strengthen and better align it with mainstream corporate regulation.

2017 DLA Piper Technical Review


- 1.18 In July 2017 the then Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, announced an independent review 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 (the Technical Review).¹⁰ The then Registrar of Aboriginal and Torres Strait Islander Corporations commissioned law firm, DLA Piper Australia, to

⁷ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.15, available from https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403 [accessed 3 July 2020].

⁸ At that time, the Indigenous Affairs Group—which is now the National Indigenous Australians Agency (NIAA)—was a division within the Department of the Prime Minister and Cabinet. On 1 July 2019, the NIAA became an Executive Agency.

⁹ KPMG, *Regulating Indigenous Corporations*, Office of the Registrar of Indigenous Corporations (ORIC), 15 December 2016, available from <https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations> [accessed 13 February 2020].

¹⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <https://www.oric.gov.au/catsi-review> [accessed 11 February 2020].



undertake the review, which included a series of public consultations with stakeholders and sought submissions on a discussion paper.

1.19 The Technical Review included:

- a literature review of relevant materials including reports, articles and cases that would assist and inform the Review's considerations;
- a review of changes and proposed changes to the Corporations Act since the commencement of the CATSI Act;
- consideration of the impact of the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) on companies incorporated under the Corporations Act; and
- preparation and dissemination of a discussion paper, and consultation with relevant stakeholders.

1.20 In late October 2017 the *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* report was provided to the Registrar. The Technical Review made 69 recommendations, across a broad range of issues arising from the terms of the review. It also identified a number of themes that emerged from stakeholder consultation including:

- 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 is often based upon additional disclosure; and
- the Registrar can play a greater role with respect to certain matters relating to native title regulation.¹¹


1.21 The themes identified in the Technical Review are important underpinnings to any consideration of changes to the CATSI Act going forward. They highlight the tension between getting the regulatory balance right to safeguard the interests of members and communities that rely on CATSI corporations, and ensuring regulation does not impinge on the autonomy of CATSI corporations.

2018 Strengthening Governance and Transparency Bill

1.22 In 2018 the Department—which still had policy responsibility for the CATSI Act—undertook an internal assessment of the recommendations in the Technical Review. The Department recommended taking forward amendments to the CATSI Act based on 30 of the recommendations. Recommendations that were not taken forward included:

- A number of recommendations relating to external administration and insolvency as they would create unnecessary inconsistency between the insolvency laws applying to CATSI corporations and companies registered under the Corporations Act. This inconsistency would have led to additional regulatory complexity and would have been directly contrary to the intent to streamline the legislation.
- Twenty recommendations specifically relating to the governance of native title Prescribed Bodies Corporate (PBCs). These recommendations have informed the broader reforms of the *Native Title Act 1993* (NTA) led by the Attorney-General's Department, which has resulted in the Native Title Legislative Amendment Bill (NTLAB) that was before the Parliament at the time this report was drafted.

¹¹ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2020].

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- 1.23 In mid-2018, the Department, in conjunction with ORIC, developed a Discussion Paper¹² outlining proposed amendments to the CATSI Act based on the relevant recommendations in the Technical Review. For six weeks from 6 August 2018, ORIC conducted consultation on the proposed amendments consisting of:
- public consultations in 14 locations across Australia attended by over 200 people;
 - one-on-one consultation sessions with 12 corporations;
 - four live radio broadcasts;
 - two presentations to around 100 people; and
 - 13 individual consultations with peak bodies, including native title bodies.
- 1.24 To promote the consultations as widely as possible the Registrar wrote to all CATSI corporations (approximately 3000) inviting them to attend public consultations and/or provide a written submission; and also offered key stakeholders one-on-one meetings.
- 1.25 The Registrar and the Department also met with the Prime Minister's Indigenous Advisory Council, both at regular meetings and with individual councilors outside of meetings, to provide updates about the review and seek advice and direction.
- 1.26 The Department, in conjunction with ORIC, then developed a bill based on the recommendations of the Technical Review and feedback received through the consultation process. The Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 was introduced into the Senate on 5 December 2018, and was subsequently referred to the Finance and Public Administration Legislation Committee for inquiry.
- 1.27 There were seven submissions to the Senate Inquiry (apart from the joint Department and ORIC submission) with the majority of submissions calling for greater consultation and a broader review of the CATSI Act as a special measure under the *Racial Discrimination Act 1975*. On 11 February 2019 the Committee handed down its report recommending the Bill be passed. Labor and Australian Greens Senators lodged dissenting reports reflecting similar concerns to those of the submissions that the scope of the review had been too narrow and there had been insufficient consultation in relation to the proposed amendments.¹³
- 1.28 The Bill was not passed before Parliament was prorogued due to the 2019 general election being called and it subsequently lapsed in July 2019.


Comprehensive Review of the CATSI Act 2019–20

Purpose

- 1.29 Following the 18 May 2019 election, Minister Wyatt, was sworn in as the first Indigenous Minister for Indigenous Australians on 29 May 2019. On 11 December 2019 Minister Wyatt announced a comprehensive review of the CATSI Act.


¹² The 2018 Discussion Paper and a summary of the Discussion Paper is available on ORIC's website at: <https://www.oric.gov.au/catsi-review>.

¹³ Parliament of Australia, *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018*, 2019, available from https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/CATSIAmendmentBill2018/Report [accessed 3 July 2020].

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- 1.30 To address criticisms received about the previous 2018 bill development process and the Technical Review, this comprehensive Review has considered:
- whether the CATSI Act is meeting its objects and continues to be desirable as a special measure for the advancement and protection of Indigenous people as set out in the Act's preamble;
 - whether the functions and powers of the Registrar of Indigenous Corporations are appropriate, effective and adequate; and
 - possible amendments to the CATSI Act to better support the regulation of CATSI corporations.
- 1.31 It has also considered the consistency and interaction of the CATSI Act with other relevant legislation, including the Corporations Act, ACNC Act and NTA.

Governance

- 1.32 The previous Technical Review and the development process for the Strengthening Governance and Transparency Bill 2018 received criticisms regarding ORIC overseeing the review of its own powers. Noting these criticisms this Review was led by the National Indigenous Australians Agency (NIAA), and overseen by a Steering Committee comprised of senior officials from the NIAA, ORIC and other Commonwealth regulatory bodies. A Reference Group of key stakeholders also provided advice and input to the conduct of the Review. ORIC's assistance with the Review has been in a subject matter expert capacity, where appropriate.
- 1.33 The Steering Committee and Stakeholder Reference Group met four times each between July 2020 and October 2020 and both were scheduled to meet in November 2020.
- 1.34 In the Wathaurong Aboriginal Co-Operative (WAC) and First Nations Bailai, Gurang, Gooreng, Taribelang Bunda People Native Title Aboriginal Corporation RNTBC (PCCC PBC) submissions to the Review, concerns were raised that there was a conflict in interest with the NIAA leading the Review as it may have a vested interest in ensuring the CATSI Act and ORIC remain in place.
- 1.35 The Registrar is a statutory office holder and the staff of his office, including the Deputy Registrar, are departmental employees of the NIAA. The Registrar's involvement in this Review has been at arm's length to ensure the Registrar has not been involved in reviewing his own powers.
- 1.36 When preparing the Draft Report, we spoke to ORIC staff and contractors to seek their feedback on those aspects of the CATSI Act that were operating effectively in addition to those parts of the legislation that could be improved. Feedback from ORIC staff has contributed to a more comprehensive review of the CATSI Act.
- 1.37 Further, ORIC's involvement in the Review in a subject matter capacity has been critical to ensuring that:
- stakeholders have had sufficient information about existing arrangements under the CATSI Act to understand the impact of proposals, which was particularly valuable during the consultation sessions; and
 - the NIAA had access to information and data to inform consideration of proposals and stakeholders' responses.
- 1.38 As ORIC staff administer the CATSI Act on a daily basis, their expertise in relation to whether proposals, ideas and suggestions could be practically implemented has assisted to ensure that the recommendations included in this report are relevant, practical and fit-for-purpose.
- 1.39 PCCC PBC, WAC and Victorian Aboriginal Community Controlled Health Organisation (VACCHO) also raised concerns with the membership of the Steering Committee, including that ORIC's membership presents a conflict of interest and the committee is not representative of the diverse number of CATSI corporations operating across Australia.
- 1.40 The Deputy Registrar held the position of co-Chair on both the Stakeholder Reference Group and Steering Committee and the Registrar was an observer for both groups.

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- 1.41 The Stakeholder Reference Group comprised a broad range of stakeholders including professional and peak bodies, other Government agencies and a CATSI corporation. Representation was across a range of sectors including native title, accounting, law, mining and governance.
- 1.42 The Steering Committee comprised other Commonwealth regulators and NIAA staff.
- 1.43 Together these groups provided a diverse range of views and experience, including direct experience with the CATSI Act and also broader experience relevant to aspects of the CATSI Act being considered as part of this Review.
- 1.44 We do not believe the involvement of ORIC on these two groups compromised, limited or otherwise directed the consideration of issues by the groups. We further note that the Terms of References, including the membership, chair and observers, were endorsed by both groups.

Review structure

- 1.45 The Review is being conducted over three phases: planning and establishment; review and consultation; and report and implementation.

Phase 1: Planning and establishment

- 1.46 The first phase (planning and establishment) commenced immediately after the Review was announced by the Minister in December 2019 and finished at the end of February 2020.
- 1.47 In the planning and establishment phase, the Review was launched by the Minister including the release of the CATSI Act Review website and first phase online survey inviting feedback in relation to those aspects of the CATSI Act that should be considered as part of the Review. The first phase survey was available on the NIAA's website from 11 December 2019 to 14 February 2020.
- 1.48 The NIAA received 60 responses to the first phase survey and a further eight submissions were received via email. The NIAA published the first phase Survey Summary Report in June 2020 which provided a snapshot of respondents' commentary according to themes.¹⁴ Governance was identified as the area that was important to most respondents, closely followed by the purpose of the CATSI Act.

Phase 2: Review and consultation

- 1.49 The second phase commenced in February 2020 and involved the development and consultation of a Draft Report which built on the findings of the previous reviews as well as covering the expanded scope of the comprehensive Review.
- 1.50 The Draft Report, published on 31 July 2020, was informed by:
- previous reviews, including the 2002 Review of the ACA Act, 2016 KPMG Review and the Technical Review;
 - documents and feedback from the 2018 consultations on the proposed amendments of the CATSI Act including the discussion paper, written submissions received in relation to the discussion paper and written submissions made to the Senate Inquiry;
 - the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018;
 - a review of relevant legislation, including any amendments or proposed amendments to the Corporations Act, ACNC Act and NTA since the Technical Review;
 - first phase survey responses as well as the written submissions received via email;
 - consultation with ORIC staff and contractors who undertake examinations and special administrations; and

¹⁴ A copy of the first phase Survey Summary Report is available on the [NIAA website](#).


- other relevant reports.¹⁵
- 1.51 Following publication, the NIAA commenced a second consultation process seeking feedback on the Draft Report. Consultation was designed to reach the widest possible range of stakeholders under the constraints of nation-wide COVID-19 travel restrictions, including targeting corporations registered under the CATSI Act, their members, and other interested stakeholders.
- 1.52 Feedback channels for the Draft Report were promoted through Indigenous.gov.au, the CATSI Act Review mailing list¹⁶ and social media.
- 1.53 Stakeholder engagement across the different channels was strong, as illustrated by:
- 41 virtual consultation sessions, attended by 165 participants¹⁷ from across Australia;
 - 15 individual consultation sessions, for industry stakeholders, traditional owners and other interested stakeholders;
 - 141 survey responses were received. In the second phase there were eight online surveys covering each of the content chapters in the Draft Report¹⁸;
 - 41 written submissions received (including four that were received after the closing date). A list of the submissions is provided at Appendix 3;
 - three anonymous feedback responses submitted through the web-based feedback form; and
 - eight feedback responses received via email.
- 1.54 Phase 2 consultation was open from 31 July 2020 until 2 October 2020, approximately nine weeks. Eight of the written submissions made comment on the Review's timeframe for consultation on the Draft Report.
- 1.55 The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) commented:
- The review is rightfully comprehensive and complex. However, many RNTBCs [Registered Native Title Bodies Corporate] and other Aboriginal and Torres Strait Islander corporations may not have adequate time or, most importantly, resources to give considered policy advice in the short period of time available. Further consultation and appropriate resourcing of RNTBCs and other Aboriginal and Torres Strait Islander corporations will result in meaningful participation and shared ownership of any CATSI Act changes.*
- 1.56 National Native Title Council's (NNTC) submission commented, 'The time frame also does not provide allowances for those affected by COVID 19, which has reduced the capacity of NNTC to consult regularly with their members in person.' VACCHO also had concerns the, '...current inquiry will not get the level of stakeholder engagement required to understand the diverse and divergent ways this Act will affect the regulation and operations of more than 3,000 Aboriginal organisations nationally'. Another five submissions called for further consultation.
- 1.57 Concerns were raised about the capacity of Registered Native Title Bodies Corporate (RNTBCs) to contribute to the review, including some of the written submissions articulating a desire to see increased resourcing for RNTBCs. Stakeholders were not just concerned about their capacity to provide feedback on the Draft Report but to understand and meet obligations under the CATSI Act and PBC Regulations, establish and implement corporate governance rules and develop transparent and accountable benefit management structures, among other areas. Resourcing for RNTBCs has been referred internally within the NIAA for further consideration.

¹⁵ A copy of the Draft Report is available on the [NIAA website](#). Supporting the Draft Report were nine factsheets which communicated the key information of the Draft Report in a clear and concise format.

¹⁶ At 20 October 2020, there were 114 email addresses registered for updates on the CATSI Act Review.

¹⁷ Over 470 individuals registered for virtual consultation sessions, with approximately 35 per cent of registered participants attending sessions.

¹⁸ Reference to survey responses throughout the report relate to the second phase chapter surveys, unless explicitly stated otherwise.

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- 1.58 This Review has undertaken two phases of consultation; both of which were approximately nine weeks in length. For the second phase and due to the restrictions of COVID-19, we made as many channels available for people to provide feedback through as we could. We also offered to arrange alternative methods for people to provide feedback if the ones available were not accessible to them. These channels could have included visiting one of our regional offices or having a visit from one of our regional staff to discuss feedback in person.
- 1.59 We acknowledge the feedback that some stakeholders consider this effort has been inadequate and if the recommendations in this report are supported by the Australian Government, we will seek to undertake further consultation with stakeholders in Phase 3.

Phase 3: Report and Implementation

- 1.60 As noted in paragraph 1.59, dependent on the Australian Government response to this report, it is proposed Phase 3 will include further consultation with stakeholders where possible.
- 1.61 Further consultation will aim to address criticism of the Phase 2 consultation process and that of the previous Strengthening Governance and Transparency Bill 2018 development process. Without further consultation, there is a strong risk a second bill will be brought into the Parliament which does not have the support of key Aboriginal and Torres Strait Islander organisations, is not consistent with the CATSI Act being a special measure and ultimately fails to secure cross-party support.
- 1.62 If approved, with debate and amendment, it is intended the bill will take effect from 1 July 2021.

2. Objects of the CATSI Act

- 2.1 The CATSI Act establishes a framework for the incorporation, regulation and support of Indigenous corporations. The CATSI Act also provides for the Registrar and ORIC.
- 2.2 The CATSI Act's preamble states that it is a special measure for the purposes of the *Racial Discrimination Act 1975* and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(4) of ICERD provides that special measures will be considered not to constitute racial discrimination stating:
- Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.*¹⁹
- 2.3 While the CATSI Act is designed to mirror many provisions of the Corporations Act, it also has unique provisions that characterise it as a special measure. In this Chapter, we discuss these provisions which include:
- incorporation provisions for Aboriginal and Torres Strait Islander corporations;
 - protection for members;
 - support for corporations; and
 - capacity building.
- 2.4 The special incorporation needs of Aboriginal and Torres Strait Islander people were identified in the Review of the ACA Act. In addition to socio-economic and cultural characteristics, the Review of the ACA Act identified special incorporation needs under the broad headings of the nature of some Indigenous corporations and the functions Indigenous corporations may be expected to perform. In this Chapter, we also look at whether these special incorporation needs exist today to help assess whether there is an ongoing need for the CATSI Act as a special measure under the *Racial Discrimination Act 1975*.

Chapter 2 Summary of survey and submission feedback

In addition to feedback in the consultation sessions, feedback on objects of the CATSI Act was provided via:

- 26 of the 141 chapter surveys;
- 33 of the 41 written submissions; and
- two of the eight email feedback submissions.

Overall, 'Objects of the CATSI Act' was the topic area that was most commented on in both surveys and written submissions.

¹⁹ United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, available from <<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>> [accessed 16 June 2020]. Australia ratified the ICERD on 30 September 1975.



Unique provisions of the CATSI Act

- 2.5 The CATSI Act is important for Aboriginal and Torres Strait Islander people and communities. It is designed to be a modern incorporation statute that provides flexibility to corporations to operate in ways that reflect cultural practices. The CATSI Act also aims to recognise the unique characteristics of the Indigenous corporate sector, including but not limited to the remote localities of many corporations as well as the critical roles many corporations play, such as delivering essential services to communities and managing native title rights and interests.

Incorporation provisions for Aboriginal and Torres Strait Islander corporations

- 2.6 Article 23 of the *United Nations Declaration on the Rights of Indigenous Peoples* states:

*Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous [sic] peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*²⁰

- 2.7 To this end, the CATSI Act supports Aboriginal and Torres Strait Islander groups to form corporations that enable them to undertake activities deemed to be a priority such as delivering health, housing and employment services or managing native title rights and interests. To ensure corporations remain controlled by Aboriginal and Torres Strait Islander people, the CATSI Act includes an Indigeneity requirement that corporations must meet for the entirety of their incorporation. Under the requirement, at least a majority of a corporation's members and directors must be Aboriginal and Torres Strait Islander people, and at least a majority of a corporation's directors must be members.
- 2.8 Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* relates to Indigenous people having the right to participate in decision-making regarding matters that affect their rights and in accordance with their procedures, including their right to maintain and develop their own decision-making institutions.²¹
- 2.9 To ensure participation in decision-making, subsection 246-5(1) of the CATSI Act requires the majority of a corporation's directors are Aboriginal and Torres Strait Islander people. Other incorporation provisions under the CATSI Act that are specific to Aboriginal and Torres Strait Islander people and are aimed at allowing CATSI corporations to be run in a culturally appropriate manner include:
- enabling CATSI corporations to hold meetings and maintain their books in languages other than English as long as there are English language translations available; and
 - providing for CATSI corporations to include rules in their rule books that take account of Aboriginal and Torres Strait Islander tradition and circumstances.
- 2.10 Recognising the role of the Registrar is to support Indigenous corporations, the CATSI Act requires that the Registrar have regard to Aboriginal and Torres Strait Islander tradition and circumstances in performing his or her functions and exercising his or her powers. This provision relates to the Registrar's administration of all aspects of the CATSI Act, and according to the Revised Explanatory Memorandum, it is another provision that confirms the CATSI Act as a special measure.

²⁰ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, available from <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> [accessed 16 June 2020].

²¹ *ibid.*




Protection for members

- 2.11 Protection for members is one of the key concepts underpinning the CATSI Act.
- 2.12 Subsection 246-5(3) of the CATSI Act requires that the majority of directors are members and the Revised Explanatory Memorandum to the CATSI Act states this is to ensure that members' interests are protected.
- 2.13 Further, several of the Registrar's functions are aimed at protecting members, including:
- providing factual and procedural advice about the registration, rules and operation of a corporation (subsection 658-1(1)(d)). These provisions aim to help resolve disputes and ensure correct procedures are followed by establishing the Registrar as a source of independent information; and
 - assisting to resolve disputes, including at the request of members (subsections 658-1(1)(f) and (g)). The Registrar can provide this assistance in many forms including by providing advice, referring parties to independent mediation and arbitration services, and by investigating and responding to complaints made about corporations.
- 2.14 The Law Council of Australia's (the Law Council) submission recommended paragraphs 658-1(1)(d), (f) and (g), *'be amended to require that factual and procedural advice about the registration and operation of a corporation, as well as assistance from the Registrar, be provided not only in English but also in local languages.'*
- 2.15 Providing this type of support would be useful in locations where languages other than English are more commonly spoken. Our review of this suggestion concluded the CATSI Act already provides for this kind of support where relevant. As noted in paragraph 2.10, the CATSI Act requires that the Registrar have regard to Aboriginal and Torres Strait Islander tradition and circumstances in administering the legislation which would include capacity building and other support.

Support for corporations

- 2.16 The Review of the ACA Act noted that a new statute should enable a form of regulation which is more 'responsive' to the particular difficulties faced by members and directors; a system where the regulator provides a more active form of assistance to the corporation in meeting the relevant legislative standards or avoiding insolvency.
- 2.17 Under the CATSI Act, the Registrar is given the unique power to appoint a special administrator at the Australian Government's expense, when a corporation is experiencing financial or governance difficulties. The aim of special administration is to return control of the corporation back to its members in better health. Without this provision, CATSI corporations experiencing difficulties would likely fail; in some cases resulting in the cessation of essential services to communities, such as health and housing, or the loss or mismanagement of native title rights and interests.
- 2.18 Special administration provisions are used by the Registrar on a regular basis to ensure the continuity of corporations registered under the CATSI Act. As at 21 October 2020, 112 corporations have been put into special administration since the commencement of the CATSI Act in 2007; of which, over 70 per cent were receiving some form of government funding to deliver services to the community and the remainder were mostly land holding corporations with a key role in native title administration. Of the 109 completed special administrations at the time of this report, over 90 per cent of corporations have been returned to the control of their members to continue delivering services to Indigenous Australians. All RNTBCs that have been placed under, and subsequently exited, special administration have been handed back to the members.²²

²² RNTBCs represent approximately 14 per cent of all special administrations although only six per cent of all CATSI corporations.

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- 2.19 The Northern Territory Government Office of Aboriginal Affairs commented on the benefit of the Registrar's unique special administration powers to CATSI corporations:

The Review Draft Report notes many Aboriginal corporations receive government funding to deliver community services. The provision of a special administrator under the CATSI Act is therefore important to ensure corporations are supported if faced with disputes, issues with senior management and/or financial concerns. The CATSI Act provides scope for corporations to access support in instances where a special administrator may be required to resolve a challenging situation.

- 2.20 PCCC PBC acknowledged the unique benefits of special administration but did not consider that it justified having a separate incorporation statute.

- 2.21 The Registrar's unique powers include safeguards for CATSI corporations that are located in remote or very remote regions and may provide essential services or hold land. Relevant provisions within the CATSI Act that take account of the remoteness of some corporations, include:

- conferring jurisdiction to a broad range of courts to hear CATSI Act matters. CATSI corporations and their members located in remote areas benefit by being able to access state courts including lower level courts;
- allowing the Registrar to appoint an authorised officer, who may not be a Commonwealth, state or territory employee or official but is suitably qualified, to exercise the powers or perform the functions of the Registrar. This provision recognises that in some remote or very remote locations, there may not be a Commonwealth, state or territory government employee or official available for appointment; and
- providing for the election of directors, for a corporation that has concluded special administration, via postal ballot to take account of the geographically dispersed membership bases of some remote corporations.

- 2.22 Another requirement unique to the CATSI Act is that CATSI corporations must have constitutions (known as rule books) that form part of the internal governance rules for how they should operate. Rule books in effect are a contract between the members and directors of a corporation.

- 2.23 The Northern Territory Government Office of Aboriginal Affairs commented on the value of this provision stating:

The requirement under the CATSI Act for corporations to have constitutions (rulebooks) is important for ensuring effective corporate governance. Constitutions outline a corporation's purpose, guide operations, and clarify the relationship between members and directors. Under the CATSI Act, corporations have the flexibility to tailor the rulebook to meet the needs of their Aboriginal governance systems while balancing the need for corporate governance.

- 2.24 Section 69-35 of the CATSI Act provides the Registrar with the power to change a corporation's rule book on his or her own initiative in certain circumstances. Recently, the Registrar was able to effectively exercise this power to assist CATSI corporations to choose to adopt special rules in relation to the holding of meetings and making of decisions. These rules were developed by ORIC to assist CATSI corporations to respond to the impacts of COVID-19. They have enabled corporations to continue their business operations by:

- holding virtual meetings in light of restrictions that have prevented large groups of people from travelling and meeting; and
- enabling resolutions to be passed without holding meetings if certain conditions have been met.

Capacity building

- 2.25 Another benefit to CATSI corporations is access to education and training programs provided by the Registrar. Section 658-1 of the CATSI Act outlines the functions of the Registrar which includes conducting public education programs on the operation of the Act and on the governance of Aboriginal and Torres Strait Islander corporations. This provision is specific to supporting CATSI corporations and is not replicated in either the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

- 2.26 As illustrated in Table 2.1, ORIC has been providing training to an increasing number of corporations with most participants reporting a 'significant' or 'very significant' increase in corporate governance knowledge following the training.

Table 2.1: Participation in training from 2012–13 to 2018–19

	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19
Number of participants	897	1015	886	865	943	1058	827
Number of corporations	198	194	169	208	260	254	261
Participants reporting a 'significant' or 'very significant' increase in corporate governance knowledge	92.5%	91.1%	90.0%	88.2%	92.1%	97.4%	84.0%

Source: ORIC data.

Special incorporation needs of Aboriginal and Torres Strait Islander people

- 2.27 The CATSI Act aims to address the special incorporation needs of Aboriginal and Torres Strait Islander people articulated in the Review of the ACA Act. The nature of these needs may have changed since that time, but they nevertheless persist in some form.
- 2.28 The Review of the ACA Act found that in light of the special incorporation needs of Aboriginal and Torres Strait Islander people, the Corporations Act alone would probably not have provided an appropriate alternative to an Indigenous-specific incorporation statute, even if special regulatory assistance were available to Indigenous corporations. The Review noted that this was particularly the case for small Indigenous corporations. Further, the Review found that the special incorporation needs of the members of Indigenous corporations are not well catered for under other incorporation statutes, including those of the states and territories.

Social disadvantage

- 2.29 The Review of the ACA Act noted factors of social disadvantage could present as barriers for some Aboriginal and Torres Strait Islander people to establish and manage corporations, including low education rates, low employment rates and English language challenges. A 2017 Australian Bureau of Statistics report noted, '*Aboriginal and Torres Strait Islander people are more likely than other Australians to experience various forms of disadvantage, including higher unemployment, poverty, isolation, trauma, discrimination, exposure to violence, trouble with the law and alcohol and substance abuse.*'²³ Some of these forms of disadvantage could present a

²³ Australian Bureau of Statistics (ABS), *Social and Economic Wellbeing of Aboriginal and Torres Strait Islander People with Disability*, ABS, 2019, available from <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Social%20and%20economic%20wellbeing%20of%20Aboriginal%20and%20Torres%20Strait%20Island>>

barrier to effectively forming a corporation, appointing or becoming directors, holding executives and directors to account for their management of a corporation, and understanding and enacting their rights as members. These barriers and challenges should not prevent Aboriginal and Torres Strait Islander people from developing their own organisations consistent with Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

- 2.30 The Aboriginal Peak Organisations of the Northern Territory (APO NT) submission to the Review highlighted the role that the CATSI Act can play in addressing the disadvantage experienced by some Aboriginal and Torres Strait Islander people:

In Australia, the CATSI Act is an important piece of legislation that helps facilitate the self-determination of Aboriginal and Torres Strait Islander people. APO NT and AGMP [Aboriginal Governance and Management Program] understand that strong effective Aboriginal organisations are essential to reduce Aboriginal disadvantage. In particular, Aboriginal organisations are vital to deliver accessible, responsible services in communities; are an important source of employment and training; promote community leadership and role modelling and ultimately bind the social fabric of remote Aboriginal communities, both through the practical contribution they make in providing services and symbolically through the pride they instil in their communities.

- 2.31 The 2020 *Closing the Gap Report* indicates that progress against the Closing the Gap targets has been mixed. For example:

- there has been progress made towards halving the gap for Indigenous children in reading, writing and numeracy but further improvement is required; and
- in 2018 the Indigenous employment rate was around 49 per cent compared to around 75 per cent for non-Indigenous Australians.²⁴

- 2.32 Further, Aboriginal and Torres Strait Islander people who speak Indigenous language(s) proficiently may have less developed English language skills. According to the Australian Bureau of Statistics 2016 Census results: around 13 per cent of people in very remote Australia who spoke an Indigenous language as their main language at home reported that they spoke English ‘not well’ or ‘not at all’; for Indigenous people living in remote and outer regional Australia this was seven per cent; for people in major cities this was four per cent; and three per cent for people living in inner regional Australia.²⁵ Not having strong English language skills can make it difficult to establish and manage a corporation as many related interactions may need to be undertaken in English, for example, meeting taxation and broader reporting requirements, interacting with auditors and regulators, and applying for funding and other kinds of support.


- 2.33 The Central Australian Aboriginal Congress Aboriginal Corporation (Congress) submission put forward that the disadvantage of Aboriginal people justified the CATSI Act commenting:

Congress’s view is that the recent 12th Closing the Gap Report 2020 highlights the continuing disadvantage faced by Aboriginal people and is a measurable indicator that the reasons for the enactment of the CATSI Act as a special measure still exist. Congress, as a provider of primary health services to Aboriginal people is disappointed to see that many targets are not on track, for example, the target to halve the child mortality rate by 2018, and closing the gap in life expectancy by 2031.

[der%20people%20with%20disability%20\(Feature%20Article\)~10001#:~:text=Aboriginal%20and%20Torres%20Strait%20Islander%20people%20are%20more,with%20the%20law%20and%20alcohol%20and%20substance%20abuse> \[accessed 6 July 2020\].](#)

²⁴ National Indigenous Australians Agency (NIAA), *Closing the Gap Report 2020*, NIAA, 2020, pp 11 and 65, available from <<https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>> [accessed 16 March 2020].

²⁵ Australian Bureau of Statistics (ABS), *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2016*, ABS, 2019, available from <<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2076.0Main%20Features1012016?opendocument&tabname=Summary&prodno=2076.0&issue=2016&num=&view=>>> [accessed 16 March 2020].

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- 2.34 The National Aboriginal Community Controlled Health Organisation (NACCHO) submission indicated that it expects the CATSI Act will contribute towards the Closing the Gap targets, acknowledging:

The CATSI Act facilitates self-determination for Aboriginal and Torres Strait Islander corporations. It provides a vehicle to ensure corporations delivering services to Aboriginal and Torres Strait Islander people remain community-controlled. The CATSI Act is designed to reduce the inequalities faced by Aboriginal and Torres Strait Islander Australians and has an important role to play in closing the gap.

Cultural values and practices


- 2.35 In the design of a regulatory framework, it is important to understand the operating environment, and for the supporting act and regulations to be fit-for-purpose. The Review of the ACA Act noted the impact Aboriginal and Torres Strait Islander customs and beliefs can have on corporations' governance arrangements. There was a strong theme among responses to the first phase survey that the CATSI Act could be further enhanced to better accommodate Aboriginal and Torres Strait Islander tradition and circumstances indicating that this is a requirement that prevails today.

Native title and traditional law and customs

- 2.36 Native title is the recognition that Aboriginal and Torres Strait Islander people hold rights and interests to land and waters under their traditional law and customs. These rights and interests are unique to each native title holding group and may extend to living on or accessing land, hunting, gathering or fishing in specific areas and engaging in cultural activities. Native title can include exclusive possession or consist of non-exclusive rights and interests that co-exist with non-Indigenous rights. Many native title holding groups have law and custom based decision-making processes. Native title rights and interests need to be responsibly and transparently managed for the benefit of common law holders. It is compulsory under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) that a corporation managing native title rights and interests be registered under the CATSI Act which includes provisions to ensure corporations remain Indigenous controlled and Aboriginal and Torres Strait Islander people are involved in decision-making.
- 2.37 A couple of submissions to the second phase of consultation acknowledged the unique role of native title entities including AIATSIS that outlined the differences between RNTBCs and other types of CATSI corporations:
- *rather than being voluntary incorporations, common law native title holding groups are mandated, under the Native Title Act 1993 (Cth) (NTA), to incorporate under the CATSI Act*
 - *under the NTA RNTBCs hold or manage native title interests on behalf of a native title group according to the laws and customs of that group and, as such, operate in an environment of de facto legal pluralism*
 - *by virtue of the NTA, its regulations and the common law, RNTBCs have special fiduciary obligations to the native title group for whom they hold or manage rights. These obligations are distinct from and may conflict with fiduciary obligations of Directors to corporation members under Corporations Law*
 - *in their role of managing and holding native title RNTBCs are increasingly required to, and often aspire to, fulfil more governmental and adjudicative roles, for example in making and/or enforcing decisions about the intramural allocation, enjoyment or impairment of native title rights and interests of individuals and groups.*

Sorry business

- 2.38 'Sorry business' is one example of an Aboriginal and Torres Strait Islander custom that can impact on the operations of a corporation. This term refers to the traditional practices observed by many Aboriginal and Torres Strait Islander people when mourning the loss of a family member, when a family or community member is ill or imprisoned, or when a cultural connection to the land is lost. There is no set time period for sorry business and customs can vary between communities. Where sorry business relates to mourning the loss of a family or



community member, the day-to-day business of the community can be suspended and external visitors may be asked to postpone any planned visits. These circumstances can make it difficult for Aboriginal and Torres Strait Islander corporations to meet pressing or time specific requirements or business related matters, including holding meetings, and preparing and submitting reports. To this end, the CATSI Act includes provisions that support CATSI corporations during these times and as part of this Review, it is proposed to further extend these provisions. For example, by allowing corporations to access a 30-day time extension to hold an Annual General Meeting (AGM) for reasons including if there has been a death in the community (refer paragraph 4.105).

Nature of corporations

- 2.39 The Review of the ACA Act refers to corporations that have been established as a result of legislative requirements or Government policy. In 2002 examples of corporations in this category included those obligated to form due to requirements of the NTA or in order to receive Government funding. Similar legislative and policy requirements are in place today with some legislation mandating incorporation under the CATSI Act and a policy position requiring some entities in receipt of funding through the Indigenous Advancement Strategy (IAS) to incorporate under relevant Commonwealth legislation; as a general rule, under this policy Indigenous corporations are required to incorporate under the CATSI Act (refer paragraphs 2.42 to 2.43).

Legislated

- 2.40 The NTA requires that if the Federal Court hands down a native title determination, it should also determine which corporation is to manage native title on behalf of common law holders. As noted in paragraph 2.36, corporations managing native title rights and interests are required to incorporate under the CATSI Act as it contains special provisions for RNTBCs. Further, RNTBC specific provisions under the CATSI Act have been designed to complement obligations under the NTA.
- 2.41 Subsection 150(2) of the Victorian *Aboriginal Heritage Act 2006* also requires an applicant for registration as a Registered Aboriginal Party (RAP) must be a corporation registered under the CATSI Act. This requirement exists to ensure RAPs:
- have in place sound governance frameworks;
 - can access the support provided by the Registrar and ORIC to CATSI corporations such as special administration, and education and training programs; and
 - can be both a RAP under the state legislation and a RNTBC under the Commonwealth legislation.

Policy

- 2.42 According to the Review of the ACA Act, at the time of the Review there was a requirement from the then Aboriginal and Torres Strait Islander Commission and other funding bodies for groups and communities to be incorporated to receive funding.²⁶
- 2.43 Such a requirement also exists today and the Australian Government introduced its Strengthening Organisational Governance policy on 1 July 2014. The aim of the policy is to ensure organisations receiving Australian Government funding to deliver Indigenous programs have high standards of governance and accountability. Organisations receiving grant funding of \$500,000 or more in any single financial year under the IAS administered by the NIAA are required to:
- incorporate under Commonwealth legislation—Indigenous organisations are required to incorporate under the CATSI Act and other organisations are required to incorporate under the Corporations Act; and

²⁶ Corrs Chambers Westgarth, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976, 2002*, paragraph 301.

- maintain these arrangements while they continue to receive funding.²⁷

Corporations' functions

- 2.44 Another special incorporation need identified in the Review of the ACA Act relates to the functions that Indigenous corporations may be expected to fulfil to facilitate social, economic and political objectives. The Review of the ACA Act noted that many of the existing corporations were not-for-profit and/or delivering community services such as housing, health, employment and legal services. Consequently, whole communities may be dependent on services provided by a corporation and when such a corporation fails, there may be no alternative service providers. While demonstrating the ongoing nature of special incorporation requirements, the diversity in corporation types also adds to the complexity in supporting CATSI corporations.
- 2.45 The Australian Indigenous Governance Institute (AIGI) submission to the Review highlighted how expectations of Aboriginal and Torres Strait Islander corporations may have changed since the Review of the ACA Act stating, *'Aboriginal and Torres Strait Islander organisations often have to perform broader community governance roles without the proper funding or staffing to do so. At the same time, organisations often service or represent several different 'communities of identity' with varying legal rights and interests, their leaders and managers are constantly trying to balance competing sets of demands, obligations and responsibilities.'*
- 2.46 There remains a significant number of CATSI corporations that deliver essential services to communities, often in remote locations. As demonstrated in Table 2.2, as at 30 November 2020 there were hundreds of CATSI corporations delivering education, housing, municipal, and health and community services.

Table 2.2: Number of CATSI corporations delivering essential services as at 30 November 2020

Nature of service	Number of CATSI corporations delivering service
Education (including child care)	305
Employment and training	493
Health and community services	751
Housing	307
Municipal services	108

Source: ORIC data.

- 2.47 The role of the CATSI Act in supporting community controlled entities and sectors was specifically highlighted in the Congress submission, *'Any proposed amendments to the CATSI Act must have the principles of supporting community controlled entities as well as the intent and spirit of the CATSI Act as a special measure to address disadvantage, at their core.'* The Australian Institute of Company Directors (AICD) acknowledged the important role played by Aboriginal and Torres Strait Islander corporations within communities stating:

The AICD strongly supports the purpose of the CATSI Act. We understand from our consultation that it facilitates Aboriginal and Torres Strait Islander persons to create and manage Indigenous entities which play a vital role in Indigenous communities. These organisations deliver essential services, including health, education, employment and native title services and play a fundamental role in Indigenous communities.

²⁷ Funding received for capital works or through procurement activities are not subject to these requirements. Statutory bodies, government bodies and organisations operating under a specific piece of legislation are also excluded and Indigenous organisations already incorporated under the Corporations Act do not have to change their incorporation status to meet this requirement.



Criticisms of the CATSI Act

2.48 Some of the feedback received as part of the Review was critical of the CATSI Act.


Paternalistic

- 2.49 In a couple of the consultation sessions and in the ESJ Law submission, the CATSI Act was criticised as being paternalistic, which has been a common criticism of the legislation since its enactment.
- 2.50 The ACA Act was introduced to support self-determination. Specifically, it was considered at that time and following the 1967 Referendum that Aboriginal and Torres Strait Islander people could realise community priorities through government grants to community organisations.²⁸ Now, we see a broad range of corporations incorporated under the CATSI Act, including for-profit entities, registered charities and native title bodies. The CATSI Act aims to provide support to all of these entities which are also at different stages of maturity.
- 2.51 Some participants in the consultation sessions shared their corporations' experiences with us, including one participant who outlined what could only be considered as better practice corporate operations. Nevertheless, this participant explained that the operations of the corporation have evolved significantly since the corporation was first established as a small native title entity. This participant also advised that over the corporation's life, it had accessed the various kinds of support available under the CATSI Act, including the training offered by ORIC.
- 2.52 As CATSI corporations mature, they can tailor their operations and introduce better practice processes like the one described in paragraph 2.51. However, as a starting step, the CATSI Act sets out a minimum basic standard aimed at helping corporations to achieve their priorities which may include delivering vital services, pursuing native title recognition or facilitating economic opportunities.
- 2.53 Some measures perceived as paternalistic provide a minimum standard of governance for CATSI corporations. This is in-part recognition that groups establishing corporations under the CATSI Act may not have experience with establishing and managing a corporation. As an example, we see groups establishing Prescribed Bodies Corporates (PBCs) to pursue native title recognition, who may have limited or no experience with running a corporation. Further, a number of stakeholders raised in their feedback to the Review that PBCs are often scarcely resourced and sometimes run by volunteers. ORIC provides assistance to these and other types of newly established entities, including model rules books and workshops to develop rule books.
- 2.54 The need for support for corporations was emphasised through the consultation sessions and in the written submissions, where there was extensive feedback on increasing and improving capacity building opportunities.²⁹ Stakeholders told us they want specific types of training, more guidance material, access to mentoring as well as hands on support for boards.
- 2.55 Feedback to the Review also acknowledged the vulnerability of some CATSI corporations that are taken advantage of by unscrupulous individuals. One survey respondent said:

We often get the carpet baggers who come through and gut corporations, especially the larger ones with a lot of cashflow, they manipulate the Native Title Process as well, and fake documents or outcomes of NT meetings....The Registrar needs to be able to act quickly, needs more power to intervene, to request documents and proof of an action in governance, it needs to be funded better as well.


²⁸ Corrs Chambers Westgarth, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976*, 2002, paragraph 228.

²⁹ Capacity building was the area that received the most written feedback with 19 of the 41 submissions including commentary on the importance of capacity building activities.

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- 2.56 The ESJ Law submission was critical of the CATSI Act which stated that the Act, *'leaves Aboriginal People who are Native Title Holders, and their rights and interests, more vulnerable to corruption or unsolicited conduct within some corporate structures, when in comparison with other Australian corporation regulation.'*
- 2.57 Some participants in the consultation sessions shared their experiences of having: former executives appropriate significant levels of corporation resources to themselves; opaque corporate structures being put in place by internal and external stakeholders; and large sums of hidden administrative and management fees charged through complex structures. However, proposals put forward as part of the Review to address feedback that members and directors of some corporations do not have adequate transparency over the operations of their corporations, were criticised by some as being paternalistic. These proposals included the increased reporting requirements relating to executive remuneration, director payments and executive performance, which are discussed further in Chapter 5.
- 2.58 This highlights the difficulty in striking the right balance between ensuring that CATSI corporations are aware of and can take action to address unscrupulous behaviour while not being perceived to be introducing paternalistic provisions or to be setting a higher bar for CATSI corporations than other types of corporations. Given the crippling impact that unscrupulous behaviour can have on corporations and communities, we think corporations and members are better served through increased transparency rather than ongoing opaqueness that allows 'carpet baggers' and others to be able to thrive.

