



Australian Government



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[REDACTED]
[REDACTED]
Via email: [REDACTED]
[REDACTED]
[REDACTED]

Our reference: ACNCSUB2020/03

ACNC submission – Review of the CATSI Act

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide feedback on the draft report for the review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)*, which was published 31 July 2020 (**the draft report**).
2. The ACNC has limited its feedback at this time to the matters of direct relevance to its jurisdiction.

About the ACNC and the charity sector

3. The ACNC is the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act)*. The objects of the ACNC Act are to:
 - a. maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.

Interaction with the Office of the Register of Indigenous Corporations (ORIC)

4. There are currently 992 entities that are both indigenous corporations registered with ORIC and charities registered with the ACNC (**ORIC-registered charities**). This represents around one third of all corporations registered with ORIC.
5. 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.
6. This arrangement (**the transitional reporting arrangement**) is enabled by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional Act) 2012 (Cth)* and supported by the *Commissioner's Policy Statement: CPS 2013/08 – Accepting other*





government reports, which allow the Commissioner to accept a charity's reporting to another regulator as a substitute for reporting to the ACNC.

7. While a range of factors affect the Commissioner's decision to continue with a transitional reporting arrangement, the alternative reporting requirements must substantially mirror the ACNC's reporting requirements. To ensure that ORIC-registered charities can continue to be entitled to charity registration without imposing on them the additional burden of reporting annually to the ACNC, it is essential that the two sets of reporting requirements remain largely analogous.
8. 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.
9. If a charity is deregistered by ORIC, it may still be entitled to registration as a charity with the ACNC, in which case its reporting and compliance obligations will revert to the ACNC.

Feedback on specific aspects of the draft report

Chapter 4: Governance

Size Classification

10. Any changes to the CATSI Act should contemplate the work being undertaken by the Australian Accounting Standards Board (**AASB**). A goal of the AASB's 'Not-for-profit Private Sector Financial Reporting Framework' project is to develop standardised reporting requirements for not-for-profit entities that are required to prepare financial reports in accordance with Australian Accounting Standards. Standardised requirements across all relevant regulators may ease the administrative burden on charities, as well as support maintaining the transitional reporting arrangement by enabling alignment between the ACNC and ORIC reporting regimes.
11. The ACNC supports the introduction of consistent thresholds for ORIC and the ACNC to use to determine the size of a charity for reporting purposes. This would ensure that the reporting obligations for ORIC-registered charities are consistent with the reporting obligations other charities have with the ACNC.
12. As the draft report notes, the ACNC legislative framework has recently been reviewed (**the ACNC review**)¹. The review recommended that charities should:

¹ *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, 22 August 2018 (<https://treasury.gov.au/publication/p2018-t318031>), footnote 33.



*“be required to report based on size, determined on rolling three-year revenue, with thresholds of less than \$1 million for a small entity, from \$1 million to less than \$5 million for a medium entity, and \$5 million or more for a large entity”.*²

13. These proposed thresholds are closer to the current ORIC thresholds than the current ACNC thresholds. While this recommendation has not yet been implemented, the Commonwealth Government supports it and noted that it will consult with state and territory governments.³
14. Currently, the ORIC thresholds, for reporting purposes, are based on income, while the ACNC thresholds are based on revenue. We also support alignment between the two jurisdictions in this regard, to ensure consistency for all registered charities.
15. We do not support ORIC using only two classifications, as it is not consistent with the ACNC Regulation. If only two classifications are used, it is important to note that only small charities (revenue less than \$250 000) are exempt from submitting annual financial reports to the ACNC. Small corporations registered with ORIC (income less than \$100 000) must submit a general report, but not a financial report. Any reduction in the number of classifications should preserve the position that if a charity is large enough that it would have to submit a financial report to the ACNC, a similarly-sized charity should have to submit a financial report to ORIC if it is registered with ORIC.

Accountability to Members

16. Governance standard 2 of the ACNC Regulation requires charities to take reasonable steps to be accountable to their members⁴. While the ACNC Regulation does not prescribe what a charity must do to demonstrate compliance with this standard, it is suggested that the holding of annual general meetings and the provision of regular elections for responsible persons will be considered reasonable steps a charity can take to meet the standard.
17. We do not support allowing ORIC-registered charities to decline to hold an Annual General Meeting (**AGM**) for up to three years. Such a practice would not demonstrate compliance with governance standard 2. When managing the consequences of the COVID-19 pandemic (such as social distancing, travel restrictions, and state border closures), the ACNC advised charities to find innovative solutions to provide accountability to their members, rather than cancel AGMs. Options included a reasonable postponement of AGMs, conducting meetings virtually when the charity’s governing rules allowed, and providing members with the information they would have been provided with had the AGM taken place as scheduled.

