

TANGENTYERE
COUNCIL
SUBMISSION



Exposure Draft of the Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

Submission to the National
Indigenous Australians Agency



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Introduction

Tangentyere Council Aboriginal Corporation (TCAC) welcomes the opportunity to make a submission in response to the Exposure Draft for the CATSI Amendment Bill (Exposure Draft). If passed, the Bill will amend the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). We understand the proposed changes contained in the Exposure Draft implement 64 of the 72 recommendations from the CATSI Act Review Final Report (Final Report) published in February 2021 following a review of the CATSI Act undertaken in 2019-2020.

The CATSI Act commenced on 1 July 2007. It is our understanding that it was introduced in response to a need to overcome the rigidity of corporation design, to achieve simplicity and to improve accountability for Aboriginal Corporations.

The Act was designed to make it easier for Aboriginal and Torres Strait Islander people to form and manage corporations, support, and regulate corporations in a way that is tailored to the corporation's circumstances (such as remoteness, capacity, and culture) and meet the requirements of special statutory regimes.

For Aboriginal Corporations to utilise their assets and realise their aims, the CATSI Act must be appropriately aligned with modern corporate governance standards and corporations established under other legislative schemes, while also providing a legal framework which takes account of the special challenges faced by Aboriginal and Torres Strait Islander peoples and organisations.

Our submission is limited to certain issues raised by the Final Report and Exposure Draft about which TCAC can make a meaningful contribution based on our knowledge, experience, and expertise in the time available. These include the following:

- Requirements to record and maintain a register of member contact phone numbers and email addresses (recommended in Part 3 of the Final Report) could have the effect of diverting resources away from our core purpose and fail to reflect the needs of our member base, many of whom travel regularly to remote areas and have limited phone or internet access.
- Amendments to the provisions around cancellation of membership could create an expectation of swift connection and communication for our members, which could in turn disadvantage members without the resources or capacity to use electronic communication methods.
- We are concerned that some of the provisions of the CATSI Act create obligations on Aboriginal Corporations regulated by the CATSI Act (CATSI corporations) that do not exist to advance those corporations but impose additional burdens or rules on them that do not apply to non-Indigenous corporations. We consider it vital that close attention be paid to ensuring that any amendments to the CATSI act meet the requirements of a special measure and operate to meaningfully support CATSI corporations.
- Any amendments to the CATSI Act, and any reviews of the Act in future, should be undertaken in partnership with relevant Aboriginal and Torres Strait Islander representative leadership.

We note that interested parties have only been given one month to make submission on the Exposure Draft. We submitted a request to the National Indigenous Australians Agency (NIAA) for an extension of time to provide a submission and our request was denied.

Consequently, we have not had time to provide the detailed feedback we would have liked to provide on the 72 recommendations in the Final Report and the proposed amendments in the Exposure Draft, noting it contains 329 amendments in total. We would welcome the opportunity to participate in consultations and provide further feedback as submissions are considered and draft legislation is further developed.

Background

1. Tangentyere Council Aboriginal Corporation

TCAC is an Aboriginal Community Controlled Organisation (ACCO) delivering human services for the benefit of Aboriginal people from Alice Springs, its Town Camps and Central Australia.

TCAC has 16 Town Camp Corporate Members, over 600 Individual Members and provides services to more than 10,000 people from a region that covers approximately 873,894 km².

The TCAC Board of Directors (BoD) is composed of the elected Presidents of the 11 Town Camp Associations and 5 Aboriginal Corporations.

TCAC was formed to assist Town Campers to gain legal tenure and to obtain water, electricity, and housing. From 1979 until December 2009 TCAC operated as an Aboriginal Community Controlled Housing Organisation (ACCHO) and service provider.

Between 1979 and August 2015 TCAC was incorporated under the Associations Act (2008). To comply with the requirement for Indigenous Organisations to be incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI) to receive Indigenous Advancement Strategy funding over \$500,000, TCAC transferred incorporation to the CATSI Act in August 2015.