Higher governance standards

- 2.59 A common criticism in a small number of written submissions and in some consultation sessions was that the CATSI Act is too onerous and sets a higher standard for Aboriginal and Torres Strait Islander corporations compared with other corporations.
- 2.60 In its written submission, South Australian Native Title Services (SANTS) stated, *'We are of the view that some differences between the CATSI Act and the Corporations Act do not provide benefit to Aboriginal and Torres Strait Islanders, including reporting requirements, over regulation and transparency and accountability to the general public (i.e., through publication of and access to corporate information).'*
- 2.61 The CATSI Act is designed to support membership-based corporations that are operating to benefit a group, such as managing native title benefits or delivering services. Funds received by the corporation may belong to members, or at the very least, should be managed to benefit members and those funds may also be grant funding. To this end, provisions in the CATSI Act are aimed at providing transparency to members, common law holders and funding bodies.
- 2.62 Provisions such as requiring corporations to have rule books are aimed to benefit members. The Revised Explanatory Memorandum outlines that not only does the rule book act as a contract between members and directors but it is available to funding bodies and other stakeholders. Reference to funding bodies and other stakeholders is a direct reflection of the history of the CATSI Act. The governance standards for CATSI corporations are also aimed at providing assurance to funding bodies and others as to the safeguards around the proper use of funds.
- 2.63 Similarly, the requirement for CATSI corporations to hold an Annual General Meeting is to ensure members are kept informed of, and have the opportunity to vote on, key aspects of the corporation's operations.
- 2.64 Further, reporting to the Registrar enables the Registrar to take action where the viability of the corporation is at risk with reporting providing visibility of corporations' operations. The Registrar is able to do this through his or her regulatory powers, including the unique power to appoint a special administrator to help a corporation get back on track and return to the control of members.

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- 2.65 While it criticised the CATSI Act in its written submission (paragraph 2.60), SANTS also recognised the benefits of the legislation and said:

SANTS does consider that the CATSI Act offers some attractive elements over the Corporations Act. These include the accessibility of incorporation, simplified Rulebook, flexibility, capacity building and corporation support (including special administration). There is also a growing familiarity with the legislative framework that brings a level of confidence for corporations and members. Corporations are reviewing and amending Rulebooks to strengthen governance in accordance with local circumstances. It is thus providing a reasonable platform for Indigenous people to establish corporate entities to realise their objectives and aspirations. In certain circumstances (and where a choice is available), the Corporations Act may provide a more suitable framework.

- 2.66 It was highlighted in one submission by Associate Professor Marina Nehme from the University of New South Wales (Dr Marina Nehme), that while the Registrar undertakes capacity building which is beneficial to CATSI corporations, the CATSI Act does not adequately support, ‘*business entrepreneurship on a number of fronts*’, specifically suggesting there should be a distinction in provisions relating to for-profit and other types of entities under the CATSI Act. Dr Marina Nehme’s submission suggested that some of the governance requirements under the CATSI Act aimed at providing transparency to members should not apply to for-profit entities and also that some of the Registrar’s regulatory powers, ‘*may intrude in the day to day running of the corporation.*’

Insufficient flexibility

- 2.67 Expectations of an Indigenous-specific incorporation statute seem to have shifted over time and the CATSI Act aims to address the needs of a broad range of corporation types including newly established and more mature RNTBCs, community based corporations, registered charities and not-for-profits, and for-profit entities. In the Draft Report, we sought feedback on questions as to whether the CATSI Act was adequately supporting this broad range of corporations as well as feedback on making it easier to set up new types of structures such as subsidiaries, joint ventures and two-member corporations under the CATSI Act, among others.
- 2.68 A few written submissions to the Review suggested the CATSI Act did not provide adequate flexibility in relation to corporate structures, including WAC that indicated the Corporations Act provides greater flexibility stating, ‘*While incorporating under the Corporations Act gives organisations the ability to manage investment schemes and financial products or services, incorporating under the CATSI Act means that [sic] cannot provide financial services or be a trade union.*’ It should be noted section 116 of the Corporations Act prohibits trade unions from being incorporated.
- 2.69 Some other submissions specifically raised the suitability of structures in relation to native title bodies with the First Nations Legal and Research Services (First Nations) commenting, ‘*Taking a bigger picture view, consideration should be given to whether corporate structures, in general, are an appropriate fit for native title communities. This may be relevant not only for new corporations but also for existing corporations who may wish to transition away from traditional corporate structure options.*’ Specific structures for RNTBCs are discussed in Chapter 7.
- 2.70 NNTC’s written submission questioned whether the, ‘*current corporate structure designated to Indigenous Corporations by incorporation under the CATSI Act is the best option for RNTBCs...A separate division of CATSI for RNTBCs, such as the ACA Act mentioned in the introduction, could have additional options for the incorporation of RNTBCs, such as a statutory body or authority or a local council model.*’ This proposal is discussed further in Chapter 7.
- 2.71 The AIATSIS submission acknowledged that the Revised Explanatory Memorandum notes the need to provide flexibility to corporations to accommodate cultural practices but, ‘*While this presumption of flexibility may have been aimed at the cultural context in which many or all Aboriginal and Torres Strait Islander corporations operate, the need is particularly pertinent for the group of CATSI corporations that are RNTBCs....RNTBCs are entrusted with maintaining, preserving and advancing Indigenous law and culture and would benefit from a framework that better supports the governmental role they hold or aspire to hold.*’



Restricts economic opportunities

- 2.72 Another question we asked in the Draft Report was how the Registrar and ORIC could better support corporations to pursue economic and community development opportunities.
- 2.73 NNTC's submission responded to this question stating, '*there needs to be substantial work on improving economic development opportunities for RNTBCs, particularly smaller RNTBCs and those without access to their land or without Indigenous Land Use Agreements (ILUAs).*' Marrawah Law Pty Ltd (Marrawah Law) also specifically commented on RNTBCs in this context suggesting, '*...there needs to be additional special measures in the CATSI Act to provide better support for social and economic opportunities for CATSI corporations and RNTBCs.*'
- 2.74 The WAC submission reflected on economic opportunities for all CATSI corporations and put forward that:
- The CATSI Act is not of benefit to our community and arguably does not constitute a 'special measure' under the RD Act [sic] due to the negative impact on the self-determination and economic development opportunities for our organisations, communities and people. The requirements to incorporate under this Act to receive IAS funding demonstrates how the CATSI Act can be used to impinge on Aboriginal peoples and organisations' rights to freedom of association, and to equal protection of the law without discrimination.*
- 2.75 Unfortunately, this understanding is incorrect and as noted in footnote 27, Indigenous corporations already incorporated under the Corporations Act are not required to change their incorporation statute in order to receive IAS funding.
- 2.76 There were contrasting views, however, as to whether the Registrar should play a role in economic development, including the SANTS submission that said:
- We believe that the focus of the Registrar and ORIC should remain on the regulation and administration of the CATSI Act and in supporting corporations with good governance through capacity building and associated initiatives. We do not support the Registrar and ORIC having a role in economic development. We do support the review to identify any legislative barriers to economic development or including more enabling legislation.*
- 2.77 In the survey, we asked how the Registrar and ORIC can better support corporations to pursue economic and community development opportunities. A couple of responses suggested this was not the role of the Registrar nor ORIC. There were also other suggestions as to how the Registrar and ORIC can better support the realisation of economic opportunities that have been reproduced below:
- establish better working relationships and rapport with land councils, native title support bodies and native title representative bodies;
 - provide business and market planning sessions, investment sessions and continue to undertake governance sessions for the directors and make it compulsory that directors attend a three to five day governance session or are able to provide evidence and receive a 'recognition of prior learning for the position they hold;
 - allow corporations to [establish] wholly owned subsidiaries;
 - the Registrar issue an annual compliance certificate for corporations that have met their compliance requirements; and
 - establish online advice portals and direct contact with ORIC staff for phone advice.
- 2.78 It should be noted ORIC provides a call centre service for phone support and advice to corporations and members; as well as locally based staff in eight locations around Australia who can meet with corporations and provide advice.

Harmony with the Native Title Act

- 2.79 The ESJ Law submission stated that the CATSI Act, '*allows far to [sic] much discretion for Directors to approve or reject Native Title Holders from being made members of Aboriginal Corporations which are also Prescribed Body Corporates.... and is in **conflict** with the native title regime under the Native Title Act 1993 (Cth) (NTA).*'

2.80 It would be prudent to note that if passed, the NTLAB will:

- remove the choice of directors of RNTBCs to refuse membership applications from members of the native title holding group; and
- require RNTBC constitutions to have dispute resolution pathways for people who are or who claim to be common law holders, and provide for all the common law holders to be directly or indirectly represented in the RNTBC.

2.81 Further, the scope of this Review has included consideration of the interaction of the CATSI Act with relevant pieces of legislation including the NTA. Recommendations in this report aim to complement existing provisions and proposed amendments to the NTA including the arbitration powers discussed in paragraphs 7.61 to 7.72 which would work together with the new mediation powers being proposed in the NTLAB.

Support for tradition and customs

2.82 The ESJ Law submission to the Review criticised the CATSI Act as it, *'does not mandate the continuance of traditional laws and customs of Aboriginal Peoples.'*

2.83 Marrawah Law's submission, and arguably in opposition to the model outlined in paragraphs 2.87 to 2.90, stated, *'The CATSI Act is largely modelled from the Corporations Act 2001 (Cth), creating a situation where many of the replaceable rules and requirements are not culturally appropriate and at times creates tension with traditional law and customs.'*

2.84 In contrast to the views above, some participants in the consultation sessions warned against incorporating cultural practices into the CATSI Act. This view was also shared in the SANTS submission that said:

The current regime provides flexibility for corporations to generally adopt governance arrangements that support and respond to local circumstances and needs including cultural practices. As stated below, SANTS has some reservations around trying to codify cultural practices within a legislative framework. The interface between cultural practices and protocols and a corporate governance framework needs to be defined and shaped at the local level.

2.85 Participants in the consultation sessions suggested that rather than the CATSI Act including specific provisions in relation to Aboriginal and Torres Strait Islander practices and customs, CATSI corporations would be better served by being able to incorporate relevant and local arrangements into their operations through their rule books. CATSI corporations can do this now and a number of CATSI corporations shared their experiences with doing this in the consultation sessions.

2.86 Ninety-two per cent of the 26 survey respondents agreed that there were ways to embed cultural practices into governance procedures and made suggestions as to how this could be done which are reproduced below:

- *Traditional governance can be tailored according to their constitution etc. election of board of elders and the country they affiliate with under their custodianship, and responsibility to country and family according to their traditional lore.*
- *Yes through a sub-committee structure.*
- *...specific consultation with traditional Elders would be advisable.*
- *ORIC has assisted us already to do this and should be given resources to do it some more. CATSI act does not need to be changed to do this.*
- *...perhaps providing for a "council of elders" of say at least 4 that can advise the CEO/etc.*



Another model

- 2.87 The PCCC PBC submission acknowledged the disadvantage faced by Aboriginal and Torres Strait Islander people but did not consider that it was best supported through a specific incorporation statute stating:

*Special laws and regulations do not in and of themselves address these disadvantages and in fact perpetuate them by requiring Indigenous Australians to understand a different and more complex regulatory regime than faced by non-Indigenous Australians. If the focus truly was on overcoming the disadvantages and challenges that Indigenous people face when dealing with the complex legal and regulatory corporation frameworks, then resources would be better directed to developing their capacity to address these disadvantages and enabling them to overcome these challenges **within the existing corporate frameworks available to all Australians** rather than burdening them with even more legalities and regulation in the form of the CATSI Act and ORIC.*

- 2.88 The PCCC PBC submission went on to suggest the CATSI Act should be repealed and if corporations incorporated under the Corporations Act meet certain criteria—referred to as Indigenous organisations—they could be registered with a special commission. It also suggested that these Indigenous Organisations could access a ‘Special Regulatory Assistance Scheme’ that would be administered by the special commission and overseen by the Registrar of Aboriginal and Torres Strait Islander Corporations but the regulator would be Australian Securities and Investments Commission (ASIC) or the Australian Charities and Not-for-profits Commission (ACNC). The submission indicated that specific provisions in the Corporations Act would need to be altered to accommodate the traditions and cultural requirements of Aboriginal and Torres Strait Islander people.
- 2.89 The PCCC PBC submission suggested that this proposal would mean Indigenous organisations would not be subject to the, ‘*highly rigid and over-regulated corporate structure under the CATSI Act.*’ It also suggested under this model that various unique provisions under the CATSI Act should be made available to Indigenous organisations under the Corporations Act, including the provisions for remote corporations, special administration and the Registrar’s capacity building function discussed in this Chapter.
- 2.90 Our understanding of this proposal is that it suggests: applying the unique provisions under the CATSI Act to Indigenous corporations but under the Corporations Act instead; delivering capacity building opportunities through a special commission rather than ORIC—but still overseen by the Registrar; and having regulation undertaken by the ACNC or ASIC. We are unclear of the benefits of this model over the existing model. Further, implementation of such a model could be more resource intensive as it is expected that a section would need to be established within ASIC and staffed by officers with sufficient understanding of the unique provisions that apply to Indigenous organisations to ensure effective regulation while maintaining staffing at the special commission to deliver capacity building activities—both functions which are both currently undertaken by ORIC.

Special measure

- 2.91 One of the key areas of consideration for the Review is whether there was an ongoing need for the CATSI Act as a special measure. Through the consultation sessions, there was almost unanimous support for retaining the CATSI Act. Most written submissions that commented on retaining the CATSI Act were supportive:
- ‘*The CATSI Act is still relevant today. Its framework, regulations and support mechanisms have been tailored specifically to the needs of Aboriginal and Torres Strait Islander people.*’ (Northern Territory Government Office of Aboriginal Affairs).
 - ‘*AIATSIS supports retaining the CATSI Act as a special measure and continues to view the CATSI Act as a vehicle for the advancement of Aboriginal and Torres Strait Islander people’s goals and aspirations. This beneficial purpose must guide reform.*’

- ‘...the CATSI Act continues to be justified as a special measure noting that the circumstances that prompted the introduction of the Act continue today. While noting the view of some respondents that the Act is racist, [DDHS Danila Dilba Health Services] considers that it does meet the definition of a special [measure] being a form of positive discrimination designed to provide benefits to Aboriginal people.’
- ‘In the Law Council’s opinion, the legislation as a standalone mechanism for participation in legal, political and commercial endeavours of First Nations people, remains as valid an exercise of the special measures exemption from the Racial Discrimination Act 1975 (Cth) as it was when first enacted as the Aboriginal Councils and Associations Act 1976 (Cth). The capacity to create and maintain corporate entities exclusive to First Nations people under various subcategories now has an integral role in holding or managing native title rights, operating Indigenous entities capable of economic empowerment activities through access to the Indigenous Procurement Policy, and facilitating and operating expressions of First Nations self-determination. It is also noted that the recently refreshed National Agreement on Closing the Gap speaks of community-controlled sector service delivery. The majority of those community-controlled organisations will be CATSI Act corporations.’
- ‘The Central Land Council [CLC] is supportive of the ongoing operation of the CATSI Act. The CATS Act is directed to the legitimate need for a form of corporation that takes account of the unique cultural and social situation of Indigenous people in Australia (including their possession of native title rights and interests). The success of so many Aboriginal Corporations...in delivering economic and social benefits to Aboriginal people in Central Australia is testament to the value of an effective legal vehicle for collective Aboriginal action.’

2.92 We agree with a recommendation put forward by Dr Marina Nehme’s submission that stated, ‘The Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) should be retained as it has the potential to play an important role in closing the gap and empowering Indigenous people...The objects of the CATSI Act require a review: The legislation should incorporate as part of its objectives building capacity and promoting Indigenous values.’

2.93 Expanding the objects of the CATSI Act to better reflect the role of the legislation was also raised in one of the consultation sessions and we agree with this suggestion.

Recommendation 1

It is recommended the objects of the CATSI Act be amended to better reflect its role by referring to capacity building, promoting modern governance and accommodating Aboriginal and Torres Strait Islander tradition and circumstance.

2.94 The views outlined in the PCCC PBC submission were not supportive of retaining the CATSI Act stating:

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

2.95 We acknowledge the criticisms of the CATSI Act and the views that there is no need for an incorporation statute specifically for Aboriginal and Torres Strait Islander people. We also acknowledge that while most corporations have the choice to incorporate under the Corporations Act or CATSI Act, some do not and some stakeholders consider this paternalistic and believe it can disadvantage those corporations.

2.96 There are also prevalent views that the CATSI Act supports the self-determination of Aboriginal and Torres Strait Islander people, contributes towards the realisation of priorities for Indigenous communities including the delivery of critical services, and plays a role in achieving the Closing the Gap targets.

2.97 Based on the support for retaining the CATSI Act through the consultation sessions and written submissions, our position remains that the CATSI Act should be retained with a view to amending it to align with the expectations and needs of Aboriginal and Torres Strait Islander people. Ninety-two per cent of the 26 survey respondents also agreed with retaining the CATSI Act as a special measure.

Recommendation 2

It is recommended the CATSI Act be retained as a special measure.

- 2.98 We also suggested in the Draft Report that the CATSI Act should be subject to periodic review to monitor progress and determine whether the measure has achieved its purpose. The CATSI Act had not previously been subject to a comprehensive review or assessment of the ongoing need for a special incorporation statute for Aboriginal and Torres Strait Islander corporations.
- 2.99 Consequently, consideration should be given to including a requirement for the CATSI Act to be subject to regular review in order to assess this position at appropriate intervals. Other legislation established as special measures under the *Racial Discrimination Act 1975* include mechanisms for their review. For example, section 18 of the *Low Aromatic Fuel Act 2013*, which is a special measure under the *Racial Discrimination Act 1975*, provides for the relevant Minister to undertake a review of the operation of the Act as soon as possible after the introduction of the section and every five years thereafter.
- 2.100 Eighty-eight per cent of the 26 survey respondents agreed that the CATSI Act should be subject to regular review.
- 2.101 Suggestions varied in relation to how regularly such a review should be undertaken, including from twice a year at the shortest to five to 10 years at the longest. Seven respondents indicated every five years; three respondents indicated every three years; and three respondents indicated every two years. Some respondents also offered ranges such as five to seven years, five to 10 years, or a minor review every three years with a major review every seven years.
- 2.102 The survey responses were at odds with the views put forward as part of the consultation sessions where participants suggested that 10 years was too long an interval but five years was also seen to be too short as it was likely to result in the legislation constantly being subject to some kind of legislative amendment process whether that be a review, drafting changes or seeking passage of a Bill through Parliament.
- 2.103 Several of the written submissions agreed with incorporating a review provision, including comments such as:
- *'NACCHO supports regular legislative review in accordance with other special measures but encourages an emphasis on carrying out reviews in partnership with relevant Aboriginal and Torres Strait Islander representative leadership.'*
 - *'Monitoring and consultation will need to be undertaken in practice in order to ascertain whether the objectives of the special measure have been achieved and therefore ensure compliance with the legal requirement that the special measure does not remain in place beyond such time....the Law Council strongly support the proposal at paragraph 2.40 [of the Draft Report] for a legislative mechanism for review.'*
 - *'The legislation should be reviewed regularly to ensure it still meets its purpose. Further it needs to evolve with the times and the needs of Indigenous people. This will ensure that the legislation remains relevant, up-to date and able to adapt to new circumstances. A 10 year interval is appropriate as it allows for consistency and stability to be there while providing an opportunity for the law to be revisited to ensure it still meets its purpose.'* (Dr Marina Nehme).

Recommendation 3

It is recommended the CATSI Act be amended to include a provision requiring review of the CATSI Act every seven years.



Support for CATSI corporations

2.104 The Federation of Victorian Traditional Owner Corporations (the Federation) submission to the second phase of consultation highlighted not only the diversity of corporations under the CATSI Act but the important and varied roles those corporations play in their communities, stating:

CATSI corporations play an important role in delivering services and enabling development in communities. CATSI corporations have varied objectives and functions....In Victoria many CATSI corporations contribute to and enable the cultural, social, political and economic development, and financial security of their communities. This is achieved through business operations, social enterprises, community organisations, and statutory functions....To this end, the more successful CATSI corporations are, the greater the benefit to society. The advancement of Indigenous rights benefits the whole community and provides beneficial outcomes for members, communities, and government.

2.105 In the Draft Report and through the surveys, we asked for feedback on a number of questions in relation to the level of support provided by the CATSI Act and of the 26 survey respondents:

- fifty-four per cent did not agree the CATSI Act is meeting the needs and expectations of Aboriginal and Torres Strait Islander people;
- sixty-nine per cent agreed that the CATSI Act is putting CATSI corporations on an even playing field with corporations incorporated under the Corporations Act;
- sixty-nine per cent agreed the CATSI Act is flexible enough to meet the needs of a whole range of different Aboriginal and Torres Strait Islander corporations; and
- eighty-one per cent agreed that changes could be made to the CATSI Act to better support corporations operating in remote or very remote areas.


2.106 Some participants in the consultation sessions asked why we were interested in whether CATSI corporations were on an even playing field with Corporations Act companies. This question was put to us as part the first phase of consultation as a question we should be asking as part of the Review.

2.107 Many of the suggestions in response to these questions could be grouped according to theme including:

- enabling corporations to make better use of technology to support their operations, such as online communications, virtual meetings, online voting systems, online reporting forms, and capacity development opportunities;
- greater flexibility for corporations to meet governance requirements, including when faced with unexpected events such as illness or death;
- supporting corporations to integrate Aboriginal and Torres Strait Islander tradition and circumstances into their operations; and
- greater flexibility in terms of corporate structures, including one written submission indicating that consideration needs to be given to better support for-profit entities as evidenced by the small number of these types of corporations incorporated under the CATSI Act.

2.108 These areas are being considered and addressed as part of the Review. This report contains recommendations to enable corporations to use technology more to support their operations, to help corporations meet their reporting and meeting obligations when faced with unexpected events and to provide greater flexibility to CATSI corporations in terms of corporate structures.

2.109 The WAC submission noted that CATSI corporations are not able to 'own' or 'trade' shares, debentures or other securities unlike companies incorporated under the Corporations Act. The submission goes on to say, '*This is in direct contradiction to economic development goals for our communities that have been committed to by the Australian Government (Closing the Gap) and highlights how the CATSI Act as a special measure is not in the best*



interests of Indigenous people. In terms of owning and selling part of a corporation, it should be noted a for-profit corporation can be established under the CATSI Act and profits can be distributed to members. Further, it is possible to 'sell' such a corporation if the Indigeneity requirement can be met by the purchaser.

- 2.110 Some proposals such as reducing the Registrar's regulatory powers and restricting the amount of publicly available information about corporations have been considered as part of the Review. However, we are not recommending any changes in these areas.
- 2.111 Further, some suggestions, such as issuing CATSI corporations with ABNs at the time of incorporation, are the legislated responsibility of other government departments and agencies.
- 2.112 There have also been suggestions that are outside the scope of the Review but have been referred to either the NIAA or ORIC for further consideration such as increased resourcing for ORIC, including an increased number of ORIC offices in more locations and increased on-the-ground support for corporations. See Appendices 1 and 2 for a summary of the matters referred to ORIC and NIAA.
- 2.113 One area that generated significant discussion in consultation sessions and also received extensive coverage in the written submissions and survey responses was capacity building.

Capacity building

- 2.114 Stakeholders suggested improvements to ORIC's existing capacity building offerings, including training and guidance.
- 2.115 Specific types of targeted training and support were identified by stakeholders including for new, small and native title corporations. In relation to specific support for native title corporations, the Minerals Council of Australia (MCA) submission stated, *'Guidance materials should be available to PBCs, land users and others covering good practice engagement, benefit management structure options and linkages between the CATSI Act and other regulatory and policy measures.'*
- 2.116 Governance was also repeatedly raised by stakeholders as an area that should be a priority, including comments in written submissions:
- *'There is a significant need for governance training amongst Aboriginal and Torres Strait Islander corporations. ORIC is well placed to respond to this need given its focus on corporate governance and its experience developing culturally responsive training materials.'* (Northern Territory Government Office of Aboriginal Affairs).
 - *'Increasing awareness and education by providing resources and easily accessible information in areas such as Governance may encourage pro-active engagement from directors and members of CATSI corporations.'* (Chartered Accountants Australia and New Zealand (CA ANZ)).
 - *'While there is a need for governance training to increase the capacity of Indigenous organisations to meet their corporate and organisational governance requirements, there is also a demonstrated need to move toward a broader understanding of governance within the Indigenous education and training sector. Training based on a broader understanding of governance should be informed by the internal constituencies and rights of Indigenous community members, and should incorporate information about cultural institutions, accountabilities and skills as a strength for effective governance.'* (AIGI).
- 2.117 Another recurring theme was that capacity building support should reflect cultural considerations, including comments:
- *'ORIC needs to be better equipped to be agile and adaptable to meet the needs of Indigenous organisations and individuals. ORIC should have regard to cultural considerations in developing robust and effective evaluation and feedback mechanisms, to capture the evolving training needs of Indigenous organisations. ORIC should maintain flexibility and dynamism in the design of its programs to meet those changing needs.'* (AIGI).



- ‘While not requiring legislative reform, further sharing of governance stories and practices of corporations which utilise and rely on cultural practices and protocols would be beneficial in building a body of work and experience in this area.’ (SANTS).
 - ‘RNTBC governance training needs to be culturally appropriate, specific and purpose built for the complex needs of native title corporations. There is currently a gap in the certificate level accredited training (particularly targeted at younger native title holders) to learn the complex business of RNTBCs.’ (AIATSIS).
- 2.118 Specific assistance for remote or very remote corporations was also a priority area identified by stakeholders in written submissions. CATSI corporations perform a critical role in supporting Indigenous communities, including in regional and remote areas. As at 27 February 2020, there were 1,256 CATSI corporations operating in remote or very remote areas, which represents almost 40 per cent of all CATSI corporations.
- 2.119 The CLC submission responded that ORIC should be provided with additional resources to undertake capacity building activities in remote and very remote locations where there is significant CATSI corporation activity, including delivering training for directors in community.
- 2.120 The Law Council submission noted:
- The provision of training in remote and very remote areas, in local languages and through summarised accessible factsheets or videos, or direct face-to-face learning approaches would increase the understanding of members of their rights and obligations, as the legislative regime is lengthy and complex and the detail confusing to those without extensive experience in this area, even those with formal legal education.*
- 2.121 Stakeholders also suggested new types of capacity building such as delivering training to emerging leaders to enable them to be prepared for director positions that may become available in CATSI corporations in their community.
- 2.122 Other recommendations were:
- ‘the development of interactive, tailored workshops to assist organisations in drafting Rule Books in innovative ways to accommodate each organisation’s unique circumstances and cultural practices’ (AIGI);
 - ‘the development and implementation of a framework for Governance health checks’ (AIGI);
 - facilitating a mentoring program that linked less mature CATSI corporations with more mature ones to enable the sharing of experience, knowledge and better practice;
 - training for members so they are aware of their own rights and responsibilities as well as those of others such as directors and executives; and
 - support for boards, including Chief Executive Officer (CEO) recruitment and performance management, and establishing financial management frameworks; empowering boards to manage CEOs where there is an education or other power imbalance causing issues; assisting to identify breaches of the CATSI Act; and taking action to address negligent or otherwise inappropriate behaviour from CEOs.
- 2.123 ORIC does have a comprehensive training program that is delivered across Australia, including at the offices of corporations. Nevertheless, participants in the consultation sessions and other written submissions indicated a desire for more capacity building options from ORIC. We have heard this from corporations at both ends of the spectrum from less mature corporations to very sophisticated corporations. Some more established corporations advised they had received training from ORIC when less mature and felt they would now benefit from a different type of training. There was also a desire for members’ training to help members understand their rights and responsibilities.
- 2.124 This feedback has been referred to ORIC for consideration.

Conclusion

2.125 The CATSI Act continues to fulfil an important role as a special measure, supporting and building the capacity of Aboriginal and Torres Strait Islander corporations, and we propose that the Act be retained. Areas considered as part of this Review confirm the ongoing need for the CATSI Act as a special measure and suggest further measures—as opposed to the weakening or removal of existing protections—are required to safeguard the unique interests of Aboriginal and Torres Strait Islander peoples. For example, Chapter 7 outlines issues associated with ensuring transparency around the holding, investment and use of native title monies for common law holders, and suggests that the provisions outlined in the CATSI Act relating to the reporting requirements for entities dealing with native title monies need strengthening.

Table 2.3: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Preamble	Special measure
Part 1-1, section 1-25	Objects of the CATSI Act
Part 1-2, section 6-1	Overview of the Act
Part 2-3, section 29-20	Internal governance rules
Part 3-2, section 69-1, section 69-35 and section 72-5	Rule book requirement Registrar can change a corporation's rule book Corporation must provide member with rule book
Part 3-7, section 115-1	Document access addresses for small and medium CATSI corporations
Part 5-2, section 201-5	Request by members for directors to call general meetings
Part 5-4, section 220-10	Members' access to minutes
Part 6-2, section 246-1, section 246-5, section 249- 10 and section 252-5	Eligibility for appointment as a director Majority of director requirement Removal by members Members may obtain information about directors' remuneration
Part 6-6, section 284-1	Need for member approval for financial benefit
Part 6-6, section 342-5	Members' access to reporting
Part 10-3, section 447-1	Examinations
Part 11-2, section 487-1	Registrar can put corporations into special administration
Part 16-3, section 658-1 and section 658-5	Functions of Registrar Aims of the Registrar



3. Powers and functions of the Registrar

- 3.1 The CATSI Act establishes the Registrar's functions and powers. Amongst other things, the Registrar's powers allow him or her to intervene when necessary to solve problems within corporations, including assisting with dispute resolution and examining the books of a corporation. The Registrar is also empowered to do all things necessary or convenient to enable the performance of his or her functions.
- 3.2 Effective regulatory frameworks include a range of enforcement options that are designed to allow a graduated and proportionate response to different cases of non-compliance.

Chapter 3 Summary of survey and submission feedback

In addition to feedback in the consultation sessions, feedback on the powers and functions of the Registrar was provided via:

- 17 of the 141 chapter surveys; and
- 22 of the 41 written submissions.


- 3.3 A number of submissions indicated support for providing the Registrar with a broader, or 'cascading', suite of regulatory powers that enabled a proportionate and graduated response to non-compliance. Throughout this chapter, these submissions are reflected as supporting individual proposals.

Broader suite of regulatory powers

- 3.4 Despite having essentially the same role, the Registrar does not possess all of the regulatory powers of ASIC.³⁰ For example, currently the only action open to the Registrar where a corporation has failed to lodge reports is to consider commencing a criminal prosecution and refer a matter to the Commonwealth Director of Public Prosecutions (CDPP) for this purpose. Depending on the facts of the case, this may be a heavy-handed response to what might be a minor regulatory breach. Unlike ASIC, the Registrar does not have the power to impose fines by way of infringement notice, which may be more appropriate, particularly if the breach is the first offence by a corporation.
- 3.5 In 2017—after 10 years of administering the CATSI Act—it was very clear that there was a gap in the regulatory tools at the disposal of ORIC and the Registrar resulting in a sometimes disproportionate response to non-compliance. Feedback from CATSI corporations and members also indicated a frustration with ORIC's inability to respond to certain situations.
- 3.6 The Technical Review was asked to consider this and reported that some stakeholders expressed the view that the Registrar and ORIC require additional powers which are less severe in scope or consequence to supplement existing powers. In other words, there was a widespread view that a broader range of powers (and resulting regulatory and support options) is needed.³¹

³⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, p. 177, available from <<https://www.oric.gov.au/catsi-review>> [accessed 11 February 2020].

³¹ *ibid.*, p.173.

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- 3.7 We proposed to expand the powers of the Registrar to include a suite of lower level discretionary powers, modelled on those of ASIC, including the power to issue penalty notices which in essence impose fines. This would enable the Registrar to respond in a proportionate manner, reflecting the nature of the breach. Of the 17 responses to the survey on this Chapter, 88 per cent agreed with providing the Registrar with a broader suite of lower level powers modelled on those of ASIC, including the power to issue penalty notices. The two responses that did not agree with this proposal offered no reasons for their objection.
- 3.8 In total, 22 submissions made comments in regard to this Chapter, and responses were quite varied. Twelve submissions supported or expressed qualified support for the proposal for the Registrar to have the power to issue fines, four did not support, and a further six made no comment or wanted further information before indicating a position. The Law Council submission was very supportive of this proposal stating:
- Subject to the detail of any legislative proposal, the Law Council keenly supports expanding the regulatory powers that are open to the Registrar, to enable a more positive intervention methodology that begins with constructive intervention such as the provision of supports, such as alerts, and then warnings, and then progressing through the tiers of fines, enforceable undertakings and finally litigation, as suggested at paragraph 3.6 [of the Draft Report]. While the rights of members must be appropriately safeguarded, this should be achieved through other means than litigation as a first resort.*
- 3.9 An anonymous web-based form noted, 'An expanded but 'cascading' range of regulatory powers aimed at encouraging compliance before punitive or high level interventionist measures are imposed would be an appropriate addition to the Registrar's suite of options' and the Northern Territory Government Office of Aboriginal Affairs noted, 'Expanding the Registrar's powers to include a broader suite of regulatory responses will allow for more proportionate intervention and better and more suitable corporations when required'. Marrawah Law commented, 'We agree that the Registrar should have extra powers to support CATSI corporations such as the issuing of fines/infringement notices for non-compliance with obligations.'
- 3.10 Many submissions made recommendations about considerations that should be taken into account when making a decision to impose a fine, in particular emphasising that ORIC should be supporting and building the capacity of corporations to achieve compliance, and fines should only be considered as a last resort. The Law Council also advised that if given broader powers to issue fines, the Registrar should also develop and publish broader guidelines setting out the criteria on which a decision to pursue a financial penalty would be made, thus providing certainty and transparency to the regulated community.
- 3.11 In its submission, Pika Wiya Health Service Aboriginal Corporation (Pika Wiya) raised concerns regarding the source of the funds that would be used to pay a penalty notice, noting it would be undesirable for a corporation to expend grant funds on fines, which may already be the case for any court imposed penalties.³² Other submissions also raised concerns about the capacity of small corporations in particular to pay fines: Congress noted, 'the introduction of fines for minor regulatory breaches...could serve to frustrate and disempower Aboriginal corporations, particularly small corporations...that do not have any assets or funds to pay fines'; and 'NNTC would be concerned about the imposition of fines for trivial breaches of administrative compliance, particularly where this involves small corporations with no employees or resources.' This concern could be addressed by the Law Council's suggestion that 'the size and financial capability of the corporation be included as factors that the Registrar must have regard to when imposing a penalty...'
- 3.12 On balance, there is support for providing the Registrar with lower level powers including the power to issue penalty notices. Feedback from consultation sessions as well as submissions also underscored the need for those powers to be discretionary, and for there to be simple, clear guidance available as to how and when those powers could be used.

³² Under NIAA grant agreements, using grant funding to pay fines or court penalties is not allowable as grant funding must only be used for the project for which it is provided.

Recommendation 4

It is recommended the Registrar's powers be expanded to include the ability to issue penalty notices.

- 3.13 Three submissions disagreed with the proposal for the Registrar's powers to be expanded and called for the decriminalisation of the CATSI Act altogether. A fourth submission from First Nations also called for decriminalisation stating, *'First Nations supports the call to de-criminalise the CATSI Act where possible, save for civil and criminal penalties necessary to protect the good governance of Indigenous corporations. First Nations has observed examples of the civil and criminal offences currently included in the CATSI Act creating a culture of fear in corporations which, in our view, results in corporations being less likely to seek guidance from the Office of the Registrar of Indigenous Corporations (ORIC) and feel empowered to realise their full potential.'*³³ However, they also supported a broader range of lower level discretionary powers for the Registrar, *'that enable a more proportionate and graduated response to non-compliance.'*
- 3.14 We considered this suggestion and note criminal prosecutions have only been undertaken in a small number of instances by ORIC, including prosecuting individuals who have defrauded corporations (see Table 3.1). As part of the regulatory powers available under the CATSI Act, the Registrar may undertake criminal investigations for referral to the CDPP for assessment and criminal prosecution, civil litigation or may intervene in a court proceeding relating to a matter arising under the CATSI Act. These powers enable the Registrar to take a proportionate approach when faced with non-compliance. While corporations can be subject to criminal prosecutions, these powers also act as a protection for corporations by deterring fraudulent and corrupt behaviour. The Stakeholder Reference Group stated it would be a 'tragedy' to decriminalise the CATSI Act, and noted the successful outcomes ORIC had achieved to date through its prosecutions of some wrongdoers.

Table 3.1: Prosecutions finalised by ORIC by financial year

	FINANCIAL YEAR								TOTAL
	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	
No. of major criminal prosecutions	0	3	3	1	0	1	7	1	16
No. of civil prosecutions	2	3	3	6	3	0	1	1	19
TOTAL	2	6	6	7	3	1	8	2	35

Source: ORIC data.

Note: There were nil major criminal or civil prosecutions in 2019-20 as ORIC's ability to undertake investigations was impacted by resourcing issues and travel restrictions imposed in response to the global COVID-19 pandemic.

- 3.15 In addition to the major criminal and civil prosecutions outlined in Table 3.1, ORIC also undertakes minor regulatory prosecutions where a small, medium or large CATSI corporation has failed to lodge annual reports. Between 28 September 2010 and 13 October 2020, the CDPP finalised 168 matters in court, as referred by ORIC for minor regulatory prosecution.
- 3.16 The ability to pursue criminal and civil proceedings has been vital in protecting corporations, their members and communities. For example, the outcomes of prosecutions to date, as referred to in Table 3.1 has been:
- 50 per cent of criminal prosecutions and over 30 per cent of civil prosecutions resulted in an individual convicted of wrong doing ordered to pay reparation or compensation to the CATSI corporation; and
 - 50 per cent of criminal prosecutions and 100 per cent of civil prosecutions resulted in an officer being disqualified from managing corporations for periods ranging from six months to 15 years.
- 3.17 Further ways to protect corporations from officers who may use his or her position to cause detriment to a CATSI corporation is explored in Chapter 5.

³³ It is concerning the submission refers to a culture of fear which may need to be addressed by ORIC through training, guidance and other information materials. This matter has been referred to ORIC for consideration.

Enforceable undertakings


- 3.18 An enforceable undertaking is an administrative settlement that can be accepted as an alternative to civil court action or other administrative actions and is legally enforceable. The use of enforceable undertakings allows the regulator flexibility to reach outcomes that can be more comprehensive than that of the court, which is subject to some restrictions.³⁴ An enforceable undertaking can also avoid the Registrar having to take prosecution action for relatively minor breaches of the Act. Both the Australian Competition and Consumer Commission (ACCC) and ASIC use enforceable undertakings. However, the Registrar does not currently have the power to accept enforceable undertakings from corporations.
- 3.19 We proposed the Registrar's powers be expanded to accept enforceable undertakings as well as to identify situations where the corporation is failing to fulfil the undertaking it has made. This was one of the more uncontroversial proposals, encountering little resistance either in the consultation sessions, the survey or submissions. Participants in consultation sessions questioned what types of breaches might be addressed through an enforceable undertaking and what an undertaking might look like. Enforceable undertakings can be used as a remedy for a broad range of non-compliance. As an example, an RNTBC which has failed to meet its consultation and consent requirements under the PBC Regulations might undertake to hold a consultation process, and publicly apologise for failing to meet its requirements.
- 3.20 One participant at a consultation session noted the ACCC has years of experience using enforceable undertakings, with successful outcomes, and Environment Protection Authority (EPA) Victoria have used them in a restorative manner as they provide for creative solutions to deal with non-compliance. Of the 17 survey responses, 88 per cent agreed that the Registrar should be able to accept enforceable undertakings. One of the two survey respondents who disagreed indicated a more general disaffection with the role of the Registrar as a whole.
- 3.21 Thirteen of the 22 submissions that addressed this Chapter made a comment on enforceable undertakings including 12 that expressed support for the proposal, and one indicated the proposal appeared reasonable but required further detail. Dr Marina Nehme strongly advocated the benefits of enforceable undertakings noting:
- This sanction will be an asset for the Registrar as it forms a bridge between the strategies of persuasion and enforcement. On the one hand, the sanction is based on negotiation between the regulator and the alleged offender...The use of persuasion over other enforcement strategies is often a more effective use of a regulator's limited resources. In addition, the sanction can be healing as it may be restorative in nature and accordingly make a difference in the affected communities. Further, an enforceable undertaking may lead to greater education for the alleged offender and the broader community...This sanction is more useful than the introduction of an infringement notice which may be viewed as a cost of business.*
- 3.22 The Arnold Bloch and Leibler (ABL) submission made the observation that enforceable undertakings could be used in place of special administration in the right context. Given their voluntary nature, enforceable undertakings would also serve to underpin the self-determination of CATSI corporations and their membership.

Recommendation 5

It is recommended the Registrar's powers be expanded to be able to accept enforceable undertakings.