² ACNC Review, Recommendation 12

³ *Government Response to Australian Charities and Not-for-profits Commission Legislation Review 2018*, 6 March 2020.

⁴ Section 45.10 *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth)



18. We support the notion of charities using electronic means to contact members when the charity's governing rules allow for it.

Providing Financial Reports to Members

19. The ACNC supports charities submitting financial reports to their AGMs, rather than merely providing members with a copy upon request. Key documents about a charity's performance should be as accessible as possible to the charity's members as possible. As well as promoting transparency, such a practice would demonstrate compliance with governance standard 2.

Extensions to Reporting Deadlines

20. We note the suggestion that corporations receive an automatic 30-day extension to their reporting deadline in certain circumstances, such as a death in the community or natural disaster. We support this suggestion in principle. The ACNC, for example, agrees to extensions when the circumstances warrant it. Extensions should be short and reasonable – timely compliance with reporting obligations remains an important means of providing transparency and accountability.

Reporting for 'Dormant' Charities

21. 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).
22. 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.

Chapter 5: Officers of corporations

Executive Remuneration

23. The ACNC Review proposed that:

"Large registered entities be required to disclose the remuneration paid to responsible persons and senior executives on an aggregated basis".⁵

⁵ ACNC Review, Recommendation 15



The Commonwealth Government has expressed its support for this recommendation, and affirmed that the start date for this requirement will coincide with any change to the ACNC revenue thresholds.

24. Large charities that are characterised as reporting entities, according to the AASB, currently submit a General Purpose Financial Statement (GPFS) to the ACNC, as opposed to a Specific Purpose Financial Statement (SPFS). The AASB standards require that the remuneration of certain executive personnel is disclosed in a GPFS. Therefore, a number of large charities already disclose this information. The AASB's 'Not-for-profit Private Sector Financial Reporting Framework' project has proposed that all large charities must submit a GPFS. In effect, the ACNC will be collecting this data for large charities once this proposal is adopted, and the ACNC Review recommendation will align with that outcome. For privacy reasons, a charity would be exempt if the requirements meant disclosing the remuneration of only one individual.
25. As the transitional reporting arrangement is built on a premise that the reporting obligations of ORIC-registered charities and other registered charities should be consistent, we submit that this recommendation should be adopted before any changes to the ACNC come into effect.

Related Party Provisions

26. The CATSI Act currently requires registered corporations to gain the approval of members before providing a related party benefit. This may be a burdensome requirement for some indigenous corporations. However, in the ACNC's experience, related party transactions can be a vehicle for the responsible persons⁶ behind a charity to provide a private benefit to themselves and/or their acquaintances. This is one of the most concerning sources of non-compliance by registered charities, and it is important that reasonable safeguards remain in place, even if the current CATSI Act provisions are relaxed.
27. The ACNC Act and ACNC Regulations do not contain an analogous requirement, but compliance with the governance standards requires a charity to appropriately manage any related party transaction.
28. The ACNC Review has proposed that:

*"Registered entities be required to disclose related party transactions."*⁷

This recommendation has been supported by the Commonwealth Government, but regulatory change has not yet been implemented.

⁶ 'Responsible entity' is defined in s 205-30 of the ACNC Act. To avoid confusion, the ACNC refers to responsible entities as responsible persons, which means anyone responsible for the governing of a charity.

⁷ ACNC Review, Recommendation 14



29. The ACNC Review (and the ACNC's current approach) focuses on 'related party transactions' while the draft report focuses on 'related party benefits'. This distinction may be important, and the ACNC favours consistency as much as possible.
30. We also note that it is reasonably likely that any changes to the ACNC Regulation regarding disclosure of related party transactions will mirror the AASB requirements⁸. The current definition of 'related party' in section 293-1 of the CATSI Act is broader than the AASB provisions. The CATSI Act definition includes an entity that was a related party in the past six months, and an entity which reasonably believes it will become a related party in the future. While we prefer consistency, we do not necessarily object to standards that are higher than the ACNC's, noting the risk of related party transactions by a charity being used to achieve a private benefit and jeopardising the entity's charity status.
31. The draft report considers allowing an exception to the current CATSI Act provisions where a related party transaction is conducted at arm's length, which would reflect the *Corporations Act 2001* (Cth). Related party transactions conducted at arm's length should still be disclosed under the relevant AASB standard.

