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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**CORPORATIONS AMENDMENT (ABORIGINAL AND TORRES STRAIT ISLANDER  
CORPORATIONS) BILL 2006**

**EXPLANATORY MEMORANDUM**

(circulated by authority of the Minister for Families, Community Services and Indigenous  
Affairs, the Honourable Mal Brough, MP)

# CORPORATIONS AMENDMENT (ABORIGINAL AND TORRES STRAIT ISLANDER CORPORATIONS) BILL 2006

## 1. Outline

### Purpose

1.1. The Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 amends the *Corporations Act 2001* as a consequence of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (the CATSI Bill).

1.2. The amendments remove duplication arising from provisions in the CATSI Bill which mirror provisions in the Corporations Act. The amendments also remove areas of doubt and potential regulatory gaps that could be created by implementing the CATSI Bill alongside the Corporations Act.

### Effect of principal provisions

1.3. The CATSI Bill closely aligns with the Corporations Act in a number of key areas including the duties of officers and the disqualification of persons from managing corporations. The amendments ensure that the CATSI Bill and the Corporations Act will work together seamlessly.

1.4. Duplication is removed in the areas of duties of officers and employees, winding-up, receivers, courts, proceeding and offences. The Bill removes potential doubt by confirming that the Corporations Act otherwise applies to corporations registered under the CATSI Bill. Potential regulatory gaps are prevented by implementing a framework recognising the disqualification of persons from managing corporations under both pieces of legislation.

### Background

1.5. The CATSI Bill, when enacted, will replace the *Aboriginal Councils and Associations Act 1976* (the ACA Act) to improve governance and capacity in the Indigenous corporate sector. The CATSI Bill aligns with modern corporate governance standards and corporations law. At the same time it maintains a special statute of incorporation that takes account of the special risks and requirements of the Indigenous corporate sector.

### Financial impact statement

1.6. There is no financial impact.

## 2. Contents

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## 3. Abbreviations

ACA Act	<i>Aboriginal Councils and Associations Act 1976</i>
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i>
Bill	Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006
CATSI Bill	Corporations (Aboriginal and Torres Strait Islander) Bill 2005
CATSI corporation	Corporation registered under the proposed Corporations (Aboriginal and Torres Strait Islander) Act 2006
Native Title Act	<i>Native Title Act 1993</i>
Registrar	Registrar of Aboriginal and Torres Strait Islander Corporations as defined by the CATSI Bill.

## 4. Notes on clauses—overview

### Introduction

1.1. The overall approach of the proposed consequential amendments to the Corporations Act has three elements:

- confirming application of the Corporations Act to CATSI corporations
- removing duplication between the Corporations Act and the CATSI Bill
- removing any regulatory gaps that could be created by the CATSI Bill.

1.2. This overview of the clauses covers the following topics:

- section 57A of the Corporations Act: meaning of ‘corporation’
- winding-up and receivers
- duties of officers and employees
- disqualification of a person from managing corporations
- transfers from the Corporations Act to the CATSI Bill
- courts, proceedings and offences.

### **Section 57A of the Corporations Act: meaning of corporation**

1.3. Section 57A of the Corporations Act provides that the term corporation includes any body corporate. This means that provisions in the Corporations Act that apply to a corporation currently apply to a body corporate incorporated under the ACA Act. The interaction between the Corporations Act and the ACA Act creates uncertainty where ACA Act provisions are inconsistent with the Corporations Act.

1.4. Amendment 31 makes it clear that a CATSI corporation is a corporation for the purpose of the Corporations Act. This removes any uncertainty that may have otherwise been created by the commencement of the CATSI Bill. Without this amendment it may have been argued that the CATSI Bill, being a more recent Commonwealth enactment than the Corporations Act, would displace section 57A.

### **Winding-up and receivers**

1.5. Amendment 2 specifically excludes CATSI corporations from the definition of a Part 5.7 body in subsection 9(1) of the Corporations Act. Part 5.7 of the Corporations Act provides for the winding-up of bodies other than companies. Part 11-5 of the CATSI Bill provides for the winding-up of CATSI corporations and aligns with the Corporations Act approach to winding-up companies. Without amendment 2 the conflicting provisions of Part 5.7 would also apply to CATSI corporations.