- 3.23 Currently, section 453-1 of the CATSI Act allows the Registrar to appoint an authorised officer to examine the books of a corporation or related body corporate and report to the Registrar on the results of that examination, at any time. We proposed this section could be enhanced to provide that a suspected contravention of an enforceable undertaking may also be the subject of a report following an examination of a CATSI corporation. This was aimed at equipping the Registrar with the necessary powers to identify contraventions and act accordingly.
- 3.24 During discussion on this point in a consultation session, one participant advised that enforceable undertakings generally included a requirement to report regularly on the progress of the undertaking, so the proposal was not

³⁴ Nehme, Marina, *Enforceable Undertaking: A Restorative Sanction?* 36(2) Monash University Law Review, 2010, p.129.



necessary. Furthermore, the advantage of enforceable undertakings is that if an enforceable undertaking is not complied with, the regulator may enforce the undertaking in court. As Dr Marina Nehme's submission noted, '*such an option maximises the chances that an undertaking will be complied with.*'

- 3.25 While we acknowledge that an enforceable undertaking will include a reporting mechanism, we also note this relies on the party involved meeting its reporting requirement and reporting accurately. We see no harm or detriment to including a suspected contravention of an enforceable undertaking as a subject of a report following an examination of a CATSI corporation.

Recommendation 6

It is recommended section 453-1 be amended to provide that a suspected contravention of an enforceable undertaking may be the subject of a report following an examination of a CATSI corporation.

Investigation powers

- 3.26 Investigations are a key underpinning of ORIC's regulatory approach and the CATSI Act provides the Registrar with a range of powers that may be used in investigations.
- 3.27 The Registrar may use his or her investigation powers to look at alleged breaches of the CATSI Act or other law. We explored a number of areas where the Registrar's powers could be better aligned with those of ASIC including in regard to the issuing of notices for the production of books. We also looked at some inadvertent limitations around the investigation powers of the Registrar and authorised officers, and proposed changes.
- 3.28 The discussion below outlines the feedback received against each of these proposals and the subsequent recommendations of the Review team.

Notice period

- 3.29 There is currently a misalignment between the powers of ASIC and those of the Registrar in relation to provisions around the production of books. Under section 453-5 of the CATSI Act, the Registrar is required to give a person 14 days' notice to produce books. Such a delay can frustrate prompt regulatory action, particularly in cases where it would be appropriate and reasonable for the Registrar to require immediate production of books. By comparison, ASIC is empowered to specify what it considers would be a reasonable time for the person served to respond to the notice. The 2016 KPMG Review supported changes to the 14 day notice period for the production of books, and recommended the Registrar's powers should be amended to reflect those of ASIC, allowing the Registrar to specify what is a reasonable time.³⁵
- 3.30 During the consultations, this proposal was met with general agreement. Many participants noted that it seemed logical and particularly that there was value in bringing the Registrar's powers into alignment with those of ASIC. Of the 17 surveys completed, 94 per cent agreed with this proposition. In commenting on why they disagreed, the one respondent outlined that the current 14 day period was known and provided certainty.
- 3.31 In their submission, Pika Wiya addressed this proposal specifically noting, '*Removing the 14 days' notice period is supported and for it to be replaced with a more considered timeframe, being determined by the Registrar, based on the issue.*' Pika Wiya went on to comment, '*in making this determination the Registrar should have regard to the size of the organisation and its access to support in compiling information in the manner sought by the Registrar.*' The determination of a 'reasonable time to produce books' would be a discretionary decision of the Registrar, based on the situation. On ASIC's website, it outlines how this power is applied:

³⁵ KPMG, *Regulating Indigenous Corporations*, ORIC, 15 December 2016, available from <https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations> [accessed 13 February 2020].

The time for production must be a reasonable time from the date of service of the notice, taking into account the documents required and the type of inquiry. In some cases, it may be appropriate to require the documents to be provided immediately. The notice must state in general terms, the basis on which we require production of the documents.³⁶

Recommendation 7

It is recommended section 453-5 be amended to provide the Registrar with the power to specify a reasonable time within which to produce books.

Issuing notices

- 3.32 The Registrar's powers to issue notices to produce books is also limited compared to ASIC's powers. ASIC has extensive powers that enable it to require a person or entity to produce books relevant to a corporation's affairs, and these powers extend to auditors and liquidators. The Registrar may only compel the production of books from someone who the Registrar, on reasonable grounds, believes to have some knowledge of the examinable affairs³⁷ of an Aboriginal and Torres Strait Islander corporation. We proposed that it would be beneficial for the Registrar to have similar powers to ASIC in regard to issuing notices for the production of books. Again these were relatively uncontroversial proposals, and met with general agreement. One participant at the consultation sessions noted that any moves to align ORIC's powers with those of ASIC would be highly beneficial in moving Indigenous organisations to self-determination.
- 3.33 Another participant questioned the Registrar's current powers, noting the wording seemed quite broad. While it can appear so, there is currently an onus of belief on the Registrar that is not required of ASIC, and thus limits the Registrar's powers in this regard. In other words, the Registrar must believe a person to have some knowledge of the corporation's affairs in order to compel production of books. ASIC can do so from anyone associated with the corporation. This issue also came up through the survey where 88 per cent of responses agreed with the proposition and two respondents disagreed. One of the respondents who disagreed was unclear what additional power was required given the Registrar already had the power to compel production, while the other stated they agreed provided the corporation had the capacity to comply with the direction and suggested that assistance could be provided free of charge to support the corporation to comply.
- 3.34 All eight submissions that provided comment on the proposal were supportive and so it is recommended to be adopted.
- 3.35 We also proposed the Registrar have a further power to compel the production of books, if the books are not produced initially. This may be a further notice, or another form of regulatory action.
- 3.36 On further consideration, it seemed unlikely that if an initial notice to produce had not been complied with, the recipient would adhere to a second notice. Therefore, we were not inclined to make a recommendation in this area.

Recommendation 8

It is recommended the Registrar's powers to issue notices to produce books be aligned with that of the Australian Securities and Investments Commission to require a person or entity to produce books relevant to a corporation's affairs.

³⁶ ASIC, *ASIC's compulsory information-gathering powers*, ASIC, June 2020, available at <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/>> [accessed 17 October 2020].

³⁷ Section 700 of the CATSI Act defines the examinable affairs of a corporation as meaning: (a) the promotion, formation, management, administration or winding up of the corporation; or (b) any other affairs of the corporation; or (c) the business affairs of a connected entity of the corporation in so far as they are or appear to be, relevant to the corporation; or anything that is included in the corporation's examinable affairs because of (a) and (b).



Accessing and reviewing a corporation's books

- 3.37 There are some inadvertent limitations in the language used in section 456-10 of the CATSI Act which means that while an authorised officer³⁸ is expressly permitted to use the books from a CATSI corporation that have been produced or seized under a warrant for a proceeding (subsection 456-10(4)), there is no express provision for the Registrar to be able to do so. Likewise, an authorised officer is expressly permitted to make copies of said books (subsection 456-10(3)), but again there is no similar provision regarding the Registrar. As the Registrar authorises an authorised officer, it is implicit that the Registrar can also wield these powers, however, it would be preferable to make this explicit.
- 3.38 Additionally, at present authorised officers can only request an explanation of material in the books from a person who produced or compiled them. This can limit a field of investigation, and may mean the authorised officer is not speaking to the most appropriate person, or the person who has the most knowledge of the matter.
- 3.39 To this end, it was proposed the CATSI Act be amended to:
- provide the Registrar with the same powers as authorised officers; and
 - expand the sections of the CATSI Act that enable an authorised officer to inspect a corporation's books and request a person to explain the material in those books, to model the rights currently granted to an auditor of a corporation under the CATSI Act. This would ensure an authorised officer could request information, explanations and other assistance from a company officer, as well as from a person who produced books to the authorised officer or who was a party to the compilation of those books.
- 3.40 Much of the discussion in consultation sessions around this topic involved ensuring there was complete clarity and transparency around the role and the powers of the Registrar. One participant said they were fully supportive of everything that had been proposed in order to reduce ambiguity and remove loopholes. On the other hand, participants noted that expanding the Registrar's powers to align with those of ASIC would be a good thing, but there was a need to balance that with not being too burdensome.
- 3.41 Only one survey respondent disagreed with this proposal although they did not provide any explanations for their disagreement. The seven submissions dealing with this proposal all indicated support. The Northern Territory Government Office of Aboriginal Affairs stated, *'Granting the Registrar the same powers as its authorised officers to inspect, use and copy the books of CATSI corporations will rectify a current anomaly in the CATSI Act.'*
- 3.42 The CATSI Act will benefit from measures aimed at reducing ambiguity, so we recommend these anomalies be addressed.

Recommendation 9


It is recommended the CATSI Act be amended to:

- provide the Registrar with the same powers as authorised officers; and
- expand the sections of the CATSI Act that enable an authorised officer to inspect a corporation's books and request a person to explain the material in those books, to model the rights currently granted to an auditor of a corporation under the CATSI Act.

Subjects of powers

- 3.43 Lastly, under section 84 of the ASIC Act, any power exercisable over a body corporate is extended to a person who is, or has been, an officer or employee of the body corporate. In other words, ASIC's powers are not confined to

³⁸ The CATSI Act provides for the Registrar to appoint a suitable person as an 'authorised officer' for the purposes of carrying out enforcement functions. The functions and powers of an authorised officer are outlined in various parts of the CATSI Act and include (but are not limited to): undertaking an examination and reporting to the Registrar on specific matters; applying to a magistrate for a search warrant; and inspecting and making copies of a corporation's books.



the corporation, but apply to anyone who has worked for, or been an officer of, the corporation. The Registrar does not have the same power, which potentially limits relevant avenues of investigation.

- 3.44 Discussions at the consultation sessions made it clear that most stakeholders were unaware of the differences in the scope of powers between the Registrar and ASIC, believing that they were the same. As such, there was a strong mood to bring the powers into alignment, because the Registrar and ORIC deal with the same issues.
- 3.45 Eight submissions were supportive, including Pika Wiya stating, *‘This proposal is supported, however, consideration should be given as to whether there should be some statutory time limit established on this access. Appropriate protections, commensurate to [the] role they may have played in a matter should also be considered’*.
- 3.46 However, the PCCC PBC submission noted, *‘All these inconsistencies between the regulatory powers in relation to ASIC Corporations vs CATSI corporations are symptomatic of having a separate incorporation statute for CATSI Corporations. Under our proposal [discussed at paragraphs 2.87 to 2.90 in Chapter 2] where all corporations were incorporated under the Corporations Act this issue would not arise’*. As discussed in Chapter 2, while this proposal was considered, it was assessed that it was overly complicated and would require significant resources, and the recommendation was to retain the CATSI Act.

Recommendation 10


It is recommended the CATSI Act be amended to mirror section 84 of the *Australian Securities and Investments Commission Act 2001*, allowing the Registrar to extend any powers exercisable over a body corporate to a person who is, or has been, an officer or employee of the body corporate.

Criticisms

- 3.47 A few submissions expressed disagreement in general with the proposal to expand the Registrar’s powers, which appeared to be based on a broader criticism of the CATSI Act as a whole, and as a special measure. The WAC submission contended that the proposal to expand the Registrar’s powers would impinge on self-determination and community control, noting:

The CATSI Act’s extension of powers of the Registrar directly reduces community control and self-determination of [community control organisations] currently incorporated under the Corporations Act; directly contradicting to contemporary federal and State commitments. The proposed changes to the CATSI Act legislate the Registrar with potentially discriminatory and disempowering regulatory and enforcement powers, that will diminish the community control and self-determination of our communities’ organisations. The Corporations Act in contrast supports the accommodation of local traditions and circumstances of people in governing our organisations.

- 3.48 The CATSI Act requires the Registrar to have regard to the circumstance and tradition of Aboriginal and Torres Strait Islander people which is an important point of difference between the CATSI Act and Corporations Act. Furthermore, the proposal is to align the Registrar’s powers with those of ASIC and so will subject CATSI corporations to the same regulatory powers as those applied to companies incorporated under the Corporations Act.
- 3.49 The AICD submission cautioned the proposals represented an additional level of complexity for CATSI corporations:
- However, our stakeholder engagement has highlighted that certain proposals set out in the Draft Report, if adopted, will add a further level of complexity, compliance and regulation to CATSI corporations that is unnecessary and out of step with the purpose of the legislation. We have also received feedback that the existing CATSI Act does not, in some cases, provide the flexibility and support needed to meet the unique cultural contexts of Aboriginal and Torres Strait Islander peoples.*



3.50 While we are deeply aware of the need to balance additional regulation with simplicity and red tape reduction, we believe that providing the Registrar with these lower level powers will result in benefits for CATSI corporations which otherwise might have been subject to prosecution for minor non-compliance.

3.51 The Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC (ETNTAC) submission stated:

ETNTAC supports measures in the CATSI Act aimed at protecting the rights of members but is cautious about any additional powers that would be proposed to be granted to the Registrar to intervene in a corporations affairs. ETNTAC notes that the role of the Registrar should be to work with and build the capacity of corporations and also to assist educate members in relation to the challenges faced by corporations. Any decision by the Registrar to step in or appoint a registrar should be an action of last resort.

Further ideas

3.52 We also sought feedback and input about two further issues. Firstly, we asked whether there are powers available to other Commonwealth regulators that are not currently available to the Registrar, and would assist the Registrar to better support CATSI corporations. In particular, we asked for feedback in relation to the following questions:

- Which powers would be most appropriate and why?
- Should these powers be replicated for the Registrar or altered in some way to better support CATSI corporations?

3.53 Only a few suggestions were forthcoming in response to these questions from submissions and consultation sessions. The DDHS submission was more general in its suggestion stating, '*the types of powers discussed could be strengthened to better support well governed corporations in dealing with vexatious actions*'. One participant at a consultation session suggested that warning letters may be appropriate where there is suspected non-compliance, particularly when an infringement notice is not appropriate or has not been paid. The warning letter could be made public which could provide a deterrent for corporations.

3.54 There was a number of suggestions provided through the survey responses, however, many of the powers suggested are already available to the Registrar, including: maintaining a register of people who have been found to have defrauded or mismanaged corporations by a court; and intervening in, and investigating, corporations' affairs when required.

3.55 A couple of the suggestions are outside the role of the Registrar, such as undertaking audits and holding service providers accountable for service delivery. A further suggestion to provide auditors with qualified privilege is a recommendation included in Chapter 6.

3.56 We also sought feedback in regard to whether the current dispute resolution powers of the Registrar are adequate and/or appropriate and if not, how they could be enhanced. Under the CATSI Act, the Registrar can help corporations resolve disputes. In particular, the Registrar can provide general advice, a formal advisory opinion and facilitate conferencing between parties. This issue is explored in some depth in Chapter 7.

3.57 This was an important issue for many stakeholders and we acknowledge the resource intensive nature of dispute resolution and mediation as highlighted by one participant during a consultation session. Stakeholders indicated that disputes were a constant in CATSI corporations, and in some cases they were intractable, causing bottlenecks in the management and governance of corporations. There was general agreement that there needed to be better ways of dealing with disputes, although what that might look like was a matter for debate.

3.58 Only 29 per cent of the survey respondents agreed with the proposition that the Registrar's dispute resolution powers were appropriate. Comments included: that the Registrar needs: greater capacity to assist with native title disputes and enhanced powers in relation to memberships disputes; and the current model needs to be reviewed with a focus on transparency and community-based solutions.



- 3.59 Submissions provided a different perspective, and while some were supportive of expanding the dispute resolution powers of the Registrar, others were against the Registrar having a role in dispute resolution seeing it as an issue of self-determination. As the Federation submission noted, *'...we consider dispute resolution is an internal matter to be dealt with as outlined by the corporation's Rule Book.'* The PCCC PBC submission stated, *'The current dispute resolution powers given to the Registrar are consistent with a positive discriminatory approach. Any extension that goes beyond providing advice, guidance and assistance to corporations to resolve disputes would amount to regulatory overreach.'*
- 3.60 WAC recommended in their submission, *'the ORIC Registrar's powers be equivalent to, and not extended beyond, those of ASIC as the regulatory body of the Corporations Act.'* Currently, ASIC has no dispute resolution powers.
- 3.61 On the other hand, several submissions indicated a preference for the Registrar to have expanded responsibilities in dispute resolution. Pika Wiya supported a proposal to expand the powers of the Registrar in relation to dispute resolution, warning that, *'natural justice needs to continue to be afforded to the parties'*.
- 3.62 The Law Council of Australia stated it was supportive of alternative dispute resolution mechanisms although stopped short of nominating where responsibility for those mechanisms should reside. The submission advised, *'First Nations directors, members, organisations and communities should lead the development of such mechanisms, so that these are appropriately suited to their needs.'*
- 3.63 This theme is picked up in other submissions, *'ETNTAC notes that there may be some role for Native Title Representative Bodies to be involved in dispute resolution and that it is important that any decision made or actions taken by the Registrar are made in a regional context and with a solid understanding of the particular nature of the issues in dispute.'*
- 3.64 This sentiment is echoed in the submission from AIATSIS which states, *'Building strong decision-making and dispute management within corporations requires bespoke processes and outcomes that are designed and owned by the members (and native title holders in the case of RNTBCs), but they need to be supported by accessible and culturally capable expertise and advice.'*
- 3.65 The AIATSIS submission supports a role in dispute resolution for the Registrar, in conjunction with, *'building the confidence of corporations in their own governance and their ability to manage conflict.'* It notes that arbitration or dispute management could be offered by the Registrar as an optional service to RNTBCs through provision of an independent facilitator, mediator or arbitrator. AIATSIS goes on to say, *'Facilitators may be better able to successfully achieve a voluntary resolution of issues in ways that build, long term organisational resilience, without any further need for interventions such as mediation or arbitration or other more serious action by the Registrar or the Courts'*. Finally the submission provides that, *'Where matters remain unresolved, the Registrar could play a role in appointing an arbitrator and managing the arbitration process. Under a CATSI Corporation's rules the Registrar may be required to arbitrate when a dispute arises. There does not appear to be any specific legal impediment to the Registrar having a role in mediation as well as arbitration, with the possible exception of conflict of interest.'*
- 3.66 After careful consideration of all of the comments, submissions and survey responses it is clear that there are widely divergent views on this topic, which is not unexpected given that disputes have a profound impact on corporations, their members and communities. We agree there would be merit in ORIC working with key stakeholders including the Tribunal, the NNTC, RNTBCs, and Native Title Representative Bodies (NTRBs) to develop culturally appropriate graduated and escalating dispute resolution processes. This will be particularly important after the passage of the NTLAB which will require RNTBCs to have dispute resolution processes in their rule books. We have referred this to ORIC for its consideration.



Conclusion

- 3.67 Expanding the Registrar's powers to include a broader suite of regulatory responses will enable a more proportionate intervention when required, and better support Aboriginal and Torres Strait Islander corporations, particularly those that may be at risk of poor governance or financial management. Being able to provide this type of support is generally consistent with the expectations of stakeholders.
- 3.68 Aligning the Registrar's powers with those of ASIC recognises the importance of the Indigenous corporate sector. It does not create additional regulation as some submissions have suggested, but provides more options for the regulator in dealing with corporations and recognises nuance in size and capability.

Table 3.2. Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Chapter 5	Registrar's power to call meetings
Chapter 10	Regulation and enforcement
Part 10-2, Division 439	Regulation of CATSI corporations
Part 10-3, Division 453 and section 456-10	Examination of books and persons Powers where books produced or seized



4. Governance

- 4.1 The CATSI Act outlines governance standards designed to meet the needs of Aboriginal and Torres Strait Islander people. For example, requiring the majority of a corporations' directors and members are Aboriginal and Torres Strait Islander people ensures that corporations are Indigenous controlled.
- 4.2 Sections 658-1 and 658-5 of the CATSI Act set out the functions and aims of the Registrar and in carrying out those functions and aims, the Registrar supports and regulates CATSI corporations by:
- providing advice in relation to incorporation requirements;
 - training directors, members and key staff on good governance practices;
 - monitoring corporations' compliance with CATSI Act requirements; and
 - intervening when needed.
- 4.3 In the first phase survey conducted by the NIAA seeking input to this Review, governance was the area that was important to most survey respondents.³⁹
- 4.4 In this Chapter, we consider how the CATSI Act supports corporations to:
- manage their membership bases;
 - establish appropriate corporate structures and consider their corporation size;
 - manage their meeting and reporting obligations; and
 - develop and utilise their rule books.

Chapter 4 Summary of survey and submission feedback

In addition to feedback in the consultation sessions, feedback on governance was provided via:


- 19 of the 141 chapter surveys;
- 31 of the 41 written submissions; and
- one of the eight email feedback submissions.

Membership management

Contact details

- 4.5 Indigenous corporations are ultimately controlled by members and, therefore, corporations need to know who their members are to understand who is entitled to receive notices and other information, and who can participate in member meetings. Consequently, subsection 180-1(1) of the CATSI Act requires that corporations establish and maintain a register of members, and subsection 180-5(1) requires that the register include each member's name, address and date when the member's name was added to the register. This requirement could be updated to explicitly allow the collection of email addresses and phone numbers for members which may make it easier and less costly for corporations to contact members.


³⁹ Of 60 survey respondents, 57 identified governance arrangements as important to them.

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- 4.6 Of the 19 survey respondents, 74 per cent agreed with including such a requirement in the CATSI Act. The reasons put forward for not supporting this proposal included that members change their phone numbers and email addresses or don't have them at all, emails are 'personal', and this was seen to be additional red tape and not beneficial to members. In the consultation sessions, participants were generally supportive of this proposal although also noted that members may change their contact details or may not have an email or phone number.
- 4.7 Fifteen written submissions also commented on this proposal with 11 providing support or qualified support, and four providing no clear position for enabling corporations to record the email and telephone numbers of members. Concerns were raised in relation to the privacy of information and ensuring that personal details do not become available publicly. It was also noted in a number of the submissions that internet and mobile coverage was limited in some remote areas, and Aboriginal people can have a high rate of turnover for mobiles phones, as illustrated by the CLC submission which stated:
- Email and mobile phone coverage is by no means a given across Aboriginal communities in Central Australia. Coverage is patchy at best, and access is almost non-existent in smaller homelands. It is common knowledge that Aboriginal people have a high rate of turnover of mobile phones which are often shared between family members. Anecdotally this can accrue to up to 25 mobile numbers per individual user.*
- 4.8 Overall feedback was supportive of providing as many means as possible to contact members and it was raised that whatever channels are used by corporations to contact members need to provide equitable access for all members. Stakeholders suggested to us that while younger people may be happy to receive information by email, older people may prefer letters. It was also put to us that how corporations communicate with members is a matter for corporations to decide in consultation with members and should be decided through a resolution and/or set out in rule books.

Recommendation 11

It is recommended corporations be required to collect phone numbers and email addresses of members where available.

- 4.9 Members can provide corporations with alternative contact details to receive notices of meetings but corporations are not required to record these details in their register of members and are not permitted to use these details for other purposes such as determining that the member is non-contactable when deciding to cancel their membership (refer paragraphs 4.45 to 4.51). The Technical Review recommended changing the CATSI Act to oblige corporations to attempt to contact potentially uncontactable members using alternative contact details, where the corporation has not been able to contact members at their registered addresses for a period of not less than 11 months.
- 4.10 Using alternative contact details should make it easier for corporations to contact members and ensure that members are kept informed of the corporation's operations. This could be achieved by requiring corporations to record a member's alternative contact details in the corporation's records and to use them in addition to a member's primary contact details for issuing notices of meetings as well as other communication with members, including when considering cancelling membership (refer paragraphs 4.45 to 4.51).
- 4.11 Seventy-nine per cent of the 19 respondents agreed to the survey question that corporations should be required to use members' alternative contact details when issuing notices to meetings and other communication. Those respondents who did not agree with this proposal suggested that it was the responsibility of members to ensure their contact details are up-to-date and it should be available as an option to corporations rather than a requirement.
- 4.12 A number of the written submissions that commented on the recording and use of alternative contact details also suggested that it should be an option for corporations to use these details but not a requirement, including the Law Council submission that stated, '*Overly prescriptive obligations relating to contacting members are likely to cause real problems for corporations that are not well-resourced or that have large numbers of members based in*



remote or very remote areas. In contrast, the DDHS submission indicated the use of primary and alternative contact details by corporations should be a, *'minimum standard'*.

- 4.13 Through the consultation sessions, there was general support for corporations to be able to use a member's alternative contact details. Consistent with the feedback in the written submissions, a number of participants suggested alternative contact details should be an option available for corporations to use but this should not be a mandatory requirement under the CATSI Act.

Recommendation 12

It is recommended corporations be required to record alternative contact details, and be able to use those contact details when contacting members where available.

Contacting members

- 4.14 Feedback received in response to the NIAA's first phase online survey as well as the Technical Review indicated that enabling corporations to use other methods such as email to notify members may result in more effective and timely communication. In paragraph 4.5 we discussed corporations collecting email addresses and telephone numbers from members to make it easier to contact them.
- 4.15 We also asked for feedback on whether corporations should be able to determine the nature of contact that would be acceptable when contacting members, what forms of contact would be acceptable; and how corporations would make this decision.
- 4.16 Corporations told us they already employ a range of different communication channels to engage with members including social media. In its written submission, Pika Wiya shared their approach to contacting members commenting, *'Pika Wiya has a substantial lack of return rate when issuing information to registered addresses and uses other avenues as well i.e. print media, website and Facebook to provide notice of meetings and opportunities to engage.'*
- 4.17 Much of the feedback we received was that corporations should decide in consultation with members the preferred methods for contact. Under subsection 201-25(3) of the CATSI Act, corporations can outline the means by which they give notice of a meeting—to the extent that it is not one of the identified options—in their rule books. To this end, we do not consider there is a need for any legislative change in this area.

Redaction of member details

- 4.18 Each CATSI corporation maintains a register of members which is provided to the Registrar each year as part of the corporation's annual general report. The Registrar subsequently publishes CATSI corporations' member lists on the public register available on ORIC's website. In response to feedback received during the CATSI Act amendment consultations in 2018, the Registrar announced in October 2019 that ORIC would no longer publish members' addresses by-default on the ORIC website. However, members' addresses are recorded on a corporation's register of members, and under section 180-22 of the CATSI Act, any person is entitled to inspect the register.
- 4.19 There was general support among the submissions made to the Technical Review to redact personal information from member registers in the interests of ensuring the safety of members. In the Draft Report, we canvassed this issue again but specifically in relation to the member registers held by corporations and sought feedback on a number of questions, including:
- whether people supported information being redacted from a corporation's register of members;
 - should the relevant member have to request that their information be redacted from the register, or in some circumstances, should the corporation be able to make such a decision on behalf of the member;
 - if members are required to submit a redaction request, should the request be submitted to the corporation or in some circumstances, could it be submitted to the Registrar directly;




- should there be a threshold for requesting the redaction of personal information, such as personal safety;
 - how would members be able to organise a meeting without access to the personal information of other members;
 - how should such a request be recorded; and
 - should some of the points above be matters for corporations to decide?
- 4.20 Seventy-nine per cent of the 19 survey respondents agreed that corporations should be able to redact personal information from member registers. Suggestions were put forward as to the kinds of consideration that should enable the redaction, including family and community violence, traditional lore and privacy. Participants in the consultation sessions were also supportive of enabling the redaction of personal information from member registers.
- 4.21 There was a strong sentiment expressed across a number of submissions that members' personal details should not be available on the public register and in which case, there would be no need to request a redaction. Most written submissions indicated support for enabling corporations to redact personal information from member registers. Almost all submissions advocated that the relevant member should request their information to be redacted. The NNTC submission recommended that where relevant, corporations could contact a member and suggest that their information be redacted or even, the corporation could temporarily redact the information until the member can be contacted.
- 4.22 Most written submissions recommended that the management of redaction requests should be the responsibility of the corporation. A couple of submissions were supportive of members being able to approach the Registrar directly to request the redaction or for the Registrar to have a decision review responsibility if a member is dissatisfied with their corporation's management of their redaction request.
- 4.23 Many submissions indicated there should not be a consideration requirement, such as safety or privacy, to support a redaction request.
- 4.24 To enable members to contact others for the purposes of forming the minimum number of members required to request a general meeting, it was suggested members could request contact information from the corporation. In turn, a corporation could provide the contact information as long as it had the consent of those members. It was further suggested that an obligation be imposed on the member who requested the personal information that it could only be used for the purpose of requesting the meeting and could not be disclosed to anyone else.
- 4.25 This was consistent with a process, described by one participant in a consultation session, which had been put in place by a CATSI corporation, whereby members wanting the contact details of another member requested it from the corporation. The CATSI corporation would then seek the respective member's consent to release the information.
- 4.26 In the feedback, there was a suggestion that ORIC could be responsible for organising general meetings at the request of members. In consideration of this suggestion, we noted this could potentially have significant resourcing implications for ORIC. Further, where directors of a corporation do not respond to members' request to call a general meeting, the Registrar currently has the power under section 439-5 to call a meeting.

Recommendation 13

It is recommended members be able to make a request to corporations to have their contact details redacted from a member register and that if a member is dissatisfied with a corporation's response to such a request, they can have the decision reviewed by the Registrar.

It is not recommended there be a threshold question about safety, privacy or any other issue to support such a request.

It is not recommended corporations be given the power to redact information from a member register on behalf of members.


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- 4.27 Dr Marina Nehme's submission recommended a change to section 201-10 of the CATSI Act that outlines when directors are expected to comply with a request from members to call a general meeting. The provision enables directors to seek the permission of the Registrar to deny such a request from members if the directors believe the request is frivolous or unreasonable, or complying with the request would be contrary to the interests of the members as a whole.
- 4.28 Dr Marina Nehme's submission states that this limitation could be too broad and suggests the phrase, '*contrary to the interests of the members as a whole*' has, '*strong links to oppression and may mean different things to different people*.' According to the submission, section 201-10 is not required as section 201-55 requires meetings be held for a proper purpose. Accordingly, it was suggested rather than amending section 201-10, a provision could be added to enable the Registrar to intervene when the directors do not consider that the members are requesting a meeting for a 'proper purpose.'
- 4.29 When ORIC is approached by directors to deny a meeting request from members, it may be that the meeting is being requested for a 'proper purpose' such as electing or removing directors. The further criteria of whether the meeting may be contrary to the interests of members enables ORIC to consider additional factors such as the costs of holding a meeting (which could be tens of thousands of dollars) as well as the proximity of the requested meeting to the most recently held or next scheduled meeting. For example, while a meeting may be for a 'proper purpose', convening it may result in significant and unnecessary costs where another meeting has already been scheduled within a reasonable timeframe. Consequently, we are not inclined to make a recommendation in this area.
- 4.30 Section 180-25 allows any person to inspect a CATSI corporation's member register. This provision is consistent with section 173 of the Corporations Act. The ABL submission noted the Corporations Act also includes a proper purpose requirement as laid out in subsection 173(3A) which provides that a person wishing to copy a company's register must make an application that outlines each purpose for which the person is accessing the register. Further the reasons provided for accessing the register cannot be a 'prescribed purpose' which is defined in Regulation 2C.1.03 of the Corporations Regulations 2001 and includes reasons such as soliciting a donation.
- 4.31 The ABL submission recommends the CATSI Act should also include a proper purpose requirement. We agree and note the 'prescribed purpose' could be tailored specifically to CATSI corporations and their members, and could include as an example contacting members with the purpose of selling goods or services.

Recommendation 14

It is recommended the CATSI Act be amended to include a proper purpose requirement in relation to section 180-25, inspecting a CATSI corporation's member register.

Membership approval

- 4.32 One response to the CATSI Act Review first phase online survey noted there is no requirement for boards to make a decision in relation to membership applications within a specific timeframe. In the Draft Report, we asked whether the CATSI Act should include a statutory timeframe within which corporations need to consider membership applications. For those who supported the proposal, we queried what would be the appropriate length of such a timeframe, and as an example, asked whether three months would be appropriate to align with quarterly directors' meetings.
- 4.33 Of the 19 survey respondents, 89 per cent agreed that a statutory timeframe should be included in the CATSI Act within which corporations need to determine the outcome of a membership application. Suggestions from survey respondents in relation to a timeframe varied from 21 days being the shortest to 12 months being the longest. Four respondents said three months would be appropriate followed by three respondents suggesting six months.
- 4.34 In the consultation sessions, there was strong support for this proposal. A number of participants suggested three months was probably not a sufficient length of time for reasons including that membership applications were put to Elders' Councils and then to directors' meetings, and three months was not long enough for both groups to




consider an application. Other participants also advised that they hold directors' meetings every six months rather than quarterly so they would not be able to meet this timeframe. It was also suggested to us through these sessions that we should:

- include a longer timeframe that can be met by corporations and those that would prefer a shorter timeframe could implement one; and
 - consider a provision such as six months or the next directors' meetings whichever is the earliest.
- 4.35 Among the written submissions: one put forward that further consultation was required in relation to this proposal; 11 indicated that they did not support a statutory timeframe; and six supported the proposal. Among those submissions that did not support the proposal, there was recognition that consideration of membership applications should be a matter for corporations, including the following comments:
- *'Membership is a matter for the individual RNTBC and their internal processes and may require extended periods for research and consideration.'* (AIATSIS).
 - *'Corporations often do not meet for some time (e.g., perhaps only twice per year in accordance with Rulebook requirements) and the decision on member applications can be challenging.'* (SANTS).
 - *'It should be left to each corporation to decide if they wish to include a timeframe in their constitution and, if so, what that timeframe should be.'* (PCCC PBC).
 - *'The NNTC does not support introducing a statutory timeframe for members to consider membership applications as it may overburden some corporations with such a regulatory mechanism.'*
- 4.36 Membership decisions are often the cause of disputes and the NTLAB includes provisions to help RNTBCs address these types of disputes. If passed, the NTLAB provisions will remove the choice of RNTBC directors to refuse membership applications from members of the native title holding group; require RNTBC rule books to have dispute resolution pathways for people who are or who claim to be common law holders and provide for all the common law holders to be directly or indirectly represented in the RNTBC.
- 4.37 To complement these new provisions and also ensure other CATSI corporations have provisions in place to help minimise membership disputes, we think it prudent to introduce a statutory timeframe within which membership applications need to be determined. It is not recommended this provision be the earliest of a directors' meeting or a specified time period, to provide sufficient flexibility for corporations to undertake relevant internal processes when reviewing membership applications such as consideration by an Elder's Council.

Recommendation 15

It is recommended the CATSI Act be amended to require corporations to make a determination of membership applications within six months, and that the Registrar can extend or exempt this consideration period for a corporation or class of corporations.

- 4.38 Related to the point above, a submission to the previous review of the CATSI Act noted the significant power that boards have in relation to accepting or rejecting membership applications. The submission suggested that where a membership application is rejected despite an applicant meeting all of the membership criteria, the applicant could request a meeting of all of the corporation's members to reconsider the application. The submission further suggested there should be timeframes within which the applicant can request the meeting and within which the meeting must be called, as well as a specified quorum of members to consider the membership request.
- 4.39 Three of the written submissions supported the proposal to enable an applicant who has their membership application rejected to request a members' meeting to have it reconsidered— albeit two with qualification. Eleven submissions did not support this proposal including but not limited to: six submissions suggesting that corporations' rule books should outline a process for membership application outcome reviews; one submission suggesting a membership application review should be referred to the Registrar; another one saying it should be referred to ORIC and/or the NNTT; and one submission suggesting disputes should be settled through mediation or court action. A further two submissions highlighted the risks with introducing such a proposal but did not clearly express a position.


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- 4.40 The same submission referred to in paragraph 4.38 also proposed that where a member wishes to challenge the acceptance of a person's membership, the existing rules regarding the requisitioning of a member's meeting should apply. Similarly, the submission proposed that the challenge should be required within a nominated timeframe and should be considered by a specified quorum of members.
- 4.41 Eight submissions did not support the proposal to allow a member who intended to challenge the acceptance of a membership application to call a members' meeting, with six of those submissions indicating that a review process should be outlined in corporations' rule books. Only one submission provided qualified support for this proposal.
- 4.42 Participants in the consultation sessions were mostly opposed to these proposals as it conferred a member's right on the membership applicant even though they are not a member. Participants also advised that some corporations would incur significant costs to hold a meeting to have the application decision reconsidered. It was suggested that membership applications could instead be reconsidered at Annual General Meetings.
- 4.43 Fifty-eight per cent of the 19 survey respondents agreed with allowing an applicant who had their membership application rejected to call a members' meeting. When asked what they thought an alternative mechanism could be to have a rejected application reconsidered, those who did not agree with the proposal suggested the applicant make a written submission or be able to appeal to directors or ORIC, and corporations have in place clear eligibility policies so the decision can be seen to be procedurally fair. We did not ask a question in the survey about enabling an existing member to challenge a decision to accept a membership application.
- 4.44 We agree with the suggestion that corporations should have a membership determination review process which is decided by the corporation and outlined in its rule book.

Recommendation 16

It is recommended the CATSI Act require corporations to outline a dispute resolution process to deal with membership applications in their rule books.

Membership cancellation

- 4.45 In specific circumstances, corporations can cancel memberships including when a member is uncontactable. Subsection 150-25(3) allows corporations to cancel a membership on the grounds that a member is uncontactable, if the corporation has:
- been unable to contact the member for a period of two years at their address recorded on the corporation's register of members; and
 - made two or more reasonable attempts to contact the member during that two year period.
- 4.46 Feedback received during the consultation process in 2018 for the previously proposed amendments to the CATSI Act included:
- both support for and against the reduction of the non-contactable period for the purposes of cancelling memberships from two years to 12 or fewer months; and
 - a variety of ideas about the appropriate form of attempted contact and the number of attempts that should be made before membership is cancelled.
- 4.47 We asked in the Draft Report how it would work in practice if the non-contactable period for cancelling memberships was reduced from two years, including the:
- length of an appropriate non-contactable period, for example, would the 11 months recommended by the Technical Review be appropriate; and
 - number of attempts that should be made to contact an uncontactable member, how long there should be between each attempt and the acceptable form of attempted contact.
- 4.48 Fifty-three per cent of the 19 survey respondents agreed that the two-year period for determining that a member was non-contactable should be shortened. Five respondents suggested that it should be reduced to one year,



one suggested that it should be six months and another suggested that it should be two weeks. Those who did not agree with the proposal were asked why they didn't think the two-year period should be reduced and responded that: two-years was appropriate; membership should not be cancelled due to whether a member can be contacted and should instead be based on a decision by other members; corporations may take advantage of the reduced timeframe; and there may not be sufficient opportunity, either through communication or meetings, for a member to reengage within a 12 month period.

- 4.49 Within the consultation sessions there was a lot of discussion and varied opinions on this issue. Some participants noted that corporations incur unnecessary costs in sending information to members who may be disengaged and/or for whom the corporation does not have up-to-date contact details. It was also put forward that over the course of a year a corporation would make multiple attempts to contact a member by way of meeting notices and disseminating other information so 12 months was an appropriate period of time. Some participants advised that this was not an issue for their corporations which have geographic eligibility requirements and if a member moves outside of a specified radius, their membership is automatically cancelled. Other participants considered that two years was an appropriate period and should not be changed.
- 4.50 Six of the written submissions did not agree with reducing the two year non-contactable period—although two of the six suggested that 18 months may also be an appropriate period. One submission did not indicate a preference for a timeframe but suggested that it should be a replaceable rule. This was consistent with some other submissions that suggested that the non-contactable period as well as the number of contact attempts should be matters for corporations to decide and set out in their rule books. A further three submissions supported a shorter non-contactable period of 11 or 12 months.
- 4.51 Due to the level of support to retain the two year period and limited support to change the number of contact attempts, we see merit in retaining the wording of the provision. However, we also think that it is important for corporations to be able to decide the most appropriate approach for their circumstances which should be outlined in their rule books.

Recommendation 17


It is recommended the provision in the CATSI Act in relation to cancelling memberships based on contact with members and number of contact attempts be a replaceable rule.

Corporate structures

- 4.52 Providing CATSI corporations with greater flexibility in designing their corporate structures can generate more options for social, economic and community development. Making it easier for CATSI corporations to establish subsidiaries or enter into joint ventures will in turn expand business opportunities for Indigenous communities.

Subsidiaries and joint ventures

- 4.53 Establishing wholly-owned subsidiaries is difficult under the CATSI Act as the majority of a corporation's directors must also be members of a corporation under subsection 246-5(3), and while members can be individuals or bodies corporate, directors must be individuals (i.e. natural persons). Consequently, a CATSI corporation could not be established as a subsidiary with only one corporate member unless a class of members is established for individuals who can be directors. A way around this is for CATSI corporations to establish subsidiaries by ensuring the majority of directors are members of the subsidiary for the term of their directorship, and the sole corporate member is the only member with voting rights. While effective, this solution imposes unnecessary administrative burden on corporations.
- 4.54 Amending the CATSI Act to change the current membership and directorship provisions for corporations with corporate members to make it easier for CATSI corporations to establish subsidiaries and joint ventures would



assist with growing Aboriginal and Torres Strait Islander businesses and ensure that corporation structures are fit-for-purpose. The CATSI Act could be changed to make it easier for a:


- corporation to establish a wholly-owned subsidiary CATSI corporation; and
 - group of entities to establish a CATSI corporation, similar to a joint venture where the majority Indigenous membership requirement (the 'Indigeneity requirement') is met by the parent entity or group of entities.
- 4.55 This proposed amendment is consistent with the Technical Review which recommended allowing an entity or group of entities to establish a CATSI corporation as a subsidiary or joint venture entity if the entity or group can satisfy the Indigeneity requirement in section 29-5 of the CATSI Act. There was general support among submissions to the Technical Review for this recommendation, including one submission which stated, *'The Act should be amended to allow CATSI corporations to be wholly owned subsidiaries from another CATSI corporation. The existing requirement to have a majority of personal members is complex, confusing, unnecessary and costly.'*
- 4.56 Of the 19 survey respondents, 79 per cent agreed that it should be easier under the CATSI Act to establish joint ventures and wholly-owned subsidiaries. Respondents who did not agree suggested the proposal would result in too much influence from non-Indigenous sources and insufficient transparency for common law holders and members. We should note here that Recommendation 20 of this report aims to provide greater transparency to members and common law holders in relation to complex corporate structures.
- 4.57 During the consultation sessions there was general support for this proposal as participants saw value in CATSI corporations having greater flexibility of corporate structures which in-turn is expected to assist with the realisation of economic opportunities. Similar to the survey respondents above, some participants did raise concern about the opportunity for 'black-cladding' and CATSI corporations to be taken advantage of in a joint venture arrangement with a non-Indigenous entity.
- 4.58 Among the 15 written submissions that commented on this proposal, there was unanimous support noting: two indicated they were supportive and would like more detail on the proposal; one was supportive and suggested corporations should include a rule in their rule books if they do not want to establish a subsidiary as part of their structure; and two were supportive and suggested the provision in the CATSI Act that the majority of directors must also be members should be removed altogether.
- 4.59 As discussed in Chapter 2, the requirement that the majority of directors are members is a provision that sets the CATSI Act apart from other incorporation statutes and is aimed at ensuring decisions taken by the board are in the interests of members. Through both phases of the consultation there has been strong feedback that the unique provisions of the CATSI Act need to be strengthened as opposed to limited. We are therefore not inclined to recommend the removal of the provision that the majority of directors are members, where members are natural persons. We also note that Recommendation 40 will make it easier for CATSI corporations to appoint independent directors by removing the need for the corporation's rule book to allow for the appointment.