Chapter 6: Modernising the CATSI Act

Accounting Standards

32. The ACNC Regulation regarding the type of financial report a charity must submit currently aligns with the AASB standards. If an entity is not a reporting entity⁹ the ACNC will accept an SPFS. Reporting entities are obliged to submit a GPFS. It is mandated in the ACNC Regulation (s 60-30(2)) that non-reporting entities that submit an SPFS must still meet the relevant parts of six AASB standards.¹⁰
33. The Draft Report and ORIC website indicate that these obligations may not be clear to some indigenous corporations which are submitting the wrong type of statement. The ORIC website states that corporations that must report under the CATSI Act:
- "must prepare the report in accordance with the accounting standards (to the extent the standards are capable of applying) as if they were a reporting entity".¹¹*
34. In our view, this position is capable of being misinterpreted, and is not consistent with the ACNC Regulation or the AASB standards. If an entity can properly be characterised as a non-reporting entity according to the AASB standards, we believe it should generally be able to submit an SPFS, subject to the same sort of baseline AASB standards applying as in the ACNC Regulation.

⁸ AASB 124

⁹ AASB 1053, Appendix A "an entity in respect of which it is reasonable to expect the existence of users who rely on the entity's general purpose financial statements for information that will be useful to them for making and evaluating decisions about the allocation of resources".

¹⁰ AASB 101, AASB 107, AASB 108, AASB 1031, AASB 1048, AASB 1054

¹¹ <https://www.oric.gov.au/run-corporation/financial-reports> (at 11 September).



Chapter 7: Registered Native Title Bodies Corporate (RNTBC)

Regulation and Transparency of Trusts

35. As explained in the draft report, ORIC receives a disproportionate number of complaints about RNTBCs, which may suggest there are additional complications with the governance and transparency of such entities.
36. While the use of trusts by such entities provides advantages to them, such as managing risk and reducing their tax liability, the ACNC agrees that complex business structures can lack transparency. Where native title benefits are held on trust, different regulators may have oversight of the management of those trusts, including the ACNC and state and territory agencies. Some trusts have no regulatory oversight. However, there is minimal to no reporting about these trusts to ORIC, and ORIC generally does not have any regulatory power over them.
37. In our view, this presents a risk, noting that the native title benefits held on trust can be significant. When these entities are registered charities, the ACNC is concerned about the lack of assurance that the funds are applied to a charitable purpose.
38. The ACNC supports any changes that would provide greater transparency in this space, including expanding ORIC's regulatory role. The ACNC can contribute further to discussions about how best to streamline and optimise regulatory oversight of these trusts.

Chapter 8: Unclaimed money and remaining assets

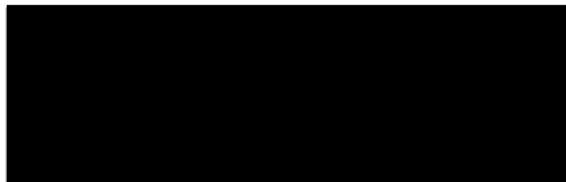
39. We note that when an entity is deregistered by ORIC, its remaining assets revert to the Registrar, and the Registrar holds any unclaimed money for six years, subject to any legal claim, before the funds are turned to Consolidated Revenue.
40. In some situations, this may conflict with the ACNC Act and *Charities Act 2013* (Cth). This conflict is not necessarily resolved by the suggestion that, after six years, any unclaimed money should be available to the Registrar to assist him/her with the upkeep of any remaining assets that he/she holds.
41. To maintain registration with the ACNC, a charity must be a not-for-profit entity with charitable purposes. Its assets and revenue must be applied towards a charitable purpose (or a purpose that is incidental or ancillary to a charitable purpose). This obligation extends to the charity's winding-up.
42. Excepting that any legal claim on a charity's assets or money may take precedence:
 - a. If a charity is deregistered by ORIC but remains a registered charity, its assets should continue to be available to it to apply towards a charitable purpose.



- b. If a charity is deregistered by ORIC and ceases to be a registered charity, any remaining assets and money should be diverted to another charity with analogous charitable purposes.
43. We would prefer that any changes to the CATSI Act reflect this distinction for registered charities, which we believe also aligns with a community expectation that charitable funds should go to a charitable purpose.

Next steps

44. If you have queries about this submission please contact [REDACTED]



[REDACTED]
Commissioner
Australian Charities and Not-for-profits Commission