In 2009, 11 Town Camp Housing Associations and 3 Town Camp Aboriginal Corporations executed Tripartite Alice Springs Living Area Subleases with the Executive Director of Township Leasing (EDTL) on behalf of the Commonwealth and the CEO of Housing on behalf of the Territory. The EDTL then entered a Housing Management Agreement (Sublease) with the CEO of Housing (NT) making the Department of Territory Families, Housing and Communities (DTFHC) the Housing Authority for the Town Camps. Despite the changed leasing arrangements, TCAC and its Corporate Members; subsidiary and related parties retain an active role in Town Camp Housing Management.

The work undertaken by TCAC is aligned with action on the social, environmental, and behavioural determinants of health and wellbeing. Programs delivered throughout Central Australia include: (1) Child Protection and Wellbeing; (2) Children and Schooling; (3) Community Safety; (4) Alcohol and Other Drugs; (5) Tenancy Support; (6) Employment; (7) Aged and Disabled; (8) Chronic Disease Care Coordination; (9) Family Violence Prevention; (10) Housing Maintenance; (11) Municipal and Essential Services; (12) Construction and (15) Art and Culture.

TCAC is committed to the employment and capacity development of Aboriginal people. 55% of the TCAC workforce of 273 people is Aboriginal.

2. Languages

The residents of the Alice Springs Town Camps are multilingual. For most residents, English is not their first language.

The following table outlines the languages spoken on the Alice Springs Town Camps.

| Name | Alias | Languages |
|-------------------|------------------|--|
| Akngwertnarre | Morris Soak | Arrernte, Warlpiri |
| Anthelk-Ewlpaye | Charles Creek | Arrernte, Anmatyerr |
| Lhenpe Artnwe | Hoppys | Arrernte, Pertame, Luritja, Anmatyerr |
| Anthepe | Drive In | Arrernte, Warlpiri, Luritja, Pitjantjatjara |
| Aper-Alwerrkng | Palmers | Arrernte |
| Ewyenper-Atwatye | Hidden Valley | Arrernte, Warlpiri |
| Ilparpa | Ilparpa | Arrernte, Pertame, Luritja |
| Ilperle Tyathe | Warlpiri | Warlpiri |
| Ilyperenye | Old Timers | Arrernte, Warlpiri, Luritja, Pitjantjatjara |
| Inarlenge | Little Sisters | Arrernte, Warlpiri, Luritja, Pitjantjatjara |
| Irrkerlantye | White Gate | Arrernte |
| Karnte | Karnte | Luritja, Pitjantjatjara |
| Mount Nancy | Mount Nancy | Arrernte, Kaytetye, Anmatyerr, Alyawarr |
| Itwiyethwenge | Basso's Farm | Arrernte, Kaytetye, Anmatyerr, Alyawarr |
| Mpwetyerre | Abbotts Camp | Arrernte, Warlpiri, Luritja, Pitjantjatjara, Warumungu |
| Nyewente | Trucking Yards | Arrernte, Luritja |
| Yarrenyty Arltere | Larapinta Valley | Arrernte, Pertame, Luritja, Pitjantjatjara |

3. Local Decision-Making

TCAC and the Territory executed a Local Decision-Making (LDM) Agreement in July 2020.

LDM is underpinned by the principle of self-determination and places an emphasis on the empowerment of Aboriginal people to determine service delivery models that work best for their community.

The vision agreed to by TCAC and the Territory is that the LDM Agreement is a platform to support the transition to community control of services aligned with the Wellness Domains as defined in the Town Camp Wellness Framework.

The work being undertaken by TCAC to achieve LDM is underpinned by the Town Camp Wellness Framework (described below). A key initial focus of the LDM Agreement is to oversee the transition from a Public Housing Model to a Community Housing Model on the Town Camps.

4. Town Camp Wellness Framework

The Town Camp Wellness Framework reflects the overall balance between elements identified by Town Campers.

The balance between elements including identity, country, shelter, knowledge, community, healing, and leadership contributes to outcomes of health and wellness.

This Town Camp Wellness Framework has been developed by Town Campers and is underpinned by the premise that strong wellness of a Town Camp will improve the wellbeing of individuals living there. Physical, social, emotional, cultural values along with work, learning, safety, environment, and access to material basics all impact upon the overall wellness of each Town Camp.