Recommendation 18

It is recommended the membership and directorship provisions in the CATSI Act be changed to make it easier for corporations to establish subsidiaries and joint ventures.

Two-member corporations

- 4.60 Two-member corporations can also be challenging to establish under the CATSI Act. While subsection 29-5(b) allows for the registration of two-member corporations where at least one member is an Aboriginal or Torres Strait Islander person, subsection 246-5(1) requires that the majority of a corporation's directors be Aboriginal or Torres Strait Islander persons. In the event that two people intend to establish a CATSI corporation, one of whom is an Aboriginal or Torres Strait Islander person and the second of whom is non-Indigenous, a third Aboriginal or Torres Strait Islander person would need to act as a director.

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- 4.61 The Technical Review recommended removing the requirement in subsection 246-5(1) that a majority of directors be Aboriginal and Torres Strait Islander persons in circumstances where a CATSI corporation is established with two members, one of whom is an Aboriginal and Torres Strait Islander person and that person has a casting (deciding) vote. Making it easier for two people to establish a corporation, where only one of whom is an Aboriginal or Torres Strait Islander person, will encourage small business and entrepreneurship, particularly in the case of spouses. In the Draft Report we suggested that there would be merit in adopting this recommendation of the Technical Review.
- 4.62 Sixty-three per cent of the 19 survey respondents did not agree with this proposal and provided reasons such as the proposal does not support self-determination, provides too much influence to the Indigenous director, the structure has the potential to be abused and a two-member corporation is not relevant under the CATSI Act.

- 4.63 There was support among the three written submissions that specifically commented on this proposal. The ABL submission commented:

We also agree there is merit in removing the requirement that a majority of directors be Aboriginal and Torres Strait Islander persons in circumstances where a CATSI Corporations [sic] is established with two members and instead ensuring Aboriginal and Torres Strait Islander control through provision of a casting vote to the Aboriginal and Torres Strait Islander director. As a useful illustrative guide, a company that is 50% Aboriginal and/or Torres Strait Islander owned is eligible for Supply Nation registration but not certification.

- 4.64 There was general support for this proposal in the consultation sessions although similar concerns were raised in these sessions around the potential for abuse in such an arrangement and also whether it was appropriate to support such a structure under the CATSI Act which is specifically designed to benefit Aboriginal and Torres Strait Islander people.
- 4.65 We are inclined to support this proposal noting it provides greater flexibility for structures that can be established under the CATSI Act which in turn can support the realisation of economic opportunities by Aboriginal and Torres Strait Islander people.

Recommendation 19

It is recommended the CATSI Act be changed to allow for the incorporation of two-member corporations where only one member is Indigenous as long as that member has the deciding vote.

Complex structures

- 4.66 In some circumstances, corporations establish very complex corporate structures—usually native title entities. These complex structures may develop for a range of reasons including the establishment of separate entities to manage native title rights and interests, to reduce tax and manage risk, or simply due to poor advice from advisers. Complex corporate structures can be costly to establish and maintain, and can limit transparency to members and common law holders in relation to the receipt and use of native title benefits. While consideration needs to be given to supporting more flexible corporate structures, there is also a need to provide transparency of these structures. The CATSI Act could be amended to provide members with improved visibility of corporate structures by requiring corporations to include in their annual report to the Registrar:
- information about their corporate structure, for example, where the CATSI corporation has associated subsidiaries and/or trusts; and
 - the names of the key management personnel such as the Chief Executive Officer (CEO), Chief Operating Officer (COO) and Chief Financial Officer (CFO) of entities within that structure.
- 4.67 This issue is also explored more in Chapters 5 and 7.
- 4.68 There was support for this proposal from participants in the consultation sessions. Further, 89 per cent of the 19 survey respondents agreed with this proposal. Both survey respondents who did not support the proposal raised concerns in relation to privacy. There was unanimous support among the four written submissions that commented on the proposal noting one submission recommended directors should provide this information to members as part of their general accountability and did not specifically comment on reporting to the Registrar.

Recommendation 20

It is recommended CATSI corporations be required to include in their annual reports to the Registrar details of their:

- corporate structure, including any subsidiaries or trusts; and
- key management personnel within that structure.



Support for particular types of structures

- 4.69 One response to the NIAA's first phase online survey suggested that a question for the Review should be whether the CATSI Act could better support profit-driven entities. The response went on to suggest that the CATSI Act does not seem to align with the policy of Supply Nation certification and specifically identified the Indigeneity requirement, profit distribution and clarity of ownership through shareholdings as areas where there is a lack of alignment. We asked in the Draft Report whether the CATSI Act could better support profit-driven entities and if so, what that support might look like.
- 4.70 Of the 19 survey respondents, 68 per cent agreed that the CATSI Act could better support for-profit entities. One survey respondent indicated that improving support to for-profit entities would assist CATSI corporations to become self-sustainable in lieu of Government funding. Respondents suggested that support could include increased education and training, less red tape and fewer governance requirements. Two survey respondents who did not agree with the survey question indicated that it was not the role of the Registrar to provide increased support to for-profit entities.
- 4.71 In the consultation sessions, there were few suggestions in response to this question.
- 4.72 The WAC submission recommended that CATSI corporations should be able to issue shares and debentures. The PCCC PBC submission put forward that the CATSI Act is not suited to for-profit entities because:
- *of its focus on the Community Controlled Essential Services Justification for the CATSI Act;*
 - *[of] the fact that it treats CATSI Corporations akin to publicly funded companies and the public interest justification has been used to put stricter regulations around them;*
 - *[of the] lack of flexibility around designing the board and other decision-making structures that are suited to privately owned and for profit corporations;*
 - *there is no means of raising capital e.g. through issues of shares, that can be used to support growth.*
- 4.73 The PCCC PBC submission is correct in that the CATSI Act is designed to support community based organisations which reflects its history and that of the ACA Act. Consequently, and as already discussed in Chapter 2, the CATSI Act includes provisions that provide a minimum standard of governance and that aim to provide transparency to members. Through the consultation phases, there was strong support for enhancing transparency provisions in relation to corporate structures and other types of provisions.
- 4.74 However, similar to the concerns of the PCCC PBC submission outlined in paragraph 4.72, we have also heard that increased transparency provisions under the CATSI Act can also mean that commercial CATSI corporations have information in the public domain that can put them at a disadvantage compared with other commercial entities.
- 4.75 The ABL submission recommended including a provision in the CATSI Act for a model rule book relating to for-profit entities and increasing the information available on ORIC's website about incorporating as a for-profit entity. These suggestions do not require legislative change and have been referred to ORIC for its consideration.
- 4.76 Dr Marina Nehme's submission suggested:
- The legislation may promote for-profit entities by creating a new class of corporations with a different less prescriptive set of rules. For instance, special administration may not be appropriate in those setting [sic], but a form of voluntary administration would be. More replaceable rules may be desired (currently this number is very small compared to the ones under the Corporations Act 2001 (Cth)). The Registrar should have less ground for intervention in the affairs of the corporation. The Registrar's role should be mainly limited to building capacity of these organisations and holding directors and their organisation accountable when appropriate.*
- 4.77 This suggestion was supported by the Law Council which said in its submission:
- Further, to the extent that CATSI Act entities are intended to be able to reflect traditional decision-making structures, as many groups prefer in relation to native title corporations or in self-governance bodies, the*

move towards greater consistency with the Corporations Act 2001 (Cth) is not likely to be consistent with that outcome. This dilemma begs the question as to whether in order to truly meet the special measure characteristics, further work needs to be done on accommodating the specifically Indigenous needs for hybrids of the type referred to by Marina Nehme

- 4.78 There may be merit in exploring the recommendation put forward in paragraph 4.76 to establish a special class of corporation under the CATSI Act. This would require analysis in relation to:
- provisions of the CATSI Act that should not apply to this class of corporation;
 - new provisions that would need to be added to the CATSI Act to support this class of corporation; and
 - capacity building and other types of support that would be required from the Registrar and ORIC for this class of corporation.
- 4.79 We would then recommend exploring the results of this analysis through public consultation, including with relevant Government entities, to test its relevance and accuracy. It would also be worthwhile to test the appetite among Aboriginal and Torres Strait Islander people as to their interest in establishing a corporation under this class.
- 4.80 Further, resourcing implications for the Registrar and ORIC would need to be considered—which is outside the scope of this Review. However, a separate class of corporations which could issue shares and debentures and with different reporting and other requirements would require a different regulatory response from ORIC. There would also be additional resourcing implications associated with specific capacity building and other support to these corporations.
- 4.81 A final consideration would need to be whether the expected benefit of introducing such a class of corporation under the CATSI Act and the additional resourcing required to support it, sufficiently outweighs the option currently available to Aboriginal and Torres Strait Islander people which is to incorporate under the Corporations Act, including as a subsidiary to an existing CATSI corporation.
- 4.82 The analysis, consultation and final consideration required would need to be undertaken as a subsequent targeted review to this comprehensive Review.

Recommendation 21

It is recommended a subsequent targeted review be undertaken to consider establishing a special class of CATSI corporation in relation to for-profit entities.

- 4.83 It has also been noted that ORIC is registering an increasing number of single member corporations and we asked whether the CATSI Act can be enhanced to help these types of corporations develop and grow.
- 4.84 In one of the consultation sessions, it was put to us that it could be easier to establish one-member corporations under the CATSI Act and also, that these types of corporations should not be subject to requirements such as to hold an Annual General Meeting.
- 4.85 The CATSI Act includes some provisions specifically aimed at one-member corporations, including subsection 201-150(4) which exempts one-member corporations from having to hold an Annual General Meeting. There is also section 204-5 that outlines the requirements for passing resolutions in a one-member corporation and subsection 243-1(1) that specifies that one-member corporations must have at least one director.
- 4.86 None of the written submissions provided feedback on this issue. Sixty-eight per cent of survey respondents agreed that the CATSI Act could be improved to better support single member corporations. The three suggestions of how the CATSI Act could be improved were all around increased support for sole-traders which relates more to capacity building and policy than legislative change. We have referred this to ORIC for consideration.

Size classification

- 4.87 Under the CATSI Act, a corporation is classified as small, medium or large based on whether it meets thresholds for any two of three criteria relating to income, assets and number of employees. A corporation's size determines aspects of its governance requirements under the CATSI Act such as the nature of contact details they are required to provide to the Registrar, and how information held by the corporation should be stored and made available to members. However, a corporation's reporting requirements is based on its size and income—also a determinant of size. This can result in a situation where a corporation is categorised as small according to asset and staffing criteria thresholds, but then have more reporting obligations due to its income level. Not only is this confusing, but with so many factors to take account of, it can be difficult for corporations to self-assess in preparing for reporting.
- 4.88 The Technical Review noted that the size classification requirements outlined in the CATSI Act do not adequately address the differences between the types of, and activities undertaken by, CATSI corporations. For example, a small, passive land holding body may be subject to the same reporting requirements as a small CATSI corporation with income and employees.
- 4.89 When consulting on proposed amendments to the CATSI Act in 2018, ORIC sought views on aligning the CATSI Act size classification framework with that of the ACNC, under which around 30 per cent of CATSI corporations are registered. This proposal would change the size classification test to be based on revenue only and align the revenue thresholds used to determine size with the ACNC classifications. Table 4.1 outlines the current thresholds noting that a 2018 review of the ACNC legislation⁴⁰ recommended further increasing the ACNC revenue thresholds.⁴¹

Table 4.1: Income and revenue thresholds to determine corporation size

Current income thresholds ¹		Proposed revenue thresholds ²	
Small	Less than \$100,000	Small	Less than \$250,000
Medium	Between \$100,000 and \$5 million	Medium	\$250,000 or more and less than \$1 million
Large	\$5 million or more	Large	\$1 million or more

Note 1: Income is one of three criteria used to determine size classification under the CATSI Act; corporations' sizes are determined when they meet the thresholds for two of three criteria. The other criteria are the value of the corporation's assets and the number of its employees.

Note 2: The proposed thresholds as based on the revenue thresholds to determine entity size as specified in the ACNC Act as at 16 June 2020.

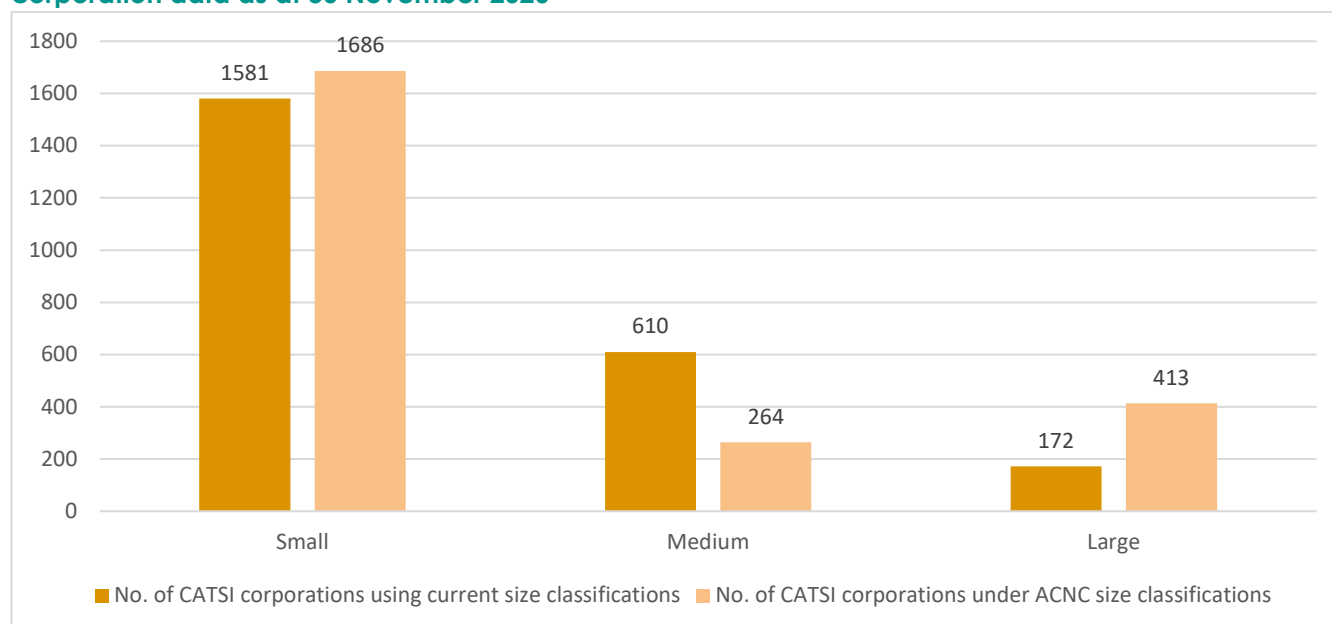
Source: CATSI Regulation 37-10.01 and ACNC Act section 205-25.

- 4.90 Implementation of this size classification change in line with the ACNC's current framework would result in another 118 corporations being classified as small, 368 fewer corporations being classified as medium and a further 250 corporations being classified as large as illustrated in Figure 4.1.

⁴⁰ Patrick McClure AO, Greg Hammond OAM, Su McCluskey, Dr. Matthew Turner, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission, Legislation Review 2018*, The Treasury, 2018, available from <<https://treasury.gov.au/publication/p2018-t318031>> [accessed 13 February 2020].

⁴¹ A 2018 review of the ACNC legislation recommended further increasing the ACNC revenue thresholds. Although it supported the recommendation, in its response, the Government outlined a program of broad consultation to ascertain the appropriate thresholds before proceeding with legislative change. Alignment of the two regulatory regimes is expected to benefit those corporations subject to both regimes and as such, it would be proposed to change the thresholds for CATSI corporations in line with the revised thresholds introduced by the ACNC.

Figure 4.1: Changes to the number of CATSI corporations under ACNC size classification based on ORIC corporation data as at 30 November 2020



Note: The corporations included in the figure above are those corporations that have lodged income information for 2018–19 and 2019–20. For corporations that have lodged income information for both financial years, their 2019–20 income figure has been used for this analysis. Corporations not included in the table above are those that have not lodged 2018–19 or 2019–20 reports with ORIC or were not required to report.

Source: ORIC data.

- 4.91 There was varying support among submissions made to both the Technical Review and to the Senate Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendments (Strengthening Governance and Transparency) Bill 2018 for changes to size classifications. One submission to the Technical Review outlined a preference to see alignment between regulatory frameworks, for example, in relation to size classifications, *‘We support the alignment of duties and responsibilities with the standards developed by the ACNC in relation to Corporations that are registered charities.’*
- 4.92 In contrast, another submission to the Senate Inquiry noted the ACNC size and reporting classification framework is the same as that for companies limited by guarantee registered under the Corporations Act. The submission suggested that aligning CATSI corporations with companies limited by guarantee was inappropriate as the latter are usually established for public or community purposes which is not always the case for CATSI corporations.
- 4.93 While it is true that not all CATSI corporations are established for public or community purposes, it should be noted that the vast majority are. As outlined at paragraph 4.73 this is because of the history of the CATSI Act and the ACA Act. Companies limited by guarantee are the class of companies under the Corporations Act that are generally considered to be most like CATSI corporations.
- 4.94 We asked whether people thought the CATSI size classification should be changed to that of the ACNC. Overall, we received mixed support. In the consultation sessions, participants could see the benefit to registered charities that are also CATSI corporations with aligning the two frameworks. However, they did not think that revenue as the only determinant of size accurately reflected the nature or risk of corporations with significant asset holdings such as land holding and housing corporations. Similarly, number of employees was considered to be an important consideration of size by the Stakeholder Reference Group.
- 4.95 Of the written submissions:
- one submission recommended retaining the current CATSI Act size classification framework and considering the addition of further criteria such as geographic area for service coverage;



- six supported aligning with the ACNC size classification framework;
 - three supported aligning with the ACNC size classification framework but adding a fourth type of corporation to reflect corporations with no employees and no income (this is discussed further in paragraphs 4.150 to 4.157);
 - two supported aligning with the ACNC framework but changing the threshold amounts for medium and/or large corporations;
 - one partly supported aligning with the ACNC framework but considered that more consultation was required;
 - one partly supported aligning with the ACNC framework but thought that there should be two frameworks with one specifically relating to for-profit corporations;
 - one recommended aligning with Proprietary Limited companies under the Corporations Act; and
 - one did not indicate a preference for a particular framework but suggested that whatever the framework, it should consider the capacity of a corporation's staff to meet its reporting obligations. This submission was also supportive of adding a fourth type of corporation to reflect corporations with no employees and no income (this is discussed further in paragraphs 4.150 to 4.157).
- 4.96 While aligning the two size classification frameworks would ease the administrative burden on corporations, it has also been suggested that a new CATSI Act framework could be introduced with only two sizes: small and large. In the Draft Report we asked what people thought about a two size classification framework and if they supported the idea, what the criteria and associated threshold(s) could be for determining whether a corporation is small or large.
- 4.97 The Kimberley Land Council (KLC) and Northern Territory Government Office of Aboriginal Affairs indicated support for a two tier model and had also indicated partial support for aligning with the ACNC framework. PCCC PBC did not support the two-tier model noting that it would only serve to confuse the reporting process.
- 4.98 In the survey we asked people whether they thought the three sizes should be retained with a simplified test or they thought there should be only two sizes: small and large. Sixty-eight per cent of survey respondents agreed with the question with 10 respondents indicating a preference for a three-tier model and six respondents preferring a two-tier model. One respondent suggested moving to a five-tier model.
- 4.99 Two of the responses suggested that three tiers should be retained because there is a significant shift in obligations between small and large corporations. This was also raised in the consultation sessions where participants considered that there was value in having a medium tier to enable corporations to gradually build their capacity before being subject to the obligations associated with a large corporation. Overall there was very limited support for a two-tier model in the consultation sessions.
- 4.100 We understand that while not all CATSI corporations are registered charities, alignment of the size classification framework will make it easier for the one-third of CATSI corporations that are also regulated by the ACNC. Under Division 336 of the CATSI Act, the Registrar can increase reporting requirements for corporations. We are inclined to recommend alignment with the ACNC model, noting that the Registrar can increase reporting requirements for corporations that have significant assets and/or employ a large number of staff.

Recommendation 22

It is recommended the CATSI size classification framework be aligned with that of the *Australian Charities and Not-for-profits Commission Act 2012* size classification framework.

Meetings

- 4.101 Under the CATSI Act, corporations have meeting obligations and can change some aspects of meeting rules to suit their specific needs. An AGM is held once a year to allow directors to keep members informed of the work of the

corporation over the last 12 months. Corporations can also hold general meetings throughout the year for a range of reasons including if directors want to seek the views of members on a major plan or project or if members would like to discuss an issue(s).

Annual General Meetings

4.102 All corporations are required to hold an AGM within five months of the end of their financial year unless the Registrar has approved an extension or exemption. Corporations must apply for an extension by completing and lodging a form with the Registrar. As illustrated in Table 4.2, on average, around nine per cent of corporations apply for an extension each year, most for less than 30 days and all for reasons of a death in the community, natural disaster, cultural activity, a delay in the audit or awaiting another event.⁴²

Table 4.2: Number of CATSI corporations that requested a time extension for holding their Annual General Meeting

	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20
Number of CATSI corporations requesting an extension	153	123	181	258	270	341

Source: ORIC data.

4.103 The Technical Review recommended amending the CATSI Act to:

- enable small CATSI corporations to pass a special resolution to not have an AGM for up to three years provided that the directors do not vote on that resolution and the corporation is required to advise the Registrar if there is any material change to its circumstances; and
- provide the Registrar with the power to require directors to hold a general meeting where it is reasonable to do so. Examples of this might include when members have made a significant number of complaints or when members have not been provided with an opportunity to ask questions of the Board and the Board has not been able to include answers to these questions in the corporation's annual reporting.

4.104 There were varying levels of support for changes to meeting requirements among submissions to the Technical Review as reflected in the comments below,


... 'does not necessarily support members of medium and large corporations having the power to pass a resolution not to have an AGM for up to three years.'

'The coordination and compliance requirements for meetings under the Corporations Act 2001 and the CATSI Act may be burdensome particularly for CATSI corporations that are small or lacking resources and capacity (as is the case with many native title corporations) to meet their obligations to members, often across vast geographical areas.'

4.105 In the Draft Report, we suggested amendments to the CATSI Act to provide flexibility to corporations that would struggle to meet their meeting obligations when faced with an uncommon event by allowing corporations to access an automatic 30-day time extension to hold a particular AGM where the corporation:

- notifies the Registrar before the period to hold the AGM has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and
- has not notified the Registrar of an extension of time more than three years in a row.

⁴² Recently, a number of corporations have also requested exemptions due to COVID-19 related matters as shown by the increase in requests for extensions in 2019–20 in Table 4.2.

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- 4.106 Eighty-four per cent of the 19 survey respondents agreed with corporations being able to access the automatic 30 day time extension. It was suggested by those survey respondents who did not agree, that such a provision would result in a delay in information being provided to members and also that corporations already had sufficient time within which to hold an AGM.
- 4.107 There was extensive support for this proposal among the participants in the consultation sessions. Although some participants did not agree with the proposed limit to preventing CATSI corporations from accessing an extension for more than three years in a row. Instead, it was suggested that corporations should be able to access the extension when required and without limit. It should be noted here that if such a provision was introduced under the CATSI Act and a corporation accessed the automatic 30 day time extension for three years in a row, the corporation could still apply to the Registrar to delay its AGM in the fourth year if faced with extenuating circumstances.
- 4.108 Ten of the written submissions were supportive of this proposal as were five others but with a variation to what was being suggested including that: the corporation should be able to adapt to circumstances as they arise without limitations prescribed by the CATSI Act including there be no three-year limit; corporations can decide when they hold the delayed AGM within a maximum period set by the Registrar; it should be 60 days rather than 30 days; natural disaster should not be a reason for extension; and corporations should have to apply with an explanation for the extension.⁴³

Recommendation 23

It is recommended a CATSI corporation be able to access an automatic 30-day time extension to hold an Annual General Meeting where it notifies the Registrar before the period to hold the Annual General Meeting has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and it has not notified the Registrar of an extension of time more than three years in a row.

- 4.109 We also asked what people thought about the Technical Review recommendation that small corporations be allowed to pass a special resolution to not hold their AGM for up to three years after their most recent AGM; provided that directors do not vote on that resolution unless all members are also directors, and the corporation advises the Registrar if there is any material change in its circumstances (refer paragraph 4.103).
- 4.110 Fifty-three per cent of survey respondents did not agree with this proposal. Many of the survey respondents indicated that an AGM was a critical mechanism to ensure accountability and provide information to members. One respondent suggested the absence of an AGM would enable unscrupulous directors to take advantage of a corporation.
- 4.111 During the consultation sessions, participants were generally not supportive of this measure but became more encouraging when we discussed that this proposal is aimed at corporations that may not be generating large amounts of revenue or income and may simply be land holding corporations, but are incurring significant costs each year to hold an AGM.
- 4.112 Four written submissions did not support this proposal and eight did with one recommending that it should be a replaceable rule and another suggesting that it should be two years instead of three years. Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation (GBK) highlighted the need for the provision stating:

We support the recommendation that small corporations can pass a resolution to postpone their AGM up to three years for those corporations that have little money or activity to report. Many of our PBCs which hold native title over uninhabited islands have sought exemptions to allow them holding AGMs every second year. This has worked well as it has been able to reduce the burden on these PBCs who receive very little support and resources to function.

⁴³ Corporations can currently apply to the Registrar for an extension to hold their AGM.



4.113 We are inclined to support this proposal for small corporations that generate little or no income or revenue from their operations. However, we agree that three years is probably too long and consider that two years would be more appropriate.



Recommendation 24

It is recommended the CATSI Act allow small corporations that generate little or no income from their operations to pass a resolution to not hold an Annual General Meeting for up to two years.


General meetings

- 4.114 In the Draft Report, we asked whether directors should be able to issue an updated notice of meeting—after one has already been issued—within 30 days of the original meeting date in the case of death, natural disaster and certain cultural activities in community, which may change one or all of the following: date; time; and place of the meeting.
- 4.115 Sixty-three per cent of the 19 survey respondents agreed with this proposal. Those who did not agree raised a number of concerns including that it could, and has in some of their experience, led to confusion among members and that it could, and has in some of their experience, been used inappropriately by directors, including to exclude certain members from meetings.
- 4.116 There was strong support for this proposal in the consultation sessions with many participants indicating that such flexibility would have been welcomed by them in the past when dealing with an unexpected event in community which has made it difficult to hold a scheduled meeting.
- 4.117 Nine of the written submissions supported this proposal with one suggesting that one week was a sufficient length of time within which the meeting should be rescheduled rather than 30 days. No written submissions objected to this proposal.

Recommendation 25

It is recommended the CATSI Act be amended to allow directors to issue an updated notice of meeting—after one has already been issued—that would defer the meeting for up to 30 days of the original meeting date in the case of death, natural disaster and certain cultural activities in community, which may change one or all of the following: date; time; and place of the meeting.


- 4.118 Another proposal in the Draft Report was whether the CATSI Act should be amended to enable the Registrar to cancel meetings after they have been called. Currently, corporations are unable to do so without a court order once a meeting has been called, unless this provision is specified in a corporation's rule book.
- 4.119 Some participants in the consultation sessions shared their personal experiences and the difficulty they had in the past with not being able to cancel meetings despite there being good reason. Some participants were concerned about the Registrar having increased power in this regard. However, they were generally more comfortable when we explained how this power was aimed at assisting corporations.
- 4.120 Fifty-three per cent of survey respondents supported this proposal. Similar to the participants in the consultation sessions, many of the survey respondents questioned why the Registrar should have the power to cancel a meeting with some suggesting that it would be an interference in the corporation's affairs.
- 4.121 Of the written submissions, six supported this proposal and one said that it should be the corporation that cancels a meeting after it has been called. To clarify, corporations can cancel a meeting after one has been called if there is a provision in its rule book. The issue this proposal is trying to address is where such a provision is not included in a corporation's rule book and it would like to, or needs to, cancel a meeting. This proposal is aimed at helping the corporation avoid the cost and effort associated with obtaining a court order to cancel the meeting as well as any delays to advising members and other stakeholders of the cancellation.
- 4.122 It was also proposed in one response to the first phase survey that the CATSI Act requires greater clarification in relation to the conduct and cancellation of general meetings; in particular, where it may be reasonable to cancel a general meeting but cancellation would be at short notice, for example, to accommodate sorry business within a



community. We asked whether other stakeholders considered that clarification is required to the general meeting provisions outlined in the CATSI Act.

- 4.123 Among the written submissions there was a suggestion that the CATSI Act should be clarified as to who bears the costs of holding a meeting when one is called by the Registrar and also, who bears the costs if a meeting is cancelled by the Registrar. ORIC would normally bear the costs of a meeting called by the Registrar unless he or she is working with the directors of the corporation to hold the meeting in which case, the costs are likely to be borne by the corporation. If the Registrar was to receive the powers outlined in paragraphs 4.118, the costs of cancelling the meeting are likely to be borne by the corporation, as it is anticipated that this power would be used when the cancellation of a meeting is requested by the corporation.
- 4.124 Two written submissions suggested clarification is necessary for the interaction of section 201-5 of the CATSI Act which requires directors to call a general meeting when a threshold number of members have requested one, and section 439-5 which provides the Registrar with the power to convene meetings. The VACCHO and another submission suggested that clarification is required as to, *‘whether members are expected to first petition the directors for a meeting, or, whether it is intended that members’ can informally request the Registrar to use this power to require directors to hold a meeting.’* The CATSI Act provides discretion to the Registrar in this regard which enables him or her to take a proportionate and relevant response to the circumstances. The Registrar’s considerations when considering calling a meeting are detailed in a policy statement on ORIC’s website, *PS-05 The Registrar’s powers to intervene*.⁴⁴
- 4.125 NNTC’s submission requested further prescription in relation to the cancellation of meetings:
- A subdivision under Division 201 of the CATSI Act to provide for cancellation or postponement of meetings would be useful to accommodate cultural matters, such as sorry business. The wording should allow for localized flexibility but if a timeframe is to be included then it needs to be for 60 days or longer, as the proposed 30-day extension would be insufficient in many circumstances. ORIC could provide a factsheet or supporting documentation that provides guidance on what a reasonable unexpected event may include.*
- 4.126 Marrawah Law also suggested increased guidance from ORIC in this area recommending:
- ...that ORIC holds face-to-face information sessions and workshops and providing factsheets on the reasons for cancelling general meetings and the unforeseeable circumstances that might arise to prevent the general meeting from occurring. Face-to-face meetings are important for Aboriginal and Torres Strait Islander peoples to have oral conversations and be interactive and learn in the meetings.*
- 4.127 We have referred feedback that greater guidance is required in this area to ORIC for consideration.
- 4.128 PCCC PBC recommended incorporating meeting cancellation provisions in alignment with the Corporations Act but ensuring they are culturally relevant. However, the Corporations Act does not include provisions in relation to the cancellation of general meetings. The SANTS submission indicated that a provision in relation to cancelling meetings should be a replaceable rule stating:
- For a number of corporations that we advise, Rulebook changes have been made to enable Directors to cancel meetings under certain circumstances. With respect to inclusion within CATSI, we support such measures being a replaceable rule so that corporations can opt in or out of such a provision and that they can define the appropriate circumstances and any other conditions.*
- 4.129 Thirty-seven per cent of survey respondents agreed that the CATSI Act required clarification in relation to the cancellation and conduct of general meetings. Suggestions for clarifying the CATSI Act included: these provisions need to be simply put; conditions around meeting cancellation should be outlined; and better explanations as to the conduct and cancellation of meetings are required.

⁴⁴ ORIC, *PS-05 The Registrar’s powers to intervene*, ORIC, 2017, available from <<https://www.oric.gov.au/publications/policy-statement/ps-05-registrars-powers-intervene>> [accessed 18 October 2020].

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- 4.130 There was mixed feedback in relation to this question in the consultation sessions with some participants agreeing greater clarification was required and others indicating that the current provisions are sufficient.
- 4.131 We have identified that the absence of provisions in rule books for the cancellation of meetings can be difficult and administratively burdensome for corporations to manage. We consider there is merit in enabling corporations to cancel meetings of their own accord in addition to members and directors being able to approach the Registrar to request a meeting be cancelled. We also agree with the submission recommending cancellation requirements be a replaceable rule so corporations can access the cancellation provisions if required and can also tailor arrangements to suit their individual circumstances.

Recommendation 26

It is recommended the CATSI Act be amended to:

- include a replaceable rule in relation to the cancellation of general meetings; and
- allow the Registrar to cancel a general meeting.


- 4.132 During the COVID-19 pandemic, the Registrar introduced special rules to allow corporations maximum flexibility to hold meetings using any suitable technology, including social media platforms, online platforms, mobile platforms or other applications. These rules also allow corporations to seek relevant members' or directors' endorsement of resolutions so they may continue conducting business when in-person meetings are not feasible. This may include using text, social media or other applications to vote. An electronic record needs to be created and retained as part of the corporation's records, for example, screenshots of text messages or social media. These rules expire in November 2020 and we asked whether these arrangements should be explicitly allowed under the CATSI Act.
- 4.133 There was very strong support among participants in the consultation sessions for seeing these arrangements continue. Participants shared their experiences about how these arrangements have enabled them to meet more frequently, increase attendance at meetings and reduce the costs associated with holding meetings. Also, 95 per cent of the 19 survey respondents and 13 written submissions supported this proposal.

Recommendation 27

It is recommended provisions be incorporated into the CATSI Act that reflect the special rules introduced by the Registrar in response to COVID-19 that have enabled corporations to hold their meetings virtually, particularly voting.

Audit committees

- 4.134 In response to the first phase survey, a suggestion was also made that large corporations should be required to establish audit committees to advise the board of directors on financial matters. This was considered to be a useful provision so the board received independent advice and the committee could help identify where internal governance rules are not being followed. In the Draft Report, we asked for people's thoughts on this suggestion.
- 4.135 Of the 19 survey respondents, 84 per cent agreed that large CATSI corporations should be required to have audit committees. Reasons for not supporting this proposal included the cost to the corporation to convene an audit committee and, the potential for duplication of functions as large corporations are already required to have audited financial statements.
- 4.136 Among the participants in the consultation sessions, there was not strong support for this proposal although participants representing corporations that had various governance committees in place commented on their value.
- 4.137 Seven written submissions did not agree with this proposal, including three submissions that acknowledged the benefit of having such committees but did not consider that an audit committee should be a mandatory requirement and instead put forward that establishing appropriate committee structures should be an increased focus of capacity building efforts by ORIC. Four written submissions were supportive of this proposal.

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- 4.138 While acknowledging that an audit committee could assist with the governance of corporations, we are not inclined to recommend such a provision in the CATSI Act. CATSI corporations can establish an audit committee if they choose. They may also choose to put in place other types of committees such as risk and/or remuneration. We heard from a number of the corporations about the governance arrangements they have established, or are in the process of establishing, and we consider this is a matter for corporations to decide.

Reporting


- 4.139 Depending on their size, corporations are required to prepare specific reports within six months of the end of their financial year, unless granted an extension or exemption from the Registrar. Small corporations are required to prepare a general report while large corporations are required to prepare a general report, financial report, audit report and directors' report. Overall there was a strong theme in the feedback received during the second phase of consultation that reporting requirements should be proportionate to the size of the corporation and scale of its operations but should not compromise accountability and transparency.
- 4.140 Similar to the point made in paragraph 4.105, it can be difficult for corporations to meet reporting timeframes when faced with circumstances such as a natural disaster or death in a community. We proposed the idea of allowing corporations to activate a 30-day time extension to lodge report(s) with the Registrar in the case of death, natural disaster and certain cultural activities in community, where they have not notified the Registrar of an extension of time more than three years in a row.
- 4.141 There was some support for such an amendment expressed in submissions to the Technical Review, including one that stated:
- The Registrar would benefit from increased powers to extend the date for lodgement of financial reports given that medium and large CATSI corporations face delays in lodgement of financial reports by 31 December for reasons often beyond their control: such as death of members of the community, natural disasters and for cultural activities or delays with auditors.*
- 4.142 There was strong support among the consultation session participants for this proposal, and 84 per cent of the 19 survey respondents also agreed. Those survey respondents who did not agree suggested that corporations should only be able to access an extension if there is a lack of staff, extreme weather condition or have justified the delay to the Registrar.
- 4.143 Nine written submissions supported this proposal with one indicating that the automatic extension should only be available for cultural reasons—not for weather events, and another suggesting that corporations should have to apply for the extension.⁴⁵ Many CATSI corporations are in remote or very remote locations, and can be subject to extreme weather events which can impact their operations. We think recognising these operational challenges is an important consideration to any proposed changes to the CATSI Act.

Recommendation 28

It is recommended a CATSI corporation be able to access an automatic 30-day time extension to lodge reports where it has notified the Registrar before the period to lodge reports has expired that there is a death in the community, natural disaster, cultural activity or an unavoidable delay in the audit; and it has not notified the Registrar of an extension of time more than three years in a row.

- 4.144 Corporations are currently not required to present reports at AGMs, however, they are required to provide members with copies of any prepared report upon request. When consulting on proposed amendments to the CATSI Act in 2018, ORIC sought views on requiring corporations to lay before the AGM any reports they are required to prepare for that financial year. Such a proposal would provide greater transparency to members of the

⁴⁵ Corporations can currently apply to the Registrar for an extension to submit their reporting.



operations of their corporation. There was also support for this proposal through the consultation process on the Technical Review, including one submission which conveyed, *‘Many members are unaware that some of these reports [annual financial report, directors’ report and auditors’ report] are available through ORIC’s website, or that s.252-2 of the CATSI Act allows members to request remuneration information. The AGM would be the most appropriate means to distribute these reports to increase transparency and accountability.’*


- 4.145 There was strong support for this proposal among the participants in the consultation sessions although there was some concern about corporations having sufficient opportunity to prepare these reports ahead of AGMs.
- 4.146 Eighty-four per cent of the 19 survey respondents supported this proposal. One survey respondent who did not support this proposal suggested corporations should instead promote the right of members to request and access these reports.
- 4.147 Of the written submissions, two supported this proposal with one from a CATSI corporation noting that it already does this. Two further written submissions did not support this proposal with one noting the costs of providing the reports to members as well as the capacity of members to understand the reports.
- 4.148 We see value in members having access to these reports to better understand the operations of their corporation and in the interests of transparency, which has been a strong theme in the feedback we have received. We also note that this proposal will complement other recommendations in this report such as the inclusion of executive and director remuneration in annual reports.
- 4.149 The CATSI Act requires corporations to hold their AGM within five months of the end of their financial year and to submit their annual reports to the Registrar within six months of the end of financial year. Therefore, implementation of this proposal would mean that reports would need to be laid before an AGM one month before they would be required to be submitted to the Registrar. If corporations indicated this was unachievable, further amendments may need to be considered.

Recommendation 29

It is recommended CATSI corporations be required to lay before their Annual General Meeting any reports they have prepared to submit to the Registrar.

- 4.150 A first phase survey response suggested that ‘dormant’ corporations should be subject to different audit and reporting requirements under the CATSI Act. Along the same lines of the argument in relation to holding AGMs, the submission noted the costs associated with preparing financial statements as well as having them audited. We asked for people’s views on this proposal; specifically in relation to whether ‘dormant’ corporations should be subject to reduced reporting and audit requirements under the CATSI Act and if so, what constitutes a ‘dormant corporation’.
- 4.151 During the consultation sessions we had a lot of discussion around what a ‘dormant’ corporation might be in this context. We think this suggestion might have been made in relation to corporations that are passive land holding corporations with no further activities or operations, like those referred to in paragraphs 4.109 to 4.113. Participants were somewhat sceptical about allowing corporations to avoid reporting and other obligations which are seen as important accountability and transparency measures.
- 4.152 We saw a different trend in the survey responses with 89 per cent of the 19 survey respondents agreeing with this proposal.
- 4.153 There was also support for this proposal among some of the written submissions with the CLC submission providing specific detail in relation to what could be considered a ‘dormant corporation’ as well as outlining the proposed reduced reporting requirements. The CLC submission proposed that a fourth corporation type be developed—in addition to small, medium and large—to accommodate such a corporation:

This corporation size is directed to corporations that, in Western terms, might be thought of as ‘dormant’, but in an Aboriginal cultural context are better understood as corporations tasked with the important role of maintaining continuity with the past, particularly in relation to land and culture.



The caretaker corporation size would only apply to corporations with both zero income and zero employees. It is not intended that any corporation with active service delivery functions would fall within this category, but we note that many RNTBCs would meet this definition....

