



28 February 2018

Mr Murray Crowe
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via Email: ACNCReview@treasury.gov.au

Dear Mr Crowe

Re: Review of Australian Charities and Not-for-profits Commission (ACNC) legislation

The National Native Title Council (NNTC) welcomes the opportunity to provide comments on the Review of the ACNC legislation.

The National Native Title Council is the peak body of Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Traditional Owner Corporations, such as Prescribed Bodies Corporates and Traditional Owner Group Entities¹. The objects of the National Native Title Council are, amongst other things, to provide a national voice for the Indigenous native title sector on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

All NTRBs and NTSPs, the NNTC, and most Traditional Owner Corporations are Not-For-Profit (NFP) entities and are either incorporated as Aboriginal Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) or as public companies limited by guarantee under the *Corporations Act 2001*.

The NNTC was incorporated as a public company limited by guarantee under the Corporations Act in 2006. It is registered for GST and was endorsed with DGR status as a Public Benevolent Institution in February 2010.

The NNTC provides the following general comments in response to the consultation paper based on views and comments received from its members. The NNTC would like to acknowledge the assistance of Mr Ben Gordon of the Federation of Victorian Traditional Owner Corporations in its preparation. Please note however, that the NNTC submission in no way precludes any divergent views that may be submitted from individual members.

¹ Traditional Owner Corporations in this submission is used as a generic term to include a range of corporate structures under various State and Commonwealth legislation, including Prescribed Bodies Corporate and Registered Native Title Bodies Corporate under the [Native Title Act 1993](#) (Cth) and Traditional Owner Group Entities under the [Traditional Owner Act 2010](#) (Vic).

Information sharing between regulatory authorities

1. NTRB/SPs and Traditional Owner Corporations generally operate as not for profit entities (NFPs) and very often have charitable (sometimes with DGR or PBI) status, often operating as a trust, and increasingly with subsidiary trusts and companies.
2. NTRB/SPs and Traditional Owner Corporations are regulated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) through the Office of the Registrar of Indigenous Corporations (ORIC), the *Native Title Act 1993* (Cth) and associated Regulations, and the *Corporations Act 2001* (Cth).
3. Under the *Australian Charities and Not-for-profits Commission Act 2012* Act (Cth) the operations of the Australian Charities and Not-for-profits Commission (ACNC) have on balance provided an efficient and effective system for NTRB/SPs and Traditional Owner Corporations by minimising duplication of reporting and maintaining online details, as well as in providing guidance and information.
4. Whilst the NNTC would not support any increase in reporting requirements for NTRB/SPs and Traditional Owner Corporations our members would support an enhancement of web based systems and an approach that enables the ACNC and ORIC to maintain and improve information flows in terms of registration, compliance and reporting, within the requirements of their respective regulatory regimes. The current approach based on ‘management arrangements’ – via a Memorandum of Understanding – is currently working well, but potentially could be enhanced through appropriate legislative amendments which would enable the ACNC to manage relevant information including through recording or updating published registers or other information, including from ORIC.
5. In some instances, Traditional Owner Corporations are using subsidiary or joint venture companies to manage operational activity. Enhanced information systems between ASIC and ACNC could also be useful to reduce currently duplicative compliance requirements and search functions, as for example the list of directors of charitable or related companies.
6. However, we note that it may not be possible for ACNC to simply mirror ASIC information with regard to information held by ORIC under the CATSI Act. This is because the CATSI Act provides for specific ways to deal with a range of issues such as special resolutions, restrictions on directors, reporting (including the need for auditors) and in the way in which the Registrar of Aboriginal and Torres Strait Islander Corporations is able to intervene or provide guidance. This would need to be considered in relation to any options for change, potentially providing alignment where appropriate to the ACNC regulated organisations.

