



ATNS SUBMISSION

SUBMISSION TO THE TREASURY, SCOPING STUDY FOR A NATIONAL NOT-FOR-PROFIT REGULATOR (CONSULTATION PAPER, JANUARY 2011)

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ABOUT THE ATNS

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities.

The [ATNS Database](http://www.atns.net.au) (<http://www.atns.net.au>) is an integral part of the project. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes.

The third iteration of the ATNS project began in 2010. The new project 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities' aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research will draw on anthropology, geography, demography, law and public policy and continue to focus on comparative case studies. The project will analyse the impacts of large-scale resources projects, and government policy and services, on local communities. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

ATNS Chief Investigators

- Professor Marcia Langton (School of Population Health, University of Melbourne)
- Professor Lee Godden (Melbourne Law School, University of Melbourne)
- Professor Ciaran O'Faircheallaigh (School of Politics & Public Policy, Griffith University)
- Assoc. Prof. Miranda Stewart (Melbourne Law School, University of Melbourne)
- Professor John Taylor (Centre for Aboriginal Economic Policy Research, ANU)
- Assoc. Prof. Maureen Tehan (Melbourne Law School, University of Melbourne)



Partner Investigator

- Dr Lisa Strelein (AIATSIS)

Research Fellows

- Ms Frances Morphy, (Senior Research Fellow, ANU)
- Ms Judy Longbottom (School of Population Health, University of Melbourne)
- Ms Jessica Cotton (School of Population Health, University of Melbourne)

Research Partners

- The Department of Families, Housing, Community Services and Indigenous Affairs
- Rio Tinto Ltd
- Woodside Energy Ltd
- Santos Ltd
- Marnda Mia Central Negotiating Committee Pty Ltd

This submission is made by the Chief Investigators on the ATNS Project and does not necessarily represent the views of the industry research partners on the project.

Please do not hesitate to contact the ATNS project team at atns-team@unimelb.edu.au or by phoning 03 8344 0823 if you would like further details about the native title agreement process or any other aspects of this submission.

1. INTRODUCTION

We are grateful for the opportunity to contribute a submission to this Scoping Study at this early stage in the government's analysis about a National Not-For-Profit (NFP) Regulator.

We note that the broad purpose of establishing a National NFP Regulator is to facilitate organisations of all types in the sector, in their diverse ways, to fulfill their community and other goals for the public benefit.

This submission addresses just one specific issue out of the many issues raised in the '*Scoping Study for a National Not-For-Profit Regulator*' (January 2011). That issue is the question of sector-specific regulation of the NFP sector, and in particular the regulation of indigenous organisations (Scoping Study paras 146-155).¹ The consultation questions are:

Q 26 What would be the advantages and disadvantages of incorporating the functions of ORIC and the proposed housing regulator into a national regulator? What alternative approaches are available to avoid duplication?

Q 27 What benefits could flow from a national regulator maintaining a dedicated subsection focusing on Indigenous corporations and/or housing?

Our submission relates only to the regulation of indigenous corporations and not to any issues relating to a housing regulator.

2. CURRENT REGULATION OF INDIGENOUS ORGANISATIONS AND ORIC

While the Office of the Registrar of Indigenous Corporations (ORIC) has come to perform a substantial regulatory function, it is important to point out that ORIC does not regulate all indigenous NFP organisations. We note the statement in the Scoping Study that ORIC currently regulates 2,600 indigenous corporations, "approximately 80 per cent of which are NFP organisations" (para 152).²

ORIC regulates only those indigenous organisations that are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). The CATSI Act commenced operation on 1 July 2007. Many older organisations have transferred over to a CATSI Act corporation; in particular, all Aboriginal Councils and Associations³ have compulsorily become CATSI corporations and now have to comply with the CATSI Act. However, there are a considerable number of NFP indigenous corporations (as well as for-profit indigenous organisations), including entities such as companies limited by guarantee, State based incorporated associations and charitable trusts, that are not currently regulated by ORIC. Many indigenous organisations choose

¹ We note that ATNS Project Chief Investigator Miranda Stewart is also a Chief Investigator on a University of Melbourne Law School ARC funded project titled 'Defining, Regulating and Taxing the Not-for-Profit Sector in Australia: Law and Policy for the 21st Century', which has made a substantial submission to the Scoping Study.

² We would be interested to learn about the source of this statistic, in particular, as the ORIC website refers to 2,270 currently registered CATSI corporations (as at 22/2/2011) and does not give details as to their not for profit status. Is it possible to make the source of this information publicly available?

³ Associations formed under the *Aboriginal Councils and Associations Act 1976* (Cth) (now repealed by CATSI Act).

not to incorporate under the CATSI Act. These other entities are, like non-indigenous NFPs, subject to regulation, to the extent it applies, under other relevant State, Territory or other federal law.

ORIC is a regulator based on the particular legal entity form of the CATSI corporation, not the purpose or function of that organisation. We would not support a proposal that would require all indigenous NFP organisations, or all NFP organisations more broadly, to adopt the same legal entity form. As such, we support the broad statement in the Scoping Study that “[e]ffective regulation of NFPs must apply broadly across the sector, notwithstanding that the NFP sector encompasses a diverse group of entities which have a variety of legal forms” (para 42).

One issue that would need to be considered is the appropriate regulator for Prescribed Body Corporates (PBCs) that hold native title, and whether these should come under a National NFP Regulator. We note that the Commonwealth government has the aim of ensuring that native title outcomes lead to financial flows to native title holders, increasing wealth and capital assets in indigenous communities. Some PBCs are currently endorsed as tax-exempt and NFP, but others are not, and may seek to enable distribution of benefits to communities.