The caretaker corporation would not be required to prepare or lodge reports in any year where an AGM is not required to be held; instead a majority of directors would need to sign a declaration every three years that none of the above circumstances applied to the corporation in the preceding three years.

Implement [sic] this proposal would lift a significant burden of unnecessary compliance for almost one hundred corporations in the CLC's region alone. It would allow these corporations to serve their function of stewarding land for the benefit of Aboriginal people while retaining protections if commercial activity should be proposed to take place on that land in the future.

4.154 The proposal of a 'caretaker' corporation was also supported by AIATSIS and NNTC.

4.155 Another two submissions indicated support for reduced reporting requirements for a 'dormant' corporation, with three other submissions not agreeing with this proposal. In particular, the ACNC noted in its submission:

If an ORIC-registered charity is 'dormant', its ACNC obligations are, technically, unchanged, and its reporting to ORIC should still be an effective substitute for reporting to the ACNC. As the ACNC thresholds are based on revenue, rather than size, dormant charities are almost always small (a dormant charity rarely receives significant revenue). Therefore, they need to submit an Annual Information Statement (AIS), but not a financial report. Completing this AIS should be a relatively straightforward task, especially when the charity has been inactive. As the ACNC still requires this information, we would expect ORIC-registered charities to provide similar information (for example, confirmation of activities, revenue, assets, responsible persons, and contact details for the preceding year).

Therefore, in order to maintain the transitional reporting arrangements, the ACNC would prefer that the CATSI Act continue to require dormant charities to annually submit the sort of information that is requested in an AIS, even if they have been inactive.

4.156 We note the support for this proposal from the native title sector. We further note that it complements another recommendation in this report aimed at allowing these type of corporations to pass a resolution to not hold an AGM for up to two years. We also acknowledge that for the purposes of registered charities, this is not a preferred arrangement.

4.157 The CATSI Act enables the Registrar to set a higher level of reporting requirements for a corporation or group of corporations. It also enables the Registrar to exempt a corporation, group of corporations or the directors of a corporation or group of corporations from reporting requirements under the CATSI Act. This exemption can be subject to conditions and for an indefinite or specific period of time. Therefore, noting the Registrar is an independent statutory office holder who cannot be directed, we do not consider that any further legislative change is required.

Rule books

4.158 All corporations under the CATSI Act are required to have a constitution, which is commonly known as a rule book. Rule books include rules for the internal governance of a corporation, for example, rules relating to its objects, member and director eligibility, meetings, and winding up the corporation.

4.159 Not all of the rules relating to internal governance of a corporation are located in the rule book. Some rules for internal governance are located in the CATSI Act, in particular:

- set rules that apply to all corporations and cannot be changed (unless, in some instances, exempted by the Registrar); and

- ‘replaceable rules’ that apply to corporations unless modified or replaced by a corporation in its rule book.
- 4.160 Other rules that affect a corporation’s internal governance may be a product of common law, such as the rule that a meeting cannot be cancelled once it is called unless the rule book allows for this.
- 4.161 It is fundamental to good governance that the members and directors of a corporation are aware of its internal governance rules. A common problem for CATSI corporations is that replaceable rules that have not been modified or replaced by the rule book continue to operate. This can be confusing and frustrating for members and directors who are unaware of the replaceable rules. It can also have unintended consequences when a corporation is changing its rule book.
- 4.162 To address this problem, we proposed that all replaceable rules be included in rule books whether they have been adopted as they are, or are modified or replaced unless the rules are irrelevant (for example, subsection 158-5(2) if a rule book does not provide for a corporation to have observers, or subsection 201-25(2) if a rule book does not provide for joint members).
- 4.163 Of the 19 survey respondents, 84 per cent agreed with this proposal and a reason put forward from those who didn’t support this proposal was that it could make rule books confusing or unruly. We also heard this concern from some participants in the consultation sessions although generally there was support for requiring the inclusion of replaceable rules in rule books.
- 4.164 Three written submissions did not support this proposal including the PCCC PBC which nevertheless made a number of constructive suggestions if it were to be taken forward, including that the model rule book provide examples of alternative rules and outline circumstances where corporations may consider replacing those rules.
- 4.165 Seven written submissions supported this proposal including the SANTS submission that specifically highlighted the issues that this proposal aims to address stating:


We have experienced corporations being unaware of a particular replaceable rule in the CATSI Act which has not been replaced but also does not appear in the Rulebook. The proposal would assist corporations in complying without always having to refer back to the CATSI Act. It would also help corporations (Directors and members) to understand what rules can be replaced and modified to support more localised governance frameworks.

Recommendation 30

It is recommended the CATSI Act require all replaceable rules, whether replaced or not, to be included in rule books.

- 4.166 Changes made to rule books need to be registered with the Registrar, including changes made by special administrators.⁴⁶ Under subsection 69-30(1) of the CATSI Act, the Registrar is required to decide whether to register a change to a corporation’s rule book, and the Registrar can reject a change to a rule book that is inconsistent with a Registrar-initiated amendment to a corporation’s rule book. The CATSI Act does not include a similar provision allowing the Registrar to reject changes to a rule book that are inconsistent with those made by a special administrator, which we proposed should be allowed under the CATSI Act.
- 4.167 There was mixed support for this proposal in the consultation sessions. Some participants whose corporations had been through special administration did not necessarily agree with the rule changes that had been introduced by the special administrator and so, did not support this proposal. Other participants suggested that the Registrar should only be able to reject inconsistent changes for a specified period of time, for example, the Registrar could reject changes until three years after the conclusion of a special administration.
- 4.168 The Law Council supported this proposal and PCCC PBC did not suggesting that the Registrar should not have the final approval of rule books. Of the 19 survey respondents, 79 per cent agreed with this proposal. Two of the

⁴⁶ The Registrar may appoint a special administrator to a corporation that is experiencing some difficulty with the aim to restore the corporation to good health and return it to the control of members. This process is discussed further in Chapter 9.



reasons provided by those who did not agree included the view that the special administrator does not always make the right changes and changes to the rule book should be the responsibility of the board.



Recommendation 31

It is recommended an explicit provision be included in the CATSI Act to allow the Registrar to reject changes to a rule book that are inconsistent with ones made by a special administrator.

4.169 The majority of responses in the first phase survey indicated that the Review should consider whether rule books could be simplified and made easier to understand. We asked what this may look like in practice.

4.170 Seventy-four per cent of the 19 survey respondents agreed that rule books could be simplified and suggested: using plain English or the local language in rule books; requiring a rule book review every three years; and including an index and contents page.

4.171 One participant in a consultation session suggested that greater prescription in some sections of rule books would be useful recommending that director's duties was a good example of where increased detail would help with simplification.

4.172 Similar to the suggestion above, one suggestion included in Marrawah Law's submission was that rule books should, 'include examples about how the rules will operate and flowcharts of the processes to make it easy for RNTBCs to understand.'

4.173 The PCCC PBC submission suggested that dividing rule books into two sections to simplify them with:

...one that has the substantive provisions that are adopted by members and only change via special resolution of the members, and a second section or schedule that replicates the internal governance rules that cannot be replaced. This section or schedule would not form part of the Rule book per se but would exist within it as a reference schedule for the purposes of drawing the awareness of members and directors to those internal governance requirements.

4.174 Pika Wiya shared how its comprehensive rule book review process has increased the understanding of its members, board and staff outlining:

With the current review of the Rule Book being undertaken by Pika Wiya, the Board and the Working Group that it formed have gained a much greater understanding of the requirements of the CATSI Act as it relates to the operations of the Corporation. They have considered the current Rule Book clause by clause and identified the issues that the members, board and the staff have experienced that could be addressed to enhance confidence in the way it operates and demonstrates good governance. The Rule Book has been completely rewritten and the board has considered the new constitution and the special resolutions on a clause by clause basis. This has been a very valuable exercise and guidance has been provided by a consultant and the Pika Wiya legal advisor. We also sought initial feedback from ORIC of the proposed changes which has been invaluable.

It is difficult for a legal document of this nature being made more easier to read. Perhaps what could be provided is a "guide to reading" the constitution which is made available to members.

4.175 A couple of submissions noted the flexibility already available under the CATSI Act for corporations to develop their own rule books with the Northern Territory Government Office of Aboriginal Affairs noting, 'Under the CATSI Act, corporations have the flexibility to tailor the rulebook to meet the needs of their Aboriginal governance systems while balancing the need for corporate governance. The Review of the CATSI Act should aim to strengthen these rulebook arrangements.' NNTC's submission suggested, 'Simplification or streamlining of rule books is best suited for capacity development by ORIC, not in legislation.'

4.176 Based on the feedback received, we agree that there is not much that can be done through legislative change to simplify rule books. We will refer the suggestions above for consideration by ORIC and note that in Chapter 7 we are recommending the development of a RNTBC-specific rule book.



Further ideas

Streamlining requirements

4.177 One response to the first phase survey suggested that the Review should consider whether there is the opportunity to further streamline the requirements for CATSI corporations that are also registered charities; and the extent to which flexible governance arrangements for charities that are registered companies limited by guarantee under the Corporations Act can be extended to CATSI corporations. In the Draft Report, we asked for people's views on these two questions.

4.178 We did not receive many suggestions through the consultation sessions in response to these questions. The ACNC noted in its submission, the already streamlined arrangements in place for CATSI corporations that are also registered charities:

The ACNC's relationship with ORIC aligns with its objective of promoting the reduction of regulatory obligations for charities. Unlike most other registered charities, ORIC-registered charities do not need to report to the ACNC on an annual basis – they are deemed to have met these requirements if they have complied with their reporting requirements to ORIC....Likewise, if an ORIC-registered charity complies with the directors' duties contained in the CATSI Act, the ACNC will generally presume that the charity is compliant with the governance standards contained in the Australian Charities and Not-for-profits Regulation 2013 (Cth) (ACNC Regulation). Therefore, any changes to the CATSI Act should preserve the position that a corporation's obligations under the CATSI Act will be consistent with a charity's obligations under the ACNC Regulation.

4.179 SANTS indicated support for streamlining arrangements for registered charities stating in its submission:

SANTS supports a consistent reporting approach with registered charities whether they be incorporated under CATSI or other legislation. The arrangement for charities under the Corporations Act should be extended to CATSI corporations with reporting to ACNC. Flexible governance arrangements should also be similarly incorporated.

4.180 This was supported by the Law Council and ABL that both identified, 'A number of provisions of the Corporations Act 2001 (Cth) have been effectively 'switched off' for registered charities by operation of section 111L of the Corporations Act 2001 (Cth). This facilitates the flexible regulation of charities that are companies limited by guarantee through conduct standards rather than inflexible procedural requirements.' The Law Council further noted that, 'This same streamlining has not been achieved for charities regulated under the CATSI Act.'

4.181 Both submissions noted that the Technical Review rejected the idea of similar provisions under the CATSI Act and explained that they did not agree with the reasoning behind this rejection because they felt that the charitable status of those corporations could be put at risk if the CATSI Act were to take a similar approach.

4.182 Email feedback received as part of consultation from Hope Dreaming Indigenous Corporation recommended CATSI corporations, 'provide family and community culturally welfare, social, and support services articulated within their ORIC's Incorporation Rules can become automatically registered, recognised and accepted with the Australian Charities and Not-for profits Commission as a public benevolent institution.' This submission made a second recommendation that, 'each registered Charity and Not-for profit Indigenous Incorporation holds endorsement from the Australian Taxation Office as an income tax exempt charitable entity under relevant Subdivision (for example 50-B) of the Income Tax Assessment Act (1997) (Cth).'

4.183 All of these suggestions need to be considered in detail and in consultation with the ACNC. Similar to the approach for considering a separate class of for-profit corporations under the CATSI Act, we consider a subsequent targeted review would be required to examine these proposals.



Recommendation 32

It is recommended a subsequent targeted review be undertaken to consider further streamlining arrangements for CATSI corporations that are also registered charities.

Proxies

- 4.184 A respondent to the first phase survey suggested that the number of proxies that one member can hold—which is currently three—should be reduced (CATSI Regulation 14). The respondent indicated that three proxies is burdensome on corporations. We asked whether three proxies is too many for one member to hold.
- 4.185 Some participants in the consultation sessions advised that through their rule books they have introduced different arrangements to proxies, including reducing the number of proxies one member can hold as well as removing the ability to appoint a proxy altogether. One participant explained to us that in some circumstances, proxy votes were seen to be limiting transparency and causing disputes among members.
- 4.186 Pika Wiya shared its experience as a corporation in dealing with proxies explaining, *‘The matter of proxies has been a key issue in our rule book review. Currently the rule book for Pika Wiya only enables one proxy member per member. The board has been keen to remove proxies as they consider the ability to manage them to be difficult.’*
- 4.187 Four submissions indicated that as corporations can deal with proxies through their rule books, there is no real need to address it through a change to the CATSI Regulations—although Dr Nehme suggested that it could be a replaceable rule. On the basis of this feedback, we are not inclined to make a recommendation in relation to proxies.

Information paywall

- 4.188 While not canvassed in the Draft Report, some participants in the consultation sessions indicated a preference for CATSI corporation information to be behind a paywall on ORIC’s website like ASIC. However, participants wanted members and directors to retain access to corporation information at no cost.
- 4.189 While ASIC’s paywall process is automated, it is unclear whether an automated process could be introduced for ORIC as members’ and directors’ information access requests would need to be discernible from requests made by others. If requests for information needed to be processed manually, this would be a significant impost for ORIC and have resulting resource implications.
- 4.190 Further, the costs charged by ASIC for access to company information is around \$9 for current information and \$19 for a full history. Our view is that if a similar cost were to be charged by ORIC, it would be unlikely to deter interested parties from accessing this information. It is also worthy to note that ASIC exempts some groups from paying fees, such as journalists, which would also need to be a consideration for ORIC.
- 4.191 Under the CATSI Act, it is already possible for the Registrar to introduce a cost for accessing corporation information. We are not inclined to make a recommendation in relation to a paywall as we do not expect it will deliver the desired benefits; a consideration of which needs to be weighed against the costs of administering such an arrangement.

Conclusion

- 4.192 The CATSI Act provides specifically for the incorporation of Aboriginal and Torres Strait Islander corporations and to that end, suggested amendments outlined in this Chapter aim to take account of the unique circumstances and traditions of Indigenous Australians. This was a strong theme in the responses to the first phase survey. Proposed

amendments also aim to assist CATSI corporations meet their governance obligations as well as to improve the transparency of corporations' operations to members.

Table 4.3: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Part 2-3, section 29-5 and Part 6-2, section 246-5	Two-member corporations where one member is non-Indigenous
Part 2-4, section 37-10 of the CATSI Act and Part 2, section 8 of the CATSI Regulations	Size classification of CATSI corporations
Part 3-2, section 66-5, section 69-25 and section 69-30	Reflecting replaceable rules in a corporation's rule book Lodging and registering changes to rule books
Part 4-2, section 150-25 and Part 5-2, section 201-25	Cancelling memberships and using members' alternative contact details
Part 4-5, section 180-1, section 180-5, section 180-22, section 180-25 and section 180-30	Redaction of personal information from a corporation's register of members
Part 5-2, section 201-5, section 201-10, section 201-20, section 201-150, section 201-155 and section 201-160	Members' request to call general meetings Amount of notice a corporation is required to provide when calling a general meeting Requirement for corporations to hold an AGM within five months of the end of their financial year Extension of time for holding an AGM Business of an AGM
Part 6-2, section 246-5	Requiring directors to be natural persons
Part 10-2, section 439-5	Registrar may convene meetings of interested persons



5. Officers of corporations

- 5.1 Directors, CEOs and other senior executives play a critical role in the management of a corporation. These individuals are responsible for developing and executing the strategy approved by the directors, and ensuring that a corporation is managed properly and its funds are spent appropriately.
- 5.2 Increasingly, there has been a call for greater transparency and accountability of senior executives and directors across the corporate sector, as well as the not-for-profit and public sectors. Recent reviews have recommended greater transparency around remuneration, better measurement and reward for performance, and greater accountability around financial transactions with closely related parties. Similarly, there is an ongoing concern about exploitive behaviour or poor performance on the part of a small number of senior executives who may move from corporation to corporation.
- 5.3 This Chapter considers amendments to the CATSI Act to increase the transparency of executive remuneration and performance, related party transactions, and the appointment and conduct of directors.

Chapter 5 Summary of survey and submission feedback


In addition to feedback in the consultation sessions, feedback on officers of corporations was provided via:

- 21 of the 141 chapter surveys;
- 28 of the 41 written submissions;
- one of the eight email feedback submissions; and
- two of the three web-based feedback submissions.

Executive remuneration

- 5.4 The level of executive remuneration across the corporate sector (both Indigenous and non-Indigenous) is an issue that generates significant discussion and debate in Australia and internationally. The matter of senior executive remuneration including employee benefits, such as bonuses, is a delicate issue that requires striking the right balance between incentivising good performance, attracting quality candidates, and transparency and accountability to members, common law holders and other stakeholders.
- 5.5 There is no requirement for CATSI corporations to report on the individual remuneration of CEOs and senior executives. The only requirement is under the Australian Accounting Standards⁴⁷ for key management personnel which requires remuneration reporting at an aggregated level.
- 5.6 Many CATSI corporations that employ staff are publicly funded through grants, or are resourced by native title benefits and in light of this, there may be a public interest in reporting senior executive remuneration to members, common law holders and other stakeholders. Further, publicly listed companies under the Corporations Act are required to disclose the nature and value of remuneration of key management personnel in their annual reporting.

⁴⁷ Australian Accounting Standards Board (AASB) *124 Related Party Disclosures*, May 2019, paragraph 17, available from <https://www.aasb.gov.au/admin/file/content105/c9/AASB124_07-15.pdf> [accessed 13 February 2020].




The 2016 KPMG review⁴⁸ suggested introducing the same requirement for large (and possibly medium) sized CATSI corporations to disclose the nature and value of remuneration of their key management personnel in annual reports, and this was canvassed further in the Technical Review.


- 5.7 A move towards this type of accountability is becoming more widespread. The 2018 *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review* (ACNC Review)⁴⁹ recommended greater disclosure of remuneration practices and related party transactions to improve public trust and confidence in the sector. The recommendation was limited to disclosing remuneration of senior executives and ‘responsible persons’ at an aggregated level for large entities only, being those with a revenue of \$1 million or more based on current thresholds, although that could change to as high as \$5 million under new thresholds proposed in the same report.⁵⁰
- 5.8 Feedback from the first phase survey was supportive of members having more information on the remuneration received by CEOs and other senior executives. This echoed much of what the Technical Review and subsequent consultations on the Strengthening Governance and Transparency Bill heard. There was also support for more transparency of board members’ remuneration and benefits, including salaries, sitting fees, allowances, loans and contracts. Although not all responses were supportive, including comments:
- the remuneration of senior employees is not appropriate to be reported to members; and
 - it would be discriminatory to have a higher standard of reporting in the CATSI Act than in the Corporations Act.
- 5.9 In the Draft Report, we suggested there was value in members and other key stakeholders such as funding bodies having greater transparency of remuneration packages for senior executives. We proposed medium and large CATSI corporations include the details and amounts of their CEO’s and other senior managers’ remuneration packages and any other material benefits in their annual reports. Noting the importance of balancing the interests of the corporation and the interests of the individual, we also asked how such an approach could be implemented while maintaining that balance. Specific questions posed in the Draft Report included:
- Should the details and amounts of CEOs’ and other senior managers’ remuneration packages, including any other material benefits, be reported in corporations’ Annual Reports?
 - What level of detail is appropriate? Should information on each relevant individual be provided with all remuneration itemised, or should information be reported in remuneration bands?
 - Are there other models that could be considered, for instance, reporting could only be required for individuals who earn over a certain threshold, for example, \$200,000?
 - What should the definition of remuneration include?
- 5.10 This proposal saw 62 per cent of survey respondents agree, while reasons for disagreement varied widely including: remuneration is a confidential agreement; in small communities, disclosure of information can cause issues for individuals; and only payments above a threshold amount should be required to be reported. Several responses considered there was a role for ORIC either in providing external advice on standard remuneration, or in receiving confidential reporting of remuneration in order to provide benchmarking information. One response also argued that executive roles in CATSI corporations should in fact be voluntary to ensure that the officer is undertaking the role for the right reason.

⁴⁸ KPMG, *Regulating Indigenous Corporations*, ORIC, 15 December 2016, available from <<https://www.oric.gov.au/publications/corporate/regulating-indigenous-corporations>> [accessed 13 February 2020].

⁴⁹ Patrick McClure AO, Greg Hammond OAM, Su McCluskey, Dr. Matthew Turner, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission, Legislation Review 2018*, The Treasury, 2018, available from <<https://treasury.gov.au/publication/p2018-t318031>> [accessed 13 February 2020].

⁵⁰ The report also proposed to increase the revenue threshold for a large entity to more than \$5 million.

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- 5.11 Twenty-eight submissions made comments against this Chapter, of which 19 specifically addressed this issue. Interestingly, of the nine submissions that indicated some support for the proposal, only two of those was unqualified. Respondents suggested a number of ways that remuneration disclosure could be managed, including:
- by remuneration band with one recommendation that this reporting should be de-identified and also against revenue bands;
 - aggregated for all executives with two recommendations this should only be required of large corporations with two or more personnel;
 - remuneration of individual executives to be reported to members;
 - reporting remuneration when it exceeds a set threshold; and
 - public de-identified individual salary reporting.
- 5.12 In relation to the definition of remuneration and establishing appropriate reporting bands, Pika Wiya suggested:
- In setting any bands for the payment of CEO and senior officer salary and benefits, consideration also needs to be given to matters such as access to training/professional development allowances, rent relief, vehicle support etc. In addition, if bands were to be adopted by the Registrar for directors, CEOs and senior staff there should be a process of consultation with the corporations prior to the setting of the bands and as they are reviewed. Consideration could also be given to CPI adjustments made on an annual basis.*
- 5.13 Of the nine submissions that did not support this proposal, nearly all expressed support for increased transparency and accountability around senior executive remuneration. Reasons for not supporting this particular proposal included:
- alignment with the remuneration reporting requirement for publicly listed companies under the Corporations Act was not appropriate for CATSI corporations;
 - reporting of remuneration should be voluntary and not mandatory;
 - remuneration of executive is a matter for directors; and
 - rather than public reporting, increased remuneration guidance from ORIC would be more useful for corporations.
- 5.14 While commenting on this proposal, the final submission did not indicate a position one way or the other.
- 5.15 Discussions in the consultation sessions and Stakeholder Reference Group focussed on other aspects of this topic including issues of self-determination. It was noted that members elected directors to act on their behalf and remuneration was an issue for directors. It was also raised that by making remuneration more transparent there was a risk that members might dispute the amount an executive is being paid without understanding the extent of the role or responsibilities, how the remuneration compares with similar roles in other corporations or the market value of the relevant executive's skills and experience.
- 5.16 A number of CEOs who attended consultation sessions said they were happy for members to know their remuneration, as they worked for them and the corporation. However, they also warned that disclosure should occur within a process that also outlined the responsibilities and functions of the role. One CEO suggested people might be surprised to see the level of remuneration compared to the responsibilities and functions of the role, while another stated it could serve to illustrate the inequities in remuneration in the Indigenous corporate sector. However, the Stakeholder Reference Group also discussed the potential risk that an executive could end up negotiating their remuneration with the entire corporation membership.
- 5.17 The other theme to arise from the Stakeholder Reference Group was whether reporting remuneration publicly would encourage the 'poaching' of staff from CATSI corporations by entities that have the capacity to pay larger salaries. There was further discussion of whether remuneration information could be considered commercial information for the purposes of 'for-profit' entities.
- 5.18 The volume of feedback and diversity of opinions highlighted that executive remuneration is a contentious and sensitive issue that requires consideration of the rights of members and common law holders with the rights of



individuals to privacy and corporations to confidentiality. Despite the broad spectrum of opinions and perspectives put forward in the consultations, there was a strong consensus that the appropriate outcome would be an increase to transparency by providing members with remuneration information.

Recommendation 33

It is recommended senior executive remuneration information be included in annual reporting to the Registrar and that the same information is laid before Annual General Meetings in accordance with Recommendation 29 in Chapter 4.

- 5.19 In the Draft Report, we also suggested members should have visibility over the remuneration paid to key personnel of related entities, and this information could be reported in corporations' annual reports. This would supplement Recommendation 20 in Chapter 4 which proposes corporations' annual reports should include the corporate structure including the details of any subsidiaries and key personnel within the extended structure.
- 5.20 This proposal received agreement from 81 per cent of the survey respondents. Those who disagreed generally cited the reporting of remuneration as the point of disagreement, with one response noting that this is a confidential agreement between the organisation and staff. Another response suggested this information could be available for viewing at each AGM on request.
- 5.21 Five submissions commented on this proposal with one agreeing with the proposal put forward in the Draft Report and a second indicating that remuneration information should be a matter for members and their corporations instead of the broader public. Two submissions disagreed with the proposal sighting that executive remuneration is a matter for directors and again not for the broader public. A further submission commented on the proposal but did not indicate a position.
- 5.22 We see merit in members understanding how the funds of associated entities are being spent but note the sensitivity with releasing this kind of information more broadly.

Recommendation 34

It is recommended the remuneration information of key personnel of associated entities also be reported in annual reports to the Registrar.

- 5.23 A related issue to those already discussed in this Chapter, is understanding whether the amount of remuneration paid is consistent with industry expectations and therefore reasonable. There is currently no guidance for boards or members about what a reasonable level of remuneration might be given the corporation's circumstances and the skills, experience and performance of the executive in question.
- 5.24 To assist boards with setting remuneration, in the Draft Report we proposed CATSI corporations provide details of their directors', CEO's and other senior managers' salary packages to the Registrar, so the Registrar can publish de-identified information by salary bands. This annual sectoral analysis will help corporations to benchmark their remuneration packages against current practice in the sector.
- 5.25 There was strong support for this proposal in the consultation sessions where a number of participants commented on how useful this kind of information would be to help set appropriate remuneration levels. In 2013, ORIC released a remuneration benchmarking report⁵¹ and some participants commented on how valuable it had been in their experience. It was also suggested in these sessions that this kind of information would be more relevant if it was reported categorised by corporation type, such as by size, remoteness, and nature and scale of operations.

⁵¹ ORIC, *Remuneration—a report benchmarking the salaries of Aboriginal and Torres Strait Islander corporations*, ORIC, 2013, available from <<https://www.oric.gov.au/publications/other-report/remuneration%E2%80%94report-benchmarking-salaries-aboriginal-and-torres-strait>> [accessed 24 October 2020].

- 5.26 A couple of written submissions made similar suggestions in relation to reporting this type of information by corporation type, including Pika Wiya commenting, *'Pika Wiya recently undertook a review of its CEO salary and it was difficult to gain information from other similar sized corporations regarding salary and package arrangements for their CEOs. The introduction of bands connected to size with deidentified data of corporations is supported. Data needs to be aligned with the size of corporations and recognition of the salary differences experienced between states based on cost of living pressure differentials that can be quite substantial e.g. between SA and NSW.'* QSNTS suggested reporting should align with corporation size and turnover.
- 5.27 In total, nine submissions agreed with this proposal; of which, Dr Marina Nehme's submission also recommended that this reporting should not be in addition to the remuneration information included by corporations in their annual reporting, which should be used to inform the Registrar's benchmark reporting (refer Recommendation 33). The Registrar will be able to use corporations' annual reports to collate remuneration data, analyse and contextualise it with the size, industry, location, remoteness, income to provide an annual or biannual sectoral analysis for benchmarking purposes. In this way, there will be no additional reporting impost on corporations.
- 5.28 A tenth submission did not specifically comment on the reporting of executive remuneration but noted the value of having director remuneration information publicly available stating, *'readily accessible and publicly available information about CATSI Act director remuneration would be useful to inform the reasonableness of remuneration.'*
- 5.29 Four submissions indicated it should not be mandatory for corporations to provide remuneration information to the Registrar and instead should be voluntary, including AIATSIS which noted, *'If RNTBCs believe this data to be of benefit when setting their remuneration bands they may choose to voluntarily share this information with the Registrar.'*
- 5.30 Of the 21 survey respondents, 90 per cent agreed with this proposal. Of those who disagreed, one disagreed more generally with directors being paid stating that they should be voluntary positions. The other noted that what a corporation pays its executive should not be part of the public record and ORIC should already have knowledge of its regulated population to be able to provide remuneration benchmarking advice.

Recommendation 35

It is recommended the information provided at Recommendation 33 be used by the Registrar to develop a de-identified sectoral analysis on remuneration benchmarking.


- 5.31 During the consultations a number of suggestions for better practice remuneration setting were put forward including corporations establishing Remuneration Committees to advise directors, or engaging the services of an external consultant. Remuneration Committees assist the board in the oversight of the remuneration, bonuses and incentives paid to the CEO and other employees, and have proven valuable to some corporations. There was also discussion about the free recruitment service ORIC provides to corporations, ORA (ORIC Recruitment Assistance), which includes support and advice from developing a job description to vetting applicants, conducting interviews and preparing the final selection report.⁵²

Director remuneration

- 5.32 Division 252 of the CATSI Act deals with director remuneration. The CATSI Act prescribes that directors of a CATSI corporation are not to be paid remuneration unless specifically provided for in the rule book. If the rule book allows the directors to be paid, the directors' remuneration is to be determined by the corporation by resolution of the members in a general meeting. The members of a CATSI corporation can obtain information about the directors' remuneration and paid expenses only if the threshold number of members request the information.⁵³

⁵² More information about this service is available on ORIC's website: <https://www.oric.gov.au/ora>.


⁵³ Subsection 252-5(7) of the CATSI Act states that the required number of members is the greater of five members or 10 per cent of the members.

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- 5.33 While sitting fees paid to directors must be approved by members at a general meeting, there can be a lack of transparency about what each director actually receives. To be consistent with the suggested changes for key management personnel, we proposed in the Draft Report all corporations report on how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar.
- 5.34 There was strong support for this proposal from respondents to the survey, with 86 per cent agreeing. Reasons for disagreement included that members approve sitting fees at the AGM and it is corporation business, while another generally disagreed with sitting fees being paid altogether.
- 5.35 Discussions during the consultation sessions prompted mixed responses from participants with some indicating strong support for the proposal due to transparency and accountability reasons. Some participants suggested that the proposal should go further and require reporting of the number of meetings attended by directors and the basis of any other director-related remuneration paid.
- 5.36 Along the same lines, Pika Wiya shared it is considering introducing a requirement that directors should not be paid unless they attend a minimum number of meetings and suggested this should be an issue of consideration for this Review.
- 5.37 Five submissions supported this proposal with one suggesting that reporting should include the approved and actual amount of remuneration paid to directors, and another suggesting that the number of meetings attended should also be reported—consistent with comments made by some participants in consultation sessions.
- 5.38 Three submissions did not wholly agree with the proposal and suggested that rather than being mandatory, reporting of director remuneration information to the Registrar should be voluntary. The AICD went further and suggested the CATSI Act should not require members to approve the remuneration of directors stating:
- While their rule book may specify member approval as a requirement of allowing payments to directors, this should be left to boards and organisations to determine, and not regulation. We caution against a level of prescription in the regulation of CATSI corporations that goes beyond that imposed on similar sized organisations and intrudes on the role of the board. Such an approach risks introducing a paternalistic approach to regulation upon CATSI corporations.*
- 5.39 While the submissions calling for this reporting to be voluntary are sound, it is important to ensure minimum governance standards are laid out by the CATSI Act. The proposal is for reporting to members and to the Registrar. Directors are responsible to the members, and adequate transparency is important so members can assess a directors' active engagement with the role.

Recommendation 36

It is recommended the CATSI Act be amended to require corporations to report how much each director is paid in sitting fees in their annual financial reports that are lodged with the Registrar.

- 5.40 Many of the first phase survey responses raised issues about directors getting paid, either as employees or through an arrangement with the corporation. There is currently no requirement for member approval of remuneration for directors as employees. In the Draft Report we sought input about whether there should be a member approval requirement and if there should be conditions in setting such remuneration.
- 5.41 Only 67 per cent of respondents agreed that members should approve the remuneration of directors as employees, with the most frequent reason for disagreeing being '*directors should not be employees*'. That issue is discussed in more detail later in this Chapter in the 'Appointment of directors and other director requirements' section. Survey respondents who agreed with this proposal suggested membership approval could be given at a general meeting based on remuneration recommendations from ORIC approved consultants, through a survey of members, or by reference to award rates and benchmark reports.
- 5.42 Some participants in consultation sessions disagreed with members setting the remuneration of directors as employees, noting this was not the process for any other employee and questioning whether members would subsequently be expected to approve the remuneration of other positions in the corporation. It was pointed out



that treating directors differently could be perceived as discriminatory and participants questioned why members should have that role.

- 5.43 Only two submissions indicated a position on this issue with one suggesting it should be a matter for corporations and dealt with in their rule books, and another recommending that the directors' remuneration as employees should be subject to the same processes the corporation has in place for setting the remuneration of other employees. While Congress did not address this issue directly, it suggested a replaceable rule should be incorporated into the CATSI Act that members and directors cannot be employees unless an exemption is given.
- 5.44 We are not inclined to make a recommendation on this issue given the mixed support for the proposal and noting many stakeholders have put forward that it should be a matter for corporations to determine and include in their rule books, if relevant.

Executive performance

Appointment and management

- 5.45 There has been concerns raised about CEOs with a poor track record of management who move from one corporation to another without any seeming accountability. The Registrar maintains a publicly available register of disqualified officers under the CATSI Act. However, the concern is around people who have not been disqualified but nevertheless have a history of poor performance. Currently neither boards nor members have visibility of an applicant's work history other than what is provided by the applicant themselves. While this issue is limited to a small number of individuals, it is important that all members' rights and interests are protected.
- 5.46 The Modernising Business Registers Program⁵⁴ is introducing a Director Identification Number (Director ID) a unique identifier that will apply to all directors that they will keep forever. The aim of the Director ID is to provide a clear public record of each director, including those of CATSI corporations, and trace their history and relationships with companies over time. Although initially this will only be applied to directors, the legislation has been drafted in such a way that it may be possible to expand the scope to include CEOs and others involved in the making of decisions that affect the business of the corporation and have the capacity to significantly affect the corporation's financial standing. The legislation governing the introduction of the Director ID was passed by Parliament on 12 June 2020, and work to implement the regime is underway. It is not expected that any change of scope will occur until after the legislation is implemented for CATSI corporation directors.
- 5.47 Members should be able to identify who is managing their corporation, and is responsible for the day-to-day operations and decisions. Similarly, clients, service providers and commercial partners will be attracted to corporations with a proven track record of sound management. The Technical Review recommended CATSI corporations include their CEO's and senior executives' names, addresses, contact details and employment history over the last 10 years in their annual reports (Recommendation 17 of the Technical Review).⁵⁵ In the Draft Report we proposed that as a minimum requirement, all corporations include the names of key management personnel (CEO, CFO and COO) and their qualifications in their annual reports.
- 5.48 Seven written submissions supported this proposal although Pika Wiya identified a number of concerns in relation to its practical implementation, including such information could be considered confidential and highlighting an executive may have been unfairly dismissed by a board. Pika Wiya also suggested boards should have contemporary and relevant processes for reviewing the performance of executives and suggested this as an area

⁵⁴ The Modernising Business Registers Program is administered in partnership by the Australian Taxation Office, the Treasury, ASIC, Department of Industry, Innovation and Science and the Digital Transformation Agency. Further information on the Program is available on the [Australian Business Register website](https://www.abr.gov.au/).


⁵⁵ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <https://www.oric.gov.au/catsi-review> [accessed 13 February 2020].

where ORIC could provide increased support. While APO NT did not indicate whether or not it supported the proposal, it noted the importance of periodic performance appraisals of senior executive.

- 5.49 Six written submissions did not support this proposal. Concerns raised in these submissions included the: reporting of such information should be voluntary; names of executives only provided sufficient transparency; recruitment of suitably qualified executive was a matter for directors; and proposal was incongruent with individuals' privacy rights. The PCCC PBC submission noted that such a requirement could make senior executives targets within their communities stating:

In addition to these issues, it raises serious privacy concerns for CEOs and senior managers and can often lead to antagonism towards them. Individuals within communities can use this information to target these people, often because it is simply a case of them being seen to getting more [sic] from the corporation than the members without any real understanding of the work these managers perform and appropriate commercial remuneration rates. It is therefore likely to highlight and increase tensions.

- 5.50 Of the 21 surveys completed, 90 per cent supported the proposal. The only reason given for disagreeing with the proposal was concerns for the privacy of individuals.
- 5.51 There was mixed support for this proposal in the consultation sessions. Some participants questioned how qualifications could be verified and others asked how 'life experience' was to be considered in relation to this proposal—a view that was also supported by the Stakeholder Reference Group.
- 5.52 A number of participants questioned whether this proposal would actually address the problem it was trying to solve and suggested it was like 'trying to close the gate after the horse had bolted' as executives had already been appointed by the corporation at the time their qualifications were being reported. Participants suggested a better approach to ensuring the appointment of suitably qualified and skilled staff was increased recruitment support from ORIC, including assistance to CATSI corporations to enable them to remove executives who may be found to have falsified claims prior to their appointment.
- 5.53 In the Draft Report, we also sought feedback as to whether medium and large corporations should include the 10-year employment history of their CEO and senior executives in their annual reports to the Registrar. This requirement would include directors who are employees. We specifically asked for stakeholder views on:
- Whether medium and large corporations have the capacity to publish CEO and other senior executives' work history in annual reports?
 - How to handle the situation where there are multiple CEOs throughout the year?
 - How can the work history be confirmed before publishing?
- 5.54 Seventy-one per cent of survey respondents agreed with medium and large corporations including a 10-year employment history for senior executives, including of subsidiaries. Reasons provided for not supporting this proposal included privacy concerns and the appointment of executives being a matter for boards, including their role to undertake reference checks prior to engagement.
- 5.55 Participants in the consultation sessions raised similar concerns in relation to this proposal as those raised when discussing the proposal to require corporations to report executives' qualifications in their annual reports. A further concern raised by participants was that it would be difficult to verify work histories.
- 5.56 Two submissions provided support for this proposal with the Northern Territory Government Office of Aboriginal Affairs suggesting as a minimum standard the 10-year employment history for the incumbent CEO and key management personnel should be reported. Nine other submissions either did not support or only partially supported this proposal; mostly for the same reasons provided in response to the proposal to publish qualifications with: one identifying privacy concerns; two suggesting it was a matter for boards; one stating it was administratively burdensome; one recommending that publishing the names of executives was sufficient; and four submissions stating it should be voluntary. Three of the nine submissions welcomed additional support from ORIC



to recruit suitably qualified and skilled executives, including Marrawah Law that identified the type of support that would be relevant:

- *We suggest that ORIC supports the autonomy and right to self-determination of the Board's decision-making by providing face-to-face information sessions and workshops to offer guidance on employment and recruitment processes.*
- *We suggest that ORIC allows the Boards of CATSI corporations and RNTBCs to request from ORIC work histories/records of the individuals who are applying for a position as CEO or a senior executive role.*


- 5.57 A further recommendation was for ORIC to maintain a publicly available directory of executives who voluntarily provide their work history and qualifications. It was suggested people with a poor history of performance may be less inclined to register those details publicly. A voluntary directory may provide support to corporations in terms of recruitment decisions noting that this may eventually be superseded by the Director ID register. It should be noted however that this will have resourcing implications for ORIC and ORIC would not undertake any assessment or make any recommendation as to the suitability of people on the directory.
- 5.58 Taking all these points into account, we acknowledge there is a role for ORIC in building the capacity of boards to undertake rigorous and diligent recruitment processes, and are not recommending any legislative change in relation to the reporting of executive qualifications and/or work histories. We have referred this matter to ORIC for consideration.

Definition

- 5.59 While section 694-85 of the CATSI Act provides the meaning of the CEO function, it has been suggested this provision could be clarified by specifying that a CEO does not have to be an employee of the corporation, but is anyone who undertakes a CEO function, which may include a contractor. This should deter attempts to try to circumvent the measures in this Chapter by putting in place alternative arrangements, such as contracts or consultancies. In the Draft Report we sought input on this subject.
- 5.60 This issue did not generate a lot of discussion during the consultation process. One participant noted regardless of what the position was called, it would be captured by the definition of officer in the CATSI Act and on that basis, suggested no change was required. While 86 per cent of survey respondents agreed with the proposal there were no comments made against the question—either agreeing or disagreeing—and there was no response at all to the follow up question asking what changes might deter corporations from trying to avoid transparency measures for CEOs.
- 5.61 Only two submissions dealt with this topic; of which, Marrawah Law was supportive stating that the meaning of CEO required clarification but providing no further suggestion. Dr Marina Nehme's submission disagreed with making any change stating, *'This requirement will make the legislation more convoluted and complex. It does not fit with the need to simplify the law. A CEO already falls under the definition of officer and this is enough as an officer has a range of duties imposed on them akin to the ones that apply to directors.'*
- 5.62 While some stakeholders commented the term 'CEO' needed to be clarified, there was no concrete suggestions as to how it is currently unclear nor how to improve clarity. Noting that we do not wish to make unnecessary changes, we are not inclined to make any recommendation in this regard.

Movements

- 5.63 Currently corporations are required to advise ORIC within 28 days of the details of directors when there has been a change of directors. In the Draft Report, we also proposed this be extended to key management personnel for the purposes of consistency.
- 5.64 This suggestion was generally well received during the consultation sessions with participants indicating that it was a logical suggestion.