The Wellness Framework provides an opportunity for community stakeholders to participate in the development of intersectoral responses to improve the expression of the social, cultural, and environmental determinants of health and wellness.

The Town Camp Wellness Framework is outlined below:

| Figure 1: Town Camp Wellness Framework Domains | |
|--|---|
| Shelter | Access to basic elements needed to live a 'normal' life, including financial and occupational wellness, stable and healthy housing, clean water, clothing, healthy food, etc. |
| Keeping Country | Encompasses the interactions between individuals and their 'habitats' at a local, community and global level, and includes safety in nature, home, work and the community. |
| Community | Embraces positive relationships and connections with families and others and includes love. |
| Healing | Having one's physical, developmental, psychosocial, and mental health needs met to achieve optimal developmental trajectories and opportunities. Includes access to preventative measures and health education as well as access to services to redress emerging health issues. |
| Knowledge | Formal and informal experiences in the classroom, at home and in community, throughout the course of one's life, to maximise life opportunities. Includes cognitive and creative pursuits to also enrich one's capacity to make decisions, problem solve and maintain mental agility. |
| Leadership | Engagement with peers and community, including governance and decision-making, determining systems, and having a voice and say on matters. Includes access to digital systems and technology for social connections |
| Identity | A positive sense of self and culture underpins all the other dimensions and is fundamental to overall Town Camp wellbeing. Cultural wellness refers to an ability to both enact one's own cultural values as well as interact effectively with people from different cultures and work towards eliminating racism and systematic discrimination, whilst spiritual wellness is seeking meaning in existence. |

Specific Feedback

1. Contacting Members Via Email and Phone

TCAC has over 600 individual members. Many of our members: (a) have no phone or email address; (b) use prepaid mobile phones and change their contact numbers regularly; (c) have multiple phone numbers; and/or (d) live or frequently travel to areas where there is unreliable or non-existent phone reception or internet.

Most of our members have Prepayment Meters (PPMs) for electricity. In Alice Springs there are >420 PPMs. 91% of these PPMs experience involuntary self-disconnections at a rate of 58 disconnections per annum for an average duration of 6 hours and 42 minutes per occasion. These disconnections further reduce the ability of residents to access phone and internet.

As noted by the Law Council of Australia in their submission to Phase 2 of the review of the CATSI Act, overly prescriptive obligations relating to contacting members are likely to cause problems for corporations that have large numbers of members based in remote or very remote areas.ⁱ

The Final Report included several recommendations relating to contact details for members, including the following:

Recommendation 11: It is recommended corporations be required to collect phone numbers and email addresses of members where available.

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.

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.

These recommendations have been implemented in sections 24 - 52, 55, 65, 66, 74 - 78 and 83 of the Exposure Draft.

Several of the amendments appear to make it mandatory that corporations record and provide the Registrar with email addresses and phone numbers of all their members. Sections 55 and 74 of the Act, for example, state that Aboriginal and Torres Strait Islander Corporations must record and provide the Registrar with 'other contact details' of their members.

Section 55 of the Exposure Draft seeks to amend subsection 138-1(1) of the CATSI Act to read:

Note: Section 180-5 requires the corporation to enter the names ~~and addresses~~, addresses and other contact details of all its members on the register of members.

Similarly, section 74 of the Exposure Draft seeks to amend subsection 180-35(1) to read:

The Registrar may, at any time, request the corporation to give him or her a copy of the register of members, or the register of former members, as at the date when the copy is given to the Registrar, and the corporation must comply with the request within 14 days or such longer period as the Registrar specifies.

Note: An Aboriginal and Torres Strait Islander corporation must give a general report to the Registrar in respect of each financial year. That report must include details of the names ~~and addresses~~, addresses and other contact details of the corporation's members: see sections 330-1 and 330-5.

We note that the term 'other contact details' is not defined in the CATSI Act or in the Exposure Draft, and its meaning is ambiguous. Recommendation 11 of the Final Report would suggest that the term means telephone numbers and email addresses, however, it is unclear whether it could allow the member to provide, for example, an alternate phone number of a family member who they have regular contact with, or details of how to contact them using social media or other web-based applications.

