



Australian Government



Australian  
**Charities** and  
Not-for-profits  
Commission

21 August 2020

Lisa Gropp  
Presiding Commissioner  
Study into Resources Sector Regulation  
Productivity Commission  
Locked Bag 2, Collins Street East  
Melbourne VIC 8003

**ONLINE SUBMISSION:** <https://www.pc.gov.au/inquiries/current/resources/make-submission#lodge>

Our reference: ACNC SUB2020-01

### **ACNC Submission – Submission to the Productivity Commission Draft Report on Resources Sector Regulation**

1. The Australian Charities and Not-for-profits Commission (ACNC) welcomes the opportunity to provide a submission to the Productivity Commission's Draft Report on Resources Sector Regulation (the Draft Report). This submission focuses on the Draft Report recommendation 10.2 and information request 10.3.

#### **About the ACNC and the Charity Sector**

2. 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.
3. Currently the ACNC's regulatory responsibility extends only to registered charities, as distinct from the wider not-for-profit sector.
4. Just over 57,000 charities are regulated by the ACNC<sup>1</sup>. Australia's charities deliver services, make grants and perform a wide range of other activities to advance health, education, welfare, and other charitable causes, including emergency relief, and helping animals and the natural environment. Charities range in size from extra-small (less than \$50,000 – 36.6%) to extra-large with revenue over \$100 million (0.4%) The majority of charities are small (83.5% with annual revenue of less than \$250,000) and do not employ staff, instead relying on volunteers.

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<sup>1</sup>As at 21 November 2019. See [acnc.gov.au](http://acnc.gov.au) for the most current figure for registered charities.



5. Of these 57,000 charities, there are approximately 1,300 registered charities established by or for Indigenous groups, or with purposes for the benefit of an Indigenous community. Approximately 21 of those charities have native title in their organisation name, while 38 of them are trusts.

### **ACNC Response to Draft Recommendation 10.2 and Information Request 10.3**

#### ***Draft Recommendation 10.2***

*The Australian Charities and Not-for-profit Commission should publish plain English guidelines on activities that are likely to be consistent with a charity's charitable purposes and for the public benefit, and those which are likely to be outside this scope. This would reduce the risks associated with any for-profit long-term development or commercial activities that Indigenous charities may wish to undertake.*

6. 'Charitable purpose' has a specific legal meaning that has been developed by the courts and parliament throughout the years. Judicially, the concept of charity developed a meaning which translated into the four "heads" of charity: the relief of the poor, aged or impotent, the advancement of education, the advancement of religion, and a catch-all category of "other purposes beneficial to the community". Charitable purpose is defined in section 12 of the *Charities Act 2013* (Cth) as twelve specific purposes.
7. Public benefit lies at the core of the legal concept of charity. To be registered as a charity with the ACNC, the charity must have charitable purposes that are "for the public benefit". A charity's purpose is for the public benefit if achieving it would be of benefit to the public generally, or to a sufficient section of the public. There are many ways a charity's purpose can benefit the public, for example it can provide goods, services, education, counselling or spiritual guidance, or improve the environment.
8. Broadly, charities are not prohibited from undertaking commercial activities where they are carried out in furtherance of a charitable purpose, and the income generated is directed to that charitable purpose.<sup>2</sup>
9. It is difficult for the ACNC to give specific guidance on what would be permissible activities in relation to each charity's charitable purpose, and what would be outside the scope as activities that are not recognised as charitable or ones that cannot be charitable. Consideration of an organisation's activities is something that is done on a case by case basis, and issuing broader guidance could lead to registration and compliance issues for charities in the future.
10. The ACNC does publish plain English guidelines on our website on a number of relevant topics, including [charitable purpose](#) and [charity subtypes](#), [public benefit](#) and the [charity money myths](#). These documents provide clear guidance of what is and isn't permissible to ensure activities are consistent with a charity's charitable purpose.
11. The ACNC is open to considering whether there is additional guidance or resources that may be of assistance, and we are currently considering whether there is further appropriate guidance we can offer.

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<sup>2</sup> *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204.



12. It is possible that Indigenous charities may face risks associated with for-profit long term development or commercial activities not because of a lack of guidance, but because charitable trusts may not always be the most appropriate structure for their circumstances. Native title funds may be held on charitable trust due to the perpetual obligation that exists with that structure, unlike other forms of trust. However, the charitable trust structure imposes obligations in relation to the management and the use of funds that other structures don't and meeting these obligations may lead to issues that would not otherwise arise in other trust structures.

### **Information Request 10.3**

- *What are some potential reasons to allow native title funds to be removed from charitable trusts?*
- *What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?*

13. Once funds are settled in a charitable trust, the trustee's fiduciary obligation compels the trustee to use the funds only for the charitable purpose for which those funds are held on trust.<sup>3</sup> A trustee cannot remove funds from a charitable trust (in the sense of taking them to be used for some other purpose) without breaching the terms of the trust deed.<sup>4</sup>

14. There is no legal mechanism to remove native title funds from charitable trusts. If a charitable trust winds up, the trust property must be applied to the same charitable purpose for which the property was initially held on trust.

15. It is for the responsible persons of a charity to determine the appropriate structure and purpose for what they seek to achieve. However, as mentioned above, the charitable trust structure imposes additional limitations on the use of funds that do not exist for other structures. The formation of a charitable trust imposes management and property use obligations that can be difficult to comply with; obligations that other trust structures would not. For example, native title settlements are effectively compensation, and other forms of compensation do not generally need to be held on trust for a charitable purpose, and as such they can be utilised by the beneficiaries of that compensation for any purpose as they see fit.

16. Trusts are regulated at the state level,<sup>5</sup> and each of the states would need to enact legislation that would enable native title funds to be removed from charitable trusts in order for those funds to be removed.

17. If there are further questions around tax implications, the ACNC believe the Australian Taxation Office to be the most appropriate agency to answer them.

### **Further information**

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<sup>3</sup> *Wylde v Attorney-General* (1948) 78 CLR 224, 255 and *Re Church of England Trusts Corporation (Wangaratta)* [1924] VLR 204, 206.

<sup>4</sup> *Ibid*, 295.

<sup>5</sup> See *Charities Act 1978* (Vic), *Variation of Trusts Act 1994* (Tas), *Charitable Trusts Act 1993* (NSW), *Trusts Act 1973* (Qld), *Trustee Act 1936* (SA), *Charitable Trusts Act 1962* (WA), *Trustee Act 1893* (NT).



18. The ACNC can provide further information should this be useful to the Committee. The ACNC can be contacted using the email address [Policy@acnc.gov.au](mailto:Policy@acnc.gov.au).

Sincerely,

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