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- 5.65 Four submissions made comments against this proposal, of which one noted support without expanding further. Two submissions made brief comments outlining their reasons for disagreeing with the proposal including:
- *'This legislative requirement is not needed and is too prescriptive. ORIC only needs to be advised regarding changes to the directorship of the corporation.'* (Dr Marina Nehme).
 - *'It is unclear to First Nations what the proposal outlined in paragraph 5.23 of the Draft Report is seeking to achieve and which roles would fall within the scope of 'key management personnel'. Without further information, this proposal is not supported.'*
- 5.66 NNTC's submission did not indicate support either way and stated it was unclear what the proposal was trying to achieve and who key management personnel were.
- 5.67 Ninety per cent of the survey respondents agreed with the proposal. Both respondents who disagreed cited that it would be too onerous for corporations, one noting that some corporations had a high turnover.
- 5.68 There appears to be acceptance of this proposal as something that will provide clarity about the management arrangements of corporations, both for members and ORIC. We accept there was a lack of clarity around the proposal in the Draft Report. We are inclined to take this proposal forward and specifying it apply only to CEOs, CFOs and COOs.

Recommendation 37

It is recommended the CATSI Act be amended to require CATSI corporations to notify ORIC within 28 days of a change in Chief Executive Officer, Chief Financial Officer and Chief Operating Officer.

Related party provisions

- 5.69 While there needs to be more regulation and transparency around remuneration, there is a need to reduce the burden around related party provisions for CATSI corporations. The current requirements can work against the best interests of some corporations, especially in small communities with extensive kinship ties and limited options for purchasing goods or services.
- 5.70 At some point, corporations may need or wish to provide a financial benefit to a related party. A related party financial benefit is when a corporation gives a financial benefit to a person or organisation with a close relationship. A related party can be an individual or an entity, for example, a body corporate or a partnership. Related parties include directors, their immediate family members or corporations/entities that they control.
- 5.71 The requirements for member approval of related party benefits are set out in Part 6-6 of the CATSI Act. Division 293 of the CATSI Act defines what a related party is, and also what constitutes the giving of a financial benefit. Subsection 293-3(3) sets out some examples of the giving of a financial benefit to a related party including:
- giving or providing the related party with finance or property;
 - buying an asset from or selling an asset to the related party;
 - leasing an asset from or to the related party;
 - supplying services to or receiving services from the related party;
 - issuing securities or granting an option to the related party;
 - taking up or releasing an obligation of the related party.
- 5.72 Apart from some limited exceptions set out in Division 287 of the CATSI Act, corporations must undertake a rigorous process to obtain the approval of members before providing a related party financial benefit. The members approve the giving of the benefit by passing a resolution at a general meeting. Before the members vote, the corporation needs to prepare certain documents and allow time for the Registrar to comment on them.

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- 5.73 The rigorous approval process for related party transactions is in place because the nature of the relationship between the corporation and the related party creates a risk that the transaction may not be in the best interests of the corporation. For example, the corporation may not have negotiated the best deal or the transaction may create a conflict of interest. This all takes time and calling a general meeting is not always easy for corporations in remote areas and with large or dispersed memberships. Further, the Technical Review⁵⁶ found that related party provisions may not be well understood resulting in inadvertent breaches.
- 5.74 The related party benefit provisions are based on similar provisions in the Corporations Act for public companies although there are some significant and practical differences which are discussed below. The Revised Explanatory Memorandum to the CATSI Bill 2006, which became the CATSI Act, indicates that in relation to related party transactions:
- ...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.*⁵⁷
- 5.75 A number of exceptions to the requirements under the Corporations Act were deliberately excluded from the CATSI Act, including for benefits given on 'arm's length terms', for payments which are for indemnities, insurance or legal costs and for payments under \$2000 to directors or their spouses. Again, the Revised Explanatory Memorandum explains, 'Not replicating these provisions is important for the sound protection of members and will act as a strong deterrent to nepotistic behaviour.'⁵⁸
- 5.76 On the other hand, the CATSI Act provides the Registrar with the discretion to exempt corporations from the rigorous process for approving related party benefits. The intention of this discretion was explained in the Revised Explanatory Memorandum:
- These exemption provisions give the Registrar the flexibility to exempt a corporation when a provision could cause an excessive administrative burden on corporations. They also allow the Registrar to take into account the diversity and special circumstances of a corporation or a class of corporations.*⁵⁹
- 5.77 However, the practicalities of seeking an exemption from the Registrar creates its own administrative burden which may be disproportionate to the amount of financial benefit in question.
- 5.78 The Corporations (Aboriginal and Torres Strait Islander) Act (Strengthening Governance and Transparency) Amendment Bill 2018 proposed some changes around related party provisions to reduce some of this red tape. This included allowing small corporations to make some related party transactions without having to pass a resolution at a general meeting, up to a limit set out in the CATSI Regulations, as well as allowing the Registrar to exempt particular transactions or classes of transactions from the related party provisions where it was in no way detrimental to the members of the corporation.
- 5.79 These proposed changes were consistent with the Technical Review which recommended the provisions relating to restrictions on related party dealings be retained, but 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 to the members of the CATSI corporation (Recommendation 21 of the

⁵⁶ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2020].

⁵⁷ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.342, available from <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403> [accessed 3 July 2020].

⁵⁸ *ibid.*, paragraph 1.345.

⁵⁹ *ibid.*, paragraph 1.211.

Technical Review). It also recommended a threshold of \$5000 or such amount be used as a trigger for the related party transaction provisions in the CATSI Act for small corporations but all related party benefits be included in an annual report that is provided to members and the Registrar (Recommendation 22 of the Technical Review).⁶⁰

- 5.80 Although there is a need to prevent misuse of corporation assets and funds, holding CATSI corporations to the same standard as publicly listed companies creates an unnecessary administrative burden, particularly for small corporations and those in regional and remote areas. The inclusion of the Corporations Act exceptions outlined above into the related party provisions could provide greater benefit to CATSI corporations than the changes proposed in the Strengthening Governance and Transparency Bill, as they would be better adapted to the way corporations operate, particularly in small, regional and remote communities. One of the responses to the first phase survey also specifically recommended adopting these provisions.
- 5.81 Further review of Part 6-6 of the CATSI Act indicates there may be value in a more comprehensive overhaul of these provisions. Feedback received through the first phase survey was that there needs to be reporting and transparency, but there should be an easier, more cost-effective and less time consuming approach to related party issues. In the interests of transparency, we suggested in the Draft Report corporations be required to include related party transactions in their annual reports to the Registrar.
- 5.82 Redrafting Part 6-6 would provide an opportunity to address drafting issues with some sections which make it difficult to understand, and even at times appears contradictory to earlier provisions. For example, there is an ambiguity in section 287-1(2) as it relates to Division 252, although it is likely the issue relates to drafting rather than substance.
- 5.83 Ninety-five per cent of the 21 survey responses agreed Part 6-6 of the CATSI Act which deals with third party provisions should be redrafted to be simplified and to bring it more in line with the Corporations Act. Suggestions from respondents as to specific provisions that could be simplified included exemption provisions if certain conditions exist such as corporations: in remote or very remote locations; with small membership bases; and without access to reliable and cost effective service providers. Other suggested exemption provisions were if: the total value of transactions do not exceed a certain amount; the transactions are listed in the annual report; or if the directors agree to or approve the transactions.
- 5.84 During the consultation sessions, discussion on this section indicated that the requirements and concepts were too complex, and therefore often not well understood. Some participants mentioned they had been unaware of the requirements around related party benefits. The most persistent issue to arise from the discussions however was many CATSI corporations by their very nature were family based organisations, in particular RNTBCs, which meant there was an inevitable tension between the operation of the related party provisions and the day-to-day operation of corporations, particularly in remote communities.
- 5.85 One participant suggested that in the interests of promoting economic development of Indigenous business, CATSI corporations should be looking to preference local Indigenous businesses with their contracts, however this could be administratively burdensome with the current related party provisions.
- 5.86 Sixteen submissions expressed strong support for streamlining the provisions around related party benefits in the CATSI Act, with a view to ensuring they are simpler and work in the best interests of corporations, members and communities. While some indicated that changes proposed under the Strengthening Governance and Transparency Bill would be welcomed, most highlighted the need for a broader revision of Part 6-6 of the CATSI Act. A range of models were put forward in submissions, including but not limited to:
- one suggesting alignment with the Corporations Act;
 - three providing support for exemption provisions;
 - four providing general support, including two advocating for greater transparency of related party transactions;

⁶⁰ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2020].



- one agreeing to a threshold to trigger related party transaction requirements as well as promoting corporations maintaining a register of related party transactions;
- one supporting the reporting of related party transactions by corporations in annual reports submitted to the Registrar;
- two indicating exemption and threshold provisions would be welcomed;
- one nominating arm's length provisions be put in place; and
- two recommending arm's length and exemption provisions, with one also indicating corporations should be required to maintain a register of related party transactions.

5.87 Transparency was a common theme among the submissions as was the need to balance administrative requirements with providing the flexibility to put effective arrangements in place in a timely manner. The unique kinship relationships of many Aboriginal and Torres Strait Islander people was also raised as a key consideration of any proposed changes.

5.88 NNTC's submission reflected the challenges of finding the right related party transaction model for CATSI corporations stating:

NNTC generally supports the adoption of an at arm's length approach to third-party transactions by RNTBCs, which already applies to corporations limited by guarantee under the CA [Corporations Act]. This approach permits such transactions in situations where the transaction is at arm's length or is legitimate remuneration for services provided. Such transactions must be noted in the corporation's accounts under existing Accounting Standards and would be reported to RNTBC members in their annual reports.

However, the arm's length approach may not be suitable for small or remote communities where Directors may also be involved in local Indigenous businesses that the RNTBC would prefer to use over non-Indigenous or non-local businesses. Approval for entering into a commercial agreement with a local Indigenous business that may be involved in the RNTBC, for example a Director who also owns or manages a local business, is not practical or timely because they would need to be approved at a general meeting first. In this case, an exemption from the Registrar would be a suitable approach to ensure that local Indigenous businesses are not discriminated against by CATSI.

The exemption process needs to be straight forward and efficient and should be subject to defined value limits, and in these circumstances would not require approval from members at a general meeting.

If these related party exceptions were introduced, it would be important for a corporation to maintain a register of related party transactions and report these in its Annual Report.

5.89 We also asked in the Draft Report whether clarification would be useful in relation to specific sections in Part 6-6 which were sections 252-1 and 287-1. Where a rule book permits it, subsection 252-1(2) requires that members must approve remuneration for directors, such as sitting fees. Subsection 287-1(2) states that the giving of remuneration to directors and officers is not subject to member approval if the remuneration is reasonable. While subsection 252-1(2) refers to members approving the quantum of the remuneration, and subsection 287-1(2) refers to the giving of the remuneration being exempt from the member approval process as set out at Division 290, there is potential for confusion as to how the two sections operate together.

5.90 All 21 survey respondents and both submissions that commented on this proposal agreed that clarification was required.

5.91 The extensive nature of the comments on this topic indicates its importance to stakeholders. While there was a range of views expressed in submissions about factors to consider, there was unanimous support for revising this part in the CATSI Act for simplification and greater alignment with the needs of Aboriginal and Torres Strait Islander corporations.



Recommendation 38

It is recommended:

- Part 6-6 be revised to simplify and align more closely with the needs of Aboriginal and Torres Strait Islander communities; and
- CATSI corporations be required to report any related party provisions in their annual reports to the Registrar.

Appointment of directors and other director requirements

Directors who are employees

- 5.92 The Revised Explanatory Memorandum to the CATSI Act outlines that the Review of the ACA Act concluded, *‘that the provisions relating to directors and directors’ duties in the ACA Act should be modernised and brought into line with the Corporations Act, with some modification for the circumstances of CATSI corporations. ...Chapter 6 of the CATSI [Act] implements these review findings’*.⁶¹
- 5.93 In operation, some provisions have been found to require clarification or be unnecessarily restrictive. As an example, subsection 246-5(4) provides that a majority of the directors of a CATSI corporation must not be employees. However, in some cases such as art centres where artists may be employed to provide, maintain or promote art work, or native title corporations where members may be employed to do cultural heritage work, it may be appropriate for the majority of directors to also be employees. Allowing the Registrar to grant exemptions to the requirement that the majority of directors of a CATSI corporation must not be employees would provide a direct benefit to many corporations and their members. Granting such an exemption could be subject to certain conditions such as the presence of an independent director on the Board. In the Draft Report, we asked for suggestions on what conditions would be appropriate to support an exemption to the requirement that the majority of the directors of a corporation must not be employees.
- 5.94 Seventy-one per cent of the 21 survey respondents agreed that the CATSI Act should be amended to enable the Registrar to exempt corporations from the requirement that the majority of directors cannot be employees. Six respondents provided reasons as to why they did not support this proposal and all were fundamentally against the concept of directors being able to be employees citing concerns such as an arrangement is a conflict of interest, promotes a power imbalance and might provide the opportunity for corruption.
- 5.95 Five written submissions commented on this proposal including three which supported the proposal for the Registrar to be able to exempt corporations from this requirement. The remaining two submissions suggested this should be a matter for corporations to determine and include in their rule books, including one of the two indicating this should be a replaceable rule. SANTS noted this was a particular issue for corporations that undertake cultural heritage services stating:

In principle, the requirement makes sense. However, in practice, it can be problematic. Where we have seen most difficulties is in relation to cultural heritage services. ...Directors are often those most active in the corporation and community, have significant knowledge and responsibilities for cultural heritage, and are thus often identified as being most appropriate to be engaged in this work. However, the majority non-employee requirement has meant that some Directors have been excluded from this work as the Board is at

⁶¹ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.20, available from https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403 [accessed 3 July 2020].

capacity in terms of number of Directors who can also be employees. SANTS thus supports a more flexible approach to be available to corporations regarding this requirement, including seeking exemptions. Furthermore, in seeking such exemptions, the nature of the position (including level, day-to-day authority and FTE) should be duly considered.


- 5.96 During consultation sessions, a number of participants also raised how this provision is an issue for corporations that undertake cultural heritage work. Similar to the point made in the SANTS submission, often directors are the most skilled and knowledgeable to undertake this type of work. Although some participants also shared with us a perception in their corporations that certain directors were consistently awarding themselves cultural heritage work without providing opportunities to others.
- 5.97 Suggestions about conditions that the Registrar could take into account when making an exemption included the size and remoteness of the community. Two further considerations are the nature of the corporation and/or its work.

Recommendation 39

It is recommended the CATSI Act be amended to allow the Registrar to exempt a corporation or class of corporations from the requirement that a majority of directors must not be employees.

Board membership

- 5.98 Many of the responses to the first phase survey indicated there should be restrictions in relation to board membership, particularly around the number of family members on boards. Further, respondents suggested there should be a focus on increasing the number of skill-based independent directors. We asked in the Draft Report whether there should be controls around board membership and composition, and if so, what controls and how should they be applied in remote communities, where restrictions on numbers of family members could cause major difficulties.
- 5.99 Twelve written submissions addressed this proposal; of which 10 commented that board composition should be a matter for corporations to determine. Six of these 10 submissions specifically noted that legislative provisions in this regard would be an impingement on the self-determination of Aboriginal and Torres Strait Islander people.
- 5.100 One of the remaining two submissions did not express a clear preference but noted that its corporation already had rules in place around board composition. The final submission of the 12 suggested that ORIC could issue guidance on board composition and the benefits of having a diverse board. A few other submissions also commented that guidance in this area would be useful. We have referred these suggestions to ORIC for consideration.
- 5.101 Of the 21 survey respondents, 62 per cent agreed that the CATSI Act should impose restrictions on corporations in relation to board composition. A range of suggestions were put forward for possible board composition restrictions, including but not limited to:
- family member appointments being limited to one or two per family;
 - character requirements such as directors cannot have been bankrupt or insolvent;
 - limiting the appointment of directors to people with relevant skills; and
 - only having restrictions for small corporations and family based corporations.
- 5.102 During the consultation sessions, most participants were of the strong opinion that the election of directors was a matter for corporations—a view which was supported by the Stakeholder Reference Group. Some participants suggested that board membership should be restricted to people with relevant skills, experience and/or training.
- 5.103 One participant shared that their corporation had set up a process whereby members nominating to be directors must undertake board training and explain to members what contribution they will make to the board if elected. The participant explained this ensured that the most suitable people were elected to the board. Further, directors



of this corporation are required to sign performance agreements which enable the corporation to take action if there are issues of underperformance.

- 5.104 Other participants also advised their corporations had put in place board restrictions for family members as well as rules for directors that they must act in the interest of the corporation rather than their respective families.
- 5.105 On the whole, we agree that board composition is a matter for corporations. As evidenced by the experiences shared in paragraphs 5.102 and 5.103, corporations can put in place processes and eligibility requirements for the election of directors of their own accord. Consequently, we are not inclined to make a recommendation in this area.

Independent directors

- 5.106 Appointing an independent director with specialist skills and knowledge is widely recognised as promoting good corporate governance, and adding value to a board. Currently, CATSI corporations are prohibited from appointing non-member directors unless the corporation's rule book provides for this.
- 5.107 In acknowledging the value of having an independent voice on a board, we suggested amending the CATSI Act to allow corporations to appoint independent directors without an explicit rule in their rule book. This does not mean corporations must have independent directors, but it means the option will be available and encouraged.
- 5.108 Many written submissions commented either on the merits of having independent directors on a board and/or indicated the appointment of independent directors should be a matter for corporations to decide. Pika Wiya shared:


Pika Wiya rule book enables the appointment of up to 3 specialist independent directors who have just been appointed and are adding tremendous value to the corporation. They are not in the majority and whilst there are different views held by many about the “skill based” board as opposed to the “member based” board there is the desirability to seek a good balance. Elections of directors are not always undertaken based on their skill but rather standing in the community – it is hoped that both matters factor into the determination by the members as to who they elect.

- 5.109 Six submissions specifically commented on this proposal and all were supportive. There was also general support for this proposal among participants of consultation sessions.
- 5.110 Sixty-two per cent of the 21 survey respondents agreed that the CATSI Act should be amended to allow corporations to appoint an independent director without first having to change their rule books. Some of the reasons put forward by those respondents who did not agree with this proposal suggested that the survey question may not have been clear. For example, a couple of the responses indicated this change would result in insufficient transparency to members and/or diminished decision-making of members. Whereas, if the change was introduced, it is expected that members would still need to be involved in deciding to elect an independent director as well as deciding who should be elected.
- 5.111 We are recommending this change noting it will make it easier for corporations to elect independent directors but it will still be a decision for corporations as to whether or not one or more are elected.

Recommendation 40

It is recommended the CATSI Act be amended to allow corporations to appoint independent directors without an explicit rule in their rule book.

- 5.112 We also asked a question about whether independent directors should be mandated for large corporations. Specifically, we queried if this would be seen as a positive move for large corporations and what, if any, issues might it present.

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- 5.113 Of the 21 survey responses, 43 per cent disagreed with the proposal for reasons including members should decide whether an independent director is appointed and directors should be internal and/or respondents could not see the value in having an independent director.
- 5.114 Participants in the consultation sessions generally did not agree with the proposal either as many considered the appointment of directors to be a matter for corporations. Participants also shared their experiences of dealing with independent directors who have detrimentally impacted corporations as well as independent directors who have made meaningful contributions to the operation of corporations. A couple of participants suggested independent directors should either not have the power to vote and/or be restricted to providing a 'nudge' where required to avoid them dominating a board.
- 5.115 One written submission agreed independent directors should be mandated for large corporations while eight did not and considered the appointment of an independent director to be a matter for corporations. AICD's submission did not support mandating independent directors instead suggesting they should be encouraged:
- The AICD has long supported a majority of independent non-executive directors (independent directors) on boards. However, we recognise that independent directors may not always be appropriate or necessary for CATSI corporations given the nature of the organisations and the stakeholders which they seek to serve. The AICD suggests that independent directors should be encouraged but not mandated for large CATSI corporations, noting that we have received some feedback that CATSI corporations tend to focus on Indigenous representation at the expense of technical expertise and governance experience.*
- 5.116 Gunaikurnai Land and Waters Aboriginal Corporation (GlaWAC) put forward, 'Independent directors should be appointed on [sic] based on skill....If independent directors are mandated, the Registrar should provide a register of Aboriginal People that have skill sets required to be an independent director and are willing to lend their time.'
- 5.117 Based on the feedback received, we are not recommending any changes in this area.

Cultural and traditional safe harbour

- 5.118 One first phase survey response put forward a range of suggestions for how culture and tradition could be incorporated into the operation of corporations through changes to directors' duties and rule books such as:
- providing a defence for directors or officers who are complying with traditional Aboriginal customs or practices of their tribal group; and
 - specifying a range of traditional customs and practices, which the directors and officers may follow and that would form the basis of a safe harbour.⁶² This would mean that if the directors acted within the scope of the rules, they would be absolved from any breaches of duty that would otherwise occur.
- 5.119 In the Draft Report, we asked for views on how the suggestions in paragraph 5.118 would work in practice. We also asked for further suggestions on ways corporations can operate in a more culturally appropriate way.
- 5.120 Eighty-one per cent of the 21 survey respondents agreed that the CATSI Act should be amended to provide a 'safe harbour' defence for directors who are complying with traditional Aboriginal customs or practices. Respondents who did not support this proposal suggested that it would allow people to 'hide' their conduct behind these provisions and also indicated this change would enable the abuse of cultural practices.
- 5.121 Three of the six written submissions that commented on this proposal supported it with two of these three offering suggestions of what such a provision would look like in practice including:

⁶² A safe harbour provision in a statute specifies that particular conduct will not be deemed a violation of a given rule. An example of a safe harbour provision can be found under section 588GA of the Corporations Act, which protects directors from being personally liable for debts if they have taken courses of action likely to lead to a better outcome for the corporation.

- *'The Law Council submits on the advice of its Indigenous Legal Issues Committee that this would need some parameters. For example, there might be a requirement that Directors must have acknowledged the existence of the relevant traditional law or custom at or before the time of the act or resolution, and perhaps an obligation to report on the application of traditional laws or customs in conflict with the CATSI Act requirements in the annual report.'*
- *'The CLC supports the introduction of a safe harbour provision for directors who take actions in relation to land or other assets of a corporation, if those actions are taken pursuant to a direction made by the owners of those assets under Aboriginal tradition. A direction would need to be made through the informed consent of the relevant group, and by a process consistent with relevant Aboriginal tradition.'*

5.122 Two of the written submissions did not support the proposal with the AICD submission noting that this proposal would be, *'incredibly challenging for ORIC to regulate in practice and would therefore not be appropriate. The AICD considers that such a defence would require further consultation and consideration before being implemented.'* A further submission commented on the proposal but did not indicate a position.

5.123 Participants in the consultation sessions expressed differing views in relation to these proposals. At least one participant representing a corporation indicated that they follow traditional lore within their corporation and would support such an approach more broadly. Other participants were also supportive of these proposals, however, some participants expressed concern that this would be a complete defence and suggested that perhaps its enactment could be dependent on the nature of the infringement. Another view was that in a contemporary setting, directors should be held accountable and it would not be acceptable for people to avoid the consequences of breaches to the CATSI Act. Similar to the written submissions, concern was also raised among some participants in relation to 'unpacking' the culture aspect of these proposals.

5.124 Hearing the challenges that some corporations have had in implementing a similar approach we are reticent to make a recommendation in this area. One written submission asked how far this provision would go and as an example questioned whether it would enable directors to breach related party provisions. This raises an important question and also a risk that unscrupulous directors may abuse such a provision. We also acknowledge feedback that this would be difficult to regulate.

Definitions

5.125 As a final area of consideration, section 683-1 provides a definition of 'director' and 'officer' of the corporation. The definition of director is also subsumed in the definition of officer. Although not specifically referenced in this section, a CEO is also an officer of a corporation. Another question we asked in the Draft Report is whether the current CATSI Act definitions of 'CEOs (CEO functions)' and 'officers' provide sufficient flexibility when considering who 'senior executives' are.

5.126 Sixty-two per cent of the 21 survey responses agreed that the current definitions provide sufficient flexibility. Those that did not agree provided a range of suggestions as to what was required including: job descriptions; separation of duties provisions; and clearer distinctions between the role of officer, director and executive. Two further suggestions were that the issue was around regulation rather than definition.

5.127 Three written submissions specifically addressed this question; of which, two considered that the current definitions provide sufficient flexibility with Dr Marina Nehme's submission noting *'There is no need to introduce a definition of CEO. CEOs fall under the definition of officers of the corporation and as such have a clear set of rules that apply to them.'* Pika Wiya suggested the definitions required clarification as, *'The current definition of an "officer" in the Act is confusing in that a director can also be an officer and the CEO of the corporation. Section 683 also further confuses these definitions when attempting to define decision-making roles and requires amendment.'*

5.128 We received limited feedback on this question in the consultation sessions. Given most of the feedback was that no change is required, we are not making a recommendation in this area.



Conclusion

5.129 Suggested changes outlined in this Chapter aim to improve the transparency of corporations' operations for members and further suggest ways to hold those in decision-making positions accountable. They are intended to strike the right balance between administrative effort and accountability. Changes regarding related party provisions, target processes that we have heard are administratively burdensome and not fit-for-purpose for corporations operating in remote and very-remote areas. In contrast, we believe the increased reporting effort associated with the proposed remuneration and performance changes is justified as the changes are expected to benefit members and reflect modern expectations.

Table 5.1: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Part 6-2, subsection 246-1(3), subsection 246-5(4), section 246-20, section 252-1, section 252-5 and Part 6-8, section 310-5	Clarifying directors' requirements and appointments
Part 6-6, section 284-1, section 287-1 and Part 7-3, section 330-5	Increasing practical application of related party provisions for small CATSI corporations
Part 7-3, section 327-1, section 330-5(1) and section 333	Supporting the transparency of executive remuneration and performance
Part 17-1, section 683-1, and Part 17-2, section 694-85	Clarifying the distinction between directors and officers



6. Modernising the CATSI Act

- 6.1 The CATSI Act has been in place for approximately 13 years. Over this period, there have been changes to both the Indigenous and non-Indigenous corporate sectors, including how information is managed, stored and accessed. There have also been changes to how governments interact with the public such as through the use of more modern communication platforms, like social media, email and phone-based messaging. Similarly, the way corporations interact with their stakeholders has changed consistent with general expectations of fast and effective interactions. There is an opportunity to modernise the CATSI Act to take account of these advancements.

Chapter 6 Summary of survey and submission feedback

In addition to feedback in the consultation sessions, feedback on modernising the CATSI Act was provided via:

- 12 of the 141 chapter surveys; and
- 21 of the 41 written submissions.

Disclosure, storage and publishing of information

- 6.2 The CATSI Act includes specific information management provisions that apply to the Registrar as well as separate requirements for corporations. The CATSI Act outlines how the Registrar should manage, disclose and communicate information. Similarly, it imposes certain obligations on corporations in relation to the collection, storage, availability and communication of information.

Protected information

- 6.3 Under the CATSI Act, the Registrar is able to disclose protected information in various circumstances.⁶³ Currently, the CATSI Act describes the situations where disclosure is authorised as broad principles (subsection 604-25(1)), as well as providing a list of circumstances in which a disclosure is deemed to be authorised. For example, the CATSI Act allows information to be provided to ASIC for the purposes of it carrying out its functions or exercising its powers. However, there are some circumstances where a disclosure that should be regarded as authorised is not specifically identified.
- 6.4 Consequently, it was proposed the CATSI Regulations be updated to clarify who is permitted to receive protected information. There was general support for this proposal in the consultation sessions once we clarified the types of positions and roles that are currently able to receive protected information, such as Commonwealth and state and territory government officials. Consultation participants also expressed concern that this was a new power for the Registrar but were more comfortable when they understood this was an existing power, and what was being proposed was providing greater clarity around its application.
- 6.5 Of the 12 survey responses, 82 per cent agreed with clarifying who can receive protected information. The four written submissions that responded to this proposal also indicated support with the Northern Territory Government Office of Aboriginal Affairs stating that such an amendment would, *'establish the appropriate level of authority to receive confidential information.'*

⁶³ Protected information includes information given to the Registrar or another person in confidence, in connection with the Registrar conducting his or her role.



Recommendation 41

It is recommended the CATSI Regulations be updated to prescribe who can receive protected information.

Providing notices


- 6.6 The Registrar is required to publish various notices in the *Australian Government Gazette* and/or in newspaper(s) under the CATSI Act. For example, the CATSI Act requires the Registrar to give public notice of changes to reporting requirements for particular types of CATSI corporations in the *Australian Government Gazette*. Given modern technology, this practice is outdated and results in unnecessary costs and delays in information being provided to CATSI corporations.
- 6.7 In the Draft Report, we contended that the Registrar should be able to publish such notices on modern electronic communication platforms, including ORIC's website, rather than in the *Australian Government Gazette* and/or in newspapers. This suggestion is consistent with recommendation 27 of the Technical Review to allow the Registrar to publish information on ORIC's website rather than have to publish information in the *Australian Government Gazette* and newspaper(s).⁶⁴
- 6.8 Of the 12 survey respondents, 100 per cent agreed with this suggestion. There were a couple of suggestions in the consultation sessions and in four of the written submissions that allowing the Registrar to publish notices on modern electronic communication platforms should be in addition to publishing in the *Australian Government Gazette* and/or in newspapers. Some participants in the consultation sessions suggested that newspapers were more accessible to some cohorts in the community such as older people, so the Registrar should continue to publish important notices in newspapers. This was supported by comments in the PCCC PBC submission stating, *'The reality is that many Indigenous People, particularly elders and those in remote locations, do not have access to modern technology and still rely on print media such as newspapers.'*
- 6.9 These are valid concerns and we agree accessibility needs to be a key consideration when publishing notices. Some thought will need to be given as to how to address these concerns in practice if the Government agrees to take forward this proposal. For example, the Registrar could be required under the CATSI Act to publish notices in the *Australian Government Gazette*, in newspapers and on electronic communication platforms. Alternatively, the Registrar could be given the discretion to determine the most suitable means for publishing notices when required.
- 6.10 Eight further written submissions indicated support for this proposal, with NNTC's submission noting, *'We would expect that these measures would assist corporations and their members by making the Registrar's communications and notifications more readily accessible.'*

Recommendation 42

It is recommended the CATSI Act be amended to allow the Registrar to publish notices on electronic communication platforms as well as in the *Australian Government Gazette* and/or in newspapers.

- 6.11 In the Draft Report we also proposed that the Registrar be able to use electronic means, such as email, when required to notify people or corporations directly. Currently, sections of the CATSI Act require the Registrar to provide notices in-person or by post, which does not enable the Registrar or ORIC to take advantage of faster, less costly communication methods such as email. For example, the Registrar is required under the CATSI Act to give notice to a person to produce relevant information about a corporation, or to appear to answer questions about a corporation, either personally or by post. Similarly, the Registrar is required to issue a penalty notice either in-person or by post.
- 6.12 Of the 12 survey respondents, 100 per cent agreed with enabling the Registrar to contact individuals and corporations using electronic means rather than by post or in-person. Participants in the consultation sessions

⁶⁴ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2020].



were generally supportive of this proposal but some participants suggested that contact by electronic means should not be instead of contact by post or in-person. Participants indicated contact should still also be by post for formal notices. For example, the Registrar may send an email followed by a written notice via post. It was also raised in the consultation sessions that some people may not have an email address or may prefer to receive information by post.

- 6.13 Eleven written submissions showed support for this proposal, albeit half of those suggested electronic communication methods should be available to, and used by, the Registrar in addition to more traditional communication methods. For example, the CLC suggested when the Registrar is exercising coercive powers, he or she should generally give notice in-person or by post, commenting, *‘Where the Registrar seeks to exercise coercive powers under the CATSI Act (Draft Report [6.5]), in the CLC’s view it is appropriate that notices should be served in person or by post, unless the person acknowledges receipt of the notice by electronic means.’* Submissions also raised concerns in relation to accessibility of electronic channels, particularly for older people, as well as network access, coverage and disruption. Two further submissions indicated that individuals and corporations should be able to ‘opt in’ or be able to choose option(s) for receiving notifications from the Registrar.
- 6.14 Underpinning these concerns is a desire to ensure that notices reach recipients in a timely manner which is also a key driver for this proposal. Similar to the consideration detailed in paragraph 6.9, if the Government was to support this recommendation the CATSI Act could be amended to require the Registrar to contact individuals and corporations using specific communication means or provide the Registrar with the discretion to determine the most appropriate means.


Recommendation 43

It is recommended the CATSI Act be amended to allow the Registrar to contact individuals and corporations using electronic means in addition to in-person or by post.

Information storage

- 6.15 Corporations registered under the CATSI Act are required to make information, such as the corporation’s rule book, available for inspection by members and officers at a nominated physical address. While some sections of the CATSI Act refer to maintaining information on computer, they do not explicitly provide for a corporation’s information to be stored on cloud servers, which is technology now commonly used by corporations, individuals and organisations to store information.⁶⁵ In the Draft Report, we suggested it would be useful if CATSI corporations could store their information on cloud servers and to complement such a change, they would need to take reasonable steps to ensure that the information was secure and met any relevant privacy requirements.
- 6.16 There was general support for this proposal in the consultation sessions with at least one corporation indicating that it already stores its information on cloud servers. Security, privacy and accessibility of information concerns were raised in some consultation sessions. Further and importantly, in one session it was suggested that any change to the CATSI Act should be ‘future proofed’ and rather than refer to a particular type of technology that may be superseded, it would be more prudent to use a general term such as ‘modern information storage solution.’
- 6.17 Ninety-one per cent of the 12 survey responses indicated support for this proposal. The one respondent who did not agree with the proposal raised concerns about information security. Respondents’ views varied on whether there should be some conditions for corporations that store information on a cloud server. One respondent said there should be no conditions; two respondents indicated corporations should be required to have their information ‘back-ups’ held in Australia; two agreed with the proposal that the corporation should have to take

⁶⁵ Corporations may independently maintain or access cloud servers. ORIC is also currently investigating the opportunity to provide corporations with access to cloud servers to store information such as their register of members, records of member applications and approvals, and board papers and meetings minutes.



reasonable steps to ensure that information was secure and met privacy requirements; and one noted there may be significant costs associated with ensuring the security of information held on cloud servers.

- 6.18 There was mixed feedback from the six respondents who addressed this proposal in their written submissions. The PCCC PBC submission suggested that the imposition of conditions, such as security and privacy requirements, in relation to storing information on cloud servers was ‘regulatory over-reach’ as, *‘No other corporations are subject to this type of interference in their day to day operations and there is no justification for this type of regulation under the special measure test.’* The Law Council implied support by suggesting that adopting a modern information storage solution should be at the discretion of corporations as determined by general resolution. Dr Marina Nehme recommended the CATSI Act should be neutral in relation to the use of technology and CATSI corporations should be able to choose technology that is available as required. The Federation, Pika Wiya and DDHS written submissions provided unequivocal support for the proposal.
- 6.19 Acknowledging the concerns raised about requiring CATSI corporations to ensure the security and privacy of information held on any electronic modern storage solution, we are not recommending to take forward this element of the proposal. We nevertheless consider updating the CATSI Act to explicitly enable corporations to store information on modern information storage solutions is appropriate.

Recommendation 44

It is recommended the CATSI Act be amended to explicitly enable corporations to store information on modern information storage solutions.

Sharing data for research purposes

- 6.20 Information collected by the Registrar in the course of performing a function or exercising a power is ‘protected information’ according to the CATSI Act. Information is not protected if it has lawfully been made public from other sources.
- 6.21 The Registrar is able to use or disclose protected information in performing a function or exercising a power. The Registrar is also able to provide information to various people such as officers of state, territory and Commonwealth agencies, among others. However, the Registrar is prevented from sharing protected information more broadly and is required to ‘take all reasonable measures’ to ensure protected information is not subject to unauthorised use or disclosure.
- 6.22 Researchers, peak bodies, academics and other stakeholders are interested in the information held by the Registrar and ORIC. The type of requests seek information about the operation of CATSI corporations, including those that have been placed into special administration.
- 6.23 As the Registrar and ORIC often receive requests to access information, we proposed that the Registrar be able to share de-identified data and information with stakeholders such as researchers, academics and peak bodies among others.
- 6.24 De-identified data does not contain identifiers that enable individuals—and in this case corporations too—to be identified. To ensure data cannot be used to identify individuals and corporations, the nature of the data request needs to be considered. At a national or aggregated level, a particular corporation is unlikely to be identifiable. However, if this information was to be provided at a regional level, it may be easier to identify a particular corporation for example, if there is only one or two corporations in a particular region.
- 6.25 Of the 12 survey responses, 10 supported the proposal to allow the Registrar to share de-identified data and information with stakeholders. The one respondent who did not support this proposal commented that it should only be allowed where consent from members has been obtained. Of the 12 written submissions that addressed this proposal:

- three indicated they did not support this proposal and the release of information should be a matter for corporations;
- five supported the proposal;
- three indicated that consent should be obtained from corporations prior to the release of any information; and
- one indicated that further consultation with corporations was required before a position should be taken as part of the Review.


- 6.26 The nature of the written submissions and some of the consultation feedback suggested that the proposal may not have been clearly articulated in the Draft Report. The types of requests the Registrar and ORIC receive include: the number of CATSI corporations that have been issued with a compliance notice; or the number of CATSI corporations that are a RNTBC.
- 6.27 Generally, the information requested from ORIC is already available publicly at a disaggregated level and with significant time and effort the information could be analysed to determine the aggregate figures. For example, by counting the number of corporations with RNTBC in their name or by reviewing ORIC's media releases to count the number of corporations that have been placed under special administration. The information requested by stakeholders is typically not the kind that could be provided by an individual corporation as it is generally aggregated information held by ORIC.
- 6.28 As noted in Dr Marina Nehme's submission supporting this proposal, *'The Registrar should have the discretion to share de-identified data and information for the purpose of research. This is a common practice with other regulators. Further, research into CATSI corporations is important for future reform in this area. It will ensure that the reforms are based on sound empirical evidence.'* We agree with this premise and consider that research may result in the promulgation of better practice and in-turn support the governance of Aboriginal and Torres Strait Islander corporations.

Recommendation 45

It is recommended the CATSI Act be amended to allow the Registrar to release de-identified information.

Contact information

- 6.29 Where the CATSI Act requires the provision of contact information, it is currently limited to physical addresses. For example, when applying for the registration of a CATSI corporation, the applicant is required to provide their name and address. As noted elsewhere, it can be less costly and more effective to contact individuals and corporations through electronic means such as email or phone-based messaging rather than by post or in-person. A range of suggestions have been made as part of this Review to enable communication through modern, electronic channels and to complement these proposed provisions, the Registrar and ORIC need to hold relevant contact information such as email addresses and telephone numbers. Consequently, we proposed that the CATSI Act could be amended to require the provision of electronic contact details for people and corporations as well as physical address information.
- 6.30 Participants in the consultation sessions were supportive of amending the CATSI Act to enable the collection of electronic contact details recognising that these changes are dependent on support for enabling:
- corporations to contact their members using electronic communication means (refer paragraphs 4.14 to 4.17); and
 - the Registrar to contact individuals and corporations using electronic communication means (refer paragraphs 6.6 to 6.10).
- 6.31 Seven of the 12 survey respondents agreed the CATSI Act should be amended to provide for the collection of email addresses and telephone numbers where it requires the collection of address details. The PCCC PBC submission



disagreed with the proposal as, *'not all Indigenous people have emails or even telephones'*. The submission went on to say, *'The inclusion of this information should be optional for each corporation and each individual, particularly since this information becomes publicly available.'* AIATSIS' submission did not agree with the proposal indicating that rather than CATSI corporations being compelled under the Act to provide electronic contact details, corporations, members and native title holders should be able to decide what information they provide.

6.32 Of the remaining seven written submissions that addressed this proposal:

- four provided unequivocal support;
- two noted the need to keep personal information protected and confidential, including one that stated the collection of this information should not be a requirement; and
- another noted that any changes need to be made in consultation with remote and small corporations.

Recommendation 46

It is recommended the CATSI Act be amended to provide for the collection of other contact details, such as email address and phone number, in addition to physical address details.

6.33 CATSI corporations are required to lodge a notice with the Registrar which includes the contact details for a director within 28 days after he or she is appointed, and to subsequently notify the Registrar of any change in the director's personal details. There may be instances where a person is acting as a director for more than one CATSI corporation and in the event that one corporation notifies the Registrar of a change to that person's personal details, it would be useful if the Registrar could also update the change for the other corporations. Therefore, we suggested the CATSI Act be amended to enable the Registrar to update the personal details of a director when he or she is aware they are incorrect or out-of-date.

6.34 Through the consultation sessions, there was general support for this proposal. Two common concerns raised were:

- there must be certainty that any consequent records that are updated belong to the director in question; and
- consideration needs to be given as to whether details on any related records require updating; that is, whether they may be contact details specific to the director's association with a particular corporation such as a dedicated email address.

6.35 Should this amendment receive support, these are two implementation matters that will need to be considered. There are measures that could be put in place to assist with mitigating these concerns, including but not limited to:

- linking records in ORIC's system for directors who are on more than one board;
- confirming changes with the relevant director prior to making them; and
- sending confirmation advice of changes to the relevant director to enable them to advise if the changes are incorrect.

6.36 Ninety-one per cent of survey respondents indicated support for allowing the Registrar to update directors' records when he or she is aware that they are incorrect or out-of-date. The one survey response that did not agree with this proposal indicated that it was not the Registrar's role to update these records but instead the role of corporations. Five of the six written submissions that addressed this proposal indicated support and the sixth shared a similar view to the survey respondent who did not agree with this proposal because updating the records of directors was the responsibility of corporations—not the Registrar.

6.37 Respondents are correct that it is the responsibility of corporations to inform the Registrar of changes to directors' details. Nevertheless, sometimes and for a range of reasons, this advice is not provided to the Registrar which is the situation that this proposal aims to address.

Recommendation 47

It is recommended the CATSI Act be amended to allow the Registrar to correct information on directors' records if he or she is aware that they are incorrect.