Conversely, section 65 of the Exposure Draft uses the term 'may' instead of 'must' and appears to provide corporations with flexibility to record additional member details. Section 65 of the Exposure Draft would have the effect of amending section 180-5(1) of the CATSI Act as follows:

- 1) The register of members must contain the following information about each member who is an individual:
 - a) the member's given and family name.
 - b) the member's address.
 - c) the date on which the entry of the member's name in the register was made.

The register may also contain any other name by which the member is or was known and any other contact details the member has provided to the corporation.

Recording and maintaining up-to-date email addresses and phone numbers for each of our 600+ members would create a significant administrative burden on TCAC and will require a sizeable diversion of our resources. Further, we consider that the exercise of recording and attempting to maintain phone numbers and email addresses may prove futile as most of our members do not have email addresses and their contact details change frequently.

We consider that allowing for both paper and electronic methods of contact is fair, but it should be at the discretion of corporation which method is employed given their knowledge of their member base. We endorse the comments of the National Aboriginal Community Controlled Health Organisation (NACCHO) in their submission to Phase 2 of the review of the CATSI Act that:

Appropriate governance is important to establish policies to guide the successful operation of Aboriginal and Torres Strait Islander corporations, including financial management, control and reporting. However, consideration of cultural, geographic, social, and economic situations must inform how governance is carried out. For example, a remote corporation may have a highly transient membership base making contact difficult without recourse to posting notices on noticeboards in health services or outback stores. It is important that governance structures in the CATSI Act are flexible enough to accommodate such situations without an unnecessary compliance burden.

Recommendations- Member Contact Details

We recommend that:

- a) Amendments to the CATSI Act create an option for corporations to record “other contact details”, but do not require the corporation to do so. The language of all relevant provisions of the draft legislation should reflect that recording other “contact details” is optional and at the complete discretion of the corporation.
- b) The term “other contact details” be defined in the draft legislation so there as clarity about what information corporations can and cannot record.
- c) In further developing the draft legislation, special effort should be taken to ensure that corporations from remote and regional corporations and those with members with limited or intermittent access to phone or internet reception are contacted for input on the proposed changes.
- d) In further developing the draft legislation, consideration be given to whether corporations will have the resources to collect, utilise, and store data that is increasingly personal or sensitive in nature, noting the increased security and privacy demands and liabilities that attach to possessing that information.

2. COVID-19 Measures

The COVID-19 pandemic and its response has created significant challenges for Aboriginal and Torres Strait Islander corporations, making it difficult to hold face to face Annual General Meetings, and impacting governance and operations.

Notwithstanding the fact that many of our members do not have regular phone or internet access, Tangentyere supports the continuance of rules that have emerged because of the COVID-19 crisis which allow a corporation to postpone or cancel a meeting after it has been called, more easily pass resolutions without meeting, meet virtually, and allow for virtual participation in physical meetings.

We particularly acknowledge and support:

- a) sections 104 and 105 on the Exposure Draft, which enable corporations to use technology to hold a meeting and to hold a vote in another manner if a show of hands is not possible.
- b) Section 102 of the Exposure Draft, which allows corporations to alter the place, date or time of a meeting where there has been a death in a community, a cultural activity or natural disaster which affects the ability to hold a meeting.
- c) Section 120 of the Exposure Draft, which allows corporations to access an extension of time to hold annual general meetings or lodge reports where there has been a death in a community, a cultural activity or natural disaster.

3. Special Measure for the Advancement of Beneficiaries

The CATSI Act prescribes a set of rules and protections for Aboriginal corporations, many of which do not apply to or are not available to corporations incorporated under the Corporations Act 2001.