3. KEY FUNCTION OF EDUCATION, PUBLIC INFORMATION AND OUTREACH TO INDIGENOUS COMMUNITIES

In our submission, the most valuable function currently performed by ORIC is its out-reach and educational role, in particular in providing support and assistance of indigenous communities in establishing and operating CATSI corporations. While there could be improvements, ORIC has built up a certain level of experience and cultural competency concerning indigenous corporations and their community and governance functions. This educational function performs a critical role in enabling compliance with regulatory requirements.

There may be some advantages in maintaining this body of knowledge and connections with indigenous communities in a separate agency that deals with indigenous corporations, whether for-profit or NFP. However, as noted above, ORIC does not in any event regulate all indigenous organisations, and this means that in the current environment, ORIC’s education and support is not reaching all indigenous NFPs.

Further, ORIC does not currently provide support and information about the *not for profit* status or activities of indigenous NFPs (even if they are CATSI corporations). For example, ORIC has not issued any fact sheets that specifically discuss issues related to NFP status. Consequently, ORIC is not currently fulfilling all of the roles that a National NFP Regulator would be expected to do.

We submit that it would be possible, and may be desirable, for the key educational and support aspects of ORIC’s role in relation to indigenous NFP organisations to be conducted as a division or under the auspices of a general National NFP Regulator. This could have the advantage that all regulation (and tax) aspects that are particularly relevant to NFP organisations would be appropriately supported for all indigenous NFPs.

It would be important not to lose the experience and cultural competency that has been developed in ORIC in the last few years. However, such a regulatory shift could have the advantage that it would extend that expertise and support to other NFP entities that are not CATSI corporations.

4. “LIGHT TOUCH” REGULATION AND AVOIDANCE OF DUPLICATION

We submit that indigenous NFPs should benefit from the same support, and be required to comply with the same, minimal, regulatory obligations that would be applicable to other NFPs.

On this basis, we support the proposal of a ‘report-once, use-often’ model of NFP reporting. A minimal report for the National NFP Regulator could form the basis for any additional regulatory requirements of other relevant regulators (see Q11 of the Scoping Study and background information, paras 72 and 81). A National NFP Regulator would at least have this basic regulatory interest regarding indigenous NFP organisations, and could potentially take over and support this minimal regulatory requirement.

We wish to emphasise that to the extent possible, regulatory burdens should be kept to a minimum for indigenous organisations, and duplication should be avoided. This is an issue for all NFPs but is particularly crucial in relation to indigenous community organisations, which are frequently small, poorly resourced, remote and facing serious capacity issues. In particular, indigenous organizations face problems that might not be so common in other NFP organizations, including language and literacy problems and access to appropriate expertise.

We note the concern expressed in the Scoping Study that ‘current governance and accountability arrangements do not meet community expectations in relation to governance arrangements for organisations in receipt of public monies’ (para 103). However, it is important to be clear that indigenous organisations have been subject, in particular in the last few years, to significantly increased regulatory burdens. In addition to ORIC, to a degree, indigenous organizations are regulated through required compliance with grant conditions. What these organisations require is support and education in governance, not increased regulatory obligations.

5. PROPOSED TAX-EXEMPT INDIGENOUS COMMUNITY FUND

In its *Consultation Paper on Native Title, Indigenous Economic Development and Tax* (May 2010), the Treasury raises the option of legislating a tax-exempt Indigenous Community Fund (ICF). We refer to our previous submission of November 2010 in which we expressed support for this proposal. In planning for the future scope of a National NFP Regulator in regard to indigenous organisations, this proposal needs to be taken into account.

On the assumption that all organisations that have tax-exempt status (and are NFP) are prima facie regulated by the National NFP Regulator, a tax-exempt ICF would come under the auspices of the National NFP Regulator. As noted above, ORIC regulates only CATSI corporations. We have previously submitted that a tax-exempt ICF should not be limited in entity form to a CATSI corporation. We would not support an expansion in functions of ORIC to regulate the proposed tax-exempt ICF.

6. NEW ZEALAND MODEL

We note that in New Zealand, the Charities Commission manages some aspects relating to regulation and tax-exempt status of Iwi/Maori organisations. These organisations may take a range of legal entity forms. The Fact Sheet of the NZ Charities Commission in relation to this role is attached to this Submission. The Commission also provides this information in appropriate languages (available from <http://charities.gov.nz>).

The NZ model warrants further investigation and could work for support and regulation of indigenous NFP organisations in Australia. We note that in general, the NZ model makes registration with the Charities Commission voluntary but ensures that tax-exempt status requires registration with the Commission. The same approach could be taken in Australia. If this was to be adopted, we suggest that the National NFP Regulator would be a more appropriate regulator than ORIC.

7. CONCLUSION

We support the broad proposal for a National NFP Regulator with a substantial public information, transparency and educational function, to facilitate activity in the NFP sector in all of its diversity, for the public benefit.

At this stage, we do not submit a final considered view as to whether it would be better to have a division of a National NFP Regulator that concerns indigenous NFP organisations, or whether this regulation should be in another regulator, such as ORIC. However, it may well be appropriate to bring indigenous NFPs, together with other NFPs, under the auspices of a National NFP Regulator, while still acknowledging relevant differences of function and purpose. We therefore recommend that the government give serious consideration to how indigenous NFP organisations could be accommodated in a division of a National NFP Regulator, and how ORIC's experience regarding CATSI corporations could be incorporated into that division, to the extent it is relevant, and without duplication.

We suggest that before implementation, any regulatory change such as this requires further targeted consultation with indigenous communities, Land Councils and Native Title Representative Bodies and PBCs. We consider that it would be possible for the government to proceed with its broad policy proposal to establish a National NFP Regulator, while ensuring more detailed consideration and consultation takes place on aspects and scope relating to indigenous organizations as the government proceeds with this proposal.