Consistent approach in relation to false and/or misleading information

- 6.38 The CATSI Act makes it an offence for false and/or misleading information about a corporation's affairs to be made available to members and other key stakeholders, or to be included in documents required by or for the purpose of the Act, or lodged with or submitted to the Registrar, without having taken reasonable steps to avoid this situation. These provisions are similar to those contained in the Corporations Act which were amended in 2014 to outline what 'reasonable steps' means in this context. In the Draft Report, we suggested there would be merit in including a similar explanation of 'reasonable steps' in the CATSI Act in order to maintain alignment with the Corporations Act.
- 6.39 Participants' responses to this proposal in the consultation sessions was largely supportive. Most participants considered there to be value in updating the CATSI Act to include a description of reasonable steps in this context. This was consistent with 91 per cent of the 12 survey respondents who also supported this proposal.
- 6.40 Seven written submissions that addressed this proposal indicated support with the Law Council suggesting that the explanation of 'reasonable steps' needs to be specifically considered in the context of Aboriginal and Torres Strait Islander people. The NNTC submission indicated that it would require further information about the meaning of 'reasonable steps' before it could comment on this proposal.
- 6.41 As outlined in Table 6.1, the CATSI Act creates offences for the making of false and/or misleading statements. While the nature of the offence outlined in each subsection is substantially the same, the penalties imposed differ. In the Draft Report, we suggested there would be value in aligning the penalties for these offences.

Table 6.1: Provisions relating to the making of false and/or misleading statements

Subsection	Offence	Penalty
561-1(4)	<p>A person commits an offence if the person, in a document required by the CATSI Act or lodged with the Registrar:</p> <ul style="list-style-type: none">▪ makes or authorises statements that are materially false or misleading, or▪ omits or authorises the omission of information from statements, without which the document is materially misleading, <p>without taking reasonable steps to ensure that the statement was not false or misleading, or the omission would not cause the document to be misleading.</p>	200 penalty units or imprisonment for five years, or both
561-5(2)	<p>An officer or employee of a CATSI corporation commits an offence if he or she provides or authorises the provision of materially false or misleading information to a director, auditor or member of the corporation without taking reasonable steps to ensure that the material was not materially false or misleading, or the omission would not render the information materially misleading.</p>	100 penalty units or imprisonment for two years, or both

Source: CATSI Act.

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- 6.42 Most participants in the consultation sessions indicated support for this proposal although there was one warning that consideration needs to be given as to whether there is an intentional difference between the two provisions. As the Explanatory Memorandum does not explain the difference in penalties, it is difficult to determine whether the difference was intentional. Nevertheless, our current consideration is the two provisions should be aligned.
- 6.43 This proposal was supported by all 12 survey respondents and the eight written submissions that addressed the proposal.

Recommendation 48

It is recommended the CATSI Act be amended to:

- include an explanation of what reasonable steps means in the context of providing false and/or misleading information in relation to a corporation's affairs; and
- align the penalties for providing false or misleading information in relation to a corporation's affairs to the lower penalty of 100 penalty units or imprisonment for two years or both.

Whistleblower protection

- 6.44 Similar to other legislation such as the Corporations Act, the CATSI Act provides protection to whistleblowers who make disclosures to certain people when they have reasonable grounds to suspect that a corporation, or an officer or employee of a corporation has breached a provision of the CATSI Act. As a result of amendments to the Corporations Act to expand the whistleblower provisions in 2019, the CATSI Act provisions now seem comparatively narrow. Consequently, it was a recommendation of the Technical Review that the CATSI Act adopt the whistleblower amendments then in the pipeline for the Corporations Act (Recommendation 69).⁶⁶ We proposed expanding the protection provisions for whistleblowers under the CATSI Act in line with the 2019 amendments to the Corporations Act. This would promote greater consistency in the regulatory frameworks for both CATSI and non-CATSI corporations.
- 6.45 There was unanimous support for this proposal in the consultation sessions as well as from all 12 survey respondents. Twelve written submissions also supported the proposal including PCCC PBC which noted that under its proposed model (see paragraphs 2.87-2.90), inconsistencies between legislation would not exist because all corporations would fall under a single regulatory framework.

Recommendation 49

It is recommended the CATSI Act be amended to incorporate the 2019 whistleblower provisions that were incorporated into the Corporations Act.

ORIC examinations of CATSI corporations

- 6.46 ORIC conducts examinations to assess the corporate governance and financial health of corporations. Possible outcomes of an examination include the Registrar issuing a:
- compliance notice requiring rectification of a less serious compliance matter; or
 - 'show cause' notice, where there are more serious concerns, requiring the corporation to explain why it should not be placed into special administration; or

⁶⁶ DLA Piper, *Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC, 2017, available from <<https://www.oric.gov.au/catsi-review>> [accessed 13 February 2020].

- 'management letter' advising the corporation of the conclusion of an examination, and highlighting minor concerns and opportunities for better practice.
- 6.47 As things stand, the Registrar does not actually have to issue anything to confirm the completion of the examination. Currently there is no legislative basis for this 'management letter', and there is also confusion around the term 'management letter' due to its use in the Audit process. We proposed the CATSI Act require ORIC to issue a finalisation letter if either a compliance notice or 'show cause' notice is not issued at the conclusion of an examination. This is expected to provide certainty to CATSI corporations that an examination has been formally concluded, as well as guidance about actions that may be required to fix any issues identified.
- 6.48 In respect of a compliance notice, the Registrar does not have to issue anything to show that he or she is satisfied that problems set out in the compliance notice have been fixed. A letter from the Registrar confirming issues have been addressed may help a corporation when responding to queries from members and other stakeholders. Therefore, we also proposed the Registrar be required under the CATSI Act to issue compliance outcome letters to confirm that matters raised in compliance notices have been adequately addressed by corporations.
- 6.49 These two proposals received unanimous support. Participants representing CATSI corporations in the consultation sessions indicated that a finalisation letter and compliance outcome letter would both be useful to assist with responding to queries from stakeholders such as members, creditors and funding bodies in relation to the outcomes of an examination and compliance notice.
- 6.50 All 12 survey respondents supported both proposals as did the ten written submissions that addressed the proposals.

Recommendation 50

It is recommended the CATSI Act be amended to require ORIC to issue a:

- finalisation letter at the conclusion of an examination in the absence of issuing a compliance notice or 'show cause' notice; and
- compliance outcome letter confirming that issues raised in a compliance notice have been addressed by the relevant corporation.

Accounting standards

- 6.51 CATSI Regulation 23 provides that financial reports required to be prepared by corporations under the CATSI Act must be prepared in compliance with the accounting standards even if the corporation is not a reporting entity as defined under the accounting standards. The accounting standards are required to be applied to the extent they can be applied to a CATSI corporation. Anecdotal evidence indicates that the intent of the Regulation is unclear from its current wording and many corporations are not preparing their financial reports in accordance with the accounting standards as a reporting entity. In the Draft Report, we proposed that CATSI Regulation 23 should be amended to make it clear that reporting entities under the CATSI Act need to prepare general purpose financial statements in accordance with the accounting standards—as opposed to special purpose financial statements.⁶⁷
- 6.52 Participants in the consultation sessions saw merit in amending CATSI Regulation 23 to clarify the requirements in relation to preparing financial statements. There was also support for this proposal from 10 of the 12 survey respondents and the nine written submissions that addressed this proposal.
- 6.53 CA ANZ recommended we consult with the Australian Accounting Standards Board (AASB) over the timing and specific wording of its proposed amendments to Regulation 23. The AASB is currently reforming Australia's

⁶⁷ General purpose financial reports are prepared in accordance with the Australian Accounting Standards. Special purpose financial reports are prepared according to requirements usually established by directors or members. Special purpose financial reports are prepared for a limited group of users or for a specific purpose. [ORIC's website](#) contains more information about the specific reporting requirements for corporations.



Financial Reporting Framework. This project aims to remove the use of the "reporting entity concept" and replace, where appropriate, special purpose financial reports with a series of tiered reporting requirement for both for-profit and non-for-profit sectors.



Recommendation 51

It is recommended CATSI Regulation 23 be amended following consultation with Australian Accounting Standards Board.


Auditor provisions

- 6.54 CATSI corporations may be required to have their financial reports audited. To this end, the CATSI Regulations include a range of provisions in relation to the appointment and conduct of auditors. While the CATSI Regulations provide for the resignation of an auditor, there is no provision for appointing a replacement auditor outside an Annual General Meeting. We proposed the CATSI Regulations be amended to outline the process for corporations needing to replace an auditor who has resigned. This is in line with a recommendation of the Technical Review that the CATSI Regulations be amended to enable the directors of a corporation to appoint a replacement auditor when the incumbent resigns.
- 6.55 Some of the discussion in the consultation sessions indicates this is another proposal that could have been clearer in the Draft Report. Some participants considered that CATSI Regulation 34 already outlines a process for appointing a replacement auditor because it indicates an auditor may be appointed in a general meeting and if an auditor is not appointed at a general meeting, the directors can appoint an auditor. Complementing Regulation 34 is section 201-160 of the CATSI Act which outlines the business of an Annual General Meeting including the appointment and remuneration of the auditor.
- 6.56 Therefore, while the CATSI Regulations state the appointment of an auditor can be made at a general meeting, the CATSI Act indicates that the appropriate general meeting is the Annual General Meeting which introduces some ambiguity. As a result, we saw merit in clarifying the process for appointing an auditor who has resigned outside of an Annual General Meeting.
- 6.57 All 12 survey respondents agreed with this proposal and offered suggestions around the appointment of the replacement auditor, including that the appointment should be made: by the Registrar; by resolution of the directors as a general meeting is too onerous and costly; by resolution of the directors and then approved by the members; and at a general meeting and then confirmed at an Annual General Meeting.
- 6.58 The eight written submissions that considered the proposal were also supportive. Three of the six submissions provided suggestions as to the appointment of a replacement auditor, including:
- SANTS suggested the process should be consistent with the process outlined in CATSI Regulation 34;
 - Pika Wiya indicated it should be, *'subject to a tender process, where there is no conflict in the appointment of a further auditor. Consideration needs to be given to the group that makes such an appointment of the new auditor to be confirmed'*; and
 - CA ANZ recommended alignment with the provisions in the Corporations Act.

Recommendation 52

It is recommended CATSI Regulations be amended to outline a process for the appointment of a replacement auditor when the incumbent has resigned outside of an Annual General Meeting.

- 6.59 A further proposed change outlined in the Draft Report relating to auditors, was to align the CATSI Act with the Corporations Act under which auditors are provided with qualified privilege in relation to specific actions they may undertake as part of their work. Qualified privilege operates as a defence in defamation law. Qualified privilege covers statements made in the situation where there is a legal obligation to give the information, and the person to whom it is given has a corresponding duty or interest to receive it, such as an auditor's obligation to bring matters to the attention of the Registrar. It allows free communication in certain relationships without the risk of



an action for defamation. The defence of qualified privilege cannot be used if it can be proved that the defamation was motivated by malice.

- 6.60 Participants in the consultation sessions were supportive of this proposal as were nine of the 12 survey respondents. Further, all eight of the written submissions that addressed this proposal were supportive.

Recommendation 53

It is recommended the CATSI Act be amended to provide auditors with qualified privilege consistent with the Corporations Act.

Conclusion

- 6.61 Proposed changes have been outlined in this Chapter with the aim of bringing the CATSI Act in line with modern expectations. They also reflect areas where the CATSI Act has not been operating as intended. These proposed changes aim to ensure the CATSI Act operates as a modern incorporation statute for the benefit of Aboriginal and Torres Strait Islander corporations and their members.

Further ideas

- 6.62 As previously noted, the CATSI Act establishes the position of the Registrar, whose title is set out in the CATSI Act as the "Registrar of Aboriginal and Torres Strait Islander Corporations" and the Office of the Registrar, which in the CATSI Act is entitled the 'Office of the Registrar of Aboriginal and Torres Strait Islander Corporations.' Nevertheless, the Registrar is often referred to as the Registrar of Indigenous Corporations and the Registrar's Office is commonly known as the Office of the Registrar of Indigenous Corporations or ORIC.
- 6.63 The formal titles cannot be formally changed without a change to the CATSI Act itself. We sought feedback on the proposal that there would be benefit in being able to change these titles more simply to reflect developments in the Indigenous Affairs portfolio, such as a shift in preferred language. We asked for feedback on whether people thought the CATSI Act could be amended to allow changes to the title of the Registrar and Registrar's Office.
- 6.64 Participants in the consultation sessions were generally supportive of this change but some cautioned against changing the title of the Registrar frivolously. Only 55 per cent of the 12 survey respondents supported this proposal; those who disagreed made a range of comments, including: this change will not achieve consistency because the name in the CATSI Act will still be inconsistent; the title should be set out in legislation; and people should be consulted on any proposed change. The four written submissions that addressed this proposal were supportive.
- 6.65 There seems to be a general theme in these comments that as the Registrar's role is established in law, any changes should be considered with due formality. A further theme appears to be a desire from stakeholders to contribute towards any type of reconsideration of this role. Both of these themes are positive and illustrate a strong connection between stakeholders and the Registrar.

Recommendation 54

It is recommended the CATSI Act be amended to allow the title of the Registrar and that of his or her office to be changed following a public consultation process and with endorsement by the relevant Minister.

Table 6.2: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Part 2-2, section 21-1	Application for registration
Part 3-2, section 72-5	Corporation must provide governance material to members
Part 6-7, section 304-5	Notice of name and address of directors and secretaries to the Registrar
Part 7-3, section 336-5	Registrar may require additional reports, or increase reporting requirements, for class of corporation
Part 10-2, section 439-20	Registrar may require compliance with the CATSI Act
Part 10-3, section 453-5	Production of books or attendance to answer questions
Part 10-5	Protection for whistleblowers
Part 11-2, section 487-10	Show cause notice procedure
Part 13-1, section 561-1 and section 561-5	False or misleading statements False information
Part 13-2, section 566-5	Penalty notices
Part 15-2, section 604-5, section 604-10 and section 604-25	Protected information and the Registrar's obligations Authorised use or disclosure
CATSI Regulation 23	Requirement for financial reports to be prepared in compliance with accounting standards
CATSI Regulation 33	Appointment of auditor
CATSI Regulation 36	Resignation of auditor
CATSI Regulation 54	Authorised use or disclosure of protected information



7. Registered Native Title Bodies Corporate

- 7.1 RNTBCs, commonly known as Prescribed Bodies Corporate (PBCs)⁶⁸ are a special form of corporation established under the CATSI Act, pursuant to the *Native Title Act 1993* (NTA). RNTBCs have legal responsibilities under the NTA, the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), the CATSI Act and its Regulations, and other Commonwealth and state and territory legislation.
- 7.2 Like other CATSI corporations, RNTBCs must meet obligations under the CATSI Act and are accountable to their members. Unlike other CATSI corporations, RNTBCs are also accountable to common law holders who may not be members of the corporation.
- 7.3 Recognising the challenges of navigating this complex legal and operational environment, this Review has specifically considered what legislative and other changes are needed to better support RNTBCs in their unique position amongst CATSI corporations.
- 7.4 The Draft Report focused on addressing the key issues that affect the capacity and governance of RNTBCs. There are currently 224 RNTBCs which account for approximately 6.8 per cent of CATSI corporations. However, more than 20 per cent of the complaints ORIC receives are in relation to RNTBCs, often relating to the management of native title benefits and membership. The Registrar has also placed 16 RNTBCs under special administration (14.3 per cent of all special administrations).

Chapter 7 Summary of survey and submission feedback


In addition to feedback in the consultation sessions, feedback on RNTBCs was provided via:

- 22 of the 141 chapter surveys;
- 26 of the 41 written submissions;
- four of the eight email feedback submissions; and
- one of the three web-based feedback submissions.

Transparency around native title monies and benefits

- 7.5 In response to calls from stakeholders, the Draft Report posed several questions about legislative amendments to improve transparency in decision-making and reporting on native title monies, with a particular focus on the establishment of external benefit management arrangements outside of RNTBCs. These benefit management arrangements can result in common law holders losing visibility of how their native title monies and benefits are being distributed and managed, due to fragmented regulation and a lack of reporting requirements.

⁶⁸ PBCs are established to be appointed as the body that manages and/or holds the native title rights and interest (as trustee or agent) for the common law holders (also known as native title holders) recognised in a determination by the Federal Court of Australia.

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- 7.6 Balancing the need to improve transparency, stakeholders expressed mixed views and support for greater regulation around the management of native title benefits throughout consultations. A strong view expressed was that further regulation would increase the compliance burden on RNTBCs. Some stakeholders felt effort should focus on assistance to build capacity and compliance within existing regulations. Other stakeholders emphasised they already had in place strong transparency and accountability to common law holders under the existing regulatory framework. Where feedback supported additional transparency measures, stakeholders generally considered they should be fit for purpose and focus on delivering timely and relevant information to those with a legitimate interest.

Benefit management structures

- 7.7 The Draft Report posed the question whether a special corporate structure for the management of native title benefits was needed. It proposed such a structure could be created under the CATSI Act and would increase transparency and accountability about the use of native title monies and benefits to common law holders. It would also provide common law holders greater flexibility on how they manage their native title monies and benefits.
- 7.8 This proposal has received considerable attention over the past decade due to limitations on the use of charitable trusts to realise economic opportunities through profit-making enterprises. These limitations were initially identified by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, which reported to the Australian Government in July 2013.
- 7.9 In 2013, amendments to the *Income Tax Assessment Act 1997* (ITAA) and the then-new *Charities Act 2013* addressed some of these concerns. Acknowledging this, the Draft Report sought stakeholder feedback on whether these changes have addressed the sector's concern about benefit management structures (BMS).
- 7.10 Several stakeholders noted the increasing need for a special corporate structure in light of the High Court's decision in the *Griffiths* compensation case (also known as 'Timber Creek')⁶⁹. The historic Timber Creek decision is expected to lead to other common law holders and RNTBCs securing benefits through native title compensation claims.
- 7.11 The majority of stakeholders stressed the importance of ensuring flexibility and choice for RNTBCs in developing their own BMS. Many agreed about the need for simple, tailored options to enable RNTBCs to unlock the potential of native title monies and benefits for economic development.
- 7.12 Some stakeholders noted the current legislative framework does not facilitate the kind of arrangements many groups often require. These typically include both charitable and non-charitable structures to enable provision for public and private benefits and ensure a future fund for intergenerational benefits.

Economic Vehicle Status

- 7.13 To address this gap, a solution proposed by two institutional stakeholders was the creation of a special type of BMS: the PBC Economic Vehicle Status (PBC EVS).
- 7.14 The PBC EVS model, which stakeholders indicated was developed with the assistance of independent experts and lawyers with experience in native title benefits management, is designed as an option for RNTBCs to more directly and effectively utilise their native title monies to support economic development. The model is intended as an alternative to charitable trusts and other structures currently in common use.
- 7.15 The PBC EVS seeks to address what stakeholders perceive as structural impediments that limit the ability of some native title groups to use native title funds for long-term economic benefit. For example:

⁶⁹ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.



- some stakeholders feel the ACNC guidance provides only limited clarity on the activities a charity (or charitable trust) may legitimately pursue for a charitable purpose when it is also focused on economic development for an Indigenous community;
 - while charities can accumulate funds, stakeholders reported finding the Australian Taxation Office's (ATO) administrative practice in relation to long duration and general purpose accumulation does not always fit well with the provision of intergenerational benefits within Indigenous communities;
 - complex associated administration costs and governance requirements are exacerbated by having to use multiple entities, including charitable trusts, discretionary trusts, a separate corporate entity and a RNTBC;
 - the language of 'charity' when applied to economic and cultural development for Indigenous Australians is seen as offensive by many, given the connotations associated with welfare; and
 - achieving practical resolution of the ambiguity about the above issues is difficult without legislative reform.
- 7.16 The PBC EVS would be a not-for-profit entity. It would impose more stringent funds management and reporting obligations on RNTBCs, including reasonable steps to ensure accountability to members, common law holders and potential beneficiaries.
- 7.17 It is important to note this model proposes the PBC EVS would benefit from favourable tax treatment of native title monies and income derived from native title monies. This includes the use of native title monies and benefits for community and economic development purposes and when used to provide finance to common law holders to establish private businesses.
- 7.18 The issue of tax concessions to support the PBC EVS model, including when it may be investing or distributing funds for the purpose of establishing a for-profit private business, needs to be further explored and is outside the scope of this Review. It would require discussions with the agencies responsible for taxation and taxation legislation.
- 7.19 It is clear further work is required on the design and details of the PBC EVS model.

Recommendation 55

It is recommended current benefit management structures be reviewed to identify and address the impediments to supporting economic development for common law holders, including the extent to which charities can:


- engage in economic development activities; and
- act as future funds given the conflicting obligations of paying out benefits and accumulating them for future generations.

It is recommended the National Indigenous Australians Agency consult on the viability of the Prescribed Bodies Corporate Economic Vehicle Status model with the Department of Finance, the Treasury, the Australian Taxation Office and the Australian Charities and Not-for-profits Commission.

It is recommended the National Indigenous Australians Agency work in consultation with the Office of the Registrar of Indigenous Corporations and the native title sector to develop guidance material on best-practice benefit management structures to support good governance of native title benefits for Registered Native Title Bodies Corporate and common law holders.

Native Title Benefit Management Trusts under the CATSI Act

- 7.20 The Draft Report posed the question whether the CATSI Act should support the establishment of native title benefit management trusts. This proposal involved a requirement for regular reporting on trust activity and the Registrar maintaining a Register of Trust Deeds. Some stakeholders considered further detail was needed before they could provide meaningful comment on this proposal.
- 7.21 The CATSI Act does not prevent CATSI corporations from acting as trustees and holding money or property on trust. It also does not require CATSI corporations holding money or property on trust to report to the Registrar or



members on the use of that money or property. CATSI corporations, including RNTBCs, are only required to report on corporate monies.

- 7.22 Native title monies and benefits are unique to RNTBCs. Proposals to strengthen arrangements for recording, reporting and decision-making in relation to native title monies and benefits are considered in the next section.
- 7.23 Native title monies and benefits flow from private agreements between common law holders and other parties and are set up to reflect the wishes of the common law holders and their choice about how they wish to manage their affairs. Stakeholders emphasised a requirement to establish these arrangements under the CATSI Act could undermine self-determination. Stakeholders also raised concerns about ORIC's capacity and expertise in operating as a trust regulator.
- 7.24 Legislative changes could be made to the CATSI Act to better define the obligations of CATSI corporations, including RNTBCs, whose primary purpose is to hold money or property on trust. This would potentially involve a requirement for trusts to be registered under the CATSI Act and for the Registrar to regulate CATSI Act trusts. This would apply to all CATSI corporations, not just RNTBCs and such a recommendation is beyond the scope of this chapter.
- 7.25 We recommend further targeted consideration of this proposal, including consultation with Aboriginal and Torres Strait Islander people as to their interest in establishing CATSI Act registered trusts.
- 7.26 Stakeholder feedback was clear that any reforms establishing native title benefit management trusts under the CATSI Act should not be mandatory. Those stakeholders who supported the creation of native title benefit management trusts under the CATSI Act stressed it should be an option rather than a requirement.
- 7.27 On balance, the principle of encouraging common law holders and RNTBCs to establish native title benefit management trusts under the CATSI Act seems sensible. Coupled with requirements to report on trust activity, it may also assist in supporting a standard of transparency and accountability that would help reduce the risk of disputes about the distribution and management of native title monies. It is clear that mandating such an arrangement would be counterproductive but for those that choose to use it, there would be certain minimum requirements for reporting on trust activity.
- 7.28 It is critical any option in this area reflect the principle of choice, be specific to native title benefits negotiated by RNTBCs and provide for transparency and accountability to the RNTBC and common law holders.


Recommendation 56


It is recommended a separate, targeted consultation process be considered to determine the need and appetite to amend the CATSI Act to allow for the creation of registered trusts. Such an option to become a registered CATSI Act trust would be open to anyone and not be restricted to Registered Native Title Bodies Corporate or common law holders.

Recording, reporting and decision-making

Additional reporting for RNTBCs and benefit management structures

- 7.29 As noted above and in the Draft Report, there is no obligation under the CATSI Act for RNTBCs to report either publicly, to members or to common law holders on the management and use of native title monies and benefits held on trust, or when native title monies are held on trust in external benefit management arrangements.
- 7.30 Stakeholder feedback suggested the lack of transparency and accountability around native title benefits increased the risk of directors using benefits for personal gain. This feedback is consistent with complaints to ORIC and evidence that poor governance of benefits management has resulted in cases of special administration under the CATSI Act.

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- 7.31 To address this, the Draft Report proposed the introduction of a separate reporting requirement for RNTBCs to common law holders on native title monies and benefits. It also asked whether this requirement should be extended to entities outside a RNTBC holding native title monies and benefits.
- 7.32 There was broad agreement among stakeholders that common law holders should have access to information about the management of their native title benefits. Questions about transparency and reporting were included in the chapter survey about RNTBCs on the CATSI Act Review website. A majority (82 per cent of 22 survey respondents) considered RNTBCs should be the source of information on the management of native title benefits for common law holders. A similar proportion (86 per cent of survey respondents) thought there should be reporting on the management and use of native title benefits.
- 7.33 However, there was reluctance from some stakeholders to support increased reporting obligations in written submissions, with nine submissions opposing or questioning the need for further regulation. In particular, public reporting on the management and use of native title monies and benefits was opposed on the grounds native title agreements are private agreements and the information they contain is often commercial-in-confidence.
- 7.34 Several submissions also expressed concern the proposal would result in a level of monitoring and regulation of Indigenous people and their communities that exceeds that required of the wider community.
- 7.35 A further concern among some stakeholders was the impact increased reporting obligations would have on RNTBCs, adding to their administrative burden without additional resources to support compliance. These stakeholders considered government should focus on building the capacity of RNTBCs, not adding to their tasks.
- 7.36 Some stakeholders considered existing arrangements to be adequate, ensuring appropriate accountability by RNTBCs. For example, existing provisions cover annual reporting and general meetings of members. Others noted the CATSI Act does not preclude RNTBCs setting up reporting and transparency mechanisms for native title benefits. Various examples were given of RNTBCs establishing trust arrangements with regular reporting to the common law holders and strict conditions about permitted uses. Common law holders may also provide standing instructions about how benefits should be managed.
- 7.37 However, participants in consultation sessions provided contrasting reports, where they had experience with RNTBCs and external benefit management structures. We heard examples where RNTBCs had limited or no visibility of the management and use of native title monies and benefits, and in particular, the level of fees charged by private trustees. Participants noted these arrangements would be difficult and costly to change to improve transparency now they are in place.
- 7.38 Feedback from industry, government and regulators was generally supportive of enhanced reporting requirements. These stakeholders acknowledged the lack of legislative oversight of reporting on native title benefits and considered such reporting requirements could increase transparency for common law holders.
- 7.39 Overall, the feedback provided indicates the current arrangements are inadequate and do not provide transparency and accountability in all cases to common law holders on native title benefits. The solution must balance the benefit of increasing transparency and accountability against the cost of increased reporting.
- 7.40 One solution could involve amending the PBC Regulations to provide for additional reporting requirements. For example, RNTBCs could be required to report to common law holders on how native title monies and benefits are being managed, regardless of how they are held (by the RNTBC on trust or by external benefit management arrangements).
- 7.41 This would impose an obligation on RNTBCs to ensure reporting lines back to the RNTBC when making agreements and setting up external benefit management structures, with a requirement to pass this reporting on to the common law holders. Additionally, there could be a requirement that RNTBCs lodge these reports with ORIC. To maintain confidentiality, the lodged reports could be subject to protection against public disclosure.
- 7.42 This proposal was put to the sector in the context of consultations on the NTLAB. Consistent with a number of submissions to this Review, there was opposition to increasing the regulatory burden on RNTBCs.

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- 7.43 A partial alternative to amending the PBC Regulations could be to draw on the existing provisions of the CATSI Act. ORIC already has the ability to require RNTBCs to report on native title benefits held on trust. Under section 336-5 of the CATSI Act, the Registrar may require additional reports, or otherwise increase reporting requirements, for a class of corporation. This could be used to capture monies held on trust by RNTBCs. It could be a non-public report to common law holders. This would capture current and future monies held on trust by a RNTBC.
- 7.44 This measure could be complemented by amending the PBC Regulations to mirror the reporting requirements for native title monies held under an external trust arrangement.

Recommendation 57

It is recommended to amend the Prescribed Bodies Corporate Regulations to require reporting to common law holders on the management and use of native title monies and non-monetary benefits negotiated on behalf of common law holders held on trust under external trust arrangements.

It is recommended the Registrar give consideration to introducing reporting requirements under section 336-5 of the CATSI Act, consistent with the reporting requirements to be implemented through changes to the Prescribed Bodies Corporate Regulations.


It is recommended that should the Registrar decide against additional reporting under the CATSI Act, changes to the Prescribed Bodies Corporate Regulations outlined above be extended to include reporting on all native title benefits held by Registered Native Title Bodies Corporate.

Definition of 'Native Title Benefits'

- 7.45 Agreement making can often result in the acquisition of significant non-monetary benefits, exceeding the value of a monetary consideration. There was general agreement by stakeholders that RNTBCs should be accountable to the common law holders for all native title benefits under administration, irrespective of whether the benefits are monetary or non-monetary.
- 7.46 However, there was little feedback on the proposal to define 'native title money' and 'non-monetary native title benefits'. Despite this, there was broad agreement that to promote accountability, the definition of native title benefits should include non-monetary benefits. The management of monetary and non-monetary benefits can be complex as they can be administered through different financial structures, or require different taxation treatment depending on the nature of the benefit.
- 7.47 The value of codifying a definition of monetary and non-monetary native title benefits is unclear. Native title agreements negotiated on behalf of common law holders must specify, where relevant, the nature of the benefits to be conferred under the agreement(s).
- 7.48 An issue of greater consequence for the interests of common law holders is whether decisions about agreed native title benefits are native title decisions.

Decisions about native title benefits as native title decisions

- 7.49 The Draft Report proposes amending the PBC Regulations to include decisions about native title benefits in the definition of 'native title decision'. This would strengthen common law holder control over decisions about the use of native title benefits.
- 7.50 However, this change to the definition of 'native title decision' would also require RNTBCs to consult and seek the consent of the common law holders on decisions affecting native title benefits, for example investment decisions.
- 7.51 Support for this proposal from stakeholders was limited. Some stakeholders suggested an expanded definition may not be needed as the PBC Regulations already require a RNTBC 'to invest or otherwise apply money held in trust as directed by the common law holders'. Arguably, this already ensures appropriate consultation with common law holders on decisions about native title monies and benefits.

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- 7.52 Stakeholders also noted RNTBC directors are currently subject to statutory duties regarding the proper running of a corporation. These stakeholders expressed concern an expanded definition of 'native title decisions' would fundamentally undermine a function of the board - to make and implement strategic decisions on the activities of the corporation, including the management and use of native title monies and benefits. Some stakeholders noted the standard practice by some RNTBCs to make decisions about the management and use of native title benefits in line with a corporate strategy and plan.
 - 7.53 A key concern expressed by stakeholders is that an expanded definition of 'native title decisions' would significantly increase the administrative burden on RNTBCs. This flows from the PBC Regulations, which set out a process for consultation and consent relating to native title decisions. This can be time consuming and costly. Where decisions about the use of benefits occur frequently, the process described under the PBC Regulations does not readily allow for decisions at short notice or on a routine basis. Stakeholders expressed concern that the value of native title benefits would be eroded by the cost of holding additional meetings.
 - 7.54 Those stakeholders who supported an expanded definition of native title decisions, as a way of promoting transparency and accountability, proposed the use of standing instructions under the PBC Regulations to provide the necessary consent for dealing with native title benefits. This would obviate the need for costly meetings.
 - 7.55 On balance, the feedback demonstrates serious concern about expanding the definition of 'native title decision' to include decisions about native title benefits, because of the additional financial and administrative burden associated with holding consultation meetings with common law holders.

ORIC regulatory oversight of native title benefits

- 7.56 The Draft Report notes there is currently no regulatory oversight of RNTBC management of native title monies and benefits. Some regulators may have oversight of some aspects of the management of native title trusts. This includes the ACNC and agencies responsible for regulating state and territory trust legislation. Some trusts may have no regulatory oversight. There is minimal reporting about trusts to ORIC.
- 7.57 The CATSI Act could be amended to give the Registrar a regulatory role in relation to decision-making by RNTBCs on native title benefits. This is already contemplated in proposed changes to the PBC Regulations under the NTLAB requiring RNTBCs to issue certificates in relation native title decisions. These certificates must include the details of the consultation and consent process used and must be made available to common law holders on request.
- 7.58 A new power is also proposed for the Registrar of Indigenous Corporations to make a finding that a certificate fails to comply with the PBC Regulations. These changes are intended to make PBC decision-making more transparent and the Registrar's new power may reduce disputes as the Registrar is able to share and discuss the information in the certificate with common law holders.
- 7.59 Additional reporting to common law holders on the management of native title benefits is proposed in Recommendation 57 above. By introducing these requirements, the Registrar will have regulatory oversight of compliance with reporting on native title benefits. Noting the opposition to further reporting requirements expressed by some stakeholders, additional regulatory oversight by ORIC may be difficult to justify in terms of costs and benefits.
- 7.60 However, stakeholders indicated support for further training and assistance on the PBC Regulations, in addition to the governance training ORIC currently provides. The NIAA currently funds governance training and support for PBCs through a number of mechanisms. Any changes to the PBC Regulations and broader changes to the regulatory environment in which RNTBCs operate will require additional support for education and information to RNTBC directors and common law holders. This could be provided within existing resources.

Recommendation 58

It is recommended the National Indigenous Australians Agency work with relevant stakeholders, including the Office of the Registrar of Indigenous Corporations, to develop and deliver education and information resources on changes to Registered Native Title Bodies Corporate reporting and compliance obligations arising from this Review, and other



reforms currently in train, for use by Registered Native Title Bodies Corporate directors, members and common law holders.

Dispute resolution

- 7.61 The Draft Report proposed adding an arbitration option to existing dispute resolution processes for RNTBCs. RNTBCs experience a higher level of disputes than other CATSI corporations. These disputes often involve a decision by the RNTBC board to reject an application for membership.
- 7.62 Currently, if a dispute cannot be resolved, the only option is to seek to have the matter heard in the Federal Court. This is both time consuming and expensive and in most cases neither practical nor a good use of limited resources.
- 7.63 As noted in the Draft Report, the NTLAB includes amendments, which if passed, may reduce the likelihood of these types of disputes occurring. These changes would mean:
- RNTBC boards will not be able to refuse membership if an individual meets the RNTBC's membership eligibility criteria;
 - RNTBC rule books must include a dispute resolution process for disputes with persons who are, or assert to be, common law holders (and as such are not covered by existing dispute resolution processes which only apply to members); and
 - a new dispute resolution function for the National Native Title Tribunal (NNTT) to assist RNTBCs and common law holders, including through mediation.
- 7.64 Even with these additional measures, some stakeholders consulted for this Review indicated disputes involving membership can be difficult to resolve and may benefit from the availability of an arbitration mechanism.
- 7.65 Some stakeholders who supported an arbitration option expressed caution, emphasising the importance of the free, prior and informed consent of parties to participate in the arbitration process. They also stressed arbitration should only be a last resort, after exhausting other mechanisms. There was strong opposition to mandating use of arbitration as a dispute resolution process. Mandatory arbitration would also raise complex legal and constitutional questions.

Principles for an arbitration mechanism

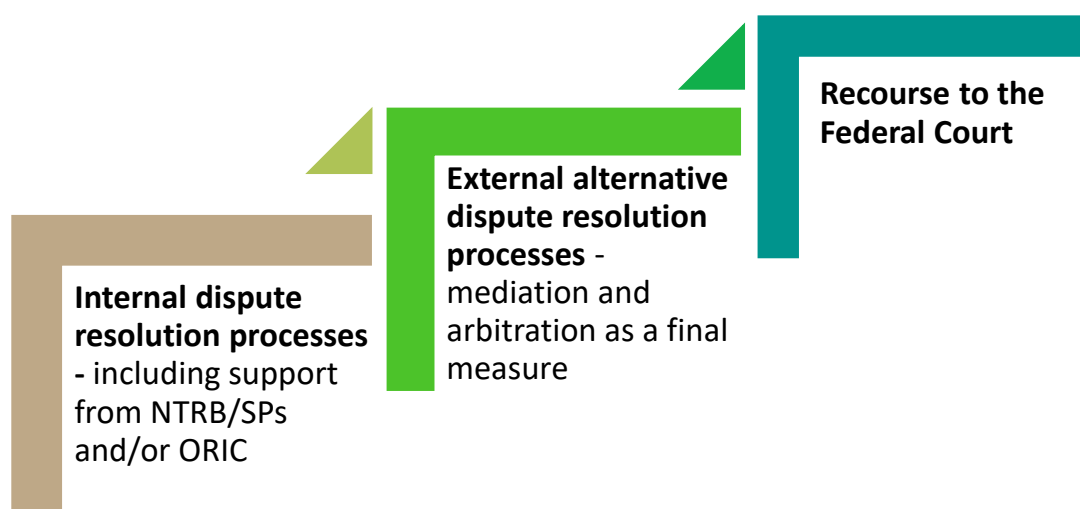
- 7.66 The following principles, informed by consultations with relevant stakeholders, could be used to inform the development of an arbitration mechanism:
- *Free, prior and informed consent*—consent of the parties to engage in the arbitration process is an essential precondition.
 - *Culturally appropriate*—the arbitrator(s) must be qualified and experienced in native title dispute resolution, and preferably be an Aboriginal or Torres Strait Islander person or have Aboriginal or Torres Strait Islander members to apply a cultural lens to disputes and for outcomes to carry cultural authority.
 - *Last Resort*—arbitration is part of a *staged approach* to RNTBC dispute resolution and available as a last resort after the internal and other agreed dispute resolution pathways have been exhausted, except for litigation in the Federal Court.
 - *Independence*—the arbitrator(s) must be independent and, if necessary, disclose any perceived or real conflicts of interest.
 - *Evidence-based*—the arbitration decision must be based on evidence provided by the parties (e.g. the native title determination and relevant anthropological advice).
 - *Compliance*—the parties must agree to be bound by the outcome of the arbitration.

- *Confidential*—the arbitration proceedings and related evidence will be kept confidential, unless agreed by all parties to the arbitration.
- *Transparency*—the outcome of the arbitration, subject to confidentiality requirements, and the reasons for the decision, to be reported in an open and transparent manner.

7.67 A staged approach to RNTBC dispute resolution was proposed by Indigenous stakeholders in the 2017 CATSI Act Review. It was proposed again in the current consultation process. In practice, a staged approach would provide parties with a dispute resolution pathway of appropriate and cost-effective intervention options. This does not mean parties must follow a linear process. Parties should be able to choose the option that most suits their circumstances and wishes. The stages and options offered include:


- **Internal dispute resolution process** – RNTBCs and the parties to the dispute attempt to resolve the dispute internally according to the RNTBC’s rulebook and in line with relevant traditional decision-making processes.
- **External alternative dispute resolution** – where RNTBCs and the other parties wish to, they may engage the relevant Native Title Representative Body or Service Provider (NTRB/SP) or alternatively or additionally, engage ORIC, which can opt to use existing powers to provide assistance in resolving the dispute. They may also opt to participate in:
 - Mediation – RNTBCs and other parties may agree to seek assistance, including from the NNTT if the NTLAB passes, in mediating the dispute, or agree to an alternative, experienced mediator;
 - Arbitration – where the dispute cannot be resolved through mediation or other mechanisms, the RNTBCs or other parties may agree to refer it to arbitration for a binding decision.
- **Recourse** to the Federal Court – judicial relief to the Federal Court will remain open to all parties even without the agreement of the other party.

Figure 7.1: A staged approach to dispute resolution



Design of the arbitration function

- 7.68 An arbitration option, if agreed, would require the settling of a number of practical design and implementation issues.
- 7.69 These issues include questions about the administration of the arbitration mechanism. For example, some stakeholders noted the NNTT’s existing native title expertise, research and experience with dispute resolution and arbitration (under the future acts regime) arguing it is best placed to perform the function. Others prefer ORIC given its existing relationships with corporations and the potential need for ORIC to play a role in enforcing the binding outcome of an arbitrated dispute.

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- 7.70 Other issues concern the selection and qualifications of those charged with performing the arbitration. It was the view of many stakeholders in consultations and submissions that, while the NNTT or ORIC could administer the arbitration function, the performance of arbitration should be by an arbitrator/a panel of arbitrators with Aboriginal or Torres Strait Islander persons experienced in dispute resolution. Parties should also be able to choose the appropriate arbitrator.
- 7.71 Comprehensive information on the process will be essential to ensure the process is understood and entered into with free, prior and informed consent. Rules about evidence and procuring evidence for the purposes of the process will also need careful consideration as will questions about costs and resources.
- 7.72 Notwithstanding the issues around implementation, the proposed arbitration option addresses a critical gap under current arrangements where individuals, whose membership applications are rejected, have little recourse for redress other than through litigation in the Federal Court.

Recommendation 59


It is recommended the National Indigenous Australians Agency lead a targeted design process with key bodies in the native title sector to develop an option for voluntary arbitration to assist in resolving disputes about Registered Native Title Bodies Corporate membership after other internal dispute pathways have been exhausted.