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<sup>1</sup> Amendment numbers refer to the items in ‘Schedule 1—Amendments of the *Corporations Act 2001* relating to Aboriginal and Torres Strait Islander corporations’.

1.6. Similarly, amendments 24 and 25 ensure that Part 5.2 of the Corporations Act dealing with receivers and other controllers does not apply of its own force to CATSI corporations. It only applies as modified by section 516-1 of the CATSI Bill.

### ***Duties of officers and employees***

1.7. Division 265 of the CATSI Bill specifically deals with the duties of officers and employees. The duties generally mirror those set out in Division 1 of Part 2D.1 of the Corporations Act. Amendment 4 makes it clear that this division of the Corporations Act does not apply to CATSI corporations. Without this amendment there would be duplicate legislative schemes and dual regulators responsible for enforcing compliance with the duties.

1.8. The duties in the CATSI Bill also differ from those in the Corporations Act in one important respect regarding the interaction with the Native Title Act. In some circumstances requirements under the Native Title Act could be in conflict with the general duties of officers and employees. The CATSI Bill deals with this potential conflict, and the amendment preserves the CATSI Bill's specific handling of the interaction between the CATSI Bill and Native Title Act obligations.

### ***Disqualification of a person from managing corporations***

1.9. Subsection 279-5(5) of the CATSI Bill sets up one side of a mutual recognition scheme where persons disqualified from managing corporations under the Corporations Act are automatically disqualified under the CATSI Bill. Amendments 6 to 23 complete the scheme so that disqualification under the CATSI Bill results in automatic disqualification under the Corporations Act.

1.10. A number of the amendments are also necessary to ensure that the introduction of the CATSI Bill disqualification provisions do not create any regulatory gaps. This is particularly necessary to apply consistent governance standards across groups of corporations which may include corporations under both the CATSI Bill and Corporations Act regimes. For one example of how a regulatory gap is avoided, see amendments 10 to 15 in relation to disqualifying a person from managing corporations on the basis of their involvement in two failed corporations.

### ***Companies transferring from the Corporations Act to the CATSI Bill***

1.11. Amendments 26 to 30 enable the transfer of companies from the Corporations Act to the CATSI Bill. No consequential amendments are necessary to enable the transfer of a CATSI corporation into the Corporations Act. One of the policy aims of the CATSI Bill is to provide an incorporation framework which is appropriate for the special risks and requirements of the Aboriginal and Torres Strait Islander corporate sector. Companies controlled by Aboriginal people or Torres Strait Islanders may wish to transfer their registration to the CATSI Bill to take advantage of the support and special measures provided.

### ***Courts, proceedings and offences***

1.12. Amendments 31 to 35 avoid duplication in a number of miscellaneous provisions in Chapter 9 of the Corporations Act. These provisions are mirrored in the CATSI Bill. The specific provisions to be amended are:

- the offence in section 1309 for giving false or misleading information

- the power of a court to grant relief under section 1318
- appeals from decision of receivers or managers in subsection 1321(b)
- the direction a court can make in relation to costs under section 1335.

### **Legislative matters**

1.13. The amending items of the Bill commence at the same time as the CATSI Bill—1 July 2007. This date takes account of reporting provisions and record keeping requirements in the CATSI Bill which are tied to the financial year. It also accommodates an awareness raising campaign for corporations and other stakeholders.

1.14. The Bill does not contain any amendments affecting the review of decisions by the Registrar or ASIC.

1.15. The Bill does not contain any amendments affecting the delegation of functions by the Registrar or ASIC.

1.16. The Bill does not contain any strict liability offences. However, amendment 6 does mean that a person who is disqualified from managing CATSI corporations is automatically disqualified from managing Corporations Act corporations. If a disqualified person manages a Corporations Act corporation the person commits an offence under section 206A of the Corporations Act and strict liability applies to the circumstance that the person is disqualified. The amendments do not expose any more people to the strict liability offence in section 206A(1) of the Corporations Act. Before the CATSI Bill begins such a person would have been disqualified from managing a Corporations Act corporation by virtue of section 57A of the Corporations Act. One minor difference is that prior to enactment of the CATSI Bill the only regulator with the power to disqualify a person from managing corporations was ASIC. The Registrar's power in the CATSI Bill to disqualify a person from managing CATSI corporations mirrors the grounds on which ASIC may disqualify a person from managing corporations—so while the regulator may be different the grounds are identical.

