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17 September 2021

Senate Finance and Public Administration Legislation Committee

Via email: fpa.sen@aph.gov.au

Our reference: ACNC SUB2021/9

ACNC submission – Inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021*

The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide feedback on the draft *Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021* (Cth) (**the Bill**).

On 24 September 2020, the ACNC made a submission to the National Indigenous Australians Agency as part of its review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**). We are pleased to note that the outcome of that review, and the Bill, generally reflect our observations and the concerns we expressed in that submission.

We have limited our feedback to matters of direct relevance to the ACNC's regulatory remit. If it would assist the Committee, we are willing to discuss any of these matters further.

Interaction between the ACNC and the charity sector

1. The ACNC is the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**).
2. There are currently around 1,000 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.
3. The ACNC's relationship with ORIC aligns with its objective of promoting the reduction of regulatory obligations for 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.
4. 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*



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

5. To maintain the transitional reporting arrangement and ensure that ORIC-registered charities can continue to be entitled to charity registration without imposing the additional burden of reporting annually to the ACNC, the alternative reporting requirements must continue to substantially mirror the ACNC's reporting requirements.
6. Likewise, if an ORIC-registered charity complies with the directors' duties in the CATSI Act, the ACNC will generally presume that the charity is compliant with the governance standards 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.

Size classification of corporations

7. We welcome the intention of the Bill to align the size classifications applied to CATSI Act corporations with those used by the ACNC. These size classifications determine the nature and complexity of a charity's reporting obligations. We note that the CATSI Act thresholds will be prescribed in the regulations, which will make continued alignment with the ACNC easier to achieve.¹
8. However, we note an important distinction between the Bill and the proposed ACNC legislative framework. In our view, it is appropriate that the classification of CATSI Act corporations will now be based on revenue, rather than a combination of income, assets and employees. However, the ACNC determines size by referring to revenue at the registered entity level; section 111 of the Bill will apply 'consolidated revenue' as the determinant of size, which will include the revenue of subsidiary entities. This may mean that some ORIC-registered charities will be considered larger, under the ORIC framework, than they are under the ACNC framework. The ACNC will need to consider whether this inconsistency will affect the transitional reporting arrangement, and any future streamlined reporting arrangement – ORIC's reporting requirements will, in effect, be more stringent for some charities, which may allow continuation of the transitional reporting arrangement. However, different requirements between

¹ In 2018, the ACNC legislative framework was reviewed. The Commonwealth Government has responded to the recommendations of that review, and recently announced that proposed changes to the ACNC size classifications will come into effect for reporting for the 2021/22 financial year, which will be due from 1 July 2022 - <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/cutting-red-tape-charities>. Charities with revenue of less than \$500,000 will be categorised as small. Charities with revenue between \$500,000 and \$3 million will be categorised as medium. Charities with revenue exceeding \$3 million will be categorised as large.

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regulators for the assessment of revenue may cause confusion for charities and the public.

Reporting of remuneration

9. We support the proposed changes, which should enhance transparency and accountability. The Commonwealth Government has announced that from 1 July 2022, most large charities², being those with annual revenue exceeding \$3 million, will be required to report on remuneration paid to responsible persons and senior executives, and this change will lead to greater harmonisation between the ACNC and ORIC frameworks.

Unclaimed money and remaining assets

10. We understand that when a CASTI Act corporation is deregistered, subject to any other claims, the corporation's unclaimed money and remaining assets will be held by the Registrar. Currently, there is provision for unclaimed money to be returned to Consolidated Revenue after six years. The Bill will now allow money to stay with the Registrar to fund the upkeep of any remaining assets the Registrar holds. In our September 2020 submission, we highlighted how this may conflict with the requirement for registered charities to apply any remaining charitable funds and assets to an analogous charitable purpose when they wind up. The Bill will not replace this requirement. If a CATSI Act corporation is also an ORIC-registered charity, any charitable funds and assets it holds must be applied to an analogous charitable purpose if it winds up. When deciding whether an entity can be registered as a charity, we insist that this requirement is reflected in the entity's governing document – as it is in Rule 13 of the Rule Book for CATSI Act corporations.
11. In our view, there remains a potential conflict between ACNC legislation and the process that would apply under the CATSI Act if the Bill becomes law. If an ORIC-registered charity winds up, we will continue to expect that its surplus assets are distributed to an analogous charitable purpose. Although it depends upon the governing documents, it is highly likely that those analogous purposes will be for Aboriginal benefit.

Appointment of a special administrator

12. The Bill introduces a new ground upon which the Registrar can appoint a special administrator to a CATSI Act corporation; namely, where the Registrar has identified “a serious irregularity in the financial affairs of the corporation”. We note that, as identified

² The change will only apply to charities with two or more responsible persons or key management personnel who are remunerated for privacy reasons.

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in the Explanatory Memorandum, this will allow the Registrar to intervene more effectively when a corporation needs assistance, and in the context of ORIC-registered charities, may help protect charitable assets and ensure that entities continue to be focused on their charitable purposes.

13. The ACNC Act allows the Commissioner to revoke the registration of a charity if a person has been appointed, under an Australian law, to manage the charity's affairs because it is unable to pay its debts when they become due and payable³. Our understanding is that this section will interact with the new ground for the appointment of a special administrator, so that ORIC-registered charities may be revoked where the "serious irregularity" is that the charity is unable to pay its debts on time.

Next steps

14. As mentioned at the outset of this letter, we are available to provide further assistance to the Committee if required.

The Hon Dr Gary Johns

Commissioner

Australian Charities and Not-for-profits Commission

³ Subsection 35-10(1)(d)(iii) of the ACNC Act.

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