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Executive Research Officer
Aboriginal Lands Parliamentary Standing Committee
Parliament of South Australia
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ACNC submission – Aboriginal Lands Parliamentary Standing Committee inquiry into Aboriginal Governance

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to assist the Aboriginal Lands Parliamentary Standing Committee (**the Committee**) with its inquiry into governance standards in South Australian Aboriginal community-controlled organisations (**the Inquiry**).
2. The Committee is also receiving submissions regarding its inquiry into Aboriginal heritage policies and standards in South Australia. While the Committee may use this submission for the purposes of that inquiry, the subject matter of that inquiry does not naturally align with the ACNC's jurisdiction, and any assistance the ACNC can provide to it may be limited.

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.
4. The ACNC maintains a register of charities. Currently, there are around 58,000 registered charities. In order to be registered, and maintain registration, an entity must meet the legislative definition of a charity and comply with ongoing governance and reporting obligations, which are set out in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (**ACNC Regulation**).



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Background

5. The focus of the Inquiry is South Australian Aboriginal community-controlled organisations and corporations; some of which will be registered charities. I cannot quantify how many registered charities would fall within the scope of the Inquiry.
6. As of March 2021, the ACNC register includes around 1,000 charities that operate in South Australia and have reported that their beneficiaries include the Aboriginal and Torres Strait Islander community. Many of these would not be Aboriginal-controlled, would have purposes that extend beyond assisting indigenous Australians, and/or be based in another state with only a small amount of operations in South Australia.
7. There are also currently 992 entities that are both charities registered with the ACNC and indigenous corporations registered with Office of the Registrar of Indigenous (**ORIC-registered charities**). This submission discusses the ACNC's experience of providing regulatory oversight to **Indigenous charities** – this term does not have a precise meaning, but for the purposes of this submission it should be taken to mean Aboriginal and Torres Strait Islander-controlled charities that principally assist the Indigenous community, including ORIC-registered charities.
8. Registration with the ACNC requires an entity to be registerable under the *Charities Act 2013 (Cth)* and the ACNC Act. Registration is not compulsory for charities but does allow entities to gain access to certain charity tax concessions administered by the Australian Taxation Office and states and territories.

Governance Structures

9. Indigenous charities registered with the ACNC take many forms, including trusts, incorporated associations, and unincorporated associations. It is for the responsible persons of an Indigenous charity (the people who govern the charity) to determine the appropriate structure for the charity, considering its circumstances and purposes.
10. Different Commonwealth, state and territory legal frameworks apply to each entity type, and each entity type has its own advantages and constraints. ORIC-registered charities are corporations.¹ In my view, no entity type is preferred from a governance perspective.
11. Native title property and interests are typically placed on trust, which may be a charitable trust that is registered with the ACNC; and the trustee of which may be a 'Prescribed Body Corporate' (**PBC**) which is an ORIC-registered corporation. The use of trusts to manage property and interests may provide advantages, such as reducing the entity's tax liability, however they can lack transparency and restrain a charity in pursuing commercial opportunities (as discussed below).

¹ *CATSI Act Review Final Report*, National Indigenous Australians Agency, February 2021. The National Indigenous Australians Agency recommends making it easier for a broader range of corporate structures to be registered with the ORIC, for trusts to be registerable with the ORIC, and for CATSI corporations to be able to establish wholly-owned subsidiaries and enter into joint ventures. The report noted that "providing CATSI corporations with greater flexibility in designing their corporate structures can generate more options for social, economic and community development" (paragraph 4.52).



12. Where native title benefits, which may be of significant value, are held on trust, different regulators may have oversight of the governance of those trusts, including the ACNC and state and territory agencies. Some trusts may have no regulatory oversight and minimal reporting requirements.
13. Finally, local legislation in the Northern Territory, New South Wales, and Tasmania provides for the establishment of 'land councils'. There are 137 land councils that are registered charities, which are subject to the same ACNC governance requirements as other registered charities, in addition to any requirements they have under state or territory legislation.

Good governance

14. All charities are required to conform with the Governance Standards and the reporting requirements contained in the ACNC Regulation. The Governance Standards "*support registered entities² in fulfilling their objectives by providing a minimum level of assurance that they meet community expectations in relation to how a registered entity should be managed.*"³ With specific reference to item 1(f) of the Committee's terms of reference:
 - a. **Integrity:** An Indigenous charity must comply with its charitable purposes, and its character as a not-for-profit entity.⁴ It must take reasonable steps to ensure that its responsible persons: act in good faith in the charity's best interests⁵; not misuse their position;⁶ and disclose real or perceived conflicts of interest.⁷
 - b. **Transparency:** An Indigenous charity must make information about its charitable purposes available to the public⁸ and must provide the ACNC with financial information on an annual basis.⁹
 - c. **Accountability:** An Indigenous charity must take reasonable steps to be accountable to its members and provide an opportunity for them to raise concerns.¹⁰
 - d. **Efficiency:** An Indigenous charity must take reasonable steps to ensure that its responsible persons manage the charity's financial affairs responsibly.¹¹
15. Special arrangements are in place for ORIC-registered charities. A transitional reporting arrangement means ORIC-registered charities are not required to submit financial reports to the ACNC if they have complied with their reporting requirements to the ORIC.

² 'Registered entities' is used by the ACNC Act and ACNC Regulation. Effectively, it means a charity that is registered with the ACNC.

³ Section 45.1 of the ACNC Regulation, 'Simplified Outline'.

⁴ Section 45.5(2)(c) of the ACNC Regulation, Governance Standard 1(2)(c).