Recommendations:

- Continue to develop streamlined, web based information management to enhance the efficient provision of information by registered entities and better enable search functions
- Consider changes whereby the ACNC can record, report and provide relevant information to support the objectives of the ACNC to CATSI organisations, including as the portal for relevant information provided to ORIC
- In considering changes to reduce compliance costs through better connection with ASIC information, also consider ORIC information

Scope of the ACNC: extend to not for profit

7. NTRB/SPs and Traditional Owner Corporations, and indeed many of the corporations established under the CATSI Act are not for profit (NFP) entities. Some are also recognised as charitable for taxation purposes, including having DGR and PBI status. Across many sectors providing NFP/charitable services, there are organisations which are using NFP labels as ‘marketing’. The inaccurate description of some organisations as “NFP” could undermine the trust and work undertaken in those sectors, including for example where government contracting and grant funding is a core part of the business model.
8. An extension of the scope of ACNC operations to include NFPs could have a number of benefits to enhance trust and understanding of NFPs. A key to this is to assist in providing assurance on the status of an NFP. One area of concern relates to the necessary information that enables public understanding of the underlying ‘ownership’ structure, including whether a corporation is NFP, particularly with collective (community) ownership rather than private ‘for profit’ ownership. There is potential for some organisations to purport to be (or through naming to appear to be) ‘community based’ when they are actually for profit enterprises.
9. Given that this is potentially a very large number of organisations, it may be appropriate that identification of NFP status is undertaken voluntarily, as a way to provide a means for ‘self-regulating’, by electing to be registered as an NFP and being required to provide greater transparency of appropriate information. This could include for example, providing an indicator of the type of organisation structure (eg it has members, is limited by guarantee).
10. Conversely, ASIC registered subsidiaries of charitable or NFP organisations may not be identified as NFP, unless there is some way to indicate this.
11. In this regard, the ACNC could usefully provide a ‘one stop information hub’ or even the registrar of corporations with DGR and PBI status along-side charitable and NFP status.

Recommendation:

- Consider the scope of the ACNC to include and maintain a register of NFPs, with key information available such as whether a corporation is a corporation limited by guarantee or has members rather than shareholders.

Scope of the ACNC: flexibility for native title corporation structures and capital accumulation in charities

12. Currently native title and other similar payments are generally directed towards charitable trusts. While there are valid reasons for this, the limitations of charitable trusts, including legal barriers to how distributions are applied (due to the narrow range of charitable purposes) and limitations on the accumulation of funds reduces the benefits of the charitable status and tax exemption benefits.²

² See Australian Taxation Office TR 2015/1 ‘Income tax: special conditions for various entities whose ordinary and statutory income is exempt’ (25 February 2015); TR 2011/4 ‘Income tax and fringe benefits tax: charities’ (12 October 2011).

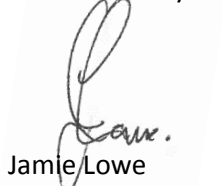
13. Capital accumulation, such as the retention and growing of land, funds and other assets for generations to come is arguably a key underlying purpose of Traditional Owner Corporations and the native title system. We note that similar problems arise in other charitable sectors (eg charitable housing) from the inability to retain and grow capital in a sustainable way that supports the ultimate beneficiaries.
14. Over time it is expected that Traditional Owner Corporations, will continue to grow and prosper, including by developing a range of structures or special purpose vehicles, potentially as subsidiaries, that provide appropriate mechanisms to meet the NFP and charitable purposes requirements as a way to overcome the historical anomaly. In this regard we note that the Indigenous Community Development Corporation (ICDC) proposal has been considered within recent taxation and native title reviews, as a vehicle through which to maintain the advantages of charitable trusts while overcome the shortcomings of these arrangements.
15. It is timely, given the current trajectory of native title settlements, to provide flexibility within the ACNC regime to coordinate with ORIC including to maintain information and registers and potentially regulate aspects of charities and associated (subsidiary) corporations.

Recommendation:

- Consider providing flexibility within the ACNC functions to collect and provide appropriate information to cover corporations and other vehicles that are inherently charitable in purpose, but which require different structures to overcome historical anomalies.

We trust the above comments are suitable for your purposes. In the meantime, however should you have any queries or require any further information please do not hesitate to contact Matthew Storey on 0419 578 504 at your convenience.

Yours sincerely



Jamie Lowe
Chairman