The provisions of the CATSI Act are only valid laws so long as they meet the requirements of a 'special measure' for the purposes of subsection 8(1) of the Racial Discrimination Act 1975. To meet the requirements of a special measure, a law must:

- (1) confer a benefit.
 - (2) on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin.
 - (3) the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms.
 - (4) the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
 - (5) must not have yet achieved its objectives (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).ⁱⁱ
4. We note that Recommendation 2 in the Final Report was that the CATSI Act be retained as a special measure. Special measures are a feature of the principle of non-discrimination in customary international law.ⁱⁱⁱ Legal academic Warwick McKean notes:

It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared. Such measures must be strictly compensatory and not permanent or else they will become discriminatory. It is important that these **measures should be optional** and not against the will of the groups affected, and **they must be frequently reconsidered** to ensure that they do not degenerate into discrimination.^{iv} (emphasis added)

Any changes to the CATSI Act should be treated accordingly. It is essential that any amendments to the CATSI Act confer a benefit on Aboriginal and Torres Strait Islander corporations and operate to secure the advancement of Aboriginal and Torres Strait Islander people. Provisions of the CATSI Act must not, for example, create onerous requirements that do not confer any benefit on the corporation and do not apply to similarly sized corporations that exist outside the CATSI Act.

5. Review of the Act

TCAC supports regular legislative review of the CATSI Act. Monitoring and meaningful consultation will need to be undertaken at regular intervals to ascertain whether the objectives of the special measure have been achieved and ensure compliance with the legal requirement that the special measure does not remain in place when it is no longer required, or its provisions do not confer benefits Aboriginal and Torres Strait Islander people and corporations.

TCAC is of the view that review of the Act should occur more frequently than every 7 years, as proposed in the Exposure Draft and in Recommendation 3.

In considering amendments to the Act, and in undertaking any reviews of the Act in future, TCAC is supportive of the view that reviews should be undertaken as a partnership between the NIAA and Aboriginal Corporations.

6. Avoiding Double Standards

We recognize that there are many other amendments in the Exposure Draft that are designed specifically to bring the CATSI Act in line with developments to the Corporations Act. These include, for example, the new protections for Whistleblowers (Recommendation 49) and the reductions in penalties in the CATSI Act so they accord with those in the *Corporations Act 2001* (Recommendation 48, for example).

We are concerned that some of the provisions of the CATSI Act create obligations on Aboriginal Corporations that do not exist to advance those corporations, but merely give the Registrar additional powers or impose additional burdens or rules on Aboriginal Corporations that do not apply to non-Indigenous corporations.

One example relates to recommendation 71 of the Final Report, which says:

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.

Items 235, 241 and 243 to 245 in the CATSI Amendment Bill reflect recommendation 71 and remove the requirement for the Registrar to seek the leave of the court in advance of making an application to wind up a corporation.

Conversely, if an insolvent company registered under the *Corporations Act 2001* is not voluntarily wound up, leave of the court is required to commence winding up on the grounds of insolvency and appoint a liquidator.

This is just one example of a different standard applying to an Aboriginal Corporation than a corporation governed outside the CATSI Act. The amendment has no apparent benefit to CATSI corporations. Its only effect appears to be to make it easier for the Registrar to commence an application for the winding up of a company. The amendment would lead to a different set of laws for Aboriginal corporations under the CATSI Act to all other corporations.

In developing a further draft of the legislation, it is in our view essential that close attention be paid to only advancing amendments that operate to benefit CATSI corporations and not those that would result in separate rules that do not confer benefits on CATSI organisations.

7. Conclusion

TCAC supports the process initiated by the NIAA to bring the CATSI Act in line with other Commonwealth legislation through regular reviews and improved governance so far as possible to ensure no disadvantage to CATSI organisations while still providing for different legislative requirements where they benefit Indigenous organisations.

We would like to see a reduction in the administrative and compliance burden for Aboriginal and Torres Strait Islander corporations, particularly where such burdens do not exist for similarly sized organisations incorporated under the Corporations Act 2001 or otherwise.

We would also like to see attention given to the discrete needs of CATSI organisations operating in remote or regional areas, as well as of cultural traditions and safety, in the operations of the CATSI Act.

We would also welcome the opportunity to engage further in discussions around the review process.

8. References

- ⁱ Law Council of Australia, 'Submission to Phase 2 of the Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*', 1 October 2020, at 8 [27].
- ⁱⁱ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 1(4).
- ⁱⁱⁱ Australian Human Rights Commission, 'Guidelines to understanding 'Special Measures' in the Race Discrimination Act 1975 (2011) at 3 [8].
- ^{iv} ^{iv} Warwick McKean, *Equality and Discrimination under International Law* (1983) 288, cited by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 130.