1.17. The Bill does not contain any provisions which introduce new regulatory powers. The existing regulatory powers in the Corporations Act apply. The Bill avoids potential duplication of regulatory powers in the CATSI Bill and the Corporations Act.

1.18. No exceptions have been sought from the operation of the *Legislative Instruments Act 2003*.

1.19. The Bill does not contain any provisions which allow regulations to modify provisions of the Bill itself, the CATSI Bill or the Corporations Act.

1.20. The Bill does not contain any provisions which reverse the onus of proof.

## 5. Notes on clauses—details

### **Preliminary material**

1.1. Proposed section 1 is a formal provision specifying the short title of the Bill.

1.2. Proposed section 2 sets out the commencement information of the Bill. Proposed sections 1 to 3 will commence on the day the Bill receives royal assent. The proposed amendments to the Corporations Act set out in Schedule 1 of the Bill will commence at the same time the CATSI Bill commences.

1.3. Proposed section 3 ensures that Schedule 1 of the Bill will amend the Corporations Act as set out in the schedule.

### **Schedule 1—Amendments of Corporations Act 2001 relating to Aboriginal and Torres Strait Islander corporations**

1.4. Amendment 1 includes a definition of *Aboriginal and Torres Strait Islander corporation* in the section 9 dictionary.

1.5. Amendment 2 replaces the definition of *Part 5.7 Body* in the section 9 dictionary. The new definition ensures that Part 5.7 does not apply to a CATSI corporation. Section 526-35 of the CATSI Bill applies Parts 5.4, 5.4B, 5.5, 5.6, 5.7B, 5.8, 5.8A and 5.9 of the Corporations Act with modifications. Applying Part 5.7 would be inconsistent with these applied parts.

1.6. Amendment 3 clarifies the application of the term *corporation* in the Corporations Act to CATSI corporations. The note highlights that while generally a reference to *corporation* in the Corporations Act can be read as including CATSI corporations there are some parts where this is specifically not the case.

1.7. Amendment 4 is an example of where references to *corporation* will not be read as including CATSI corporations. Proposed section 190B ensures that the general duties of directors, secretaries, officers and employees in Division 1 of Chapter 2D, Part 2D.1 do not apply to CATSI corporations or the directors, secretaries, officers and employees of CATSI corporations. The CATSI Bill provides for such general duties in relation to CATSI corporations.

1.8. Similarly, amendment 5 provides that section 197 of the Corporations Act does not apply to CATSI corporations. Section 271-1 of the CATSI Bill mirrors the duty to discharge trust liabilities in section 197 but includes specific provisions for dealing with native title which is held on trust.

1.9. Amendment 6 is important in making sure the disqualification of persons from managing corporations is recognised under both the CATSI Bill and the Corporations Act. Subsection 279-5(5) of the CATSI Bill provides that persons disqualified from managing corporations under the Corporations Act are automatically disqualified from managing CATSI corporations. Amendment 6 mirrors this recognition by ensuring that a person who is disqualified from managing CATSI corporations is automatically disqualified from managing Corporations Act corporations.

1.10. Amendment 7 to subsection 206BA(1) is another important element in ensuring the disqualification of persons from managing corporations is recognised under both regimes. This amendment means that ASIC can seek an extension of the period of disqualification of a person even if the disqualification flows from actions taken under the CATSI Bill. Likewise, section 279-10 of the CATSI Bill allows the Registrar to apply to the court to extend the period of disqualification even when the disqualification was triggered by actions relating to a Corporations Act corporation. This is important given that a disqualified person might from time to time be of greater interest to the Registrar or ASIC depending on which jurisdiction they are operating in.

