



**Law Council**  
OF AUSTRALIA  
*Office of the President*

**17 September 2018**

Mr Mike Fordham  
Acting Registrar of Indigenous Corporations  
Office of the Registrar of Indigenous Corporations  
PO Box 29  
WODEN ACT 2606

By email: [CATSIreview@oric.gov.au](mailto:CATSIreview@oric.gov.au)

Dear Acting Registrar

### **PROPOSED AMENDMENTS TO THE CATSI ACT**

1. The Law Council welcomes the opportunity to provide a submission to the Office of the Registrar of Indigenous Corporations (**ORIC**) in relation to the discussion paper entitled *Proposed amendments to the CATSI Act (Discussion Paper)*.
2. The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee (**the Committee**) in the preparation of this submission. The submission does not seek to address each of the questions raised in the Discussion Paper, rather it addresses issues identified by the Committee in relation to:
  - (a) the proposed introduction of new grounds for the appointment of a special administrator under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**);
  - (b) the proposed broadening of the compliance powers of the Registrar of Indigenous Corporations (**Registrar**); and
  - (c) training for the directors and members of Aboriginal and Torres Strait Islander corporations.

### **Appointment of special administrators**

3. The grounds on which the Registrar may determine that an Aboriginal and Torres Strait Islander corporation is to be under special administration are set out in subsection 487-5(1) of the CATSI Act. The grounds for appointment under the CATSI Act are significantly broader than those for receivership or voluntary administration under the *Corporations Act 2001* (Cth) (**Corporations Act**). The reasoning for this distinction was noted in the Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth):

*The term 'special' is used to distinguish administration under CATSI from administration under the Corporations Act. It also relates to the application of the CATSI Bill as a special measure for the advancement and protection of Aboriginal people and Torres Strait Islanders. Placing a corporation under special administration, appointing a special administrator and conducting a special*

*administration will be informed by the objects and aims of the CATSI Bill as opposed to an administration under the Corporations Act which is principally driven by the interests of creditors and the certainty of commercial transactions.*

...

*Proposed section 487-5 sets out the grounds on which a corporation may be placed under special administration. The grounds are broader than insolvency or inability to repay a debt, which are usually the basis for appointing administrators or liquidators under the Corporations Act. The grounds include circumstances where disputes within the corporation are interfering with the conduct of the corporation affairs.<sup>1</sup>*

4. Similarly, in *Policy Statement 20 – Special administrations*, ORIC notes that:

*Special administration is a form of external administration unique to the CATSI Act. It is a special measure that addresses the unique role and circumstances of Aboriginal and Torres Strait Islander corporations. It contributes towards the CATSI Act as a special measure to advance and protect Aboriginal and Torres Strait Islander people and their respective cultures.*

*Special administration enables the Registrar to provide early proactive regulatory assistance when a corporation experiences financial or governance difficulties. It is quite different to a receivership or voluntary administration under the Corporations Act 2001 (the Corporations Act), which are usually driven by the interests of creditors.*

*Only the Registrar may place an Aboriginal and Torres Strait Islander corporation under special administration. The Registrar does not need to apply to a court. The grounds for placing a corporation under special administration are broad. They are not restricted to insolvency or the inability to pay a debt. They allow early intervention once certain risk factors are present and may avoid later corporate collapse. For example, a common risk factor is when a dispute between members and the board has escalated to the point of interfering with the operations of the corporation. This would be one reason for placing a corporation under special administration and is an important special measure.<sup>2</sup>*

5. The Law Council generally supports the policy justification behind the more proactive approach to appointment of special administration under the CATSI Act. However, it submits that the following proposed new grounds are expressed too broadly and should be narrowed in the drafting of the new provisions:

- 'there is doubt as to whether the board of directors is validly constituted'; and
- 'the corporation is a registered native title body corporate and conducts its affairs contrary to the interests of the common law holders'.<sup>3</sup>

---

<sup>1</sup> Revised Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) 1.521, 1.523.

<sup>2</sup> Office of the Registrar of Indigenous Corporations, 'Special administrations' (Policy Statement 20, 21 February 2017) [2.1]-[2.3].

<sup>3</sup> Office of the Registrar of Indigenous Corporations, *Proposed amendments to the CATSI Act: Discussion paper* (2018) 21 ('Discussion Paper').

### 'Doubt' as to whether the board of directors is validly constituted

6. A proposed new ground for the appointment of a special administrator is that 'there is *doubt* as to whether the board of directors is validly constituted' (emphasis added). In the Law Council's view, the term 'doubt' is too broad and the threshold for intervention is therefore too low. The Law Council submits that something more than mere doubt as to the validity of a board's composition should be required, or at the very least, that further guidance be provided as to what constitutes 'doubt'.
7. Consideration should be given to limiting the role of the special administrator to determining, as soon as possible, whether the Board of Directors is validly constituted, and if not, to take such steps as necessary to return control of the corporation to a validly constituted board. If the special administrator determines that the board of directors is validly constituted, then he or she should be required to immediately terminate the special administration and return control of the corporation to the board of directors.