RNTBC model rule book

- 7.73 CATSI Corporations are required to have rule books approved by ORIC.⁷⁰ ORIC has produced a model, generic rule book as a free resource for new corporations, available on ORIC's website. ORIC's website has other resources, some of which focus on RNTBCs, such as 'A guide to writing good governance rules for PBCs and RNTBCs'.⁷¹
- 7.74 The Draft Report proposed ORIC produce a model rule book tailored specifically to RNTBCs. This would reflect the unique legal environment RNTBCs operate in, which include obligations under the NTA and PBC Regulations in addition to those under the CATSI Act.
- 7.75 The NTLAB, and the proposed amendments to the PBC Regulations, contain several changes specific to RNTBC rule books. If passed, these changes will require a RNTBC's rule book to:
- reflect the native title determination;
 - include dispute resolution pathways for people who claim to be common law holders; and
 - provide for all the common law holders to be directly or indirectly represented in the RNTBC.
- 7.76 The proposal for a RNTBC model rule book received unanimous support from relevant stakeholders. Recognising the support needed for RNTBCs, stakeholders made a number of suggestions for the RNTBC model rule book:
- a best practice membership application process, in line with the determination;
 - an example of a dispute resolution pathway;
 - clarity between corporate decisions and decisions the RNTBC board can make, including native title decisions;
 - an example of rules about native title decision-making; and
 - specific guidance on responsibilities for directors of RNTBCs.

⁷⁰ Rule books are discussed in Chapter 4 with the Review making two recommendations in relation to rule books (Recommendations 30 and 31).

⁷¹ ORIC, *A guide to writing good governance rules for prescribed bodies corporate and registered native title bodies corporate*, ORIC, 2008, available from <www.oric.gov.au/sites/default/files/documents/06_2013/ORIC-PBCs-guide_May11.pdf> [accessed 28 October 2020].

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- 7.77 Stakeholders requested the model rule book be written in plain English and include diagrams of complex provisions to assist with comprehension. Importantly, stakeholders emphasised the need for the model rule book to be co-designed with the native title sector, and to be regularly reviewed.

Recommendation 60

It is recommended the Office of the Registrar of Indigenous Corporations develop a Registered Native Title Bodies Corporate model rule book in consultation with the native title sector.

RNTBC name change registration on the National Native Title Register (NNTR)

- 7.78 As outlined in the Draft Report, after a CATSI corporation becomes a RNTBC, its members may wish to change the corporation's name. Presently, it is not clear if a name change made to the Register of Aboriginal and Torres Strait Islander Corporations which is maintained by ORIC can be carried over to the NNTR, which is maintained by the National Native Title Registrar.
- 7.79 A concern expressed during consultations was this proposal could contribute to conflict where there is a dispute between sub-groups of a native title group. Where a RNTBC's name is changed to one that may more closely reflect the language or culture of one of these groups over the other, the automatic carry-over of a change to the NNTR may contribute to tensions.
- 7.80 NIAA considers this is unlikely to be a common scenario, and on balance, the advantages of having clarity about which RNTBC represents which native title determination and providing for consistency throughout the native title system outweighs this concern.

Recommendation 61

It is recommended the Native Title Act be amended to enable the Registrar of the National Native Title Tribunal to update the National Native Title Register when the Register of Aboriginal and Torres Strait Islander Corporations is updated.

Further ideas

A separate division of the CATSI Act for RNTBCs

- 7.81 NIAA received a number of submissions proposing a separate division of the CATSI Act containing the provisions specific to RNTBCs. These submissions pointed to the complex legal environment RNTBCs are required to navigate and the value of being able to more easily locate provisions specific to RNTBCs in one place within the CATSI Act, particularly for RNTBC directors, members and common law holders.
- 7.82 There are currently only a few provisions in the CATSI Act that apply exclusively to RNTBCs. This would make such a fundamental structural change to the CATSI Act difficult to justify.
- 7.83 However, the NTLAB, if passed, would see additional provisions in the CATSI Act on RNTBC membership and dispute resolution. Moreover, should the RNTBC-specific recommendations in this Review be taken up, further provisions may be added.
- 7.84 It is salutary that this Review includes a chapter dedicated to RNTBCs. Noting the unique character of RNTBCs within the Australian corporate landscape, and the special place they occupy under the scheme created by the NTA, with RNTBCs holding native title over (as at September 2020) more than 40 per cent of the Australian land



mass, it would seem appropriate to dedicate a division of the CATSI Act to those provisions that are unique to this class of corporation.

Recommendation 62

It is recommended a separate division of the CATSI Act be created that is dedicated to those provisions specific to Registered Native Title Bodies Corporate.

Conclusion

- 7.85 RNTBCs face a range of challenges unique to their role as native title organisations. This includes their accountability to common law holders outside their membership base and their special obligations in relation to decisions that affect native title rights and interests.
- 7.86 These challenges set RNTBCs apart from other corporations that operate under the CATSI Act. Such challenges may also help explain why RNTBCs experience a level of disputation disproportionate to that experienced by other CATSI Act corporations. These disputes most often relate to membership and management of native title monies.
- 7.87 Stakeholder consultations undertaken for this Review have indicated support for and against a range of reforms proposed in the Draft Report. In some cases, these reforms complement those being put forward as part of the NTLAB currently before the Parliament.
- 7.88 To address calls for increased transparency and accountability in relation to native title benefits, this Review recommends additional reporting requirements to common law holders, further work on a dedicated trust structure built into the CATSI Act, and further work to develop a special PBC economic vehicle aimed at addressing limitations with the use of native title monies for economic development.
- 7.89 To address the issues involving disputes about membership, this Review recommends arbitration as an additional option for those who have had their membership application refused, when other options are exhausted.
- 7.90 Further recommendations are proposed, aimed at addressing some of the administrative issues unique to RNTBCs such as changing the corporation's name and developing a model rule book specific to RNTBCs.
- 7.91 As a result of the unique character of RNTBCs, the final recommendation of this chapter is to collect those provisions of the CATSI Act that are unique to RNTBCs in a division of the CATSI Act dedicated to this class of corporation.

Table 7.1: Sections of the CATSI Act explored in this chapter

Section of CATSI Act	Discussion Area
Part 3-2	Rules dealing with the internal governance of corporations
Part 3-4, section 88-1	Corporation changing its name
Part 7-2, section 322-10	Obligation to keep financial records
Part 7-3	Reporting requirements



8. Special Account: Unclaimed Money Account and Protection of Assets

- 8.1 The Unclaimed Money Account is established as a special account under section 551-20 of the CATSI Act—as provided for under section 80 of the *Public Governance, Performance and Accountability Act 2013*. The account is used to hold money including proceeds from the sale of unclaimed property of deregistered CATSI corporations.

Chapter 8 Summary of survey and submission feedback

In addition to feedback in the consultation sessions, feedback on the Unclaimed Money Account was provided via:

- 12 of the 141 chapter surveys; and
- 8 of the 41 written submissions.

Background


- 8.2 Ordinarily, a CATSI corporation will not be deregistered if it has more than \$1000 in assets. While the Registrar strives to ensure that a corporation has divested itself of all property, there are occasions when a corporation still holds, or is entitled to hold significant assets at the time of deregistration. In some instances the Registrar may not be aware of this property until action is taken by a creditor or other impacted party that brings it to the Registrar's attention.
- 8.3 Money in old bank accounts is transferred into the Registrar's Unclaimed Money Account, as are the proceeds of the sale of land or other assets if sold by the Registrar. At the time of writing this report, the account holds just under \$1 million and the Registrar has released around \$570,000 from the account since 2010. Currently six properties are vested in the Registrar following the deregistration of corporations.
- 8.4 Under the CATSI Act, the Registrar is required to transfer unclaimed money to a person who is legally entitled to the property on application. The Registrar and his office provide guidance to anyone wishing to apply for the transfer of these funds, however, it is resource intensive to proactively identify and pursue potential applicants, and often there are no parties with a legal claim to the asset. If no such applicant comes forward, after six years, funds in the Unclaimed Money Account are moved to the Commonwealth's Consolidated Revenue Fund.⁷²
- 8.5 Under subsection 546-20(2) of the CATSI Act, remaining assets of a deregistered corporation vest in the Registrar. The property remains subject to all liabilities imposed on it under law, such as a charge or claim on the property, or

⁷² The Consolidated Revenue Fund is established by section 81 of the Constitution and consists of all revenue and monies raised or received by the executive government of Australia. Source: Department of Finance, *Consolidated Revenue Fund*, Department of Finance, 2019, available from <<https://www.finance.gov.au/about-us/glossary/pgpa/term-consolidated-revenue-fund-crf>> [accessed 13 January 2020].

land rates and taxes. The Registrar maintains a record of unclaimed property and provides guidance to anyone claiming entitlement to the property.⁷³

- 8.6 While property is vested in the Registrar, there may be issues that affect the value of the asset or pose a potential risk to the public or community, for example, pest threats, illegal tenancies, fire or flood. At present, the Registrar's financial resources for taking preventive or remedial action for the protection of these assets is limited to the assets of the deregistered corporation. Consequently, there is a risk of inadvertent deterioration and/or devaluation of the asset(s) while in the custody of the Registrar.
- 8.7 Natural disasters and other events, such as bushfires, can also impact properties vested with the Registrar, requiring remedial action. Contamination of water supply, damage to infrastructure, and risk to human and livestock safety are just a few examples of risks that need to be managed, and can result in substantial costs if intervention is required. While the Registrar may be immune from liabilities accruing against the asset, as a statutory office holder, he or she has a responsibility to practice ethical and responsible land management.
- 8.8 We proposed that rather than becoming part of the Consolidated Revenue Fund, the CATSI Act be amended to allow the Registrar to use funds in the Unclaimed Money Account after six years to maintain and protect assets that are vested in the Registrar under subsection 546-20(2) of the Act. This may include using those funds to engage an asset manager to manage the property until the Registrar can take appropriate action to divest the property. It is not proposed that funds will be used to pay liabilities such as rates, but rather for threat mitigation and rectification, and insurance costs.
- 8.9 This proposal was one of the most uncontroversial and universally supported proposals of the second phase of consultation. Participants in the consultation sessions articulated a high level of support for retaining the funds for the protection of Indigenous assets, and the benefit of Aboriginal and Torres Strait Islander people.
- 8.10 Comments included, *'this is pretty uncontroversial, I agree with the proposed suggestion'*; *'It is an Indigenous asset and the idea is to protect it, then yes, no question about it, particularly if,...in some cases the use of the funds protects the public as well'*; *'I like the idea of fixing the properties or land.'*
- 8.11 During these discussions stakeholders questioned why funds that had been generated or owned by Indigenous corporations were going to Consolidated Revenue, and a consistent theme was that these funds should be quarantined for the use of Indigenous people. It was suggested the funds should be made available to the responsible portfolio Minister. Members of the Stakeholder Reference Group contended, *'that money from Indigenous corporations could be more productively used, and should remain for the use of Indigenous corporations through activities like governance training.'*
- 8.12 One participant in a consultation session questioned whether the cost of protecting the assets would exceed \$50,000 (the average amount returned to the Consolidated Revenue Fund each year). While it is a relatively small amount, it is considered sufficient as the number of properties vesting with the Registrar tends to remain quite low. It is also anticipated that these funds may accumulate over time, although they would only be used for the purpose of protecting assets.
- 8.13 All eight written submissions that commented on this Chapter supported the proposal, although two with qualifications. The Law Council noted that before engaging an asset manager, ORIC should work with First Nations people and traditional owners in the area to facilitate a reconnection to the property involved to strike an appropriate balance between asset protection and self-determination.
- 8.14 In contrast, the CLC and APO NT recommended that any funds from Northern Territory registered corporations should be transferred to the Aboriginals Benefit Account, established under the *Aboriginal Land Rights (Northern*

⁷³ ORIC, *PS-18: Property of deregistered corporations*, ORIC, 2015, available from <https://www.oric.gov.au/publications/policy-statement/ps-18-property-deregistered-corporations> [accessed 12 June 2020].



Territory) Act 1976, rather than to the Consolidated Revenue Fund to ensure that the funds are used for the benefit of Aboriginal people living in the Northern Territory.

- 8.15 The submission from the ACNC noted that the funds and assets of registered charities that are deregistered by ORIC and cease to be a registered charity, should be diverted to another charity with analogous charitable purposes and not go to Consolidated Revenue, nor be used by the Registrar. While this is also the intent of the CATSI Act, the experience to date has been that it is not always possible to identify such an organisation, particularly where a corporation may have been operating in a remote community. There is also a resource consideration in imposing such an obligation on ORIC.
- 8.16 Nevertheless, the NIAA will liaise with the ACNC about how to facilitate the identification of an appropriate registered charity.

Recommendation 63

It is recommended a special account be established under the CATSI Act and any funds in the Unclaimed Money Account which are due to be returned to Consolidated Revenue Fund, be instead directed to this new special account. The purpose of the special account is that the funds be used only for the protection of assets vested with the Registrar.

Table 8.1: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Part 12-2, section 546-20	Effect of deregistration
Part 12-3, sections 551-1 – 551-25	Unclaimed property
Part 16-3, section 658-1	Functions of the Registrar



9. Special administration, insolvency and winding up of CATSI corporations

- 9.1 Changes to the special administration, insolvency and winding up provisions of the CATSI Act are being considered with the aim of giving more help to CATSI corporations facing financial difficulty.
- 9.2 From time to time corporations struggle to operate effectively, have financial challenges or otherwise come to a difficult point in their lifecycle. Some may be assisted through a special administration, some may voluntarily choose to deregister, and some may need to be wound up by other means.
- 9.3 Where a corporation's challenges are financial, it can be difficult and costly to determine if the corporation is insolvent, particularly where there is poor or limited record keeping.

Chapter 9 Summary of survey and submission feedback


In addition to feedback in the consultation sessions, feedback on special administration, insolvency and winding up of CATSI corporations was provided via:

- 12 of the 141 chapter surveys; and
- 18 of the 41 written submissions.

Special administration

Title of special administration

- 9.4 Special administration allows the Registrar to provide early proactive assistance when a CATSI corporation faces financial or governance difficulties. When a corporation is experiencing financial stress, special administration may provide a better outcome than formal insolvency options that might otherwise apply.
- 9.5 The aim of special administration is to restore a corporation to financial and organisational health and, once this is achieved, to give control back to directors and members. The appointment of a special administrator should be seen as a positive intervention. However, anecdotal evidence indicates that people often perceive special administration in a negative light as they assume that it is similar to external or voluntary administration. Sometimes this assumption has resulted in funding bodies indicating that they intend to rescind funding to corporations placed under special administration.
- 9.6 We suggested that the name of special administration could be changed to help people avoid making the incorrect assumption that it is the same as external or voluntary administration. During the second phase of consultation, there was general support for such a change although some concerns were raised in the consultation sessions about whether some people who have developed an understanding of special administration might become confused if its name were changed. Of the 12 survey responses, 83 per cent agreed with changing the name of special administration.

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- 9.7 Of the 18 submissions that dealt with this Chapter, 11 submissions addressed this issue. The majority supported the proposal to change the name however AIATSIS and Dr Marina Nehme specifically noted that a change of name would not substantially help to address the difficulties faced by Aboriginal and Torres Strait Islander people in managing their corporations or address the perceptions of special administration.
- 9.8 There have been a range of suggestions to replace the name of special administration including: interim management, special intervention, management intervention, administrative reconstruction, special action, support administration, review, second chance, restoration scheme, independent control and independent review.

Recommendation 64


It is recommended the name of special administration be changed to one of the following options:

1. **Special Regulatory Assistance**
 2. **CATSI Special Management**
 3. **Statutory Management**
- 9.9 Some participants at consultation sessions pointed out that it was the ‘involuntary’ nature of special administration in some situations that caused the concern, particularly with members, and one participant noted that it was almost never an Indigenous person appointed as a special administrator, and that contributed to the poor perception of the process. This feedback has been provided to ORIC, which advised it had already commenced appointing Indigenous special administrators.
- 9.10 Furthermore, a number of participants questioned whether there was an alternative to special administration, or a step before special administration that could involve an independent specialist coming in and working with the board rather than displacing the board, at least in the first place. This was similar to what was proposed in the PCCC PBC submission that recommended implementation of a ‘Special Regulatory Assistance Scheme’ to guide and mentor boards, maintaining their self-determination. Corporations are able to engage independent governance support and training at present, and ORIC also provides governance training for boards, and members and staff of corporations. The concept of a corporate ‘health check’ or a mentoring program will be referred to ORIC for consideration.

Appointing special administrators

‘Show cause’ notice procedure

- 9.11 To put a CATSI corporation under special administration, the Registrar must be satisfied that one or more of the grounds set out in section 487-5(1) of the CATSI Act exist. Except in limited circumstances involving urgency, if the Registrar is considering putting a corporation under special administration, the corporation must be given a reasonable opportunity to say why this should not be done. This is known as the ‘show cause’ notice procedure.
- 9.12 Even if the directors of a CATSI corporation unanimously ask the Registrar to appoint a special administrator, the Registrar must still follow the ‘show cause’ notice procedure.
- 9.13 It has been suggested that if all of a corporation’s directors request the appointment of a special administrator, then the Registrar should not have to undertake the ‘show cause’ notice procedure. Submissions to the Technical Review were almost unanimously supportive of removing this procedure where all the directors requested the appointment of a special administrator, as well as the publishing requirements.
- 9.14 One of the grounds for appointing a special administrator is if a majority of directors request the Registrar to appoint one. As such, it has also been suggested that in this case the ‘show cause’ notice procedure could also be dispensed with, since the request in and of itself satisfies one of the grounds for special administration.
- 9.15 During the second phase of consultation, we asked whether the ‘show cause’ notice procedure should be removed if all or the majority of a corporation’s directors request the appointment of a special administrator. Through the consultation process we heard support for removing the procedure in these circumstances but there was no clear



preference whether it should be when all of the directors request the appointment of a special administrator or when only a majority of directors make the request. Of the 12 survey responses, nine supported the removal of the show cause notice procedure, including seven who indicated it should be when a majority of directors requested the appointment and only one who indicated it should be when all directors made the request.

- 9.16 Participants in consultation sessions were supportive of removing the ‘show cause’ notice process welcoming moves which would see a corporation in difficulty get help sooner. Participants indicated it would remove additional bureaucracy, and was logical where the majority of directors made the request of the Registrar.
- 9.17 Responses in submissions however were more varied with five of the eight submissions that addressed this topic in favour of removing the show cause notice process when all of the directors request the appointment of the special administrator. The general feeling was captured in the submission from VACCHO which stated:

The show cause notice is an important mechanism for making sure the corporation can respond to claims against it. Removing the requirement for a show cause notice where only a majority have requested may impact on minority directors. If only a majority of directors have made the request, this suggests there may be a disagreement. In those circumstances, a show cause notice is appropriate.

- 9.18 On balance, there was strong support for removing the ‘show cause’ notice process when a majority of directors requested the Registrar to appoint a special administrator and we agree with this proposal.

Recommendation 65

It is recommended the ‘show cause’ notice procedure not be required under the CATSI Act when a majority of directors have requested that a special administrator be appointed.

- 9.19 Related to the point raised above, we asked whether people thought that the ‘show cause’ notice procedure could be streamlined or shortened. Six of the 12 survey respondents agreed that the process could be streamlined or shortened and the suggestions received about how this could be done included by: using electronic means to undertake the process; removing the show cause notice when the majority of directors or 20 per cent of members request the appointment of a director; and freezing the transactions and practices of the corporation until the ‘show cause’ notice procedure has concluded.
- 9.20 In relation to the first suggestion, ORIC currently uses email to send the show cause notice to corporations. In cases where there is a dispute among board members, ORIC will also send a letter by registered post to every director whose details they have, to avoid the risk of one party or faction not making it available to another.
- 9.21 In relation to the second suggestion, this report proposes changes to the CATSI Act to remove the ‘show cause’ requirement when the majority of directors request the appointment of a special administrator (refer Recommendation 50).
- 9.22 The purpose of special administration is to restore the corporation to better health and then return it to the control of members. Freezing the transactions of a corporation may significantly worsen a corporation’s operating position making the process of restoring it to better health more difficult. Similarly, if the corporation was able to demonstrate that it should not be placed under special administration in response to the ‘show cause’ notice, freezing its transactions would have the impact of restricting the otherwise effective operations of the corporation. For these reasons, we are not putting forward this suggestion as a recommendation.
- 9.23 It was noted the Registrar has a power to place a corporation under special administration without issuing a ‘show cause’ notice where he or she is of the opinion that the delivery of essential services to community or the health and wellbeing of community members is at risk. This power is rarely used as the Registrar would rather work with corporations in difficulty to find the best outcome.

Grounds for appointment

- 9.24 Currently, one of the grounds for the appointment of a special administrator is if the Registrar thinks that the CATSI corporation has traded at a loss for at least six of the last 12 months. It can be difficult for the Registrar to

determine if a corporation has been in that situation, if the corporation is lacking adequate records. A different issue is that financially sound corporations that receive grant funding in intervals (such as annually, biannually or quarterly), or that trade seasonally such as tourism corporations, could be captured by this ground.

- 9.25 We suggested this ground could instead be changed to an irregularity in the management of a corporation's financial affairs which would be more practical and improve the effectiveness of this provision. Thus where the Registrar identifies an irregularity or irregularities in the management of a corporation's financial affairs, the Registrar can appoint a special administrator.
- 9.26 There was general support for these changes from participants in the consultation sessions and one question around how financial irregularity would be defined. It is proposed the existing definitions for examinable affairs and operations would be used for this purpose.
- 9.27 Of the 12 survey responses, 100 per cent agreed with the proposal. However, more than half of the submissions that commented on this proposal raised concerns about the suggested ground lowering the threshold for the appointment of a special administrator. While they saw merit in changing the current ground, they contended that 'irregularity in the management of financial affairs' was too broad, too vague, and needed further refinement. For example the Law Council of Australia, *'submits that the proposed new ground for appointment in paragraph 9.14 [of the Draft Report] relating to 'an irregularity in the management of a corporation's affairs' is expressed too broadly and should be revisited to address this important issue.'*
- 9.28 The Review team note that an irregularity in financial affairs is a commonly used term. The Australian financial reporting guide notes that an auditor's duty to report includes reporting any defect or irregularity in the financial statements.⁷⁴

Recommendation 66

It is recommended the current ground for appointing a special administrator that the CATSI corporation has traded at a loss for at least six of the last 12 months be changed to identification of an irregularity in the management of a corporation's financial affairs.

- 9.29 One of the key messages arising from the Review was the need for some simple, easy to understand information sheets about special administration, what it is, what it aims to achieve, and how it works. The underlying issue is the lack of understanding of special administration, and in particular, its beneficial nature. Unlike administration under the Corporations Act, special administration under the CATSI Act is to work in the best interests of members. While not a legislative change, we have referred this issue to ORIC for their consideration.

Examinable affairs and financial matters

- 9.30 In parallel with changing the ground for special administration outlined above, we also canvassed expressly including an irregularity or irregularities in the management of a corporation's financial affairs as a subject for examination. While the terms of section 453-1 are sufficiently broad to cover examination of financial irregularities the Act could be made more explicit. This would assist in the Registrar being made aware of, and taking timely and appropriate action, in relation to CATSI corporations that are in financial distress.
- 9.31 Together, the proposals could be useful changes as they will provide for a process where a corporation in financial distress can be examined and reported on, and where necessary, the corporation can be provided with support and rehabilitation. The opportunity for early identification and intervention through such a process has the potential to reduce the number of corporations that become insolvent.
- 9.32 This proposal aligns with the intent of the CATSI Act as outlined in the Revised Explanatory Memorandum to the CATSI Bill which states examinations are, *'often used by the Registrar, with the consent of corporations, to*

⁷⁴ Deloitte, *Australian financial reporting guide, Financial reporting periods ending on or after 31 December 2019*, Deloitte, 2019, p. 206, available from <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/audit/deloitte-au-audit-december-2019-australian-financial-reporting-guide-201219.pdf>> [accessed 12 October 2020].

undertake diagnostic examination of corporations in difficulty. This 'special regulatory assistance' is also important in the context of 'capacity building' for these corporations.'⁷⁵


- 9.33 As with changing the ground, participants in the consultation sessions were generally supportive of this change, acknowledging that the Registrar required an ability to identify whether the grounds for appointing a special administrator existed.
- 9.34 Furthermore, 100 per cent of the 12 survey respondents agreed with this change. However, three of the eight submissions that commented on this question expressed support while three did not support the proposal. A further two made commentary but did not indicate a clear position. VACCHO and one other submission questioned how the proposal applied to related entities, stating, *'Noting that the definition of "examinable affairs" extends to the "business affairs" of connected entities, there is a risk that financial irregularities of connected entities may be grounds for special administration. Affairs that are examinable (which extend to connected entities) must be distinct from "financial affairs"'*. It is noted an examiner can already consider the affairs of related entities. Given this proposal is to provide clarity to actions that can already be undertaken through the CATSI Act, it is recommended it is taken forward.

Recommendation 67

It is recommended the CATSI Act be made explicit in relation to the ability of an authorised officer to report on an irregularity in the management of a corporation's financial affairs.

- 9.35 We also sought suggestions on other matters on which an authorised officer should be able to report. One respondent to the survey noted that authorised officers should be required to report on, *'all matters that have a bearing on the future success of the corporation, including poor training, poor governance, poor accounting, bullying, and poor spending of finances'*.
- 9.36 ORIC is a corporate regulator and concerned with monitoring compliance with the CATSI Act, and the corporation's rule book. Some of these issues such as poor governance are already within the current scope of what an authorised officer can report on, but others are outside the scope of ORIC's functions. For example, issues such as bullying are issues of human resources policy and are not within ORIC's jurisdiction. We feel the scope of what an authorised officer can report on is already broad enough, and we do not propose to take forward any recommendation on this proposal.
- 9.37 When appointing a special administrator, the Registrar must give public notice. Currently, the CATSI Act requires the Registrar to give notice in the *Australian Government Gazette* and newspapers. We are proposing it would be more efficient and effective if the Registrar could publish notices of the appointment of a special administrator on modern electronic communication platforms, including ORIC's website.
- 9.38 Of the 12 responses to the survey, 100 per cent agreed that the Registrar should be able to use electronic communications means to notify of the appointment of a special administrator, and generally, submissions that commented on the issue were also supportive. However a number of participants in the consultation sessions cautioned that many members of CATSI corporations may not have access to the internet, either due to remoteness, access to reliable services, or due to personal choice. Feedback was that some people, particularly elderly people, continued to use newspapers to get their current affairs, and advertising in newspapers should not be discontinued.
- 9.39 Noting 12 submissions indicated strong support on the broader proposal for the Registrar to use modern communication platforms to publish notices in Chapter 6, only four submissions specifically addressed this issue in this Chapter. All four were supportive of allowing the Registrar to provide notice on an electronic communication platform, although AIATSIS proposed that corporations should be able to nominate their preferred communication

⁷⁵ Parliament of Australia, *Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006*, 2006, paragraph 1.492, available from https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r2403 [accessed 3 July 2020].



channel and, *‘written materials including fact sheets and guidance should be provided in languages relevant to the membership of a specific RNTBC.’* While we agree that allowing corporations to nominate their preferred communication channel would be preferable, collecting the information, and customising communications for over 3,200 CATSI corporations would be extremely resource intensive and difficult to achieve with current systems. The alternative is to provide the Registrar with a broad range of communication channels particularly those most used by the target audience.

Recommendation 68

It is recommended the Registrar be allowed to give notice of the appointment of a special administrator on a modern electronic communication platform as well as in newspapers, but the requirement to give notice in the *Australian Government Gazette* be discontinued.

Keeping contracts going during special administration

- 9.40 In 2018, amendments to the Corporations Act provided that contracts of insolvent companies could not be brought to an end just because the company went into receivership or voluntary administration. We see benefit in applying a similar provision to corporations that are placed under special administration noting the aim of special administration is to restore the corporation to good health to return it to the control of members. The cessation of contracts during a period of special administration is more likely to harm than help a corporation.
- 9.41 This was generally met with agreement by participants and survey respondents alike. Of the responses to the survey, 83 per cent agreed with this proposal. One participant in the consultation sessions noted that there may be an exception where a contract was not in the best interests of the corporation, and this sentiment was echoed by a respondent to the survey who disagreed with the proposal. Another session participant noted that there were generally clauses in contracts that allowed them to be cancelled for various reasons including failure to deliver and these could be used if required.
- 9.42 Four of the five submissions that referred to this issue were highly supportive. CA ANZ noted, *‘We support applying a similar provision to that under the Corporations Act 2001, where contracts of insolvent companies could not be brought to an end just because the company went into receivership or voluntary administration, as this provision would support the objective of the [Special Administration] process.’* Further, PCCC PBC noted in its submission that under its proposed model (see paragraph 2.87–2.90), inconsistencies between legislation would not exist.

Recommendation 69


It is recommended the CATSI Act be amended to provide that contracts of corporations under special administration cannot be cancelled, unless they are detrimental to the corporation in the opinion of the special administrator.

Insolvency and winding up

- 9.43 A CATSI corporation may be insolvent if it is unable to pay its debts when they must be paid. Insolvency can affect the management and operation of a corporation, and can have serious consequences for the corporation's officers, employees and members.

Rebuttable presumptions of insolvency

- 9.44 Having financial trouble does not necessarily mean a CATSI corporation is insolvent. However, if a corporation is insolvent and no steps are taken, the court may need to get involved. For example, the court can wind up a CATSI corporation if it is insolvent under section 526-1 of the CATSI Act.
- 9.45 One way to make it easier for a court to wind up a corporation is to introduce practical tests for insolvency, based on evidence and advice from a specialist. If a CATSI corporation meets these tests, the court would then be able to



assume that the corporation is insolvent. This is called a presumption of insolvency. A corporation would still have the chance to show to a Court that it can pay its debts even if one of these presumptions of insolvency exist. A court would then make a decision as to whether the corporation should be wound up based on all the evidence before it.

- 9.46 In the Draft Report, we proposed a CATSI corporation should be presumed to be insolvent where an authorised officer appointed under the CATSI Act has reported to the Registrar, or a special administrator forms the opinion:
- the corporation has failed to keep adequate written financial records (with no time period specified); or
 - the corporation has failed to keep adequate financial records for a period of seven years.
- 9.47 This is a rebuttable presumption so even if a party applying to a court to wind up a CATSI corporation can prove the criteria are satisfied, the corporation can still seek to prove it is not insolvent. If the corporation can do so, it will not be wound up on grounds of insolvency.
- 9.48 This proposal was supported across the consultations, particularly with participants who were accountants. We presented the two statements as either/or options, with some participants preferring the seven year time frame as providing a wide margin for error, while others preferred the first option noting that seven year old records are unlikely to reflect the current situation of the corporation. A decline into insolvency could happen quite quickly, for example over a period of less than a year. Being required to establish a lack of financial records seven years ago is irrelevant to the current situation of the corporation.
- 9.49 However, in its submission, CA ANZ clarified that the provision in the Corporations Act (Section 588E(4)) on which this proposal is based states:
- the corporation has failed to keep adequate financial records (with no time period specified); or
 - the corporation has failed to *retain* adequate financial records for a period of seven years.
- 9.50 This makes the provision much more logical and in line with other requirements under taxation law. It is proposed that the recommendation be amended to reflect this wording.
- 9.51 Many participants questioned the definition of adequate financial records, and it was agreed this could be sourced from other legislation such as the Corporations Act.
- 9.52 Seventy five per cent of respondents to the survey agreed with the proposal. One respondent noted that introducing these presumptions of insolvency placed Indigenous corporations in a more vulnerable position than those incorporated under the Corporations Act.
- 9.53 Eleven of the 18 submissions addressed this proposal, with six agreeing or partially agreeing and five disagreeing. Concerns included that there is no equivalent provision in the Corporations Act, and the proposal represented regulatory overreach. While Pika Wiya was supportive, it suggested, *‘It would be more appropriate if earlier triggers were used to assess the situation and another criteria was introduced i.e. where recommendations by the Registrar, auditor or other specialists are not adhered to (within reasonable time frames) actions are taken.’*
- 9.54 The Review team considered there was clear support for the proposal, and given that it is a rebuttable presumption, there is sufficient safeguards to ensure that solvent corporations will not be wound up inappropriately.

Recommendation 70

It is recommended the CATSI Act be amended to provide that a CATSI corporation be presumed to be insolvent where an authorised officer appointed under the CATSI Act has reported to the Registrar, or a special administrator forms the opinion:

- the corporation has failed to keep adequate financial records (with no time period specified); or
- the corporation has failed to retain adequate financial records for a period of seven years.



Registrar to seek leave of the court

- 9.55 Currently the Registrar may apply to the court to wind up a corporation on the grounds that it is insolvent only with the leave (permission) of the court.⁷⁶ In any application for winding up, the Registrar has to prove that the corporation is insolvent. However, needing leave of the court means that, before the Registrar even gets to the stage of having to prove insolvency of the corporation, the Registrar must first satisfy the court that it is appropriate to bring the application.
- 9.56 It is proposed to remove the need for the Registrar to seek leave of the court to wind up the corporation. The Registrar would still need to show the court why the corporation needs to be wound up i.e. prove insolvency. This change is consistent with Recommendation 31 of the Technical Review.
- 9.57 This was mostly supported, although some participants at consultation sessions noted that the same requirement exists under the Corporations Act, and since the intent was to maintain consistency with the Corporations Act, we should not seek to remove this provision. Other participants were clear that it was a redundant step that was no longer required.
- 9.58 Of the 12 surveys completed, 83 per cent agreed with this proposal, with one dissenting respondent stating that for reasons of transparency, the current process should be retained. Only three of the submissions addressed this proposal, with Pika Wiya and CA ANZ expressing support while PCCC PBC did not agree with the proposal.

Recommendation 71

It is recommended the CATSI Act be amended to remove the requirement for the Registrar to apply for leave of the court, before making an application for winding up a corporation on the grounds of insolvency.

Voluntary deregistration

- 9.59 When CATSI corporations no longer serve a function, or they are functioning ineffectively, voluntary deregistration is less costly and complex than winding up by appointing an administrator or liquidator through the courts.
- 9.60 Currently, under section 546-1(2) of the CATSI Act, in order to voluntarily deregister a corporation, all of the members must agree to the deregistration. Where a corporation is no longer active, the membership may have lost interest and contact, and it can be difficult to convene a meeting or circulate a resolution to gain 100 per cent member agreement, particularly when there is a large membership.
- 9.61 We proposed providing for a lower threshold such as allowing a special resolution to be passed agreeing to the winding up, or alternatively, providing the Registrar with the power to exempt corporations from a particular criteria for deregistration such as the requirement for 100 per cent of the membership to agree.
- 9.62 Eight submissions addressed this issue. All were supportive, although Pika Wiya provided qualified support in that there should be ‘demonstrated evidence about why deregistration is being sought.’ Two of the eight submissions also stated that they would, *‘be prepared to consider a proposal to provide the Registrar with the power to exempt corporations from satisfying particular criteria to deregister if more details were provided about the parameters of this power of exemption.’*
- 9.63 One participant at a consultation session noted that corporations under the Corporations Act often experience the same problem, and ASIC has the power to deregister them without member agreement, however there are safeguards including a three month notice period. The Review team will investigate the powers available to ASIC in this regard.
- 9.64

⁷⁶ The CATSI Act confers jurisdiction on the same courts as those under the Corporations Act, including the Federal Court, Supreme Courts in each state and territory, Family Court and State Family Courts, and the lower courts of each state and territory.



Recommendation 72

It is recommended the CATSI Act be amended to provide that the Registrar may exempt corporations from satisfying specific criteria required to be met for voluntary deregistration.

Insolvent trustee corporations

- 9.65 A trustee corporation is a corporation which acts as a trustee of property under a trust deed. This section is not referring to a corporation's trustee responsibilities under the native title legislation.
- 9.66 A corporation which acts as a trustee may act just in that trustee capacity (where that is its only purpose for existing). Alternatively, a trustee corporation may act in more than one capacity—it may be a trustee but also manage its own property.
- 9.67 The CATSI Act incorporates the Corporations Act insolvency provisions. Many of these are general provisions only, but must be applied to insolvent trustee corporations even though the provisions are not particularly suited to these types of corporations. This causes problems for companies under the Corporations Act as well as CATSI corporations.
- 9.68 Recently, the courts have made some decisions which help explain how insolvency laws can apply to insolvent trustee corporations.
- 9.69 Previous reviews have considered whether the CATSI Act should be amended to better explain how insolvency laws should apply to insolvent trustee corporations. We sought feedback from stakeholders in this regard in the Draft Report.
- 9.70 There has been minimal feedback in this regard, although one participant at a consultation session noted that issues around 'insolvent trustees' were receiving significant interest more broadly and that the Review team should keep abreast of potential changes to the Corporations Act.

Other Feedback

- 9.71 One submission suggested the Review consider replicating an amendment that was made to the Corporations Act in 2017, to provide a safe harbour to empower directors to take actions which will promote the company's interests by protecting them from personal liability. Under the safe harbour, directors are not held liable for certain types of debts,⁷⁷ if they can show they were in the process of taking a course of action which was 'reasonably likely' to lead to a better outcome than the immediate appointment of an administrator or liquidator.
- 9.72 The Review team notes these provisions are contained in Part 5.7B of the Corporations Act which is applied by section 531-1 of the CATSI Act. As such no change is required to align to the Corporations Act in this instance.

Conclusion

- 9.73 Changes proposed in this Chapter are expected to better support CATSI corporations requiring intervention to improve their financial and/or governance health. In turn, these changes will benefit members who will see the return of healthier corporations to their control. Some changes also aim to address those corporations for which intervention may be too late or inappropriate, perhaps because members are disengaged or there is no longer a need for the corporation. In any case, streamlining processes to intervene is expected to result in more timely and effective outcomes for CATSI corporations.

⁷⁷ These are debts that were incurred by a company at the time the director was in place; the company was insolvent at the time or becomes insolvent from incurring the debt; and there were reasonable grounds for suspecting that the company was insolvent or would become insolvent.



Table 9.1: Sections of the CATSI Act explored in this Chapter

Section of CATSI Act	Discussion Area
Part 10-3, section 453-1	Examination of books
Part 11-2	Special administration
Part 11-5, Division 526	Winding up
Part 12-2	Deregistration

Appendix 1: Matters referred to ORIC

Table A1: Suggestions or Issues raised in the Review referred to ORIC

Ref	Recommendation
Chapter 2 Objects of the CATSI Act	
Page 38	Increased on the ground support for corporations.
Page 40	Increased capacity building opportunities.
Chapter 3 Powers and functions of the Registrar	
Page 44	ORIC provide training, guidance and other information materials in relation to criminal prosecutions.
Page 51	Working with key stakeholders to develop culturally appropriate graduated and escalating dispute resolution processes.
Chapter 4 Governance	
Page 64	Capacity building opportunities for sole-traders.
Page 65	Develop a model rule book relating to 'for-profit' entities and increasing the information available on ORIC's website about incorporating as a for-profit entity.
Page 71	Guidance on cancelling meetings.
Page 77	Simplifying rule books.
Chapter 5 Officers of corporations	
Page 89	Increased recruitment assistance for corporations
Page 95	Guidance on board composition.
Chapter 9 Special administration, insolvency and winding up of CATSI corporations	
Page 117	Concept of a corporate 'health check' or a mentoring program.



Appendix 2: Matters referred to NIAA

Table A2: Suggestions or Issues raised in the Review referred to NIAA

Ref	Recommendation
Chapter 1 Introduction	
Page 19	Resourcing for RNTBCs
Chapter 2 Objects of the CATSI Act	
Page 38	Increased resourcing for ORIC, including an increased number of ORIC offices in more locations.

Appendix 3: Written submissions

Table A3: List of written submissions received as part of Phase 2 consultation

No.	Entity
1	Aboriginal Peak Organisations of the Northern Territory (APO NT)
2	Australian Capital Territory Government, Community Services Directorate (ACT Government)
3	[name extracted]
4	Arnold Bloch Leibler (ABL)
5	Australian Charities and Not-for-profits (ACNC)
6	Australian Indigenous Governance Institute (AIGI)
7	Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS)
8	Australian Institute of Company Directors (AICD)
9	Cape York Land Council (CYLC)
10	Central Australian Aboriginal Congress Aboriginal Corporation (Congress)
11	Central Land Council (CLC)
12	Chartered Accountants Australia and New Zealand (CA ANZ)
13	Ms Denise Colbung
14	Commonwealth Director of Public Prosecutions (CDPP)
15	Danila Dilba Health Services (DDHS)
16	[name extracted]
17	ESJ Law (ESJ Law)
18	Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC (ETNTAC)
19	Federation of Victorian Traditional Owner Corporations (the Federation)
20	First Nations Bailai, Gurang, Gooreng, Taribelang Bunda People Native Title Aboriginal Corporation (PCCC PBC)
21	First Nations Legal and Research Services (First Nations)
22	Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC)
23	Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation(GBK)
24	Kimberley Land Council (KLC)
25	Marrawah Law Pty Ltd (Marrawah Law)
26	Minerals Council of Australia (MCA)
27	National Aboriginal Community Controlled Health Organisation (NACCHO)
28	National Native Title Council (NNTC)
29	National Native Title Tribunal (the Tribunal)
30	Northern Territory Government, Department of the Chief Minister and Cabinet, Office of Aboriginal Affairs (Northern Territory Government Office of Aboriginal Affairs)



No.	Entity
31	Paulette Dupuy Mediation and Consulting (Ms Dupuy)
32	Pika Wiya Health Service Aboriginal Corporation (Pika Wiya)
33	Queensland South Native Title Services Limited (QSNTS)
34	South Australian Native Title Services (SANTS)
35	The Law Council of Australia (Law Council)
36	Mr David Tasker (Mr Tasker)
37	Torres Strait Regional Authority (TSRA)
38	University of New South Wales, Associate Professor Marina Nehme (Dr Marina Nehme)
39	Victorian Aboriginal Community Controlled Health Organisation (VACCHO)
40	Victorian Government, Victorian Aboriginal Heritage Council (Council)
41	Wathaurong Aboriginal Co-Operative (WAC)

In addition to the 41 written submissions there was three anonymous feedback responses submitted through the web-based feedback form, and eight feedback responses received via email.