⁵ Section 45.25(2)(b) of the ACNC Regulation, Governance Standard 5(2)(b).

⁶ Section 45.25(2)(c) of the ACNC Regulation, Governance Standard 5(2)(c).

⁷ Section 45.25(2)(e) of the ACNC Regulation, Governance Standard 5(2)(e).

⁸ Section 45.5(2)(b) of the ACNC Regulation, Governance Standard 1(2)(b).

⁹ Division 60 of the ACNC Act. Charities with revenue exceeding \$250,000 must submit a financial report. All charities must submit an Annual Information Statement. Basic Religious Charities do not need to submit financial information.

¹⁰ Section 45.10 of the ACNC Regulation, Governance Standard 2.

¹¹ Section 45.25(2)(g) of the ACNC Regulation, Governance Standard 5(2)(g).



The ACNC also presumes that ORIC-registered charities are meeting the ACNC governance standards if they are meeting the directors' duties in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**).

16. The ACNC Regulation provides examples of the sorts of steps a charity can take to ensure that its operations are transparent and it is accountable to its members, including: holding annual general meetings; providing members with information about the charity's financial position and performance; and providing members with opportunities to ask questions of the charity's responsible persons and air grievances.
17. The ACNC also provides guidance material to charities about the steps they can take to ensure their compliance with the Governance Standards. The ACNC's *Governance for Good* guide outlines the importance of robust rules for matters such as the conduct and frequency of board meetings, record-keeping, and disclosing and managing conflicts of interest.
18. Well-governed charities also have procedures in place to disclose and manage any related party transactions. From time to time, it might be in charity's best interests to transact with a related party. But, in the ACNC's experience, related party transactions can be a means for a charity's responsible persons 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. Best practice by charities includes assessing alternatives on the open market before engaging with a related party and disclosing all related party transactions.
19. Charities with documented policies and procedures that address the Governance Standards are more likely to comply with their obligations as a registered charity, achieve their charitable purposes, and continue to have the character of a not-for-profit entity. Such steps, however, are not a guarantee – good governance requires a charity's responsible persons to bring diligence and integrity to their task. A charity can still engage in non-compliant and inappropriate behaviour despite the existence of robust governance policies and procedures.
20. Whether the sort of measures outlined above are appropriate for a charity is a case-by-case proposition. Some charities may require additional measures, and some may require different measures altogether.
21. For example, unique circumstances can exist for Indigenous charities dealing with native title property and interests, where the exact size of the membership group may be difficult to quantify, and members may be geographically dispersed and difficult to contact. Such charities are subject to the same obligations around transparency and accountability to members, but tailored governance arrangements may be needed. Cultural values and practices are also relevant - sorry business, for example, may be an understandable barrier to an Indigenous charity meeting strict timing provisions in regulations, policies and procedures.



22. While the ACNC's guidance is a useful tool for all charities, the ACNC is not prescriptive about what policies and procedures a charity must have in place, and our guidance is adaptable. The ACNC's focus is on ensuring charities adopt governance practices that suit their circumstances and enable them to meet their obligations and fulfil their charitable purposes.

Maximising economic opportunities

23. The legislation which is administered by the ACNC does not preclude Indigenous charities from pursuing commercial opportunities. However:
- charities must only have charitable purposes, or purposes that are incidental or ancillary to a charitable purpose. A commercial venture might be incidental or ancillary to a charitable purpose if, for example, any financial return is used to pursue that charitable purpose.
 - the Governance Standards require charities to ensure that their responsible persons manage the charity's finances responsibly and act in the charity's best interests – engaging in high-risk commercial ventures may not be compliant behaviour.
 - charities must observe their own governing documents, such as a constitution or trust deed, which may constrain a charity in the sort of commercial activities it can engage in.
24. Within these parameters, from the ACNC's perspective, it is up to charities to make their own informed decisions about pursuing commercial opportunities. When considering a commercial venture, a charity should undertake, and document, its due diligence. This includes assessing the risks, costs, and benefits of the venture and ensuring that the activity is permitted by the charity's governing document.
25. Native title trusts may face additional risks in this regard. In 2020, the Productivity Commission considered these matters and noted:
- “The purposes that traditional owners wish to pursue with native title funds – in particular economic development, including commercial activities – do not clearly satisfy” the charitable purposes and public benefits requirements of the Charities Act 2013 (Cth). “Thus, charitable trusts may not always be the most appropriate vehicle to manage native title funds, and traditional owners may need to look at alternatives such as Indigenous corporations”¹².*
26. ACNC legislation requires that funds held by a charitable trust must go towards a charitable purpose, or a purpose that is incidental or ancillary to a charitable purpose. This does not, *per se*, preclude a charitable trust from making investments. However, a trust deed might contain limitations, and if a charitable trust winds up, any remaining funds must be distributed to a charity with analogous purposes.

¹² Productivity Commission, *Resources Sector Regulation, Study Report*, November 2020, page 339.



27. Secondly, once property is settled in a charitable trust, the trustee's fiduciary obligation constrains the trustee in using the funds only for the charitable purpose for which they are held. A trustee must deal with trust funds within the terms of the trust deed.

28. If you have queries about this submission please contact Mitchell Tucker on (03) 8632 4662 or at mitch.tucker@acnc.gov.au.

A handwritten signature in black ink, appearing to read 'Gary Johns'. The signature is fluid and cursive, with a long horizontal stroke at the end.

The Hon Dr Gary Johns
Commissioner
Australian Charities and Not-for-profits Commission