

## Fact Sheet:

### IAS Funding Requirement to Incorporate under the CATSI Act

#### Background

In May 2015, the Federal Government allocated funding under the Indigenous Advancement Strategy (*IAS*) to a large number of Indigenous and non-Indigenous organisations. Funding conditions require that Indigenous organisations receiving grants of \$500,000 or more must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)*. A number of Indigenous organisations have expressed concerns that this requirement is racially discriminatory in nature. This fact sheet summarises the details of the IAS requirement and concerns about racial discrimination. It also raises practical issues that organisations will need to consider in transferring to a new legal structure.

#### The IAS Requirement

The IAS Guidelines<sup>1</sup> require that all Indigenous organisations<sup>2</sup> receiving funding of more than \$500,000 be incorporated under the CATSI Act. Organisations may apply for an exemption from this requirement on identified grounds and exemptions will be considered on a case-by-case basis, taking into account whether the organisation is “well-governed, high-performing and low risk”.

The CATSI Act is legislation that applies to the governance and regulation of Indigenous organisations. There are a number of aspects of the CATSI Act which arguably are disadvantageous to Indigenous organisations. These include wide-ranging regulatory and enforcement powers granted to the Registrar of Aboriginal and Torres Strait Islander Corporations (*ORIC*), which include the ability to place an Indigenous organisation under special administration.

#### Concerns about racial discrimination

The IAS funding requirement to be incorporated under the CATSI Act raises concerns under section 9 of the *Racial Discrimination Act 1975 (Cth)* given that it is a requirement that only applies to Indigenous organisations. However, any distinction based on race will not be racially discriminatory if it can be justified as a “special measure” that is for the benefit of Indigenous people. A “special measure” is sometimes also called “affirmative action”. It involves something that is done for the benefit of a particular racial group and for the sole purpose of assisting that group to achieve the equal enjoyment of rights.

#### Legal steps to transfer to incorporation under the CATSI Act

There are multiple legal steps an Indigenous organisation will have to take to transfer from its current incorporated structure to be incorporated under the CATSI Act. These steps will differ depending on the particular legislation governing the Indigenous organisation's current incorporated structure (eg. whether they are an incorporated association or a cooperative, and in what State or Territory). The steps will

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<sup>1</sup> Available on the Department of Prime and Cabinet website at <http://www.dpmc.gov.au/indigenous-affairs/incorporation-requirements>.

<sup>2</sup> It appears that an “Indigenous organisation” is one that would meet the Indigeneity requirements in section 29-5 of the CATSI Act – that is, an organisation that is eligible to be registered under the CATSI Act.

include drafting new governing documents (a rule book), obtaining member approval and applying to ORIC, but there are many other steps an Indigenous organisation will need to take to transfer effectively. Legal advice should be sought to assist with the transfer and minimise possibly unintended consequences (for example, organisations transferring should be able to retain their ABN, charity and tax status, but may need assistance to ensure that this occurs; organisations that own property will have to notify relevant land titles offices etc.).

### **Further information**

If you would like more information about:

- (i) exploring the basis on which the incorporation requirement might be said to be a “special measure” under the *Racial Discrimination Act 1975* (Cth); **or**
- (ii) whether an organisation may be eligible for an exemption from the IAS guidelines; **and / or**
- (iii) the legal steps required to transfer an organisation from its current incorporated structure to be incorporated under the CATSI Act

please contact:

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#### **About Justice Connect Not-for-profit Law**

Not-for-profit Law provides free and low cost legal assistance to community organisations in Victoria and New South Wales, with plans to expand services to other states and territories over the next 4 years. Not-for-profit Law is a service of Justice Connect, a charity providing access to justice through pro bono.

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