### Affairs conducted contrary to the interests of the common law holders

8. Another proposed ground for special administration is where a registered native title body corporate 'conducts its affairs contrary to the interests of the common law holders'. Currently, paragraphs 487-5(1)(d)-(e) of the CATSI Act set out in relation to all Aboriginal and Torres Strait Islander corporations that a special administrator may be appointed if:

(d) *the officers of the corporation have acted in the affairs of the corporation:*

(i) *in their own interests rather than in the interests of the members of the corporation as a whole; or*

(ii) *in a way that appears to be unfair or unjust to members of the corporation;*

(e) *the affairs of the corporation are being conducted in a way that is:*

(i) *oppressive; or*

(ii) *unfairly prejudicial to, or unfairly discriminatory against, a member or members of the corporation; or*

(iii) *contrary to the interests of the members of the corporation as a whole.*

9. The proposed ground is significantly broader than the above current grounds. While there are many cases in which administration on this ground would be justified, it may also be enlivened in circumstances which, although 'contrary to the interests of the common law holders', are relatively minor – for example, failing to call an annual general meeting within the relevant period. While the Registrar would have a discretion in deciding whether or not the particular facts might justify special administration, the Law Council suggests that the amendments include a requirement that administration can only occur where the relevant acts or omissions are contrary to the interests of the common law holders in a significant (or a substantial) respect.
10. Regard must be had to the already extensive provisions in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**NT(PBC) Regulations**), in particular clauses 6 to 8, which imposes significant obligations on a CATSI corporation which is operating as a prescribed body corporate. It must be assumed that ORIC is proposing to enhance its regulatory functions in this regard because there is a perceived

deficiency. The proposed amendments should also be linked to the NT(PBC) Regulations.

### **Proposed broadening of the Registrar's compliance powers**

11. The Registrar's current powers are more limited than those of the Australian Securities and Investments Commission (**ASIC**) and are only suited to more serious situations. The Law Council generally supports the proposal to introduce lower level powers such as fines and enforceable undertakings to address situations which are less serious, bringing the powers of the Registrar more in line with those of ASIC.<sup>4</sup>
12. The Law Council notes that the Discussion Paper suggests that these powers will be discretionary and will allow ORIC to contact and support a corporation before any penalty is applied. The Law Council submits that such discretion should be ensured in the drafting of the new powers. Although less serious than the current compliance powers, fines and enforceable undertakings can be 'blunt instruments' and can disproportionately affect small-to-medium corporations. The Law Council recommends that considerations as to the size and financial capability of the corporation be included as considerations that the Registrar must have regard to in imposing a penalty – keeping in mind that such powers should only be used where absolutely necessary. Alternatively, consideration could be given to confining the exercise of these powers to large corporations or at least to medium and large corporations, with mechanisms such as contact and support available to smaller corporations.
13. It is recommended that clear and well communicated policy needs to be developed around the circumstances in which such discretion will and will not be exercised. There is a concern that ORIC will not have the capacity to undertake regulatory functions in relation to lower level breaches in a uniform manner across the whole sector. Therefore, the manner in which breaches are detected and fines and undertakings are imposed ought to be the subject of transparent policy and guidelines. Such policy and guidelines ought to be available in advance of the legislative amendment to ensure community confidence in the new powers.
14. The Law Council also notes that the proposed changes would give the Registrar the power to 'set deadlines that require action sooner than 14 days'.<sup>5</sup> Short deadlines are likely to cause real problems for corporations based in remote areas, for corporations that are not well-resourced and for corporations where the relevant action requires it to get professional advice, among other circumstances. This may disproportionately affect smaller Aboriginal and Torres Strait Islander corporations. The imposition of short, or very short, response/action deadlines will be especially onerous on unfunded or poorly funded Registered Native Title Bodies Corporate who are already well known to be under-resourced to comply with their existence regulatory obligations. Such powers should only be available when there is some real urgency for taking the action against the corporation.
15. The Law Council recommends that given the range of circumstances that apply nationally, a 14-day minimum period should be maintained. In the alternative, the power to impose a shorter deadline should require consideration of factors such as size, remoteness, capacity and the need for the corporation to seek external advice.

---

<sup>4</sup> Ibid 23.

<sup>5</sup> Ibid.

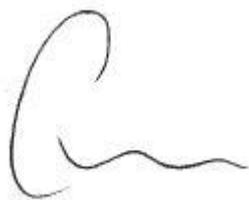
## **Training for the directors and members of Aboriginal and Torres Strait Islander corporations**

16. The CATSI Act framework is complex, and for many Aboriginal and Torres Strait Islander corporations, achieving a good understanding of the regime, let alone a substantially-changed one, is no easy task.
17. The Law Council acknowledges that, at a number of points in the Discussion Paper, the need for training, support, and/or assistance is recognised.<sup>6</sup> ORIC already provides a range of training programs to 'increase corporate governance knowledge, skills, efficiency and accountability within corporations'.<sup>7</sup> However, the Law Council submits that ORIC's capacity to provide training to corporations and their directors and members should be expanded, in particular to advise corporations of the changes and ensure that they are properly understood.

### **Contact**

18. Thank you for the opportunity to provide these comments. The Law Council would be pleased to elaborate on the above issues, if required.
19. Please contact Mr Nathan MacDonald, Senior Policy Lawyer, on 02 6246 3721 or at [Nathan.MacDonald@lawcouncil.asn.au](mailto:Nathan.MacDonald@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely



**Morry Bailes**  
**President**

---

<sup>6</sup> Ibid 7-8, 15-16, 23.

<sup>7</sup> Office of the Registrar of Indigenous Corporations, *About our courses* <<http://www.oric.gov.au/training/about-our-courses>>.