1.11. Amendment 8 to paragraph 206C(1)(a) of the Corporations Act allows ASIC to apply to the court to disqualify a person from managing corporations because they have contravened a civil penalty provision of the CATSI Bill.

1.12. Amendment 9 confirms that, when ASIC applies to disqualify a person from managing corporations because they have contravened a civil penalty provision, the court can consider the conduct of that person in relation to any corporation including a CATSI corporation.

1.13. Amendment 10 to subsection 206D(1) of the Corporations Act enables ASIC to apply to the court to disqualify a person from managing corporations if they have been involved in two or more corporations that have failed. This provision can currently be used to disqualify a person who has been involved in two failed corporations, one of which was under the ACA Act and the other under the Corporations Act, through section 57A of the Corporations Act. This amendment confirms that the court can disqualify a person from managing corporations based on their involvement with two failed corporations where one is a CATSI corporation and the other a Corporations Act corporation.

1.14. Amendment 11 to paragraph 206D(2)(a) of the Corporations Act ensures that an order that a CATSI corporation be wound up in insolvency means that the corporation has failed for the purposes of subsection 206D(1).

1.15. Amendment 12 to paragraph 206D(2)(g) of the Corporations Act ensures that entering into a compromise or arrangement with creditors under the applied Part 5.1 means the corporation has failed for the purposes of subsection 206D(1).

1.16. Amendment 13 to paragraph 206D(2)(h) of the Corporations Act ensures that if a liquidator lodges a report with the Registrar under the applied subsection 533(1) it means the corporation has failed for the purposes of subsection 206D(1).

1.17. Amendment 14 amends section 206D of the Corporations Act. The proposed subsection 206D(2A) ensures that administration of a CATSI corporation under the applied Part 5.3A means that the corporation has failed for the purposes of subsection 206D(1). The proposed subsection 206D(2B) ensures that the definition of *officer* in the CATSI Bill operates when determining whether a person has been an officer of a CATSI corporation for the purposes of subsection 206D(1). This is necessary as the definition of *officer* in section 683-1 of the CATSI Bill includes specific handling of the interaction with the Native Title Act.

1.18. Amendment 15 confirms that in section 206D proceedings the court can consider the conduct of a person in relation to any corporation including a CATSI corporation.



1.19. Amendment 16 to subparagraph 206E(1)(a)(i) of the Corporations Act ensures that, when ASIC applies for a person to be disqualified from managing corporations because they have been an officer of a body corporate that has repeatedly contravened the Corporations Act, the court can also disqualify on the basis of repeated contraventions of the CATSI Bill.

1.20. Amendment 17 to subparagraph 206E(1)(a)(ii) of the Corporations Act ensures that, when ASIC applies for a person to be disqualified from managing corporations because they have repeatedly contravened the Corporations Act while an officer, the court can also disqualify on the basis of repeated contraventions of the CATSI Bill.

1.21. Amendment 18 ensures that the definition of *officer* in the CATSI Bill operates when determining whether a person has been an officer of a CATSI corporation for the purposes of section 206E. This is necessary as the definition of *officer* in section 683-1 of the CATSI Bill includes specific handling of the interaction with the Native Title Act.

1.22. Amendment 19 confirms that in section 206E proceedings the court can consider the conduct of a person in relation to any corporation including a CATSI corporation.

1.23. Amendment 20 to subparagraph 206F(1)(a)(ii) of the Corporations Act ensures that when a liquidator lodges a relevant report with the Registrar under the applied subsection 533(1), it is a relevant factor for ASIC to exercise its power of disqualification.

1.24. Amendment 21 confirms that, in exercising the power of disqualification under section 206F, ASIC can consider a person's involvement in any corporation including a CATSI corporation.

1.25. Amendment 22 confirms that, in exercising the power of disqualification under section 206F, ASIC can consider a person's conduct in relation to any corporation including a CATSI corporation. The amendment also confirms the relevance of relationships between corporations including between CATSI corporations and Corporations Act corporations.

1.26. Amendment 23 is important in ensuring the disqualification of persons from managing corporations is recognised by both regimes. The amendment makes it clear that it is the CATSI Bill provisions which operate to disqualify a person from managing a CATSI corporation. This has some important flow on effects for the operation of Part 2D.6. For example, subsection 206F(5) allows ASIC to grant a person leave to manage a corporation if they have been disqualified 'under this part' of the Corporations Act. If the Registrar has disqualified a person from managing CATSI corporations, the person is automatically disqualified from managing Corporations Act corporations under section 206B of the Corporations Act—see amendment 6. As this automatic disqualification does take effect under Part 2D.6, ASIC can grant a person leave to manage a *Corporations Act corporation*. The amendment does not give ASIC the power to grant a person leave to manage a *CATSI corporation* as the disqualification from managing CATSI corporations takes effect under the CATSI Bill and is therefore not 'under this part'. The Registrar can grant leave to manage a CATSI corporation under subsection 279-30 (7) of the CATSI Bill.

1.27. Amendment 24 is a technical amendment to insert a subsection number as a consequence of the subsection inserted by amendment 25.

- 1.28. Amendment 25 confirms that Part 5.2 of the Corporations Act dealing with receivers and other controllers does not apply of its own force to CATSI corporations. This is necessary to remove doubt as Part 5.2 is applied with modification by section 516-1 of the CATSI Bill.
- 1.29. Amendment 26 to section 601AI of the Corporations Act enables a company to transfer from the Corporations Act to the CATSI Bill. Transfer would otherwise be prohibited by the use of the phrase ‘law of a State or Territory’ as the CATSI Bill is a law of the Commonwealth.
- 1.30. Amendment 27 to section 601AI of the Corporations Act means that the restriction on transferring to a state or territory that the company is taken to be registered in does not apply to transfers into the CATSI Bill. This restriction is unnecessary in relation to registration under the CATSI Bill as the registration is under the jurisdiction of the Commonwealth.
- 1.31. Amendment 28 to paragraph 601AJ(1)(a) of the Corporations Act ensures that the application for transfer is accompanied by a resolution referring to the CATSI Bill. This would otherwise be prohibited by the use of the phrase ‘law of a State or Territory’ as the CATSI Bill is a law of the Commonwealth.
- 1.32. Amendment 29 to subsection 601AK(c) of the Corporations Act ensures that ASIC can consider the CATSI Bill in making a transfer of registration declaration. This would otherwise be prohibited by the use of the phrase ‘law of a State or Territory’ as the CATSI Bill is a law of the Commonwealth.
- 1.33. Amendment 30 to paragraph 601AL(1)(b) of the Corporations Act ensures that ASIC must deregister a company once it is registered under the CATSI Bill. This would otherwise be prohibited by the use of the phrase ‘law of a State or Territory’ as the CATSI Bill is a law of the Commonwealth.
- 1.34. Amendment 31 to section 1309 of the Corporations Act removes duplication of an offence in the CATSI Bill. The amendment does not effect paragraph 1309(1)(c) of the Corporations Act as this paragraph is not mirrored in the CATSI Bill.
- 1.35. Amendment 32 to section 1318 of the Corporations Act removes duplication of a court power in the CATSI Bill.
- 1.36. Amendment 33 is a technical amendment to insert a subsection number as a consequence of the subsection inserted by amendment 34.
- 1.37. Amendment 34 to section 1321 of the Corporations Act removes duplication of an appeal right in the CATSI Bill.
- 1.38. Amendment 35 to section 1335 of the Corporations Act removes duplication of a court power in the CATSI Bill. Subsection 581-20(1) of the CATSI Bill applies to any action or other legal proceeding in which a CATSI corporation is a plaintiff. It is therefore broad enough to cover actions under the Corporations Act in which a CATSI corporation is the plaintiff. Subsection 1335(2) of the Corporations Act deals with the bearing of costs in a court proceeding *under* the Corporations Act and will continue to apply to a CATSI corporation that is a party to a proceeding under that Act.